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Sydney Law Review

Law Publishing Unit

Sydney Law School

Building F10, Eastern Avenue

UNIVERSITY OF SYDNEY NSW 2006

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A Well-Founded Fear of Being Persecuted ... But When?

Adrienne Anderson,* Michelle Foster,† H       Lambert‡ and Jane McAdam  

Abstract

It is well established that the ‘well-founded fear’ test in refugee law requires a prospective assessment of potential future harm. Yet, the requisite timeframe for this test is rarely examined. Analysis of jurisprudence across a wide range of jurisdictions reveals that Australian courts have been unusually cognisant of the question of timing of harm. Indeed, they have been particularly insistent that a flexible and longer-range assessment is appropriate, encapsulated by the ‘reasonably foreseeable future’ test. This article provides an in-depth analysis of the principles set out by Australian courts and tribunals, and identifies particularly challenging contexts in which timing has played an important role. It also assesses the extent to which decision-makers at the tribunal level adhere to the flexible approach formulated by the judiciary. It is hoped that our analysis of Australian jurisprudence may prove helpful in other jurisdictions in which the issue of timing of harm is equally pertinent, but far less developed.

* Research Associate, Andrew & Renata Kaldor Centre for International Refugee Law, Faculty of Law, UNSW Sydney, New South Wales, Australia; PhD candidate, Melbourne Law School, The University of Melbourne, Victoria, Australia. Email: adriennea@student.unimelb.edu.au.

† Professor and Director, Peter McMullin Centre on Statelessness, Melbourne Law School, The University of Melbourne, Victoria, Australia. Email: m.foster@unimelb.edu.au; ORCID iD: 0000-0002-4381-9484.

‡ Professor of Law, University of Technology Sydney, New South Wales, Australia. Email: helene.lambert@uts.edu.au; ORCID iD: 0000-0003-1456-6219.

   Scientia Professor and Director, Andrew & Renata Kaldor Centre for International Refugee Law, Faculty of Law, UNSW Sydney, New South Wales, Australia. Email: j.mcadam@unsw.edu.au; ORCID iD: 0000-0002-3999-7843.

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I Introduction

The question whether an individual qualifies for refugee status turns on an assessment of his or her risk of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group. Assessing such risk is undertaken by reference to the ‘well-founded fear’ test contained in art 1A(2) of the *Refugee Convention*, which defines the term ‘refugee’.¹ Given the broad and largely undefined terms in the definition, refugee status determination can be a highly contested undertaking, with credibility often at the core of decision-making.² The absence of consistent ‘country of origin’ information and traditional evidentiary sources (especially witnesses), in conjunction with the forward-looking, speculative assessment of risk, means that refugee status determination constitutes a uniquely demanding fact-finding task.³ In this light, it is hardly surprising that the meaning of ‘well-founded fear of being persecuted’ has been extensively examined by courts and scholars alike. Around the world, courts have emphasised that the *Refugee Convention* ‘looks to the future’,⁴ and that ‘a well-founded fear of future persecution is the touchstone of asylum’.⁵ Likewise, scholars agree that the test requires a forward-looking assessment of risk:⁶ it ‘is essentially an essay in hypothesis.’⁷ Yet, while it is acknowledged that ‘time is

¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) read in conjunction with the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (together ‘*Refugee Convention*’). Article 1A(2) of the *Refugee Convention* defines a refugee as a person who,

owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

² Hilary Evans Cameron, *Refugee Law’s Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge University Press, 2018) 33.

³ *Ibid* 35–8.

⁴ *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1, 27 [74] (McHugh J) (‘*S152/2003*’).

⁵ *Camara v Attorney General (US)*, 580 F 3d 196, 202 (3rd Cir, 2009).

⁶ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 56: ‘the decision-maker must then make a reasoned guess as to the future’; James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 110: ‘the risk-oriented understanding of “fear” as forward-looking apprehension, and as mandating only a prospective appraisal of an applicant’s actual risk, is very much in accord with the underlying goals of the treaty’; Cornelis Wolfram Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia, 2009) 83: ‘The element of risk stipulated by the words “well-founded fear” is the backbone of the refugee definition It implies that there needs to be a present or prospective risk of persecution which can objectively be established’; Andreas Zimmermann and Claudia Mahler, ‘Article 1 A, Para 2 1951 Convention’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 281, 338: ‘The object and purpose of the 1951 Convention thus supports an interpretation of the notion of “well-founded fear” as forward-looking expectation of risk’.

⁷ Goodwin-Gill and McAdam (n 6) 54.

everywhere' in refugee law,⁸ there is very little consideration in either the jurisprudence or the scholarship as to how far into the future the risk of persecution may extend for refugee protection to be forthcoming. On the one hand, it is impossible to develop any precise timeframe, since all refugee claims are necessarily contextual, with various factors weighted differently depending on the individual circumstances of the case. On the other hand, given how meticulously the concept of well-founded fear has been analysed, it is surprising that such limited attention has been paid to this question.⁹

While caution ought to be exercised in circumscribing too closely an open-ended phrase such as 'well-founded fear', the lack of guidance on the question of timing has allowed a notion of imminence — or immediacy of risk — to infiltrate refugee status determination silently across a wide range of jurisdictions. In some cases, this has resulted in the denial of protection where harm is not deemed sufficiently imminent to warrant protection under international human rights law.¹⁰ In other cases, denial of protection is the result of a (mis)application of the *Refugee Convention*.¹¹ Hence the concern to examine the question of timing of harm is not a mere academic exercise.

Moreover, there are certain 'types' of contemporary protection cases in which the nearness in time of harm seems to play a critical role — such as those relating to the (future) impacts of climate change and to deterioration of health over time. Although the feared harm is not felt acutely now, it may have deleterious consequences in the future. In New Zealand ('NZ'), for instance, a series of cases has begun to delineate the scope of refugee and human rights law to protect Pacific Islanders at risk of the negative impacts of climate change, disasters and environmental degradation.¹² These kinds of cases inevitably require analysis

⁸ Bruce Burson, 'The Concept of Time and the Assessment of Risk in Refugee Status Determination' (Conference Paper, Kaldor Centre Annual Conference, 18 November 2016) 1 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/B_Burson_2016_Kaldor_Centre_Annual_Conference.pdf>. See also at 2, 4.

⁹ For the purposes of this article, the focus is refugee law. However, given the alignment of tests in the Australian context, the same analysis would apply to complementary protection cases.

¹⁰ See Adrienne Anderson et al, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68(1) *International Comparative Law Quarterly* 111. That article offers the first analysis of the notion of imminence in the jurisprudence on international protection from four supranational courts and international oversight bodies, namely, the United Nations ('UN') Human Rights Committee, the UN Committee against Torture, the European Court of Human Rights and the Court of Justice of the European Union. It argues that although the number of cases that have engaged explicitly with the notion remains quite small, 'it is nonetheless significant that it has been invoked *at all*, given that it does not appear to have a solid foundation in traditional principles of risk assessment in the law on international protection': Anderson et al at 124 (emphasis in original). It concludes with the urgent need for a greater understanding of the role of time in this area of law.

¹¹ In its full scope, our research project also considers jurisprudence from refugee status decision-making in Australia, Canada, France, Germany, New Zealand ('NZ'), the United Kingdom ('UK') and the United States ('US'). While important nuances exist between these jurisdictions, our general findings indicate imminent-like notions are used in the application of the well-founded fear test to varying degrees. The focus of this article, however, is the unusually sophisticated analysis of timing of harm in Australian case law compared to other jurisdictions.

¹² *AC (*Tuvalu*) [2014] NZIPT 800517; AF (*Kiribati*) [2013] NZIPT 800413; AF (*Tuvalu*) [2015] NZIPT 800859; *BG (*Fiji*) [2012] NZIPT 800091; *Teitiota v Chief Executive of the Ministry of*

of how far forward in time the assessment of risk may extend. Of course, in relation to climate-related displacement, it is important to acknowledge that refugee law will not be a good fit in most cases. The impacts of climate change and/or disasters generally will not satisfy the meaning of ‘persecution’ because of the need for human agency, and even if such harm could be characterised as persecution, a further challenge would be linking the persecution to one of the five *Refugee Convention* grounds. However, human rights-based protections from refoulement may apply, which prevent states from sending people to places where they face a real risk of being arbitrarily deprived of life, or subjected to cruel, inhuman, or degrading treatment. Since jurisprudence in this area often draws on refugee law principles by analogy, the capacity of refugee law to protect people from future risks may be highly relevant. Indeed, in the NZ cases, the notion of ‘imminence’ was explicitly invoked,¹³ with the decision-maker observing that ‘[i]mminence should not be understood as imposing a test which requires the risk to life be something which is ... likely to occur’.¹⁴ Rather, it is comparable to the well-founded fear test in refugee law, requiring ‘no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger’.¹⁵ That is why it is crucial to understand what the well-founded fear test entails.

Australian decision-makers have grappled with the idea of future risk in a relatively sophisticated and nuanced way, compared to other jurisdictions.¹⁶ Indeed, our analysis of decisions across a wide range of jurisdictions revealed a comparatively large number of Australian cases over the past 20 years — at both the Tribunal and court levels¹⁷ — in which the timing of harm was considered in some depth.¹⁸ The clear principle that emerges in Australian jurisprudence is that

Business, Innovation and Employment [2014] NZAR 162; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZAR 688; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107. Note that an asterisked (*) NZ case means that it is a precedent. Australian and NZ authorities have considered cases on this issue at least as far back as 1995, as discussed in Jane McAdam, ‘The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement’ (2015) 3(1) *Migration Studies* 131. The UN Human Rights Committee followed the reasoning of the NZ tribunal and courts in *Teitiota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 October 2019).

¹³ *EW v Netherlands*, UN Doc CCPR/C/47/D/429/1990 (8 April 1993); *Aalbersberg v Netherlands*, UN Doc CCPR/C/87/D/1440/2005 (12 July 2006).

¹⁴ *AF (Kiribati)* (n 12) [90].

¹⁵ *Ibid.* See also *AC (Tuvalu)* (n 12) [57]. This was notwithstanding the Tribunal member’s recognition, in subsequent remarks given in a personal capacity, that in other areas of international law, such as self-defence, ‘imminence’ seems to envisage a very immediate timeframe for harm to materialise, and certainly more immediate than the real chance standard in refugee law: *Burson* (n 8) 7.

¹⁶ This is the case in particular when compared with the jurisdictions mentioned above (nn 10–11).

¹⁷ In this article, ‘Tribunal’ is used to describe decisions by both the Administrative Appeals Tribunal (Migration and Refugee Division) and its predecessor, the Refugee Review Tribunal.

¹⁸ We identified 473 relevant Australian cases between 1996 and 2019 at either tribunal or court level as part of our broader ARC-funded imminence project. Approximately half of these cases concerned the question of timing of harm and were identified as relevant to this article because: (1) ‘imminence’ was used explicitly in the case (by the applicant or the decision-maker); (2) ‘imminence’ was used implicitly (through the use of synonyms such as ‘today’, ‘present’, ‘immediate’, ‘short-term’, ‘near future’) in framing the timing of harm; or (3) timing of harm was otherwise very relevant to the outcome of the claim as evidenced by the facts of the case and/or because the decision-maker considered whether the harm would occur in the ‘reasonably foreseeable future’. We footnoted only those that identified key principles, implemented those

when examining whether a person has a ‘well-founded fear of being persecuted’, and thus requires international protection, the relevant timeframe for assessing risk is not the immediate future, but rather the ‘reasonably foreseeable future’.¹⁹ By contrast, our analysis of the implementation of the law of international protection in a range of international and regional jurisdictions has identified that the notion of ‘imminence’ — in the sense of immediacy of harm — has begun to infiltrate decision-making, sometimes explicitly, but, much more commonly, implicitly.²⁰ Our concern is that because the role and significance of time is rarely explicitly acknowledged or assessed in other jurisdictions, including in comparative domestic jurisdictions,²¹ there is potential for an ‘imminence test’ to slip into refugee status determination without critical reflection or examination.²² In this context, a critical appraisal of one of the few jurisdictions to have examined the issue of timing of harm explicitly, namely, Australia, is instructive and timely, given that cases involving a risk of harm that may take longer to materialise are increasingly likely to arise in assessing international protection obligations.

There is no international tribunal or committee vested with jurisdiction to hear individual complaints or otherwise authoritatively dictate a common interpretation of the *Refugee Convention*, meaning that refugee law has evolved mostly through the interpretation of national courts and tribunals.²³ As such, the

principles, or, on the contrary, where a rejection was based at least in part on the absence of a foreseeable risk, and risk of harm in the future was not (adequately) considered.

¹⁹ See, eg, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 279 (Brennan CJ, Toohey, McHugh and Gummow JJ) (*‘Wu Shan Liang’*); *SZQXE v Minister for Immigration and Citizenship* (2012) 134 ALD 495; *MZACU v Minister for Immigration and Border Protection* [2015] FCCA 486; *AON15 v Minister for Immigration and Border Protection* (2019) 269 FCR 184; *CSO15 v Minister for Immigration and Border Protection* (2018) 260 FCR 134; *DUX16 v Minister for Immigration and Border Protection* [2018] FCA 1529 (*‘DUX16’*); *DPM16 v Minister for Immigration and Border Protection* [2018] FCA 249 (*‘DPM16’*); *ALV16 v Minister for Immigration and Border Protection* [2018] FCCA 626; *CPF15 v Minister for Immigration and Border Protection (No 4)* [2018] FCCA 1169; *EBZ17 v Minister for Immigration and Border Protection* [2019] FCCA 79.

²⁰ Anderson et al (n 10) 139.

²¹ Our research reveals that the concept of imminence, in the sense of timing of future harm, has been invoked explicitly or implicitly in comparator jurisdictions, but with little or no analysis of the appropriateness or relevance of this factor. For example, in NZ decision-makers tend not to discuss future timeframes explicitly and, in many cases, the reasoning appears to indicate quite a circumscribed period of time as being the only period for assessing well-founded fear: *BA (Afghanistan)* [2017] NZIPT 801138; *AH (Hungary)* [2018] NZIPT 801172; *DT (India)* [2017] NZIPT 801159. In Canada, claims brought on the basis of a risk of female genital mutilation on return have sometimes been rejected because the harm was not assessed as likely to occur immediately on return: see, eg, *Re X (Re)* (Immigration and Refugee Board of Canada, Refugee Protection Division, RPD File Nos TA6-04120 TA6-11916, Daniel G McSweeney, 1 August 2007) [2007] CanLII 80670; *Re X* (Immigration and Refugee Board of Canada, Refugee Appeal Division, RAD File Nos TB7-11035 TB7-11036 TB7-11037 TB7-11038, Christine Houde, 2 January 2019) [2018] CanLII 64862. In the US, the language of imminent risk has been invoked to reject claims, see, eg, *Hernandez-Jimenez v Sessions*, 710 Fed Appx 257, 7 (7th Cir, 2018); *Mejia-Ramos v Barr*, 934 F 3d 789 (8th Cir, 2019). In the UK, these issues have arisen particularly in the context of health deterioration: Anderson et al (n 10) 131–2.

²² Anderson et al (n 10) 140.

²³ Hélène Lambert, ‘Transnational Law, Judges and Refugees in the European Union’ in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 1, 4.

Australian approach to these issues offers particular insights that may have broader relevance.²⁴

Part II of this article explores briefly the concept of well-founded fear and its relevance to the timing of harm. Next Part III examines the Australian doctrinal position on the question of timing in more detail. Part IV identifies particular circumstances in which imminence is still implicitly or explicitly invoked by Australian decision-makers, especially at the tribunal level, despite superior rulings that this is not the correct approach. Finally, Part V analyses the ‘reasonably foreseeable future’ standard in Australian law, drawing out relevant principles and guidance that may assist in future refugee status adjudication. It should be noted at the outset that while ‘time’ is central to many aspects of refugee protection,²⁵ this article focuses specifically on the relevance and significance of the timing of future harm in determining whether a person is assessed as having a well-founded fear of being persecuted.

