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# *The Judicial Law-Making Function and a Tort of Invasion of Personal Privacy*

Aiden Lerch\*

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## *Abstract*

There has long been debate about whether there should be a tort of invasion of personal privacy. While the debate has traditionally focused on the precise formulation of the tort, consideration of whether the tort's advancement would be within the bounds of the judicial law-making function has been largely overlooked. Extant literature validly points out that invasions of privacy are now commonplace in our technological society. However, societal change alone is unlikely to be sufficient to justify the establishment of a new tort. This article explores whether there is a more principled justification for the common law development of a tort of invasion of personal privacy by critically assessing whether it can be integrated into the underlying foundations of contemporary Australian tort law. It is argued that upon an acceptance that the rights-based theory provides a leading account of Australian tort law, it can be determined that the judicial advancement of a tort of invasion of personal privacy would be justified and legitimate.

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## I Introduction

Advances in technology and information exchanges are ubiquitous in the world we live in. In creating a digitally connected world, technology has undeniable benefits. However, as governments and businesses increasingly rely on online repositories of personal information to provide goods and services, and individuals are seemingly compelled to hand over their personal data to access these basic services, personal privacy concerns linger. Indeed, data breaches are everywhere,<sup>1</sup> causing identity theft,<sup>2</sup> economic loss,<sup>3</sup> and, in light of the Cambridge Analytica scandal and the recent cyber-attacks on the Australian Government, interference with the democratic process and the free thinking of the individual.<sup>4</sup> Moreover, bodily privacy is often infringed by individuals taking unlawful photographs and videos in public and private spaces and posting them on online social networks.<sup>5</sup> Even household conversations are being recorded by digital platforms.<sup>6</sup> All the while, and perhaps to make matters worse, the Australian Government has passed legislation effectively giving its agencies (and those of the states and territories) the power to hack into any online account to obtain access to stored personal data.<sup>7</sup> It cannot be doubted that the abundance of technology in our society has culminated in a serious degradation of personal privacy.

<sup>1</sup> The Office of the Australian Information Commissioner received 1,176 data breach notifications in 2019–20 alone, affecting over 5 million Australians: Office of the Australian Information Commissioner, *Annual Report 2019–20* (21 September 2020) 43 <<https://www.oaic.gov.au/assets/about-us/our-corporate-information/annual-reports/oaic-annual-reports/annual-report-2019-20/OAIC-Annual-Report-2019-20.pdf>> ('*OAIC Report*'); Office of the Australian Information Commissioner, *Notifiable Data Breaches Scheme 12-month Insights Report* (13 May 2019) 14 <<https://www.oaic.gov.au/assets/privacy/notifiable-data-breaches-scheme/statistics/ndb-scheme-12month-insights-report.pdf>>.

<sup>2</sup> The Australian Bureau of Statistics reported that in 2014–15, 126,300 Australians were the victims of identity theft: Australian Bureau of Statistics, 'Personal Fraud' (Catalogue No 4528.0, 20 April 2016) <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-fraud/latest-release#key-findings>>.

<sup>3</sup> In 2017, the Ponemon Institute released a report on the cost of data breaches in Australia and found that the average cost per capita for each lost or stolen record is \$139 and the total average cost paid by a company due to a data breach is \$2.51 million: Ponemon Institute, *2017 Costs of Data Breach Study* (June 2017) <<https://www.ibm.com/downloads/cas/ZYKLN2E3>>.

<sup>4</sup> According to whistleblower Christopher Wylie, the collection and aggregation of personal data by Cambridge Analytica was used to create a 'full service-propaganda-machine': Carole Cadwalladr, "'I Made Steve Bannon's Psychological Warfare Tool': Meet the Data War Whistleblower", *The Guardian* (online, 18 March 2018) <<https://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-facebook-nix-bannon-trump>>. For an example of cyber-attacks on the Australian government and other organisations, see Prime Minister, Minister for Home Affairs, Minister for Defence, 'Statement on Malicious Cyber Activity against Australian Networks' (Media Statement, 19 June 2020) <<https://www.pm.gov.au/media/statement-malicious-cyber-activity-against-australian-networks>>.

<sup>5</sup> See, eg, 'Man Secretly Filmed More Than 200 People in Sydney Public Toilets, Court Told', *The Sydney Morning Herald* (online, 19 April 2017) <<https://www.smh.com.au/national/nsw/man-secretly-filmed-more-than-200-people-in-sydney-public-toilets-court-told-20170419-gvo2a3.html>>.

<sup>6</sup> Geoffrey A Fowler, 'Alexa Has Been Eavesdropping on You This Whole Time', *The Washington Post* (6 May 2019) <<https://www.washingtonpost.com/technology/2019/05/06/alexa-has-been-eavesdropping-you-this-whole-time/>>.

<sup>7</sup> *Telecommunications Act 1997* (Cth) ss 317L–317RA by virtue of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth). There are many circumstances in which an agency can compel an entity by way of a technical assistance notice to assist the agency in obtaining data on the entity's platform: see *Telecommunications Act 1997* (Cth) s 317L.

In response to these privacy concerns, a number of legislative reforms have been enacted at federal and state levels. Each state and territory has passed a *Surveillance Devices Act* or equivalent statute that regulates the use of surveillance and listening devices, and imposes criminal sanctions on any person (including a private entity) who breaches the relevant provisions of the legislation.<sup>8</sup> Furthermore, more ‘traditional’ criminal offences that protect against the unlawful invasion of individual privacy have been introduced.<sup>9</sup> For example, in Victoria a person commits an offence if they intentionally distribute an intimate image of another to a third party, and the distribution of that image is contrary to community standards of acceptable conduct.<sup>10</sup>

The Australian Parliament has also passed three major legislative reforms. First was the introduction of the *Australian Privacy Principles*, which are 13 principles that place requirements on entities to standardise the handling, use, and management of personal information.<sup>11</sup> They apply to public agencies, private entities which have an annual turnover of \$3 million or more, and private sector health service providers.<sup>12</sup> Second, in 2018 the Notifiable Data Breaches (‘NDB’) scheme was established.<sup>13</sup> The scheme imposes a mandatory obligation on entities regulated by the *Privacy Act 1988* (Cth) (‘*Privacy Act*’) to notify affected individuals and the Australian Information Commissioner when an eligible data breach occurs.<sup>14</sup> Third, an individual complaint scheme was introduced. Pursuant to s 36 of the *Privacy Act*, individuals have the power to lodge a complaint with the Information Commissioner where an act or practice of an entity amounts to an alleged interference with their privacy.<sup>15</sup> The Commissioner then has the power to investigate the complaint(s) and can make various determinations under s 52(1), including a declaration that the complainant is entitled to monetary compensation.<sup>16</sup> Notably, however, these determinations are neither binding nor conclusive;<sup>17</sup> meaning a complainant who receives a favourable outcome is required to commence

<sup>8</sup> See *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 1998* (WA); *Surveillance Devices Act 2016* (SA); *Invasion of Privacy Act 1971* (Qld); *Listening Devices Act 1991* (Tas); *Surveillance Devices Act 2007* (NT); *Crimes (Surveillance Devices) Act 2010* (ACT).

<sup>9</sup> *Criminal Code Act 1995* (Cth) s 474.17A; *Crimes Act 1900* (NSW) ss 91K–91L, 91P–91Q; *Summary Offences Act 1953* (SA) s 26C; *Summary Offences Act 1966* (Vic) s 41DA.

<sup>10</sup> *Summary Offences Act 1966* (Vic) s 41DA.

<sup>11</sup> *Privacy Act 1988* (Cth) (‘*Privacy Act*’) sch 1 (‘*Australian Privacy Principles*’). The principles cover a variety of issues, such as the collection of personal information, the storage of that information, and how it can be used and disclosed.

<sup>12</sup> Ibid ss 6, 6C, 6D. State and territory governments have also passed legislation governing the collection, storage and use of personal information by state entities: see, eg, *Privacy and Personal Information Protection Act 1998* (NSW).

<sup>13</sup> *Privacy Act* (n 11) pt IIIC.

<sup>14</sup> If an entity fails to provide such notification, it will be subject to the Act’s civil penalty provisions: ibid s 13(4A).

<sup>15</sup> Such interference will have occurred where an entity fails to comply with the Notifiable Data Breaches (‘NDB’) scheme, breaches any of the *Australian Privacy Principles*, or contravenes the Act by any other means: ibid s 13.

<sup>16</sup> *Privacy Act* (n 11) s 52(1)(b)(iii).

<sup>17</sup> Ibid s 52(1B).

proceedings in the Federal Court of Australia or the Federal Circuit Court of Australia to enforce the determination.<sup>18</sup>

Despite these necessary legislative reforms and the increased privacy protection they provide, extant literature has uniformly labelled them as deficient and inadequate.<sup>19</sup> Specifically, there has been an increased focus on the shortcomings of the individual complaint scheme.<sup>20</sup> From the outset, the scheme is limited to infringements of the *Privacy Act*, and therefore cannot be used by victims of ‘privacy crimes’ under state and territory legislation.<sup>21</sup> Of those who can access the scheme, it seems that complainants have little chance of obtaining a sufficient remedy. Indeed, of the 2,673 privacy complaints that were made in 2019–20, the Commissioner made only four determinations.<sup>22</sup> It has been observed that this extremely low number suggests that the scheme is unable to account for the rapid and extreme influx of privacy invasions, such that complainants are being left without adequate remedies.<sup>23</sup> Moreover, the fact that successful complainants are then required to enforce their determination in the courts undermines the time and expense required to bring the complaint to the Commissioner in the first place.

It is with these shortcomings in mind that one might expect the common law to provide plaintiffs with adequate redress. In *Australian Broadcasting Corporation v Lenah Game Meats*, the High Court of Australia acknowledged that the debate over whether a privacy tort should exist is not foreclosed, and expressed an inclination to develop a common law ‘principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life’.<sup>24</sup> Although this suggestion was followed in the Queensland District Court and the Victorian County Court, where it was held that a tort of invasion of personal privacy had been committed,<sup>25</sup> other courts have since doubted whether such a tort exists.<sup>26</sup> Courts have instead ‘been content to grope forward cautiously along the grooves of

<sup>18</sup> Ibid s 55A. The Information Commissioner may also commence proceedings: s 55A(1)(b).

<sup>19</sup> Yvonne Apolo, ‘Incongruent Selves in Social Media and Privacy Law: Proposing a Humanistic Psychological Intervention’ (2018) 22(4) *Media and Arts Law Review* 464, 477–8; Moira Paterson and Maeve McDonagh, ‘Data Protection in an Era of Big Data: The Challenges Posed by Big Personal Data’ (2018) 44(1) *Monash University Law Review* 1, 9–15; Michael Kirby, ‘Publication Privacy: Action At Last?’ (2012) 17(2) *Media and Arts Law Review* 202, 209.

<sup>20</sup> Aiden Lerch and Sophie Whittaker, ‘More Valuable Than Oil: The Application of Tort Law and Equity to Data Breach Cases’ (2019) 27(2) *Tort Law Review* 100, 104–5; Rose Dlouatch, ‘Cyber-Insecurity: Data Breaches, Remedies and the Enforcement of the Right to Privacy’ (2018) 25(4) *Australian Journal of Administrative Law* 219, 224–5.

<sup>21</sup> An ‘interference with the privacy of an individual’ is limited to acts done by entities or organisations that are subject to, and in breach of, the *Australian Privacy Principles* or another standard imposed by the Act: see *Privacy Act* (n 11) s 13.

<sup>22</sup> *OAIC Report* (n 1) 13, 36.

<sup>23</sup> Lerch and Whittaker (n 20) 104–5; Dlouatch (n 20) 224.

<sup>24</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 258 [132] (Gummow and Hayne JJ) (*ABC v Lenah*). See also at 248–9 [106]–[108] (Gummow and Hayne JJ), 328–9 [335] (Callinan J); *Smethurst v Commissioner for Police* (2020) 94 ALJR 502, 520 [48] (Kiefel CJ, Bell and Keane JJ).

<sup>25</sup> *Grosse v Purvis* (2003) Aust Torts Reports 81-706; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

<sup>26</sup> *Kalaba v Commonwealth* [2004] FCA 763, [6] (Heerey J); *Chan v Sellwood* [2009] NSWSC 1335, [37] (Davies J); *Giller v Procopets* (2008) 24 VR 1, 35–6 [167]–[168] (Ashley JA), 106–7 [447]–[450] (Neave JA) (*Giller (VSCA)*); *Sands v South Australia* [2013] SASC 44, [613]–[614] (Kelly J).

established legal concepts'.<sup>27</sup> For example, the tort of trespass to land has been held to protect against the taking of photos or video footage when a defendant gains unpermitted or conditional entry onto an occupier's land,<sup>28</sup> and in *Raciti v Hughes* an interlocutory injunction was granted on the basis that the defendants' actions in setting up a light system with cameras to surveil the activity in the plaintiff's backyard was likely an actionable private nuisance.<sup>29</sup> Courts have also held that the equitable wrong of breach of confidence will have been committed, and equitable compensation for mental distress is available, where a defendant shares sexually explicit photos and videos of his or her previous partner.<sup>30</sup>

The consequence of such a piecemeal approach, however, is that the protection of privacy is limited by the elements of causes of action that were not originally intended to protect against invasions of privacy. Thus, it has been widely argued that the common law is currently unable to sufficiently protect against the innumerable ways in which personal privacy can be compromised.<sup>31</sup>

In light of the limitations of Australia's statutory and common law responses, there seems to be ample reason for the advancement by the courts of a tort specifically designed to impose liability for an intentional invasion of personal privacy. This view is strengthened by the fact that four law reform commissions, and a report by the Australian Competition and Consumer Commission, have recommended a statutory action for serious invasions of privacy:<sup>32</sup> recommendations that the legislature has continually failed to enact. Courts have a duty to develop the common law where 'legislative law reform languishes'.<sup>33</sup> In its compelling 2014 report, the Australian Law Reform Commission ('ALRC') advised that the tort should comprise of six elements:

<sup>27</sup> Barbara McDonald, 'Privacy Rights' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Thomson Reuters, 10<sup>th</sup> ed, 2011) 683, 684.

<sup>28</sup> *Lincoln Hunt Pty Ltd v Willesee* (1986) 4 NSWLR 457, 463–4 (Young J). See generally, *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333.

<sup>29</sup> *Raciti v Hughes* (1995) 7 BPR 14,837. Although note that recently the English Court of Appeal held that the tort of private nuisance does not protect privacy at all: see *Fearn v Board of Trustees of the Tate Gallery* [2020] Ch 621, 638–48.

<sup>30</sup> *Giller v Procopets* [2004] VSC 113 ('*Giller (VSC)*'); *Giller (VSCA)* (n 26); *Wilson v Ferguson* [2015] WASC 15; *Scala v Scala* [2019] FCCA 3456; *Kwok v Thang* [1999] NSWSC 1034.

<sup>31</sup> Des Butler, 'Protecting Personal Privacy in Australia: Quo Vadis?' (2016) 42(1) *Australian Bar Review* 107, 109, 130–31; Barbara McDonald, 'A Statutory Action for Breach of Privacy: Would it Make a (Beneficial) Difference?' (2013) 36(3) *Australian Bar Review* 241, 250–3 ('A Statutory Action for Breach of Privacy'); Barbara McDonald, 'Tort's Role in Protecting Privacy: Current and Future Directions' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 86; Mark Johnston, 'Should Australia Force the Square Peg of Privacy into the Round Hold of Confidence or Look to a New Tort?' (2007) 12(4) *Media and Arts Law Review* 441, 447–8; Jonathan Lewis, 'Privacy: A Missed Opportunity' (2005) 13(3) *Tort Law Review* 166, 173–5.

<sup>32</sup> Australian Law Reform Commission ('ALRC'), *Serious Invasions of Privacy in the Digital Era* (Report No 123, June 2014) ('*ALRC 2014 Report*'); Australian Law Reform Commission, *For Your Information: Privacy Law and Practice* (Report 108, May 2008) ('*ALRC 2008 Report*'); New South Wales Law Reform Commission, *Invasion of Privacy* (Report No 120, April 2009) 9 [4.1]; Victorian Law Reform Commission, *Surveillance in Public Places* (Report No 18, June 2010); Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019) 37 (Recommendation 19) <<https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>>.

<sup>33</sup> *Gala v Preston* (1991) 172 CLR 243, 262 (Brennan J).

1. The invasion of privacy must occur by: (a) intrusion into the plaintiff's seclusion or private affairs; or (b) misuse or disclosure of private information about the plaintiff;
2. The invasion of privacy must be either intentional or reckless;
3. A person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances;
4. The court must consider that the invasion of privacy was 'serious' in all of the circumstances, having regard to, among other things, whether the invasion was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities;
5. The invasion need not cause actual damage, and damages for emotional distress may be awarded; and
6. The court must be satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest in the defendant's conduct.<sup>34</sup>

Additionally, it has long been argued in Australian tort law scholarship that the judiciary should develop a common law tort of invasion of personal privacy.<sup>35</sup> Other than requiring an *intentional* invasion (rather than a reckless one), the precise formulation of the tort suggested by the scholarship is virtually identical to the first *five* elements recommended by the ALRC.<sup>36</sup> The sixth element is not included, presumably because in the context of a common law development courts are unlikely to engage in such policy reasoning without express legislative authority. It is the general view of the literature that such a tort would provide dynamic and appropriate redress to the developments in our technological society. Indeed, it has been argued that a tort of invasion of personal privacy would properly respond to privacy concerns caused by the accumulation of data,<sup>37</sup> as well as the rampant use of drones.<sup>38</sup>

While the scholarly contributions should be commended, there is an increasing tendency in the literature to overlook the limits of the judicial law-making function. Scholars have simply observed that because society is more reliant on technology, such social change justifies the courts creating a new privacy tort.<sup>39</sup> This is certainly *a* reason for such development, as the courts have a duty to develop the

<sup>34</sup> *ALRC 2014 Report* (n 32) 19 [1.11]. The author acknowledges that the fifth 'element' is better described as a 'feature' and is not strictly an element of the cause of action.

<sup>35</sup> See generally Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29(2) *Melbourne University Law Review* 339, 373, 375; Butler (n 31) 122–9; Johnston (n 31) 457, 466; Lewis (n 31) 190. The elements are based on those outlined by Skoein SDCJ in *Grosse v Purvis* (n 25) 444.

<sup>36</sup> The scholarship has generally split the tort of invasion of privacy into two corresponding torts, 'unreasonable intrusion' and 'disclosure of private facts': Butler, 'A Tort of Invasion of Privacy in Australia?' (n 35) 373, 375. For the purposes of this article, the single 'merged' tort provided by the ALRC will be employed: *ALRC 2014 Report* (n 32). Given that the ALRC considered all of the competing arguments on this issue in great depth, it is this author's view that the ALRC's considered opinion that a unified tort best captured the issues at hand, should be adopted.

<sup>37</sup> Paul Roth, 'Data Protection Meets Web 2.0: Two Ships Passing in the Night' (2010) 33(2) *UNSW Law Journal* 532, 560.

<sup>38</sup> Des Butler, 'The Dawn of the Age of the Drones: An Australian Privacy Law Perspective' (2014) 37(2) *UNSW Law Journal* 434, 442–8.

<sup>39</sup> Butler 'A Tort of Invasion of Privacy in Australia?' (n 35) 363–4; Butler (n 31) 131; Johnston (n 31) 444–5; McDonald (n 27) 681, 688.



law when the values of our society change and the conditions in which we live become fundamentally different.<sup>40</sup> However, it must be remembered that '[c]ourts are not law reform commissions'.<sup>41</sup> Judges cannot simply point to what they believe is 'social change' and invent new legal doctrine.<sup>42</sup> They do not have the resources, nor the constitutional validity, to survey a wide range of community values.<sup>43</sup> For judicial advancement of the law to be legitimate, it must be incremental and seen as 'a step in an evolutionary process or continuum'.<sup>44</sup> In this sense, judges are 'heavily influenced by the accumulated wisdom of the past'<sup>45</sup> and any development of the law will only be valid where it can be 'integrated into the mass of principles, rules and standards which constitute the common law and equity'.<sup>46</sup>

It follows that for the judiciary to have greater legitimacy in implementing a common law tort of invasion of personal privacy, a court must be satisfied that such a tort would align with the existing principles of Australian tort law and its underlying philosophical foundations. The theoretical and philosophical examination of 'tort law' has long been the subject of judicial and scholarly discourse.<sup>47</sup> Although Australian tort law scholars have, for the most part, remained relatively silent on this issue, there is some acceptance that Australia's law of torts is bifurcated, with one category of torts imposing liability for harm caused by fault, and the other category of torts imposing liability for infringements of particular rights.<sup>48</sup> The rights-based theory of tort law, the modern thesis of which is principally propounded by Stevens,<sup>49</sup> therefore provides a persuasive account of, at a minimum, the category of torts that are designed to protect particular rights.<sup>50</sup> Given that a tort of invasion of privacy would be predicated upon the protection of an individual's right to personal privacy, the rights-based theory is pertinent to any consideration of whether there is a justifiable basis for the common law development of such a tort.

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<sup>40</sup> Sir Anthony Mason, 'The Role of the Courts at the Turn of the Century' (1993) 3(3) *Journal of Judicial Administration* 156, 164–5; Justice MH McHugh, 'The Judicial Method' (1999) 73(1) *Australian Law Journal* 37, 42; Justice Michael Kirby, 'Judicial Activism? A Riposte to the Counter-Reformation' (2004) 24(3) *Australian Bar Review* 219, 226.

<sup>41</sup> McHugh (n 40) 48.

<sup>42</sup> Chief Justice Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 472; McHugh (n 40) 47–8; Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 20(1) *Australian Bar Review* 4, 6; Justice JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 14(2) *Australian Intellectual Property Law Journal* 78, 92–3.

<sup>43</sup> McHugh (n 40) 43, 48. See also *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633 (Mason J).

<sup>44</sup> Mason (n 40) 165.

<sup>45</sup> Ibid.

<sup>46</sup> *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 593 (McHugh J).

<sup>47</sup> See, eg, James Goudkamp and John Murphy, 'The Failure of Universal Theories of Tort Law' (2015) 21(2) *Legal Theory* 47.

<sup>48</sup> James Edelman and Simone Degeling, 'The Future of the Common Law of Torts' (2010) 33(1) *Australian Bar Review* 45, 47; James Edelman, James Goudkamp and Simone Degeling, 'The Foundations of Torts in Commercial Law' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 1, 2–3; Justice James Edelman, 'Fundamental Errors in *Donoghue v Stevenson*?' (2014) 39(2) *Australian Bar Review* 160, 169.

<sup>49</sup> Robert Stevens, *Torts and Rights* (Oxford University Press, 2007).

<sup>50</sup> As explained in Part II, it is this author's view that while the theory cannot explain the entirety of the law of torts, it can effectively explain particular torts centred on the protection of individual rights. It therefore has fundamental weight in any development of a tort designed to protect a nominate right.

In order to contribute to the debate over whether a common law tort of invasion of personal privacy should be advanced by the judiciary, this article seeks to examine whether there is a more principled justification for the judicial implementation of a privacy tort. It does not intend to examine the substantive merits of the tort; instead, this article is simply concerned with whether the judiciary, rather than the legislature, would be justified in developing the cause of action. To this end, this article employs the rights-based theory of tort law, representative of a theoretical foundation of Australia's law of torts, to assess whether a *common law* privacy tort should be developed.

To position the analysis, Part II outlines the rights-based theory and explores its underpinnings in Australian tort law. Part III then uses the normative implications of the theory to critically assess whether judges would be justified in developing a tort of invasion of personal privacy at common law. According to the rights-based theory, the last criterion for any tort law development is that it coheres with existing law. Part IV therefore draws upon the doctrine of legal coherence and its explication within Australian jurisprudence to place the analysis in the context of Australian law specifically. To conclude, this article comments on the validity of the judiciary exercising its law-making function to establish a common law tort of invasion of personal privacy.

## II The Rights-Based Theory of Tort Law in Australian Jurisprudence

Although a rights-based account of the law of torts recently gained ascendancy in modern private law scholarship, it is not new. Similar accounts can be found in the works of significant jurists of the 18<sup>th</sup> and 19<sup>th</sup> centuries. Blackstone,<sup>51</sup> Cooley,<sup>52</sup> Pollock<sup>53</sup> and Winfield<sup>54</sup> all propounded theories of tort law that centred upon the protection of individual rights.<sup>55</sup> However, as tort law developed in the 20<sup>th</sup> century, there was an increasingly common misconception in academia that tort law was incomprehensible due to the fact that it consists of seemingly disparate causes of action such as, for example, deceit, conversion, negligence and collateral abuse of process.<sup>56</sup> As a result, it was thought that tort law could only be properly understood as a societal mechanism that existed to achieve community welfare goals.<sup>57</sup> McBride

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<sup>51</sup> See William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) Book III.

<sup>52</sup> See Thomas M Cooley, *A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract* (Callaghan, 1879) ch II.

<sup>53</sup> See Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens & Sons, 1887) 7–10.

<sup>54</sup> Percy H Winfield, *The Province of the Law of Tort* (Cambridge University Press, 1931) 32–9.

<sup>55</sup> This has been identified in modern scholarship: see Edelman (n 48) 167; Edelman, Goudkamp and Degeling (n 48) 1.

<sup>56</sup> McBride gives numerous examples of this: Nicholas J McBride, 'Rights and the Basis of Tort Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 331, 331–3.

<sup>57</sup> Allan Beever, 'Our Most Fundamental Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 63, 84; Robert Stevens, 'Rights and Other Things' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 115, 116; McBride (n 56) 332–3.

described this as a ‘MacIntyrean catastrophe’, in which tort academics were ‘huddled together under the banner “Tort Law = Compensation for Loss”’, creating the impression that judges could use tort law to give themselves ‘powers to redistribute losses as they [saw] fit, according to their own private notions of what is “fair, just and reasonable”’.<sup>58</sup>

In an attempt to move contemporary tort law thinking away from ideals of policy, rights theorists have put forward a more principled theoretical explanation for the law of torts by contending that it is founded upon the infringement of rights. Put simply, rights theorists such as Stevens, McBride, Beever, Goldberg and Zipursky contend that tort law is ‘concerned with the secondary obligations generated by the infringement of primary rights’.<sup>59</sup> The meaning of a ‘primary right’ is drawn from Hohfeld’s definition of a ‘claim right’,<sup>60</sup> which is a legal right held by a particular plaintiff that correlates with a legal duty owed by a particular defendant.<sup>61</sup> Such rights are ‘legal’ in the sense that they are created by the legislature or the judiciary, and are recognised as enforceable in the legal system at hand. Importantly, however, primary rights are not general or broad rights such as a ‘right to privacy’; rather, they are ‘fully specified, absolute and conclusive’ and when created by the judiciary, always expressed as a negative kind.<sup>62</sup> For example, a person has a primary right *not* to have others interfere with their property, and a right *not* to have their property converted. But this does not mean that a person has an all-encompassing general ‘right to property’.<sup>63</sup>

Rights scholars contend that tort law only comes into operation when a primary right of the plaintiff is violated by the defendant.<sup>64</sup> It is when a primary right is infringed that a secondary obligation in tort law is generated, and imposed on the tortfeasor to provide the victim with a remedy.<sup>65</sup> The role of a judge when deciding a case in tort law is therefore to determine whether the plaintiff’s primary rights have been violated, and if they have, to provide the plaintiff with an appropriate remedy.<sup>66</sup>

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<sup>58</sup> McBride (n 56) 332.

<sup>59</sup> Stevens (n 49) 2. See also McBride (n 56) 335; Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007) 45, 218; John CP Goldberg and Benjamin C Zipursky, ‘Rights and Responsibility in the Law of Torts’ in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 251, 251. Although note that Beever’s approach is limited to the tort of negligence and is more of a hybrid between the rights-based theory and the theory of corrective justice.

<sup>60</sup> Wesley Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23(1) *Yale Law Journal* 16, 31-2.

<sup>61</sup> Donal Nolan and Andrew Robertson, ‘Rights and Private Law’ in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 1, 8; Goldberg and Zipursky (n 59) 251; Stevens (n 49) 4; Beever (n 59) 238.

<sup>62</sup> Nolan and Robertson (n 61) 8. See also Stevens (n 49) 9, 339.

<sup>63</sup> Stevens (n 49) 340.

<sup>64</sup> *Ibid* 3; Goldberg and Zipursky (n 59) 251, 262; McBride (n 56) 335; Stevens (n 57) 120; Beever (n 59) 218; Benjamin C Zipursky, ‘Rights, Wrongs and Recourse in the Law of Torts’ (1998) 51(1) *Vanderbilt Law Review* 1, 16.

<sup>65</sup> Stevens (n 49) 2; Goldberg and Zipursky (n 59) 251, 268; McBride (n 56) 335, 359. The theory is therefore heavily reliant on the bilateral structure of tort law, as only the right-holder, and the right-infringer, can sue, and be sued in tort, respectively: James Goudkamp and John Murphy, ‘Torts Statutes and Torts Theories’ (2015) 131(1) *Law Quarterly Review* 133, 138.

<sup>66</sup> McBride (n 56) 335; Stevens (n 49) 311, 330.

Thus, the rights scholars reason that the fundamental purpose of the law of torts, in its entirety, is to protect individual rights.<sup>67</sup>

In coming to this conclusion, rights theorists have posited a theoretical account of tort law that is principled and distinguishable from policy reasoning alone. Interestingly, however, there are two strands of scholarly thinking in relation to the role of policy considerations in tort law generally. Stevens and Beever argue that if a plaintiff's right has been infringed, courts are not permitted to deny the existence of that right by later deciding as a matter of policy that the enforcement of that right would not be in the public interest.<sup>68</sup> This, it is said, is beyond the scope of the judicial function as it requires judges to weigh and assess incommensurable policy considerations, something which should only be done by the legislature.<sup>69</sup> As stated by Stevens, 'our rights should not be decided, or altered, according to a judge's personal assessment of the balance of a basket of policy concerns'.<sup>70</sup> Thus, in the opinion of Stevens and Beever, courts should enforce all primary rights unless, or until, the legislature provides otherwise.

Other scholars have adopted a more pluralistic approach, rejecting the assertion that questions of policy are never relevant to claims in tort. Bagshaw contends that the function of tort law is to 'make the world a better place',<sup>71</sup> with McBride adding that this is done 'by granting people rights that they can assert against other people, and by providing them with remedies designed to uphold those rights'.<sup>72</sup> Considerations of policy therefore have a place in tort law, as it would be irresponsible for the courts to grant rights to individuals that would be obviously contrary to the public interest and 'make the world a worse place'.<sup>73</sup> Thus, the 'pluralists' differ from Stevens and Beever in that they accept that considerations of policy are relevant to determining the extent to which primary rights can be enforced.

Irrespective of which approach is adopted, the rights-based theory should be commended as it extrapolates a principled approach to deciding tort cases. The rights theorists unanimously agree that, from the outset, the task of a judge who determines a case in tort is to decide whether a primary right of the plaintiff has been infringed by the defendant.

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<sup>67</sup> Stevens (n 49) 4; Stevens (n 57) 122; McBride (n 56) 335, 338. Although Goldberg and Zipursky opine that tort law is explained by the 'inherent relationality of tortious wrongdoing' as well as the protection of rights: Goldberg and Zipursky (n 59) 262.

<sup>68</sup> Stevens (n 49) 306–17; Beever (n 59) 176–7.

<sup>69</sup> Stevens (n 49) 310.

<sup>70</sup> Ibid 309 (emphasis omitted). Interestingly, the High Court has approved of some of Stevens' views about policy reasoning: see *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, 230 [134] (Crennan, Bell and Keane JJ).

<sup>71</sup> Roderick Bagshaw, 'Tort Law, Concepts and What Really Matters' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 239, 249.

<sup>72</sup> McBride (n 56) 340.

<sup>73</sup> Ibid 339–40. In the context of the tort of negligence, Robertson and Perry have similarly argued that policy reasoning is legitimate and necessary: Andrew Robertson, 'Rights, Pluralism and the Duty of Care' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 435, 440–50; Stephen Perry, 'The Role of Duty of Care in a Rights-Based Theory of Negligence Law' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 79, 83. Hohfeld was also originally of the view that the determination of claim rights is 'ultimately a question of justice and policy': Hohfeld (n 60) 36.

This account of tort law nevertheless has its limitations and has, unsurprisingly, been the subject of significant scrutiny. Cane has persuasively argued that the rights-based theory oversimplifies and misrepresents the complexity of private law more generally.<sup>74</sup> Goudkamp and Murphy reiterate this in the context of tort law specifically, by demonstrating how the rights-based theory fails to satisfactorily explain certain elements of the tort of negligence, the availability of exemplary damages, the defence of illegality and the rule in *Rylands v Fletcher*.<sup>75</sup> Additionally, Edelman and Degeling have observed how torts like misfeasance in public office, negligence, deceit and conspiracy are clearly focused upon the fault of the defendant.<sup>76</sup> In resolving cases concerning these torts, Edelman explains that the courts are required to make ‘difficult value judgements ... to determine the boundaries of such liability for fault’ and therefore the rights-based theory, at least in respect of the fault-based torts, is unhelpful.<sup>77</sup>

Despite these criticisms, a rights-based account of the torts of trespass and other torts that relate to particular ‘rights’, such as conversion, detainee, defamation, false imprisonment, private nuisance, and interference with contractual relations (the ‘right-specific torts’), has generally been accepted in Australian and English literature.<sup>78</sup> This is because, as shown below, these torts are clearly actionable upon the infringement of a nominate right. Furthermore, it would be unsound for courts to decide not to uphold most of the rights protected by these torts by relying on general policy reasoning. For example, if X is punched in the nose (in the absence of any applicable defences), a court can objectively and precisely determine that X’s right not to be battered was infringed, thus resulting in the tort of battery having been committed. However, the courts would make a mockery of themselves if they went on to decide that the tort of battery was not made out because, taking into account numerous and incommensurable policy considerations, on balance it was in the public interest not to uphold X’s right.<sup>79</sup> It is for these reasons that even Cane, an opponent of the rights-based account, has accepted that at least the torts of trespass ‘are most obviously explained as protecting (primary) rights’.<sup>80</sup>

The rights-based theory of right-specific torts also finds significant support in Australian jurisprudence, particularly in decisions of the High Court of Australia. In *Hill v Van Erp*, Gaudron J observed that, ‘[t]here is nothing novel in the imposition of liability in tort for the loss or impairment of a legal right’.<sup>81</sup> Consequently, it has been held that:

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<sup>74</sup> See Peter Cane, ‘Rights in Private Law’ in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 35.

<sup>75</sup> See Goudkamp and Murphy (n 47). See also John Murphy, ‘Rights, Reductionism and Tort Law’ (2008) 28(3) *Oxford Journal of Legal Studies* 393, 407.

<sup>76</sup> Edelman and Degeling (n 48) 47.

<sup>77</sup> Edelman (n 48) 169.

<sup>78</sup> Edelman and Degeling (n 48) 47; Edelman (n 48) 169; Edelman, Goudkamp and Degeling (n 48) 1–3; Cane (n 74) 37.

<sup>79</sup> To take a hyperbolic example: because the person being hit was a powerlifter and muscular people are stronger than non-muscular people, it is acceptable for them to be punched in the nose.

<sup>80</sup> Cane (n 74) 57.

<sup>81</sup> *Hill v Van Erp* (1997) 188 CLR 159, 197.

- '[the] torts of trespass, conversion, detainee and slander of title are intimately concerned with the protection of legal rights';<sup>82</sup>
- the tort of private nuisance is underpinned by 'the invasion of the common law rights of an owner or occupier of land';<sup>83</sup> and
- the tort of conversion 'is confined to acts inconsistent with the right to possession'.<sup>84</sup>

Even in developing the tort of negligence, the High Court has been hesitant to employ policy-based reasoning. As was aptly put by Kitto J in *Rootes v Shelton*:

I think it is a mistake to suppose that the case is concerned with 'changing social needs' or with 'a proposed new field of liability in negligence', or that it is to be decided by 'designing' a rule. And, if I may be pardoned for saying so, to discuss the case in terms of 'judicial policy' and 'social expediency' is to introduce deleterious foreign matter into the waters of the common law — in which, after all, we have no more than riparian rights.<sup>85</sup>

However, it is in the foundational case of *Plenty v Dillon* that the rights-based account of tort law in Australia is clearly expressed.<sup>86</sup> In that case, police constables attempted to serve a summons on the daughter of Mr Plenty by entering his property. Mr Plenty expressly revoked any implied consent given to the police constables to enter upon his land. Despite this, the constables deliberately went onto his land to serve the summons. Mr Plenty subsequently sued for trespass.<sup>87</sup> The defendants alleged, among other things, that s 27 of the *Justices Act 1921* (SA), which gave police the power to serve a summons personally or on some other relevant person, also gave them the power to enter the plaintiff's premises without consent to effect service.<sup>88</sup> Mason CJ, Brennan and Toohey JJ found that s 27 did nothing to imply that a process-server acquired a power to enter upon private land without the leave or licence of the person in possession.<sup>89</sup> Their Honours therefore held that a trespass had been committed and that Mr Plenty was 'entitled to some damages in vindication of his right to exclude the defendants from his farm'.<sup>90</sup>

Gaudron and McHugh JJ also reasoned that the *Justices Act 1921* (SA) did not provide such a power and observed that while the inability to enter private property for the purpose of serving a summons may be inconvenient, it 'is not a ground for eroding fundamental common law rights'.<sup>91</sup> Their Honours held that Mr Plenty was entitled to damages and stated:

True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of

<sup>82</sup> *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 200 [34] (Gaudron J) quoting *Hawkins v Clayton* (1988) 164 CLR 539, 594 (Gaudron J). See also *Hill v Van Erp* (n 81) 197 (Gaudron J).

<sup>83</sup> *Hargrave v Goldman* (1963) 110 CLR 40, 60 (Windeyer J). See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 566–7 [121] (Gaudron, McHugh and Gummow JJ), 609 [257] (Hayne J).

<sup>84</sup> *Penfolds Wines Pty Ltd v Elliot* (1946) 74 CLR 204, 226 (Dixon J).

<sup>85</sup> *Rootes v Shelton* (1967) 116 CLR 383, 386–7.

<sup>86</sup> *Plenty v Dillon* (1991) 171 CLR 635.

<sup>87</sup> *Ibid* 636.

<sup>88</sup> *Ibid* 644.

<sup>89</sup> *Ibid* 645.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Ibid* 654.

vindicating the plaintiff's right to the exclusive use and occupation of his or her land.<sup>92</sup>

All five justices in *Plenty v Dillon* identified that the tort of trespass to land is concerned with protecting the right to exclusive possession of land and that it was actionable upon that right being infringed, irrespective of the level of fault of the defendants. Indeed, although it may have been in the public interest for the summons to be served in order to promote the efficiency of the justice system, the High Court refused to override the plaintiff's right not to have others interfere with his land simply because of this policy consideration. *Plenty v Dillon* was followed in *Coco v The Queen*, where Mason CJ, Brennan, Gaudron and McHugh JJ held that every unauthorised entry upon private property is a trespass as 'the right of a person in possession or entitled to possession of premises to exclude others from those premises [is] a fundamental common law right'.<sup>93</sup> This subsequently led Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ to conclude in *New South Wales v Ibbett* that it is 'well established that the tort protects the interest of the plaintiff in maintaining the right to exclusive possession'.<sup>94</sup>

Although the High Court's reasoning in *Plenty v Dillon* was specific to the tort of trespass to land, it is similarly applicable to the torts of trespass to the person and trespass to goods, as these torts are also predicated on upholding personal and proprietary rights. The High Court has held on numerous occasions that the tort of false imprisonment exists to protect individual liberty, which has been described as 'the most elementary and important of all common law rights'.<sup>95</sup> Similarly, in *Marion's Case*, the Court emphasised that the torts of battery and assault protected against invasions of an individual's right to bodily integrity.<sup>96</sup> By relying on these torts, the Court held that no impairment of Marion's fundamental common law rights could be justified in the absence of lawful consent, even if the opinion of medical professionals was that it was in Marion's best interests to be sterilised.<sup>97</sup> The view that the tort of battery protects the right to bodily integrity was again affirmed by the High Court in *Binsaris v Northern Territory*, in which the Court held that the use of tear gas by prison officers on detainees in a youth detention centre without express legislative authority was unlawful.<sup>98</sup> As was explained by Gageler J:

Like other members of this Court, I cannot read the provisions of the *Youth Justice Act* conferring powers on the Superintendent to maintain order and ensure safe custody and protection of persons within the Detention Centre as

<sup>92</sup> Ibid 654–5.

<sup>93</sup> *Coco v The Queen* (1994) 179 CLR 427, 435.

<sup>94</sup> *New South Wales v Ibbett* (2006) 229 CLR 638, 646 [29].

<sup>95</sup> *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J). See also *Ruddock v Taylor* (2005) 222 CLR 612, 632 [70] (McHugh J), 649 [136]–[137] (Kirby J); *Watson v Marshall* (1971) 124 CLR 621, 630 (Walsh J).

<sup>96</sup> *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 232–3 (Mason CJ, Dawson, Toohey and Gaudron JJ), 265–6 (Brennan J), 309–11 (McHugh J) ('*Marion's Case*'). See also *Fontin v Katapodis* (1962) 108 CLR 177, 183–4 (McTiernan J).

<sup>97</sup> *Marion's Case* (n 96) 253–4 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>98</sup> *Binsaris v Northern Territory* (2020) 94 ALJR 664, 669 [20] (Kiefel CJ, Keane J), 670 [25] (Gageler J), 684 [109] (Gordon and Edelman JJ).

authorising an interference with the common law right of a detainee to bodily integrity protected by the tort of battery.<sup>99</sup>

In light of the above analysis, although there is some doubt that the rights-based theory can explain the entirety of the law of torts, it is strongly arguable that, at least in relation to right-specific torts, Australian tort law has its theoretical foundations in the rights-based theory. Indeed, in the view of Edelman and Degeling, the common law of torts is 'bifocal'<sup>100</sup> in the sense that it is divided into two categories: 'one category focused upon liability for harm caused by fault and another focused upon infringements of particular rights'.<sup>101</sup> It follows that the rights-based theory has a significant role to play in any development of an Australian tort that is founded on the protection of a particular right. For this reason, there is fundamental weight in employing the normative implications of such theory to critically assess whether a common law tort that protects against invasions of a right to privacy should be developed in Australia's general law.

### III The Rights-Based Theory and a Tort of Invasion of Personal Privacy

If a privacy tort were to be developed in Australia, it can be presumed that it would be framed around the protection of a right not to have one's personal privacy invaded. It logically follows that the rights-based theory of tort law, as a principled theory that explains and justifies the imposition of tortious liability for right-specific torts, has significant influence in the determination of whether a privacy tort should be developed.<sup>102</sup> The rights-based theory will therefore be employed in this Part to assess whether there is a more principled justification for the development of a privacy tort in Australia's general law.

#### A *Common Law Rights as Determined by Reference to Moral Rights*

One of the primary objections to the rights-based theory is that on its account, tort law 'is essentially empty'.<sup>103</sup> As was explained in Part II, according to the rights theorists, tort law exists only to protect primary rights, which are rights that have been recognised by the judiciary as being enforceable. However, given that tort law was originally forged by the decisions of common law judges, from its very beginnings it must never have protected primary rights. For example, before the tort of battery existed, tort law could not be said to protect an individual's right not to have his or her bodily integrity invaded. It was only when the judiciary recognised that there was a tort of battery that tort law protected that right. Thus, under the

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<sup>99</sup> Ibid 670 [25].