II The ‘Well-Founded Fear’ (or ‘Real Chance’) Test

It is clear that the well-founded fear test in refugee law requires a prospective, forward-looking assessment. It ‘necessarily involve[s] a degree of speculation. No one knows with certainty what the future holds.’²⁶ As Goodwin-Gill and McAdam note, ‘a decision on the well-foundedness or not of a fear of persecution is ... an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin.’²⁷ The requirement that the fear be ‘well-founded’ speaks to the need for objective evidence that the fear is plausible and reasonable,²⁸

²⁴ Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge University Press, 2013). Unlike many aspects of the refugee definition, which have been given a particular meaning under Australian statute, the well-founded fear test has not been domestically circumscribed.

²⁵ Anderson et al (n 10) 117–18. A practical example in the Australian context is the 2010 practice of the Australian Government Department of Immigration and Citizenship in imposing a ‘freeze’ on claims by Hazara asylum seekers from Afghanistan (for six months) and asylum seekers from Sri Lanka (for three months) in order ‘to ensure that decision-making was based on up-to-date, accurate realistic information about the country circumstances in those two places’: Joint Select Committee on Australia’s Immigration Detention Network, *Final Report* (Report, March 2012) [6.46]–[6.48] <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/immigrationdetention/report/c06>. The Minister for Immigration and Citizenship, Chris Bowen, acknowledged at the time that

[a]s a result of the more exhaustive country information, there have [sic] been a decrease in the number of primary acceptances of claims from Afghans who are not subject to the processing pause. Even taking into consideration the possibility of some of these being overturned at review, the percentage of successful refugee claims is likely to be lower than in the past.

‘Govt Lifts Freeze on Refugee Processing’, *ABC News* (online, 30 September 2010) <<https://www.abc.net.au/news/2010-09-30/govt-lifts-freeze-on-refugee-processing/2280450>>.

Such a ‘freeze’ illustrates the broader relevance of time in refugee status determination (albeit not specifically in the application of the well-founded fear test).

²⁶ *Wu Shan Liang* (n 19) 288 (Kirby J).

²⁷ Goodwin-Gill and McAdam (n 6) 54.

²⁸ See *ibid* 64 and references there. As the US Board of Immigration Appeals has framed it, an individual’s fear of persecution ‘must have a solid basis in objective facts or events’: *Matter of Acosta*, 19 I&N Dec 211, 225–6 (BIA, 1985). See also Hathaway and Foster (n 6) 105: ‘The

thus permitting the finding that the individual, in his or her particular circumstances, faces a real chance of being persecuted.²⁹ Past harm may be relevant to, but not determinative of, future persecution.³⁰

A person's fear can be 'well-founded' even if he or she 'only has a 10% chance of being shot, tortured, or otherwise persecuted'.³¹ In Australia, this approach is encapsulated by the 'real chance' test,³² which

clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 per cent chance of persecution occurring.³³

existence of a "well-founded fear" of being persecuted requires only that there be a forward-looking apprehension of risk, thus mandating a purely objective inquiry.'

²⁹ The requisite degree of probability must take into account the intensity of the fear, the nature of the projected harm (death, imprisonment, torture, detention, serious discrimination, etc.), the general history of persecution in the home country, the applicant's personal experience and that of his or her family, and all other surrounding circumstances.

UN High Commissioner for Refugees ('UNHCR'), 'Brief of the Office of the United Nations High Commissioner for Refugees as *Amicus Curiae* in support of Respondent', Submission in *Immigration and Naturalization Service v Cardoza-Fonseca* 85-782, 14 July 1986, 29 (United States) <<https://www.refworld.org/docid/4b03c5818.html>>.

³⁰ In *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 574-5 ('Guo'), the majority stated that:

Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability — high or low — of their recurrence. The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity.

See also *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, 26 [83] (McHugh J): 'Past acts of persecution are usually strong evidence that the applicant will again be persecuted if returned to the country of his or her nationality. But the relevance of past acts of persecution depends upon the degree of likelihood that they or similar acts will occur in the future'. In *S152/2003* (n 4) 27 [74] McHugh J noted:

The Convention looks to the future. What has occurred in the past does not determine whether a person is a refugee for the purpose of the Convention. In determining whether that person has a well-founded fear that he or she will be persecuted if returned to the country of nationality, the past is a guide — a very important guide — as to what may happen. But that is all.

In *N00/35501* [2001] RRTA 582, the Tribunal stated: 'My task is not, however, to dwell on the past. Rather, it is to make an assessment about whether the applicants face a real chance of persecution in the future. In making this assessment I must necessarily draw on the events in the past'.

³¹ *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421, 440 (Stevens J) (1987). See also *Minister for Immigration, Local Government and Ethnic Affairs v MOK* (1994) 55 FCR 375, 407 (Sheppard J) ('MOK'): 'The chance spoken of is a chance that is less than 50 per cent and one which may be as low as 10 per cent.'

³² *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 389 (Mason CJ), 398 (Dawson J), 406-7 (Toohey J), 427-29 (McHugh J) ('*Chan*'). Like in Australia, a well-founded fear test is required in other jurisdictions and is expressed as a 'real chance' test (such as in NZ and the UK), 'reasonable possibility' test (such as in Canada and the US) or 'crainte avec raison' test (such as in France), all requiring a forward-looking assessment. For an overview of this standard in different jurisdictions, see Hathaway and Foster (n 6) 113. See also Anderson et al (n 10).

³³ *Chan* (n 32) 389 (Mason CJ), referring also to *Bouhey v The Queen* (1986) 161 CLR 10, 21 (Mason, Wilson and Deane JJ). See *I404760* [2014] RRTA 769, [24]: 'while "anything could happen in the future" and that "bombs and explosions could occur anywhere at any time"... [the

This is an appropriately liberal test that reflects the protective objective of the refugee definition and the inherent challenges involved in establishing a future risk of persecution with any certainty.³⁴ In our view, it appears capable of accommodating a longer timeframe assessment of future risk, and is therefore able to encompass evolving, slower-onset harms that may present less immediate, but no less serious, threats. In this regard, it is interesting to consider a more general observation by the Federal Court of Australia on the relationship between time and harm:

All other factors remaining the same, the chance of harm will tend to multiply proportionally to the time spent exposed to it. In other words, the longer a person is exposed to a source of harm, the more likely it is that at some stage the person will encounter that harm. In that way, even a risk that on its face is remote or fanciful, may increase through prolonged exposure such that the level of risk becomes real.³⁵

Part III, below, examines the approach of Australian courts and tribunals with respect to how far into the future a risk may extend for protection to be warranted.

III The Australian ‘Reasonably Foreseeable Future’ Test: Looking ‘Not Only to the Hills but Also to the Horizon’³⁶

As early as 1996, the High Court of Australia endorsed the ‘reasonably foreseeable future’ test to assess a ‘real chance’ of harm.³⁷ It did not engage in a detailed analysis of its meaning, but simply noted that the approach taken by the Tribunal was correct (namely, whether there was a real chance that the applicant ‘would be persecuted for a Convention reason were he to return at this time or within the reasonably foreseeable future’).³⁸ The Federal Court of Australia has since held that a decision-maker who considers only ‘the present or immediate future’, as distinct from ‘the reasonably foreseeable future’, falls into jurisdictional error.³⁹ The ‘question of harm in the reasonably foreseeable future is a mandatory relevant consideration’,⁴⁰ and failure to consider it is a reviewable error of law. Thus, a decision-maker cannot simply consider ‘future possibilities over a very short, future time frame’, but must ‘prognosticate the situation into the reasonably

Tribunal must] base its decision on the information before it and assess whether the chance of an event occurring in the reasonably foreseeable future is real or remote’. See also *1214267* [2013] RRTA 168, [127].

³⁴ Anderson et al (n 10) 119.

³⁵ *AEN15 v Minister for Immigration and Border Protection* [2018] FCA 509, [29]. See also Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press, 2020) 107: ‘the predicament of being persecuted is best understood as a condition of existence, permeated by risk and potentially punctuated by acts of persecution or other serious denials of human rights that reflect and reinforce that predicament’.

³⁶ *AOX16 v Minister for Immigration and Border Protection* [2019] FCCA 132, [24] (‘*AOX16*’).

³⁷ *Wu Shan Liang* (n 19) 279 (Brennan CJ, Toohey, McHugh and Gummow JJ).

³⁸ *Ibid.*

³⁹ *MZYXR v Minister for Immigration and Citizenship* (2013) 141 ALD 276, 283 [22] (‘*MZYXR*’).

⁴⁰ *DUX16* (n 19) [22].

foreseeable future’,⁴¹ which involves ‘an assessment of the period of time to look into the future’.⁴²

The most pertinent examination of the meaning of ‘reasonably foreseeable future’ was undertaken by Mortimer J in the 2017 Federal Court case of *CPE15 v Minister for Immigration and Border Protection*:

The ‘reasonably foreseeable future’ is something of an ambulatory period of time, but the use of reasonable foreseeability as the benchmark concept indicates that the assessment is intended to be one which can be made on the basis of probative material, without extending into guesswork. It is also intended to preclude predictions of the future that are so far removed in point of time from the life of the person concerned at the time the person is returned to her or his country of nationality as to bear insufficient connection to the reality of what that person may experience.⁴³

In essence, the assessment must be contextual. The ‘reasonably foreseeable future’ cannot be confined to any particular timeframe; it is a relative notion that will depend on the circumstances of each individual case. The further away in time the risk, the more probative the evidence needs to be that the particular individual is at risk.⁴⁴ However, an applicant who fears harm in the more distant future does not have to provide a higher *quality* of evidence, and nor does the standard of proof change, regardless of the length of that period. There must also be a degree of flexibility, as suggested by Kirby J’s observations in *Guo*:

The places from which refugees normally flee rarely have legal or administrative systems that permit the rational and consistent application of logic which our courts like to boast of but sometimes themselves fail to provide. To say this is not to intrude into assessment of the merits or to impose a conclusion about likely events in any particular country. It is simply to accept the inherent unpredictability of the future and the special difficulties which arise in assessing accurately the possible course of political or other oppression in the kinds of countries from which refugees typically come.⁴⁵

⁴¹ *QAAH v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363, 391 [108] (*‘QAAH’*). Although this case concerned cessation of refugee status under art 1C(5) of the *Refugee Convention*, rather than consideration of the refugee definition per se, similar principles apply in both contexts.

⁴² *AON15 v Minister for Immigration and Border Protection* (2019) 269 FCR 184, 196 [50].

⁴³ *CPE15 v Minister for Immigration and Border Protection* [2017] FCA 591, [60] (Mortimer J) (*‘CPE15’*).

⁴⁴ By way of analogy, the Court of Justice of the European Union has explained that in situations of generalised violence, ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection’: *Elgafaji v Staatssecretaris van Justitie* (C-465/07) [2009] ECR I-00921, I-955 [39].

⁴⁵ *Guo* (n 30) 596 (Kirby J). See also Kirby J in *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142, 1158 [93]:

That risk would need to be judged by reference not only to current political and religious conditions in Iran but also to possible future conditions. Those conditions might change; not necessarily for the better. These questions were not considered explicitly by the second Tribunal, although clearly raised by the appellant’s reference to the dangers of return to Iran for an apostate Muslim like himself. They are crucial in judging whether his ‘fear’ of persecution is ‘well-founded’.

In this regard, a decision-maker's choice of, and willingness to engage with, country-of-origin information that speaks to future trends or trajectories of harm may be central to the outcome.⁴⁶

A decision-maker is not required to refer explicitly to the 'reasonably foreseeable future' since that language is not used in the legislation.⁴⁷ Conversely, however, merely referring to the 'reasonably foreseeable future' is not sufficient to discharge the decision-maker's duty to consider it.⁴⁸ As the Federal Court held in *BOT15 v Minister for Immigration and Border Protection*, the Tribunal's mention of 'reasonably foreseeable future' did

no more than set out the test. It is a bare assertion that is insufficiently explained and lacks logical connection to the material and analysis that precedes it. There is no consideration by the Tribunal of what may happen after the completion of the withdrawal of foreign troops and of how the country information demonstrates that the appellant does not face a real chance of serious harm or a real risk of significant harm in the reasonably foreseeable future. Its focus on the near completion of the withdrawal of foreign troops looks to the past and present and, possibly, to the near future, and not to the reasonably foreseeable future.⁴⁹

Likewise, it is not necessarily determinative if a decision-maker refers to 'current risk' and uses only the present tense (as opposed to referring to 'future risk' and/or phrasing the assessment in the future tense).⁵⁰ The requirement is that a prospective assessment is made in substance, regardless of the 'manner of expression'.⁵¹

⁴⁶ *Ministerial Direction No 84 — Consideration of Protection Visa Applications* (24 June 2019), made under s 499 of the *Migration Act 1958* (Cth), requires the Tribunal to take account of available relevant country information assessments prepared by the Department of Foreign Affairs and Trade (Cth) 'expressly for protection status determination purposes' (at [3]). See also *BOR15 v Minister for Immigration and Border Protection* [2017] FCCA 152, [43]; *1213438* [2012] RRTA 1043; *1216090* [2013] RRTA 213, where the Tribunal preferred information that spoke to the future, rather than just the current situation. In *1215874* [2013] RRTA 58 the decision-maker relied on predicted future harm, giving weight to independent evidence and finding that 'the situation regarding the Palestinian refugees in Lebanon is volatile and fragile and can be described metaphorically as a "time bomb." I find this is not mere fanciful speculation but is an assessment based on factual evidence.' (at [140]), and that the security situation, 'rather than diminishing, is on the rise' (at [145]). Contrast this with *1517729 (Refugee)* [2018] AATA 3034 [15], where the Tribunal found that a claim by a Chinese applicant was too speculative, where the applicant was separated from his wife, but feared violating the family planning policy in the future if he remarried and had more children. See also *1703287 (Refugee)* [2018] AATA 409, [27].

⁴⁷ *CDW18 v Minister for Home Affairs* [2019] FCA 270, [16] ('*CDW18*'). See also at [29]: 'The reasons read as a whole indicate that the Authority was assessing what might happen on return, including into the future.' See also *CDW18 v Minister for Home Affairs* [2018] FCCA 2334, [26]–[28].

⁴⁸ *CDW18* (n 47) [20]. See also *BOT15 v Minister for Immigration and Border Protection* [2018] FCA 654, [59] ('*BOT15*').

⁴⁹ *BOT15* (n 48) [59]. See also *AIE15 v Minister for Immigration and Border Protection* [2018] FCA 610, [34] ('*AIE15*').

⁵⁰ See *AOX16* (n 36) [15], [21], [24], in which the Court was not persuaded that the Tribunal's exclusive use of the present tense indicated that the reasonably foreseeable future had not been considered. See also *BYH16 v Minister for Home Affairs* [2018] FCCA 2051; cf cases where the Court found that the Tribunal's present-tense expression pointed to a focus only on the past and present: *BKD17 v Minister for Immigration and Border Protection* [2018] FCCA 3182 ('*BKD17*'); *DRO17 v Minister for Immigration and Border Protection* [2018] FCCA 3547 ('*DRO17*'). But in some cases, the use of the future tense enabled the Court to find that the Tribunal had carried out its

Thus, in all cases, a decision-maker must carefully assess the applicant's claim in light of what might occur in the reasonably foreseeable future, regardless of what terminology he or she uses.⁵²

IV Challenges in Implementation

Notwithstanding that superior courts have been clear that decision-makers ought to consider a longer timeframe in assessing well-founded fear, extensive examination of the case law reveals ongoing challenges in practice. Indeed, in particular contexts, the most prominent of which are examined below, the notion of imminence or immediacy of harm still features in the reasoning of Australian decision-makers.

A Imminence and Credibility

One of the most striking contexts in which imminence continues to be invoked is where the decision-maker undertakes a *retrospective* assessment of the applicant's departure, often as a method of assessing credibility and/or the question of subjective fear.

This is particularly common at the tribunal level. There are dozens of decisions (including some very recent ones) in which the Tribunal's reasoning identifies whether an applicant's delay in leaving the country of origin, travel through a third country without claiming asylum, and/or delay in applying for protection in Australia was inconsistent with an imminent (risk of) harm. This tends to imply that an imminent risk at the point of departure is necessary in order to establish a well-founded fear of persecution. Applicants' claims have been erroneously rejected where the decision-maker has based the decision on past events without substantively assessing the applicant's fear into the reasonably foreseeable future.⁵³

There are a number of decisions refusing protection where the alleged delay (equated to a lack of immediacy of harm) has led to an inference that an applicant

assessment prospectively: *BJU15 v Minister for Immigration and Border Protection* [2018] FCCA 1296; *AQK17 v Minister for Immigration and Border Protection* [2018] FCCA 3584.

⁵¹ *AOX16* (n 36) [24].

⁵² *SZGHS v Minister for Immigration and Citizenship* [2007] FCA 1572, [3] ('SZGHS'); *AIE15* (n 49) [33].

⁵³ By way of example, in *DRO17* (n 50) [30] the Court found the Tribunal to have erred where it 'assessed the future prospects of harm simply on the basis of what view the authorities had at [the time of his departure]. There was, in other words, no reasonable speculation as to what might occur in the future'. Cf *1005911* [2010] RRTA 923, where the Tribunal acknowledged, and avoided, the potential for error. The Tribunal found, at [64] and [104], that the applicant's actions in returning to his country of former habitual residence and his delay in applying for protection in Australia were inconsistent with him facing 'imminent harm' at that time, but went on to state at [105]: 'However the Tribunal must look, not merely to the immediate, but to the reasonably foreseeable future.' The Tribunal ultimately concluded that the applicant would face persecution on cumulative (largely socio-economic) grounds, including some forms of harm that would manifest further into the future such as difficulty finding work which might compromise his ability to subsist.

lacked genuine subjective fear or credibility.⁵⁴ For example, in *1514886 (Refugee)*, the Tribunal stated that:

The applicant sought protection in Australia, after many years of visiting this country, because there is greater acceptance of LGBT people and more favourable lifestyle options compared with Fiji. His family and personal circumstances influenced the timing of this decision. He did not leave Fiji in response to any past persecution or significant harm, or any imminent fear that he would be subject to such harm.⁵⁵

Similarly, in *1101896*, the Tribunal found, in relation to credibility,

that if the applicant was indeed under the threat of imminent harm, he would not have waited four months before applying for a protection visa. For [this and] all the above reasons, the Tribunal does not find the applicant to be a credible, truthful and reliable witness.⁵⁶

The Tribunal has also made numerous similar findings in relation to a lack of 'urgent fear', which may, in some cases, be considered a proxy for imminence.⁵⁷ In only one such case invoking urgency was the applicant granted protection because it was accepted that she still had a well-founded fear of being persecuted, notwithstanding doubts as to her credibility.⁵⁸ The Tribunal observed that the

notable delay in the applicant's protection visa application and the weakly argued reasons for that delay ... indicate[d] that the applicant's otherwise genuine fears were not as deeply and urgently held as exaggeratedly presented to the Tribunal.⁵⁹

Ultimately, however, it concluded that

the applicant was genuinely but not urgently motivated to leave her country of origin based on [a relevant] incident for reasons of safety. Therefore, the applicant did have a genuine personally-held fear of serious harm at the time

⁵⁴ In some cases, lack of credibility or subjective fear on this basis formed at least part of the reasons for rejection. While in three of these cases it appears that the applicant claimed to fear imminent harm, in the rest the Tribunal itself introduced the concept of imminence or immediacy: see, eg, *V97/08193* [2000] RRTA 196; *N01/39734* [2003] RRTA 137; *N02/42403* [2003] RRTA 272; *0800904* [2008] RRTA 99; *071959605* [2008] RRTA 256; *0808521* [2009] RRTA 270; *1000095* [2010] RRTA 371; *1009089* [2011] RRTA 17; *1103103* [2011] RRTA 592; *1101896* [2011] RRTA 401; *1101401* [2011] RRTA 620; *1205487* [2012] RRTA 710; *1103936* [2013] RRTA 857; *1218579* [2013] RRTA 741; *1403634* [2014] RRTA 230; *1305041* [2014] RRTA 378; *1406956* [2014] RRTA 894; *1301484* [2015] RRTA 98; *1600083 (Refugee)* [2017] AATA 3066; *1611485 (Refugee)* [2018] AATA 4213; *1514886 (Refugee)* [2018] AATA 3849; *1514689 (Refugee)* [2018] AATA 3629.

⁵⁵ *1514886 (Refugee)* (n 54) [60] (emphasis added). In this case, while noting that it was not necessarily determinative, the Tribunal considered that the applicant's 'migration history significantly weaken[ed] his claims to have experienced persecution or significant harm in Fiji ... ; and to fear such harm if he returns there in the future': at [21].

⁵⁶ *1101896* (n 54) [90]–[91].

⁵⁷ See, eg, *1617430 (Refugee)* [2018] AATA 4977; *1602952 (Refugee)* [2018] AATA 4556; *1608643 (Refugee)* [2018] AATA 3630; *1500744 (Refugee)* [2018] AATA 3094; *1501478 (Refugee)* [2017] AATA 2732; *1616021 (Refugee)* [2017] AATA 2204; *1606474 (Refugee)* [2017] AATA 2216; *1612947 (Refugee)* [2017] AATA 2681; *1606330 (Refugee)* [2017] AATA 3187; *1507725 (Refugee)* [2018] AATA 3775. All but one of these cases was decided by the same decision-maker.

⁵⁸ *1507725 (Refugee)* (n 57).

⁵⁹ *Ibid* [53].

of her departure and at the time she applied for a protection visa, as well as now and into the foreseeable future.⁶⁰

It is not possible to assess whether, and to what extent, this reasoning is invoked at the departmental stage of decision-making since such decisions are not published. However, some tribunal decisions indicate that the Department is also using imminence in assessing credibility and/or subjective fear.⁶¹ For example, in *1504740 (Refugee)*, the Tribunal noted that:

The applicant and his wife could neither afford not to work nor take their children to a childcare centre for they feared for their safety as their circumstances and the threats prevented them from continuing to attend school. *The Department incorrectly interpreted the applicants' actions as evidence the family did not face imminent danger and the children were safe at home.* On the contrary the children could not go to school as there were threats to kidnap them.⁶²

In another matter, the applicant argued that a similar finding on delay by the departmental delegate was 'inconsistent with the Convention which does not require that a person be in immediate trepidation'.⁶³ The Tribunal did not address this argument in its reasoning, although the case was successful on other grounds.

The Tribunal's reasoning on credibility and the absence of imminent fear/risk has received very little attention by the courts. Despite being set out in some decisions, it has not been the subject of review and it has only rarely been commented on.⁶⁴

References to imminent danger or fear at time of flight are problematic. These notions are not contained in the *Refugee Convention*, or in established jurisprudence on the meaning of well-founded fear. Yet, their invocation in the cases discussed above suggests that some applicants are being required to show that they left on account of an imminent risk of harm in order to establish at least

⁶⁰ Ibid [69].

⁶¹ In at least 23 cases, the Tribunal's reasoning reveals that the departmental delegate had raised an issue relating to lack of immediacy of the applicant's fears. Of these 23, the Tribunal nevertheless went on to make a positive decision in 12 cases. In four cases it rejected the claim, at least in part, on the basis of delay or return to country of origin; in others the rejection related to other reasons. See also *AYT15 v Minister for Immigration and Border Protection* [2018] FCCA 688; *BPC16 v Minister for Immigration and Border Protection* [2017] FCCA 1140.

⁶² *1504740 (Refugee)* [2017] AATA 868, [43] (emphasis added).

⁶³ *1407181, 1407173* [2015] RRTA 140, [15].

⁶⁴ See, eg, *BDT16 v Minister for Immigration and Border Protection* [2017] FCA 249; *SZVSE v Minister for Immigration and Border Protection* [2017] FCA 1435; *DTJ16 v Minister for Immigration and Border Protection* [2017] FCCA 2049; *DFE16 v Minister for Immigration and Border Protection* (2017) 317 FLR 215; *FIG17 v Minister for Immigration and Border Protection* [2018] FCCA 3751. But see *Applicant MZKAO v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1484, [35], where the Federal Court did expressly consider and approve of the Tribunal's reasoning:

This point can be dealt with shortly. It is clear that the appellant's voluntary return to India on three occasions is relevant to assessing whether and to what extent the appellant fears persecution or 'serious harm' in India. The fact that the appellant was prepared to return there more than once strongly suggests that the fear he held, if any, was either not a fear of immediate harm or not a fear of treatment that would amount to 'serious harm'.

one component of the well-founded fear test (namely, subjective fear).⁶⁵ Although less frequent elsewhere, there are also instances in Canada, the United States ('US') and NZ where protection has been denied for this reason.⁶⁶

The fundamental problem with this approach is that refugee status determination is a *prospective* exercise in which an assessment must be made of future risk. As such, it should not matter whether the risk at the time of flight was urgent — or even in existence. Yet, the reasoning in this line of cases incorrectly implies that there is a right and a wrong time to leave, and that the Tribunal is in a position to determine whether the applicant chose the right time.

The language (and notion) of imminence should therefore be discarded in the context of reviewing the trajectory of an applicant's experience prior to flight, as it may distract a decision-maker from the core function of assessing the well-founded fear of persecution in the future (which, in any event, is largely an assessment of objective risk of future harm).

B *Imminence and the Assessment of Future Harm*

The notion of imminence remains prevalent in assessing future harm even though it is clear that the well-established test of 'reasonably foreseeable future' for assessing well-founded fear in Australian refugee law requires a longer-frame assessment (see Part III). In some decisions, applicants themselves argued that they faced imminent risk or harm.⁶⁷ However, more concerning is the fact that the Tribunal has rejected claims on the basis that there was no risk of harm arising from any 'imminent' event or circumstance.⁶⁸

The Australian Government's *Procedures Advice Manual* ('PAM3') advises that '[h]ow far into the future a decision-maker should consider in terms of future harm (i.e., the real chance of persecution) will vary depending on the circumstances in the receiving country', spanning from 'a period as short as a week

⁶⁵ See generally Hathaway and Foster (n 6) 100–2, 150–4.

⁶⁶ See, eg, *Re X* (Immigration and Refugee Board of Canada, Refugee Appeal Division, RAD File No TB7-24034, G Erauw, 6 November 2018) [2018] CanLII 143642, [16]; *Pang v Bureau of Citizenship and Immigration Services*, 448 F3d 102 (2nd Cir, 3 May 2006) 104 [17]. In NZ, see *CX (China)* [2017] NZIPT 801141 [58]; *Refugee Appeal No. 75402* [2006] NZRSAA 40; *Refugee Appeal No. 73504* [2003] NZRSAA 90.

⁶⁷ See, eg, 0908758 [2010] RRTA 227; *N01/41067* [2002] RRTA 1127; *N06/53069* [2006] RRTA 88; *N99/30512* [2000] RRTA 404; *1213207* [2012] RRTA 1078; *1610107 (Refugee)* [2018] AATA 1429; *1514117 (Refugee)* [2018] AATA 1362; *1511167 (Refugee)* [2017] AATA 1524; *1504584 (Refugee)* [2017] AATA 650; *1606403 (Refugee)* [2018] AATA 2615; *SZTBD v Minister for Immigration and Border Protection* [2013] FCCA 2182; *BDF15 v Minister for Immigration and Border Protection* [2016] FCCA 1307. See also, in four cases, the applicant referred to the imminence of a harm-causing event (war), rather than the harm itself: *V00/11087* [2002] RRTA 92; *N00/33037* [2001] RRTA 879; 0908758 (n 67); *1512717 (Refugee)* [2017] AATA 212.

⁶⁸ See, eg, *N06/53217* [2006] RRTA 58; *N03/45607* [2003] RRTA 961; *N99/30760* [2000] RRTA 399; *N01/36945* [2001] RRTA 536; *N98/21019* [2000] RRTA 730; *1215644* [2013] RRTA 377; *1213201* [2013] RRTA 113; *N02/45124* [2003] RRTA 1054; *1722737 (Refugee)* [2018] AATA 643.

or month (possibly even days)’ to ‘more than a year’.⁶⁹ It is, with respect, difficult to understand how the test of ‘reasonably foreseeable future’ could plausibly be satisfied by an assessment that considered a window confined to just one week. Indeed, it is difficult to imagine a scenario in which it would be appropriate to consider only a few days or a week into the future. In reality, what might vary is the period of time in which it is claimed (or the facts indicate) that harm may *actually* occur. For example, the evidence may point to a risk of immediate harm, such as arrest at the airport. However, that is an evidentiary, or factual, question, and in cases where the decision-maker finds that there is a real chance that this risk may eventuate immediately, it may be a simple decision. However, that may not always be the appropriate window of time for the decision-maker in similar cases. Were there to be a finding that risk would not eventuate in the short-term, further enquiry should not be foreclosed. Rather, in most cases, the decision-maker should go on to consider a period of time after return, in the event that the person is not arrested immediately or is released, but subsequently arrested (and that such treatment (cumulatively) amounts to persecution).

In situations where the Tribunal has improperly focused only on the current or present risk, the courts have been willing to intervene. There are numerous cases in which an appeal has been successful on this ground.⁷⁰ However, despite lucid and coherent authority emanating from the superior courts, it has not always been followed by the Tribunal.⁷¹ Furthermore, the possibility of review decreases as one moves through the hierarchy, such that only a small percentage of cases reach judicial review stage, underlining the importance of the merits review stage.

In sum, the question of the timing of harm and the relevance of ‘imminence’ to assessing future harm remains problematic, at least at the tribunal level. This is despite the High Court of Australia signalling an expansive approach to assessing well-founded fear over 20 years ago. As a concern that has largely gone unnoticed in the scholarship to date, it is hoped that by drawing out the issues, this article can contribute to a more coherent and principled approach.

⁶⁹ Department of Immigration and Border Protection, *Procedures Advice Manual 3: Refugee and Humanitarian — Refugee Law Guides* (1 July 2017) [7.2] (‘PAM 3’). These guidelines are not formally binding on decision-makers, but are generally followed unless inconsistent with the *Migration Act* or *Regulations*. In *1215016* [2013] RRTA 169, [104] the Tribunal regarded the following year as the ‘reasonably foreseeable future’, noting that such a timeframe was ‘not qualitatively any more speculative than an assessment of the situation at present.’ (citations omitted). See also *1214267* [2013] RRTA 168, [127]. The Tribunal has its own, brief, guidance on the meaning and application of ‘reasonably foreseeable future’: Administrative Appeals Tribunal, Migration and Refugee Division (Cth), *A Guide to Refugee Law in Australia* (2020) 3–8–3–9.