<sup>100</sup> Edelman and Degeling (n 48) 47.

<sup>101</sup> Ibid 47 citing FH Lawson, *The Rational Strength of English Law* (Stevens & Sons, 1951) 122–3. See also Edelman (n 48) 169; Edelman, Goudkamp and Degeling (n 48) 1–3.

<sup>102</sup> In particular, Nolan and Robertson have identified three normative implications of the theory: Nolan and Robertson (n 61) 10.

<sup>103</sup> Stevens (n 49) 329. See also Cane (n 74) 61; Jane Stapleton, 'Evaluating Goldberg and Zipursky's Civil Recourse Theory' (2006) 75(3) *Fordham Law Review* 1529, 1538.



rights-based theory, tort law is ‘empty’ until the judiciary decides to protect certain rights by creating corresponding torts. This begs the question, posed by Stevens: ‘How can, and did, the judges of the common law, largely unfettered by legislation, determine what our rights are without resorting to policy choices?’<sup>104</sup>

Rights theorists contend that from the outset, common law rights are determined solely by reference to interpersonal moral rights.<sup>105</sup> Stevens argues that we have moral rights that are deduced by reason, human reflection and ‘from the nature and experience of ourselves, and the world and society in which we live’.<sup>106</sup> He goes on to explain that the legislature:

[H]as the power to create legal rights for any reason at all, unconnected with the moral rights we have one against another. ... By contrast, the judiciary, in creating and changing over time our common law, sourced our legal rights one against another in our moral rights.<sup>107</sup>

According to the rights-based theory, moral rights therefore provide the only legitimate justification for common law judges to establish new common law rights.<sup>108</sup> It is when judges make a decision to recognise the minimum content of our moral rights, that they become legal.<sup>109</sup> Thus, in order for a right to be given the force of law, it must firstly be accepted as a moral right.

This initial requirement poses little difficulty for the enforcement of a right to privacy. Irrespective of how a moral right is determined, a wealth of scholarship has accepted that individuals have a moral right to personal privacy.<sup>110</sup> For this reason it is morally reprehensible to watch someone enter their personal identification number (‘PIN’) when they withdraw cash from an automated teller machine (‘ATM’), or for a clothes store to operate without enclosed change-rooms. Indeed, these basic examples show that it is untenable to suggest individuals do not have a moral right to personal privacy. Courts therefore have the capacity to derive legal rights from this moral right. The more contentious question that remains, however, is what is the minimum content of that right, such that it could be legally enforced?

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<sup>104</sup> Stevens (n 49) 330.

<sup>105</sup> Nolan and Robertson (n 61) 11–12; Stevens (n 49) 330–2; Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 19, 49. Cf McBride (n 56) 352–5.

<sup>106</sup> Stevens (n 49) 330–1.

<sup>107</sup> Robert Stevens, ‘The Conflict of Rights’ in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 139, 145.

<sup>108</sup> Stevens (n 49) 330–2; Nolan and Robertson (n 61) 11.

<sup>109</sup> Stevens (n 49) 331–2.

<sup>110</sup> See generally, Adam D Moore, *Privacy Rights: Moral and Legal Foundations* (Penn State University Press, 2010) chs 2–5; Carolyn Doyle and Mirko Bagaric, *Privacy Law in Australia* (Federation Press, 2005) ch 2; Diane P Michelfelder, ‘The Moral Value of Informational Privacy in Cyberspace’ (2001) 3(2) *Ethics and Information Technology* 129; J Angelo Corlett, ‘The Nature and Value of the Moral Right to Privacy’ (2002) 16(4) *Public Affairs Quarterly* 329; Charles Fried, ‘Privacy’ (1968) 77(3) *Yale Law Journal* 475. See also *ABC v Lenah*, where Gleeson CJ draws on ‘morals and behaviour’ to identify material that is private: *ABC v Lenah* (n 24) 226 [42].

## B *Limitations on the Types of Common Law Rights*

In order to address the above-mentioned question, rights theorists have argued that only specific types of rights should be recognised by the common law.<sup>111</sup> As was explained in Part II, it is generally accepted by rights theorists that tort law will not protect open-ended, general rights such as ‘a right to property’. It follows that tort law would never recognise an all-encompassing general right to privacy; rather, the right protected would be framed as an individual’s right *not* to have his or her personal privacy invaded. However, beyond this basic identification that common law rights must always be expressed in a negative form, rights theorists have established two further limitations on the types of rights that courts should enforce.

### 1 *Common Law Rights Must Accord with the Rule of Law*

Stevens posits that the rule of law requires that courts can only enforce rights that are definable and limited, and therefore capable of being determined in advance.<sup>112</sup> A corollary of this limitation is that courts cannot determine the scope of individual rights and duties by weighing a disparate range of open-ended policy concerns.<sup>113</sup> Stevens gives the example of a general offence of ‘misbehaviour’ that is ‘subject to a number of policy exceptions’ that are used by the court to assess whether the relevant conduct of the defendant was criminal.<sup>114</sup> Such an offence is clearly unacceptable because it cannot readily be determined what sort of conduct is criminal: it is entirely dependent on policy reasoning. On Stevens’ approach, rights should only be enforced where courts can determine their scope without relying on considerations of policy.

The tort of invasion of personal privacy, as endorsed by the ALRC and extant literature, requires an intentional or reckless invasion.<sup>115</sup> Therefore, from the outset, the tort’s protection is limited in scope as only those who are proven to *intentionally* or *recklessly* invade someone’s privacy can be held liable. Moreover, the scope of the protection is further refined by the requirements that the plaintiff had a reasonable expectation of privacy in all of the circumstances and that the invasion was objectively ‘serious’. Thus, if these fault and conduct elements are adopted by the courts, it is readily arguable that the scope of the right protected by the common law tort is defined and limited, such that it can be determined in advance.

However, Stevens’ requirement may still pose a complication for the common law recognition of a right not to have one’s personal privacy invaded. Numerous authors,<sup>116</sup> and Gleeson CJ and Gummow and Hayne JJ in *ABC v*

<sup>111</sup> Nolan and Robertson (n 61) 12.

<sup>112</sup> Stevens (n 49) 339.

<sup>113</sup> Ibid 340.

<sup>114</sup> Ibid 339–40.

<sup>115</sup> See above n 34 and accompanying text.

<sup>116</sup> See, eg, Apolo (n 19) 475; McDonald, ‘A Statutory Action for Breach of Privacy’ (n 31) 269; Patrick O’Callaghan, ‘Privacy in Pursuit of a Purpose?’ (2009) 17(2) *Tort Law Review* 100, 103; Johnston (n 31) 443–4; Daniel Solove, ‘A Taxonomy of Privacy’ (2006) 154(3) *University of Pennsylvania Law Review* 477, 479–80; Raymond Wacks, ‘Why There Will Never Be an English Common Law

*Lenah*,<sup>117</sup> have recognised the inherent difficulty of defining the concept of privacy. While in some situations it is very clear that an individual's personal privacy has been invaded, such as when their medical records are released to the public at large,<sup>118</sup> there is a 'large area in between what is necessarily public and what is necessarily private'.<sup>119</sup> It could therefore be argued that if a right to privacy was protected by tort law, courts would have to engage in general policy reasoning to determine whether what has been invaded was personally private. On Stevens' approach, this may be unacceptable as individuals would be unable to determine in advance whether their actions will invade the personal privacy of another.

There is no doubt that it is difficult to identify precisely an overarching definition of what will be sufficiently personally private to warrant protection. However, it is arguable that over time, in the context of incremental development, the concept of personal privacy, and the exact circumstances in which it should be protected, can be delineated.<sup>120</sup> As the ALRC has observed, there are three arms to the concept of personal privacy: informational, bodily and territorial privacy.<sup>121</sup> Informational privacy is concerned with the information (or data) of the individual that is inherently personal.<sup>122</sup> Given that courts are able to determine when information is 'confidential' for the purposes of assessing whether the equitable wrong for breach of confidence has been made out, it can be said that courts are capable of defining the limits of the somewhat different concept of informational privacy.<sup>123</sup> As to bodily privacy, it is self-evident that this is concerned with the physical body, and it would therefore be of little difficulty for a court to delineate such a concept.

Lastly, territorial privacy refers to privacy that is inherent in the right to exclusive possession,<sup>124</sup> described as the 'fundamental right of privacy in one's home'.<sup>125</sup> *Prima facie*, the limits of this concept may be difficult to define: if X stands

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Privacy Tort' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 154, 175–8.

<sup>117</sup> *ABC v Lenah* (n 24) 225–6 [41]–[42] (Gleeson CJ); 249–50 [108]–[110] (Gummow and Hayne JJ). See also *Giller (VSCA)* (n 26) 35 [167]–[168] (Ashley J).

<sup>118</sup> See, eg, *LU and Department of Defence* [2017] AICmr 61.

<sup>119</sup> *ABC v Lenah* (n 24) 226 [42] (Gleeson CJ).

<sup>120</sup> Since the landmark decision of the High Court of New Zealand in *C v Holland* [2012] 3 NZLR 672, which established the common law tort of invasion of personal privacy, the New Zealand courts have incrementally developed (and thereby limited) the scope of the tort: see NA Moreham, 'A Conceptual Framework for the New Zealand Tort of Intrusion' (2016) 47(2) *Victoria University of Wellington Law Review* 283.

<sup>121</sup> *ALRC 2008 Report* (n 32) vol 1 142 [1.31]. Note, however, that the Report also suggests that the concept of privacy also incorporates 'Privacy of communications': at vol 1 142 [1.31]. For the purposes of this article, this category will be subsumed into that of informational privacy, as it better reflects the modern definition of 'informational privacy' which includes communications: see generally Moira Paterson, *Freedom of Information and Privacy in Australia: Information Access 2.0* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2015).

<sup>122</sup> *ALRC 2008 Report* (n 32) vol 142 [1.31], vol 1 150–3 [1.69]–[1.79].

<sup>123</sup> 'Confidential information' and 'private information' are distinct concepts. It is for this reason, among others, that New Zealand courts refused to extend breach of confidence to protect against invasions of personal privacy more generally: *Hosking v Runting* [2005] 1 NZLR 1, 15–6 [45]–[50] (Gault J; Blanchard and Tipping JJ agreeing).

<sup>124</sup> *ALRC 2008 Report* (n 32) vol 1 142 [1.31].

<sup>125</sup> *Morris v Beardmore* [1981] 1 AC 446, 465 (Lord Scarman); *Plenty v Dillon* (n 86) 640.

on a public road and films a family having Sunday morning bacon and eggs on their front veranda, is this a breach of their right not to have their personal privacy invaded? However, courts have readily identified where the boundaries of territorial privacy lie in the context of assessing claims for private nuisance. In *Bernstein v Skyviews General Ltd*, Griffiths J in the English High Court held that while aerial photography of another's land for commercial purposes is not an interference with the right to privacy inherent in the use and enjoyment of land, constant aerial surveillance certainly would be.<sup>126</sup> Young J in the New South Wales Supreme Court in *Raciti v Hughes* reiterated this view when he awarded an interlocutory injunction restraining the defendants from using flood lights and cameras to record the plaintiffs' neighbouring backyard.<sup>127</sup>

Hence, although it must be acknowledged that personal privacy is a difficult concept to define, the above analysis demonstrates that courts are capable of rationally confining its meaning. Moreover, it must be borne in mind that in any advancement of a new common law right, there will be a degree of indeterminacy. This is inevitable and tolerable, particularly in the context of common law development where a level of 'vagueness' is required to enable the law to function effectively.<sup>128</sup> To take a modern example, despite being established well over two centuries ago, the scope of protection that the tort of private nuisance provides is still uncertain. However, it would be odd to suggest that because of this uncertainty, private nuisance should never have been developed. Additionally, even the statutory creation of a tort does not necessarily guarantee absolute certainty: the statute will still need to be interpreted by the courts.

Thus, in the context of the judicial development of a tort of invasion of personal privacy, simply pointing out that there will be a level of uncertainty surrounding the definition of 'personal privacy' does not justify, in itself, a refusal to recognise any common law protection of it. The better view is that because the concept of personal privacy can be delineated over time, the development of a tort predicated on the concept, but rationally confined by precise fault and conduct elements, is in accordance with the rule of law and therefore justified.

## 2 Common Law Rights Must Be in the Public Interest

McBride contends that Stevens' rights-based theory is reductionist, since by requiring courts to make absolutely no reference to the public interest, tort law is prevented from enforcing any rights whatsoever.<sup>129</sup> McBride gives the example of courts upholding a right not to be killed or injured. Clearly, enforcing this general right would be unacceptable because all deaths and injuries on the road would be actionable irrespective of how they were caused, and this would hugely increase drivers' insurance premiums. However, McBride suggests that, on Stevens' view, it would also not be legitimate for courts to recognise a right that individuals *take care*

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<sup>126</sup> *Bernstein v Skyviews General Ltd* [1978] 1 QB 479, 489.

<sup>127</sup> *Raciti v Hughes* (n 29).

<sup>128</sup> Timothy Endicott, 'Law is Necessarily Vague' (2001) 7(4) *Legal Theory* 379, 382–4.

<sup>129</sup> McBride (n 56) 336–41. See also Roderick Bagshaw, 'The Edges of Tort Law's Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 407, 433.

not to kill or injure others, as courts are prevented from employing policy reasoning to decide whether this more limited right is compatible with the public interest.<sup>130</sup> This is clearly an irrational conclusion, as it would result in drivers on public roads not being liable for committing the tort of negligence. Stevens' theory is therefore said to be unduly limiting because it prevents a court from taking into account that, in some circumstances, it is 'very clear' that it would be in the public interest to enforce a particular right.<sup>131</sup>

In light of these limitations, McBride posits that rights should be enforced where they are measured and limited such that their enforcement would 'clearly' be in the public interest.<sup>132</sup> While Stevens has not wholly endorsed this approach, more recently he has suggested that courts are justified in creating 'basic, minimal rights that all systems pursuing justice must have'.<sup>133</sup>

It is this author's contention that the enforcement of a limited and defined right not to have one's personal privacy invaded is plainly in the public interest in a democratic society such as Australia that values and protects individual autonomy through the operation of the common law.<sup>134</sup> As observed in the introduction, the abundance of technology in our society has culminated in a serious degradation of personal privacy. Governments, the media and social networks have the power to collect vast amounts of information about their citizens and users. Additionally, individuals, through the use of technologies such as cameras and drones, have the capacity to instantly invade the privacy of others. Basic limits protecting when an individual has a right to privacy are therefore essential to upholding individual freedoms.<sup>135</sup> For example, surely we should be able to use bathrooms without being filmed.<sup>136</sup> Surely we should be able to save private photos, information and materials on our devices that cannot generally be accessed by the public at large.<sup>137</sup> And surely, we should have the freedom to come to our own political views and general beliefs without being unconsciously manipulated by third parties.<sup>138</sup> If it were otherwise, it would seem that the modern society in which we live has returned to the age where we could 'rape, steal... [and] deceive others with impunity':<sup>139</sup> only this time, we can do it electronically.

It follows that limited and defined protection of an individual's right not to have his or her privacy invaded is so basic to democracy and its commitment to the value of the individual that it must be reflected in the common law. Indeed, as Lord

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<sup>130</sup> McBride (n 56) 340–1.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid 341, 352–5.

<sup>133</sup> Robert Stevens, 'The Proper Limits of Judicial Law-Making', *Judicial Power Project* (Blog Post, 30 September 2016) <<https://judicialpowerproject.org.uk/robert-stevens-the-proper-limits-of-judicial-law-making>>; Robert Stevens, 'Damages for Wrongdoing in the Absence of Loss' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018) 97, 105.

<sup>134</sup> See, e.g. Chief Justice RS French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, 4 September 2009) 3–4 [7].

<sup>135</sup> Justice Patrick Keane, 'Too Much Information: Civilisation and the Problems of Privacy' (Speech, 2020 Griffith Law School Michael Whincop Memorial Lecture, 27 August 2020) 9.

<sup>136</sup> See above n 5.

<sup>137</sup> See above n 3.

<sup>138</sup> See above n 4.

<sup>139</sup> Stevens, 'The Proper Limits of Judicial Law-Making' (n 133).

Nicholls observed in *Campbell v MGN Ltd*, '[Privacy] lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual.'<sup>140</sup> Thus, on both McBride's and Stevens' analyses, courts would be justified in giving effect to a right not to have one's personal privacy invaded.<sup>141</sup>

According to the rights theorists, however, one final consideration must be satisfied before it can be said that the judiciary would be justified in protecting such a right in tort law. Even where a moral right can be expressed in a limited form that can be determined in advance and its enforcement is clearly in the public interest, private law rights must fit within, and promote, the broader coherent legal system.<sup>142</sup>

## IV Common Law Rights Must Cohere with Existing Law

Rights theorists argue that courts should refuse to uphold particular rights if their enforcement would lead to incoherence in the law.<sup>143</sup> However, they do not properly expand on what is meant by legal coherence and refer to its meaning as developed by the English courts. In order to bolster the above analysis and ensure that it is practically applicable to Australian law, this final Part draws upon the principles of legal coherence as developed by the High Court of Australia to assess whether a tort of invasion of personal privacy would cohere with existing law.

### A Legal Coherence: What is it?

There is an abundance of scholarship on the doctrine of legal coherence being deployed as a justificatory tool for judges to choose an appropriate position on the law in hard cases.<sup>144</sup> MacCormick describes the concept as 'the multitudinous rules of a developed legal system ... "mak[ing] sense" when taken together'.<sup>145</sup> However, he contends that this does not mean that all legal principles must be consistent and explained as emanating from a single principle: a set of consistent principles can still

<sup>140</sup> *Campbell v MGN Ltd* [2004] 2 AC 457, 464 [12].

<sup>141</sup> This explains why courts in New Zealand, Canada and America have developed torts protecting against invasions of personal privacy despite varying levels of positive intervention by their respective legislatures: see, eg, *Hosking v Runting* (n 123); *C v Holland* (n 120); *Jones v Tsige* (2012) 108 OR (3d) 241; *Time Inc v Hill*, 385 US 374 (1967); *Cox Broadcasting Corporation v Cohn*, 420 US 469 (1975). It is arguable that because the common law plays such a significant role in protecting individual rights and freedoms in Australia, courts are even more justified in developing such a right.

<sup>142</sup> Nolan and Robertson (n 61) 10–11; Beever (n 59) 62.

<sup>143</sup> Nolan and Robertson (n 61) 11; Beever (n 59) 266. Stevens adds that where rights are coherent within the legal system, they must not be unduly limited: Stevens (n 49) 54–5.

<sup>144</sup> See generally Ronald Dworkin, *Law's Empire* (Belknap Press, 1986); Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, 1984); JM Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103(1) *Yale Law Journal* 105; Michael Gillooly, 'Legal Coherence in the High Court: String Theory for Lawyers' (2013) 87(1) *Australian Law Journal* 33; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *UNSW Law Journal* 367; Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statues' (2016) 42(2) *Monash University Law Review* 360; Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160.

<sup>145</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1994) 152.

pursue something of unintelligible value.<sup>146</sup> As Balkin has properly observed, values and judgments are normatively coherent if ‘they employ distinctions and similarities that are principled and reasonable as opposed to those which are arbitrary and unreasonable’.<sup>147</sup> Thus, in the context of the common law, ‘each branch of law must be founded upon a unique set of principles and policies that shape, orient and inform the body of law within it’.<sup>148</sup>

The High Court of Australia is no stranger to the doctrine of legal coherence. Indeed, the Court has repeatedly held that common law claims will be denied if their recognition does not cohere with existing law.<sup>149</sup> As Fell has identified, the Court has articulated two strands of the legal coherence doctrine: (1) coherence with the common law; and (2) coherence with statute.<sup>150</sup>

## B Legal Coherence within the Common Law

In *Sullivan v Moody*, the High Court held that incoherence in the law will arise if the incremental development argued for subverts another area of the common law.<sup>151</sup> In that case, the Court assessed whether medical practitioners and police officers owed a duty of care to fathers of children to exercise reasonable care when reporting and investigating allegations of child sexual abuse. The plaintiffs alleged that they had suffered loss when the defendants wrongly accused them of molesting their own children, and false information about them was subsequently communicated to others. Cognisant of this characterisation of loss, the Court found that if a duty of care was upheld, it would undermine the tort of defamation. Had the plaintiffs brought their claim in defamation, the defendants would have had a complete defence by relying on the developed principles of qualified privilege. It was reasoned that ‘to apply the law of negligence ... would resolve that competition on an altogether different basis. It would allow recovery of damages for publishing statements to the discredit of a person where the law of defamation would not’.<sup>152</sup> The duty of care was therefore denied on the basis that its recognition would lead to incoherence within the law of torts. The High Court has since followed *Sullivan v*

<sup>146</sup> MacCormick (n 144) 38–9. Cf Grantham and Jensen (n 144) 361.

<sup>147</sup> Balkin (n 144) 114.

<sup>148</sup> Aiden Lerch and Yvonne Apolo, ‘Re-Examining *Miller v Miller*: A Search for Rationality and Coherence in Australia’s Illegality Defence’ (2019) 25(3) *Torts Law Journal* 219, 228.

<sup>149</sup> *Sullivan v Moody* (2001) 207 CLR 562, 580–2 [54]–[60] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame v New South Wales* (2002) 211 CLR 317, 335 [28] (Gleeson CJ), 342 [57]–[58] (Gaudron J), 361–2 [122]–[126] (McHugh J), 418 [298]–[299] (Hayne J); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 406–8 [39]–[42] (Gummow, Heydon and Crennan JJ); *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513–4 [23]–[25], 518 [34] (French CJ, Crennan and Kiefel JJ); *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129, 143–4 [46] (French CJ, Crennan, Kiefel and Bell JJ); *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 525 (Bell, Gageler and Keane JJ); *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (n 70) 201–2 [25] (French CJ), 214 [69] (Crennan, Bell and Keane JJ).

<sup>150</sup> Fell (n 144) 1161. Gillooly instead divides the principles of legal coherence into categories of compatible duties and compatible bodies of law: Gillooly (n 144) 38–46.

<sup>151</sup> *Sullivan v Moody* (n 149) 580 [50].

<sup>152</sup> *Ibid* 581 [54].

*Moody* to refuse to develop the tort of negligence where it would conflict with not only other torts, but also with other areas of the common law.<sup>153</sup>

On the principle extrapolated in *Sullivan v Moody*, a court would only be permitted to uphold a tort that protects an individual's right not to have their personal privacy invaded if it did not subvert or conflict with another tort or cause of action. A strict interpretation of legal coherence may therefore pose a complication for the development of such a tort. As outlined in Part I, private nuisance, trespass to land and breach of confidence have been employed to hold a defendant liable for invading a plaintiff's personal privacy in certain circumstances. It could therefore be deduced that the development of a privacy tort would impermissibly extend liability beyond the scope of these causes of action as it would allow personal privacy to be protected in circumstances where these actions would not ordinarily apply.<sup>154</sup> Thus, in extending liability beyond the established causes of action founded on longstanding common law principles, it could be said that a privacy tort would lead to incoherence.

There are two major flaws in this conclusion. The first is that it overlooks the fact that a single set of facts often generate concurrent liability in the common law, and this should not stifle incremental development. For example, a factual scenario may validly give rise to the possibility of a breach of contract, a breach of fiduciary duty and negligence being committed. However, as both Stapleton and Goudkamp have identified, simply because one of these causes of action cannot be made out does not mean that the imposition of liability for the commission of another should be prevented.<sup>155</sup> It could otherwise be said that the tort of negligence should never have been established, as it extended liability beyond the longstanding principles of contract. It would therefore be irrational to reason that a privacy tort should not be developed merely because it would impose liability in circumstances where private nuisance or breach of confidence would not. Indeed, in being implemented to give further common law protection to the right of privacy, this would be the very purpose of the tort.

Second, the above reasoning does not consider that the development of a privacy tort could in fact *promote* legal coherence.<sup>156</sup> Currently, the right to privacy

<sup>153</sup> See, eg, *Tame v New South Wales* (n 149) 335 [28] (Gleeson CJ), 342 [57]–[58] (Gaudron J), 361–2 [122]–[126] (McHugh J), 418 [298]–[299] (Hayne J); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (n 149) 407–8 [39]–[40] (Gummow, Heydon and Crennan JJ; French CJ and Hayne J agreeing). The doctrine of legal coherence has never been considered in the context of tort law generally, as distinct from an application to the tort of negligence when assessing whether there is a duty of care. This limited judicial consideration must be borne in mind in the remainder of the analysis.

<sup>154</sup> For example, consider a scenario similar to that of *Smethurst v Commissioner for Police* (n 24): a Commonwealth agency uses its new powers under the *Telecommunications Act 1997* (Cth) to hack remotely into the computer of a journalist to take his or her personal data and that hacking is later found to be unlawful due to the relevant warrant being invalidly issued. In such a situation, trespass to land, trespass to goods, private nuisance or breach of confidence are highly unlikely to have been committed.

<sup>155</sup> Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1998) 71; James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 201–2.

<sup>156</sup> Butler has suggested that the extension of breach of confidence to protect personal privacy may lead to 'doctrinal distortions' between common law and equity: Butler (n 31) 130.



is primarily protected by the piecemeal development of private nuisance, trespass to land and breach of confidence. The consequence is that invasions of territorial privacy are generally regulated by the principles of the common law, and invasions of informational privacy (and to an extent, bodily privacy)<sup>157</sup> are regulated by the principles of equity. It follows that the law which assesses the wrongdoing, and the kinds of remedies that plaintiffs are entitled to, is dependent on the type of privacy that has been invaded. However, there is no justifiable basis for why this is the case other than that these causes of action ‘best fit’ the facts that arise in particular cases.

Furthermore, the protection of privacy is limited by the elements of these causes of action, which were not developed to impose liability for invasions of privacy. For example, an essential element of breach of confidence is that the relevant confidential information is given to the defendant in circumstances of a duty or obligation of confidence.<sup>158</sup> Although English courts have broadened the meaning of this requirement to capture strangers who obtain confidential information in circumstances where they do not have a pre-existing personal, contractual or fiduciary relationship with the plaintiff,<sup>159</sup> Australian courts have not (yet) followed suit.<sup>160</sup> In *Giller v Procopets*, the plaintiff and the defendant were in a de facto relationship when the sexual encounters between them were filmed by the defendant.<sup>161</sup> The Court was therefore satisfied that when the plaintiff gave her consent to the filming, this was done in circumstances where the defendant clearly owed a duty of confidence to the plaintiff on the basis of their existing personal relationship.<sup>162</sup> However, the difficulty that this requirement presents is that personal privacy can be invaded in circumstances where there is no pre-existing relationship between the parties and a duty of confidence will therefore not arise. For example, it is unlikely that a breach of confidence will be committed where X, unknown to Z, films Z in a public bathroom without Z’s knowledge; or where a wrongdoer hacks into another person’s computer.<sup>163</sup> Thus, the scope of the action does not capture some of the most egregious invasions of privacy.

<sup>157</sup> Given that the equitable wrong of breach of confidence has been held to have been committed where a person shares sexually explicit photos or videos of another person with whom they had previously been in a relationship, it can be said that equity protects bodily privacy: see *Giller (VSCA)* (n 26).

<sup>158</sup> *Coco v AN Clark (Engineers) Ltd* [1968] RPC 41, 48; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50–52 (Mason J); *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J).

<sup>159</sup> See *Attorney-General v Guardian Newspaper Ltd (No 2)* [1990] 1 AC 109, 268 (Lord Griffiths), 281–2 (Lord Goff); *Campbell v MGN Ltd* (n 140) 464–5 [14] (Lord Nicholls).

<sup>160</sup> Although Gleeson CJ approved of the English approach in *ABC v Lenah* (n 24) 222 [30], the other members of the Court did not. Since then, Australian courts have not followed Gleeson CJ’s viewpoint and require an obligation of confidence arising from a defined relationship to found the cause of action: see *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, 159 [36] (Hodgson JA); *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281, 290 [39] (Finn, Sundberg and Jacobson JJ); *Marshall v Prescott* [2015] NSWCA 110, [6](3), [52]–[53] (Beazley P, Macfarlan and Emmett JJA agreeing).

<sup>161</sup> *Giller (VSCA)* (n 26).

<sup>162</sup> *Giller (VSC)* (n 30) [153]–[158] (Gillard J). The Victorian Court of Appeal agreed with the primary judge in this respect: see *Giller (VSCA)* (n 26) 1 [1] (Maxwell P), 28–9 [131] (Ashley JA), 51 [229], 90 [386] (Neave JA).

<sup>163</sup> *Butler* (n 31) 130–1.

Bearing in mind the formulation of a privacy tort proposed in Part I,<sup>164</sup> it can be determined that if a tort was established with the sole aim of protecting a right not have one's personal privacy invaded, courts would develop a set of reasoned principles that are sensitive to the precise conduct that the tort is designed to capture *and* to the limits that should be placed on the scope of liability. Moreover, the extent to which the three arms of personal privacy should be protected can be clarified, and the same types of remedies would be available to plaintiffs. This would generate certainty in judicial decisions and lead to a greater capacity for the tortious conduct to be determined in advance. While it may be that a privacy tort, private nuisance, trespass to land and breach of confidence would overlap, such concurrent liability is reflective of the rich pattern of the common law response.<sup>165</sup> For these reasons, it is this author's contention that the development of a tort of invasion of personal privacy will generate greater coherence in the common law.

### C *Legal Coherence and Statute*

In addition to cohering with the common law, the enforcement of a right to privacy must not undermine or stultify any relevant statute. Since the late 20<sup>th</sup> century, the High Court has been more inclined to develop the common law by reference to statute.<sup>166</sup> Although common law duties in negligence were said to conflict with statutory duties and generate legal incoherence in *Sullivan v Moody*<sup>167</sup> and *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*,<sup>168</sup> incoherence with statute to deny a common law claim is widely recognised as finding its unanimous genesis in *Miller v Miller*.<sup>169</sup> In that case, the plaintiff and the defendant were cousins and had stolen a car with other family members and friends in order to return home from a nightclub. While driving, the defendant lost control of the car and the plaintiff was rendered tetraplegic. The plaintiff sued in negligence. The defendant pleaded the defence of illegality by alleging that the plaintiff had entered into a joint criminal enterprise to use a car without the consent of the owner contrary to s 371A of the *Criminal Code Act Compilation Act 1913* (WA). The High Court (Heydon J dissenting) found that the plaintiff had withdrawn from the joint criminal enterprise and as such the illegality defence did not apply.<sup>170</sup> However, the majority (Heydon J agreeing) held in obiter dicta that the plaintiff's claim in negligence would have failed had she been acting illegally.

The Court stated that the central consideration at stake was coherence in the law, as it is the primary rationale for the illegality defence in tort.<sup>171</sup> The plurality reasoned that, '[i]t will be by reference to the relevant statute, and identification of its purposes, that any incongruity, contrariety or lack of coherence denying the

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<sup>164</sup> Excluding the sixth final element: see above n 34.

<sup>165</sup> Stapleton (n 155) 71.

<sup>166</sup> See Sir Anthony Mason, 'The Interaction of Statute and Common Law' (2016) 90(5) *Australian Law Journal* 324, 334–6.

<sup>167</sup> *Sullivan v Moody* (n 149) 581–2 [55]–[62].

<sup>168</sup> *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (n 149) 407–9 [41].

<sup>169</sup> See above n 149.

<sup>170</sup> *Miller v Miller* (n 149) 483 [106] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 483 [108] (Heydon J).

<sup>171</sup> *Ibid* 454 [15].

existence of a duty of care will be found'.<sup>172</sup> Applying this to the facts of the case, the Court stated that the purpose of s 371A was to use the criminal law to deter and punish individuals using a vehicle in circumstances that lead to reckless driving.<sup>173</sup> Despite that this purpose was expressed in the form of a basic criminal law offence and was silent as to civil liability, the Court held that it was the intention of the legislature to interpolate the statutory purpose into tort law to deny a duty of care because:

The statutory purpose of a law proscribing dangerous or reckless driving is not consistent with one offender owing a co-offender a duty to take reasonable care. ... The inconsistency or incongruity arises regardless of whether reckless or dangerous driving eventuates. It arises from the recognition that *the purpose of the statute is to deter and punish* using a vehicle in circumstances that often lead to reckless and dangerous driving.<sup>174</sup>

*Miller v Miller* has since been followed by the High Court to deny common law claims on the basis that their enforcement would be incongruous with statute.<sup>175</sup> Importantly, however, the pursuit of legal coherence should not be seen as a pursuit of legal consistency.<sup>176</sup> Indeed, Fleming has argued that if courts interpolate statutory purposes into the common law without any clear and express intention by the legislature to do so, this is an unauthorised act of judicial legislation.<sup>177</sup> It is for this reason that *Miller v Miller* has been widely criticised and any further application of it should be done cautiously.<sup>178</sup>

On the reasoning of *Miller v Miller*, a common law right not to have one's personal privacy invaded would be denied if its recognition would be incongruous with the purposes of any relevant statute. Upon a review of the various schemes in the *Privacy Act* and the state and territory statutes as outlined in Part I, this is unlikely to pose significant difficulty.

From the outset, the fact that the individual complaint scheme exists does not prevent the common law from developing alongside it. Unless expressly stated otherwise, where both statutory and common law avenues exist, litigants are free to make a choice as to how they wish to bring their claim.<sup>179</sup> The more pertinent issue

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<sup>172</sup> Ibid 473 [74].

<sup>173</sup> Ibid 481–2 [101].

<sup>174</sup> Ibid (emphasis added).

<sup>175</sup> *Equuscorp Pty Ltd v Haxton* (n 149) 513–4 [23]–[25], 518 [34], 520 [38], 544 [111] (French CJ, Crennan and Kiefel JJ). See also *Legal Services Board v Gillespie-Jones* (n 149) 525 [119] (Bell, Gageler and Keane JJ); *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (n 149) 143–4 [46] (French CJ, Crennan, Kiefel and Bell JJ).

<sup>176</sup> Lerch and Apolo (n 148) 227–30. Cf Fell (n 144) 1167–79.

<sup>177</sup> John Fleming, *The Law of Torts* (Law Book Co, 1957) 278–80; John G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 139–42, 322. See also *O'Connor v SP Bray Ltd* (1937) 56 CLR 464, 477–8 (Dixon J).

<sup>178</sup> See Chief Justice Beverley McLachlin, 'Weaving the Law's Seamless Web: Reflections on the Illegality Defence in Tort Law' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015) 207, 217; Sharon Erbacher, *Negligence and Illegality* (Hart Publishing, 2017) 128–9; Fell (n 144) 1190–1; Lerch and Apolo (n 148) 232–7.

<sup>179</sup> It could be argued here that because the legislature has positively intervened, courts should refrain from providing further common law protection. However, this argument is misconceived in the context where protection of a limited right to privacy is so clearly within the purview of the courts, given that it upholds basic individual freedoms necessary in any modern polity. This explains why

is how a tort of invasion of personal privacy would interact with the purposes of the *Australian Privacy Principles* and the NDB scheme. As outlined in Part I, the NDB scheme imposes an obligation on entities to notify their consumers when a data breach occurs. An imposition of tortious liability for an invasion of privacy would clearly not overlap with the purpose of such a notification: the NDB scheme would simply be helpful evidence of an invasion of privacy. The *Australian Privacy Principles*, however, specifically impose standards on how entities can collect, store, use and disclose data. Therefore, there is potential for a tort of invasion of personal privacy to conflict with these standards and their underlying purposes.

Before the *Australian Privacy Principles* were introduced by passing the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth), Attorney-General Nicola Roxon, in her second reading speech, stated that the purpose of the amending legislation was to ‘bring Australia’s privacy protection framework into the modern era’.<sup>180</sup> The Principles, in setting a minimum standard of rules that must be complied with for the collection, use, storage and disclosure of personal information, therefore clearly have the protection of personal privacy at their forefront. However, as Apolo has convincingly identified, the *Australian Privacy Principles* are consequentialist in nature as they allow for private and public entities to acquire personal information where certain standards are met.<sup>181</sup> Accordingly, the Principles balance the personal privacy of the individual with the social benefits of data processing.<sup>182</sup>

It is unlikely that the imposition of tortious liability for an invasion of personal privacy would be incongruous with this purpose. Bearing in mind the elements of the tort proposed by extant literature, tortious liability will only be imposed where the invasion of privacy was intentional.<sup>183</sup> Therefore, the tort can be classified as an intentional one, and the general defence of consent will prevent liability from being imposed where a plaintiff consents to their personal privacy being invaded.<sup>184</sup> This precisely reflects how the *Australian Privacy Principles* regulate the collection of sensitive personal information. Principle 3.3(a) states in clear terms that an entity must not collect sensitive information about an individual unless that individual consents to the collection of the information. If an entity collects such information without consent, they are in breach of Principle 3.3 and an individual can make a complaint about that entity, and potentially obtain a remedy by way of a determination. Thus, a privacy tort that imposes liability on a defendant who, in breach of Principle 3.3, takes personally private information from an individual without their consent, would enhance the statutory purpose of the *Australian Privacy Principles*, rather than undermine it.

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courts in Canada and New Zealand advanced common law privacy torts although their Parliaments had positively intervened to varying extents: see above n 141.

<sup>180</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 2012, 5210 (Nicola Roxon, Attorney-General and Minister for Emergency Management).

<sup>181</sup> Apolo (n 19) 476–8. This is evident from Principle 3, which allows for personal information to be acquired by public and private entities provided that it ‘is reasonably necessary for one or more of its functions or activities’: *Australian Privacy Principles* (n 11).

<sup>182</sup> Apolo (n 19) 478.

<sup>183</sup> Although the ALRC recommended that recklessness should also suffice: see above n 34.

<sup>184</sup> *ALRC 2014 Report* (n 32) 195–7 Recommendation 11–4, [11.52]–[11.60]; Butler, ‘A Tort of Invasion of Privacy in Australia?’ (n 35) 379–80.

However, it must be accepted that where the legislature, by way of the *Australian Privacy Principles*, has specifically designated a relevant standard to be imposed on entities in certain situations, then a privacy tort would likely conflict with the Principles if it imposed a higher standard in those specific situations. Any development of a tort of invasion of personal privacy must therefore be cognisant of this issue, as it would likely reduce the tort's scope of application. Nevertheless, if the tort were to impose obligations beyond those of the Principles in circumstances where they were silent on particular issues, it does not necessarily follow that incongruity would arise. For example, although Principle 6.2 provides for how an individual's personal information can be used by an entity, a contentious issue that it does not regulate is that of cumulative data use. This involves a situation where a person consents to a data platform collecting and using individual pieces of personal information (such as an email address, phone number, location, date of birth and credit card number), but the platform later uses that information in combination without any such consent. If P were to consensually give the abovementioned information to D on separate occasions and D used that information in combination without P's consent, it is unclear whether D is in breach of the Principles. It follows that if P's identity is stolen by a third-party hacker as a result of the combined use, and she suffers economic loss, P may not have a valid complaint under the Act against D.

If a tort of invasion of personal privacy were held to exist, there are good arguments that the tort would be committed in instances where non-consensual cumulative data use occurs.<sup>185</sup> If this were the case, tort law would certainly be imposing obligations on entities beyond those of the *Australian Privacy Principles*. However, this does not mean that the tort is in conflict with the statutory purpose of the Principles. It is, instead, fulfilling the function of the common law: to incrementally respond to new forms of infringements of individual rights. Thus, a tort of invasion of personal privacy that imposes additional liability to protect a right not to have one's personal privacy invaded will not undermine the purpose of the *Australian Privacy Principles*.

As to the state and territory legislation, the establishment of a privacy tort would not be incongruous with these statutes. Rather, it would inject coherence into the legal response to invasions of privacy. As was outlined in Part I, a number of states and territories have enacted offences rendering it illegal for a person to film another person engaged in a private act.<sup>186</sup> Although it must be acknowledged that each offence has widely different elements, their general underlying purpose is to deter and punish an unreasonable invasion of a person's privacy without their consent. The refusal of express common law protection of privacy does not align with this purpose. For example, if X were to film Y while getting changed in a clothes store, X could be charged with a criminal offence. However, if X were to upload that video on TikTok, and the video went viral such that Y's employer saw the video and sacked Y, Y would have no civil claim against X to be compensated

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<sup>185</sup> In doing so, data platforms are creating individual profiles that could arguably tell a third party more about a person than that person's own DNA. This is likely an intentional intrusion on the plaintiff's informational privacy beyond the original consent that was given by a plaintiff and the non-consensual use of a profile created this way would likely be offensive to a reasonable person.

<sup>186</sup> See above n 8.

for his or her losses.<sup>187</sup> This is anomalous; the legislature is denouncing the conduct as criminal on the one hand, while the common law is refusing to acknowledge it as a civil wrong on the other.<sup>188</sup> Thus, the development of a privacy tort that gives the victims of crimes the ability to sue for invasions of their personal privacy would facilitate the unique purposes of criminal law and tort law to ensure that the overall legal response to invasions of privacy is principled and free from contradiction.

## D Summary

The above analysis demonstrates that according to the rights-based theory of tort law, it would be justifiable for *courts* to develop the common law to protect an individual's right not to have his or her personal privacy invaded. Three principled conclusions can be derived from the foregoing exploration.

First, although the concept of 'personal privacy' is difficult to define, it is a moral right that is capable of being subject to definable limits in circumstances where it is clearly in the public interest to warrant protection. In this sense, conduct that infringes a right not to have one's personal privacy invaded can be determined in advance to a sufficient standard of certainty. Therefore, a tort of invasion of personal privacy that imposes liability for such conduct would be cognisant of the rule of law.

Secondly, in being predicated as a tort that protects a particular right from being intentionally infringed, the tort of invasion of personal privacy readily 'fits' within the law of torts. Not only does the tort not conflict with any other causes of action, but its implementation would imbue a more unified common law response to invasions of privacy.

Thirdly, a tort of invasion of personal privacy would actively promote and enhance the purposes of the territory, state and federal privacy legislation. The tort provides an alternative avenue of remedy to all individuals who have had their privacy infringed, irrespective of whether the defendant was subject to the *Australian Privacy Principles*. Additionally, the tort would act as an underlying safety net, in which legislative gaps could be filled with a purpose to protect against invasions of privacy as they grow in complexity in response to new and novel technological advances. Such a combined statutory and common law approach is an effective and proficient response that complements the intention of the legislature.

These findings, in themselves, provide compelling reasons for the development of a tort of invasion of personal privacy. However, taken together, they indicate that the imposition of tortious liability in such circumstances would align with the theoretical underpinnings of Australia's bifocal law of torts.

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<sup>187</sup> On the current state of Australian law, breach of confidence would not be made out because the relevant personal 'information' was not given to X in circumstances of a duty or obligation of confidence: X and Y are strangers. See text accompanying above n 158–160.

<sup>188</sup> It must be acknowledged here that simply because conduct is deemed criminal does not, in itself, justify the imposition of tortious liability for identical conduct.