⁷⁰ See, eg, *BKD17* (n 50); *DRO17* (n 50); *AOO15 v Minister for Immigration and Border Protection* [2016] FCCA 2871; *MZZXD v Minister for Immigration and Border Protection* [2015] FCCA 104 (‘MZZXD’); *SZTF1 v Minister for Immigration and Border Protection* (2015) 231 FCR 222; *SZTUI v Minister for Immigration and Border Protection* [2015] FCCA 1667 (‘SZTUI’); *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 (‘MZYTS’); *MZYXR* (n 39); *Minister for Immigration and Citizenship v SZQKB* (2012) 133 ALD 495; *MZYAY v Minister for Immigration and Citizenship* (2009) 109 ALD 498; *SZGHS* (n 52); *NACZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 457 (‘NACZ’).

⁷¹ We found only one decision that referred to Mortimer J’s discussion of the ‘reasonably foreseeable future’ test in *CPE15* (n 43), namely *1703914 (Refugee)* [2018] AATA 3088, [87].

V Understanding 'Reasonably Foreseeable Future'

Even though there is some inconsistency in assessing risk prospectively, on the whole Australian courts and tribunals have engaged with the question of timing of harm more closely than any other jurisdiction we have examined, including by the United Nations ('UN') Committee against Torture, the UN Human Rights Committee, the European Court of Human Rights, the Court of Justice of the European Union, and in other countries.⁷²

A decision-maker's willingness to engage with this question may be the difference between a positive and negative outcome for an applicant who fears persecution. A comparative analysis of claims in the United Kingdom ('UK') and Australia concerning possible political violence in upcoming elections illustrates the point.⁷³ In *EM*, the UK Upper Tribunal (Immigration and Asylum Chamber) considered (and rejected) the reasoning in an Australian decision on 'reasonably foreseeable future' that gave credence to 'reasonable speculation',⁷⁴ finding instead that 'the further away the elections, the more uncertain are their consequences'.⁷⁵ The UK Upper Tribunal explained: '[t]he combined effect of the evidential uncertainty of when elections may be called and what might happen when they are produces a picture that is too equivocal or obscure to amount to a real risk of future ill treatment'.⁷⁶

By contrast, the Federal Court of Australia found, in relation to an appeal by a Fijian applicant, that the Tribunal had erred in confining its enquiry to the immediate future when elections were due to occur sometime after the immediate period upon return. The Court considered that

there was a failure to address the reasonably foreseeable future in the context of the claims made. The dealing with the three incidents was based on immediate facts — no elections looming and the character of the present government. This reflected a focus on immediacy which was no real assessment of whether in the future, with elections looming, with the first

⁷² See Anderson et al (n 10).

⁷³ At the time of the UK decision, the election date had not yet been set. This was a crucial factor in the decision, even though the elections were predicted to take place the same year or the year following the decision:

If, after promulgation of this determination, evidence emerges that elections will be held at a particular time, without any of the safeguards and other countervailing features we have described, then the structures underpinning the country guidance system ensure that judicial fact-finders will be required to have regard to the new state of affairs, in reaching determinations on Zimbabwe cases.

EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC), [265].

⁷⁴ Australian case law was raised by counsel at *ibid* [250]:

Mr Henderson also relied upon the Court of Appeal's judgment in *Karanakaran* [2000] EWCA Civ 11. In particular, he drew attention to what the Court had to say in that case about the Australian decision of Sackville J in *Minister for Immigration and Multicultural Affairs v [Rajalingam]* [1999] FCA 719 [(1999) 93 FCR 220]. The thrust of the Australian decision, according to Mr Henderson, was that the decision maker in a case involving a claim to international protection must not foreclose reasonable speculation about the chances of a future hypothetical event occurring.

⁷⁵ *Ibid* [263].

⁷⁶ *Ibid* [264].

appellant campaigning for the FLP, he would not face a similar beating for the same reasons, or threats from elements of the Taukei Movement who had already targeted him.⁷⁷

Parts V(A)–(E), below, identify key principles that emerge from decades of Australian jurisprudence on the meaning of ‘reasonably foreseeable future’ in the context of assessing risk. These principles have the potential to provide guidance to other jurisdictions, as well as in relation to emerging protection claims that raise issues of timing particularly acutely. Part V(A) analyses the different time periods that have been considered in the cases generally, while Parts V(B)–(E) briefly reflect on four contexts where a longer timeframe may be particularly appropriate: namely, claims concerning children, slow-onset environmental harm, armed conflict, and health deterioration.

A *What Time Periods Have Been Considered?*

Consistent with the notion that a well-founded fear of persecution involves an apprehension of future risk, the past may be a guide,⁷⁸ but the assessment of risk must always be forward-looking from the date of the determination. In particular, this assessment must look beyond the ‘very short, future time frame’ into the ‘reasonably foreseeable future’.⁷⁹ However, the ‘temporal limits embodied in the notion of reasonably foreseeable future are unclear’.⁸⁰ For instance, in overturning a tribunal decision that had rejected a refugee claim because the applicant had remained safe in the two to three months prior to flight, the Federal Circuit Court of Australia stressed that ‘the future was not a short closed period but an indefinite period’.⁸¹

This understanding of an open-ended notion of time when assessing ‘reasonably foreseeable future’ is present in other cases too. For instance, the Federal Circuit Court has suggested that ‘the future tense [should be used] in an

⁷⁷ *SZGHS* (n 52) [28]. See also *1404682* [2014] RRTA 893, [33], where the Tribunal took into account risk attendant on a future election:

The Tribunal is mindful too that the applicants avoided harm between August 2010 and their departure to Australia in March 2013. It notes though Mr S remains a politician. Although the applicants did not make this claim and the migration agent did not submit it, the past harm the applicants experience[d] were temporal to election cycles in Sri Lanka in the beginning of (presidential) and mid (parliamentary) 2010. The Tribunal considers there is some chance and that is more than speculative or remote chance during any future election cycle, Mr S will again take steps to silence any perceived opponents, including the first named applicant. The Tribunal finds the first named applicant will continue to hold his pro-opposition, anti-government and anti-corruption political opinion. The Tribunal finds in the reasonably foreseeable future, the threat to the first named applicant from Mr S is ongoing if the applicants return to Sri Lanka, as may be presidential elections in early 2015.

⁷⁸ *Guo* (n 30) 574–5.

⁷⁹ *QAAH* (n 41) 391 [108]. See also discussion above in Part III.

⁸⁰ *V03/16047* [2004] RRTA 11. See also *V03/16046* [2004] RRTA 15; *V03/16249* [2004] RRTA 31; *V03/16433* [2004] RRTA 349; *V04/16763* [2004] RRTA 530; *V03/16303* [2004] RRTA 33; *V03/16260* [2004] RRTA 32.

⁸¹ *SZSZO v Minister for Immigration and Border Protection* [2014] FCCA 242, [32].

unconfined way’ when making findings about what might happen to an individual on return, rather than focusing on a ‘looming event’.⁸²

But how indefinite or unconfined is this future period?

Very few cases circumscribe a concrete time period, although a number of cases have contemplated ‘a period of some years’.⁸³ For instance, in *AUK15 v Minister for Immigration and Border Protection*, the decision-maker considered that the ‘reasonably foreseeable future’ could encompass the next two to three years (based on the anticipated withdrawal of troops from Afghanistan).⁸⁴ In another case,⁸⁵ the Full Federal Court found that the Tribunal should have considered the impact on the applicant of escalating political violence linked to possible elections in 12–18 months’ time (from when the applicant lodged his protection application in May 2010). The Court noted that ‘the Tribunal did not assess in any real or active way what the situation would be in mid to late 2011 or thereafter’.⁸⁶

The Full Federal Court has acknowledged that it may be difficult for an applicant to persuade a decision-maker that there is a real chance of persecution if it will not materialise ‘for some time after his or her return’.⁸⁷ Even so, for a decision-maker to apply the correct test, ‘it may be necessary to consider whether the applicant’s fear of being persecuted in the more distant future (and not merely in the period shortly after his or her return) is well-founded’;⁸⁸ ‘a month-by-month assessment’ is a reviewable error.⁸⁹ Indeed, the Federal Court has repeatedly confirmed that a decision-maker may be in error where, in rejecting the applicant’s claim, he or she looks only to the near future and relies on a lack of evidence of a current threat.⁹⁰ This is because the Tribunal ‘must not foreclose reasonable speculation about the chances of the hypothetical future event occurring’,⁹¹ which

⁸² *AIE15 v Minister for Immigration* [2016] FCCA 451, [14] (emphasis in original). See also the approach in *SZGHS* (n 52) [28].

⁸³ *QAAH* (n 41) 391 [108]: it was ‘necessary to estimate how confidently any non-Taliban settlement can be predicted to endure, on a widespread basis, for a period of some years.’ See also *CDC15 v Minister for Immigration and Border Protection* [2017] FCA 18 (‘*CDC15*’).

⁸⁴ *AUK15 v Minister for Immigration and Border Protection* [2017] FCCA 1872, [42]. See also *MZZXD* (n 70) [69] and *CDC15* (n 83) [44], in which the Court stated that decision-makers should have assessed protection claims by Hazaras from Afghanistan in light of the likely withdrawal of international troops in one to two years’ time, which would have an adverse effect on their security.

⁸⁵ *MZYTS* (n 70).

⁸⁶ *Ibid* 444 [39] (emphasis added).

⁸⁷ *NAGT of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 319, [22].

⁸⁸ *Ibid*.

⁸⁹ *NACZ* (n 70) [38].

⁹⁰ See, eg, *SZGHS* (n 52) [28].

⁹¹ *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220, 239 [60]. See also *MZXSA v Minister for Immigration and Citizenship* (2010) 117 ALD 441, 460–61 [94]; *EMX17 v Minister for Immigration and Border Protection* [2019] FCCA 284, [16]. But this was extended to not foreclosing ‘reasonable speculation about the chances of the hypothetical future event not occurring’ in *SZVKA v Minister for Immigration and Border Protection* (2017) 320 FLR 453, 461 [33] (emphasis in original).

involves ‘speculation as to circumstances in the future on the basis of material in the present, and what has happened to the person in the past’.⁹²

In *Mok v Minister for Immigration, Local Government and Ethnic Affairs (No 1)*, the Federal Court reviewed a decision in which the decision-maker had considered that a real chance of persecution just two months after the applicant’s return to Cambodia ‘wasn’t relevant’.⁹³ The Court held that ‘the question of whether there was a real chance of persecution necessarily required the delegate to look at the future in so far as it was reasonably foreseeable at the time when he was making his decision.’⁹⁴ However, by way of explanation, it added:

On the one hand the delegate was not required to look at the possibility of something occurring in 50 years’ time — to take the example given by Mr Paterson to Mr Rose (transcript 2293). On the other hand a delegate errs in law, in my opinion, if he confines his attention to whether there is a real chance of persecution on the day after an applicant’s return. In my opinion on the delegate’s evidence of what he considered, he erred in law.⁹⁵

Thus, in this case, two months was considered too short a period; more broadly it was agreed that 50 years into the future was too long and one day was too confined.

There have been cases where decision-makers have considered a period of several years as the ‘reasonably foreseeable future’. In one case, the Tribunal found that an applicant aged in his 40s had a well-founded fear of persecution because of the risk he would be called up for reserve military service (mandatory to age 51) were he to return to Israel. There was evidence that men over 35 years of age often were not called up for reserve training as they were considered medically unfit, and were usually discharged at the age of 41 or 45. However, there was ‘no clear indication that the applicant would *not* be called up if he returned to Israel until the age of 51’;⁹⁶ thus, although this was some years away, the Tribunal found that there was a real chance it could occur within the reasonably foreseeable future.

In sum, the cases discussed above support a non-prescriptive, flexible approach by the Australian courts (much less so by the Tribunal) to the notion of time in refugee status determination. This approach treats a ‘reasonably foreseeable future’ as open-ended, permits reasonable speculation and is attuned to the importance of context in refugee cases.

Parts V(B)–(E) below highlight four specific contexts where an open-ended approach to the future may be particularly appropriate.

⁹² *MZYTS* (n 70) 443 [33] (citations omitted). In that case, it was noted that a decision-maker could rely on information that was ‘several years old ... as part of a weighing process’ helping them decide ‘which information best and most reliably supports the prediction of future risk’: at 452 [74].

⁹³ *Mok v Minister for Immigration, Local Government and Ethnic Affairs (No 1)* (1993) 47 FCR 1, 66 (*‘Mok (No 1)’*).

⁹⁴ *Ibid.* See also *MOK* (n 31).

⁹⁵ *Mok (No 1)* (n 93) 66. See also *MOK* (n 31).

⁹⁶ *1001683* [2010] RRTA 506, [75] (emphasis added).

B *Children*

In cases involving minor applicants, there is an especially strong case for taking a longer-range view of prospective harm. This is well accepted, particularly in cases involving the risk of female genital mutilation. This is also the case where the type of harm feared entails the denial of socio-economic rights, such as health care or education, or cumulative harm, which in itself is often assessed over a longer period (sometimes a lifetime).⁹⁷ As the guidelines of the UN High Commissioner for Refugees ('UNHCR') on child asylum claims emphasise:

While it is clear that not all discriminatory acts leading to the deprivation of economic, social and cultural rights necessarily equate to persecution, it is important to assess the consequences of such acts for each child concerned, *now and in the future*.⁹⁸

A good example of this approach in Australian jurisprudence is found in a case concerning the potential risk to an Ethiopian child of being subjected to corporal punishment at school. At the time of the decision, the child was still a toddler, yet the Tribunal accepted a period of at least a decade as the 'reasonably foreseeable future':

I find that the reasonably foreseeable future does not extend beyond the applicant's primary education [through to the age of 15 years], as anything beyond is dependent upon too many variables, including possible changes to government and the child's own interests and abilities to pursue further studies.⁹⁹

Although, in this case, the Tribunal felt the need to impose an outer limit on the timeframe, it nonetheless adopted an appropriately longer-range view.

C *Slow-Onset Impacts of Climate Change*

As noted above, the Federal Court of Australia in *Mok (No 1)* stated (in obiter dicta) that a decision-maker 'was not required to look at the possibility of something occurring in 50 years' time'.¹⁰⁰ Presumably, this was on account of the potential for mitigating factors that might reduce or nullify the risk of harm.¹⁰¹ However, how should a decision-maker factor in scientific evidence that weighs very strongly in favour of certain risks manifesting over time — and certainly at a sufficient level to meet the well-founded fear threshold in refugee law?¹⁰²

⁹⁷ We are grateful to Kate Jastram for this point. See also for more detailed discussion of these issues: Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007).

⁹⁸ UNHCR, *Guidelines on International Protection: Child Asylum Claims under Article 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/09/08 (22 December 2009) 15 [36] (emphasis added).

⁹⁹ *1703914 (Refugee)* (n 71) [75].

¹⁰⁰ *Mok (No 1)* (n 93) 66. See also *MOK* (n 31).

¹⁰¹ *1703914 (Refugee)* (n 71) [75]. See also *1319201* [2014] RRTA 835, [33] ('1319201'); *1314106* [2014] RRTA 796, [30] ('1314106').