## V Conclusion

It cannot be denied that technology has fundamentally changed the way in which we live. Consequently, invasions of privacy are commonplace and will only become more prevalent in years to come. While these observations are paramount to the justification for the development of a tort of invasion of personal privacy, in isolation and without additional support from an explicitly legal foundation, they do not provide a sound basis for Australian courts to exercise their judicial law-making function.

This article has therefore sought to assess whether there is a more principled justification for a tort of invasion of personal privacy by considering whether its implementation would align with the theoretical underpinnings of Australian tort law. In doing so, this article has revealed that according to the rights-based theory of tort law, the establishment of a tort of invasion of personal privacy at common law would accord with incremental tort law development as a right not to have one's personal privacy invaded can be derived from a moral right, its protection can be subject to definable limits, and its enforcement would promote coherence in Australian law.

The judicial advancement of a tort of invasion of personal privacy would be justified and legitimate. Not only is our technological society demanding further common law protection of personal privacy in circumstances in which the legislative response has remained relatively stagnant, but a corresponding tort that can be used to protect a defined right to personal privacy would also naturally integrate with the elemental principles and philosophical foundations that constitute contemporary Australian tort law. Indeed, as the rights-based theory exemplifies, a corollary of tort law's existence is a longstanding recognition that there are very particular instances in which the courts must exercise their judicial law-making function to create new torts. The advancement of a tort of invasion of personal privacy is one such instance: it is the logical next step in tort law's evolutionary process.





# *Point and Shoot: Originality, Authorship, and the Identification of the Copyright Work in Modern Photography*

Jani McCutcheon\*

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## *Abstract*

This article explores how profound technological developments in photography have problematised concepts of the photograph, authorship, and originality in Australian copyright law. These developments have resulted in highly automated photography and ubiquitous photographs, inviting questions about what constitutes a ‘photograph’ as defined in the Australian *Copyright Act 1968* (Cth) (*‘Copyright Act’*), when a photograph is sufficiently original, and how the definition of the ‘author’ of a photograph as the person who ‘took’ it should be interpreted. The article is the first to analyse these issues, ameliorating the relative dearth of serious scholarly investigation of the contemporary photograph under Australian copyright law and a paucity of judicial attention. It considers the meaning of ‘photograph’ and ‘photography’ under the *Copyright Act* and explains how software and new practices in a ‘post-photography’ world challenge those concepts. It then explores photographic originality and investigates how increasingly automated modes of photography diminish, if not eviscerate, originality in contemporary photography. The article then focuses on photographic authorship, interrogating the statutory definition of the author of a photograph as ‘the person who took it’. The article also proposes further research into ways of better aligning copyright law with contemporary photographic technological developments and artistic practice.

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## I Introduction

Photographs receive copyright protection under the Australian *Copyright Act 1968* (Cth) (*Copyright Act*), provided they fall within the Act's definition of 'photograph', are original, and are created by an author, who is defined in the Act to be the person who 'took' the photograph.<sup>1</sup> At first glance, this sounds like a relatively simple path to achieving copyright subsistence in photographs. However, technological change in the way photographs are made has forced a number of questions to come into sharp focus: what are 'photographs' these days; when are they original copyright works; who authors them; and who 'takes' a photograph? This situates the copyright status of photographs among other major questions of law and policy provoked by technological development, and raises the familiar question of how well the law keeps pace with technology. Most difficult copyright questions have been prompted by technological change, and over the last 170 years, photography has undergone the most profound technological change of any copyright-protected subject matter.

The article starts by considering the meaning of 'photograph' within the definition of 'artistic work' in the *Copyright Act*.<sup>2</sup> Australia's exhaustive closed-list system for defining both copyright subject matter generally, and the content of 'artistic work' specifically means that alignment with the definition of 'photograph' is a critical threshold for protection. The article therefore analyses what we mean by 'photograph' and 'photography' in a 'post-photography'<sup>3</sup> world. This is particularly relevant now that artificial intelligence ('AI') can generate digital images that are indiscernible from genuine photographs, raising broader questions about the suitability of a closed-list system of copyright protection, and where we can and should situate digital images in such a system. The article then focuses on an essential subsistence criterion: photographic originality. This is more questionable than ever, since modern photography is often now mostly a matter of pressing a button and allowing the computer inside the camera or mobile phone to make all of the decisions about aperture, angle, light and focus.<sup>4</sup> Different standards of originality across copyright systems complicate the standardisation of photograph protection in a globalised world, meaning the same photograph may receive protection in some jurisdictions, but not others. Finally, the article considers the *Copyright Act*'s statutory definition of the author of a photograph as 'the person who took it' and how it should be interpreted.<sup>5</sup>

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<sup>1</sup> *Copyright Act 1968* (Cth) s 10(1) (definition of 'author') (*Copyright Act*).

<sup>2</sup> *Ibid* s 10(1) (definition of 'artistic work').

<sup>3</sup> 'Post-photography' is defined in Daniel Chandler and Rod Munday (eds) *A Dictionary of Media and Communication* (Oxford University Press, 2<sup>nd</sup> ed, 2016) as '1. The use of digital photography as a distinctive medium, contrasted with traditional photography; especially reflexive art in which photographic images are digitally manipulated. 2. A cultural era of widespread photographic literacy, image manipulation, and hyperreality.' See also, eg, Robert Shore, *Post-Photography: The Artist with a Camera* (Laurence King Publishing, 2014).

<sup>4</sup> Andrés Guadamuz, 'The Monkey Selfie: Copyright Lessons for Originality in Photographs and Internet Jurisdiction' (2016) 5(1) *Internet Policy Review* <<https://doi.org/10.14763/2016.1.398>>.

<sup>5</sup> *Copyright Act* (n 1) s 10(1) (definition of 'author').

The copyright status of modern photographs is increasingly relevant to a number of stakeholders, not just professional photographers, and for a number of reasons. Infringement of the copyright in photographs is often included in the mix of claims for breach of confidence, misleading or deceptive conduct, passing off, trademark infringement, design infringement, patent infringement, defamation and some privacy-based claims,<sup>6</sup> so the issue has the potential to be more frequently ventilated. Photographs are also an absolutely essential means of distributing information. The photograph has moved from simply reproducible to inherently disseminative, feeding our contemporary see–shoot–share sensibility. Whether copyright does subsist is an important question because its exclusive rights can also be a powerful censorship tool chilling the photograph’s disseminative value and access to the important information a photograph might contain. And of course, photographs are legion, and we are all photographers these days, so these questions affect us all. It is estimated that between 1.2 trillion<sup>7</sup> and 7.5 trillion<sup>8</sup> photos were taken in 2017. Most will evade close examination of their copyright status, but those that are economically, artistically, or culturally valuable may attract more scrutiny and whether copyright subsists will be significant to professional photographers, in particular, but also to the lucky amateur photographer who happens to capture something valuable. In light of landmark cases examining authorship and originality as copyright subsistence criteria,<sup>9</sup> there is also arguably a greater potential for defendants to challenge blunt assertions of copyright in material created in association with software. These issues also directly play into more normative questions about whether the treatment of photographs under the *Copyright Act* supports or challenges the theoretical justifications for photographic copyright under either a natural rights or utilitarian model. For all of these reasons, the copyright status of photographs demands greater attention.

## II The ‘Photograph’ and Post-Photography

What is a ‘photograph’? This question prompts an array of responses, depending on the perspective: technical, aesthetic, cultural, and, for our purposes, legal. Some domains, like contemporary art, may eschew any attempt to define the photograph,<sup>10</sup>

<sup>6</sup> See, eg, *Austshade Pty Ltd v Boss Shade Pty Ltd* (2016) 118 IPR 93 (registered design, innovation patent); *Derrimut Health & Fitness Pty Ltd v Revival 24:7 Gym Pty Ltd* [2019] FCA 1988 (registered trade mark); *Sovereign Hydroseal Pty Ltd v Steynberg* (2020) 155 IPR 459 (breach of confidence); *Woodtree Pty Ltd v Zheng* (2007) 164 FCR 369 (misleading conduct); *Warne v Genex Corporation Pty Limited* (1996) 35 IPR 284 (privacy, breach of confidence, misleading conduct); *Seafolly Pty Ltd v Madden* (2021) 297 ALR 337 (defamation).

<sup>7</sup> Caroline Cakebread, ‘People Will Take 1.2 Trillion Digital Photos This Year — Thanks To Smartphones’, *Business Insider Australia* (online, 1 September 2017) <<https://www.businessinsider.com.au/12-trillion-photos-to-be-taken-in-2017-thanks-to-smartphones-chart-2017-8?r=US&IR=T>>.

<sup>8</sup> ‘How Many Photos Were Taken Last Year?’, *Forever* (Blog Post) <<https://blog.forever.com/forever-blog/2018/1/22/how-many-photos-were-taken-last-year>>.

<sup>9</sup> See, eg, *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 (‘IceTV’); *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142 (‘*Telstra v Phone Directories*’).

<sup>10</sup> See, eg, Miriam Leuchter, ‘Editor’s Letter: What is a Photograph?’ (2010) 74(3) *Popular Photography* 6; Shore (n 3); Carol Squiers, Geoffrey Batchen, George Baker, George Thomas Baker and Hito Steyerl, *What is a Photograph?* (DelMonico Books-Prestel, 2013); Stephen Shore, *The*

just as any rigid definition of ‘art’ is resisted, and others may question who is best placed to forge definitions and boundaries for art — Parliament or the artists themselves?<sup>11</sup> However, s 10(1) of the *Copyright Act* supplies a definition:

photograph means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography, and photographic has a corresponding meaning.<sup>12</sup>

This definition demands some understanding of what constitutes ‘photography’, which may also be a fluid concept for photography theorists and contemporary artists.<sup>13</sup> Courts tend to avoid those more esoteric debates, and turn to dictionary definitions. By way of example, the Merriam-Webster Dictionary defines ‘photography’ as ‘the art or process of producing images by the action of radiant energy and especially light on a sensitive surface (such as film or an optical sensor)’.<sup>14</sup> This dictionary definition gives few opportunities to rethink the photograph’s ontology. One text has raised ‘the question of how relevant this concept of photography remains in the age of digital cameras, where the processes by which images are produced may be far removed from those originally involved in photography’.<sup>15</sup> However, it seems that photographs made using digital cameras will likely satisfy the definition, since these images are the result of a process involving light, the defining feature of photography.<sup>16</sup>

However, not all digital images are ‘photographs’, even if they appear indistinguishable from photographs. Advanced 3D rendering and animation

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*Nature of Photographs* (Phaidon Press, 2<sup>nd</sup> ed, 2007); Fred Ritchin, *After Photography* (WW Norton, 2009); ‘Redefining the Photographic Medium: Chapter Introduction’ in Moritz Neumüller (ed) *The Routledge Companion to Photography and Visual Culture* (Routledge, 2018) 207.

<sup>11</sup> Justine Pila, ‘An Intentional View of the Copyright Work’ (2008) 71(4) *Modern Law Review* 535; Justine Pila, ‘Copyright and Its Categories of Original Works’ (2010) 30(2) *Oxford Journal of Legal Studies* 229 (‘Copyright and Its Categories’).

<sup>12</sup> This is consistent with the *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 24 July 1971, 1161 UNTS 3 (entered into force 15 December 1972) art 2(1) (‘*Berne Convention*’):

The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as ... photographic works to which are assimilated works expressed by a process analogous to photography ...

See also the definition of ‘photograph’ in s 4(2) *Copyright, Designs and Patents Act 1988* (UK) as ‘a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film’.

<sup>13</sup> See the sources cited at n 10 and the examples of boundary-pushing ‘photography’ below nn 29, 32–7 and accompanying text.

<sup>14</sup> Merriam-Webster Dictionary (online at 15 March 2021) ‘photography’.

<sup>15</sup> Westlaw AU, *Law of Intellectual Property: Copyright, Designs & Confidential Information* (Last updated: 4 August 2016) Part II – Copyright and Neighbouring Rights, ‘Photographs’ [7.380] (‘*Law of Intellectual Property*’).

<sup>16</sup> ‘Photography: Digital Photography’ *BBC Bitesize* (online, 2021) <<https://www.bbc.co.uk/bitesize/guides/zrg2d6f/revision/9>>: ‘The sensor in a digital camera has millions of pixels, each of which make-up a light-sensitive photocell. This cell generates a tiny electrical current in response to light.’ See also Mark J Davison, Ann L Monotti, and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press, 2<sup>nd</sup> ed 2011) 213 [6.2.1.4.5]: ‘The definition excludes cinematograph films, but is broad enough to include digital photographs where there is no film.’

software like Keyshot<sup>17</sup> and Generative Adversarial Network (‘GAN’)<sup>18</sup> technology produces images that look identical to photographs.<sup>19</sup> It may seem anomalous to deny these photorealistic computer-generated images photographic status, when they so closely resemble photographs. Despite Ansel Adams’ observation that ‘[y]ou don’t take a photograph, you make it’,<sup>20</sup> these ‘made’ images cannot be photographs within the *Copyright Act*’s definition, because they are not ‘a product of photography’ nor do they result from a ‘process similar to photography’ as described above.<sup>21</sup> Nor are they likely to be authored, a point discussed further below. These hyperreal images can clearly complicate the already confounding problem caused by ‘deep fakes’.<sup>22</sup> They also generate important issues for the livelihood of commercial photographers who are already being abandoned in preference for digital image renderers:<sup>23</sup> a tendency likely to accelerate as GAN AI technology develops to the point where we can simply ask our phones to ‘make me a picture of a castle covered in ivy’, rather than going to the bother of taking or commissioning one.<sup>24</sup>

The definition of ‘photograph’ also becomes significant when classifying manipulations and creative modifications of existing photographs, an artistic practice facilitated by Photoshop software and similar tools.<sup>25</sup> As Shore notes:

Given the abundance of pre-existing visual material in our hyper-documented world, it’s unsurprising that an increasing amount of photographic art begins with someone else’s pictures. There’s nothing new about appropriating found imagery for fine-art purposes. But the sources, methods, and goals are fast-evolving. If digital culture has transformed photographic practice — that is, how pictures are taken and displayed — it has had no less profound an impact on how found materials are sought and then manipulated.<sup>26</sup>

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<sup>17</sup> KeyShot (Website) <<https://www.keyshot.com>>. See also Joe Flaherty, ‘Hyper-Realistic CGI is Killing Photographers, Thrilling Product Designers’, *Wired* (online, 20 March 2013) <<https://www.wired.com/2013/03/luxion-keyshot/>>.

<sup>18</sup> See Chris Nicholson, ‘A Beginner’s Guide to Generative Adversarial Networks (GANs)’, *A.I. Wiki* (Web Page) <<https://wiki.pathmind.com/generative-adversarial-network-gan>>.

<sup>19</sup> See the GAN examples in William Gayde, ‘New Technology Allows for Computer-Generated Photos that are Undetectable Fakes’ *TechSpot* (Web Page, 30 October 2017) <<https://www.techspot.com/news/71654-new-technology-allows-computer-generated-photos-undetectable-fakes.html>>.

<sup>20</sup> Cited in “‘You Don’t Take a Photograph, You Make It.’ — Ansel Adams”, *Gina Milicia* (Blog Post, 26 June 2017) <<https://ginamilicia.com/2017/06/you-dont-take-a-photograph-you-make-it-ansel-adams/>>.

<sup>21</sup> See above n 12 and accompanying text.

<sup>22</sup> ‘Deepfake, a portmanteau of “deep learning” and “fake”, refers to AI software that can superimpose a digital composite face on to an existing video (and sometimes audio) of a person’: Matt Beard, ‘To Fix the Problem of Deepfakes We Must Treat the Cause, Not the Symptoms’, *The Guardian* (online, 23 July 2019) <<https://www.theguardian.com/commentisfree/2019/jul/23/to-fix-the-problem-of-deepfakes-we-must-treat-the-cause-not-the-symptoms>>. This means that, as Fred Ritchin notes, ‘[i]n the digital arena one cannot with any certainty look at a photograph and say, “So that is how it was”’: Ritchin (n 10) 58.

<sup>23</sup> Flaherty (n 17).

<sup>24</sup> Paul Melcher, ‘Future A.I. Will Be Able to Generate Photos We Need Out of Nothing’, *PetaPixel* (online, 22 June 2015) <<https://petapixel.com/2015/06/22/future-a-i-will-be-able-to-generate-photos-we-need-out-of-nothing/>>.

<sup>25</sup> See, eg, Alice Yoo, ‘10 Incredible Photo Manipulation Artists’, *My Modern Met* (Web Page) <<https://mymodernmet.com/10-incredible-photo/>>.

<sup>26</sup> Shore (n 3) 13.

Shore refers to these creative appropriations as ‘photographic art’,<sup>27</sup> no doubt because of their surface approximation of photography. However, as mentioned, these images are neither ‘a product of photography’, nor created through a process similar to photography’, but are created through a process of reproduction and transformation of a photograph. Thus, although it is true that the digital age offers many opportunities to be creative *with* photographs, that creative activity may not create a ‘photograph’.

Other technological developments that hybridise the static features of the photograph and the kinetic continuity of film can also complicate how we classify photographs under the existing copyright framework. Examples include burst and rapid-fire tools, cameras programmed to take thousands of individual photos sequentially over an extended period of time, or iPhone’s Live Photo system, which records what happens 1.5 seconds before and after a picture is taken, producing what Apple refers to as ‘a moment captured with movement and sound’.<sup>28</sup> In the context of contemporary art, a number of artists play with the boundary between film and the photograph, providing ‘a fresh look at the photographic inscription of reality either by bringing the still photograph to life or by unearthing the photographic stillness embedded in the moving image’.<sup>29</sup> All of these examples tend to blur the distinction between film and photograph, particularly since the *Copyright Act* s 10(1) definition of ‘photograph’ expressly excludes ‘an article or thing in which visual images forming part of a cinematograph film have been embodied’. This classification matters under Australian law at least, because only ‘photographs’ are works; films are ‘made’ and attract different copyright subsistence criteria and thinner rights.<sup>30</sup> Importantly, they need not be original, nor authored.<sup>31</sup>

It is also questionable how well the Act’s definition of ‘photograph’ aligns with contemporary art practices that involve ‘camera-less’ means of making images using natural processes.<sup>32</sup> Examples of artists employing these post-photography practices include Christopher Colville, who has produced images by permitting a dead squid to decompose ‘atop photographic sheet film, exposing it by the glow of the carcass’s own decomposition. The bioluminescence of the food consumed by a squid gets released as its host decays’.<sup>33</sup> Colville also generates images by ‘igniting gunpowder dusted over arrangements of metal, stone, and wood on photosensitive

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<sup>27</sup> Ibid.

<sup>28</sup> ‘Take and Edit Live Photos’, *Apple Support* (Web Page, 10 February 2020) <<https://support.apple.com/en-au/HT207310>>.

<sup>29</sup> Jihoon Kim, *Between Film, Video, and the Digital: Hybrid Moving Images in the Post-Media Age* (Bloomsbury, 2016) 2.

<sup>30</sup> Being the right to make a copy, communicate the film to the public, and cause the film, in so far as it consists of visual images, to be seen in public: *Copyright Act* (n 1) s 86.

<sup>31</sup> With the exception of the moral rights provisions, which for the purposes of pt IX of the *Copyright Act*, deem the authors of a film to be the producer, the screenwriter and the director: *Copyright Act* (n 1) s 191.

<sup>32</sup> Zack Hatfield, ‘Photographs Made with the Ocean Capture Its Swirling Rhythms’, *Hyperallergic* (online, 4 April 2017) <<https://hyperallergic.com/369965/photographs-made-with-the-ocean-capture-its-swirling-rhythms>>.

<sup>33</sup> Leah Ollman, ‘Rematerializing Photography’ *Art in America* (online, 26 May 2017) <<https://www.artnews.com/art-in-america/features/rematerializing-photography-63264/>>.

paper'.<sup>34</sup> Edgar Lissel 'combines the light-seeking behaviour of cyanobacteria ... using the exposure of light on petri dishes to influence the growth of the microorganisms in specific patterns'.<sup>35</sup> Meghann Riepenhoff 'photographs' the ocean '[b]y coating photosensitive paper with homemade cyanotype emulsion and exposing surfaces to the elements — tree branches, rain, wind, ocean waves'.<sup>36</sup> Susan Derges has generated 'images' of 'the movements of water by placing photographic paper directly onto rivers and brooks'.<sup>37</sup> All of these contemporary artists disrupt the photograph's predictable narrative and conventional process. However, because many of these processes still use light, they are perhaps similar enough to a 'product of photography' or a 'process similar to photography' to produce images falling within the definition of 'photograph'.<sup>38</sup> This will depend on whether a court would be prepared liberally to interpret the phrase a 'process similar to photography' to include these more avant-garde modes of generating photograph-like pictures.

A conclusion that these images produced by processes such as 3D rendering, GAN, hybrids of film and photograph, or through natural processes are not 'photographs' has potentially sobering ramifications in copyright systems employing closed lists of protected subject matter, particularly when those subject matter are narrowly, or exhaustively, defined. In Australia, as mentioned, the definition of 'artistic work' is exhaustive, although the enumerated items listed in the definition of artistic work may themselves sometimes be either exhaustively or inclusively defined, or undefined.<sup>39</sup> Noting perhaps Henri Cartier-Bresson's observation that '[p]hotographing, for me, is instant drawing', are these creations 'drawings'?<sup>40</sup> A conservative court may reject such a suggestion, and courts tend to be unadventurous when assessing art through a copyright lens.<sup>41</sup> The *Copyright Act* s 10(1) definition of 'drawing' only clarifies that 'drawing includes a diagram, map, chart or plan' and gives no other guidance. The Federal Court of Australia has said

<sup>34</sup> Ibid.

<sup>35</sup> 'Featured Gallery: Edgar Lissel', *Microbial Art* (Web Page) <<http://www.microbialart.com/galleries/edgar-lissel/>>.

<sup>36</sup> Hatfield (n 32).

<sup>37</sup> Ibid.

<sup>38</sup> Whether these artists are authors or mere agents of nature is a separate, but important question, investigated in Jani McCutcheon, 'Natural Causes: When Author Meets Nature in Copyright Law and Art. Some Observations Inspired by *Kelley v Chicago Park District*' (2018) 86(2) *University of Cincinnati Law Review* 707.

<sup>39</sup> *Copyright Act* (n 1) s 10(1) states that 'artistic work' means:

- (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
- (b) a building or a model of a building, whether the building or model is of artistic quality or not; or
- (c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b).

'Building', 'drawing', 'engraving' and 'sculpture' are then defined inclusively, and 'photograph' is defined exhaustively: *Copyright Act* (n 1) s 10(1). There are no definitions of 'painting' or 'work of artistic craftsmanship'.

<sup>40</sup> Henri Cartier-Bresson quoted in John Suler and Richard D Zakia, *Perception and Imaging: Photography as a Way of Seeing* (Routledge, 5<sup>th</sup> ed, 2017) 129.

<sup>41</sup> See Anne Barron, 'Copyright Law and the Claims of Art' [2002] (4) *Intellectual Property Quarterly* 368; Pila, 'Copyright and Its Categories' (n 11).

that ‘the essence of a drawing remains the concept of a representation of some object by a pictorial line’.<sup>42</sup> The Full Court of the Federal Court has clarified that this concept extends to abstract drawings and there is no requirement that the drawing represent reality.<sup>43</sup> Some of the hard-to-classify creations outlined above might appear to have been drawn, particularly some digital renderings that have a stronger resemblance to illustration than photography. Others appear more like paintings,<sup>44</sup> which are undefined in the *Copyright Act*, or approximate films, which are expressly excluded from the Act’s definition of ‘photograph’. The definition of ‘artistic work’ also includes ‘work of artistic craftsmanship’.<sup>45</sup> These are also undefined and, as the definition of artistic work clarifies, works of artistic craftsmanship may also be other items listed in the definition, such as a painting or drawing.<sup>46</sup> The High Court has held that works of artistic craftsmanship are classified based on the ‘extent to which the particular work’s artistic expression, in its form, is unconstrained by functional considerations’.<sup>47</sup> An accommodating court may be prepared to stretch the concepts of drawing, painting or film to incorporate these quasi-photographic images, or some may evidence sufficient artistic intent relative to functional design requirements to qualify as a work of artistic craftsmanship. Whether there is room for these unconventional ‘photographs’ in the artistic work definition may be very significant for putative owners of the copyright in such images who wish to restrain unauthorised reproductions, or guard against moral rights infringement. For example, a car manufacturer may be very surprised and disappointed to learn that the digitally rendered, photorealistic images of their brand-new car that constitute the core of their worldwide marketing campaign receive no protection in countries employing narrow and anachronistic definitions of ‘photograph’.<sup>48</sup> While a magnanimous court might classify these digital renderings as ‘drawings’ or perhaps a work of artistic craftsmanship, there is no guarantee this more liberal approach would be adopted.

Future research should investigate whether the *Copyright Act*’s definition of ‘photograph’ should be amended or abandoned. On balance, amending the definition could create more problems than it cures. It may be difficult to fix on a definition of ‘photograph’ that aptly captures the range of photographic or photographic-like practices occurring today, let alone in the unknown technological future. Perhaps the better approach is to delete the definition and leave ‘photograph’ undefined, allowing concepts of the photograph in copyright law to evolve with technology. Another option would be to convert the existing definition of ‘artistic work’ from exhaustive to inclusive. This would better reflect the reality that art is constantly

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<sup>42</sup> *Woodtree Pty Ltd v Zheng* (2007) 64 FCR 369, 375 [27] (Heerey J).

<sup>43</sup> *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 172 FCR 580, 589–90 [49]. The Court also clarified that for hybrid works combining literary text and graphic elements, the question is whether the drawing ‘makes a visual impression notwithstanding the presence of the words and numbers’: at 591 [60].

<sup>44</sup> See, especially, Meghann Riepenhoff’s work: Hatfield (n 32).

<sup>45</sup> *Copyright Act* (n 1) s 10(1) (definition of ‘artistic work’).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Burge v Swarbrick* (2007) 232 CLR 336, 364 [83].

<sup>48</sup> Or, as discussed below nn 99–110 and accompanying text, because the automated process of production means they are authorless, and thus not a copyright work on that basis.



changing and prevent a restrictive and anachronistic definition of artistic work from unduly excluding non-traditional creative output from the copyright domain. These questions merit further analysis and investigation and their resolution is beyond the scope of this article, which primarily seeks to illuminate the issues.

### III Photographic Originality

This Part outlines the bases for photographic originality, and how these are complicated by technology. All artistic works, including photographs, must be original in order for copyright to subsist.<sup>49</sup> However, Australian jurisprudence has not specifically interrogated photographic originality. Thus, we must extrapolate from general principles. The author of a work supplies the requisite originality under the correlative principles of authorship and originality.<sup>50</sup> In *IceTV*, French CJ, Crennan and Kiefel JJ observed, in obiter dicta, that originality ‘means that the creation (ie the production) of the work required some independent intellectual effort’.<sup>51</sup> The Full Court of the Federal Court has since held that:

As to the ‘correlative’ relationship between authorship and originality, the contemporary question is simply this: Has the author deployed personal independent skill, labour, intellectual effort, judgement and discrimination in the production of the particular expression of the work?<sup>52</sup>

Absent Australian jurisprudence on the specific issue of *photographic* originality, it is useful to consider persuasive authority from other jurisdictions. It is beyond the scope of this article to meticulously canvas the evolution of judicial recognition of, and commentary on, photographic originality across diverse copyright systems. Suffice to say that originality has been recognised as springing from factors across the spectrum of the photographic process, distilling down to three main sources, as summarised in the United States case *Mannion v Coors Brewing Co*.<sup>53</sup> First, originality may arise from pre-shoot choices such as selecting location, props, costumes, lighting the scene and posing the subject, as exemplified in Napoleon Sarony’s famous photograph of Oscar Wilde, the subject of *Burrow–Giles Lithographic Co v Sarony*.<sup>54</sup> Second, in what the *Mannion* court referred to as

<sup>49</sup> See *Copyright Act* (n 1) s 32.

<sup>50</sup> *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49, 55, 57 (Isaacs J). See also *IceTV* (n 9) 474 [34] (French CJ, Crennan and Kiefel JJ): ‘There has been a long held assumption in copyright law that “authorship” and “original work” are correlatives; the legislation does not impose double conditions.’

<sup>51</sup> *IceTV* (n 9) 474 [33].

<sup>52</sup> *JR Consulting & Drafting Pty Ltd v Cummings* (2016) 329 ALR 625, 672 [264] (emphasis omitted).

<sup>53</sup> *Mannion v Coors Brewing*, 377 F Supp 2d 444 (SDNY, 2005) (‘*Mannion*’). A similar triad of creative possibilities was recognised in Hugh Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Design* (LexisNexis, 4<sup>th</sup> ed, 2011) vol 1 254 § 4.61:

Firstly, there may be originality which does not depend on creation of the scene or object to be photographed or anything remarkable about its capture, and which resides in such specialities as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc ... Secondly, there may be creation of the scene or subject to be photographed. ... Thirdly, a person may create a worthwhile photograph by being at the right place at the right time. Here his merit consists of capturing and recording a scene unlikely to recur ...

<sup>54</sup> *Burrow–Giles Lithographic Co v Sarony*, 111 US 53 (1884).

‘rendition’ originality,<sup>55</sup> the creative choices made during the actual execution of the photograph may qualify, including framing the shot, focusing, timing, angle, lighting, exposure and filters.<sup>56</sup> This recognises originality in unstaged, point-and-shoot photography. Third, post-production creative choices may include modifying the composition by cropping, colour and tone manipulation and (today) a host of digital editing techniques.<sup>57</sup>

This seems to compile a healthy suite of creative choices available to the photographic author, such that an unoriginal photograph would seemingly be rare. Nevertheless, some photographs lack sufficient creativity. United States case examples include *Custom Dynamics LLC v Radiantz LED Lighting Inc* (shots of car parts),<sup>58</sup> *Oriental Art Printing Inc v Goldstar Printing Corp*<sup>59</sup> (photographs of Chinese food dishes) and *Bridgeman Art Library Ltd v Corel Corp*<sup>60</sup> (faithful photographic reproductions of paintings).

Due to the correlation between authorship and originality, a contemporary focus of originality discourse is the extent to which technology or machines may disrupt or supplant authorship, and thus originality. This seems particularly pertinent to photographs, in that they are utterly dependent on, indeed would not exist but for, the machine that creates them. From the discussion earlier, we know that despite this reality, there is room to attribute authorship to the photographer, even in a point-and-shoot world. However, the swift technological development since photography’s inception has gradually diminished the skill and knowledge required to make a photograph. As cameras become more autonomous, opportunities for authorial intervention correspondingly diminish, and the status of the machine as a mere tool, subordinate to the author’s intellect, becomes more complicated. Software embedded in cameras now does much of what photographers used to do manually, and can even employ new technology that performs functions traditional cameras cannot, and never could. Examples include ‘HDR’ (high dynamic range)<sup>61</sup> and machine learning algorithms such as ‘Night Sight’, a camera mode for mobile phones that ‘stitches long exposures together ... to calculate more accurate white balance and colors’.<sup>62</sup> Night Sight has been aptly described as ‘a stunning

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<sup>55</sup> *Mannion* (n 53) 452.

<sup>56</sup> See, eg, *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPCC 1.

<sup>57</sup> See, eg, *Painer v Standard VerlagsGmbH* (Court of Justice of the European Union, C-145/10, ECLI:EU:C:2011:798, 1 December 2011) [2012] ECDR 6, [91]: ‘Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software’. However, as argued earlier, this originality may come too late, if the photograph has already crystallised. This then more accurately involves creative choices directed to adapting or transforming an existing photograph.

<sup>58</sup> *Custom Dynamics LLC v Radiantz LED Lighting Inc*, 535 F Supp 2d 542 (ED NC, 2008).

<sup>59</sup> *Oriental Art Printing Inc v Goldstar Printing Corp*, 175 F Supp 2d 542 (SDNY, 2001).

<sup>60</sup> *Bridgeman Art Library Ltd v Corel Corp*, 36 F Supp 2d 191 (SDNY, 1999).

<sup>61</sup> Vince Tabora, ‘Computational Photography Will Revolutionize Digital Imaging’, *Medium* (online, 16 October 2018) <<https://medium.com/hd-pro/computational-photography-will-revolutionize-digital-imaging-a25d34f37b11>>.

<sup>62</sup> Sam Byford, ‘How AI is Changing Photography’, *The Verge* (online, 31 January 2019) <<https://www.theverge.com/2019/1/31/18203363/ai-artificial-intelligence-photography-google-photos-apple-huawei>>.

advertisement for how software is now more important than camera hardware when it comes to mobile photography'.<sup>63</sup>

The technological evolution of photography has been so radical that some contend not even the faintest residue of originality can emerge from the weight of such photographic automation. For example, Hughes argues that

a large percentage of the world's photographs are likely not protected by American copyright law because the images lack even a modicum of creativity; this should also be true of any national copyright laws that apply an 'intellectual creation' standard. Indeed, as digitization makes photography more and more ubiquitous, we have probably already crossed a threshold beyond which most of the world's photographic images are not truly protected by copyright.<sup>64</sup>

Cronin likewise argues that

[t]oday practically anyone using a smartphone camera can easily capture images with clarity unattainable by even the most skilled professional photographer a century ago. Most of these photographs enjoy minimal, if any, copyright protection.<sup>65</sup>

McGowan begrudgingly acknowledges that '[a]t some point, we will have an iconic picture taken with a phone camera that gives its owner no choices to speak of at all; courts will still grant the owner rights.'<sup>66</sup> Recently, celebrity model Gigi Hadid claimed that no copyright subsists in a photograph of her, because it was simply a quick shot, in a public setting, with no attempt 'to convey ideas, emotions, or in any way influence pose, expression or clothing'.<sup>67</sup> Likewise, it has been argued that an opportunistic iPhone photograph of a celebrity by a passer-by lacks copyright protection because the photographer put no 'thought at all into the rendition of the photograph', the smartphone camera 'automatically made all sorts of decisions', and even the angle appeared incidental to the photographer needing to be surreptitious.<sup>68</sup>

This focuses our attention on what, if any, vestiges of photographic originality can be detected in the kind of highly automated point-and-shoot photography that generates most contemporary photographs. The only relevant pre-shoot choice in such photographs is the decision to be in the space in which the candid photograph was taken. This decision about location may be too remote from the actual taking of the photograph itself to be a qualifying creative choice. However,

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<sup>63</sup> Ibid.

<sup>64</sup> Justin Hughes, 'The Photographer's Copyright: Photograph as Art, Photograph as Database' (2012) 25(2) *Harvard Journal of Law & Technology* 339, 374.

<sup>65</sup> Charles Cronin, 'Symposium: Possession is 99% of the Law: 3D Printing, Public Domain Cultural Artefacts and Copyright' (2016) 17(2) *Minnesota Journal of Law, Science & Technology* 709, 719.

<sup>66</sup> David McGowan, 'Copyright and Convergence: A Pragmatic Perspective' in Robert F Brauneis (ed) *Intellectual Property Protection of Fact-Based Works: Copyright and Its Alternatives* (Edward Elgar Publishing, 2009) 233, 246.

<sup>67</sup> Mike Masnick, 'Crazy Copyright Suit over Gigi Hadid Posting a Photo of Herself to Instagram Shows Absurdity Inherent in Photo Copyrights', *Techdirt* (Blog Post, 28 June 2019) <<https://www.techdirt.com/articles/20190626/17233242482/crazy-copyright-suit-over-gigi-hadid-posting-photo-herself-to-instagram-shows-absurdity-inherent-photo-copyrights.shtml>> quoting memorandum of law in support of Hadid's motion to dismiss a copyright infringement claim regarding Hadid reposting a photo of herself taken by another.

<sup>68</sup> Matthew L Schafer, 'The Photograph That Broke the Internet Isn't Copyrightable' (2019) 34(2) *Communications Lawyer* 1, 25.

it is closely related to the angle decision that is made immediately before the photograph is taken, which itself is connected to judgments in relation to framing, both of which make order of the space in which the photographer stands. Finally, there is the quintessential decision made by all photographers, the time to press the shutter, discussed in more detail in Part IV below. These choices limited to framing and timing provide, overall, a thinner 'rendition' originality, reliant on fewer creative contributions than in the past.

What about post-production creative choices? These raise a question that has not received judicial attention — the question of *when* a photograph crystallises using contemporary technology. Analogue photography was far more processional — there was a separation between the moment of capture, the production of the negative and the printed copy derived from the negative, and there was corresponding debate about the moment the 'photograph' eventuated and how to distinguish it from the negative.<sup>69</sup> For this reason, there was greater scope to argue that post-shoot intellectual labour, for example in the darkroom, could legitimately be considered to shape the photograph before it came into being. Today, however, the digital camera collapses all of this process into one moment, and the photograph is created when recorded in the camera, where it is stored in material form.<sup>70</sup> The post-processing actions that are applied after that event, for example applying a post-shoot filter, cropping an image, or applying any number of apps in an iPhone camera, arguably come too late to qualify as intellectual labour directed to the production of the 'photograph', which has already happened. As argued above, post-shoot labour may be applied to create new expression from that photograph — for example, a filtered version of the photograph, a FaceApp mash up, or perhaps photographs taken by a drone that have been enhanced or modified; however as discussed above in Part I, these will not themselves be 'photographs', but at best would be drawings.

## IV Photographs and the Moment in Time – Temporal Selection and Originality

Berger has argued:

The true content of a photograph is invisible, for it derives from a play, not with form, but with time. ... a photograph bears witness to a human choice being exercised. This choice is not between photographing X and Y: but between photographing at X moment or at Y moment.<sup>71</sup>

Berger goes on to say:

A photograph is a result of the photographer's decision that it is worth recording that this particular event or this particular object has been seen. If

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<sup>69</sup> Kathy Bowrey, 'Copyright, Photography and Computer Works: The Fiction of an Original Expression' (1995) 18(2) *University of New South Wales (UNSW) Law Journal* 278, 282:

Except in the case of the polaroid, the negative must first be developed and then processed, before the 'expression' takes shape. Because of this, there is no 'original' moment expressed in material form, and it is impossible to distinguish an 'original' print from the other authorised copies.

<sup>70</sup> The definition in the *Copyright Act* (n 1) s 10(1) of 'material form' includes 'any form ... of storage'.

<sup>71</sup> John Berger, 'Understanding a Photograph', in Geoff Dyer (ed) *John Berger Selected Essays* (Vintage International, 2003) 215, 216.

everything that existed were continually being photographed, every photograph would become meaningless. The photograph celebrates neither the event itself nor the faculty of sight in itself. A photograph is already a message about the event it records. The urgency of this message is not entirely dependent on the urgency of the event, but neither can it be entirely independent from it. At its simplest, the message, decoded, means: *I have decided that seeing this is worth recording*.<sup>72</sup>

And that decision needs to be made quickly, given the nature of time. Of this ‘decisive moment’, Cartier-Bresson famously said ‘[t]o take photographs is to hold one’s breath when all faculties converge in the face of fleeing reality’.<sup>73</sup>

Timing is a recognised candidate for the rendition originality identified in *Mannion*, where the court stated that ‘a person may create a worthwhile photograph by being at the right place at the right time’.<sup>74</sup> Or, as Ansel Adams said, ‘sometimes I arrive just when God’s ready to have someone click the shutter’.<sup>75</sup> The *Mannion* court gave examples of photographs ‘strikingly original in timing’,<sup>76</sup> such as Thomas Mangelsen’s *Catch of the Day*, depicting a salmon that appears to be jumping into the gaping mouth of a brown bear, and Alfred Eisenstaedt’s photograph of a sailor kissing a young woman on VJ Day in Times Square, ‘the memorability of which is attributable in significant part to the timing of its creation’.<sup>77</sup> Likewise, in *Bauman v Fussell*, Romer LJ identified the skill involved in taking a photograph of two fighting cocks.<sup>78</sup> While the photographer had no control over the position of the birds, Romer LJ noted the skill required to register the significance of this and then to record the moment in a striking way.<sup>79</sup> Each of these examples involves photographers deliberately setting out to catch a moment. We intuitively want to reward the photographer for making the effort to find and capture the image, particularly if that comes after a gruelling five-hour hike, or after waiting in the freezing cold for the salmon to leap, or literally putting their lives in danger when chasing storms.<sup>80</sup> As one photographer defensively explained:

Many of the places that we photographers choose to stand, immediately prior to taking a photograph, are difficult to get to. Sometimes we’ll walk for an entire day just to get to one spot. We get on aeroplanes and fly to the other side of the planet to stand in a particular spot, just prior to taking a photograph.

<sup>72</sup> Ibid (emphasis in original).

<sup>73</sup> Henri Cartier-Bresson quoted in Suler and Zakia (n 40) 130. See Suler and Zakia (n 40) at 128 for the origin of Cartier-Bresson’s use of the term ‘decisive moment’.

<sup>74</sup> *Mannion* (n 53) 452 quoting Hugh Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Design* (Butterworths, 3<sup>rd</sup> ed, 2000) vol 1 229 § 4.57. See also *Mannion* at 453.

<sup>75</sup> Quoted in Jodi Robbins, ‘Behind the Lens with Harold Davis’, *Topazlabs* (Blog Post, 2 February 2017 <<http://blog.topazlabs.com/behind-the-lens-with-harold-davis/>>)

<sup>76</sup> *Mannion* (n 53) 453.

<sup>77</sup> Ibid.

<sup>78</sup> *Bauman v Fussell* [1978] RPC 485 (Court of Appeal of England and Wales) (decided in 1953, reported in 1978).

<sup>79</sup> Ibid 492–3.

<sup>80</sup> Which explains why such a photographer might take action against Netflix for reproducing part of their photograph of a storm in *Stranger Things*, a successful Netflix program: see Michael Zhang, ‘Photographer Sues Netflix for Using His Storm Photo for ‘Stranger Things’ *PetaPixel* (online, 18 September 2018 <<https://petapixel.com/2018/09/18/photographer-sues-netflix-for-using-his-storm-photo-for-stranger-things/>>).

We walk, run, swim, wade through rivers, get thigh deep in snow-drifts, climb rock faces, dive to the bottom of the ocean. We evade angry wildlife, dodge idiots in vehicles, risk illness, dismemberment and death. All so we can stand in a very particular spot.<sup>81</sup>

Photographs thus extract the static from the kinetic. Again, in Cartier-Bresson's words: '[o]f all the means of expression, photography is the only one that fixes forever the precise and transitory instant'.<sup>82</sup> The question in the context of copyright subsistence is whether this temporal selection is sufficient to demonstrate originality. Hughes queries whether this prize for serendipitous timing, this 'originality hunting', is really just hard work or good luck that strictly falls short of originality, but which we nevertheless choose to reward through copyright.<sup>83</sup> While perhaps a fragile source of originality, temporal selection probably meets the threshold because, in freezing moments of time that will never happen again, photographers alter reality and the photograph evidences the intervention of the author's mind.