¹⁰² This was, in effect, acknowledged in *AF (Kiribati)* (n 12) [90], where the Tribunal observed that the concept of an 'imminent' risk to life ... requires no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger. In other words,

This is particularly pertinent to cases involving the slower-onset impacts of climate change. As noted above, such cases may enliven states' international protection obligations, which necessarily involve an assessment of whether or not a well-founded fear of harm (or real risk of harm, in human rights law) has been established. When it comes to climate change itself, the Intergovernmental Panel on Climate Change ('IPCC'), which is the expert UN body for assessing the science related to climate change, has predicted with 'very high confidence'¹⁰³ impacts from recent climate-related extremes, such as heat waves, droughts, floods, cyclones, and wildfires,¹⁰⁴ and increased risks in urban areas for people, assets, economies and ecosystems, including from heat stress, storms and extreme precipitation, inland and coastal flooding, landslides, air pollution, drought, water scarcity, sea level rise and storm surges.¹⁰⁵ The IPCC has noted with 'high confidence' that low-lying areas are at risk from sea-level rise, which will continue for centuries even if the global mean temperature is stabilised,¹⁰⁶ and that it is virtually certain that global mean sea-level rise will continue for many centuries beyond 2100 (the amount will depend on future emissions).¹⁰⁷ At the same time, the IPCC has acknowledged (with 'very high confidence' and 'high confidence', respectively) that '[i]nnovation and investments in environmentally sound infrastructure and technologies can reduce GHG [greenhouse gas] emissions and enhance resilience to climate change'¹⁰⁸ and '[t]ransformations in economic, social, technological and political decisions and actions can enhance adaptation and promote sustainable development'.¹⁰⁹ That said, such mitigation and adaptation measures remain uncertain,¹¹⁰ and they do not detract from the current trajectory of adverse climate change impacts. Hence, a longer timeframe for assessing risk may be particularly suited to the context of slow-onset of climate change in order to capture both real risk and mitigating measures. Context is key, and the rules cannot be too prescriptive: in refugee law, the focus is not on *certainty* of harm, but whether there is a real *risk* of it.¹¹¹ The competing

these standards should be seen as largely synonymous requiring something akin to the refugee 'real chance' standard. That is to say, something which is more than above mere speculation and conjecture, but sitting below the civil balance of probability standard.

¹⁰³ A combination of the IPCC's evaluation of the underlying scientific evidence, and the degree of expert agreement about it, determines the level of 'confidence' ascribed, which ranges from 'very low' to 'very high'. Confidence in the 'validity of a finding [is] based on the type, amount, quality and consistency of evidence (e.g., mechanistic understanding, theory, data, models, expert judgment) and on the degree of agreement': Intergovernmental Panel on Climate Change ('IPCC'), *Climate Change 2014: Synthesis Report* (Report, 2014) 121. The term 'virtually certain' means that the probability is 99–100%: at 2.

¹⁰⁴ Ibid 8.

¹⁰⁵ Ibid 15.

¹⁰⁶ Ibid 13.

¹⁰⁷ Ibid 16.

¹⁰⁸ Ibid 26 (emphasis omitted).

¹⁰⁹ Ibid 20 (emphasis omitted).

¹¹⁰ While, in some cases, uncertainty about mitigating factors has led decision-makers to deny the protection claim, in others, it has worked in the applicant's favour — while conditions may improve, they also may not (and the applicant should, in effect, be given the benefit of the doubt): see 1515485 (*Refugee*) [2018] AATA 724; 1605348 (*Refugee*) [2018] AATA 785.

¹¹¹ We are reminded of Lord Diplock's cautionary statement in the 1971 extradition case of *Fernandez v Government of Singapore* [1971] 2 All ER 691, 696–7, in which his Lordship explained that:

possibilities therefore need to be assessed in light of this standard. A mere possibility of intervention or *potential* mitigating developments may not be sufficient to reduce an existing real risk (albeit one that will manifest in the distant future).

D *Armed Conflict*

Armed conflict is another context in which arguments have been made for extending the timeframe. There are two lines of argument. First, the effects of armed conflict on civilians are indirect as well as direct, and the indirect effects (food insecurity, lack of essential healthcare, and so on) often take time to manifest at scale.¹¹²

Second, armed conflicts are usually volatile in terms of severity and geographic scope,¹¹³ such that areas previously considered safe become conflict-affected.¹¹⁴ The point has been noted by the Tribunal in the case of Afghanistan, for instance,¹¹⁵ and appears to cause consternation for decision-makers applying the ‘reasonably foreseeable future’ test. There is a tendency in some cases to curtail the ‘reasonably foreseeable future’ to a relatively short period because of the fluidity of the situation and uncertainty over variables involved.¹¹⁶ For example:

Whilst the Tribunal accepts that Islamic State has made threats against Shias in Pakistan, particularly in Parachinar and Hangu, the Tribunal considers that the potential for Islamic State to infiltrate or increase its presence in Pakistan remains uncertain. The Tribunal considers that the applicant’s claims in relation to this issue are highly speculative given the variables

There is no general rule of English law that when a court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens. ... The degree of risk should be an important factor in the court’s decision, whether it is more or less than 50 per cent.

¹¹² Hélène Lambert and Theo Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ (2010) 22(2) *International Journal of Refugee Law* 237, highlighting that the indirect effects often are more deadly on the civilian population (ie, refugees) than the direct effects of armed conflict. See also UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions*, UN Doc HCR/GIP/16/12 (2 December 2016), 5 [19] (*‘Guidelines on Armed Conflict’*).

¹¹³ *Guidelines on Armed Conflict*, UN Doc HCR/GIP/16/12 (n 112) 6 [25].

¹¹⁴ Theo Farrell and Olivier Schmitt, ‘The Causes, Character and Conduct of Internal Armed Conflict and the Effects on Civilian Populations, 1990–2010’ in Volker Türk, Alice Edwards and Cornelius Wouters (eds), *In Flight from Conflict and Violence: UNHCR’s Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press, 2017) 25. See also Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (Oxford University Press, 2007).

¹¹⁵ See, eg, 1215343 [2013] RRTA 240, [66]; 1213298 [2013] RRTA 43, [54]; 1217298 [2013] RRTA 81, [138].

¹¹⁶ 1703914 (*Refugee*) (n 71) [88]. See also DPM16 (n 19) [9]: ‘The fluidity of the political situation was directly relevant to that chance [of harm].’ This approach is also sometimes applied in contexts other than armed conflict: see 1601317 (*Refugee*) [2018] AATA 2740.

involved such as actions that may be taken by the Pakistan state, neighbouring countries or Western countries.¹¹⁷

An alternative approach would have been for the decision-maker to discuss the trajectory of Islamic State's military gains against the already known actions of neighbouring or other countries, in order to assess the risk to the applicant based on these conflict trends.

The foreclosure of reasonable speculation about future events is reflected in *PAM3*, which states: 'If a receiving country is subject to a violent political environment, events may change rapidly and the foreseeable future may be limited'.¹¹⁸ This general statement warrants scrutiny, as it does not make clear what is the implication of a violent political environment. While a rapidly changing environment might add to the complexity of a person's experience and perception of risk, this statement from *PAM3* should not be equated with an automatic shortening of the future window. Rather, existing authority supports the notion that volatility might *increase* the risk to the applicant in some cases and certainly requires a longer-frame assessment.¹¹⁹ For instance, in *Minister for Immigration and Multicultural Affairs v Jama*, a majority of the Full Federal Court of Australia noted the importance of taking into account the possibility of changing circumstances, particularly in a fluid situation, such as that in Somalia.¹²⁰ Even though there may be no current risk of persecution, 'a change in circumstances may readily be foreseen that would create a significant risk of persecution'.¹²¹ However, in cases involving the withdrawal of international troops from Afghanistan in 2014, some decision-makers took the withdrawal to suggest an increased risk based on predictions about the security situation post-2014,¹²² while others did not.¹²³

Signs that conditions might be improving should also be treated with caution since they may not be sustainable over the longer term.¹²⁴ Thus, in *1703914 (Refugee)*, the Tribunal reasoned:

¹¹⁷ *1314106* (n 101) [30]. See also *1319201* (n 101) [33] containing the same reasoning by the same decision-maker in relation to the risk from Islamic State in Pakistan.

¹¹⁸ *PAM3* (n 69) [7.2].

¹¹⁹ *Guidelines on Armed Conflict*, UN Doc HCR/GIP/16/12 (n 112) 6 [25].

¹²⁰ *Minister for Immigration and Multicultural Affairs v Jama* [1999] FCA 1680, [24], [29].

¹²¹ *Ibid* [24] (Branson and Sackville JJ). See also *DUX16* (n 19) [14].

¹²² In *CDC15* (n 83) [36], Charlesworth J noted that:

The predictive and speculative function of the Tribunal could not be properly discharged without assessing and dealing with the appellant's assertions that the troops would withdraw as predicted, that the Taliban would assume increased control as predicted, and that the chance of him being persecuted, or the risk that he would suffer serious harm, would be elevated as a result.

See also *MZZXD* (n 70) [69]; *1215016* (n 69) [107].

¹²³ *SZTUI* (n 70) [28]; *1220489* [2013] RRTA 292, [134].

¹²⁴ See Linda Kirk, 'The Concept of Imminence in Refugee Law: Administrative Appeals Tribunal (Migration and Refugee Division)' (Conference Paper, Expert Workshop on the Concept of 'Imminence' in the International Protection of Refugees and Other Forced Migrants, 20 August 2018) [8]. See also *1703914 (Refugee)* (n 71) [88]. In the context of art 1C(5) of the *Refugee Convention*, it has been stated that the contemplated change in circumstances must 'have some degree of permanency, at least in the context of future foreseeable events': *V04/17240* [2004] RRTA 52.

With such a rapidly changing political landscape it is difficult for the Tribunal to base a decision on probative material when so little is known and so many changes are occurring. It is possible that the political situation regresses. It is possible that the changes are cosmetic to the larger security apparatus and how it operates. It is possible that the country will reduce its heavy handedness. As such while acknowledging these changing circumstances I find that they cannot provide a basis upon which to ground a decision which projects into the reasonably foreseeable future.¹²⁵

In assessing the durability of changes in Afghanistan in the context of the cessation clause in art 1C(5) of the *Refugee Convention*, the Tribunal's reasoning in *V04/17240* provided an interesting insight into how future contingencies should be assessed in light of past and present circumstances:

(i) ... given the history of unrest in that country and apparent growing reluctance of the international community to make a long term and extensive commitment to securing some level of stability to the region it is premature to assume that anything has happened to date that would found a basis for confidence that the human rights situation in general in Afghanistan and the political dynamics which resulted in the persecution of the applicant in particular have materially changed so far as the *short to mid term future of the nation* is concerned. ...

(vii) Until effective new state structures are installed in Afghanistan, it would be premature to assert that the applicant no longer faces persecution in the reasonably foreseeable future ...¹²⁶

Logically, there is no reason why such analysis should be limited to cessation cases and not also apply to claims for refugee status: the two provisions, arts 1A(2) and 1C(5), are related. In *V04/17240*, the Tribunal (correctly in our view) considered the history of unrest and instability in Afghanistan, its human rights situation in general, and the absence of effective new state structures and permanent reform (that would indicate a safer future) over and above the many (volatile) changes in the political and military landscape in Afghanistan. Such a longer-frame assessment is appropriate in assessing refugee claims involving armed conflict.

E *Health Deterioration*

Analogous issues have arisen in cases concerning the future health of applicants and the absence of appropriate medical treatment in the country of origin. In one matter, *1008364*, involving an HIV-positive applicant from Indonesia, medical evidence suggested that the applicant was clinically stable and not 'at imminent risk of death whilst taking the current medications', but he would be 'likely to endure a significant reduction in health status and a significantly increased risk of death if he were to return to Indonesia where access to the required treatment is

¹²⁵ See *1703914 (Refugee)* (n 71) [88]. See also other cases where the future possibility of improving circumstances did not affect the finding of risk based on the existing circumstances: *1515485 (Refugee)* (n 110); *1605348 (Refugee)* (n 110).

¹²⁶ *V04/17240* (n 124) (emphasis added). It could be argued that referring to the future of a 'nation' may imply a year-long timeframe, given how long it can take for systemic changes such as those outlined here to be realised. See also *V03/16047* (n 80), which involved the same decision-maker and same reasoning.

unavailable'.¹²⁷ The Tribunal found that while the Indonesian authorities were striving to provide appropriate care to people with HIV/AIDS, 'their efforts [we]re hampered by, among other problems, a lack of resources, a recent decentralisation of the health sector, and by limited effectiveness in delivering basic health care services, especially to the poor'.¹²⁸ Although a lack of appropriate medical treatment 'would not occur as a result of discrimination but because of the lack of resources and endemic problems within the health service', the end result would be that the applicant would have to rely on his family and community 'to ensure his survival'.¹²⁹ As such, the Tribunal found that

the hardship the applicant is likely to incur in the foreseeable future if he returns to Indonesia and is unable to access appropriate treatment, threatens his capacity to subsist, and therefore amounts to persecution in a *Convention* sense (s 91R(2) of the Act).¹³⁰

Another matter, 0903707, concerned a Vietnamese applicant with HIV and Hepatitis B who claimed that he would be unable to access necessary medical treatment on return to Vietnam and would die within three to five years.¹³¹ His family had disowned him because of his illness and he said that he would have no means of support. He also feared being ostracised and unable to find work or accommodation on account of the stigma associated with his illnesses. The Tribunal was provided with medical evidence that he 'would be at risk of death in the short to medium term with the last months or years of his short life likely to be made more miserable because of discrimination'.¹³² Even though there was anti-discrimination legislation in place in Vietnam, the Tribunal considered that 'the Vietnamese government's laws and policies regarding HIV/AIDS ha[d] not been effectively or uniformly implemented across the country, especially in rural areas such as Ca Mau' and 'there was little evidence that the social change required to minimize stigma and discrimination had occurred in remote rural areas like the applicant's home area'.¹³³ The Tribunal found that the applicant had a well-founded fear of persecution given there was

a real chance that, if he returns to Vietnam now or in the reasonably foreseeable future, the applicant will face discrimination and stigmatisation which will deny him access to basic services and the capacity to earn a livelihood of any kind such that it threatens his capacity to subsist ...¹³⁴

These cases underline the importance of a contextual analysis, in which the intensity, severity and nature of *future harm*, based on its foreseeability in light of the individual's circumstances, are the crucial factors.¹³⁵ Although the temporal

¹²⁷ 1008364 [2010] RRTA 1135, [32].

¹²⁸ Ibid [69].

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ 0903707 [2009] RRTA 758.

¹³² Ibid [50].

¹³³ Ibid [108].

¹³⁴ Ibid [116]. Cf, 1200203 concerning an applicant from Japan who feared future nuclear disasters, which would exacerbate his existing physical and psychological medical conditions. The Tribunal was not satisfied that he faced serious harm for a *Refugee Convention* reason were he to return to Japan in the reasonably foreseeable future: 1200203 [2012] RRTA 145.

¹³⁵ See Foster (n 97) 192–3.

proximity of a potential event is not determinative of the likelihood of its occurrence, it is a contextual factor to be considered. Thus, if a threat is likely to manifest very soon, it may be easier for an individual to argue that he or she faces a real chance of being harmed, since there may be less opportunity for mitigating factors to intervene. By contrast, a threat in the more distant future might be able to be allayed or diminished through intervening measures. However, the decision-maker must weigh up the likelihood of the risk with any mitigation eventuating, rather than simply dismissing the risk as too speculative.¹³⁶ Even so, if the risk of harm is distant but very real — as in each of the four specific contexts discussed in this Part — then protection may well be required.

VI Conclusion

It is widely understood that the well-founded fear test in refugee law requires some speculation in light of its forward-looking and predictive nature. Yet, the requisite timeframe involved in an assessment of well-founded fear is rarely examined. It is an error of law to suggest that protection is only forthcoming where (risk of) harm is imminent, yet this notion has started to creep into refugee status decision-making, usually without explicit examination or reflection.¹³⁷

Australian courts and tribunals are notable for being singularly attuned to the relevance of time in refugee law and, in particular, in identifying the need for a flexible, longer-frame, assessment of future harm. Yet, as this article has revealed, even in this jurisdiction, decision-makers still sometimes struggle with the appropriate frame of reference. This suggests that the issue of time requires explicit scholarly and judicial analysis, so as to safeguard against inappropriately narrow approaches that may result in a rejection of refugee status even where a person faces a well-founded fear of persecution, albeit not immediately on return.

This article constitutes the first analysis of the approach of Australian courts and tribunals in examining the relevant timeframe involved in a well-founded fear assessment. It identified that the accepted position is one that is forward-looking, from the date of determination, into the ‘reasonably foreseeable future’. That timeframe is open-ended (an ‘indefinite period’) and must not be confined (for instance, to impending events). Decisions (notably by the Tribunal) that conflict with this authoritative position are erroneous. The article highlighted four specific contexts in which there is a particularly strong case for a longer timeframe: claims in relation to children, slow-onset impacts of climate change, armed conflict, and health deterioration.

It is hoped that the considered and insightful Australian jurisprudence examined in this article may provide the basis for the formulation of an appropriately inclusive approach to assessing well-founded fear in other jurisdictions in which the issue of time is far less developed. In light of contemporary protection challenges, the need for an open-ended approach to the timing of harm in refugee law is more important than ever.

¹³⁶ See *1314106* (n 101) [30]; *1319201* (n 101) [33].

¹³⁷ See generally Anderson et al (n 10).

Equity's Wergeld: Monetary Remedies for Emotional Distress by way of the Equitable Obligation of Confidence


William Khun*

Abstract

Many aspects of social and commercial life depend on our ability to confide secrets in others. The law, responsive to societal needs, developed the action for breach of confidence, traditionally offering relief through an order enjoining continued publication. However, in an era where instantaneous, irrevocable digital publication of information can be achieved by a single keystroke, such an order is no longer enough. Once online, the damage is done: the internet never forgets. It is settled that courts of equity may order equitable compensation as an alternative remedy for breach of confidence in commercial settings. However, courts have struggled to articulate a compelling jurisdictional basis for the same order in personal contexts. This article locates such a basis in a unified theory of equitable actions for breach of confidence: that the doctrine is a species of equitable fraud, and that it is this feature that justifies grants of monetary relief. While quantification methodology will differ between personal and commercial settings, there is no jurisdictional reason for monetary awards to be made in commercial contexts but not the personal.

I Introduction and Context

Some say that three may keep a secret, if two of them are dead.¹ This is not particularly practical advice. Interpersonal relations and commercial transactions alike depend on our ability to repose trust in one another so as to facilitate sharing of confidential information.

* LLB Hons (Syd), BA Hons (Syd), Lawyer, Allen & Overy, Sydney, Australia.
Email: william.khun@allenoverly.com. ORCID iD:  0000-0002-3694-8771.
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¹ Benjamin Franklin (ed), *Poor Richard's Almanack for 1850-1852*, compilation and republication (John Doggett Jr, 1851) 43.

Australian law recognises the value of such trust through the equitable action for breach of confidence.² The conventional remedy obtained by such an action in both personal and commercial settings is an injunction to restrain breach of that confidence.³ It is also accepted that, where the obligation has arisen in respect of commercial information, an alternative remedy is monetary relief.⁴ Some Australian courts have also awarded monetary compensation in *personal* settings, where the information has no commercial value, but disclosure has caused emotional distress.⁵

The archetypal example is publication of intimate sexual imagery by ex-partners, but the concept has far broader application. For example, in *Evans v Health Administration Corporation* ('NSW Ambulance Class Action'),⁶ claimants brought an action against their employer for sale of their medical records to personal injury law firms (the case settled without resolving the availability of monetary compensation).⁷ Had a clear jurisdictional basis for ordering monetary compensation for distress existed, it is plausible that the settlement calculus may have been different,⁸ or injurious disclosure prophylactically deterred outright.

Given the normative value to society of our ability to repose trust in one another, and the importance of human dignity preserved by control over our personal information, the hurt caused by disclosure of confidential material should not go unremedied. The question for this article is whether Australian courts ordering monetary awards for such distress have an equitable jurisdiction to do so, or whether, as one critic puts it, the 'boldness' of such awards 'hides intellectual timidity'.⁹

This article argues the former: ordering equitable compensation to remedy a breach of confidence causing emotional distress (but no pecuniary loss) falls squarely within the existing jurisdiction of courts of equity. The argument is straightforward: the jurisdictional basis for such monetary relief in commercial

² See, eg, *Del Casale v Artedomus Pty Ltd* (2007) 165 IR 148 ('Del Casale'); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('Lenah'); *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 ('Smith Kline'); *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 ('Moorgate Tobacco'); *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 ('John Fairfax'); *De Beer v Graham* (1891) 12 LR (NSW) Eq 144 ('De Beer').

³ See above n 2, and also *Stephens v Avery* [1988] Ch 449 ('Stephens v Avery'); *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 ('Coco v AN Clark'); *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302 ('Duchess of Argyll'); *Pollard v Photographic Co* (1888) 40 Ch D 345 ('Pollard'); *Morison v Moat* (1851) 9 Hare 241; 68 ER 492 ('Morison v Moat'); *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171 ('Prince Albert'); *Abernethy v Hutchinson* (1825) 1 H & Tw 28; 47 ER 1313 ('Abernethy').

⁴ *Smith Kline* (n 2) 83 (Gummow J); *Seager v Copydex Ltd* [1967] 1 WLR 923, 932 (Lord Denning MR; Salmon and Winn LJ agreeing) ('Seager'). See also *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413, 415 (Lord Greene MR; Somervell and Cohen LJ agreeing) ('Saltman Engineering').

⁵ *Wilson v Ferguson* [2015] WASC 15 ('Wilson'); *Giller v Procopets (No 2)* (2008) 24 VR 1 ('Giller (No 2)'); *Doe v Australian Broadcasting Commission* [2007] VCC 281 ('Doe v ABC').

⁶ *Evans v Health Administration Corporation* [2019] NSWSC 1781 ('NSW Ambulance Class Action'), settlement of which was approved pursuant to s 173 *Civil Procedure Act 2005* (NSW).

⁷ *NSW Ambulance Class Action* (n 6) [29], [38] (Ward CJ in Eq).

⁸ *Ibid* [29] (Ward CJ in Eq).

⁹ PG Turner, 'Rudiments of the Equitable Remedy of Compensation for Breach of Confidence' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 239, 271 ('Breach of Confidence').

contexts is the same jurisdiction invoked for monetary relief in personal contexts. This is because the jurisdictional basis for equity's intervention in all cases of breach of confidence (not being in equity's auxiliary jurisdiction)¹⁰ is that such breach constitutes equitable fraud. The equitable fraud, constituted by departure from the standards of conduct mandated by equity, gives rise to a liability akin to a debt commensurate with the magnitude of that departure, discharged by payment of equitable compensation. It is this fact of departure which is remedied by equitable compensation, not injury caused by the departure. Critically, this goes beyond a mere desire for formal symmetry in remedies (that is, in circumstances where an injunction is available, compensation ought also to be available):¹¹ grounding the obligation of confidence in equitable fraud allows for a substantive justification for the award of monetary relief.

A similar concept long existed in Anglo-Saxon law. Historically, a person who did proscribed wrongs owed the victim of said wrongs a sum of money as wergeld.¹² The obligation to pay wergeld arose by reason of doing the wrong, not by reason of any injury *caused* by the wrong (contrasted with botgeld, which compensated for injury).¹³ For example, a murderer owed wergeld to the kin of their victim, the sum of which was fixed by reference to the ascertained value of the victim,¹⁴ not by reference to any actual loss suffered by the mediæval family. By reason of the murder, the murderer owed the mediæval family a debt that was discharged by payment of wergeld. The wergeld was a second-best substitute for the person, not compensation for injury caused by the death of the person.

Modern equity has more refined tools than blood money. A plaintiff bringing an action for breach of confidence may obtain a quia timet injunction to restrain anticipated breach and/or a mandatory injunction enjoining future disclosure. Either is closer to performance by the confidant of their obligations than money alone, but both (requiring coercive intervention by the court or State) are second-best substitutes for performance. Equitable compensation is merely another substitute. The defaulting confidant is obliged to restore the confider to as close as possible the position they would have been in had the obligation been performed:¹⁵ whether by

¹⁰ For example, an action in assumpsit by way of the doctrine of part performance.

¹¹ See criticism of the 'symmetry argument': PG Turner, 'Privacy Remedies Viewed through an Equitable Lens' in Jason NE Varuhas and NA Moreham, *Remedies for Breach of Privacy* (Bloomsbury, 2018) 265, 272–4 ('Privacy Remedies').

¹² Old English, wer (man) + geld (gold). See also Theodore FT Plucknett, *A Concise History of the Common Law* (Butterworth, 5th ed, 1956) 426 ('A Concise History'); Harold Potter, *An Historical Introduction to English Law and its Institutions* (Sweet & Maxwell, 3rd ed, 1948) ('Historical Introduction') 341; Sir William Holdsworth, *A History of English Law* (Methuen; Sweet & Maxwell, 7th ed, 1969) vol I, 22 ('History of English Law').

¹³ Old English, bot (recompense) + geld (gold).

¹⁴ For example, in 771 CE a thegn (a minor noble) was worth 1200 shillings, but a commoner a mere 200: F Liebermann (ed), *Die Gesetze der Angelsachsen 3 Vols* (Halle, 1903–1916) vol I, 392–3. The author thanks his sister for translation assistance. See also Plucknett, *A Concise History* (n 12) 629.

¹⁵ *McKenzie v McDonald* [1927] VLR 134, 146 (Dixon AJ) ('*McKenzie v McDonald*'), citing *Nocton v Lord Ashburton* [1914] AC 932 ('*Nocton*') (generally) and *Robinson v Abbott* (1894) 20 VLR 346, 365–8 (Holroyd J) ('*Robinson v Abbott*'). See also *Re Collie*; *Ex parte Adamson* (1878) 8 Ch D 807, 820 (James and Baggallay LJ) ('*Ex parte Adamson*'); *Re Dawson*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSW 211, 216 (Street J) ('*Re Dawson*').

actual (albeit legally compelled) performance, or by substituted performance in the form of monetary compensation.

Had the Anglo-Saxons possessed the coercive power of the modern State, one could expect they too would have developed such refined remedies. Precursors to the injunction can be seen in the concept of ‘pay the wer or bear the feud’:¹⁶ legally sanctioned violence against recalcitrant debtors is not dissimilar to enforcement of an injunction by threat of committal.¹⁷ Moreover the development of more sophisticated remedies does not eradicate their older cousins, nor deprive those blunter instruments of a role to play. Much like recovery of wergeld for murder, in the digital era, actions for breach of confidence occur after the fact, when information is irrevocably publicised and injunctive relief unhelpful.

A Why Equity?

An anterior question is ‘why bother with equity at all?’. The answer is twofold. First, it is argued that the power to order equitable compensation is derived from equity’s exclusive jurisdiction. Given that the existence of parallel remedies does not necessarily erase either (such as parallel contractual and equitable relief for breach of confidence),¹⁸ the possibility of remedies at law does not eradicate existing remedies in equity.

Second, the common law has not been generous in alternative remedies. As information is not property,¹⁹ rights in rem are not directly of aid (though they may serve an ancillary function, such as an action in replevin to recover a diary), nor are there statutory remedies in Australia for interpersonal breaches of privacy,²⁰ in contrast to the United Kingdom (‘UK’).²¹ In New South Wales (‘NSW’), in cases of criminal non-consensual recording and distribution of intimate images,²² statute provides for compensation by court order out of the convicted person’s property.²³ However, this is no panacea: not only has the victim limited control over the

¹⁶ Plucknett, *A Concise History* (n 12) 444.

¹⁷ *Lever Bros Ltd v Kneale and Bagnall* [1937] 2 KB 87, 94 (Greene LJ); Holdsworth, *History of English Law* (n 12) vol I, 454–8; Edmund Robert Daniell, *The Practice of the High Court of Chancery* (Stevens & Sons, 1871) vol II, 1533–6 (‘*High Court of Chancery*’).

¹⁸ *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281, 290 (Finn, Sundberg and Jacobson JJ) (‘*Optus v Telstra*’); *Del Casale* (n 2) 175 (Campbell JA); *Yovatt v Winyard* (1820) 1 Jac & W 394; 37 ER 425 (‘*Yovatt v Winyard*’).

¹⁹ *Breen v Williams* (1996) 186 CLR 71, 90 (Dawson and Toohey JJ), 111 (Gaudron and McHugh JJ) (‘*Breen v Williams*’); *Smith Kline* (n 2) 120 (Gummow J).

²⁰ Contrast regulation of corporate conduct: *Privacy Act 1988* (Cth) s 6 (definition of ‘entity’).

²¹ *Human Rights Act 1998* (UK) s 6 (‘*Human Rights Act*’); *PJS v News Group Newspapers Ltd* [2016] AC 1081 (‘*PJS v News Group*’); *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) (‘*Mosley*’); *McKennitt v Ash* [2008] QB 73 (‘*McKennitt v Ash*’); *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 (‘*Campbell v MGN*’); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004 CETS No 194 (entered into force 1 June 2010) art 8 para 1 (‘*ECHR*’).

²² *Crimes Act 1900* (NSW) div 15C.

²³ *Victims Rights and Support Act 2013* (NSW) s 97(1).

proceedings, but guilt must be established beyond reasonable doubt and the offence is restricted to specific types of information.²⁴

The fêted developing tort of privacy lies nascent:²⁵ only one District Court judgment has awarded damages solely on the basis of such a tort,²⁶ and just three judgments have awarded undifferentiated damages on bases inclusive of such a tort.²⁷ Judicial statements such as that it is ‘difficult to see’ how such a tort could be pleaded in NSW,²⁸ and that ‘Australian common law does not recognise a tort of privacy’²⁹ render such claims ambitious. This is notwithstanding that damages for distress are already available as consequential loss in other tort claims (for example, the tort of conversion,³⁰ statutory misleading and deceptive conduct claims,³¹ or under *Wilkinson v Downton*³²), or even contractual claims (where the object of a contract is to provide enjoyment,³³ damages have been awarded for inconvenience,³⁴ distress,³⁵ or even a ‘feeling of anxiety’³⁶).

Accordingly, the plaintiff turns to equity, pleading for its intervention to ‘soften and mollify the Extremity of the Law’.³⁷

B Existing Approaches in Equity

Three Australian cases have ordered equitable compensation to remedy emotional distress caused by breach of confidence. In *Doe v Australian Broadcasting Corporation*, the trial judge awarded equitable compensation on the basis that they were bound by the Victorian appellate decision of *Talbot v General Television*

²⁴ *Crimes Act 1900* (NSW) s 91N (definitions of ‘intimate image’, ‘private act’ and ‘private parts’).

²⁵ *NSW Ambulance Class Action* (n 6) [30] (Ward CJ in Eq); *Glencore International AG v Commissioner of Taxation* (2019) 372 ALR 126, 128 [7] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Lenah* (n 2) 248–51 (Gummow and Hayne JJ).

²⁶ *Grosse v Purvis* [2003] QDC 151, [441]–[442] (Skoien J).

²⁷ *Giller (No 2)* (n 5) 6 (Maxwell P); *Doe v ABC* (n 5) [157]–[164] (Hampel CCJ). See, more recently, *Scala v Scala* [2019] FCCA 3456, [60], [79] (Burchardt J), which describes *Wilson* (n 5) and *Giller (No 2)* (n 5) as discussing the ‘tort’ of breach of confidence (at [60]), but which does not analyse the jurisdictional bases for the award of compensation.

²⁸ *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 319–20 (Callinan J).