However, while all photographs capture moments in time, not all involve timing originality, which requires the mind of an author to decide the moment. Thus, in the United States case *Pagano v Chas. Beseler Co*, the court recognised that '[i]t undoubtedly requires originality to determine just when to take the photograph',<sup>84</sup> but merely determining the moment was not sufficient; this had to be 'so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc'.<sup>85</sup> In this case, the photograph of the New York City library qualified. It was

admirable [because] [t]he photographer caught the men and women in not merely lifelike, but artistic, positions, and this is especially true of the traffic policeman. The background, taking in the building of the Engineers' Club and the small trees on Forty-First street, is most pleasing, and the lights and shades are exceedingly well done.<sup>86</sup>

Contemporary technology permitting continuous or burst shooting has the potential to disrupt this kind of temporal selection as the basis of originality. Some of these tools can capture 30 or more frames per second of high-resolution images over long periods of time, generating hundreds of thousands of images per hour.<sup>87</sup> Is the photographer really intellectually responsible for all of these shots? Is the photographer's intellectual effort overlaid across them all? And when does each separate new work emerge from the continuum of almost identical snaps?

<sup>81</sup> 'Why "Right Place, Right Time" Is an Insult to all Photographers', Andy Hutchinson Photography (Blog Post, 2021) <<https://andyhutchinson.com.au/why-right-place-right-time-is-an-insult-to-all-photographers/>>.

<sup>82</sup> Henri Cartier-Bresson, 'Preface' in *The Decisive Moment: Photography by Henri Cartier-Bresson* (Simon and Schuster, 1952).

<sup>83</sup> Hughes (n 64) 410–11.

<sup>84</sup> *Pagano v Chas. Beseler Co* 234 F 963, 964 (SDNY, 1916).

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> See, eg, Adam Griffith, 'Dude, Who Took My Photograph? Curating Automated Photography' *PetaPixel* (online, 1 May 2014) <<https://petapixel.com/2014/05/01/dude-took-photograph-curating-automated-photography/>>.

With this technology, the photographer acts like a curator, more responsible for discovering the gold in the mass of images, than perhaps authoring it. This sifting activity seems to problematise the decisive moment, the capture of which exemplifies the creative core of point-and-shoot photography. This certainly demonstrates the pressures on the doctrine of originality that technological developments can exert. The decisive moment was a more profound moment when each shot had to be laboriously — and expensively — processed through the technological progression of glass, paper, chemicals and film. Film was expensive, and timing needed to be impeccable in order to capture the moment. With the advent of digital photography and continuous shooting mode, the photographer can shoot away with minimal expense and effort, and with little judgment, and no concept of wastage. This is the difference between a single, carefully shot arrow and a scattergun of bullets, or a single harpoon compared to a fishing net. Analogies with the photographer as hunter are germane. Cartier-Bresson himself mentions in the preface to *The Decisive Moment*, ‘I prowled the streets ... ready to pounce, determined to ‘trap’ life’.<sup>88</sup>

Perhaps we can locate originality in today’s progressive photography in the photographer’s choice of the *range* of time and the action occurring within it, shifting from the decisive moment to the decisive period. They decide the broad frame of the photographed content, and decide when to commence the rapid-fire shooting and when to end it. We might argue that shooting in bursts with the intention of discovering or generating a final picture in the curatorial phase after shooting, the photographer is assembling the raw materials to realise a particular imagined moment to be unearthed later. This imagined moment of course assumes the preconception of something. It does not explain the accidental gems that can be captured in rapid-fire photography.<sup>89</sup> We may also question how different this process of rapid-fire photography is to conventional photography practice? Even Sarony’s 19<sup>th</sup> century session with Wilde produced 32 photographs.<sup>90</sup>

The resolution of this issue may also, as mentioned above in Parts II and III, depend on how we categorise the photographer’s product. The generation of thousands of images using hyper-fast continuous shooting mode is more akin to the production of a film than a series of thousands of independent photographs. In that case, the photographer-author simply becomes a filmmaker-producer, and is laying claim to the best still images extracted from that film.<sup>91</sup>

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<sup>88</sup> Cartier-Bresson (n 82) ‘Preface’.

<sup>89</sup> Such as the perfectly timed photos at Viktorija Gabulaitė, ‘144 Perfectly Timed Pics That Will Make You Look Twice’, *Bored Panda* (online, 2016) <<https://www.boredpanda.com/funny-perfectly-timed-photos-taken-right-moment/>>.

<sup>90</sup> ‘The Sarony Photographs of Oscar Wilde’, *Oscar Wilde in America* (Web Page, 2020) <<https://www.oscarwildeinamerica.org/sarony/sarony-photographs-of-oscar-wilde-1882.html>>.

<sup>91</sup> It has been argued that a single frame of a film is a photograph for copyright purposes: see K Lindgren and WA Rothnie (eds), LexisNexis, *Copyright & Designs* (online at 2 December 2020) ‘Photographs’ [6110] (‘*Copyright & Designs*’).

## V Photographs and Artificial Intelligence

The preceding Part discussed how technological developments can limit creative choices in contemporary photography to framing and timing, resulting in an arguably vestigial originality. What happens if we then cede these residual creative choices to software, for example, an unmanned drone taking a series of photos of a hotel resort,<sup>92</sup> or Google's Clips camera that 'uses artificial intelligence to automatically capture important moments in your life'?<sup>93</sup>

Do we lose these last remnants of photographic originality because it is no longer a human author timing the shot or framing those scenes, but the software employed by the putative author? Here, we can contrast the decisive moment with the *random* moment of the drone, or the *constant* moment of the clip camera. Recognising originality in these circumstances seems to come close to affording a kind of 'copyright in being there'. However, it has been argued that this movement towards the 'constant moment' does not destroy the decisive moment:

The Constant Moment doesn't end any of that. All it does is capture the billion missed Decisive Moments that previously slipped through our fingers, by expanding the available window of temporal curation from 'here and now' to 'anywhere and anytime'.<sup>94</sup>

A similar argument was made in relation to burst technology, discussed above in Part IV. Again, the 'photographer' becomes the curator, sifting through the copious output of these ravenous cameras. However, clip cameras are distinguishable from burst photographs. The former cede all decisions about timing to the software, and the argument that the clip operator has 'framed' the photograph in such a way that it reveals the operator's intellectual conception is extremely weak. The argument becomes baseless in the context of fully automated technology such as drones, surveillance cameras embedded in myriad buildings and devices, Google Maps Street View, satellites, or, as Patry has argued, photographs taken by medical technology where there is no discretion in the placement of the patient.<sup>95</sup> Human

<sup>92</sup> See, eg, 'DARPA's New 1.8-Gigapixel Camera is a Super High-Resolution Eye in the Sky', *New Atlas* (online, 11 February 2013) <<https://newatlas.com/argus-is-darpa-gigapixel-camers/26078/>> describing unmanned drones that have 'hundreds of smartphone image sensors to record a 1.8 gigapixel image'.

<sup>93</sup> Dan Seifert, 'Google Clips Review: A Smart Camera that Doesn't Make the Grade', *The Verge* (online, 27 February 2018) <<https://www.theverge.com/2018/2/27/17055618/google-clips-smart-camera-review>>. Similar technology is Narrative Clip, which 'automatically documents the user's life by taking a photo every 30 seconds': David Becker, 'Lifelogging Camera Maker Memoto Has a New Name, \$3M in Capital and a Ship Date', *PetaPixel* (online, 4 October 2013) <<https://petapixel.com/2013/10/04/lifelogging-camera-maker-memoto-new-name-3m-capital-ship-date/>>. There is also the now discontinued Autographer, which used 'algorithms and five built-in sensors to make decisions on when to snap ... up to 2,000 high-resolution photos of the course of a single day, giving you a visual record of your life experiences': Michael Zhang, 'Autographer is a New Wearable Camera that Automatically Documents Your Life', *PetaPixel* (online, 24 September 2012) <<https://petapixel.com/2012/09/24/autographer-is-a-new-wearable-camera-that-automatically-documents-your-life/>>.

<sup>94</sup> Clayton Cubitt, 'The Decisive Moment is Dead. Long Live the Constant Moment', *PetaPixel* (online, 22 May 2013) <<https://petapixel.com/2013/05/22/on-the-constant-moment/>>.

<sup>95</sup> William Patry, *Patry on Copyright* (Thomson/West, March 2021 update) § 3:118 'Photographs'.



authorship must surely be even more remote in the case of emergent technology involving cameras using AI programs to learn and adapt to user behaviours and patterns.<sup>96</sup>

The editors of Halsbury's *The Laws of Australia* have stated:

There has been some speculation regarding photographs that are 'computer-generated', ie their taking is predetermined by a computer or similar process, such as aerial survey photographs or photographs taken by a satellite, that they may not have an author at all. However, that is to overlook the person who set up the process to take the photographs — of what and when — who surely exercises the required level of authorial contribution. Compare the provisions relating to 'computer-generated works' in the *Copyright, Designs and Patents Act 1988* (UK).<sup>97</sup>

This, of course, overlooks the fact that Australia has no equivalent to s 9(3) of the *Copyright, Designs and Patents Act 1988* (UK),<sup>98</sup> to which Halsbury's refers. Such automated photographs are, as computer-generated works, likely to lack an author, at least under Australian law.<sup>99</sup> Applying *Telstra Corporation Ltd v Phone Directories Co Pty Ltd*<sup>100</sup> to photographs, they will likely lack authorship if 'much of the contribution'<sup>101</sup> to the form of the photograph is due to the software, or if the photograph is 'essentially computer-generated',<sup>102</sup> 'almost entirely automated',<sup>103</sup> or 'overwhelmingly the work'<sup>104</sup> of the software. On a qualitative assessment, the relevant questions are whether the photographer was 'controlling the nature of the material form produced by',<sup>105</sup> the software, and whether the software was the 'transformative' step, 'obviously fundamental',<sup>106</sup> of 'central importance',<sup>107</sup> or of 'such overwhelming significance',<sup>108</sup> to the form. In the absence of an equivalent to s 9(3) of the *Copyright, Designs and Patents Act 1988* (UK),<sup>109</sup> successfully claiming authorship of highly automated photographs seems unlikely. The question of whether Australia should adopt a similar provision to protect authorless works — not only photographs — has been considered and recommended.<sup>110</sup> If such an amendment were adopted, it would clearly go some way to conferring copyright on

<sup>96</sup> Byford (n 62).

<sup>97</sup> Westlaw AU, *The Laws of Australia* (online at 16 December 2020) 23 Intellectual Property, 23.1 'Copyright' [23.1.6390 n 2] ('*The Laws of Australia*').

<sup>98</sup> The *Copyright, Designs and Patents Act 1988* (UK) (n 12) s 9(3) provides that the author of a computer-generated literary, dramatic, musical or artistic work, 'shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken'.

<sup>99</sup> See generally, Jani McCutcheon, 'The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law' (2012) 36(3) *Melbourne University Law Review* 915.

<sup>100</sup> *Telstra v Phone Directories* (n 9).

<sup>101</sup> Ibid 181 [130] (Yates J) (emphasis added).

<sup>102</sup> Ibid 191 [169] (Yates J) (emphasis added).

<sup>103</sup> Ibid 177 [114] (Perram J) (emphasis added).

<sup>104</sup> Ibid 171 [89] (Keane CJ) (emphasis added).

<sup>105</sup> Ibid 178 [118] (Perram J).

<sup>106</sup> Ibid 190 [167] (Yates J).

<sup>107</sup> Ibid 170 [88] (Keane CJ).

<sup>108</sup> Ibid 191 [169] (Yates J).

<sup>109</sup> See above n 98.

<sup>110</sup> Jani McCutcheon, 'Curing the Authorless Void: Protecting Computer-Generated Works following *IceTV* and *Phone Directories*' (2013) 37(1) *Melbourne University Law Review* 46.

AI-produced photographs. However, *Telstra v Phone Directories* clearly illuminated the lack of copyright protection for AI-produced works more than 10 years ago, and there seems little government appetite to remedy that outcome through statutory copyright law reform.

## VI Statutory Definition of ‘Author’

The *Copyright Act* defines the ‘author’ of the photograph as ‘the person who took it’.<sup>111</sup> This raises at least two important questions. First, does the statutory definition of author deem originality to subsist in the photograph? If so, the preceding discussion on originality becomes irrelevant. Second, what concept of ‘taking’ a photograph is reflected in the definition and how does it align with the concepts of photographic originality discussed above?

### A Deemed Originality?

Due to the correlative relationship between originality and authorship, does this statutory definition effectively make originality in photographs moot, leaving open the argument ‘that the mere taking of the photograph satisfies the correlative requirements of authorship and originality’?<sup>112</sup> This suggests that by assigning authorship, the statutory definition correspondingly allocates — or deems — originality. However, while originality and authorship are correlative, they are distinguishable and separate. Identifying an author does not necessarily identify an original work, and artistic works must be original.<sup>113</sup> There is a split between the author as material fixer<sup>114</sup> and the author as intellectual labourer, but these two features are required for both originality and authorship. The statutory definition of author may only therefore be an expedient contrivance for identifying the author as fixer, reflecting case law recognising the author as the person reducing the idea to material form.<sup>115</sup> If the statutory definition makes further consideration of originality unnecessary, this narrow interpretation would logically render photocopies original copyright works,<sup>116</sup> given that the definition of ‘photograph’ includes products of

<sup>111</sup> *Copyright Act* (n 1) s 10(1) (definition of ‘author’).

<sup>112</sup> *Law of Intellectual Property* (n 15) (Last updated: 4 August 2016) Part II – Copyright and Neighbouring Rights, ‘Originality in relation to Photographs’ [7.385]. This is more robustly asserted at Westlaw AU, *The Laws of Australia* (n 97) 23 Intellectual Property, 23.1 ‘Copyright’ [23.1.610]: ‘While a photograph (see [23.1.600]) must be original to qualify for protection, it appears that this is satisfied by the taking of the photograph itself’. Similarly, it has been asserted that, based on the definition of ‘author’, ‘it seems that a photograph is original by the mere fact that it has been taken’: CCH Intelliconnect, *Australian Intellectual Property Commentary* (Last updated: 13 September 2017) Copyright, ‘Photographs’ [1-760].

<sup>113</sup> *Copyright Act* (n 1) s 32.

<sup>114</sup> For the significance of fixation to authorship and copyright subsistence, see Elizabeth Adeney, ‘Authorship and Fixation in Copyright Law: A Comparative Comment’ (2011) 35(2) *Melbourne University Law Review* 677.

<sup>115</sup> See, eg, *IceTV* (n 9) 496 [105] where Gummow, Hayne and Heydon JJ insist that copyright subsists ‘by reason of the relevant fixation of the original work of the author in a material form’.

<sup>116</sup> As argued in *Law of Intellectual Property* (n 15) (Last updated: 4 August 2016) Part II – Copyright and Neighbouring Rights, ‘Originality in relation to Photographs’ [7.385].

xerography.<sup>117</sup> The background to the definition is also relevant. Under the *Copyright Act 1912* (Cth), the person who owned the original negative from which the photograph was made was deemed to be the author.<sup>118</sup> Ownership of the copyright in a photograph was accorded to any person that ordered the ‘original’, rather than the ‘author’.<sup>119</sup> The *Copyright Act* provides that for photographs taken before the commencement of the Act, the author of a photograph is ‘the person who, at the time when the photograph was taken, was the owner of the material on which the photograph was taken’.<sup>120</sup> The current definition of ‘author’ was presumably designed to avoid that outcome. It also cures the incongruence of the possibility that an author may be a corporate owner of the material, particularly when authors of photographs also enjoy moral rights.<sup>121</sup>

## B ‘Taking a Photograph’

The default position under the *Copyright Act* is that the author of a work is the owner of copyright in that work.<sup>122</sup> Thus, identifying the author under the Act’s definition of ‘author’ is important. This depends on what it means to ‘take’ a photograph.<sup>123</sup> If we limit this to the physical action of pressing the button, then the pool of potential authors will be correspondingly diminished. It also likely excludes authors using ‘photographic’ processes that do not involve cameras or other conventional apparatus that we associate with the concept of ‘taking’ a photograph.<sup>124</sup> Under a formula that focuses on the button pusher, copyright in perhaps the most famous photograph in American copyright law, Sarony’s photograph of Wilde, may not have gone to the renowned Sarony, but to his cameraman Benjamin Richardson, who actually operated the camera.<sup>125</sup> The objective of defining a photographic author seems to be to allocate authorship to ease identification of the first owner of the copyright.<sup>126</sup> On a narrow construction of the ‘taker’ as button pusher, the provision provides certainty, clarifying and simplifying ownership by eliminating the potential for claims of singular or joint authorship by multiple parties who might be involved in setting up, designing and curating photographs, including claims that could be made by photography’s subjects.<sup>127</sup> However, it is unclear why Parliament did not

<sup>117</sup> See above n 12 and accompanying text.

<sup>118</sup> *Copyright Act 1911*, 1 & 2 Geo 5, s 21 as set out in *Copyright Act 1912* (Cth) sch.

<sup>119</sup> *Copyright Act 1911*, 1 & 2 Geo 5, s 5(1)(a) as set out in *Copyright Act 1912* (Cth) sch.

<sup>120</sup> *Copyright Act* (n 1) s 208(1).

<sup>121</sup> See *Berne Convention* (n 12) art 6bis, which requires moral rights to be conferred on ‘authors’ of works of this kind.

<sup>122</sup> *Copyright Act* (n 1) s 35(2).

<sup>123</sup> See n 112 and accompanying text.

<sup>124</sup> See above n 12 and accompanying text.

<sup>125</sup> Eva E Subotnik, ‘The Author Was Not an Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia’ (2015) 39(3) *Columbia Journal of Law & the Arts* 449, 450; Christine Haight Farley, ‘The Lingering Effects of Copyright’s Response to the Invention of Photography’ (2004) 65(3) *University of Pittsburgh Law Review* 385, 434.

<sup>126</sup> See Kevin Garnett and Alistair Abbott, ‘Who is the “Author” of a Photograph?’ (1998) 20(6) *European Intellectual Property Review* 204, 205.

<sup>127</sup> See generally Subotnik (n 125). See also Haight Farley (n 125) 433:

who is more responsible for evoking the expression in the face of the great Sarah Bernhardt, Sarony or Bernhardt? And while the pose of a theatrical star may have been in sharp contrast to

simply leave this potential puzzle to be resolved by the statutory definition of a ‘work of joint authorship’,<sup>128</sup> as is done for all other copyright works with more than one putative author.

The statutory definition of ‘author’ certainly reflects a common understanding of photographic authorship. In *Creation Records Ltd v News Group Newspapers Ltd*, for example, Lloyd J stated:

It seems to me that ordinarily the creator of a photograph is the person who takes it. There may be cases where one person sets up the scene to be photographed (the position and angle of the camera and all the necessary settings) and directs a second person to press the shutter release button at a moment chosen by the first, in which case it would be the first, not the second, who creates the photograph.<sup>129</sup>

Likewise, Haight Farley has argued:

With the benefit of a hundred and fifty years of experience with photography, this choice seems obvious. The person operating the camera always exercises choice in producing a photograph. There are creative choices in the precise timing to click the shutter, the angle of the shot, the frame, the focus, the distance from the subject, the centering of the subject, etc.<sup>130</sup>

However, she also recognises that other minds involved in the photographic process may also merit authorial status, continuing with the qualification that: ‘[o]f course it is possible that a director could dictate many if not most of these choices to the cameraman and therefore be deemed the author even though he did not operate the camera’.<sup>131</sup>

If the definition privileges the button pusher, this clearly belies an assumption that the creative ‘moment’ of clicking the shutter captures the intellectual gold. Bowrey says of the definition, ‘[t]his suggests a reversion to the position under the 1862 Act, with copyright again arising from the “original” moment of pushing the button’.<sup>132</sup> She goes on to say that ‘[t]o award copyright to the “taker” of the photograph was to recognise that the skill involves both an aesthetic and a mechanical understanding and that it makes no sense to judge one as more important than the other.’<sup>133</sup>

In England, the Whitford Committee recommended that the definition of an author should be redefined as the ‘person responsible for the composition of the

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the conventional portrait pose, the result may be more attributable to the celebrity’s experience playing a particular role, than to Sarony.

One of the earliest United Kingdom cases on photographic authorship, *Nottage v Jackson*, also acknowledged that often many humans were involved in the production of a photograph: (1883) 11 QB 627, 632.

<sup>128</sup> Under the *Copyright Act* (n 1) s 10(1), ‘work of joint authorship means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors’.

<sup>129</sup> *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1, 5.

<sup>130</sup> Haight Farley (n 125) 434.

<sup>131</sup> *Ibid.*

<sup>132</sup> Bowrey (n 69) 286.

<sup>133</sup> *Ibid.* 287.

photograph'.<sup>134</sup> This is clearly a much broader concept of photographic author and could capture multiple contributions. The 1981 Green Paper accepted the Whitford Committee recommendation.<sup>135</sup> However, the 1986 White Paper expressed concern that this definition could permit photographic subjects to claim a contribution to the composition of a photograph.<sup>136</sup> It preferred a simpler definition of the 'photographer' as author. Ultimately, the *Copyright, Designs and Patents Act 1988* (UK) makes no distinction with respect to photographic authorship, meaning that the author of a photograph is, like all other works, the person who 'creates' it.<sup>137</sup> Nevertheless, the parliamentary debates shed some light on the concept of authorship of a photograph. During the passage of the Copyright, Designs and Patents Bill 1988 (UK) through Parliament, it was recognised that the concept of authorship was certainly broader than simply identifying the camera operator:

In certain cases someone other than the person who operates the camera will make a substantial creative contribution to the final image — perhaps in the darkroom, perhaps in composing the picture through the viewfinder without actually pressing the button — and it would not be right to deny him a copyright in it on the grounds that he was not the actual photographer.<sup>138</sup>

How relevant is Australia's current statutory definition today? How comfortably does it reflect case law on originality and authorship? It may not be much of an issue, because in most cases, the person pushing the button is also likely to be the person making the creative choices that instil the photograph with originality. For example, Lindgren and Rothnie simply note the definition and then go on to discuss originality.<sup>139</sup> On the other hand, an interpretation limited to the button pusher as 'taker' may privilege the fixer while denying any rights to the person whose creative choices truly shaped the expression, or made a substantial contribution to it.

Thus we can, and should, adopt a broader view of who 'takes' a photograph, so that the definition can accommodate the creative choices made by persons who do not physically manipulate the camera and thus more faithfully reflect case law on originality and authorship. This approach does not contort the ordinary meaning of 'taking' a photograph. It recognises that 'taking' a photo is a *process* — and is not necessarily an isolated and momentary act of pressing a shutter button. The button pusher may act effectively as the agent of the intellectual labourer, or act as a co-author with one or more other authors. An early example is *Melville v Mirror of Life Co*,<sup>140</sup> where despite one person operating the camera, arranging the subject, and

<sup>134</sup> Whitford Committee on Copyright and Designs Law, *Report of the Committee to Consider the Law on Copyright and Designs* (Cmnd 6732, 1977) cited in Garnett and Abbott (n 126) 205.

<sup>135</sup> Department of Trade and Industry (UK), *Reform of the Law relating to Copyright, Designs and Performers' Protection: A Consultative Document* (Cmnd 8302, 1981) cited in Garnett and Abbott (n 126) 205.

<sup>136</sup> Department of Trade and Industry (UK), *Intellectual Property and Innovation* (Cmnd 9712, 1986) cited in Garnett and Abbott (n 126) 205.

<sup>137</sup> *Copyright, Designs and Patents Act 1988* (UK) (n 12) s 9(1).

<sup>138</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 30 November 1987, vol 490, col 883 (Lord Beaverbrook).

<sup>139</sup> *Copyright & Designs* (n 91) 'Definition of Photograph' [10,140].

<sup>140</sup> *Melville v Mirror of Life Co* [1895] 2 Ch 531.

framing the shot, the author was considered to be the person who was on site and appeared to be in effective control of the shoot.<sup>141</sup> This broader concept of ‘taking’ a photograph could also facilitate copyright subsistence in photographs taken in a photo booth, even though a ‘person’ may not physically operate the camera, as required by the definition.<sup>142</sup> Importantly, a liberal interpretation of ‘take’ is consistent with the persuasive case law on photographic originality discussed above in Part III. As already mentioned, this case law recognises that the mechanical act of taking a picture itself is not the only act that imbues the photograph with originality; pre- and post-click intellectual labour is also relevant. Indeed, the act of clicking is only relevant — to originality — to the extent that it captures a moment in time selected by the photographer. Construing the statutory definition to refer only to the mechanical operator of the machine is thus a dangerously simplistic view of photographic authorship. A more liberal notion of the concept of ‘taking’ a photograph is therefore both coherent and desirable.

Australia currently lacks judicial guidance on the meaning of ‘taking’ a photograph. It may be that future cases clarify the meaning of the definition and appropriately recognise the diverse potential candidates that may be recognised as photographic authors. Alternatively, further analysis and consultation with stakeholders could be undertaken to examine whether the definition of ‘author’ should be amended to better reflect the variety of photographic author candidates and avoid a potentially narrow construction. Alternatively, the effect of deleting the definition entirely could be considered. While removing the definition may seem a radical proposal, there are genuine questions as to whether it is efficacious or necessary, and these deserve examination. It is tempting to say that the definition achieves certainty in allocating authorship and, thus, ownership. However, the preceding discussion indicates that it still leaves a number of unanswered questions about who really ‘takes’ a photograph. Without the definition, the *Copyright Act* can allocate authorship through standard copyright principles of authorship and recognise that photographic originality and authorship are not homogenous, and certainly are not necessarily resolved by identifying the person who pushed the button. Further research and analysis could interrogate whether there is anything particularly unique about photography to justify it exceptionally meriting the sole statutory definition of author, particularly an arguably ambiguous one. Its lonely inclusion as the sole definition of authorship in the *Copyright Act* invites the question of why the Act lacks similar definitions for other works, clarifying that the author of a sculpture is the person who sculpted it and the author of a painting is the person who painted it. It would also be useful to consider why Australia is an apparent outlier in defining the photographic author, rather than adapting the position in other common law countries like the United Kingdom, New Zealand and Canada of treating photographic authorship consistently with the (undefined) authorship of other works.

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<sup>141</sup> Bowrey (n 69) 284.

<sup>142</sup> The author of a photograph is the ‘person who took it’: see n 112 and accompanying text. This seemed to be the view of the Federal Court in *Francis v Allen & Unwin* (2014) 108 IPR 18, where the identity of the subject of a photograph was contested, but the parties and the Court seemed to accept that if the plaintiff was indeed the subject of the photograph ‘she is the artist who owns the copyright’ (at 24 [26]) even though it was taken in a photo booth (at 19 [2]).

## VII Conclusions

The radical technological evolution of photography has raised serious questions about how effectively it now comports with concepts of the photograph, authorship, and originality in copyright law. These questions are profoundly resonant in an age of exceptional photographic ubiquity, with estimates that more than 1.4 trillion photographs will be taken in 2021.<sup>143</sup> We are all photographers now, and rampantly sharing photographs that we take effortlessly on devices that are becoming so sophisticated and automated that their AI may ultimately eclipse any vestige of natural human intelligence, the cornerstone of authorship. This article has demonstrated that, in many cases, there is a considerable misalignment between the *Copyright Act*'s statutory definition of 'photograph' and what is taking place in the creative world, and the definition of the 'author' of a photograph may be ambiguous and fail to reflect the true scope of photographic authorship. The highly automated nature of modern photography also challenges photographic originality, particularly photographs largely produced through AI. These factors may result in at least an uncertain copyright status, or a lack or slippage of copyright protection. Such uncertainty may or may not be normatively justified, depending on what we consider to be the right copyright policy goals. These goals may be difficult to formulate, given the very diverse major stakeholders and the wide range of photographic and quasi-photographic material produced today. Whether these issues demand address, and how to resolve them, merits further analysis. This could interrogate in greater detail and scope whether and how the current ambiguity or gaps in protection are sufficiently problematic in practical or normative terms. It could consider whether, in any event, the definition of 'photograph' and/or 'author' should be amended or deleted, or the definition of 'artistic work' should be inclusively defined to better reflect contemporary photographic creativity. It could also consider whether AI-generated photographs should be left in the public domain or protected under a provision deeming authorship to computer-generated works, similar to s 9(3) of the *Copyright, Designs and Patents Act 1988* (UK). Alternatively, it may be sensible to simply await some judicial clarification on the issues, and meanwhile do nothing, knowing that the existing status quo, while perhaps uncertain, has not apparently slowed the rate of photographic production, nor led to a glut of contentious litigation. This article has, it is hoped, at least demonstrated how the impact of technology has raised a number of genuinely difficult and important questions surrounding the place of modern photography in copyright law.

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<sup>143</sup> David Carrington, 'How Many Photos Will Be Taken in 2021?', *mylio.com* (online, 11 March 2021) <<https://focus.mylio.com/tech-today/how-many-photos-will-be-taken-in-2021>> .





# *Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales*

Liz Campbell\*

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## *Abstract*

Deferred prosecution agreements ('DPAs') are likely to be introduced in Australia to enable the settlement of criminal proceedings between the Commonwealth Director of Public Prosecutions and corporations. The hope is that DPAs will mitigate the risks and costs of criminal investigation and adjudication, and prove more effective in responding to corporate wrongdoing. This article analyses the DPA scheme in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, looking at its core purposes, animating principles, and placement in the wider legal scheme of corporate accountability. It reflects on the development and embedding of DPAs in the law of England and Wales, which exposes matters that need to be clarified and resolved if DPAs are adopted in Australia. It parses DPAs along three lines: cooperation, compliance, and compensation. These three factors make DPAs more likely to be offered and approved, as well as representing outcomes that DPAs seek to encourage. This article updates and extends existing critiques in Australia and beyond to provide new and concrete proposals for further reform of the proposed DPA scheme.

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## I Introduction

Addressing corporate wrongdoing through criminal investigation and adjudication in the form of contested prosecution can be risky, costly, protracted, and ineffective, and therefore is an infrequently used tool of last resort for State agencies. Thus, the Australian Parliament proposes to augment the suite of mechanisms available to the Commonwealth Director of Public Prosecutions ('CDPP') by legislation to introduce deferred prosecution agreements ('DPAs').<sup>1</sup> DPAs enable the settling of criminal proceedings, through the agreeing of facts and the construction of terms combined with the imposition of certain conditions on the corporation.

This article centres on the core purpose of DPAs, their animating principles, and their placement in the wider legal and regulatory scheme of corporate accountability in Australia. It draws on comparative insights from England and Wales, due to the legislative similarities and policy transfer evident here. The proposed Australian DPA scheme has been nascent for a number of years, and this reasonably slow trajectory is to our analytical advantage insofar as there is more comparative jurisprudence and experience on which to draw. The article surveys the nine approved English and Welsh DPAs to ascertain matters that need to be resolved if (or perhaps when) DPAs are introduced in Australia. The article examines these DPAs along three principled lines — co-operation, compliance, and compensation — that make DPAs more likely to be offered and approved, and are what DPAs seek to encourage. This article updates and extends existing critiques in Australia and beyond,<sup>2</sup> to provide novel and concrete proposals for further reform of the proposed DPA scheme, as well as analysis relevant to its implementation.

After presenting a brief overview of the proposed DPA framework in Australia, as well as the English and Welsh counterpart, the article assesses the purpose behind their introduction and use in both jurisdictions. It then assesses the core principles of cooperation, compliance, and compensation, considering how these manifest in the approval and content of DPAs in England and Wales. In doing so, the article integrates a review of DPAs in the wider landscape of corporate accountability.

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<sup>1</sup> Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 (Cth) sch 2 ('CLACCC Bill 2019').

<sup>2</sup> See Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements' in Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt and Sarah Murray (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 211; Liz Campbell, 'Trying Corporations: Why Not Prosecute?' (2019) 31(2) *Current Issues in Criminal Justice* 269; Colin King and Nicholas Lord, 'Deferred Prosecution Agreements in England and Wales: Castles Made of Sand?' [2020] (April) *Public Law* 307; Mark Lewis, 'Deterring Corporate Crime through the Use of Deferred Prosecution Agreements: An Analysis of the Proposed Australian Deferred Prosecution Agreement Regime' (2018) 42(2) *Criminal Law Journal* 76.

## II Overview

DPA's are a form of negotiated settlement or 'non-trial resolution',<sup>3</sup> permitting prosecutors to enter into agreements with corporations to defer or suspend criminal proceedings, despite evidence and admissions of corporate wrongdoing. Originating in the United States ('US'), DPAs in various guises have been developed globally,<sup>4</sup> and have been mooted in Australia for the past few years.<sup>5</sup> Progress has been somewhat stilted. The Attorney-General's Department published a Consultation Paper on *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* in 2017.<sup>6</sup> This led to the publication of the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 (Cth) ('CLACCC Bill 2017') and a draft Code of Practice.<sup>7</sup> The CLACCC Bill 2017 was introduced and first read on 6 December 2017, but lapsed at the end of Parliament in July 2019. On 2 December 2019, the Australian Government tabled the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 (Cth) ('CLACCC Bill 2019') in the Senate. In respect of DPAs, the CLACCC Bill 2019 does not differ greatly from the 2017 iteration. At the same time, the Australian Law Reform Commission ('ALRC') was conducting its inquiry into Australia's corporate criminal responsibility regime. The Discussion Paper included a chapter on DPAs, coming to a somewhat equivocal conclusion on their merits.<sup>8</sup> In its Final Report, the ALRC's focus in respect of DPAs was on recommendations for enhanced judicial oversight.<sup>9</sup> Furthermore, the Senate Legal and Constitutional Affairs Legislation Committee supports the introduction of DPAs.<sup>10</sup> At the time of publication, the 2019 Bill remains before the Australian Senate.

The CLACCC Bill 2019 sch 2 pt 1 inserts provisions into the *Director of Public Prosecutions Act 1983* (Cth) to permit the CDPP to enter into a DPA with a person other than an individual for certain financial and property offences, such as market misconduct and prohibited conduct relating to financial products/services under the *Corporations Act 2001* (Cth), offences under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), the *Autonomous Sanctions Act*

<sup>3</sup> Organisation for Economic Co-operation and Development ('OECD'), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019) 11.

<sup>4</sup> See Corruption Watch, *Out of Court, Out of Mind – Do Deferred Prosecution Agreements and Corporate Settlements Deter Overseas Corruption?; Resolving Foreign Bribery Cases* (2016).

<sup>5</sup> Campbell (n 2).

<sup>6</sup> Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (Public Consultation Paper, March 2017) <<https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx>> ('2017 Consultation Paper').

<sup>7</sup> Attorney-General's Department (Cth), 'Deferred Prosecution Agreement Code of Practice' (Consultation Draft, May 2018) <<https://www.ag.gov.au/sites/default/files/2020-03/Deferred-prosecution-agreement-scheme-draft-code-of-practice.pdf>> ('Draft DPA Scheme Code of Practice').

<sup>8</sup> Australian Law Reform Commission ('ALRC'), *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) ch 9 ('ALRC Corporate Criminal Responsibility Discussion Paper').

<sup>9</sup> Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020) 495–503 [11.10]–[11.36] ('ALRC Corporate Criminal Responsibility Report').

<sup>10</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019* (Committee Report, 17 March 2020) 24–5 [2.65]–[2.71].

2011 (Cth) and various property offences under the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*') such as theft, proceeds of crime offences, and bribery of a foreign official.<sup>11</sup> A DPA means that criminal proceedings must not be instituted as long as the corporation meets certain specified conditions set out in the DPA,<sup>12</sup> such as paying a penalty or compensation; cooperating with prosecutions of relevant individuals; reviewing and improving compliance programmes; and appointing a monitor.<sup>13</sup> A DPA will include an agreed statement of facts; conditions to be fulfilled; any financial penalty; and the circumstances that would constitute a material contravention of the agreement.<sup>14</sup> An 'approving officer' (a former judicial officer of a federal/State/Territory court) must review the agreement, and must approve it if satisfied that its terms are 'in the interests of justice', and are 'fair, reasonable and proportionate'.<sup>15</sup> There is no requirement for the authorising officer to give reasons.<sup>16</sup> The ALRC recommends that this power of approval instead be conferred on a judge of the Federal Court of Australia,<sup>17</sup> citing concerns that the conferral of judicial power on an approving officer is unconstitutional and that there is no right for de novo review of any of their decisions.<sup>18</sup>

Both the US and the English and Welsh DPA schemes were cited in the Attorney-General's Department 2017 *Consultation Paper*,<sup>19</sup> though the latter model is the more apposite comparator and prototype, due to the equivalent statutory framework, as well as the constitutional and cultural context.<sup>20</sup> In ascribing corporate criminal liability, England and Wales and Australia rely on the identification doctrine, whereby persons who control or manage the affairs of a company are deemed to embody the company itself.<sup>21</sup> Furthermore, the US may be distinguished due to the distinctive and expansive doctrine of *respondeat superior*, according to which the corporation is liable for acts of its employees and agents.<sup>22</sup> For that reason, the English and Welsh law and experience are drawn on here to flesh out the principles behind DPAs in theory and practice.

In England and Wales, a DPA is an agreement between a designated prosecutor (the Serious Fraud Office ('SFO') or the Crown Prosecution Service) and a corporate entity (not an individual) that could be prosecuted for an economic crime to suspend the indictment if the Crown Court approves the agreement.<sup>23</sup> The list of offences eligible for DPAs includes the common law offences of conspiracy to defraud, and cheating the public revenue, as well as offences under the *Theft Act*

<sup>11</sup> CLACCC Bill 2019 (n 1) sch 2 pt 1 s 7 (inserting 17B (Offences to which a DPA may relate) into the *Director of Public Prosecutions Act 1983* (Cth)). The Australian Government has considered the inclusion of other types of crime 'such as environmental crime, tax offences, cartel offences, and offences under workplace health and safety legislation': 2017 *Consultation Paper* (n 6) 6.

<sup>12</sup> CLACCC Bill 2019 (n 1) s 17A(2).

<sup>13</sup> *Ibid* s 17C(2).

<sup>14</sup> *Ibid* s 17C(1).

<sup>15</sup> *Ibid* s 17D.

<sup>16</sup> ALRC *Corporate Criminal Responsibility Report* (n 9) 501 [11.16].

<sup>17</sup> *Ibid* 502 [11.35] and recommendation 20.

<sup>18</sup> *Ibid* 502 [11.33].

<sup>19</sup> 2017 *Consultation Paper* (n 6) 6, 11, 14–15.

<sup>20</sup> Campbell (n 2) 274.

<sup>21</sup> *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

<sup>22</sup> *New York Central & Hudson River Railroad Co v United States*, 212 US 481 (1909).

<sup>23</sup> *Crime and Courts Act 2013* (UK) sch 17 pt 1 s 1(1).

1968 (UK), *Proceeds of Crime Act 2002* (UK), *Companies Act 2006* (UK), *Fraud Act 2006* (UK) and *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (UK).<sup>24</sup> The Crown Court must be convinced that the DPA is ‘in the interests of justice’ and that its terms are ‘fair, reasonable and proportionate’.<sup>25</sup> The DPA must contain a statement of facts relating to the alleged offence, which may include admissions by the corporate entity, and may impose a variety of requirements, such as payment of a financial penalty, compensation of victims, charitable or other donations, disgorgement of profits, implementing or altering a compliance programme, and cooperation in any investigation related to the alleged offence.<sup>26</sup>

Section 17H of the CLACCC Bill 2019 limits the use of information gathered in the process of negotiation of DPAs against that corporation. Documents (other than the agreement itself) indicating that the person entered into DPA negotiations, or which were created solely for the purpose of negotiating a DPA, are not admissible in civil or criminal proceedings against it. Such documents include records that the person entered into negotiations for the DPA, any record of such negotiations, and any draft of the DPA, including any draft statement of facts. Section 17H does not affect the admissibility in evidence of any information or document obtained as an indirect consequence of a disclosure of, or any information contained in, any document.<sup>27</sup> This provision does not apply if there has been a proven breach or provision of misleading information, or if the person gives evidence in another proceeding that is inconsistent with these documents. Also, it is important to ascertain the meaning of ‘person’ in this instance, as it does not include other human individuals, or other corporations. This is noteworthy, as in two agreed DPAs in England and Wales (*Serco* and *G4S C&J*), the corporation engaging in misconduct was a wholly owned subsidiary of a larger parent company, and the DPAs included undertakings by the parent companies. Such an approach does not treat the subsidiary as a separate legal entity,<sup>28</sup> as would be the case in Australia, but may in fact be more cognisant of ‘the commercial reality that every holding company has the potential and, more often than not, in fact, does, exercise complete control over a subsidiary’.<sup>29</sup>

Documents created solely for the purpose of negotiating a DPA are not admissible in proceedings against the person in the agreement. Such a sole purpose test had been deployed in the common law regarding legal professional privilege until *Esso Australia Resources Ltd v Commissioner of Taxation*, where the High Court disputed the appearance of the test as a ‘bright-line test, easily understood and capable of ready application’.<sup>30</sup> Gleeson CJ, Gaudron and Gummow JJ observed that rigid application of this test would mean that ‘one other purpose in addition to the legal purpose, regardless of how relatively unimportant it may be, and even though,

<sup>24</sup> Ibid sch 17 pt 2 ss 15–17, 20, 23–25, 27.

<sup>25</sup> Ibid sch 17 pt 2 ss 7(1), 8(1).

<sup>26</sup> Ibid sch 17 pt 1 ss 5(1)–(3).

<sup>27</sup> CLACCC Bill 2019 (n 1) s 17H(4).

<sup>28</sup> *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567.

<sup>29</sup> *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577.

<sup>30</sup> *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49, 72 [58] (Gleeson CJ, Gaudron and Gummow JJ) (*‘Esso’*).

without the legal purpose, the document would never have come into existence, will defeat the privilege'.<sup>31</sup> This suggests that a comparable alternative purpose would render the materials related to DPA negotiations admissible in Australia. Similarly, in England and Wales material created solely for the purpose of preparing the DPA or statement of facts on a prosecution for an offence consisting of the provision of inaccurate information is not admissible.<sup>32</sup> Material that shows a person entered into negotiations for a DPA is not admissible.<sup>33</sup> This includes any draft of the DPA or draft of a statement of facts intended to be included within the DPA, any statement indicating that they entered into such negotiations.<sup>34</sup> Apart from this,

there is no limitation on the use to which other information obtained by a prosecutor during the DPA negotiation period may subsequently be put during criminal proceedings brought against [them], or against anyone else (so far as the rules of evidence permit).<sup>35</sup>

So, where information is obtained by the prosecutor during the DPA negotiation period, but where a DPA has not been concluded and the prosecutor chooses to pursue criminal proceedings against them, such information may be used.<sup>36</sup> Such proceedings are yet to occur in England and Wales. Moreover, unless criminal proceedings are pursued, or the DPA has been approved, the process and content of discussions will not be disclosed to the public.

### III Purpose

The introduction of DPAs is designed to enhance the range of measures available to the State in responding to corporate wrongdoing. It is also designed to move away from the orthodox binary choice in the criminal context between prosecution or no proceedings at all to something more nuanced and potentially more interventionist. DPAs are seen to enhance the prospect of at least some degree of corporate accountability, and may be more appealing to corporations and prosecutors alike in terms of predictability, cost, timing and outcome. Moreover, the terms of DPAs may increase the likelihood of effecting behavioural and cultural change within corporations,<sup>37</sup> though the US experience undermines claims about this potential impact.<sup>38</sup>

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<sup>31</sup> Ibid 72 [58].

<sup>32</sup> *Crime and Courts Act 2013* (UK) (n 23) sch 17 pt 13(4) and (6).