²⁹ *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484, 515 (McColl JA). See also *NSW Ambulance Class Action* (n 6) [30] (Ward CJ in Eq): ‘such a tort [of invasion of privacy] has not been recognised in [NSW]’.

³⁰ *Graham v Voigt* (1989) 95 FLR 146, 155–6 (Kelly J) (‘*Graham v Voigt*’); *Jamieson’s Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144, 150 (Quilliam J) (‘*Jamieson’s Tow*’).

³¹ *Newman v Financial Wisdom Ltd* (2004) 56 ATR 634, 696–8 (Mandie J); *Holloway v Witham* (1990) 21 NSWLR 70, 85–6 (Lee CJ at CL).

³² *Wilkinson v Downton* [1897] 2 QB 57. See also *Magill v Magill* (2006) 226 CLR 551, 589 (Gummow, Kirby and Crennan JJ) (‘*Magill*’); *Tame v New South Wales* (2002) 211 CLR 317, 376 (Gummow and Kirby JJ) (‘*Tame v NSW*’); *Civil Liability Act 2002* (NSW) s 31.

³³ *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 363 (Mason CJ), 370 (Brennan J), 382 (Deane and Dawson JJ).

³⁴ *Burton v Pinkerton* (1867) LR 2 Ex 340, 351 (Kelly CB); *Hobbs v London and South Western Railway* (1875) LR 10 QB 111, 116 (Cockburn CJ).

³⁵ *Jarvis v Swan Tours Ltd* [1973] QB 233, 237–8 (Lord Denning MR).

³⁶ *Kemp v Sober* (1851) 1 Sim (NS) 517, 520; 61 ER 200, 201 (Lord Cranworth V-C).

³⁷ *Earl of Oxford’s Case* (1615) Ch Rep 1, 7; 21 ER 485, 486 (Lord Eldon LC) (capitalisation in original) (‘*Earl of Oxford*’).

*Corporation Pty Ltd*³⁸ to assess ‘damages’ in equity by the method most appropriate to compensate for the breach.³⁹ *Talbot* relied on the assertion that a breach of confidence was a ‘wrongful act’ within the meaning of Victoria’s *Lord Cairns’ Act* provisions (then in original form),⁴⁰ a controversial proposition (see discussion in Part IVA below).

The second case was the appellate decision in *Giller v Procopets (No 2)*.⁴¹ There, two parties in a de facto relationship had an acrimonious breakup, following which one party distributed images and video of their past sexual intercourse to the other’s friends and family. The trial judge refused monetary award because, inter alia, Australian law did not permit award of damages to compensate distress resulting from breach of confidence where the distress fell short of recognised psychiatric injury.⁴² The appellate Court unanimously rejected this reasoning. First, Victoria’s amended⁴³ *Lord Cairns’ Act* provisions removed any wrongful act requirement: because the Court had the jurisdiction to hear an application for an injunction in the case, it had the jurisdiction to order damages. The Court also stated, in obiter dicta, that a breach of confidence was a ‘wrongful act’ under the unamended *Lord Cairns’ Act*.⁴⁴ Second, the Court held that equitable compensation (not damages)⁴⁵ was available in equity’s exclusive jurisdiction by parity of reasoning with injunctive relief.⁴⁶ This was because conferral of equitable jurisdiction on a court carried with it ‘inherent jurisdiction to grant relief by way of monetary compensation for breach of an equitable obligation, whether of trust or confidence’,⁴⁷ and an inability to award compensation would leave Ms Giller without an effective remedy.⁴⁸

The third case, *Wilson v Ferguson*, dealt with facts materially similar to *Giller (No 2)*. There, Mitchell J awarded equitable compensation for breach of confidence.⁴⁹ Two bases were provided. First, that *Giller (No 2)* was not ‘plainly wrong’⁵⁰ in its interpretation of non-statutory law, and therefore binding as an

³⁸ *Talbot v General Television Corporation Pty Ltd* [1980] VR 224, affd on appeal at [1980] VR 224, 250 (Young CJ), 253 (Lush J) (*‘Talbot’*).

³⁹ *Doe v ABC* (n 5) [141]–[142], citing *Talbot* (n 38) 244–5 (Marks J).

⁴⁰ *Supreme Court Act 1958* (Vic) s 62(3); cf *Chancery Amendment Act 1858*, 21 & 22 Vict c 27, s 2 (*‘Lord Cairns’ Act’*).

⁴¹ *Giller (No 2)* (n 5).

⁴² *Giller v Procopets* [2004] VSC 113, [165]–[170] (Gillard J).

⁴³ *Supreme Court Act 1986* (Vic) s 38. See also *Supreme Court Act 1933* (ACT) s 34, *Civil Proceedings Act 2011* (Qld) s 8.

⁴⁴ *Giller (No 2)* (n 5) 94 (Neave JA), citing *Talbot* (n 38). See also discussion in *Wentworth v Woollahra Municipal Council (No 2)* regarding whether purely equitable claims are wrongful acts under *Lord Cairns’ Act*: (1982) 149 CLR 672, 676–7 (Gibbs CJ, Mason, Murphy and Brennan JJ) (*‘Wentworth v Woollahra (No 2)’*).

⁴⁵ *Giller (No 2)* (n 5) 102–3 (Neave JA), discussing *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 303 (Spigelman CJ) (*‘Digital Pulse’*).

⁴⁶ *Giller (No 2)* (n 5) 32 (Ashley JA), 100 (Neave JA; Maxwell P agreeing), citing, inter alia, *Stephens v Avery* (n 3).

⁴⁷ *Smith Kline* (n 2) 83 (Gummow J), quoted in *Giller (No 2)* (n 5) 100 (Neave JA).

⁴⁸ *Giller (No 2)* (n 5) 32 (Ashley JA) 100 (Neave JA), citing *Cornelius v De Taranto* [2000] EWHC 561 (QB) (*‘De Taranto’*).

⁴⁹ *Wilson* (n 5) [55]–[60] (Mitchell J), citing, inter alia, *Duchess of Argyll* (n 3) and *Prince Albert* (n 3).

⁵⁰ *Wilson* (n 5) [76] (Mitchell J).

interstate intermediate appellate decision.⁵¹ Second, that the Supreme Court of Western Australia, being a court of equity, has inherent jurisdiction to make monetary compensation for breach of an equitable obligation, ‘whether of trust or confidence’.⁵² Because the two bases for the decision (*Lord Cairns’ Act* and the exclusive jurisdiction) independently justified the relief given, either could be read as the ratio decidendi of *Wilson*.⁵³

Doe v ABC, Giller (No 2) and *Wilson* have been subject to some criticism. Most forcefully, Turner argues that pleas that to do otherwise than grant relief would leave a wrong without a remedy⁵⁴ hide ‘intellectual timidity’.⁵⁵ Given that equitable doctrines traditionally focus on economic interests⁵⁶ and that the days of unfettered equitable discretion have long passed,⁵⁷ Turner argues that reversing equity’s settled attitude against award of damages for personal loss (traditionally the realm of torts) requires more than mere perceived injustice.⁵⁸

Neither *Giller (No 2)* nor *Wilson* turned on unfettered discretion: compensation was awarded by parity of reasoning with injunctive relief for breach of confidence.⁵⁹ In commercial settings, neither injunctive relief⁶⁰ nor equitable compensation⁶¹ for breach of confidence requires proof of monetary loss: the jurisdiction is enlivened by proof that the obligation was breached, not that a breach caused a particular category or quantum of injury.⁶² Moreover, parallel legal and equitable actions can (and do) coexist. The fact that they result in different quanta of compensation, apply different tests of causation, and are subject to different defences reflects the fact that the actions vindicate different values and principles.⁶³

⁵¹ Ibid [75]–[76] (Mitchell J), applying *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁵² *Smith Kline* (n 2) 83 (Gummow J), cited in *Wilson* (n 5) [69] (Mitchell J).

⁵³ *Day v Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335, 346 (Leeming JA; Meagher and Emmett JJA agreeing); *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665, 713 (Campbell JA; Giles and Whealy JJA agreeing).

⁵⁴ *Wilson* (n 5) [79]–[82] (Mitchell J).

⁵⁵ Turner, ‘Breach of Confidence’ (n 9) 271.

⁵⁶ *Paramasivam v Flynn* (1998) 90 FCR 489, 504 (Miles, Lehane and Weinberg JJ) (‘*Paramasivam*’); Turner, ‘Breach of Confidence’ (n 9) 270–1.

⁵⁷ *Digital Pulse* (n 45) 304 (Spiegelman CJ); *Gee v Pritchard* (1818) 2 Swans 403, 414; 36 ER 670, 674 (Lord Eldon LC).

⁵⁸ Turner, ‘Breach of Confidence’ (n 9) 271–3.

⁵⁹ *Giller (No 2)* (n 5) 100 (Neave JA, Maxwell P agreeing), citing, inter alia, *Stephens v Avery* (n 3); *Duchess of Argyll* (n 3).

⁶⁰ *NRMA v Geeson* (2001) 40 ACSR 1, 10–11 [58] (Ipp AJA; Mason P and Giles JA agreeing); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 190 (McHugh JA); *Moorgate Tobacco* (n 2) 438 (Deane J).

⁶¹ *Smith Kline* (n 2) 83 (Gummow J); *Seager* (n 4) 932 (Lord Denning MR; Salmon and Winn LJ agreeing); *Saltman Engineering* (n 4) 415 (Lord Greene MR; Somervell and Cohen LJ agreeing).

⁶² *Smith Kline* (n 2) 112 (Gummow J); *Moorgate Tobacco* (n 2) 438 (Deane J).

⁶³ Justice Leeming, ‘Equitable Compensation for Breach of Confidence’ [2017] (Spring) *Bar News* 39 (In reply to PG Turner Seminar Paper, NSW Bar Association and Ross Parsons Centre of Commercial, Corporate and Taxation Law, 30 March 2017) 44 (‘A Response to Peter Turner’). See also *Gulati v Mirror Group Newspapers Ltd (No 2)* for a discussion of different approaches to quantifying damages for distress, including for invasion of privacy: [2017] QB 149, 167–74 (Arden LJ; Rafferty and Kitchin LJ agreeing).

II The Obligation of Confidence

A *The Nature of the Obligation*

It is a 'broad principle of equity that he who has received information in confidence shall not take advantage of it'.⁶⁴ This principle, and the concomitant power to enjoin breaches of confidence, has been asserted since the 19th century⁶⁵ and is a settled feature of Australian law.⁶⁶ From early recognition as distinct from actions in property or contract,⁶⁷ through mid-20th century revivification⁶⁸ and the present day,⁶⁹ the primary remedy has been an injunction ensuring performance of the obligation. Monetary compensation has been primarily⁷⁰ (though not exclusively)⁷¹ sought and awarded in commercial settings.

The orthodox formulation is that in *Coco v AN Clark (Engineers) Ltd*,⁷² subject to modifications extending the doctrine to eavesdroppers and innocent finders of information.⁷³ The obligation arises where:

- (i) specifically identifiable⁷⁴ information;
- (ii) having the necessary quality of confidence;
- (iii) is received in circumstances importing an obligation of confidence.

The requirement at (iii) is akin to (though distinct from) constructive notice: information is received in circumstances where a reasonable person on reasonable grounds would realise they were not free to deal with the information as their own.⁷⁵

⁶⁴ *Seager* (n 4) 931 (Lord Denning MR). See also *Lord Ashburton v Pape* [1913] 2 Ch 469, 475 (Swinfen Eady LJ), quoted in *John Fairfax* (n 2) 50 (Mason J).

⁶⁵ See, eg, *Morison v Moat* (n 3).

⁶⁶ *Moorgate Tobacco* (n 2) 437–8 (Deane J); *John Fairfax* (n 2) 50–2 (Mason J).

⁶⁷ *De Beer* (n 2) 146–7 (Owen CJ in Eq); *Yovatt v Winyard* (n 18) 426 (Lord Eldon LC).

⁶⁸ *Coco v AN Clark* (n 3) 53 (Megarry J); *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293, 1317 (Roskill J); *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* [1960] RPC 128, 130 (affirming Roxburgh J at first instance).

⁶⁹ *Wilson* (n 5) [90] (Mitchell J); *Smith Kline* (n 2) 121 (Gummow J).

⁷⁰ *Smith Kline* (n 2) 83 (Gummow J); *Seager* (n 4) 932 (Lord Denning MR; Salmon and Winn LJ agreeing); *Saltman Engineering* (n 4) 415 (Lord Greene MR; Somervell and Cohen LJ agreeing).

⁷¹ *Wilson* (n 5) [90] (Mitchell J); *Giller* (n 5) 50 (Ashley JA) 100–2 (Neave JA; Maxwell P agreeing); *Campbell v MGN* (n 21) 493 (Lord Hope), 502 (Baroness Hale), 505 (Lord Carswell); *De Taranto* (n 48) [84] (Morland J).

⁷² *Coco v AN Clark* (n 3) 47 (Megarry J).

⁷³ *Optus v Telstra* (n 18) 290 (Finn, Sundberg and Jacobson JJ).

⁷⁴ See *O'Brien v Komesaroff* (1982) 150 CLR 310, 326–8 (Mason J Murphy, Aickin, Wilson and Brennan JJ agreeing) ('*Komesaroff*').

⁷⁵ *Del Casale* (n 2) 171 (Campbell JA), quoting *Coco v AN Clark* (n 3) 47–8 (Megarry J) and citing its adoption in, inter alia, *John Fairfax* (n 2) 51 (Mason J); *Komesaroff* (n 74) 326 (Mason J; Murphy, Aickin, Wilson and Brennan JJ agreeing); *Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443 (Gummow J) ('*Corrs Pavey*'); *Smith Kline* (n 2) 86–7 (Gummow J).

Disagreement exists as to the jurisdictional basis of this action.⁷⁶ Canadian⁷⁷ and New Zealand⁷⁸ jurisprudence treat the obligation as ‘sui generis’,⁷⁹ and the arguably formulaic⁸⁰ nature of the test suggests it could be characterised as a tort (at least in conflict of laws contexts).⁸¹ New Zealand treatment suggests the ‘mingling or merging’⁸² of legal and equitable remedies means any or all are available for breach of confidence.⁸³

Australia recognises a purely equitable obligation of confidence founded in conscience arising in the circumstances of the case.⁸⁴ It is enforced by equity’s intervention on the basis that the obligation fastens, on ‘grounds of faith or confidence’,⁸⁵ upon the conscience of the confidant.⁸⁶

B A Brief History

Equity’s origins lay in petitions to the monarch in the name of God and charity⁸⁷ to safeguard the immortal souls of their subjects by restraining legal, but sinful, exercise of rights at law.⁸⁸ Over the centuries, this ecclesiastic compulsion secularised into a ‘technical morality’;⁸⁹ a conscience *civilis et politica* dispensed by

⁷⁶ See discussion of the consequences of classification in Barbara McDonald and David Rolph, ‘Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?’ in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Bloomsbury, 2018) 239.

⁷⁷ *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, 161–3 [26]–[28] (Binnie J; L’Hereux-Dubé, Gonthier, McLachlin, Iacobucci, Major and Bastarache JJ agreeing) (‘*Cadbury Schweppes*’); *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 615 (Sopinka J dissenting), contra *La Forest J* at 672 (‘*Lac Minerals*’).

⁷⁸ See, eg, *Splice Fruit Ltd v New Zealand Kiwifruit Board* [2016] NZHC 864, [120] (Health J) (‘*Splice Fruit*’).

⁷⁹ See Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) ch 4 (‘*Gurry*’); Jennifer E Stuckey, ‘The Equitable Action for Breach of Confidence: Is Information Ever Property?’ (1981) 9(2) *Sydney Law Review* 402, 403 (‘Is Information Ever Property?’).