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (February 2014) 9 [4.5] <[https://www.cps.gov.uk/sites/default/files/documents/publications/dpa\\_cop.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf)> ('UK DPA Code of Practice').

<sup>36</sup> Ibid 9 [4.4].

<sup>37</sup> See *2017 Consultation Paper* (n 6) 11; Jennifer Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8(1) *Journal of Legal Analysis* 191, 200–3.

<sup>38</sup> HSBC is a prime example of this, with multiple DPAs in the US, as well as settlements in Switzerland: Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014) 102. There is a growing list of repeat corporate offenders who have resolved more than one enforcement action under the *Foreign Corrupt Practices Act of 1977*, Pub L No 95-213, 91 Stat 1494: <<https://fcprofessor.com/corporate-fcpa-repeat-offenders-4/>>. Moreover, Parker and Nielsen found that in Australia 'some elements of compliance systems can translate into good management of compliance[,] [b]ut management commitment to compliance values, managerial

In Australia, DPAs would be located within the existing suite of regulatory mechanisms and potential public enforcement actions ranging from enforceable undertakings through to contested prosecution. The Attorney-General's Department has noted that:

To ensure effective and efficient responses to serious corporate crime, investigators and prosecutors need a range of tools. ... Negotiated settlements are used in some contexts for the regulation of companies, including [the Australian Securities and Investments Commission ('ASIC')] ASIC's use of enforceable undertakings. These are used as a supplementary tool in matters in which criminal proceedings are undertaken. Faced with an increasingly complex and serious threat environment, there may be scope to increase the options available to respond quickly and effectively to offending by companies, by allowing for negotiated settlements through a DPA scheme.<sup>39</sup>

Though ASIC's use of enforceable undertakings has been criticised, this is not necessarily fatal to DPAs.<sup>40</sup> In the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Commissioner Hayne found that enforceable undertakings had been negotiated and agreed to by ASIC on terms that the entity admitted no more than that ASIC had reasonably based 'concerns' about its conduct.<sup>41</sup> This would be guarded against in respect of DPAs by requiring detailed admissions by corporations.

In Australia, the timelines for investigation and prosecution of suspected corporate crime are remarkably protracted, and contested trials are not common. In terms of duration, some cases about overseas bribery, such as those involving Securrency International Pty Ltd, a Reserve Bank of Australia subsidiary, took more than a decade,<sup>42</sup> with similar timeframes in respect of actions for financial misconduct.<sup>43</sup> While DPA investigations and processes are not necessarily much swifter,<sup>44</sup> the hope is to place some responsibility on the corporation with regard to

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oversight and planning, and organizational resources are just as important': see Christine Parker and Vibeke Lehmann Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41(1) *Administration & Society* 3, 3.

<sup>39</sup> Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia* (Public Consultation Paper, March 2016) <<https://documents.pub/reader/full/deferred-prosecution-agreements-discussion-paper>> 6–7.

<sup>40</sup> See Campbell (n 2) 272.

<sup>41</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 2018) vol 1, xix [2.2].

<sup>42</sup> Commonwealth Director of Public Prosecutions, 'Case Report: Securrency and Note Printing Australia Foreign Bribery Prosecutions Finalised' (Web Page, 2018) <<https://www.cdpp.gov.au/case-reports/securrency-and-note-printing-australia-foreign-bribery-prosecutions-finalised>>.

<sup>43</sup> For example, a financial advice company, Storm Financial, collapsed in 2009 after giving inappropriate advice to many investors. ASIC commenced civil penalty proceedings against the company's directors in 2010. The Federal Court found in favour of ASIC in *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 and the Full Federal Court dismissed an appeal in *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533. See also *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293, cited in *ALRC Corporate Criminal Responsibility Report* (n 9) 112 [3.103].

<sup>44</sup> In terms of English DPAs:

- Standard Bank self-reported its concerns to the United Kingdom ('UK') Serious Fraud Office ('SFO') and instructed an internal investigation with disclosure of those findings to the SFO in April 2013, with the DPA approved in 2015 (see *Standard Bank* (n 187));

internal investigation and information provision, to mitigate issues of resource and risk. As for frequency, the ALRC found that prosecutions against corporations in Australia are ‘relatively rare’, and ‘often not pursued due to practical difficulties and perceived low prospects of success’; usually they are ‘long, complex, and contested by well-resourced defendants’; and when pursued are deployed as a ‘broader strategy to pursue the responsible individuals ... and/or because a greater penalty is seen to be warranted’ than would be available under other mechanisms.<sup>45</sup> In the 2018–19 financial year, less than 1% of defendants in cases finalised in Australian criminal courts were organisations.<sup>46</sup> Moreover, ‘[c]harges against organisations are frequently withdrawn by the prosecution’, at around three times the rate for individuals.<sup>47</sup> ‘Between 30 June 2009 and 30 June 2019, the CDPP commenced a total of 13 prosecutions against corporations for offences under the *Criminal Code*’, seven of which ‘resulted in convictions, each after a plea of guilty’.<sup>48</sup> Just one matter went to trial in that decade.<sup>49</sup> ‘Between 30 June 2009 and 30 June 2019, the CDPP commenced a total of 567 prosecutions against corporations under statutes other than the *Criminal Code*’, of which 423 resulted in a plea or guilty verdict.<sup>50</sup> Between 30 June 2015 and 30 June 2019, ‘ASIC referred between 35 and 50 briefs of evidence to the CDPP annually’.<sup>51</sup> In this five-year period, 194 matters prosecuted by the CDPP on referral from ASIC were finalised.<sup>52</sup> A significant proportion of these were for offences under the *Corporations Act 2001* (Cth), so it is conceivable that some such referrals might lead to the opening of DPA negotiations.

It is intended that the introduction of DPAs will encourage corporate self-reporting, which could increase these numbers, although not all such reports will lead to prosecution, or to the negotiation of a DPA.<sup>53</sup> Serious corporate crime cases

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- Sarclad’s in-house counsel disclosed findings of its internal investigations to the SFO in January 2013, with the DPA approved in July 2016 (see *Sarclad* (n 111));
  - Rolls-Royce’s investigation was announced December 2013 by SFO press release, with the DPA approved January 2017 (see *Rolls-Royce* (n 86));
  - Tesco’s investigation was announced in October 2014, with the DPA approved in April 2017 (see *Tesco* (n 102));
  - the Serco investigation was opened by SFO in October 2013 with the DPA approved in July 2019 (see *Serco* (n 157));
  - the SFO investigation of Güralp Systems Ltd (‘GSL’) began in December 2015, with the DPA approved in October 2019 (see *GSL* (n 84));
  - the Airbus SE investigation opened in 2016 with the DPA approved in January 2020 (see *Airbus* (n 79)), and
  - the SFO opened its investigation into G4S C&J in 2013, with the DPA approved in July 2020 (see *G4S C&J* (n 61)).

<sup>45</sup> ALRC *Corporate Criminal Responsibility Discussion Paper* (n 8) 75 [3.56].

<sup>46</sup> ALRC *Corporate Criminal Responsibility Report* (n 9) 97 [3.73].

<sup>47</sup> *Ibid* 114 [3.106].

<sup>48</sup> ALRC *Corporate Criminal Responsibility Discussion Paper* (n 8) 75 [3.57].

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* 78 [3.61].

<sup>51</sup> *Ibid* 80 [3.67].

<sup>52</sup> *Ibid* 81 [3.68].

<sup>53</sup> Explanatory Memorandum, Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 (Cth) [10], [192]. In the UK, numerous self-reported matters are not prosecuted, such as in respect of ABB Ltd, a Swiss robotics/automation technology company. The SFO was investigating the activities of ABB Ltd’s UK subsidiaries, their officers, employees and agents for suspected bribery and corruption. The investigation was announced on February 2017 following a self-report



may be dropped due to lack of evidence, the public interest, or national security concerns.<sup>54</sup> All of this, however, underlines how rare contested corporate prosecutions are, and how matters might be improved by adding to the CDPP's tools. Moreover, in a hard-headed sense, one could see DPAs as enabling similar outcomes to conviction and guilty pleas. While there may be none of the quintessential 'calling to account' as occurs in the course of a criminal trial and sentencing,<sup>55</sup> the corporation still needs to narrate its wrongdoings in an agreed statement of fact, it must address its wrongdoing in terms of compliance, and it is likely to pay a penalty, akin to post-conviction punishment. In contrast to prosecutions, which might culminate in acquittal, DPAs avoid this inherent risk by settling matters.

Furthermore, DPA negotiations between enforcement authorities and corporations enable what has been conceptualised as the 'bundling' of allegations as well as enforcement actions.<sup>56</sup> 'Allegation bundling' is where 'the terms of settlements often include a basket of allegations widely spread across time and geography'.<sup>57</sup> 'Enforcement bundling' involves 'a set of distinct enforcement authorities with overlapping jurisdiction'.<sup>58</sup> Bundling can mitigate issues regarding lack of evidence or weaknesses in cases. It enables 'comprehensive resolutions with organisations that engaged in major corruption schemes',<sup>59</sup> providing efficiencies on both sides: enforcement agencies can collaborate as well as merge charges of differing strengths, while companies may avoid the light being shone on all wrongdoing.

It is instructive to use this concept of bundling to interpret the DPA with G4S C&J.<sup>60</sup> Although G4S C&J engaged in inaccurate reporting of cost efficiencies across a six-year period, its criminal liability related to a period of approximately 12

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by representatives acting on behalf of ABB. It was related to an ongoing investigation into Unaoil (announced 19 July 2016). The SFO concluded in 2020 that the case did not meet the relevant test for prosecution as defined in the Code for Crown Prosecutors: Serious Fraud Office, 'SFO Closes Its Investigation into ABB Ltd', *Case Updates* (Web Page, 19 May 2020) <<https://www.sfo.gov.uk/2020/05/19/sfo-closes-its-investigation-into-abb-ltd/>>. Another example is ALCA Fasteners Ltd, which the SFO began investigating in December 2017 for suspected bribery and money laundering, prompted by a self-referral. The company owner pleaded guilty to bribery in 2019. The SFO stated subsequently that ACLA and its new directors cooperated fully with the investigation, and that no further action would be taken: Serious Fraud Office, 'ALCA Fasteners Ltd', *Case Information* (Web Page, 12 February 2021) <<https://www.sfo.gov.uk/cases/alca-fasteners-ltd/>>.

<sup>54</sup> For an assessment of the lawfulness of the SFO Director's decision to halt a criminal investigation into allegations of corruption against BAE Systems plc on national security public interest grounds following a threat from Saudi representatives, see *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 6; Andrew Roberts, 'Prosecution: Director of SFO — Lawfulness of Decision to Discontinue Prosecution' (2009) 1 *Criminal Law Review* 46; Michael Zander QC, 'When Caving in is Lawful' (2008) 158(7334) *New Law Journal*.

<sup>55</sup> Anthony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: Judgment and Calling to Account* (Hart Publishing, 2006); King and Lord (n 2).

<sup>56</sup> Branislav Hock, 'Policing Corporate Bribery: Negotiated Settlements and Bundling' (2020) *Policing and Society* 1 <<https://doi.org/10.1080/10439463.2020.1808650>>.

<sup>57</sup> *Ibid* 1.

<sup>58</sup> *Ibid* 1–2.

<sup>59</sup> *Ibid* 2.

<sup>60</sup> *Serious Fraud Office v G4S Care and Justice Services (UK) Ltd* (Deferred Prosecution Agreement, 17 July 2020) <<https://www.judiciary.uk/judgments/sfo-v-g4s/>> ('G4S C&J DPA').

months between 2011 and 2012.<sup>61</sup> Though such a choice regarding the charge might occur in relation to conventional prosecutions, the process of negotiation and interaction in DPAs renders this more likely. This is quintessential allegation bundling or, more sceptically, a downplaying of the gravity and extent of the harms.<sup>62</sup> Also notable is the conclusion of the Court that the conduct of G4S C&J appeared to be motivated by ‘a desire to conceal unanticipated cost efficiencies’, rather than overtly attempting to defraud the Ministry of Justice from the outset.<sup>63</sup> This is a remarkably benign view, given the nature and duration of the misreporting, and the favourable implications of so doing for the corporation.

As detailed below, DPAs can permit more intervention and ongoing oversight than would usually occur post-conviction, and so may be more cognisant of the complexity and reality of wrongdoing as well as reform efforts. While there is no evidence that DPAs, whether domestic or multi-jurisdictional, prevent future misconduct or crime,<sup>64</sup> they could be an improvement on no or failed prosecutions. A further aim of DPAs is to alter behaviour without destruction of the company, though the extent to which this ‘corporate death penalty’ is likely after conviction has been debunked in the US.<sup>65</sup> Practically speaking, the introduction of DPAs would align Australia with other jurisdictions.<sup>66</sup> This is preferable for large corporations with global footprints, who benefit from DPAs and may prefer consistency between jurisdictions. In addition, regulatory and law enforcement agencies benefit from the uniformity as well as the ability to negotiate terms in conjunction with overseas agencies in respect of corporations. There is, of course, a recurring and fair criticism that DPAs are offered to, and favour, bigger and more powerful companies,<sup>67</sup> while smaller companies are more likely to be prosecuted and so will not benefit from such efficiency gains.

## IV Principles

DPAs have been described as representing a new form of justice, a hybrid model of legal responsibility whereby civil penalties and settlements, rather than criminal

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<sup>61</sup> *Serious Fraud Office v G4S Care and Justice Services (UK) Ltd* (Southwark Crown Court, Davis J, 17 July 2020) [25] (‘G4S C&J’).

<sup>62</sup> Steve Tombs and David Whyte, ‘The Shifting Imaginaries of Corporate Crime’ (2020) 1(1) *Journal of White Collar and Corporate Crime* 16.

<sup>63</sup> *G4S C&J* (n 61) [20].

<sup>64</sup> Campbell (n 2) 282.

<sup>65</sup> The much-cited example is the collapse of accounting firm Arthur Andersen LLP in the US: Jonathan D Glater, ‘Last Task at Andersen: Turning Out the Lights’, *New York Times* (online, 30 August 2002) <<https://www.nytimes.com/2002/08/30/business/last-task-at-andersen-turning-out-the-lights.html>>; Susan E Squires, Cynthia J Smith, Lorna McDougall and William R Yeack, *Inside Arthur Andersen: Shifting Values, Unexpected Consequences* (Cisco Press, 2003). Markoff’s research found that no publicly traded company failed because of a conviction between 2001 and 2010: Gabriel Markoff, ‘Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century’ (2013) 15(3) *University of Pennsylvania Journal of Business Law* 797, 797–8.

<sup>66</sup> OECD (n 3).

<sup>67</sup> See Brandon L Garrett, ‘Declining Corporate Prosecutions’ (2020) 57(1) *American Criminal Law Review* 109, 137.

processes, are the dominant regulatory norm.<sup>68</sup> This novel mode of justice prioritises negotiation and pragmatism in respect of corporations, against whom conventional criminal proceedings are often unfeasible or unsuccessful.<sup>69</sup>

The *Draft DPA Scheme Code of Practice* does not outline governing principles explicitly, though these, as well as DPAs' purposes, may be gleaned throughout:

The aim of an Australian DPA scheme is to enhance the ability of investigators and prosecutors to identify and address serious corporate crime by encouraging corporations to self-report misconduct and cooperate with law enforcement. In appropriate cases, DPAs would provide a more effective and efficient way of holding offending corporations to account without the cost and uncertainty of a criminal trial.<sup>70</sup>

The lack of a principled basis and clear purpose for the negotiation and approval of DPAs in England and Wales has been criticised, leading to what is described as 'haphazard' practice.<sup>71</sup> Indeed, there are issues regarding the lack of a principled grounding in legislation, as well as how DPAs have been operationalised. That said, it appears more that practice is organic, evolving and rather too generous to corporations, than haphazard per se, since there is an inherent logic to it.

Despite the absence of articulated principles in the relevant legislation, this article suggests that DPAs seek to enable, and are predicated on, a number of core principles that include cooperation, compliance, and compensation. As indicated above in Part II, this is exemplified by ss 17A(2) and 17C(2) of the CLACCC Bill 2019, which provide that a DPA means that criminal proceedings must not be instituted, as long as the corporation complies with certain conditions, such as paying a penalty or compensation; cooperating with prosecutions of individuals; reviewing and improving compliance programmes. The core principles are relevant both in approving DPAs, as well as in the terms that are required to be agreed and adhered to.

Unlike in the context of sentencing,<sup>72</sup> there is no overt statutory basis for these underlying principles, though there are public interest factors that guide negotiations for a DPA and any subsequent approval of its terms.<sup>73</sup> As noted previously, under the proposed Australian DPA scheme the CDPP will enter into DPA negotiations only if they are in the public interest.<sup>74</sup> The approving officer must approve the agreement if satisfied that its terms are in the interests of justice, and are fair, reasonable and proportionate.<sup>75</sup> The corporation's level of cooperation with law enforcement constitutes a 'particularly influential public interest factor'.<sup>76</sup> Other public interest factors include:

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<sup>68</sup> Bronitt (n 2) 211, 225.

<sup>69</sup> Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave, 2017).

<sup>70</sup> *Draft DPA Scheme Code of Practice* (n 7) 1 (explanatory note).

<sup>71</sup> King and Lord (n 2) 308.

<sup>72</sup> See *Crimes Act 1914* (Cth) s 16A.

<sup>73</sup> See Campbell (n 2) 275–6.

<sup>74</sup> *Draft DPA Scheme Code of Practice* (n 7) 4 [2.4].

<sup>75</sup> *Ibid* 15 [4.8].

<sup>76</sup> *Ibid* 20 [7.3].

- whether, when, and the extent to which the corporation self-reported;
- whether there is a history or culture of similar conduct or other legal breaches;
- whether the corporation has taken steps to avoid a recurrence;
- whether significant harm was caused to the integrity or confidence of markets or governments;
- whether the corporation withheld material required for the effective investigation and prosecution of individuals;
- the timing of the offending and whether the corporation in its current form essentially is a different entity from the offending one;
- whether the collateral consequences of any court-imposed penalty would be disproportionate; and
- whether conviction is likely to have significant and disproportionate effects on the public, employees, shareholders or members of a superannuation scheme.<sup>77</sup>

Returning to extant English and Welsh case law, as summarised in Table 1 at the end of this article, we will see that these principles of cooperation, compliance, and compensation are emerging as retrospective justification in an iterative fashion, rather than forming the basis for the initiation and approval of DPAs, strictly speaking. Their interpretation by both prosecutors and the courts has been liberal in assessment of corporate acts and timeframes, indicating that they are *post hoc* rationalisations rather than pre-animating motivations. In essence, the emerging body of DPAs in England and Wales is helping to clarify and crystallise the core principles, which is helpful for the ongoing legislative process in Australia.

## A Cooperation

Under Australia's proposed DPA scheme, corporate cooperation (such as self-reporting of wrongdoing, disclosure of information, waiver of legal privilege, and making individuals available for interview) increases the likelihood of a DPA being offered, negotiated, and approved; cooperation is also required in the finalised DPA terms.<sup>78</sup> It can also lead to a discount of the total pecuniary penalty imposed.<sup>79</sup> As noted above, the corporation's level of cooperation with law enforcement is a 'particularly influential public interest factor' in determining the appropriateness of

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<sup>77</sup> Ibid 19–20 [7.1].

<sup>78</sup> CLACCC Bill 2019 (n 1) s 17C(2)(a)(v).

<sup>79</sup> *Director of the Serious Fraud Office v Airbus SE* (Southwark Crown Court, Sharp P, 31 January 2020) [112] ('Airbus').

deferring prosecution.<sup>80</sup> Another public interest factor is whether, when, and the extent to which the corporation self-reported.<sup>81</sup>

Corporate cooperation is also among the public interest factors that favour deferred prosecution in England and Wales.<sup>82</sup> Cooperation usually refers to ‘past and future’ cooperation in the DPA process.<sup>83</sup> Once the DPA is finalised, cooperation becomes a continuing obligation.<sup>84</sup> Hence, in evaluating the public interest factors, courts will consider not only the terms required in the DPA for future cooperation, but also the corporation’s past cooperation with the SFO. For example, in relation to both the Airbus and Rolls-Royce DPAs, the Court described their past cooperation as ‘exemplary’<sup>85</sup> and ‘extraordinary’,<sup>86</sup> rather generously it must be said. What is relevant is the level and quality of the past cooperation, which includes any self-reporting by the corporation.<sup>87</sup> Airbus cooperated ‘to the fullest extent possible’ after a ‘slow start’;<sup>88</sup> though initially it was sluggish in coming forward, rigorous investigations followed, with continued steps taken to prevent wrongdoing, as well as an internal review.<sup>89</sup> Notably, acceptance of the extraterritorial powers of the SFO under the *Bribery Act 2010* (UK) and thus its jurisdiction was included as evidence of Airbus’s cooperation. Airbus is registered in the Netherlands, but it is considered a ‘relevant commercial organisation’ under s 7 of the *Bribery Act 2010* (UK) because part of its business is carried out in the United Kingdom (‘UK’).<sup>90</sup> Dame Victoria Sharp noted that accepting the SFO’s jurisdiction ‘was an unprecedented step for a Dutch and French domiciled company to take, in respect of the reporting of conduct which had taken place almost exclusively overseas’.<sup>91</sup> Indeed, one could speculate that Airbus’s main reason for accepting jurisdiction might have been to increase its chances of getting a DPA.

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<sup>80</sup> *Draft DPA Scheme Code of Practice* (n 7) 20 [7.3]. See also above nn 73–7 and accompanying text.

<sup>81</sup> *Ibid* 21 [7.5]. Self-reporting is a central dimension of routine corporate compliance and disclosure. The reporting of suspected misconduct may generate criminal investigations or charges, but is often met with leniency.

<sup>82</sup> *UK DPA Code of Practice* (n 35) 5 [2.8.2]; *Airbus* (n 79) [61].

<sup>83</sup> *Serious Fraud Office v Standard Bank Plc* (Deferred Prosecution Agreement, 30 November 2015) [6(i)] <<https://www.sfo.gov.uk/cases/standard-bank-plc/>> (‘*Standard Bank DPA*’); *Director of the Serious Fraud Office v Airbus SE* (Deferred Prosecution Agreement, 31 January 2020) [5(b)] <<https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/>> (‘*Airbus DPA*’).

<sup>84</sup> See, eg, *Airbus* (n 79) [114]. See also *Serious Fraud Office v Güralp Systems Ltd* [2020] Lloyd’s Rep FC 90, [31] (Davis J) (‘*GSL*’).

<sup>85</sup> *Airbus* (n 79) [73], [87], [112].

<sup>86</sup> *Serious Fraud Office v Rolls-Royce Plc* [2017] Lloyd’s Rep FC 249, [121] (‘*Rolls-Royce*’).

<sup>87</sup> *Airbus* (n 79) [68].

<sup>88</sup> *Ibid* [69].

<sup>89</sup> *Ibid* [70]–[73].

<sup>90</sup> *Ibid* [21].

<sup>91</sup> *Ibid* [72].

## 1 Self-Reporting

While DPAs seek to incentivise self-reporting,<sup>92</sup> such reporting is not a prerequisite for a corporation to be regarded as cooperative,<sup>93</sup> as was made clear in *Rolls-Royce* and *Airbus*. In *Rolls-Royce*, the SFO's investigation was triggered initially by a whistleblower's online posts, whereas the catalyst for reporting in *Airbus* was an audit by a government body: UK Export Finance. *Airbus* suggests that while self-reporting is a crucial factor, what matters more is the thoroughness of the reporting, not necessarily the order of or motivation for reporting.

It would be wrong to look at the issue of self-reporting purely from the perspective of the first report of wrongdoing, however. Even if the prosecuting authorities became aware of the relevant conduct by the actions of a third party, if subsequent self-reporting or co-operation overall, is of a high quality and brings significant wrongdoing to light that would not otherwise have come to the attention of the authorities, this will be a significant factor in favour of a DPA: see *Rolls Royce* para 22 of the final judgment and *Sarclad* at paras 37 to 38 of the preliminary judgment. To that extent, there is no necessary bright line between self-reporting and co-operation.<sup>94</sup>

It is of note that an Airbus subsidiary, GPT Special Project Management Ltd ('GPT'), was investigated separately by the SFO, outside the DPA settlement. Thus, this subsidiary is not caught by the cooperation requirements of the agreed DPA. The SFO announced the GPT investigation in August 2012. On 30 July 2020 it brought charges against GPT and three individuals in connection with the conduct of GPT's business in the Kingdom of Saudi Arabia.<sup>95</sup> GPT is alleged to have paid at least £14 million in bribes to secure a £2 billion military contract with the Saudi Arabian Government.<sup>96</sup> It does not appear that this was regarded as relevant to the DPA with Airbus.

## 2 Timing and Level of Cooperation

The *G4S C&J DPA* reinforced the centrality, yet flexibility, of the concept of cooperation. In 2013, the UK Ministry of Justice notified the SFO of its concerns that G4S C&J had raised invoices for the electronic monitoring of offenders when no monitoring was taking place, and then raised a further concern that G4S C&J had

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<sup>92</sup> Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) [10], [192].

<sup>93</sup> *Draft DPA Scheme Code of Practice* (n 7) 21 [7.5]. The SFO's guidance on corporate self-reporting was revised in October 2012: 'Corporate Self-Reporting', *Serious Fraud Office* (Web Page, October 2012) <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/>>.

<sup>94</sup> *Ibid* [68].

<sup>95</sup> Serious Fraud Office, 'GPT Special Project Management Ltd', *Case Information* (Web Page, 30 July 2020) <<https://www.sfo.gov.uk/cases/gpt-special-project-management-ltd/>>; Serious Fraud Office, 'SFO Charges GPT and Three Individuals following Corruption Investigation' (News Release, 30 July 2020) <<https://www.sfo.gov.uk/cases/gpt-special-project-management-ltd/>>.

<sup>96</sup> GPT had just one contract with the UK Ministry of Defence. The company reported that its contract with the Ministry was due to end and that it had no intention to renew or seek other business: see 'GPT Special Project Management Ltd: Annual Report and Financial Statements', *Compliance Week* (online, 31 December 2018).

not complied with its financial reporting obligations.<sup>97</sup> Early in 2014, G4S C&J self-reported to the SFO that it had discovered material indicating that it had failed to provide accurate financial reports to the Ministry of Justice.<sup>98</sup> Though G4S C&J cooperated from the outset, the level of cooperation increased significantly in October 2019, by providing access to all interviews conducted by its solicitors and accountants, responding voluntarily to SFO investigative requests and providing digital and hardcopy material to the SFO or notifying the SFO of when and how data had been destroyed.<sup>99</sup>

The Court noted that G4S C&J's 'less than full cooperation with the SFO investigation until a relatively late stage point[ed] to the public interest being properly served by prosecution of G4S C&J'.<sup>100</sup> Having said that, the Court then was prepared to look at the 'overall level of co-operation' and concluded that the 'initial reluctance to cooperate fully can be dealt with when considering the discount on any financial penalty'.<sup>101</sup> This is another variation from the initial interpretation of cooperation.

### 3 Cooperation regarding Individuals

DPAs co-exist alongside conventional actions against individuals, and indeed are hoped to improve the likelihood of successful prosecutions, given that the corporation itself 'will ordinarily be the main repository of material relevant to the prosecution of individuals'.<sup>102</sup> Cooperation regarding individuals is a public interest factor against corporate prosecution in the Code of Practice issued under the *Crime and Courts Act 2013* (UK),<sup>103</sup> so it is incentivised, though not a mandatory condition of/for DPA negotiations. Similarly the 2018 Australian Draft Code provides that 'a corporation participating in DPA negotiations will typically be expected to cooperate in any investigation and prosecution against culpable individuals'.<sup>104</sup> Sensibly, calls have been made for this to be mandatory.<sup>105</sup> Moreover, one of public interest factors in the Draft Code is 'whether a corporation has withheld material that is required for the effective investigation and ... prosecution of individuals involved in the offending conduct'.<sup>106</sup> Again, such withholding should weigh heavily against deferring prosecution, if not preclude it altogether.

The optimum balance between pursuit of corporate and human actors is not settled. Garrett's research in the US indicates that DPAs and non-prosecution

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<sup>97</sup> *G4S C&J* (n 61) [4].

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* [23].

<sup>100</sup> *Ibid* [26].

<sup>101</sup> *Ibid* [27].

<sup>102</sup> *Serious Fraud Office v Tesco Stores Ltd* [2019] Lloyd's Rep FC 283, [73] (Leveson P) ('*Tesco*').

<sup>103</sup> *UK DPA Code of Practice* (n 35) 5 [2.8.2].

<sup>104</sup> *Draft DPA Scheme Code of Practice* (n 7) 2 [1.5].

<sup>105</sup> Brent Fisse, Submission to Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (1 May 2017) 4 <<https://www.brentfisse.com/images/FisseSubmissiononDPA1May2017.pdf>>; Campbell (n 2) 284.

<sup>106</sup> *Draft DPA Scheme Code of Practice* (n 7) 19 [7.1].

agreements are not accompanied by prosecutions of individuals typically,<sup>107</sup> and that when employees *have* been charged, ‘most were not higher-up officers of the companies, but rather middle managers of one kind or another and also some quite low-level individuals’.<sup>108</sup> It is instructive to look to England and Wales to ascertain whether this trend is replicated there, and if so, how best to address this. As Table 1 shows, of the nine DPAs secured by the SFO to date, individuals alleged to be involved in the corporate wrongdoing have been prosecuted in four instances (Sarclad, Tesco, GSL, and Serco). In every case, the individuals implicated were acquitted.<sup>109</sup>

The Managing Director of Sarclad (Michael Sorby), Head of Sales (Adrian Leek) and Project Manager (David Justice) were charged with conspiring with agents to agree to bribes regarding 27 overseas contracts.<sup>110</sup> All had left the company by the time the DPA was approved.<sup>111</sup> All were acquitted on 16 July 2019. There is little other information available in relation to the prosecutions, though the jury at Southwark Crown Court obviously was not convinced by the SFO case. In relation to Tesco, Carl Rogberg (Financial Director); John Scouler (Commercial Director of Food); and Christopher Bush (Managing Director) were charged on 9 September 2016 with false accounting under s 17 of the *Theft Act 1968* (UK) and fraud under s 4(1) of the *Fraud Act 2006* (UK).<sup>112</sup> On 26 November 2018, Sir John Royce held at first instance that there was no case to answer in relation to Bush and Scouler, and Rogberg’s trial was severed due to his ill-health.<sup>113</sup> On 5 December 2018, the Court of Appeal upheld the trial decision, noting that while the jury had heard from 30 witnesses with over 3,000 pages of evidence, there was no independent accountancy expert evidence that the accused had contributed to the illegitimate accounting and underlying fraud.<sup>114</sup> This meant that the prosecution could not differentiate between differing streams of improperly recognised income, nor could it prove the extent of any alleged fraud or the underlying breaches of accountancy practice.<sup>115</sup> Moreover, the SFO had failed to provide sufficient evidence such that

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<sup>107</sup> Garrett (n 67).

<sup>108</sup> Brandon L Garrett, ‘The Corporate Criminal as Scapegoat’ (2015) 101(7) *Virginia Law Review* 1789, 1802.

<sup>109</sup> The trial of *R v Woods and Marshall* (Serco’s Finance Director and Operations Director of Field Services) commenced on 31 March 2021 before Southwark Crown Court, but the case was withdrawn in late April 2021 by the Serious Fraud Office: Serious Fraud Office, ‘Serco’, *Case Information* (Web Page, 2021) <<https://www.sfo.gov.uk/cases/serco/>>.

<sup>110</sup> Serious Fraud Office, ‘Three Individuals Acquitted as SFO Confirms DPA with Sarclad’ (News Release, 16 July 2019) <<https://www.sfo.gov.uk/2019/07/16/three-individuals-acquitted-as-sfo-confirms-dpa-with-sarclad/>>.

<sup>111</sup> *Serious Fraud Office v Sarclad Ltd* [2016] Lloyd’s Rep FC 509, [6] (Leveson P) (‘*Sarclad*’).

<sup>112</sup> Jane Croft and Jonathan Eley, ‘Tesco Fraud Trial Collapse Puts Deferred Prosecution Deals in the Dock: Store Chain Criticised for “Throwing Executives under the Bus” Over Accounting Scandal’, *Financial Times* (online, 24 January 2019) <<https://www.ft.com/content/b6c2b688-1f29-11e9-b126-46fc3ad87c65>>; Serious Fraud Office, ‘Tesco PLC’, *Case Information* (Web Page, 23 September 2020) <<https://www.sfo.gov.uk/cases/tesco-plc/>>.

<sup>113</sup> *R v Bush* [2019] EWCA 29 (Crim) [3]–[4] (‘*Bush*’); ‘I Should Never Have Been Charged — Former Tesco Director’, *BBC News* (online, 23 January 2019) <<https://www.bbc.com/news/business-46970604>>; ‘Former Tesco Director Carl Rogberg Cleared of Fraud over 2014 Scandal’, *Reuters* (online, 23 January 2019) <<https://www.reuters.com/article/britain-tesco-fraud/-former-tesco-director-carl-rogberg-cleared-of-fraud-over-2014-scandal-idUSL8N1ZM5K7>>.

<sup>114</sup> *Bush* (n 113) [4], [26], [59], [61], [125].

<sup>115</sup> *Ibid* [125].



any reasonable jury properly directed could be sure that Bush knew that income had been improperly recognised. This meant there was no case to answer on either count.<sup>116</sup> So the heart of the matter was the insufficiency of evidence. Furthermore, all three applied unsuccessfully to Leveson P to have their details redacted from the *Tesco* DPA judgment, due to their acquittals.<sup>117</sup> The basis for redaction was that the DPA ‘related only to the potential criminal liability of Tesco and did not address whether liability of any sort attached to Tesco Plc or any employee, agent’.<sup>118</sup>

Regarding GSL, founder Cansun Güralp, head of sales Natalie Pearce, and Finance Director Andrew Bell were charged in 2018 with conspiracy to make corrupt payments contrary to s 1(1) of the *Criminal Law Act 1977* (UK).<sup>119</sup> The SFO alleged that Güralp and Pearce conspired to bribe a South Korean public official to help secure contracts for GSL between 2002 and 2015.<sup>17</sup> In the final judgment approving the DPA, Davis J stated that Güralp and the official signed an agreement, according to which the official would provide support and advice to GSL in the Korean market and would recommend GSL products to buyers; and that GSL made payments of approximately US\$1 million to the official.<sup>120</sup> All were acquitted in December 2019.<sup>121</sup> This outcome is cause for concern when viewed through the lens of the DPA. In the GSL final judgment, the Court found that ‘[t]he criminal conduct was planned by senior officers and employees of the company and it continued over many years.’<sup>122</sup> These findings are hard to reconcile with the outcome of the individual cases, given the inability of the SFO to persuade juries of the criminal culpability of the individuals involved.

*Airbus* also makes reference to actions against individuals, and the possible implications of naming them:

There are ongoing investigations in respect of a number of individual suspects in this jurisdiction and abroad. It is appropriate to protect the rights of the suspects to a fair trial. In addition some of the individuals involved in the relevant conduct are based in jurisdictions where there are human rights concerns, and the death penalty exists for corruption. Further, the intermediary companies used by Airbus were often made up of a few individuals. Naming the companies would therefore be tantamount to naming those individuals.<sup>123</sup>

The trial of *R v Woods and Marshall* (Serco’s Finance Director and Operations Director of Field Services) commenced on 31 March 2021 before Southwark Crown Court. By the end of April 2021, however, the case against the defendants had been withdrawn, due to problems identified with the Crown’s disclosure of evidence to the defendants.<sup>124</sup>

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<sup>116</sup> Ibid [68].

<sup>117</sup> Croft and Eley (n 112).

<sup>118</sup> Ibid.

<sup>119</sup> Serious Fraud Office, ‘Three Individuals Acquitted as SFO confirms DPA with Güralp Systems Ltd’ (News Release, 20 December 2019) <<https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/>>.

<sup>120</sup> *GSL* (n 84) [13]–[14].

<sup>121</sup> Serious Fraud Office (n 119).

<sup>122</sup> *GSL* (n 84) [25].

<sup>123</sup> *Airbus* (n 79) [13].

<sup>124</sup> Serious Fraud Office (n 109).

The SFO has been subject to criticism for its inability to hold individuals accountable,<sup>125</sup> despite the ‘cooperation’ of companies pursuant to the terms of the relevant DPA. The crux of the matter seems to be a paucity of adequate evidence against the individuals involved, which would satisfy the standard of proof in a criminal trial before a jury. Against this are issues of procedural, as well as substantive, fairness for the individuals involved, who may be implicated and impugned by their naming in a DPA before trial. None of this is cause for optimism regarding the prosecution of individuals for corporate crimes in Australia, if DPAs are sought to improve the current state of affairs of senior management accountability for wrongdoing. The provision of information by corporations regarding individuals should be a prerequisite, and fuller elaboration in the Draft Code providing guidance for prosecutors is needed.

#### 4 *Cooperation as a Term of Deferred Prosecution Agreements*

A DPA’s terms may require a corporation to cooperate in any investigation or prosecution relating to a matter specified in the DPA.<sup>126</sup> Similarly, cooperation is a standard term of approved DPAs in England and Wales.<sup>127</sup> Generally, this requires:

- retention of material gathered by the corporation through its internal investigation and in the course of cooperating with the SFO’s investigation leading to the DPA;
- cooperation ‘fully and honestly’<sup>128</sup> with the SFO in regard to its pre-investigations, investigations and prosecutions for the duration of the DPA;
- cooperation ‘fully and honestly’ upon request of the SFO with any other domestic or foreign law enforcement or regulatory authority or agency in any investigation or prosecution of any officer, director, employee, agent, consultant or third party connected to the indictment and Statement of Facts;
- disclosure of all information and material that is not protected by a valid claim of legal professional privilege or any other law against disclosure; and
- using reasonable endeavours to make any officer, director, employee, agent, consultant or third party available for interview by the SFO.

The issue of legal professional privilege has been fraught for the SFO’s investigations and has consequences for DPAs particularly. In ascertaining the interests of justice, and before approving any DPA, ‘the court must examine the company’s conduct and the extent to which it co-operated with the SFO’ including ‘whether the company was willing to waive any privilege attaching to documents

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<sup>125</sup> Transparency International UK, ‘Lack of Individual Prosecutions in Rolls Royce Bribery — Justice Not Served’ (Press Release, 22 February 2019) <<https://www.transparency.org.uk/lack-individual-prosecutions-rolls-royce-bribery-case-justice-not-served>>; Tom Hickey, ‘Deferred Prosecution Agreements 5 Years On — the Americanisation of UK Corporate Crime Enforcement’, *White & Case* (Web Page, 10 May 2019) <<https://www.whitecase.com/publications/alert/deferred-prosecution-agreements-5-years-americanisation-uk-corporate-crime>>.

<sup>126</sup> CLACCC Bill 2019 (n 1) s 17C(2)(a)(v).

<sup>127</sup> *Sarclad* (n 111) [19]; *Tesco* (n 102) [72].

<sup>128</sup> *Airbus DPA* (n 83) [12].

produced during internal investigations'.<sup>129</sup> Therefore, waiver of legal professional privilege forms a central component of what the SFO considers full cooperation in order for a company to be eligible for a DPA.<sup>130</sup> Even a limited waiver will be looked on favourably.<sup>131</sup> Similarly, the Australian Draft Code of Practice states, in assessing whether it is in the public interest to agree a DPA, '[c]orporations will not be expected to waive legitimate claims of legal professional privilege in order to demonstrate co-operation, but waiving privilege may demonstrate a high degree of co-operation'.<sup>132</sup>

Beyond legal professional privilege, the *GSL DPA* required the company's Compliance Officer to 'co-operate generally' with the SFO.<sup>133</sup> This seems like a shift in approach, in respect of imposing a duty on an individual, rather than the corporation per se. That said, it is unlikely that this term creates any civil or criminal liability for the compliance officer. Refusal by them to comply with a request of the SFO, which was regarded as unreasonable, would not breach the DPA. Thus, the consequence and enforcement of this term are dubious. On the other hand, the *Airbus DPA* of 2020 included a further term in directly imposing an obligation on the corporation's board of directors to report any suspected serious or complex fraud.<sup>134</sup> Breach of this term would constitute a breach of the DPA.

Overall, demonstration of cooperation enables beneficial outcomes, for both the corporation as well as enforcement agencies. A company can demonstrate its integrity and future 'adhere[nce] to the highest standards required of those engaged in corporate activity' by 'self-reporting to the authorities, co-operation with an investigation, a willingness to learn the lessons'.<sup>135</sup>

## 5 Cooperation of Regulatory and Law Enforcement Agencies

Another dimension to the meaning of cooperation is between investigation authorities. Nothing in the DPA schemes precludes simultaneous criminal investigation or actions overseas, and currently there is 'no consistent international approach to the question of whether a [DPA] in one jurisdiction will operate as a bar to a prosecution in another'.<sup>136</sup> On the one hand, the SFO views a DPA as engaging the principle against double jeopardy at an international level — for example, a DPA in the US concerning certain conduct would preclude a prosecution in respect of the

<sup>129</sup> *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2019] 1 WLR 791, 836–7 [117].

<sup>130</sup> In the US context, see Lisa Kern Griffin, 'Compelled Co-operation and the new Corporate Criminal Procedure' (2007) 82(2) *New York University Law Review* 311; Cindy A Schipani, 'The Future of the Attorney-Client Privilege in Corporate Criminal Investigations' (2009) 34(3) *Delaware Journal of Corporate Law* 921.

<sup>131</sup> *Director of the Serious Fraud Office v Airline Services Ltd* [2021] Lloyd's Rep FC 42, [72] ('*SFO v Airline Services Ltd*').

<sup>132</sup> *Draft DPA Scheme Code of Practice* (n 7) 21 [7.6].

<sup>133</sup> *Serious Fraud Office v Güralp Systems Ltd* (Deferred Prosecution Agreement, 22 October 2019) [22] ('*GSL DPA*').

<sup>134</sup> *Airbus DPA* (n 83) [16].

<sup>135</sup> *Tesco* (n 102) [117].

<sup>136</sup> Katherine Hardcastle and Karl Laird, 'International Double Jeopardy and Deferred Prosecution Agreements' [2018] (12) *Criminal Law Review* 946, 960. See also OECD (n 3) 166–173.

same facts in the UK. However, on the other hand, the US and France seem to see the jurisdiction of their courts as unconstrained by proceedings elsewhere.<sup>137</sup>

That aside, many of the companies that have settled DPAs in England and Wales have been pursued simultaneously in other jurisdictions. Standard Bank was charged by the US Securities and Exchange Commission for ‘failing to disclose certain payments in connection with debt issued by the Government of Tanzania in 2013’, and settled the charges for US\$4.2 million.<sup>138</sup> The *Rolls-Royce* case led to a coordinated global resolution on the relevant conduct between the SFO and the US Department of Justice (‘DOJ’), and between the US DOJ and Brazil’s Ministério Público Federal (‘MPF’). The investigations were conducted in parallel, and a DPA was reached with the US DOJ and a Leniency Agreement with the MPF. Because of the overlap with the US investigation, the US DOJ credited the amount paid to the MPF against the fine in the US. Similarly, Airbus entered into a DPA with the US DOJ. Airbus was charged with conspiracy to violate the anti-bribery provision of the *Foreign Corrupt Practices Act of 1977*<sup>139</sup> and conspiracy to violate the *Arms Export Control Act of 1976*<sup>140</sup> and its implementing regulations, *International Traffic in Arms Regulations*. Airbus paid a total of US\$582.4 million to settle the bribery and conspiracy charges. Airbus also reached a Convention Judiciaire d’Intérêt Public (‘CJIP’ or Judicial Public Interest Agreement: the French equivalent to the DPA) with the French Parquet National Financier. The prospect of such cooperation and ‘multi-jurisdictional alignment’ being enabled is part of the appeal of DPAs in Australia.<sup>141</sup>

## B Compliance

As with cooperation, the principle of compliance operates prospectively and retrospectively as a factor in favour of deferring prosecution, as well as a term of DPAs. The relevant public interest factors for deciding whether a DPA is appropriate include whether there is a history or culture of similar conduct or other breaches of the law and whether the corporation has already taken steps to avoid a recurrence.<sup>142</sup> The presence and relative merits of a compliance programme are relevant to assessing whether a DPA and/or its terms are in the public interest.<sup>143</sup> Among terms ordinarily included in DPAs will be a requirement that the corporation review and, if necessary, improve its compliance programme, and the appointment of an independent monitor ‘to determine necessary improvements to corporate

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<sup>137</sup> Liz Campbell, ‘Settling with Corporations in Europe: A Sign of Legal Convergence?’ in Nicholas Lord, Éva Inzelt, Wim Huisman and Rita Faria (eds) *European White-Collar Crime: Exploring the Nature of European Realities* (Bristol University Press, forthcoming 2021) 359, 364.

<sup>138</sup> US Securities and Exchange Commission, ‘Standard Bank to Pay \$4.2 Million to Settle SEC Charges’ (Press Release, 2015-268, 30 November 2015) <<https://www.sec.gov/news/pressrelease/2015-268.html>>.

<sup>139</sup> *Foreign Corrupt Practices Act of 1977*, Pub L No 95-213, 91 Stat 1494.

<sup>140</sup> *Arms Export Control Act of 1976*, Pub L No 94-329, 90 Stat 729.

<sup>141</sup> *ALRC Corporate Criminal Responsibility Discussion Paper* (n 8) 195 [9.57].

<sup>142</sup> *Draft DPA Scheme Code of Practice* (n 7) 19 [7.1].

<sup>143</sup> *Ibid.*

compliance programs and to monitor compliance with DPA terms' at the corporation's expense.<sup>144</sup>

A number of English and Welsh DPAs highlight how this has been rolled out in practice. In some instances, an external auditor was commissioned: the commissioned auditor named in the *Standard Bank DPA* was Price Waterhouse Coopers LLP.<sup>145</sup> Standard Bank was required to undertake a review that included the implementation of its existing internal controls, policies, and procedures on compliance with the *Bribery Act 2010* (UK) and other anti-corruption laws.<sup>146</sup> In the Tesco DPA, Deloitte was directed to 'review and report on two aspects of Tesco's Global Finance Transformation Programme'.<sup>147</sup> In other cases, internal officers or appointments were approved or maintained. Sarclad's Chief Compliance Officer was required to prepare and submit a report on Sarclad's anti-bribery and corruption policies and their implementation within 12 months of the DPA coming into effect, and then each year of the DPA.<sup>148</sup> Lord Gold (then head of litigation at Herbert Smith Freehills, London) was retained by Rolls-Royce in January 2013 to conduct an independent review of anti-bribery and corruption compliance, and had produced two interim reports.<sup>149</sup> It was a condition of the finalised DPA that he produce a third interim report, an implementation plan, and a final report.<sup>150</sup>

The ability of the SFO to oversee compliance is questionable. For example, a compliance monitor was not imposed on Serco or GSL, despite ongoing compliance remediation being required. The *Serco DPA* was accompanied by an undertaking by Serco Group (the parent company of Serco Geografix Ltd, which was a dormant company) to strengthen and improve its group-wide ethics and compliance program, and to report annually on its group-wide assurance programme.<sup>151</sup> Similarly, the *GSL DPA* required annual reports on its corporate compliance programme and implementation to be submitted to the SFO, including measurements of the effectiveness of training, though no SFO or third-party monitor approval was required.<sup>152</sup> If it were concluded that the training was ineffective there is no mechanism in the DPA to compel an improvement, nor would the ineffectiveness amount to a breach of the DPA. Further, GSL was required to report any past, present or future conduct that would fall within the ambit of the SFO as soon as it becomes known to any director of the company.<sup>153</sup>

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<sup>144</sup> Ibid 8 [3.3].

<sup>145</sup> *Standard Bank DPA* (n 83) [28]–[30].

<sup>146</sup> Ibid.

<sup>147</sup> *Tesco* (n 102) [97].

<sup>148</sup> *Serious Fraud Office v Sarclad Ltd* (Deferred Prosecution Agreement, 6 July 2016) [20] <<https://www.sfo.gov.uk/download/sarclad-ltd-and-sfo-deferred-prosecution-agreement/>>.

<sup>149</sup> Rolls-Royce, 'Rolls-Royce Completes Agreements with Investigating Authorities' (Press Release, 17 January 2017) <<https://www.rolls-royce.com/media/press-releases/2017/17-01-2017-statement.aspx>>.

<sup>150</sup> *Serious Fraud Office v Rolls-Royce PLC* (Deferred Prosecution Agreement, 17 January 2017) [27] <<https://www.sfo.gov.uk/download/deferred-prosecution-agreement-sfo-v-rolls-royce-plc/>>.

<sup>151</sup> *Serious Fraud Office v Serco Geografix Ltd* (Deferred Prosecution Agreement, 2 July 2019) [29] <<https://www.sfo.gov.uk/download/deferred-prosecution-agreement-serco-geografix-ltd-sfo/>> ('*Serco DPA*').

<sup>152</sup> *GSL DPA* (n 133) [19].

<sup>153</sup> Ibid [20].

In contrast, a monitor was appointed for both Airbus and G4S C&J. Airbus was required to continue to implement and review its compliance improvements, and external compliance review was carried out by the Agence Française Anticorruption (the French Anti-Corruption body), Pricewaterhouse Coopers and Ernst & Young (as statutory auditors). Furthermore, the Agence Française Anticorruption was appointed to act as monitor of Airbus's compliance for the duration of the CJIP.<sup>154</sup> Thus, the SFO did not recommend the appointment of an external monitor as part of the DPA in this case.<sup>155</sup> G4S C&J and the G4S Group entered into significant compliance remediation commitments, which included the appointment of an independent monitor to review and report on such commitments.<sup>156</sup> This represents an evolution of the DPA scheme, with stronger emphasis on post-DPA oversight and assurance of compliance, as a way of ensuring remediation.

The impact on the parent company's compliance is also noteworthy. As noted, the *Serco DPA* was the first occasion in which undertakings were made by a parent company in relation to a DPA entered into by one of its subsidiaries. This was described as 'an important development in the use of DPAs'.<sup>157</sup> Approving the DPA for G4S, Davis J emphasised that, as was the case with the *Serco DPA*, the entity engaging in misconduct (G4S C&J) is a wholly owned subsidiary of a larger parent company (G4S Group).<sup>158</sup> Unlike in *Serco*, G4S Group continues to trade, and therefore the remedial steps it undertook were considered by the Court to be 'all the more important'.<sup>159</sup> The steps already taken and to be done in terms of compliance and as part of the overall 'process of corporate renewal' were regarded as 'very significant'.<sup>160</sup> Moreover, they were described as steps which 'only can be enforced under the aegis of a DPA. Prosecution and conviction of G4S C&J could not sensibly achieve this objective. The public interest in the remedial steps is very high.'<sup>161</sup>

Davis J approved the appointment of an external monitor:

an independent person will be appointed as Reviewer of the corporate renewal being undertaken by G4S. By December 2020 the Reviewer will provide a report to the SFO identifying any additional steps which G4S should take to ensure that their internal controls, policies and procedures meet defined criteria intended to prevent any fraudulent or corrupt practices.<sup>162</sup>

All of these features mean that:

The intensity of the external scrutiny as set out in the DPA is greater than in any previous DPA. This is necessary and appropriate given the exposure of both G4S C&J and the parent company to government contracts. Equally, it is an important factor in providing reassurance to the SFO, to relevant government departments and to the wider public that both companies have

<sup>154</sup> *Airbus DPA* (n 83) [28]–[30].

<sup>155</sup> *Airbus* (n 79) [80]–[81].

<sup>156</sup> *G4S C&J DPA* (n 60) [31]–[42].

<sup>157</sup> *Serious Fraud Office v Serco Geografix Ltd* [2019] Lloyd's Rep FC 518, [42] ('*Serco*').

<sup>158</sup> *G4S C&J* (n 61) [28], [43].

<sup>159</sup> *Ibid* [28].

<sup>160</sup> *Ibid*.

<sup>161</sup> *Ibid*.

<sup>162</sup> *Ibid*.

proper controls in place to ensure the integrity of their accounting and governance processes.<sup>163</sup>

Despite their appointment in Airbus and G4S C&J, corporate monitors are not a compulsory or even primary aspect of DPAs in England and Wales, and indeed the Code states that the use of monitors should be ‘approached with care’.<sup>164</sup> Further, ‘[t]he appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate.’<sup>165</sup> The SFO *Operational Guidance and Information* on evaluating a compliance programme, published in early-2020, states:

If a DPA includes terms about the organisation’s compliance programme, the prosecutor will need to be able to assess the expected reforms while the DPA is in force, to determine whether the organisation is complying with the terms of the DPA. The DPA should set out the means by which the organisation will satisfy the prosecutor. This is likely to include a monitor being appointed at the organisation’s expense.<sup>166</sup>

While used infrequently in DPAs so far, monitors have been involved in previous cases prosecuted by the SFO, such as that concerning Oxford University Press,<sup>167</sup> Balfour Beatty,<sup>168</sup> and Innospec.<sup>169</sup> In the US between 2010 and 2014, monitors were used in an average of 1-in-3 DPAs/NPAs.<sup>170</sup> However, the situation there changed with the Trump Administration Justice Department’s more pragmatic approach to addressing corporate wrongdoing.<sup>171</sup> The process for selecting a monitor was articulated in the 2018 Benczkowski Memorandum, which emphasised the need to balance the costs and benefits of imposing a monitorship and to limit the scope of monitorships ‘to avoid unnecessary burdens to the business’s operations’.<sup>172</sup> The approach of the Biden Administration in this context remains to be seen.

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<sup>163</sup> Ibid [43].

<sup>164</sup> UK DPA Code of Practice (n 35) 13 [7.11].

<sup>165</sup> Ibid.

<sup>166</sup> Serious Fraud Office, ‘Evaluating a Compliance Programme’, *Operational Guidance and Information* (Web Page, January 2020) <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/evaluating-a-compliance-programme/>>.

<sup>167</sup> Serious Fraud Office, ‘Oxford Publishing Ltd To Pay Almost £1.9 million as Settlement After Admitting Unlawful Conduct in its East African Operations’ (News Release, 3 July 2012) <<https://www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/>>.

<sup>168</sup> Jessica Naima Djilani, ‘The British Importation of American Corporate Compliance’ (2010) 76(1) *Brooklyn Law Review* 303, 324; OECD Directorate for Financial and Enterprise Affairs, *United Kingdom: Phase 2bis. Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (October 2008) 24–5 [89]–[92].

<sup>169</sup> *R v Innospec Ltd* [2010] EW Misc 7 (EWCC).

<sup>170</sup> Arlen (n 37) 201, table 1; Vikramaditya Khanna and Timothy L Dickinson, ‘The Corporate Monitor: The New Corporate Czar?’ (2007) 105(8) *Michigan Law Review* 1713.

<sup>171</sup> United States Department of Justice, Office of the Attorney General, ‘Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference Washington, DC’, *Justice News* (24 April 2017) <<https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>>.

<sup>172</sup> Memorandum from Assistant Attorney General Brian A Benczkowski to US Department of Justice, All Criminal Division Personnel, ‘Subject: Selection of Monitors in Criminal Division Matters’ (11 October 2018) 2 <<https://www.justice.gov/opa/speech/file/1100531/download>>.

In Australia, the monitoring of enforceable undertakings in the civil sphere is commonplace,<sup>173</sup> and so provides a useful prototype for DPAs. That said, Parker's research found that 'compliance program audits focus more on reviewing (and recommending improvements to) the systems elements of the compliance program, rather than its compliance performance'.<sup>174</sup> Moreover, the Australian Competition and Consumer Commission suggested that 'independent reviews are more effective than those conducted by internal staff'.<sup>175</sup> This underlines the significance of external, independent monitors. One can conceive of the strategic appointment of a 'monitor' by a corporation once an internal investigation has been started, as it appears from the English experience that if there is a monitor or auditor in place already, it is unlikely to be replaced. Furthermore, these auditors are not beyond reproach themselves, with various examples of questionable auditing practices.<sup>176</sup>

All of these matters should be reflected on in respect of the appointment of corporate monitors in Australia. The CLACCC Bill 2019 does not provide a legislative basis on which the authorities may impose monitors, though the 2018 Draft Code of Practice outlines the matters on which a monitor may be appointed to assess and advise.<sup>177</sup> Moreover the Draft Code provides that where the appointment of a monitor is proposed to be a term of a DPA, selection and provisional appointment generally will be agreed to before the DPA is approved.<sup>178</sup> While a corporation may suggest monitorship, ultimately appointment is a matter for the CDPP, having regard to views of any relevant Commonwealth agencies, the experience and knowledge of the candidate and any conflicts of interest that may arise as a result of the appointment.<sup>179</sup>

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<sup>173</sup> Marina Nehme, 'Enforceable Undertakings' Practices across Australian Regulators: Lessons Learned' (2020) 21(1) *Journal of Corporate Law Studies* 283, 308–17.

<sup>174</sup> Christine Parker, 'Regulator-Required Corporate Compliance Program Audits' (2003) 25(3) *Law and Policy* 221, 224.

<sup>175</sup> Australian Competition and Consumer Commission, *Small Business Guide to Trade Practices Compliance Programs* (April 2006) 9 <<https://www.accc.gov.au/media-release/small-business-guide-to-trade-practices-compliance-programs>> (note that this publication has been retired).

<sup>176</sup> Hannah Wootton, 'Deloitte Case Could Curb Audit Class Action Trend', *Financial Review* (online, 15 October 2019) <<https://www.afr.com/companies/professional-services/court-ruling-could-limit-trend-of-audit-class-actions-20191014-p530fi>>; Hannah Wootton, 'Court says EY Must Cop Losses from Allegedly Flawed Audit' (online, 16 October 2019) <<https://www.afr.com/companies/professional-services/court-says-ey-must-cop-losses-from-allegedly-flawed-audit-20191014-p530ik>>; Eli Moskowitz, 'Large Auditing Firms Probed for Role in £230m Investment Scandal', *Organized Crime and Corruption Reporting Project* (online, 26 June 2020) <<https://www.occrp.org/en/daily/12646-large-auditing-firms-probed-for-role-in-230m-investment-scandal>>; Financial Reporting Council ('FRC'), 'FRC Launches Investigations into Three Audit Firms over the Audits of London Capital & Finance Plc' (Press Release, 24 June 2020) <<https://www.frc.org.uk/news/june-2020/frc-launches-investigations-into-three-audit-firms>>.

<sup>177</sup> *Draft DPA Scheme Code of Practice* (n 7) 11–12 [3.19].

<sup>178</sup> *Ibid* 13 [3.20].

<sup>179</sup> *Ibid*.



## C Compensation

According to the 2018 Draft Code, a term that will be included in most DPAs is a requirement that the corporation compensate victims or take other remedial action,<sup>180</sup> noting that a foreign country may be the victim of the misconduct.<sup>181</sup> This echoes the English and Welsh scheme, which provides that the content of a DPA may include a requirement to compensate victims of the alleged offence,<sup>182</sup> and to donate money to a charity or other third party.<sup>183</sup> Moreover, the Crown Prosecution Service, the National Crime Agency and the SFO have agreed ‘general principles’ to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases.<sup>184</sup> Again, English decisions summarised in Table 1 are telling and warrant further reflection with respect to the adoption of DPAs in Australia. While this experience is of course context- and fact-specific and therefore not generalisable or binding, it demonstrates clearly that compensation is not a common term in English DPAs, notwithstanding its presence in the SFO Operational Guidance and Information,<sup>185</sup> its rhetorical weight,<sup>186</sup> and the wide-ranging impact of many of these crimes.

Only one English DPA has required the payment of compensation: Standard Bank were required to pay compensation for the benefit of the Government of the United Republic of Tanzania (US\$6,000,000 plus interest of US\$1,046,196.58).<sup>187</sup> A variety of reasons lie behind compensation’s absence in other DPAs. Sarclad’s DPA did not include a compensation order on the basis that:

- The majority of implicated contracts were made with ‘entities based in a country in Asia’ and there was no request for mutual legal assistance nor an established mechanism for payments of compensation orders to the authorities;
- The amounts of the bribe payment and any rise in the contract price to accommodate it were not always confirmed in the evidence; and

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<sup>180</sup> Ibid 8 [3.3].

<sup>181</sup> Ibid 10 [3.12].

<sup>182</sup> *Crime and Courts Act 2013* (UK) (n 23) sch 17 pt 1 s 5(3)(b).

<sup>183</sup> Ibid sch 17 pt 1 s 5(3)(c).

<sup>184</sup> Serious Fraud Office (UK), ‘General Principles to Compensate Overseas Victims (including affected States) in Bribery, Corruption and Economic Crime Cases’ (December 2017) <<https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/>>.

<sup>185</sup> See, eg, Serious Fraud Office, ‘Compensation Principles to Victims outside the UK’, *Information for Victims, Witnesses and Whistleblowers* (Web Page, 2021) <<https://www.sfo.gov.uk/publications/information-victims-witnesses-whistleblowers/compensation-principles-to-victims-outside-the-uk/>>.

<sup>186</sup> *2017 Consultation Paper* (n 6) 3; Evidence to Senate Legal and Constitutional Affairs Legislation Committee, *Committee Hansard* (12 February 2020) 6 (Mr Christopher Brown, Senior Policy Lawyer, Law Council of Australia); United Kingdom, *Parliamentary Debates*, House of Lords, Crime and Courts Bill, 13 November 2012, vol 740, col 1492 (The Minister of State, Ministry of Justice (Lord McNally)).

<sup>187</sup> *Serious Fraud Office v Standard Bank Plc (now ICBC Standard Bank Plc)* [2016] Lloyd’s Rep FC 102, [13] (‘Standard Bank’).

- The SFO could not demonstrate whether and in what sum Sarclad agents actually paid bribes to ‘named or unknown individuals’.<sup>188</sup>

Likewise, the SFO did not apply for a compensation order against Tesco. The negotiation of the DPA proceeded on the basis that the SFO did not intend to suggest that a compensation should be included as a term. The final judgment stated that it would not be easy to assess compensation and that only two of the relevant institutional investors approached by the SFO were willing to assist the investigation.<sup>189</sup> The SFO also did not apply for a compensation order against Rolls-Royce, as it could not identify a quantifiable loss arising from any of the criminal conduct.<sup>190</sup> The final judgment stated:

There is no direct evidence of contracts where there was a rise in the contract price to accommodate a bribe ... nor evidence that any of the products or services which Rolls-Royce sold to customers were defective or unwanted. In any event, any of the victims of the criminal conduct covered by the proposed DPA is in a position to pursue a claim for compensation.<sup>191</sup>

There was no compensation order as part of the DPA with Serco Geografix Ltd, on the basis that £12.8 million compensation had already been paid by Serco to the UK Ministry of Justice as part of a £70 million civil settlement in 2013.<sup>192</sup> The *GSL DPA* did not include a financial penalty or compensation order, but there is no explanation as to why in the final judgment. While this is not the first time that a compensation order has not been made, it is the first where the reasons for this have not been given, and contradicts the statement in *Rolls-Royce* that this should occur.<sup>193</sup> The SFO did not apply for a compensation order against Airbus, on the basis that the SFO could not easily identify a quantifiable loss resulting from the relevant criminal conduct; there was no evidence that any of the products or services sold by Airbus were defective or unwanted, meaning a legal claim for the value of an adequate replacement was not justified.<sup>194</sup> Furthermore, it was observed that the DPA does not prevent any victims from claiming compensation.<sup>195</sup> In *Director of the Serious Fraud Office v Airline Services Ltd*, compensation was not ordered because the SFO had not been able to identify a quantifiable loss to a particular party as a result of the criminal conduct.<sup>196</sup> The Court noted the SFO’s view that any person affected could seek compensatory damages via civil litigation, which is unlikely given that Airline Services Ltd is effectively dormant, remaining only as a shell to enable the SFO investigation and conclusion of the DPA.<sup>197</sup>

The abdication of duty with respect to ascertaining the appropriate level of compensation is curious. Difficulties in calculating the requisite amount for penalties

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<sup>188</sup> *Serious Fraud Office v XYZ Ltd* [2016] Lloyd’s Rep FC 517, [41].

<sup>189</sup> *Tesco* (n 102) [75].

<sup>190</sup> *Rolls-Royce* (n 86) [83]–[84].

<sup>191</sup> *Ibid* [84].

<sup>192</sup> Serious Fraud Office, ‘SFO Completes DPA with Serco Geografix Ltd’ (News Release, 4 July 2019) <<https://www.sfo.gov.uk/2019/07/04/sfo-completes-dpa-with-serco-geografix-ltd/>>.

<sup>193</sup> *Rolls-Royce* (n 86) [83].

<sup>194</sup> *Airbus* (n 79) [96].

<sup>195</sup> *Ibid*.

<sup>196</sup> *SFO v Airline Services Ltd* (n 131) [77].

<sup>197</sup> *Ibid* [46].

do not preclude their estimation, and a comparable approach should be adopted here. Paradoxically, or at least unfortunately, the more complex the crime, the less precise and less likely the determination of compensation will be, and it seems the less likely it is to be mooted and approved. In addition, this foisting of responsibility onto victims, as in *Rolls-Royce* and *Airbus*, is striking. To suggest that any of the victims of the criminal conduct covered by the proposed DPA is in a position to pursue a claim for compensation presumes: knowledge of victimisation; ability, capacity and resources to take action; as well as proof of standing.<sup>198</sup> It exemplifies a shift from the conception of DPAs as part of public law and enforcement and the purpose of the criminal law as vindicating the rights of the polity against the offender.<sup>199</sup>

DPAs co-exist alongside class actions taken in respect of corporate wrongdoing, and indeed such actions have been pursued in two instances in England and Wales. Nevertheless, these should never supplant the compensation dimensions and potential of DPAs. In terms of the Tesco DPA, other actions for wrongdoing were pursued. A shareholder class action against Tesco was brought in the Financial List of the High Court (Business and Property Courts) pursuant to s 90A (and its accompanying schedule, sch 10A) of the *Financial Services and Markets Act 2000* (UK), relating to Tesco's profit overstatement.<sup>200</sup> Moreover, the UK Financial Conduct Authority used its powers to force Tesco to pay compensation to institutional investors. Claimants who accepted an offer of compensation under this scheme were precluded from participating in the class action.<sup>201</sup> Likewise, there was a shareholder claim against Serco Geografix Ltd: a group of shareholders sued seeking compensation for the fall in share price following the fraud and false accounting revelations over electronic tagging in 2013.<sup>202</sup>

Similarly, Australia has class action regimes in both the Federal Court and the state supreme courts, and so DPAs if introduced would fit together with these. In the Federal Court, applicants can bring class action proceedings (a 'representative proceeding') under pt IVA of *Federal Court of Australia Act 1976* (Cth), introduced in 1992. To bring a claim under pt IVA: there must be seven or more persons with claims against the same person;<sup>203</sup> the claims must be 'in respect of, or arise out of, the same, similar or related circumstances';<sup>204</sup> and claims must give rise to at least one substantial common issue of law or fact.<sup>205</sup> Class actions have been pursued in

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<sup>198</sup> Alan Doig, 'Non-Conviction Financial Sanctions, Corporate Anti-Bribery Reparation and their Potential Role in Delivering Effective Anti-Corruption Pay-Back: The Emerging UK Context' in Liz Campbell and Nicholas Lord (eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge, 2018).

<sup>199</sup> Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42(1) *Federal Law Review* 217.

<sup>200</sup> 'Tesco Shareholder Action — Case Update', *Stewarts* (Web Page, 4 June 2019) <<https://www.stewartslaw.com/news/tesco-shareholder-action-case-update/>>.

<sup>201</sup> Herbert Smith Freehills, 'Current and Recent Shareholder Claims', *Litigation Notes* (Blog Post, 9 December 2019).

<sup>202</sup> *Allianz Global Investors GmbH v Serco Group PLC* (Case No FL-2019-000006, Business and Property Court, England and Wales High Court).

<sup>203</sup> *Federal Court of Australia Act 1976* (Cth) s 33C(1)(a).

<sup>204</sup> *Ibid* s 33C(1)(b).

<sup>205</sup> *Ibid* s 33C(1)(c).

respect of bribery,<sup>206</sup> financial misconduct,<sup>207</sup> and breach of the *Corporations Act 2001* (Cth).<sup>208</sup> Again, while we can see class actions as ‘vindicating the public interest’ and supplementing public enforcement,<sup>209</sup> this cannot be in replacement of the public action.

Despite the rhetoric, practice indicates that compensation is not a true principle of DPAs. Compensation is a potentially inventive, radical and distinctive dimension, by virtue of its ordering in a settlement taken on behalf of the public through criminal proceedings. For the compensation component to DPAs to be meaningful, reliance cannot be placed on class actions to supplement or replace it. It is useful here to draw on the insights of Fisse, who observed that

deterrence of cartel conduct and the redress of such conduct typically have been pursued in separate proceedings: public enforcement proceedings (deterrence) and civil remedial proceedings (redress). A prevalent assumption is that compensation for losses from cartel conduct is best pursued in civil remedial proceedings given the typically large number of victims, complexity of assessing the amount of damages payable and limitations on the public enforcement purse.<sup>210</sup>

Instead, Fisse suggests ‘the possibility of redress facilitation orders designed to facilitate compensation for loss caused by cartel and other unlawful conduct and at

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<sup>206</sup> For instance, a claim against CIMIC Group (formerly known as Leighton Holdings) related to allegations about corrupt payments made by a subsidiary of CIMIC in order to secure work in Iraq. This was settled in 2020: Maurice Blackburn Lawyers, *CIMIC Class Action* (Web Page) <<https://www.mauriceblackburn.com.au/class-actions/past-class-actions/cimic/>>. A class action against the Australian Wheat Board followed the *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-For-Food Programme* (Parliamentary Paper Nos 395–399, 2006) and an investigation by ASIC. This was settled for \$39.5 million in 2010: Maurice Blackburn Lawyers, *AWB Class Action* (Web Page) <<https://www.mauriceblackburn.com.au/class-actions/past-class-actions/awb-class-action/>>.

<sup>207</sup> In 2019 a shareholder class action commenced against Westpac Banking Corp relating to disclosure around monitoring of financial crime and Australian Transaction Reports and Analysis Centre (‘AUSTRAC’) proceedings: ‘Westpac Shareholder Class Action’, *Phi Finney McDonald* (Web Page, 25 November 2019) <<https://phifinney-mcdonald.com/projects/westpac-shareholder-class-action/>>. Also in 2019, a shareholder class action commenced against Commonwealth Bank for alleged breach of continuous disclosure obligations and misleading or deceptive conduct regarding AUSTRAC anti-money laundering and counter-terrorism financing requirements: ‘CBA Class Action’, *Phi Finney McDonald* (Web Page, 18 March 2019) <<https://phifinney-mcdonald.com/projects/cba-class-action/>>.

<sup>208</sup> A class action against Myer for failure to disclose material information to the market resulted in the first superior court judgment in an Australian shareholder class action: *TPT Patrol Pty Ltd (as trustee for Amies Superannuation Fund) v Myer Holdings Ltd* (2019) 140 ACSR 38. A consolidated class action against BHP seeks recovery of investor losses caused by BHP’s violations of the *Corporations Act 2001* (Cth) in relation to the collapse of the Fundão Dam in Brazil: see, eg, ‘BHP Class Action’, *Phi Finney McDonald* (Web Page, 18 March 2019) <<https://phifinney-mcdonald.com/projects/bhp-class-action/>>; *Impiombato v BHP Group Ltd (No 2)* [2020] FCA 1720. For an overview of class actions in Australia, see Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017): <[http://globalclassactions.stanford.edu/sites/default/files/documents/Morabito\\_Fifth\\_Report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Morabito_Fifth_Report.pdf)>

<sup>209</sup> Michael J Duffy, ‘Australian Private Securities Class Actions and Public Interest – Assessing the ‘Private Attorney-General’ by reference to the Rationales of Public Enforcement’ (2017) 32(2) *Australian Journal of Corporate Law* 162, 162, 165–6.

<sup>210</sup> Brent Fisse, ‘Redress Facilitation Orders as a Sanction against Corporations’ (2018) 37(1) *University of Queensland Law Journal* 85, 85–6.

the same time to enhance deterrence'.<sup>211</sup> If DPAs are to be introduced in Australia there must be a foregrounding of compensation, and, I suggest, a statutory requirement that compensation be considered and explicit reasons given if not a term in the DPA.

## V Conclusion

This article has returned to the ongoing debate around DPAs, which, despite bipartisan support, have not yet been introduced in Australia. The evolving experience in England and Wales continues to be instructive and raises issues for consideration and resolution here. King and Lord express unease with respect to the pragmatic stance of the SFO about the cost- and time-savings in DPAs: 'surely the SFO did not mean to imply that the bigger the company under investigation, and the more complex the case, the more they would be open to settlement'.<sup>212</sup> But indeed this is the precise state of affairs in many jurisdictions, however unpalatable or fatalistic it may seem. Realpolitik, as well as extant codes of practice, mean that the larger the company, the more important or sensitive its role, and the greater the potential for 'collateral' damage, so the less likely it is that it will be pursued in an adjudicated criminal sense. To be frank, in some instances DPAs might be as good as it gets. Adopting a comparably hard-nosed response to this set of circumstances, key changes to the CLACCC Bill 2019 are needed.

If DPAs are to fulfil their far-reaching preventive and remedial potential, rather than comprising a mere pragmatic alternative to adjudication, then more circumscribed rules are needed. Though this will limit discretion inevitably, experience in England and Wales does not give cause for optimism in terms of what is agreed between prosecutors and corporations otherwise. First, tighter definitions must be provided regarding the meaning and form of cooperation. The initiation of DPA negotiation should be predicated on self-reporting and, if not, the reasons for this must be interrogated by both prosecutors and the approving officer. Further, the highest degree of cooperation subsequently is a prerequisite for approval of a DPA. Acting in an unobstructive manner should not constitute cooperation; the corporation needs to be active, engaged, and helpful. In particular, the strategic use of legal professional privilege must be probed and limited. Linked to this, meaningful cooperation regarding individuals must be provided, though ultimately the public interest might not lie in their prosecution. Second, in terms of compliance, external monitors should be considered for all DPAs, be that from a State agency (as in *Airbus*) or an auditor (as in *G4S*). Again, reasons must be given if deemed not to be appropriate. Without such ability to oversee and scrutinise, the value and weight of the terms of DPAs, as well as adherence to them, is questionable. Third, compensation must be contemplated, and explicit reasons given if not required by the DPA. Finally, the presumption should be that a company would not benefit from more than one DPA in a given jurisdiction. Though the Draft Code does refer to previous behaviour as a public interest factor, repeat offenders are not precluded

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<sup>211</sup> Ibid 86.

<sup>212</sup> King and Lord (n 2) 315, citing *Rolls-Royce* (n 86) [58].

from settlement agreements.<sup>213</sup> Furthermore, these measures need to be articulated and embedded statutorily, not addressed in a non-binding way in a code of practice.

The ALRC estimates that if introduced, there is likely to be just one DPA agreed per year in Australia.<sup>214</sup> This is in line with federal prosecution rates, as well as with the English and Welsh experience. While such limited use might suggest that concerns about the framework and likely terms are overstated, instead the potential nature and level of the misconduct involved as well as the status of many of the companies mean that such adjustments are imperative. Otherwise DPAs will go no way to alleviating the accountability deficit for corporate crime.

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<sup>213</sup> As noted earlier, HSBC is an example of this: Garrett (n 38) 102. Moreover, prior to its DPA, an FCA investigation in 2011 revealed Standard Bank's failure to implement anti-money laundering and anti-corruption procedures successfully: Financial Conduct Authority, 'Standard Bank PLC Fined £7.6m for Failures in its Anti-Money Laundering Controls' (Press Release, 23 January 2014) <<https://www.fca.org.uk/news/press-releases/standard-bank-plc-fined-£76m-failures-its-anti-money-laundering-controls>>. Indeed, investors are pursuing class actions against HSBC and Standard Chartered due to apparent failures to address money laundering: Helen Cahill and Adam Luck, 'HSBC and Standard Chartered to Face Class Action over FinCEN Files Claims', *RiskScreen* (online, 1 October 2020) <<https://www.riskscreen.com/kyc360/news/hsbc-and-standard-chartered-to-face-class-action-over-fincen-files-claims/>>.

<sup>214</sup> *ALRC Corporate Criminal Responsibility Report* (n 9) 503 [11.36].

**Table 1:** Deferred Prosecution Agreements Obtained by the Serious Fraud Office (England and Wales)<sup>215</sup>

<i>Date</i>	<i>Corporate entity</i>	<i>Nature of case</i>	<i>Offence(s)</i>	<i>Benefit/ advantage</i>	<i>Cooperation</i>	<i>Terms of DPA</i>	<i>Compliance terms</i>	<i>Compensation</i>	<i>Individual prosecutions</i>
November 2015	Standard Bank Plc ('Standard Bank')	Failure to prevent bribery by Stanbic Bank Tanzania (a bank in Standard Bank's division) of Enterprise Growth Market Advisors in Tanzania, to influence members of the Tanzanian Government	Failure of a commercial organisation to prevent bribery ( <i>Bribery Act 2010</i> (UK) s 7)	Gained favour of US\$600m proposal to be carried out on behalf of the Tanzanian Government. This generated US\$8.4m transaction fees, shared by Stanbic Tanzania & Standard Bank	Self-reported	US\$6m plus interest US\$1,046,196.58 compensation; US\$8.4m disgorgement of profit; US\$16.8m financial penalty; £330,000 SFO costs payment	Auditor-commissioned review	US\$6m	No

<sup>215</sup> For an earlier and narrower iteration of such a table, see Nicholas Lord and Colin King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in Liz Campbell and Nicholas Lord (eds) *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge, 2018) 239 (Table 13.2); and King and Lord (n 2) 322 (Table 1).

Note: 'SFO' = Serious Fraud Office (UK); 'MoJ' = Ministry of Justice (UK).

<i>Date</i>	<i>Corporate entity</i>	<i>Nature of case</i>	<i>Offence(s)</i>	<i>Benefit/ advantage</i>	<i>Cooperation</i>	<i>Terms of DPA</i>	<i>Compliance terms</i>	<i>Compensation</i>	<i>Individual prosecutions</i>
July 2016	Sarclad Ltd ('Sarclad')	Company's employees & agents involved in systematic offer &/or payment of bribes to secure contracts in foreign jurisdictions	Conspiracy to corrupt & conspiracy to bribe ( <i>Criminal Law Act 1977</i> (UK) s 1); failure of a commercial organisation to prevent bribery ( <i>Bribery Act 2010</i> (UK) s 7)	£6,553,085 total gross profit from implicated contracts	Self-reported	£6,201,085 disgorgement of gross profits; £352,000 financial penalty. SFO agreed not to seek costs	Review by Internal Chief Compliance Officer	No	Yes; three directors & managers acquitted of conspiring to bribe in 2019
January 2017	Rolls-Royce plc	Company & associated persons used a network of agents to bribe officials in at least seven countries over three decades	Six offences of conspiracy to corrupt ( <i>Criminal Law Act 1977</i> (UK) s 1); five offences of failure of a commercial organisation to prevent bribery ( <i>Bribery Act 2010</i> (UK) s 7); one offence of false accounting ( <i>Theft Act 1968</i> (UK) s 17)	£258,170,000 profit gained	Original report by whistleblower; then cooperated	£258,170,000 disgorgement of profit; £239,082,645 financial penalty, £12,960,754 SFO costs payment	Review by head of litigation at Herbert Smith Freehills (continuation of internal process started in 2013)	No	No



April 2017	Tesco Stores Ltd ('Tesco')	Accounting irregularities: Tesco overstated its profits by over £326m between February & September 2014; dishonestly falsified results for six months	Commission of an offence of false accounting ( <i>Theft Act 1968</i> (UK) s 17)	By falsely inflating annual commercial income, the Tesco Board was presented with a series of 'legacy' years that formed the basis of inaccurate analysis of expected performance	Tesco issued trading update regarding overstatement of profit; then cooperated with SFO	£129m financial penalty, £3m investigation costs; £85m & related costs of the Financial Conduct Authority compensation scheme	External auditor Deloitte directed to 'review and report on two aspects of Tesco's Global Finance Transformation Programme'	No	Yes; three directors charged with false accounting & fraud; held no case to answer in 2018
July 2019	Serco Geografix Ltd ('Serco')	Scheme to dishonestly mislead MoJ as to true extent of profits made 2010–2013 by Serco Geografix Ltd's parent company, Serco Ltd, from its contract for the provision of electronic monitoring services	Three offences of fraud & two offences of false accounting ( <i>Fraud Act 2006</i> (UK) s 2)	Profit gained equated to £12.8m; preventing MoJ from limiting parent company future profits; from recovering any of parent company's previous profits; from	Self-reported; cooperated	£19.2m financial penalty; £3.7m investigative costs payment; £12.8m compensation to MoJ as part of a separate £70m civil settlement in 2013	Undertaking by Serco Group (parent company) to improve group-wide ethics & compliance program	No	Yes; two directors charged with false accounting & fraud; case withdrawn by SFO in April 2021

				seeking more favourable terms during renegotiations of contracts; threatening the parent company's contract revenues					
December 2019	Güralp Systems Ltd ('GSL')	Scheme of corrupt payments to South Korean public official 2002–2015, made as inducement or reward for exploiting his position to influence the award of government contracts to GSL	Conspiracy to make corrupt payments ( <i>Criminal Law Act 1977</i> (UK) s 1); failure of a commercial organisation to prevent bribery by employees ( <i>Bribery Act 2010</i> (UK) s 7)	GSL's revenue from the Republic of Korea grew from £20,146 in 2003 to £1,453,618 in 2015; the total gross profit calculated on the best evidence available amounted to £2,069,861	Self-reported; cooperated	£2,068,861 disgorgement of gross profits	Annual reports on its corporate compliance programme	No	Yes, three charged with conspiracy to make corrupt payments; all acquitted in 2019

January 2020	Airbus SE ('Airbus)	Failing to prevent persons associated with Airbus from bribing others concerned with the purchase of aircraft by customers across multiple jurisdictions (including Malaysia, Sri Lanka, Taiwan, Indonesia, Ghana)	Five counts of failure of commercial organisation to prevent bribery ( <i>Bribery Act 2010</i> (UK) s 7)	Bribery intended to increase sales for Airbus; €85,939,740 total gross profit	Self-reported; cooperated, accepted SFO jurisdiction	€85,939,740 disgorgement of profits; €98,034,571 financial penalty; €6,989,401 costs	Internal review of compliance programme; external compliance review by Agence Française Anticorruption, & statutory auditors Price Waterhouse Coopers & Ernst & Young. Agence Française Anticorruption to monitor Airbus compliance throughout Convention Judiciaire D'intérêt Public (French DPA equivalent)	No	Ongoing investigations overseas
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<i>Date</i>	<i>Corporate entity</i>	<i>Nature of case</i>	<i>Offence(s)</i>	<i>Benefit/ advantage</i>	<i>Cooperation</i>	<i>Terms of DPA</i>	<i>Compliance terms</i>	<i>Compensation</i>	<i>Individual prosecutions</i>
July 2020	G4S Care & Justice Services (UK) Ltd	Fraudulent conduct regarding MoJ contracts for electronic monitoring services. Financial models submitted to MoJ concealed true cost of expenditure on field equipment, communications & vehicles. Costs reported to Home Office & Ministry were substantially higher than costs in company's management accounts. Total variance 2005–2012 was over £70 million	Three counts of fraud ( <i>Fraud Act 2006</i> (UK) s 1)	Profit unlawfully obtained by the fraud was £21,396,265	Self-reported by parent company; cooperation increased from 2019	£38,513,277 financial penalty payment to SFO; £5,952,711 SFO reasonable costs payment. £21,396.265 compensation to MoJ; £22,115,505 paid under settlement deed in March 2014 credited against this amount (ie no additional compensation); £21,396,265 disgorgement of profits – 2014 payment also credited against this amount (ie no additional disgorgement)	Compliance remediation commitments, including appointment of independent monitor to review & report on G4S C&J & parent company	No	No

October 2020	Airlines Services Ltd ('ASL')	Three occasions of bribing an agent to secure contracts for ASL from Deutsche Lufthansa AG between 2011 & 2013	Three offences of failing to prevent foreign bribery ( <i>Bribery Act 2010</i> (UK) s 7)	Secured valuable contracts for ASL to refit commercial airlines for Lufthansa & one of its subsidiaries	Self-report to the SFO after an internal investigation commenced in 2015	£990,971.45 disgorgement of profits; £1,238,714.3 payment of financial penalty; £750,000 payment of SFO costs	All material from internal & SFO investigations to be retained in UK for DPA term; ASL to cooperate fully & honestly with foreign enforcement agencies; disclosure of all non-privileged material to SFO; use of best efforts to make officer, directors, employees, agents & consultants of ASL available for interview; prompt reporting of any new evidence to SFO	No	No
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# *Before the High Court*

## Liability for the Publication of Third Party Comments: *Fairfax Media Publications Pty Ltd v Voller*

David Rolph\*

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### *Abstract*

The liability of media outlets for third party comments posted on public Facebook pages raises difficult issues of basic principle for the tort of defamation. The appeal before the High Court of Australia in *Fairfax Media Publications Pty Ltd v Voller* involves a reconsideration of basic principles of publication. The media outlets argue that intention to publish is required to establish the element of publication as part of the cause of action in defamation. This column argues that the better view is that liability for publication is strict. This does not mean, however, that the media outlets are liable for the third party comments posted on their public Facebook pages. This column argues that it is necessary to analyse distinctly what the conduct amounting to communication of the defamatory matter is and the basis upon which the defendant is responsible for that conduct. It argues that the media outlets may not be liable for the third party comments, at least in the absence of actual notice, by virtue of publication by omission, the proper juridical basis of which is the defendant's continuation of a third party's wrong.

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## I Introduction

Almost two decades ago, the High Court of Australia handed down its judgment in *Dow Jones & Co Inc v Gutnick*.<sup>1</sup> *Gutnick* was the first decision of a final appellate court on the issue of jurisdiction over internet defamation cases. The High Court reaffirmed the basic principles of publication in defamation law and confirmed their application to internet technologies. Their Honours refused the invitation to fashion special rules for internet defamation,<sup>2</sup> thereby reaffirming the medium-neutral nature of the principles of publication in defamation law. In the intervening period, internet technologies have proliferated and, increasingly, publications by means of them have been sued upon in defamation cases. The diversity of internet technologies raises difficult issues of publication, with which courts throughout the common law world are grappling. These issues tended not to arise when mass media publications — newspapers, radio, television — were the dominant form of widespread publications. It is important to be clear on what has changed. For mass media publications, the composition and first dissemination of, and profit from, the defamatory matter are ordinarily integrated steps, for which the mass media publisher is responsible. As a consequence, hard questions about publication do not arise routinely. By contrast, internet technologies disaggregate these integrated steps, which complicates issues of publication.<sup>3</sup> The High Court in *Trkulja v Google LLC* suggested that the law relating to publication is ‘tolerably clear’,<sup>4</sup> but that its application to novel technologies may present some difficulties.<sup>5</sup> It may be, however, that because the issue of publication was uncontentious in so many defamation cases for so long, the relevant principles are not as well-understood as they need to be and that defamation cases involving internet intermediaries expose issues of principle relating to the concept of publication that have not needed to be decided before.

The issue of publication arises for consideration in the forthcoming appeal in *Fairfax Media Publications Pty Ltd v Voller*.<sup>6</sup> The case raises the difficult question of whether a media outlet is liable for third party comments posted on its public Facebook page, even in the absence of, and in advance of, actual notice of the presence of those comments. The course of argument has shifted as the proceedings have progressed through the various levels of the judicial hierarchy. On appeal to the High Court, the media outlets seek to argue that they cannot be liable for publication as they did not intend to publish the particular defamatory matter. They submit that intention is required for the element of publication in the tort of defamation. This column argues that the element of publication is a matter of strict liability but that, even if intention to publish were required, that may not necessarily

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<sup>1</sup> *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 (‘*Gutnick*’).

<sup>2</sup> *Ibid* 605 [38]–[39] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 629–35 [123]–[138] (Kirby J) 649–50 [186] (Callinan J).

<sup>3</sup> Kylie Pappalardo and Nicolas Suzor, ‘The Liability of Australian Online Intermediaries’ (2018) 40(4) *Sydney Law Review* 470, 472–3.

<sup>4</sup> *Trkulja v Google LLC* (2018) 263 CLR 149, 163 [39] (*per curiam*) (‘*Trkulja v Google (HCA)*’).

<sup>5</sup> *Ibid* 163–4 [39] (*per curiam*).

<sup>6</sup> *Fairfax Media Publications Pty Ltd v Voller*; *Nationwide News Pty Ltd v Voller*; *Australian News Channel Pty Ltd v Voller* (High Court of Australia, Case Nos S236/2020, S237/2020, S238/2020) (‘*Voller*’).



assist the media outlets in this case to avoid liability. This column suggests that internet technologies, and the difficult issues of publication that they continue to present, necessitate distinct consideration of the conduct alleged to constitute communication of the defamatory matter, on the one hand, and the basis upon which a particular defendant should be held responsible for the communication of that defamatory matter, on the other hand. Viewing the problem in this way, it may be that the media outlets are not publishers of third party comments in the absence of actual notice of those comments, at a minimum.

## II Facts and Procedural History

Dylan Voller came to national prominence in ‘Australia’s Shame’, an episode of the Australian Broadcasting Corporation’s current affairs show, *Four Corners*. The program concerned the mistreatment of children and young people in the Northern Territory’s adult and juvenile detention system. Voller was shown, wearing a spit hood, shackled to a restraining chair, in an adult Alice Springs correctional centre. The public response to the *Four Corners* broadcast led the then Prime Minister, Malcolm Turnbull, to establish a royal commission into the protection and detention of children in the Northern Territory.<sup>7</sup>

Three media outlets posted material to their respective public Facebook pages. The material they posted was not defamatory. However, it was possible for Facebook users to leave comments beneath the posts. Voller alleged that some of those comments were defamatory of him. Without giving prior notice to the media organisations, he commenced defamation proceedings against them in the Supreme Court of New South Wales (‘NSW’). The issue of whether the media organisations were publishers of the third party comments was ordered to be determined as a separate question. At first instance, Rothman J found that they were.<sup>8</sup> The media companies appealed.<sup>9</sup>

In the NSW Court of Appeal, Basten JA dealt with the issue of publication briefly.<sup>10</sup> His Honour applied Ribeiro PJ’s judgment in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*<sup>11</sup> to conclude that the media outlets were publishers. Basten JA stated that: ‘They facilitated the posting of comments on articles published in their newspapers and had sufficient control over the platform to be able to delete postings when they became aware that they were defamatory.’<sup>12</sup>

In their joint judgment, Meagher JA and Simpson AJA noted that defamation is a tort of strict liability.<sup>13</sup> Their Honours observed that the *Defamation Act 2005*

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<sup>7</sup> *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) vols 1–4 <<https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>>.

<sup>8</sup> *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766.

<sup>9</sup> *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700 (‘*Voller (NSWCA)*’).

<sup>10</sup> *Ibid* 712 [45]–[47].

<sup>11</sup> *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 (‘*Oriental Press Group*’).

<sup>12</sup> *Voller (NSWCA)* (n 9) 712 [47].

<sup>13</sup> *Ibid* 720 [88].

(NSW) does not define ‘publication’, so that the common law principles apply.<sup>14</sup> Meagher JA and Simpson AJA identified Isaacs J’s judgment in *Webb v Bloch*<sup>15</sup> as ‘[t]he classic statement in this country of what constitutes publication’.<sup>16</sup> Their Honours identified the particular act of publication for which the media outlets were responsible as the subscription to the public Facebook pages. According to Meagher JA and Simpson AJA this act made the media outlets instrumental and participants in the comments published on those pages.<sup>17</sup> Thus, the NSW Court of Appeal unanimously and readily found that the media outlets were publishers of the third party comments on their public Facebook pages.

Two other related issues dealt with by the NSW Court of Appeal are worth noting. The first was innocent dissemination. Both judgments agreed that the only issue on appeal was publication and the trial judge had erred by holding that the media outlets were primary publishers. Yet there was a difference of opinion as to whether innocent dissemination at common law was properly regarded as a defence or as a plea of ‘no publication’. Basten JA acknowledged that there were conflicting obiter dicta about whether innocent dissemination was a defence or a denial of publication.<sup>18</sup> His Honour found that the prevailing common law position was that of Brennan CJ, Dawson and Toohey JJ in *Thompson v Australian Capital Television Pty Ltd*, which appeared to accept the view that innocent dissemination should be viewed as a defence.<sup>19</sup> This meant that the common law approach was consistent with the statutory defence of innocent dissemination under the national, uniform defamation laws.<sup>20</sup>

The second related issue was the classification of primary and secondary publishers. Basten JA noted that, in light of the High Court’s obiter dicta in *Trkulja v Google LLC*,<sup>21</sup> it was inappropriate to classify the media outlets as either primary or secondary publishers in advance of the media outlets pleading a defence of innocent dissemination.<sup>22</sup> By contrast, Meagher JA and Simpson AJA concluded that the issue remained unresolved at common law.<sup>23</sup> With respect, the position reached by Basten JA is to be preferred. It is consistent with the High Court’s approach in *Trkulja v Google LLC*, which did not strictly distinguish between innocent dissemination based on whether it arose at common law or under statute. There is also, with respect, an internal inconsistency in the reasoning of Meagher JA and Simpson AJA on this issue. Their Honours accepted that the only issue the trial judge should have determined was whether the media outlets were publishers of the third party Facebook comments and that the trial judge erred in holding that the

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<sup>14</sup> Ibid 720 [89]–[90].

<sup>15</sup> *Webb v Bloch* (1928) 41 CLR 331, 363–4.

<sup>16</sup> *Voller (NSWCA)* (n 9) 722 [94].

<sup>17</sup> Ibid 723 [98]–[99].

<sup>18</sup> Ibid 710–11 [38]–[40].

<sup>19</sup> Ibid 710–11 [39] quoting *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 586 (‘*Thompson*’).

<sup>20</sup> See *Civil Law (Wrongs) Act 2002* (ACT) s 139C; *Defamation Act 2005* (NSW) s 32; *Defamation Act 2006* (NT) s 29; *Defamation Act 2005* (Qld) s 32; *Defamation Act 2005* (SA) s 30; *Defamation Act 2005* (Tas) s 32; *Defamation Act 2005* (Vic) s 32; *Defamation Act 2005* (WA) s 32.

<sup>21</sup> *Trkulja v Google (HCA)* (n 4) 164–5 [40]–[41] (*per curiam*).

<sup>22</sup> *Voller (NSWCA)* (n 9) 712–14 [48]–[49].

<sup>23</sup> Ibid 720–21 [90]–[93].

media outlets were primary publishers. Yet if innocent dissemination remains a denial of publication, at least at common law, it was relevant to the resolution of the issue of publication, which was the only subject of the separate question. Equally, the proper classification of the media outlets as either primary or secondary publishers was germane to the issue of publication because, even at common law, only a subordinate distributor could rely upon a plea of innocent dissemination.<sup>24</sup> Indeed, Meagher JA and Simpson AJA appeared implicitly to accept that the media outlets were primary publishers because they were ‘not relying on the “never published” principle as an answer to the separate question, no doubt because they accepted that they are not in the same position as, nor any position analogous to “book sellers, news vendors, messengers, or letter carriers”’.<sup>25</sup> The proper classification of innocent dissemination is not an idle issue of taxonomy, but will determine whether innocent dissemination is relevant to the principles of publication as an element of the plaintiff’s cause of action.

### III The Role of Intention in Publication

On appeal to the High Court, the media outlets seek to rely upon an argument not raised at first instance or on intermediate appeal: that proof of intention is required to establish publication.

#### A Defamation as a Tort of Strict Liability

The tort of defamation is conventionally described as one of strict liability.<sup>26</sup> Indeed, this was how Meagher JA and Simpson AJA described it in the NSW Court of Appeal in *Voller (NSWCA)*.<sup>27</sup> To say that defamation is a tort of strict liability ordinarily means that liability does not depend upon proof of fault; it does not depend upon proof of intention or negligence.<sup>28</sup> Whether this overall characterisation of the tort of defamation is viable is debatable, given that many defences to defamation turn upon malice or reasonableness. Nevertheless, the elements of the plaintiff’s cause of action — defamatory meaning, identification and publication — have been understood to be matters of strict liability. This is demonstrated by Dixon J’s judgment in *Lee v Wilson*.<sup>29</sup> In that case, the issue was

<sup>24</sup> *Vizetelly v Mudie’s Select Library Ltd* [1900] 2 QB 170, 180 (Romer LJ) (‘*Vizetelly*’).

<sup>25</sup> *Voller (NSWCA)* (n 9) 721 [93].

<sup>26</sup> For recent judicial statements to this effect, see, eg, *John Fairfax Publications Pty Ltd v Obeid* (2005) 64 NSWLR 485, 503 [91], 506 [98] (McColl JA; Sheller JA and McClellan A-JA agreeing); *Wookey v Quigley* [2009] WASC 284, [52] (Hasluck J); *Ten Group Pty Ltd v Cornes* (2012) 114 SASR 46, 88 [156], 92 [173] (Blue J); *Opai v Culpán* [2017] NZAR 1142, 1160 [60] (Katz J); *Durie v Gardiner* [2017] 3 NZLR 72, 84 [38] (Mallon J); *Cummings v Fairfax Digital Australia & New Zealand Pty Ltd* (2018) 99 NSWLR 173, 197 [106] (McColl JA); *Bailey v Bottrill (No 2)* (2019) 14 ACTLR 108, 113 [24] (McWilliam AsJ). *Contra Murray v Wishart* [2014] 3 NZLR 722, 751 [45] (‘the well-understood nature of the tort of defamation as an intentional tort’).

<sup>27</sup> *Voller (NSWCA)* (n 9) 720 [88].

<sup>28</sup> *Benning v Wong* (1969) 122 CLR 249, 298–9 (Windeyer J). See also Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 45; Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook, 10<sup>th</sup> ed, 2011) [1.50]; WE Peel and J Goudkamp, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 19<sup>th</sup> ed, 2014) [3-011].

<sup>29</sup> *Lee v Wilson* (1934) 51 CLR 276, 286–95.

whether intention was required to establish the element of identification. It turned upon whether the House of Lords' decision in *E Hulton & Co v Jones*<sup>30</sup> should be followed in Australia. In *Hulton*, Lord Loreburn LC found that, because it was not necessary for a plaintiff to prove intention to defame, it was also not necessary, by consistency of principle, to prove intention to identify the plaintiff.<sup>31</sup> To resolve the issue under Australian law, Dixon J in *Lee v Wilson* returned to basic principle. Like Lord Loreburn LC in *Hulton*, his Honour reasoned that, if intention is not required to establish defamatory meaning or publication, then, by consistency of principle, intention is not required to establish identification. It would be anomalous for one element of the cause of action to require proof of intention when others do not. In relation to the element of publication, Dixon J was explicit that it is a matter of strict liability. His Honour stated:

The cause of action consists in publication of the defamatory matter of and concerning the plaintiff. It might be thought, therefore, that, in any event, this warranted or required some investigation of the actual intention of the publisher. But his liability depends upon mere communication of the defamatory matter to a third person. The communication may be quite unintentional, and the publisher may be unaware of the defamatory matter.<sup>32</sup>

As a matter of principle, it is understandable that defamatory meaning and publication would be dealt with on the same basis, as matters of strict liability, because they are interrelated elements of the cause of action. Defamatory meaning is concerned with whether something disparaging about the plaintiff's reputation has been communicated and publication is concerned with whether it has been communicated.<sup>33</sup>

The High Court of Australia in *Gutnick* endorsed Dixon J's statement of principle from *Lee v Wilson*, affirming that defamation is a tort of strict liability.<sup>34</sup> The element of the cause of action in defamation considered in *Gutnick* was publication.

Judges in other jurisdictions when dealing with difficult issues of whether particular internet intermediaries are publishers for the purposes of defamation law have stated that liability for publication is strict. In *Godfrey v Demon Internet Ltd*, dealing with whether an internet service provider was a publisher of third party content posted and stored on a news server operated and controlled by it,<sup>35</sup> Morland J stated: 'At common law liability for the publication of defamatory material was strict.'<sup>36</sup> In *Oriental Press Group*, dealing with whether the operators of an internet discussion forum were liable for comments posted in it, Ribeiro PJ stated that: 'Until mitigated by the common law defence of innocent dissemination which evolved in the late nineteenth century, liability for publishing a libel was strict and could lead

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<sup>30</sup> *E Hulton & Co v Jones* [1910] AC 20 ('*Hulton*').

<sup>31</sup> *Ibid* 23–4.

<sup>32</sup> *Lee v Wilson* (n 29) 288 (Dixon J).

<sup>33</sup> David Rolph, 'The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc*' (2017) 39(4) *Sydney Law Review* 601, 610–11.

<sup>34</sup> *Gutnick* (n 1) 600 [25] citing *Lee v Wilson* (n 29) 288 (Dixon J).

<sup>35</sup> *Godfrey v Demon Internet Ltd* [2001] QB 201, 204–5.

<sup>36</sup> *Ibid* 207.

to harsh results.<sup>37</sup> It should also be noted that the Law Commission of Ontario, following its wide-ranging four-year review of defamation law, recommended that the concept of a ‘publisher’ should be defined in statute to require an intentional act of communicating a specific expression.<sup>38</sup> The purpose of this recommendation is to clarify and narrow the scope of liability for publication at common law. The fact that a legislative amendment would be required to achieve this result suggests that the common law position does not require proof of an intention to communicate the particular defamatory matter.

The argument that intention is required for publication relies heavily upon the obiter dicta of Isaacs J in *Webb v Bloch*. In his collection of statements of principle from case law and treatises, his Honour stated that:

The meaning of ‘publication’ is well described in *Folkard on Slander and Libel*, 5<sup>th</sup> ed. (1891), at p. 439, in these words: ‘The term *published* is the proper and technical term to be used in the case of libel, *without reference to the precise degree* in which the defendant has been instrument to such publication, *if he has intentionally lent his assistance to its existence for the purpose of being published*, his instrumentality is evidence to show a publication by him.’<sup>39</sup>

It should be noted that the sole reference to intention here occurs with reference to the notion of lending assistance to a publication. The reference to assistance more readily connotes the extension of legal responsibility, a form of accessorial liability, rather than the imposition of liability for the original communication of defamatory matter. Thus, the extent to which intention is required for all forms of liability for publication is questionable. The collation of principle undertaken by Isaacs J in *Webb v Bloch* needs to be considered ‘*secundum subjectam materiam*’ (according to the subject matter).<sup>40</sup> The issue of publication in that case was whether the members of a committee who authorised a solicitor to prepare a circular were publishers of that circular, in circumstances where the solicitor was actuated by malice.<sup>41</sup> Given that the statements of principle in Isaacs J’s judgment are directed to that issue, it is open to doubt whether they should be taken as a comprehensive and definitive distillation of the principles of publication in defamation law. The significance of Isaacs J’s judgment in *Webb v Bloch* on the issue of publication can be overstated if its factual context is forgotten.

## **B     *Innocent Dissemination and Liability for Publication***

The case law dealing with innocent dissemination supports the conclusion that liability for publication is strict. If liability for publication were fault-based, then the doctrine of innocent dissemination would not have needed to have been developed

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<sup>37</sup> *Oriental Press Group* (n 11) 377 [19].

<sup>38</sup> Law Commission of Ontario, *Defamation Law in the Internet Age* (Final Report, March 2020) 80 (Recommendation 35) <<https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf>>.

<sup>39</sup> *Webb v Bloch* (n 15) 363–4 (emphasis in original).

<sup>40</sup> *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 637–8 (Privy Council).

<sup>41</sup> As to the facts of this case, see *Webb v Bloch* (n 15) 335–43 (Starke J).

to overcome its harshness.<sup>42</sup> In *Emmens v Pottle*, Lord Esher MR stated that by handing the newspaper to other people, the news vendor was prima facie liable.<sup>43</sup> In *Vizetelly v Mudie's Select Library Ltd*, AL Smith LJ was more explicit, finding that: 'The defendants having lent and sold copies of the book containing that libel, prima facie they published it. What defence, then, have they? None, unless they can bring themselves within the doctrine of *Emmens v Pottle*.'<sup>44</sup>

Romer LJ adopted a similar position in his judgment in *Vizetelly*, stating that:

The law of libel is in some respects a very hard one. ... For many years it has been well settled law that a man who publishes a libel is liable to an action, although he is really innocent in the matter, and guilty of no negligence. That rule has been so long established as to be incapable of being altered or modified, and the Courts, in endeavouring to mitigate the hardship resulting from it in many cases, have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant.<sup>45</sup>

What his Lordship makes clear is that, at common law, liability for publication is strict; the courts were unable to depart from the established common law position that liability for publication is strict; to overcome the unfairness of that position in particular cases, the court devised innocent dissemination to deem conduct that would, on established principle, amount to publication not to be publication.

It is true that Lord Esher MR in *Emmens v Pottle* rejected classifying innocent dissemination as a form of privilege, instead classifying it as a plea of 'no publication'.<sup>46</sup> The extent to which that should be taken as an expression of high principle is doubtful. Lord Esher MR in *Emmens v Pottle* was overt that he was not concerned with issues of taxonomy and principle. In fashioning the doctrine of innocent dissemination, his Lordship was candid that he was doing so as a matter of policy and pragmatism, to deal with what he perceived as the unfairness of the outcome dictated by a strict application of principle.<sup>47</sup> By the time of *Vizetelly*, AL Smith LJ could refer to innocent dissemination as a defence, without the qualification of quotation marks.<sup>48</sup> In *Vizetelly*, Romer LJ was explicit that innocent dissemination was not grounded in principle, opining that 'the decisions on the subject have not been altogether logical or satisfactory on principle'<sup>49</sup> and, whilst accepting that *Emmens v Pottle* 'worked substantial justice',<sup>50</sup> did not think that the way in which those cases were decided was 'altogether logical or satisfactory on principle'<sup>51</sup> and thought that the judgment did not 'very clearly indicate on which

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<sup>42</sup> For criticisms of the breadth of liability for publication in defamation law, see *Crookes v Newton* [2011] 3 SCR 269, 283 [20] (Abella J), 295–6 [54] (Deschamps J).

<sup>43</sup> *Emmens v Pottle* (1885) 16 QBD 354, 356.

<sup>44</sup> *Vizetelly* (n 24) 175. For an earlier example to similar effect, see *Day v Bream* (1837) 2 M & Rob 54; (1837) 174 ER 212.

<sup>45</sup> *Vizetelly* (n 24) 178–9.

<sup>46</sup> *Emmens v Pottle* (n 43) 357.

<sup>47</sup> *Ibid* 357–8.

<sup>48</sup> *Vizetelly* (n 24) 175.

<sup>49</sup> *Ibid* 179.

<sup>50</sup> *Ibid* 180.

<sup>51</sup> *Ibid* 179.

principle Courts ought to act in dealing with similar cases in the future'.<sup>52</sup> There are similar criticisms of the unprincipled nature of innocent dissemination in the High Court of Australia's judgments in *Thompson*.<sup>53</sup> Brennan CJ, Dawson and Toohey JJ referred to the 'somewhat muddled origins'<sup>54</sup> of innocent dissemination and, in relation to *Vizetelly*, observed that 'the judgments ... hardly offer a satisfactory statement of principle'.<sup>55</sup> Similarly, Gummow J describes innocent dissemination as 'difficult to reconcile with other principles of the tort and rest[ing] upon "expediency"'.<sup>56</sup>

Even if innocent dissemination is deemed to be a plea of 'no publication', it is, in substance, a policy-based exculpation of the defendant for responsibility for the publication — which is to say, it is a defence. It does not assist in determining the principles of publication because it is pragmatic and directed towards avoiding liability for publication, which is *prima facie* imposed.

### C *Accidental or Unintentional Publication*

Cases of accidental or unintentional publication are also unhelpful in establishing that proof of intention to publish is required as a matter of general principle in all cases of defamation. These cases, such as that involving the curious butler<sup>57</sup> or the eavesdropping employee,<sup>58</sup> are highly particular and do not supply a sound principled basis for establishing a general principle within the concept of publication.<sup>59</sup>

### D *Proof of Intention to Publish in Recent Australian Case Law*

Recent judicial attempts to integrate intention into the element of publication in a cause of action for defamation have not been wholly successful. This can be seen in the judgments of the Supreme Court of South Australia in *Duffy v Google Inc*, at first instance and on appeal.<sup>60</sup> These treated only publication as requiring proof of intention, with defamatory meaning and identification treated as matters of strict liability. With respect, these statements of general principle are difficult to follow and seem contrary to principle and authority. In particular, given that they turn upon a putative global distinction between primary and secondary publishers, these statements are inconsistent with the obiter dicta of the High Court in *Trkulja v Google LLC* on this issue.<sup>61</sup>

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<sup>52</sup> Ibid 180.

<sup>53</sup> *Thompson* (n 19).

<sup>54</sup> Ibid 586.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 618.

<sup>57</sup> *Huth v Huth* [1915] 3 KB 32.

<sup>58</sup> *McNichol v Grandy* [1932] 1 DLR 225.

<sup>59</sup> For a further discussion of the impact of cases of accidental or unintentional publication on general principles of publication at common law, see David Rolph, 'The Concept of Publication in Defamation Law' (2021) 27(1) *Torts Law Journal* (forthcoming).

<sup>60</sup> *Duffy v Google Inc* (2015) 125 SASR 437, 472–3 (Blue J); *Google Inc v Duffy* (2017) 129 SASR 304, 332–8; [87]–[114] (Kourakis CJ), 456–63; [563]–[589] (Hinton J).

<sup>61</sup> *Trkulja v Google (HCA)* (n 4) 164–5 [40]–[41].

Even if the element of publication requires proof of intention, a range of questions follow, which do not find a ready answer in the case law on defamation. The concept of intention in tort law, while superficially simple, is by no means free from difficulty.<sup>62</sup> Does it mean merely a voluntary act on the part of the defendant?<sup>63</sup> Is the requisite intention subjective? May the requisite intention be objectively inferred? Is it only the act itself that must be intended or can liability extend to consequences that are substantially certain to result, even if they are not desired?<sup>64</sup> Will recklessness suffice to establish a form of imputed intention?<sup>65</sup> If the element of publication is fault-based, not strict liability, can publication be established upon proof of negligence? Who bears the onus of proof or disproof of fault?

If the element of publication required proof of intention, one might have expected these issues to have been explored in defamation cases more than they have been. In most Australian defamation cases, the issue of intention is rarely discussed in relation to publication, still less recklessness or negligence. This may be contrasted with trespass to the person, where issues of the availability of negligent trespass under Australian law and the onus of proof or disproof of fault have generated a not insubstantial case law.<sup>66</sup> The absence of any detailed or consistent discussion of intention in relation to publication in Australian defamation case law is consistent with the view that publication, like the other elements of the cause of action, is a matter of strict liability, turning upon the fact of the communication of the relevant matter, not whether the communication has been proved to be intentional or otherwise fault-based.

## **E     *Identification of the Relevant Conduct Constituting Communication of the Matter***

Even if the element of publication requires proof of intention, this may not necessarily assist the media outlets' case. If proof of intention to do the act is required, there is a question as to what, in fact, constitutes the relevant act. Whether the defendants intended to publish cannot be determined unless the act of publication that they were alleged to have intended is identified. In *Voller*, there are different ways of characterising the conduct constituting publication. For instance, if the NSW Court of Appeal is correct, and the act of publication is the act of subscribing to the public Facebook pages, then it may be, on one analysis, that the requisite intention is established because the media outlets intended to subscribe to the public Facebook pages, which carried with it the substantially certain consequence that

<sup>62</sup> Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5<sup>th</sup> ed, 2012) [2.3.2].

<sup>63</sup> *Fede v Gray* (2018) 98 NSWLR 1149, 1179–80 [171] (Basten JA).

<sup>64</sup> Sappideen and Vines (n 28) [2.60]; RP Balkin and JLR Davis, *The Law of Torts*, (LexisNexis Butterworths, 5<sup>th</sup> ed, 2013) [3.2]–[3.3].

<sup>65</sup> Sappideen and Vines (n 28) [2.60].

<sup>66</sup> See, eg, *Weaver v Ward* (1616) Hob 134; (1616) 80 ER 284; *Stanley v Powell* [1891] 1 QB 86, 88–94 (Denman J); *Blacker v Waters* (1928) 28 SR(NSW) 406, 410 (Street CJ); *McHale v Watson* (1964) 111 CLR 384, 386–88 (Windeyer J); *Venning v Chin* (1974) 10 SASR 299, 310–16 (Bray CJ); *Platt v Nutt* (1988) 12 NSWLR 231, 235–40 (Kirby P), 243–6 (Clarke JA); *Croucher v Cachia* (2016) 95 NSWLR 117, 122–5 [20]–[34] (Leeming JA); *New South Wales v Ouhammi* (2019) 101 NSWLR 160, 165–8 [14]–[28] (Basten JA), 173–88 [54]–[103] (Brereton JA), 202–3 [180]–[187] (Simpson AJA).



third parties would post comments on the pages. If this characterisation of the relevant act of publication is correct, it has consequences for the liability of other potential publishers, beyond the defendants in *Voller*. The reasoning of the NSW Court of Appeal in *Voller (NSWCA)* could not be confined, as a matter of principle, only to commercial publishers. The principles of publication apply generally — the common law has avoided having specific rules for different types of publishers — and do not depend upon the motive or purpose of the publication. Thus, any intentional subscription to a social media page that permitted third parties to comment would expose the person or entity so subscribing to liability for the publication of third party comments. If correct, the reasoning of the NSW Court of Appeal in *Voller (NSWCA)* would also suggest that Beach J's analysis in *Trkulja v Google LLC (No 5)*<sup>67</sup> of the liability of search engine operators for the publication of search results generated by third party users is to be preferred over McCallum J's analysis of the same issue in *Bleyer v Google Inc.*<sup>68</sup> Beach J reasoned that, because the search engine operator set up and programmed the search engine to operate in the way in which it did, the search engine operator is liable for the publication of search engine results from the point at which they are generated by third party users because the search engine is operating as intended.<sup>69</sup>

On appeal, the media outlets characterise the act of publication as the 'deliberate, purposeful' communication of the particular matter complained of.<sup>70</sup> They argue they could not have had such an intention, given that, at the time the comments were published, they did not know of their existence.<sup>71</sup> Several points may be made about this. The difficulties of defining intention in tort law have already been noted. On this approach to the relevant act of publication, intention is defined in a way that does not seem to find a sound basis in the case law. Similarly, the requirement that there should be an intention to communicate the particular matter complained of is not emphasised in the case law. It finds some support in cases ordinarily characterised as accidental or unintentional publication, but such cases are atypical. Fundamentally, though, the media outlets, through their approach to intention, seek to address the absence of actual notice of the defamatory matter in the attempt to fix them with liability for publication. Whether it is apposite to deal with the absence of actual notice through the issue of intention to publish is questionable.

## IV Publication by Omission

What constitutes the conduct amounting to communication of the relevant matter is contestable. Until that issue is settled, it will be difficult to decide whether the media outlets intended that conduct. There is another way of analysing the facts in *Voller* to reach the conclusion that the media outlets are not publishers of third party comments at least in the absence of actual notice, which does not rely upon

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<sup>67</sup> *Trkulja v Google LLC (No 5)* [2012] VSC 533.

<sup>68</sup> *Bleyer v Google Inc* (2014) 88 NSWLR 670, 685 [83].

<sup>69</sup> *Trkulja v Google LLC (No 5)* (n 67) [18].

<sup>70</sup> Fairfax Media Publications Pty Ltd, Nationwide News Pty Ltd and Australian News Channel Pty Ltd, 'Appellants' Submissions', Submission in *Voller* (n 6), 17 February 2021, [26].

<sup>71</sup> *Ibid.*

introducing intention into the element of publication. Rather than the relevant conduct amounting to publication being the positive act of subscribing to the public Facebook pages, the relevant conduct could be characterised as the failure to deal with third party comments. Viewed in this way, the conduct amounting to publication is not a positive act, but an omission.

Two features of *Voller* have tended to be overlooked or downplayed. First, the issue in *Voller* — as it was, in part, in *Murray v Wishart*<sup>72</sup> — is whether the defendants were liable for third party comments. So to state the issue should raise a concern that, as a general principle, a defendant is not ordinarily liable for the wrongs of a third party. The common law will hold a defendant liable for his or her own wrongs but will ordinarily require an exceptional reason to hold a defendant liable for the wrongs of a third party. This is made clear by Dixon J in *Smith v Leurs*, wherein his Honour stated:

[A]part from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.<sup>73</sup>

Second, and related to this, is the differential treatment of acts and omissions at common law. The common law is comfortable imposing liability on a defendant for his or her own positive acts, but is averse to imposing liability on a defendant for mere omissions.<sup>74</sup> Where a defendant is sought to be held liable for an omission, something more than the defendant's failure to act is required.

The proper characterisation of the defendant's conduct therefore becomes important because different legal consequences will follow, depending upon how the relevant conduct is identified. The suggestion that the media outlets' positive acts of subscribing to public Facebook pages constituted the relevant act of publication and the consequences that flowed from that have already been considered. It may be, however, that the conduct for which the media outlets may be held responsible is the failure to deal with the third party comments. Rather than being positive acts on the part of the media outlets, the conduct amounting to communication for which they should be held responsible is an omission. Given that

<sup>72</sup> *Murray v Wishart* (n 26) 740 [81]–[82] (O'Regan P and Ellen France J).

<sup>73</sup> *Smith v Leurs* (1945) 70 CLR 256, 261–2. For further judicial statements to similar effect, see *Weld-Blundell v Stephens* [1920] AC 956, 986 (Lord Sumner); *McHale v Watson* (n 66) 386–7 (Windeyer J); *Jaensch v Coffey* (1984) 155 CLR 549, 578 (Deane J); *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342, 359–60 (Robert Goff LJ).

<sup>74</sup> See, eg, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1060 (Lord Diplock); *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 271 (Lord Goff); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 477–9 (Brennan J); *Michael v Chief Constable of South Wales* [2015] 1 AC 1732, 1760 (Lord Toulson JSC).

the common law is averse to imposing liability for mere omissions, the question then becomes what are the conditions under which the media outlets may be held liable for their failure to act.

In this regard, the English Court of Appeal's decision in *Byrne v Deane* assumes central importance.<sup>75</sup> In *Byrne v Deane*, both counsel and the Court were astute to the novelty of the issue presented and the need to resolve this by recourse to basic principles of tort law. Both were, in particular, attentive to the distinction between acts and omissions. For instance, at the outset of his judgment, Greene LJ rejected the broad proposition that a person could never be liable as a publisher of defamatory matter due to an omission.<sup>76</sup> His Lordship then proceeded to examine the circumstances in which a person could be held liable for a failure to act with respect to a defamatory matter.

Properly understood, *Byrne v Deane* is concerned with establishing publication by omission. Because a mere failure to act with respect to a third party's communication of defamatory matter cannot make the person so failing to act responsible as a publisher of that matter, the issue becomes under what conditions the person can be rendered liable. To make the Deanes potentially liable for the unknown poster's defamatory doggerel required actual notice of its presence. The Deanes' actual notice of the presence of the defamatory matter on the golf clubhouse walls was transformative of their legal liability. Prior to actual notice of the presence of the defamatory matter, the Deanes could not be held liable for the wrong committed by a third party. It was only after they had actual notice of its presence that it was possible for them to be held liable as publishers of the defamatory matter. Actual notice alone was not sufficient, though. Then, the Deanes also needed to have the power and capacity to remove the defamatory matter, but fail to do so within a reasonable time. The failure to act in that context would render the Deanes liable for the publication of the defamatory matter by a third party. This was because they continued the third party's tort and thereby made it their own.

The continuation of a third party's tort should be regarded as the principled basis for *Byrne v Deane*. This was the basis of tortious responsibility by which the Deanes became responsible for a third party's tort. *Byrne v Deane* is sometimes treated as establishing a special category for landowners or property owners. The line of authority it originates is sometimes styled the 'trespass cases'.<sup>77</sup> This obscures what should be regarded as the proper juridical basis of *Byrne v Deane*. Only Greene LJ referred to the third party's act here as a trespass.<sup>78</sup> The reference to trespass here should not be taken in isolation. His Lordship, on more than one occasion in his judgment, referred to the Deanes as continuing the third party's tort.<sup>79</sup> This provides a principled basis for holding a defendant liable for a third party's tort, consistent with basic principles of tort law. In doing so, it follows the position in

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<sup>75</sup> *Byrne v Deane* [1937] 1 KB 818. See generally Barbara McDonald, 'Byrne v Deane (1937)' in David Rolph (ed), *Landmark Cases in Defamation Law* (Hart Publishing, 2019) 59–80.

<sup>76</sup> *Byrne v Deane* (n 75) 837.

<sup>77</sup> *Google Inc v Duffy* (n 60) 341–3 [124]–[134] (Kourakis CJ), 461 [586] (Hinton J). See also *Stoltenberg v Bolton* (2020) 380 ALR 145, 189–90 [227]–[228] (Gleeson JA) ('property cases').

<sup>78</sup> *Byrne v Deane* (n 75) 837.

<sup>79</sup> See, eg, *ibid* 838.

relation to private nuisance. In private nuisance, the occupier of land can become liable for a nuisance created by a trespasser if the defendant: becomes aware of the nuisance; has the power and capacity to deal with the nuisance; and, within a reasonable period of time, fails to do so. In such circumstances, the defendant, as the occupier of the land, becomes liable for the third party's tort because the defendant continues that wrong.<sup>80</sup>

This analysis can apply equally to internet intermediaries. In his judgment in *Oriental Press Group*, Ribeiro PJ cogently analysed the defence of innocent dissemination and *Byrne v Deane*. His Honour ultimately distinguished *Byrne v Deane* from the case of an operator of an internet discussion forum on the basis that the Deanes were not in the business of soliciting communications, whereas the operator of the internet discussion forum was.<sup>81</sup> With respect, this is not a satisfactory basis upon which to distinguish *Byrne v Deane*. The flaw in the reasoning is that it treats the particular defendant's purpose in participating in the communication as relevant to whether the defendant is responsible for the publication. If the defendant's purpose were relevant to deciding whether the defendant were a publisher, many defamation cases would have been decided differently. Defendants with a non-commercial purpose may have been able to avoid liability. Responsibility for publication turns upon the fact of the defendant's participation in the communication of the defamatory matter, not the defendant's purpose. As such, an analysis based on *Byrne v Deane* should be equally available in cases involving internet intermediaries.

In relation to publication, defamation law has tended to conflate the issues of the conduct constituting communication of the defamatory matter, on the one hand, and the basis of responsibility for that communication, on the other hand. Yet, where responsibility is sought to be imposed on a defendant for a communication originating from another person, the basis of responsibility is a distinct and important issue. Properly understood, the collection of principle by Isaacs J in *Webb v Bloch* is directed not to the issue of what constitutes publication, but the bases upon which a person who does not originate the communication may be held responsible for it. The references to assistance, conducing, concurring, assent, approval, authorisation, encouragement and inducement and accessorial liability<sup>82</sup>

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<sup>80</sup> See, eg, *Saxby v Manchester, Sheffield, and Lincolnshire Railway Co* (1869) LR 4 CP 198; *Barker v Herbert* [1911] 2 KB 633, 636–7 (Vaughan Williams LJ), 642–3 (Fletcher Moulton LJ), 645 (Farwell LJ); *Job Edwards Ltd v Birmingham Navigations Proprietors* [1924] 1 KB 341, 360 (Scrutton LJ); *Noble v Harrison* [1926] 2 KB 332, 338 (Rowlatt J); *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 893–4 (Viscount Maugham), 897, 899 (Lord Atkin), 904–5 (Lord Wright), 912–13 (Lord Romer), 919 (Lord Porter); *Wringe v Cohen* [1940] 1 KB 229, 233; *Cushing v Peter Walker & Son (Warrington & Burton) Ltd* [1941] 2 All ER 693, 702 (Hallett J); *Fennell v Robson Excavations Pty Ltd* [1977] 2 NSWLR 486, 492 (Glass JA), 495 (Samuels JA); *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 69 ALR 258, 261–2 (Privy Council); *City of Richmond v Scantelbury* [1991] 2 VR 38, 40 (Kaye J); *Owners of Strata Plan No 13218 v Woollahra Municipal Council* (2002) 121 LGERA 117, 136 (Young CJ in Eq). As to the definition of 'continuation' and its differentiation from other bases of tortious liability, such as adoption, see *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 894 (Viscount Maugham).

<sup>81</sup> *Oriental Press Group* (n 11) 387.

<sup>82</sup> *Webb v Bloch* (n 15) 362–6 (Isaacs J).

are directed to the bases of extending responsibility to a person for a communication, not a prescription of what constitutes publication.

This conflation of the issues of what constitutes communication of the relevant matter and the basis upon which a given defendant could be held responsible for it may not have been particularly problematic when mass media publications predominated. Where a defendant is being sued for his or her own positive act, there is no real issue as to the conduct amounting to communication of the relevant matter or the basis of the defendant's responsibility for it. However, the disaggregation of the steps involved in the dissemination of defamatory matter brought about internet technologies has meant that these issues arise more regularly. To deal with the difficult issues of publication, now more regularly posed by internet technologies, which flow as a consequence of this disaggregation, it may be prudent also to disaggregate the issues of what constitutes publication and who is responsible for the publication, so as to give distinct, proper and principled consideration to each of these issues.

In *Voller*, a fact that has not been given sufficient emphasis is that the proceedings were commenced without giving notice to the media outlets that there were allegedly defamatory third party comments posted on their public Facebook pages.<sup>83</sup> Such an approach will not be possible once the reforms to the national, uniform defamation laws commence, as defamation proceedings will not be able to be instigated unless a concerns notice has been given to the prospective defendant.<sup>84</sup> If the conduct constituting communication of the defamatory matter is not the positive act of subscribing to the public Facebook page, but the failure to deal with third party comments, then, in the absence of actual notice, the media outlets could not begin to be held liable for the wrongs of a third party. Analysing the facts as a publication by omission suggests that, if the media outlets had actual notice of the third party comments and, having the power and capacity to deal with those third party comments, they failed to do so within a reasonable time, then they could be held liable as publishers of those comments on the basis that they continued the torts of the third parties, thereby making them their own.

## V Conclusion

Internet technologies continue to proliferate and, in doing so, will continue to present difficult issues for defamation law, in particular, but not limited to, the element of publication. The most effective way of dealing with these complex questions is by recourse to basic principle. Internet technologies tend to expose how little consideration needed to be given to the concept of publication when mass media predominated. In such cases, proof of publication was usually uncontentious. Internet technologies compel reconsideration and clarification of basic principles of

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<sup>83</sup> This emerges clearly from the chronology filed in the High Court appeal: Fairfax Media Publications Pty Ltd, Nationwide News Pty Ltd and Australian News Channel Pty Ltd, 'Appellants' Chronology', Submission in *Voller* (n 6), 17 February 2021.

<sup>84</sup> This is the effect of the new s 12B of the Model Defamation Provisions: see Parliamentary Counsel's Committee, *Model Defamation Provisions* (27 July 2020) <[https://www.pcc.gov.au/uniform/2020/Consolidated\\_Model\\_Defamation\\_Provisions.pdf](https://www.pcc.gov.au/uniform/2020/Consolidated_Model_Defamation_Provisions.pdf)>.

defamation law. The best explanation for the absence of detailed and sustained consideration of intention in the context of publication in defamation cases generally is that proof of intention is not required to establish the element of publication. Publication turns upon the fact of the communication of the matter to a person other than the plaintiff, not upon proof of intention to communicate the matter, and, as such, is a matter of strict liability. However, liability for publication can depend not only upon the fact of communication, but also upon notions of responsibility for that communication. By disaggregating the steps involved in the dissemination of defamatory matter, internet technologies expand the number of persons and entities who can be held responsible for publication of that matter. To think clearly about the issue of publication, distinct consideration should be given first to identifying the precise conduct alleged to constitute communication of the defamatory matter and then to articulating the precise basis upon which the particular defendant should be held liable for that communication.

# *Before the High Court*

## The Meaning of Academic Freedom: The Significance of *Ridd v James Cook University*

Adrienne Stone\*

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### *Abstract*

The case of *Ridd v James Cook University* raises important questions as to the content and scope of the principle of academic freedom, and its application to public criticism of academic research and university governance. It presents a rare opportunity for the High Court of Australia to consider the legal content of the principle of academic freedom, and the outcome of the case will likely be very significant for Australian universities. This article provides a principled foundation to suggest that James Cook University's termination of Professor Ridd contravened critical and widely accepted aspects of the principle of academic freedom. It takes issue with the majority decision of the Full Federal Court of Australia under appeal on two bases. First, it suggests that the majority paid insufficient regard to the principle of academic freedom, which should properly have informed the interpretation of the provisions of the relevant university enterprise agreement relating to 'intellectual freedom'. Second, given the requirements of the principle of academic freedom and the principle's centrality to the purposes of a university, the particular provision that protects 'intellectual freedom' should have been understood, in some circumstances, to take priority over the code of conduct that Ridd was found to have breached.

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## I Introduction

For some years, public debate about universities has been at an unusually high pitch.<sup>1</sup> Much of the focus has been on freedom of speech in universities,<sup>2</sup> leading, in 2018, to the Independent Review of Freedom of Speech in the Australian Higher Education Sector, headed by the Hon Robert French AC.<sup>3</sup> Some disputes related to controversial speakers on university campuses and student reactions to them,<sup>4</sup> leading to allegations of a culture of intolerance among students.<sup>5</sup>

One of the most high-profile disputes, however, arose in a somewhat different context. In 2018, James Cook University ('JCU') terminated the employment of Professor Ridd, who had been an employee for 27 years, for 'serious misconduct'.<sup>6</sup> The termination and subsequent legal action arose from Ridd's trenchant public criticism of certain academic colleagues and their research, and so raised questions as to the right of an academic to engage in such public criticism. In other words, it raised questions as to academic freedom — a concept specific to the university context — rather than the more general concept of freedom of speech.

Ridd successfully challenged his termination at first instance in the Federal Circuit Court of Australia.<sup>7</sup> However, the Full Federal Court of Australia, by majority, upheld an appeal by JCU. At both stages, the case turned on the interaction between the JCU Enterprise Agreement ('EA'), cl 14 of which contained a commitment to 'intellectual freedom', and the JCU Code of Conduct, which contained obligations of 'courtesy', 'respect' and upholding the University's reputation. Notwithstanding the guarantee of intellectual freedom in the EA, the University found that Ridd had breached his obligations under the Code of Conduct, setting in train a process that led to his termination.

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<sup>1</sup> But debates of this kind are also very old: see Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press, 2021) ch 1.

<sup>2</sup> Katharine Gelber 'Is There a "Free Speech Crisis" in Australian Universities?', *ABC Religion & Ethics* (Opinion Post, 15 July 2020) <<https://www.abc.net.au/religion/katharine-gelber-free-speech-crisis-in-australian-universities/12459718>>.

<sup>3</sup> Robert S French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (March 2019) ('French Report').

<sup>4</sup> See, eg, Gavin Fernando, 'Riot Squad Called to Sydney University over Protests to Sex Therapist Bettina Arndt', *News.com.au* (Website, 12 September 2018) <<https://www.news.com.au/lifestyle/real-life/news-life/riot-squad-called-to-sydneyuniversity-over-protests-to-sex-therapist-bettina-arndt/news-story/0698b147e38b44f2b13fc3766664385c>>; Chris Smith, 'Psychologist Slams Hypocritical Mob of "Abusive" Protesters for Bullying', *2GB* (online, 24 September 2018) <<https://www.2gb.com/psychologist-slams-hypocritical-mob-of-abusive-protesters-for-bullying/>>.

<sup>5</sup> Evans and Stone (n 1) 111.

<sup>6</sup> *James Cook University v Ridd* (2020) 278 FCR 566 ('Ridd Appeal'). The facts are set out at 569–73 [2]–[22] (Griffiths and SC Derrington JJ).

<sup>7</sup> *Ridd v James Cook University* (2019) 286 IR 389 ('Ridd First Instance'). See also *Ridd v James Cook University* (No 2) [2019] FCCA 2489 (Judge Vasta) on the assessment of compensation and pecuniary penalties.



The case, now on appeal to the High Court of Australia,<sup>8</sup> presents a rare opportunity for consideration of the legal meaning of academic freedom.<sup>9</sup> The High Court's decision may therefore be highly significant for the rights of academics to discuss research and express academic opinions. As I will later discuss, the issues and employment instruments at issue in the *Ridd* case are hardly unique to JCU. Moreover, the case illuminates a long-running public debate about the role of universities in society and the risks posed when academics are censured for discussing research or university governance.<sup>10</sup>

In this column, I take issue with the majority judgment in the Full Federal Court on two bases. First, the majority paid insufficient regard to the concept of academic freedom, which is based on well-understood principles that should properly have informed the interpretation of the JCU EA provisions relating to 'intellectual freedom'. Second, given the requirements of academic freedom and its centrality to the purposes of a university, the EA provision that protects 'intellectual freedom' should have been understood, in some circumstances, to circumscribe the operation of the Code of Conduct.

Leaving aside technical questions as to the construction of the JCU EA and the JCU Code of Conduct, these arguments provide a principled foundation to suggest that Ridd's termination contravened critical and widely accepted principles of academic freedom. Beyond this particular case, it seems that, unless the decision is overturned on appeal, similar university codes of conduct are, or may become, significant threats to academic freedom.

## II Background

JCU's decision to terminate Ridd's employment followed two formal censures of his conduct in 2016 and 2017. These censures arose from findings by the University that Ridd had engaged in misconduct contrary to the JCU Code of Conduct and that this misconduct formed part of a wider pattern of conduct destructive of the University's reputation and of the trust and confidence necessary to the continuation of his employment.

The origins of the dispute lay in an academic disagreement about climate change and its effects on the Great Barrier Reef. Beginning in 2015, Ridd made several public statements to journalists expressing his disagreement with colleagues

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<sup>8</sup> *Ridd v James Cook University* (High Court of Australia, Case No B12/2021) ('*Ridd*'). The High Court of Australia granted special leave to appeal on 11 February 2021: see Transcript of Proceedings, *Ridd v James Cook University* [2021] HCATrans 15 (Gageler, Gordon and Edelman JJ).

<sup>9</sup> There is no Australian case providing a clear statement of the meaning of academic freedom. However, there are cases that have considered the principle or related ideas. This is often for the purpose of determining the status of academics in the context of employment disputes. See, eg, *Burns v Australian National University*, where Ellicott J stated that '[i]t is vital to the fulfilment of the University's functions as an independent educational institution committed to the search for truth that the tenure of its professorial staff be free from arbitrary attack. I can think of no principle more basic to the existence of a university in a free society.': *Burns v Australian National University* (1982) 61 FLR 76, 88.

<sup>10</sup> Evans and Stone (n 1) 111.

at the Australian Research Council Centre of Excellence in Coral Reef Studies ('Centre of Excellence') at JCU and at the Great Barrier Reef Marine Park Authority ('the Authority'), a federal government authority. For instance, in 2015 Ridd emailed a journalist questioning the reliability of reports produced by those bodies. In it, he stated that the bodies should 'check their facts before they spin their story'.<sup>11</sup> He predicted that, if pressed, the bodies would 'wiggle and squirm because they actually know that these pictures are likely to be telling a misleading story — and they will smell a trap'.<sup>12</sup> In 2017, Ridd appeared on a television program on Sky News Australia with well-known conservative commentators Alan Jones and Peta Credlin. In that interview, he suggested that research from the Centre of Excellence and the Authority was flawed and could not be trusted.<sup>13</sup>

As the dispute between Ridd and JCU escalated and disciplinary processes commenced, Ridd was directed to maintain confidentiality in respect of those processes. Such directions are commonly given to the subjects of disciplinary processes.<sup>14</sup> Later, he was also directed not to do anything that 'directly or indirectly trivialises, satirises or parodies the University taking disciplinary action against [him]'.<sup>15</sup> Ridd did not comply with these directions. For example, he published confidential documents relating to the disciplinary process on a website, engaged in further commentary about his colleagues, and set up a *Go Fund Me* campaign to raise funds to assist in his dispute with the University.<sup>16</sup> An article in *The Australian* newspaper detailed the application Ridd had filed in the Federal Circuit Court. Ridd emailed the article to a student at the University with the subject line 'For your amusement'.<sup>17</sup> Following two censures and his non-compliance with the various directions, JCU terminated Ridd's employment. Ridd successfully challenged the termination in the Federal Circuit Court.<sup>18</sup> JCU appealed to the Full Federal Court.

### III The Decision of the Full Federal Court of Australia

The essential question before the Full Federal Court was whether Ridd's conduct was protected by the JCU EA. As a legal matter, the case therefore turned on the relationship between the JCU EA and the JCU Code of Conduct, which are therefore explained in some detail below.

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<sup>11</sup> *Ridd Appeal* (n 6) 570 [4].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* 570 [5].

<sup>14</sup> The legality of the confidentiality provisions is not canvassed in this column.

<sup>15</sup> *Ridd Appeal* (n 6) 572 [13]; *Ridd First Instance* (n 7) 423 [168].

<sup>16</sup> *Ridd Appeal* (n 6) 572 [14].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ridd First Instance* (n 7).

## A *The JCU Enterprise Agreement*

For present purposes, the central clause of the JCU EA<sup>19</sup> is cl 14, entitled ‘Intellectual Freedom’.<sup>20</sup> Clause 14.1 provides that ‘JCU is committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University and in accordance with JCU’s Code of Conduct.’<sup>21</sup> Intellectual freedom is defined in cl 14.2 as including the rights of staff to:

- Pursue critical and open inquiry;
- Participate in public debate and express opinions about issues and ideas related to their respective fields of competence;
- Express opinions about the operations of JCU and higher education policy more generally;
- Be eligible to participate in established decision making structures and processes within JCU, subject to established selection procedures and criteria;
- Participate in professional and representative bodies, including unions and other representative bodies.<sup>22</sup>

Clause 14.3 expressly provides:

All staff have the right to express unpopular or controversial views. However, this comes with a responsibility to respect the rights of others and they do not have the right to harass, vilify, bully or intimidate those who disagree with their views. These rights are linked to the responsibilities of staff to support JCU as a place of independent learning and thought where ideas may be put forward and opinion expressed freely.<sup>23</sup>

As may be seen, cl 14 of the EA makes reference to the Code of Conduct. The provisions of the EA prevail over inconsistent guidelines and policies. Clause 6 of the EA relevantly provides:

- 6.3 If there is any inconsistency between the guidelines and policies and the express terms of this Agreement, this Agreement will apply.<sup>24</sup>

## B *The JCU Code of Conduct*

The Code of Conduct is an instrument approved by the Council of the University pursuant to JCU’s governing legislation.<sup>25</sup> Compliance with the Code is a

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<sup>19</sup> An enterprise agreement is a collective agreement made between employers and employees under (and subject to conditions set down by) the *Fair Work Act 2009* (Cth) and given statutory force by that Act: *Ridd Appeal* (n 6) 576 [42], citing *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152, 179–80 [89]–[90].

<sup>20</sup> *Ridd Appeal* (n 6) 577–8 [46]–[47].

<sup>21</sup> *Ibid* 577–8 [47].

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid* 582–3 [75].

<sup>25</sup> James Cook University (‘JCU’) is established by the *James Cook University Act 1997* (Qld). JCU is therefore a ‘public sector entity’ pursuant to the *Public Sector Ethics Act 1994* (Qld) sch - Dictionary

requirement, imposed by statute, on all JCU staff.<sup>26</sup> The Code of Conduct confers rights and imposes obligations on JCU employees, including, relevantly, to:

- value academic freedom, and enquire, examine, criticise, and challenge in the collegial and academic spirit of the search for knowledge, understanding and truth;
- behave with intellectual honesty;
- have the right to make public comment in a professional, expert or individual capacity, provided that we do not represent our opinions as those of the University unless authorised to do so;
- have the right to freedom of expression, provided that our speech is lawful and respects the rights of others;
- maintain appropriate confidentiality regarding University business;
- behave in a way that upholds the integrity and good reputation of the University;
- take reasonable steps to avoid, or disclose and manage, any conflict of interest (actual, potential or perceived) in the course of employment;
- comply with any lawful and reasonable direction given by someone who has authority to give that direction;
- treat fellow staff members, students and members of the public with honesty, respect and courtesy, and have regard for the dignity and needs of others; and
- refrain from and not accept vilification, bullying, harassment or sexual harassment.<sup>27</sup>

## C *Ridd's Argument*

Both at trial and on appeal to the Full Federal Court, Ridd did not dispute that he had engaged in the conduct that formed the basis for JCU's findings of misconduct and the termination of his employment. Nor did he dispute that some of his conduct amounted, as the University found, to 'misconduct' or 'serious misconduct'.<sup>28</sup> The Full Federal Court was sceptical about these concessions. Describing them as 'inexplicable',<sup>29</sup> the Court was evidently of the view that some of the University's findings about and characterisations of Ridd's conduct were unjustified. Nevertheless, the concessions by Ridd narrowed the issues in dispute.<sup>30</sup>

Ridd's primary argument was that the 'intellectual freedom' guaranteed by cl 14 of the JCU EA meant that he was entitled to express his academic opinions unconstrained by the JCU Code of Conduct. Clause 14 offered him protection provided that, in exercising his intellectual freedom, he did not harass, vilify, bully

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(definition of 'public sector entity') ('PSEA'). Accordingly JCU is subject to the requirement under that Act that it have a code of conduct: *PSEA* ss 10(1). See also *PSEA* ss 13–27.

<sup>26</sup> *PSEA* s 18.

<sup>27</sup> *Ridd Appeal* (n 6) 584–5 [85] quoting parts of Principles 1 to 3 of the Code of Conduct.

<sup>28</sup> *Ridd Appeal* (n 6) 573–4 [23] (Griffiths and SC Derrington JJ); 609 [204] (Rangiah J).

<sup>29</sup> *Ibid* 609 [204] (Rangiah J). See also 573–4 [23] (Griffiths and SC Derrington JJ).

<sup>30</sup> *Ibid* 575 [35] (Griffiths and SC Derrington JJ), 609 [204] (Rangiah J).

or intimidate those who disagreed with his views (which the University conceded his conduct did not do).<sup>31</sup> Accordingly, he argued the University had no basis to discipline him for any of his conduct and had contravened the EA in doing so.<sup>32</sup>

At first instance, the primary judge accepted this argument, finding that the Code of Conduct was subordinate to the intellectual freedom guaranteed by cl 14 of the EA.<sup>33</sup> As the impugned conduct was protected by the primary ‘intellectual freedom’ guarantee, the censures, directions, and termination in respect of that conduct were unlawful.<sup>34</sup>

## D *The Majority Decision in the Full Federal Court*

In the Full Federal Court, Griffith and SC Derrington JJ delivered the majority judgment, rejecting the primary judge’s interpretation and upholding JCU’s appeal.

### 1 *The Meaning of Intellectual Freedom*

An important step in the majority’s argument was to insist on a distinction between the related concepts of ‘intellectual freedom’ (as defined in the JCU EA) and ‘academic freedom’.<sup>35</sup> In determining the meaning of ‘intellectual freedom’, the majority explicitly put to one side any substantive consideration of the principle of ‘academic freedom’.<sup>36</sup> While the majority referred to the ‘ancient’ origins of the principle,<sup>37</sup> its connection to the growth of the secular university and its role in tenure, their Honours concluded that: ‘There is little to be gained in resorting to historical concepts and definitions of academic freedom. Whatever the concept once meant it has evolved to take into account contemporary circumstances which present a challenge to it’.<sup>38</sup>

The reason for this rejection lay partly in change in practices in universities over time. Tenure, once considered a central feature of academic appointments, has been replaced with ‘continuing appointments’.<sup>39</sup> Moreover, practices in universities and the relevant obligations found in university enterprise agreements vary. By way of example, the majority pointed (without identifying it) to the University of Melbourne’s Enterprise Agreement, which incorporates an academic freedom of expression policy expressed in strong terms.<sup>40</sup> Their Honours contrasted that policy

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<sup>31</sup> Ibid 576 [25].

<sup>32</sup> Ibid.

<sup>33</sup> *Ridd First Instance* (n 7) 435–6 [299]–[301].

<sup>34</sup> Ibid 436–7 [303].

<sup>35</sup> *Ridd Appeal* (n 6) 585–6 [90]: ‘It is important ... that the terms “intellectual freedom” and “academic freedom” not be conflated’.

<sup>36</sup> Ibid 587–8 [94]–[97]. In addition (and somewhat puzzlingly) their Honours point to the transformation of communication in the modern digital economy as a reason to put traditional understandings of academic freedom to one side: at 587 [94]–[95].

<sup>37</sup> Ibid 585 [88].

<sup>38</sup> Ibid 587 [94].

<sup>39</sup> Ibid 586 [92].

<sup>40</sup> Ibid 587 [95]. As their Honours summarise it:

That Policy describes a core value of the university being ‘to preserve, defend and promote the traditional principles of academic freedom ... so that all scholars at the University are free to

with a provision of another university's enterprise agreement that is somewhat more qualified.<sup>41</sup> The majority concluded:

These two examples, from amongst the 44 referred to in the French Review... illustrate that *there is no common understanding across the university sector as to the content of any principle of academic freedom or of intellectual freedom, nor any unanimity as to where the bounds of any such freedoms should be set.*<sup>42</sup>

In addition, the majority pointed to 'contemporary circumstances ... including the internet, social media and trolling',<sup>43</sup> which were said to render less relevant 'historical concepts and definitions of academic freedom'.<sup>44</sup> As neither the history of academic freedom, nor the practice in Australia, was sufficiently relevant or uniform to inform the meaning of 'intellectual freedom', the majority then turned to a conventional textual analysis of the JCU EA and the JCU Code of Conduct.

## 2 *The Relationship between the JCU Enterprise Agreement and the JCU Code of Conduct*

A second important step in the Full Federal Court majority's reasoning was its finding that, as a matter of construction, the protection of 'intellectual freedom' in the JCU EA was more limited than the first instance judge had accepted. Their Honours did not accept, as the first instance judge had, that the 'intellectual freedom' guarantee in the EA allowed Ridd to make public comments subject only to those provisions of the Code of Conduct that prohibit harassment, bullying or intimidation.<sup>45</sup>

In reaching this conclusion, their Honours emphasised that cl 14 of the EA contains explicit textual limits exceeding the narrow limitation for which Ridd contended.<sup>46</sup> For example, cls 14.5–14.7 respectively require that staff 'must adhere to the highest standards of propriety and truthfulness in scholarship, research and professional practice'; 'must not represent their opinions as those of JCU'; and,

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engage in critical enquiry, scholarly endeavour and public discourse without fear or favour'. The Policy expressly recognises that scholars are entitled to express their ideas and opinions even when doing so may cause offence. The right to exercise academic freedom of expression is subject to two principles: that all discourse must be undertaken reasonably and in good faith; and all discourse should accord with principles of academic and research ethics.

See University of Melbourne, *Academic Freedom of Expression Policy (MPF1224)* <<https://policy.unimelb.edu.au/MPF1224>>.

<sup>41</sup> That enterprise agreement, which appears to be Murdoch University's 2018 agreement, provides:

Without derogating from or limiting the employment and other legal obligations of Academic Employees, including the obligations to comply with reasonable and lawful directions and requests, the parties to the Agreement are committed to the principles of promoting and protecting academic freedom.

'Those principles are said to include the rights of all Academic Employees to, inter alia, "express unpopular or controversial views, but this does not mean the right to harass, bully, vilify, defame or intimidate": see *Ridd Appeal* (n 6) 587–8 [96]. See also *Murdoch University Enterprise Agreement* [2018] FWCA 4557, cl 14.3.

<sup>42</sup> *Ridd Appeal* (n 6) 588 [97] (emphasis added).

<sup>43</sup> *Ibid* 587 [94].

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid* 582 [72].

<sup>46</sup> *Ibid* 589 [102].

where contributing to public debate as individuals, ‘must not intentionally identify themselves in association with their University appointment’.<sup>47</sup>

Similarly, their Honours did not accept that the Code of Conduct was subordinate to the ‘intellectual freedom’ guarantee in cl 14 of the EA. Rather, the two instruments were to be read harmoniously. Far from subordinating the Code of Conduct, the EA required compliance with it.<sup>48</sup> For instance, cl 14.1 required the University to ‘act in a manner consistent with the protection and promotion of intellectual freedom within the University *and* in accordance with JCU’s Code of Conduct’.<sup>49</sup> Further, cl 13.1 provided that the ‘[p]arties to this agreement support the Code of Conduct’.<sup>50</sup>

For these reasons, their Honours concluded that the Code of Conduct and cl 14 of the EA were consistent and compatible: specifically, cl 14 supplied the content of the ‘intellectual freedom’ guarantee, whereas the Code of Conduct prescribed the *manner* in which that ‘intellectual freedom’ is to be exercised.<sup>51</sup> Absent any conflict between the EA and the Code, the application of the Code to Ridd’s conduct was lawful and in accordance with the University’s obligations under the EA.<sup>52</sup>

## **E     *The Dissent in the Full Federal Court***

Rangiah J dissented, taking a different view of the relationship between the JCU EA and the Code of Conduct. Like the majority, his Honour rejected Ridd’s submission that cl 14 of the EA entitled him to express his academic opinions unconstrained by the Code.<sup>53</sup> Similarly, Rangiah J accepted that cl 14 (and other relevant clauses) ‘are intended to be interpreted and applied in light of the Code of Conduct’.<sup>54</sup>

But, unlike the majority, his Honour recognised that there may be occasions where action taken under the Code of Conduct is inconsistent with cl 14.<sup>55</sup> The two instruments were therefore not, in all cases, consistent and compatible. His Honour emphasised that cl 13 provided that nothing in the Code was ‘to detract from’ cl 14, meaning that the Code ‘is not intended to undermine the scope, operation and effect of cl 14’.<sup>56</sup> Other sub-clauses of cl 14 explicitly recognised the possibility of conflict between the intellectual freedom guarantee and the Code obligations.<sup>57</sup> Thus, there may be circumstances where an academic who exercises the right to intellectual freedom protected by cl 14 simultaneously breaches the standards set out in the Code of Conduct. His Honour illustrated the point as follows:

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<sup>47</sup> Ibid 582 [71].

<sup>48</sup> Ibid 584 [82], 585 [87].

<sup>49</sup> Ibid 584 [81] (emphasis in original).

<sup>50</sup> Ibid 581 [66].

<sup>51</sup> Ibid 589 [103].

<sup>52</sup> Ibid 589 [104].

<sup>53</sup> Ibid 611 [209].

<sup>54</sup> Ibid 618 [250].

<sup>55</sup> Ibid 619 [257].

<sup>56</sup> Ibid 618 [252].

<sup>57</sup> Ibid 619 [257].

[I]t is difficult to see, for example, how an academic could make a genuine allegation that a colleague has engaged in academic fraud without being uncollegial, disrespectful and discourteous and adversely affecting JCU's good reputation.<sup>58</sup>

In such circumstances, Rangiah J considered that the following inquiry must ensue:

First, it must be determined whether the staff member was genuinely engaged in an exercise of intellectual freedom, which will require identification of how that freedom is said to have been exercised. Second, it must be determined whether the staff member may have breached the Code of Conduct, and in what manner. Third, it must be determined whether there is a conflict between the particular exercise of intellectual freedom identified and the particular requirement of the Code of Conduct that is alleged to have been breached, such that prosecuting the disciplinary proceedings will be inconsistent with JCU's obligation to protect and promote intellectual freedom within the University.<sup>59</sup>

If the third stage of the analysis is reached, and inconsistency identified, Rangiah J continued, then the guarantee of the genuine exercise of intellectual freedom prevails to the extent of the inconsistency.<sup>60</sup>

Rangiah J's position, therefore, is a more subtle reading of the relationship between the JCU EA and the JCU Code of Conduct. His Honour rejected both Ridd's submission that the cl 14 guarantee trumps the Code of Conduct; and the majority position that the Code of Conduct supplies content to, and is therefore always fully consistent with, cl 14. Rather than being an all-or-nothing proposition, inconsistency, on his Honour's view, may arise on the facts of a particular case. In such cases, 'where there is conflict between a genuine exercise of intellectual freedom and a requirement of the Code of Conduct, the former prevails to the extent of the inconsistency'.<sup>61</sup>

A final relevant point of contrast with the majority's approach was that Rangiah J's approach was informed by some consideration of the principle of academic freedom. His Honour considered that the principle of 'intellectual freedom' protected by cl 14 was evidently derived from or otherwise related to the principle of academic freedom. The principle of academic freedom, despite variances in definition and application, was not 'devoid of meaning',<sup>62</sup> and necessarily provides 'important contextual background for the construction of cl 14'.<sup>63</sup>

Ultimately, Rangiah J would have remitted the matter to the Federal Circuit Court for a new hearing on the same evidence.<sup>64</sup>

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<sup>58</sup> Ibid 620 [264].

<sup>59</sup> Ibid 621 [266].

<sup>60</sup> Ibid 621 [265].

<sup>61</sup> Ibid 625–6 [289]. See also 620–1 [265]–[266].

<sup>62</sup> Ibid 620 [260].

<sup>63</sup> Ibid 619 [258]. See also 619–21 [259]–[261].

<sup>64</sup> Ibid 626 [294].



## IV Commentary and Critique

There are a number of aspects of this case that seem unsatisfactory. Some lie in the way that the arguments were put for Ridd. As mentioned above in Part III, the Full Federal Court considered Ridd's failure to contest the University's findings that his conduct was in breach of the code 'inexplicable'.<sup>65</sup> Had Ridd done so, the Court may have concluded that some of his conduct amounted to trivial, rather than serious, breaches.<sup>66</sup> Equally, Ridd's submission that he had 'the untrammelled right (provided his conduct did not harass, vilify, bully or intimidate) to express his professional opinions in whatever manner he chose'<sup>67</sup> may have been an unfortunate framing of the issue. The rejection of such an unqualified proposition appears to have opened the way for the equally unqualified conclusion that the JCU Code of Conduct was fully consistent with the JCU EA in all circumstances. The case also points to the difficulty of the use of the term 'intellectual freedom' in the EA, a term apt to confuse, rather than the better understood term 'academic freedom'.

The focus of my comments, however, is on the majority's findings that: academic freedom and intellectual freedom are to be distinguished; and, relatedly, 'academic freedom' has no settled meaning that could have assisted the Court in the interpretation of the phrase 'intellectual freedom' in the EA. In my view, both conclusions are questionable.

Contrary to the majority's view, 'intellectual freedom' and 'academic freedom' should be understood largely to overlap. The concept of academic freedom, moreover, has a long history from which clear principles emerge. This does not mean that the principle and its requirements can be mapped with the precision of a statute. Nor does it mean that the principle is static. However, it means that there were a richer set of resources from which the Court could, but did not, draw. Indeed, given the well-accepted understandings of the principle of academic freedom, university instruments, such as enterprise agreements and codes of conduct, arguably should be *subject to* and *informed by* the requirements of academic freedom, rather than treated as charting the boundaries of those requirements.

In making these points, I note the principles governing the interpretation of enterprise agreements set out by the majority.<sup>68</sup> Rightly, the majority counsels an approach that pays attention to purpose, and also to context including the 'ideas that gave rise to an expression in a document from which it has been taken' and the history of a particular clause.<sup>69</sup> It is to the idea of academic freedom that I now turn.

### A Academic Freedom: Three Core Principles

Academic freedom is a long-established commitment of universities the world over. The roots of the idea of academic freedom lie deep in the Enlightenment and even

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<sup>65</sup> See above n 29 and accompanying text.

<sup>66</sup> *Ridd Appeal* (n 6) 573–4 [23], 602 [169].

<sup>67</sup> *Ibid* 566 [1]. Thanks to Joo-Cheong Tham for this point.

<sup>68</sup> *Ibid* 580–1 [65].

<sup>69</sup> *Ibid* quoting *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511, 518 (Burchett J).

in ancient thought. But as an articulated principle, it is usually traced to the German academic tradition of the late 18<sup>th</sup> century. The German conception depended on an ideal of the university engaged in the search for truth to be realised through freedom of teaching (*lehrfreiheit*) and of learning (*lernfreiheit*).<sup>70</sup>

Academic freedom is also a longstanding tradition within the academic traditions with more direct influence in Australia. At the Universities of Oxford and Cambridge, for instance, academic freedom (although less a fully articulated principle than a deeply held implicit assumption) was realised through a strong tradition of academic self-government.<sup>71</sup> In the United States ('US'), academic freedom principles have long been authoritatively expounded by the American Association of University Professors ('AAUP'), which has issued two highly influential declarations of these principles.<sup>72</sup> These declarations recognise the professional freedom of professors to research and teach and to speak freely, particularly about university affairs. At an international level, academic freedom is directly recognised in, for example, the United Nations Educational, Scientific and Cultural Organisation's 1997 *Recommendation Concerning the Status of Higher-Education Teaching Personnel*.<sup>73</sup>

Taken together, these various traditions of academic freedom provide a remarkably consistent statement of the central principles. The first and foremost principle of academic freedom is the freedom of research and teaching. That much follows from the very purpose of a university. Modern universities are complex institutions that serve many purposes, but the most important and distinctive function of universities is that they contribute to the public good by producing and disseminating knowledge through research and teaching.<sup>74</sup>

The AAUP's 1915 *Declaration*, for instance, identifies 'freedom of inquiry and research' and 'freedom of teaching within the university or college' as central elements of this first principle of academic freedom.<sup>75</sup> Equally, its 1940 *Statement* places these two elements at the centre of the idea of academic freedom, stating:

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<sup>70</sup> Rosalind MO Pritchard, 'Academic Freedom and Autonomy in the United Kingdom and Germany' (1998) 36(2) *Minerva* 101, 105.

<sup>71</sup> *Ibid* 102.

<sup>72</sup> 'Academic Freedom and Tenure: Statements of Principles' (1946) 32(1) *Bulletin of the American Association of University Professors* 149 reproducing the American Association of University Professors' ('AAUP') and the Association of American Colleges' 1940 *Statement of Principles on Academic Freedom and Tenure* ('1940 Statement') and the American Council on Education's 1925 *Conference Statement on Academic Freedom and Tenure*. See also, 'AAUP's 1915 Declaration of Principles', AAUP (Web Page) <[http://www.aaup-ui.org/Documents/Principles/Gen\\_Dec\\_Princ.pdf](http://www.aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf)> ('1915 Declaration').

<sup>73</sup> Paul M Taylor, 'Thinking Allowed in the Academy: International Human Rights Law and the Regulation of Free Speech and Academic Freedom under the "Model Code"' (2020) 39(1) *University of Queensland Law Journal* 117, 119, discussing United Nations Educational, Scientific and Cultural Organization ('UNESCO'), *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, UNESCO General Conference, 29<sup>th</sup> sess (adopted 11 November 1997).

<sup>74</sup> Frank M Turner (ed), *The Idea of a University: John Henry Newman* (Yale University Press, 1<sup>st</sup> ed, 1996) 117; Michael Oakeshott, 'The Idea of a University 1950' in Timothy Fuller (ed), *The Voice of Liberal Learning: Michael Oakeshott on Education* (Yale University Press, 1989) 95.

<sup>75</sup> 1915 *Declaration* (n 72).

- (a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of [their] other academic duties; ...
- (b) The teacher is entitled to freedom in the classroom in discussing [their] subject ...<sup>76</sup>

A second principle necessarily follows. For the same reasons that academics require the freedom to research and teach, universities need appropriate institutional autonomy. Free academic inquiry requires that universities are not beholden to the political agenda of governments or to the interests of wealthy individuals or corporations. Viewed globally, there is some variation in the way in which this institutional autonomy is recognised, but a strong consensus as to the importance of the principle. It is reflected in case law in some countries,<sup>77</sup> and in legislation in others, including the *Higher Education and Research Act 2017* (UK) in the United Kingdom ('UK').<sup>78</sup> It has also been recognised in numerous expert reports including: in Australia, in the *French Report*;<sup>79</sup> in sector-wide statements of academic freedom;<sup>80</sup> and in international recommendations.<sup>81</sup>

It follows from the first two principles that the third core principle is that academics must play a role in the governance of universities. Academic judgment, informed by expertise in research and teaching, is necessary to ensure universities provide conditions in which those activities prosper.<sup>82</sup> Early conceptions of the university took this idea so seriously that, in some places, universities were self-governing institutions. That is, governance was the collective task of academics, rather than a dedicated class of university leaders. This idea was a marked feature of the German institutions of the 19<sup>th</sup> century<sup>83</sup> and the 'Oxbridge' tradition where, in practice, academic freedom was secured through a faculty governance structure and, at least until 1988, a system of academic tenure.<sup>84</sup>

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<sup>76</sup> 1940 *Statement* (n 72) 152.

<sup>77</sup> A classic statement is found in the US case of *Sweezy v New Hampshire*, 354 US 234, 263 (1957) (Frankfurter J).

<sup>78</sup> *Higher Education and Research Act 2017* (UK) s 36; *Education Act 1989* (NZ) ss 160–61.

<sup>79</sup> The Model Code proposed by the *French Report* includes in its definition of 'academic freedom' the 'autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted': *French Report* (n 3) 230–31. See also National Committee of Inquiry into Higher Education (UK), *Higher Education in the Learning Society* (Final Report, 1997) 228 [15.4].

<sup>80</sup> The Association of American Universities, Australian 'Group of Eight' Universities, the League of European Research Universities ('LERU') and the Chinese 'C9' Universities League, 'Hefei Statement on the Ten Characteristics of Contemporary Research Universities' (Joint Statement, LERU, 10 October 2013) <<https://www.leru.org/files/Hefei-Statement-Full-paper.pdf>>; Universities Canada, 'Statement on Academic Freedom', (Media Release, 25 October 2011) <<https://www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/>>.

<sup>81</sup> UNESCO, *Recommendation Concerning the Status of Higher-Education Teaching Personnel* (n 73) para 22.

<sup>82</sup> Matthew W Finkin and Robert C Post, *For the Common Good: Principles of American Academic Freedom* (Yale University Press, 2009) ch 5.

<sup>83</sup> *Ibid* 23.

<sup>84</sup> On the changed landscape for academic freedom in the UK since 1988, see Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart Publishing, 2010) ch 4.

The practice of collective academic governance has not been realised in Australia.<sup>85</sup> But in its place is a principle that protects the freedom to criticise university governance. This principle, known in the US (where academic self-governance is also less common) as the freedom of ‘intra-mural’ criticism, preserves the crucial role of academic expertise with respect to research and teaching. It is a position that lies between the ideal of full academic self-governance and the dangerous position where university governance is detached from academic judgment and scholarly values.<sup>86</sup>

## **B Principles of Academic Freedom in Practice**

Principles of academic freedom leave some room for variation in their realisation. Just as forms of self-government differ, so do mechanisms for ensuring the independence of individual academics. In some university systems — notably the US and Germany — strong academic tenure rights guard against arbitrary interference with the academic freedom of individual researchers. In other systems, such as Australia and the UK, academic job security is no longer subject to special rules, and is governed by general employment law. The level of academic job security is therefore dependent on the complex interplay of this law and university governance.<sup>87</sup> There are important differences, as well, between public and private universities. It is to be expected that public universities, by virtue of the fact that they are funded by the public, may be subject to forms of control that are not appropriate for private institutions.<sup>88</sup>

But these variations in how the principles are implemented should not be mistaken for evidence that the principles have been abandoned or are meaningless. In the Australian context, they are reaffirmed in many ways. For instance, although Australian universities are creatures of statute governed by an appointed body under legislation, the statutes establishing universities typically recognise and protect academic freedom values. For instance, s 5 of the *James Cook University Act 1997* (Qld) defines the University’s functions as including:

- (a) to provide education at university standard; and
- (b) to provide facilities for study and research generally and, in particular, in subjects of special importance to the people of the tropics; and
- (c) to encourage study and research generally and, in particular, in subjects of special importance to the people of the tropics; and
- (d) to provide courses of study or instruction (at the levels of achievement the council considers appropriate) to meet the needs of the community; and
- (e) to confer higher education awards; and
- (ea) to disseminate knowledge and promote scholarship.

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<sup>85</sup> Glyn Davis, *The Australian Idea of a University* (Melbourne University Press, 2017) 34–42.

<sup>86</sup> *Ibid.*

<sup>87</sup> On tenure in UK universities, see Barendt (n 84). See also Michael Otsuka, ‘Is There Academic Tenure in the UK’, *Medium* (Blog Post, 5 August 2019) <<https://mikeotsuka.medium.com/is-there-academic-tenure-in-the-uk-93aecc388616>>.

<sup>88</sup> Barendt (n 84) 30–1.

It is not surprising that these principles — freedom of research and teaching, and institutional autonomy — were also recognised by the *French Report* as principles that govern Australian institutions.<sup>89</sup> Exactly how these values might inform the employment relationship between Ridd and JCU is another question. But it is not an entirely separate question: there is no reason to exclude consideration of the principles of academic freedom on the grounds that those principles are so outdated or so varied as to be meaningless. They are not.

### C *Intellectual Freedom and Academic Freedom*

This analysis brings into question the distinction between academic freedom and intellectual freedom drawn by the majority of the Full Federal Court. Given the centrality of the principle of academic freedom to the very concept of a university and the principle's long history — both of which are acknowledged by the joint reasons — it is most improbable that a university enterprise agreement would have been intended to limit academic freedom by guaranteeing only some elements of it.

The terms of the JCU EA do not indicate an intention to distinguish between academic freedom and intellectual freedom. The EA's definition of 'intellectual freedom', set out in Part III(A) above, includes five rights.<sup>90</sup> The first three rights are recognisable elements of the principle of academic freedom discussed above. The next two rights (eligibility to participate in decision making; and participation in representative bodies) are particular instances of the right of academic self-government.

To the extent that the rights of 'intellectual freedom' defined in the EA differ from academic freedom per se, it is not a difference in the content of the rights, but of their subjects: the rights of 'intellectual freedom' are conferred on all 'staff', including non-academic staff.<sup>91</sup> Rather than reflecting a different or narrower idea than 'academic freedom', 'intellectual freedom' is better understood as a more *expansive* idea that applies more widely, and includes academic freedom and also some additional rights, such as general employment rights to participate in professional organisations and collective bargaining.

### D *Academic Freedom and the JCU Code of Conduct*

With this understanding of 'intellectual freedom', how should the relationship between the 'intellectual freedom' guaranteed in the JCU EA and the obligations in the JCU Code of Conduct be understood? The position of the Full Federal Court majority judgment is that the recognition of the Code of Conduct in the EA indicates that the two are to be read consistently; specifically, with the Code of Conduct understood as narrowing the content of intellectual freedom. If 'intellectual

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<sup>89</sup> *French Report* (n 3) 119.

<sup>90</sup> See above n 22 and accompanying text.

<sup>91</sup> See above nn 22–3 and accompanying text. Academic freedom is ordinarily conceived as a freedom principally of academics. Though, as a matter of first principle, there is a strong argument that it should be understood as attaching to the activities of teaching, research and public commentary rather than to particular individuals: see Evans and Stone (n 1) 89–90.

freedom' were a term of entirely uncertain meaning, that interpretation may have been more open. But if intellectual freedom incorporates and expands on the centrally important principles of academic freedom, the protection of intellectual freedom may be better understood as the primary commitment that constrains the interpretation of the Code.

As Rangiah J shows in his dissent, moreover, there is textual support for this interpretation. Clause 13.3 of the EA records that the Code of Conduct is not intended to 'detract from' cl 14. As Rangiah J explains:

[T]he use of the phrase 'detract from' means that the Code of Conduct is not intended to undermine the scope, operation and effect of cl 14. It suggests, to the contrary, that cl 14 is intended to undermine the Code of Conduct.<sup>92</sup>

...

In my opinion JCU's commitment must be to *enforce* the Code of Conduct while at the same time complying with its conjunctive commitment to act to protect and promote intellectual freedom within JCU.<sup>93</sup>

The advantage of this interpretation, in addition to consistency with the text of the instruments, is that it gives priority to the core purposes of a university — purposes reflected in JCU's own enabling legislation.<sup>94</sup> The interpretation is therefore both faithful to the legal scheme established by the instruments considered here and also operates to protect the enormous public benefit that universities produce through teaching and research.

## E *University Codes of Conduct*

The consequences of the Full Federal Court majority's interpretation for academic freedom more generally are potentially significant. The obligations contained in the JCU Code of Conduct that Ridd was found to have breached are not unusual. While they appear unexceptional at first glance, requirements that staff treat others with 'respect and courtesy'<sup>95</sup> and that they 'behave in a way that upholds the integrity and good reputation of the University'<sup>96</sup> may pose a real threat to academic freedom.

Part of the problem is recognised explicitly by Rangiah J: some actions that are important expressions of academic freedom are necessarily discourteous and may harm reputations.<sup>97</sup> The same could be said of instances in which academics, acting within their rights to academic freedom, criticise university governance or point to deficiencies in the maintenance of academic standards in admissions, appointments, promotions or other activities.

A second dimension of the problem was recognised in the *French Report*:

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<sup>92</sup> *Ridd Appeal* (n 6) 618 [252].

<sup>93</sup> *Ibid* 618–19 [254] (emphasis in original).

<sup>94</sup> *James Cook University Act 1997* (Qld) (n 25) s 5.

<sup>95</sup> See above n 27 and accompanying text.

<sup>96</sup> *Ibid*.

<sup>97</sup> See above n 58 and accompanying text.

The freedom of expression which is an aspect of academic freedom should not be restricted by broadly drawn staff conduct policies such as those which would sanction expressions of opinion or comment said to create a risk of harm to the university's 'reputation' or 'prestige'. The creation of any such rule or policy goes hand-in-hand with the creation of a power on the part of some decision-maker or decision-makers to enforce it — the more broadly drawn the policy, the greater the power.<sup>98</sup>

Thus, the distinction the majority draws between the manner of the exercise of intellectual freedom (governed by the JCU Code of Conduct) and its content (governed by the JCU EA) is not stable. The regulation of 'manner' can easily slip into the regulation of 'content' and in doing so undermine academic freedom.

These dangers would be greatly reduced by a provision in a university enterprise agreement that requires respect for academic freedom and is explicit that academic freedom values cannot be unduly restricted by codes of conduct (or other university policies). More generally, the case sounds a warning that enterprise agreements, codes of conduct and other relevant instruments must be explicit in the protection of academic freedom, as opposed to some cognate phrase such as 'intellectual freedom', to prevent courts sidestepping, as in this case, the academic freedom principles at stake.

## V Conclusion

Ridd's conduct involved the exercise of two important elements of academic freedom: the expression of his opinion on scientific matters and criticism of university governance. Of course, academic freedom is not an absolute or untrammelled right. Moreover, though clear in its outline, there is room for disagreement as to precisely where the limits ought properly to lie. However, as a matter of principle, limits on academic freedom should be rare and carefully confined. The priority given to intellectual freedom in the JCU EA, properly understood, recognises that position.

With those values in mind, the burden on JCU of justifying the application of its Code of Conduct to censure, constrain and terminate an academic because of a dispute about research ought to have been very significant indeed. The manner of Ridd's criticism of colleagues may have been unconventional, unpleasant and personal. But the dispute was a dispute between scientists about research. Given the importance of academic freedom, there should be some serious and clearly identifiable cost justifying restricting that freedom beyond inconvenience, irritation and angry disputation among colleagues. Even the possibility that his conduct might damage the University's relationship with the Authority was an insufficient justification: if institutional autonomy is to be maintained, university partners also need to understand the norms of academic discourse.

Further, the way confidentiality directions were relied upon to escalate this dispute is of concern. If a university action against a researcher is contrary to

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<sup>98</sup> *French Report* (n 3) 214–15.

academic freedom, then academic freedom itself requires that researchers are free to point this out.

As mentioned, Rangiah J would have remitted the matter for further hearing according to the construction of the EA that his Honour adopted. The benefit of this course of action, and, more generally, the approach adopted by Rangiah J and argued for in this article, is that it better brings to the fore what is really at stake in the interaction between the interlocking employment instruments: the capacity of universities to freely pursue and disseminate knowledge. With those values in mind, the burden of justifying termination of an academic because of a dispute about research should be very heavy indeed.