⁸⁰ See Laura Hoyano ‘The Flight to Fiduciary Haven’ in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 169, 206–7.

⁸¹ Michael Douglas, ‘Characterisation of Breach of Confidence as a Privacy Tort in Private International Law’ (2018) 41(2) *University of New South Wales Law Journal* 490.

⁸² *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301 (Cooke P; Richardson, Bisson and Hardie Boys JJ, Somers J agreeing) (‘*Aquaculture*’). See also *Day v Mead* [1987] 2 NZLR 443, 451 (Cooke P).

⁸³ *Otoy New Zealand Ltd v Kozlov* [2017] NZHC 2294, [52]–[55] (Muir J) (‘*Kozlov*’); *Splice Fruit* (n 78) [120] (Health J); *Skids Programme Management Ltd v McNeill* [2013] 1 NZLR 1, 28 (Ellen France, Venning and Asher JJ) (‘*Skids*’).

⁸⁴ *Smith Kline* (n 2) 83 (Gummow J); *Moorgate Tobacco* (n 2) 437–8 (Deane J); *De Beer* (n 2) 146 (Owen CJ in Eq).

⁸⁵ *Morison v Moat* (n 3) (1851) 9 Hare 241, 241; 68 ER 492, 492 (Turner V-C).

⁸⁶ *Abernethy* (n 3) 1317–8 (Lord Eldon LC); *Morison v Moat* (n 3) (1851) 9 Hare 241, 255; 68 ER 492, 498 (Turner V-C). See also *Tipping v Clarke* (1843) 2 Hare 383; 67 ER 157.

⁸⁷ Daniell, *High Court of Chancery* (n 17) vol I, 266–7, 311.

⁸⁸ *Earl of Oxford* (n 37) 487 (Lord Ellesmere LC). See also Potter, *Historical Introduction* (n 12) 558; Holdsworth, *History of English Law* (n 12) vol I, 408–9; PW Young, C Croft and M Smith, *On Equity* (Lawbook, 2009) 10 [1.20].

⁸⁹ Joseph Story, *Commentaries on Equity Jurisprudence, As Administered in England and America*, Melvin M Bigelow (ed) (Little, Brown and Company, 13th ed, 1886) vol I, 310 [308] (‘*Commentaries*’). See also George Spence *The Equitable Jurisdiction of the Court of Chancery* (V & R Steven and GS Norton, 1847) vol I, 411–4 (‘*Equitable Jurisdiction*’).

the Lord Chancellor in a scientific, systematic fashion⁹⁰ by way of in personam orders against delinquent parties to compel performance of personal obligations.⁹¹ From this conscience emanates the normative rules of equity that are contextually recognised through enforcement of equitable obligations.

In 1969, Megarry J (as the later Vice-Chancellor then was) articulated the equitable jurisdiction to restrain breaches of confidence in this fashion: a specific manifestation of norms of equity expressed in a couplet posthumously attributed to Lord Chancellor Sir Thomas Moore: 'Three things are to be helped in Conscience; Fraud, Accident and things of Confidence'.⁹² Confidence (a form of fidelity) was said to be the 'cousin of trust';⁹³ enforcement of both was part of the Chancery's jurisdiction to act in personam to restrain conduct contrary to conscience.

To illustrate: a trust is a relationship between a trustee and beneficiary in respect of certain property⁹⁴ importing as incidents of that relationship certain duties cognisable in equity (for example, exercise of due care and skill in investment).⁹⁵ Those duties are cognisable in equity not because of any claim at law, but because the norms of behaviour mandated by equity's secular morality are enforced through imposition of standards of conduct.⁹⁶ The metes and bounds of these standards form the subject of disputes as to the scope and content of equitable obligations. The obligation of confidence, fastening on the conscience of the confidant,⁹⁷ is analogous: the relationship of confider and confidant imports incidental obligations as specific manifestations of the general norms of conduct demanded by equity's conscience *civilis et politica*.⁹⁸

Early case law restrained misuse of confidential information on the basis of proprietary 'common-law copyright',⁹⁹ or by implied contractual obligations¹⁰⁰ (enforced in equity's auxiliary jurisdiction).¹⁰¹ Property-based analysis is inconsistent with modern Australian law: information is not property¹⁰² and (unlike property) a confidant need not account for or even remember information, merely

⁹⁰ *Earl of Feversham v Watson* (1680) Rep Temp Finch 445; 23 ER 242, extracted in DEC Yale (ed) *Lord Nottingham's Chancery Cases* (Selden Society, 1957) vol II, 739.

⁹¹ J Brunyate (ed) *Equity: A Course of Lectures by FW Maitland* (Cambridge University Press, 1969) 17–8.

⁹² H Rolle, *Rolle's Abridgement* (1668) vol I, 374; *Coco v AN Clark* (n 3) 46 (Megarry J).

⁹³ *Coco v AN Clark* (n 3) 46 (Megarry J). See also Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010) 242 ('Fiduciary Loyalty').

⁹⁴ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 1.

⁹⁵ See *Speight v Gaunt* (1883) 22 Ch D 727.

⁹⁶ See, eg, *Breen v Williams* (n 19) 107 (Gaudron and McHugh JJ).

⁹⁷ *Moorgate Tobacco* (n 2) 438 (Deane J); *De Beer* (n 2) 146–7 (Owen CJ in Eq); *Morison v Moat* (n 3) (1851) 9 Hare 241, 255; 68 ER 498, 492 (Turner V-C).

⁹⁸ See AH Chaytor and WJ Whittaker (eds), *The Forms of Action at Common Law: A Course of Lectures by FW Maitland* (Cambridge University Press, 1965) 2 (Lecture I).

⁹⁹ *Statute of Anne 1710*, 8 Ann c 21 (also cited 8 Ann c 19); *Earl of Lytton v Devey* [1884] 54 LJ Ch 293 ('Lytton'). See also Aplin et al, *Gurry* (n 79); Stuckey, 'Is Information Ever Property?' (n 79).

¹⁰⁰ *Tipping v Clarke* (n 86) 2 Hare 383, 392–3; 67 ER 157, 161 (Wigram V-C); Aplin et al, *Gurry* (n 79) 17–24.

¹⁰¹ *Optus v Telstra* (n 18) 290 (Finn, Sundberg and Jacobson JJ). See also *Morison v Moat* (n 3).

¹⁰² *Breen v Williams* (n 19) 90 (Dawson and Toohey JJ), 111 (Gaudron and McHugh JJ); *Smith Kline* (n 2) 112 (Gummow J). See also *Phipps v Boardman* [1967] 2 AC 46, 129 (Lord Upjohn) ('Phipps v Boardman').

not put it to improper use.¹⁰³ While contractual actions remain viable today, from as early as 1825 equitable jurisprudence held that unauthorised reproduction of information could be restrained independent from contract on the basis that the recipients were under a ‘trust’ not to misuse the information.¹⁰⁴ This was applied in *Prince Alfred*, where reproduction of a catalogue of Queen Victoria’s etchings was restrained because the catalogue constituted information obtained by breach of ‘trust’.¹⁰⁵ In *Morison v Moat*, Turner V-C concluded that, where a party obtains confidential information by improper means (such as facilitating another’s breach of contract), equity ‘fastens the obligation [of confidence] on the conscience of the party, and enforces it against him’.¹⁰⁶

By 1902, Ashburner stated as accepted doctrine that:

information obtained by reason of a confidence reposed or in the course of a confidential employment, cannot be made use of either then or at any subsequent time to the detriment of the person from whom or at whose expense it was obtained.¹⁰⁷

Ashburner gave personal letters as an example: ‘[i]n the case of letters sent to A by B, A’s duty is not to deal with those letters *so as to wound the feelings* of B.’¹⁰⁸ Proof of detriment was unnecessary. Three further contemporaneous cases affirmed that equity could restrain a breach of confidence independent from action in property or contract.¹⁰⁹ The purpose of this historical survey is to demonstrate that the only thing necessary for equitable intervention is the risk of affront to conscience. An inquiry into the nature or quantum of injury suffered by the confidant’s breach is at most ‘merely a test’ of the duty imposed.¹¹⁰

In 1911, the *Copyright Act 1911* (UK)¹¹¹ provided a more convenient alternative to breach of confidence, including statutory damages¹¹² and a lower evidentiary bar.¹¹³ While the statute expressly did not abrogate the equitable jurisdiction to restrain a breach of confidence,¹¹⁴ a 1928 House of Lords case affirming that jurisdiction was seemingly viewed as unimportant and went unreported until 1963.¹¹⁵ Nevertheless, after World War II the equitable action saw a resurgence and the first monetary awards. In 1948, Lord Greene was willing to award *Lord Cairns’ Act* damages,¹¹⁶ and in 1963, Lord Denning MR expressed in

¹⁰³ *Breen v Williams* (n 19) 111–12 (Gaudron and McHugh JJ).

¹⁰⁴ *Abernethy* (n 3) 1317–8 (Lord Eldon LC).

¹⁰⁵ *Prince Albert* (n 3) 1 Mac & G 25, 45; 41 ER 1171, 1179 (Lord Cottenham LC).

¹⁰⁶ *Morison v Moat* (n 3) (1851) 9 Hare 241, 255; 68 ER 492, 498 (Turner V-C).

¹⁰⁷ Walter Ashburner, *Principles of Equity* (Butterworths, 1902) 515 (‘*Principles*’); repeated verbatim in the second edition: D Browne, *Ashburner’s Principles of Equity* (Butterworths, 2nd ed, 1933) 374 (‘*Principles 2nd ed*’).

¹⁰⁸ *Ibid* 515 (emphasis added).

¹⁰⁹ *Lamb v Evans* [1893] 1 Ch 218, 230 (Bowen LJ), 235–6 (Kay LJ); *Robb v Green* [1895] 2 QB 315, 318 (Lord Escher MR; AL Smith LJ agreeing); *De Beer* (n 2) 145 (Owen CJ in Eq).

¹¹⁰ Ashburner, *Principles* (n 107) 515.

¹¹¹ *Copyright Act 1911* (UK) 1 & 2 Geo 5, c 46 (‘*Copyright Act*’).

¹¹² *Ibid* s 6(1).

¹¹³ *Tett Bros Ltd v Drake & Gorham Ltd* (1934) [1928–1935] MacG Cop Cas 492, 495 (Clauson J).

¹¹⁴ *Copyright Act* (n 111) s 31.

¹¹⁵ *O Mustad & Son v Dosen* (1928) [1964] 1 WLR 109, 110–1; [1963] 3 All ER 416, 418–419 (Lord Buckmaster; Viscount Dunedin, Lords Phillimore, Blanesburgh, and Warrington agreeing).

¹¹⁶ *Saltman Engineering* (n 4) 414–5 (Lord Greene MR; Somervell and Cohen LJ agreeing).

obiter dicta the ‘broad principle of equity’ that one receiving information in confidence shall not take unfair advantage of it,¹¹⁷ later awarding damages without clarity as to jurisdiction.¹¹⁸ The doctrine was also applied in new contexts. For example, the reciprocal trust inherent in a matrimonial relationship¹¹⁹ meant disclosure of marital confidences amounted to ‘breach of faith’ restrained in equity.¹²⁰ Similarly, where secrets were conveyed in a close friendship it would be ‘unconscionable for a person who has received information on the basis that it is confidential to reveal that information’.¹²¹

C The Modern Position

The High Court of Australia adopted this articulation of breach of confidence when Deane J asserted in *Moorgate Tobacco* that equity’s jurisdiction to enjoin a breach of confidence was enlivened where the circumstances of receipt of information affected the conscience of the confidant,¹²² a position since followed.¹²³ Proof of economic injury is not a necessary precondition to the existence of the obligation or the availability of relief: the relevant inquiries are (1) does conscience mandate a certain standard of conduct; and (2) was that standard met.

Other jurisdictions have taken divergent paths. Canada views breach of confidence as a sui generis doctrine with hybrid roots in equity, property, and torts,¹²⁴ with a multiplicity of remedies.¹²⁵ New Zealand views ‘damages’ as available for breaches of confidence¹²⁶ on the basis that equity may draw upon the full arsenal of remedies in law,¹²⁷ including exemplary damages.¹²⁸

English jurisprudence is complicated by the *Human Rights Act 1998* (UK), which requires¹²⁹ courts to give effect to the *European Convention on Human Rights* art 8 privacy right.¹³⁰ For example, the UK Supreme Court has enjoined

¹¹⁷ *Seager* (n 4) 931 (Lord Denning MR; Salmon and Winn LJJ agreeing), citing inter alia *Salman Engineering* (n 4).

¹¹⁸ See *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 (‘*Seager (No 2)*’).

¹¹⁹ *Duchess of Argyll* (n 3) 322 (Ungoed-Thomas J).

¹²⁰ Ibid 321 (Ungoed-Thomas J), citing North J in *Pollard* (n 3) (in turn quoting *Tuck v Priester* (1887) 19 QBD 629, 638 (Lindley LJ)).

¹²¹ *Stephens v Avery* (n 3) 456 (Browne-Wilkinson V-C).

¹²² *Moorgate Tobacco* (n 2) 438 (Deane J), discussing *John Fairfax* (n 2) 51 (Mason J).

¹²³ *Smith Kline* (n 2) 83, 86–7 (Gummow J); and as examples: *Wilson* (n 5); *Optus v Telstra* (n 18); *Giller (No 2)* (n 5); *Del Casale* (n 2); *Lenah* (n 2).

¹²⁴ *Lac Minerals* (n 77) 615 (Sopinka J, dissenting), cited in *Cadbury Schweppes* (n 77) 158–63 [22]–[28] (Binnie J; L’Hereux-Dubé, Gonthier, McLachlin, Iacobucci, Major and Bastarache JJ agreeing).

¹²⁵ *Cadbury Schweppes* (n 77) 162–3 [28] (Binnie J; L’Hereux-Dubé, Gonthier, McLachlin, Iacobucci, Major and Bastarache JJ agreeing).

¹²⁶ *Aquaculture* (n 82) 301 (Cooke P; Richardson, Bisson and Hardie Boys JJ, Somers J agreeing).

¹²⁷ *Splice Fruit* (n 78) [120] (Health J); *Skids* (n 83) 28 (Ellen France, Venning and Asher JJ); *Aquaculture* (n 82) 301 (Cooke P; Richardson, Bisson and Hardie Boys JJ, Somers J agreeing).

¹²⁸ *Kozlov* (n 83) [52]–[55] (Muir J); *Skids* (n 83) 28 (Ellen France, Venning and Asher JJ).

¹²⁹ *Human Rights Act* (n 21) s 6(1). A court is a public authority for the purposes of the *Human Rights Act*: see *Human Rights Act* (n 21) s 6(3); *R v Brown (Edward)* [2016] 1 WLR 1141, 1153 (Fulford LJ).

¹³⁰ *ECHR* (n 21) art 8 para 1.

infringement of art 8 even where equity would not traditionally intervene,¹³¹ extending the ‘action for breach of confidence’ to encompass intrusion into privacy.¹³² The action has variously been labelled as a tort¹³³ or equitable doctrine expanded by statute;¹³⁴ either explanation renders monetary awards easier to justify.¹³⁵ Moreover, in 1981 the English *Lord Cairns’ Act* was amended to remove the ‘wrongful act’ requirement,¹³⁶ such that ‘damages’ are arguably available for purely equitable actions (see discussion in Part IVB).

III Equitable Compensation for Equitable Fraud

A *Justifying Equitable Intervention*

This article argues that equity’s jurisdiction to restrain breaches of confidence can be located in its jurisdiction to remedy equitable fraud. The term ‘equitable fraud’ requires clarification. It is trite to note ‘equitable fraud’ is a *nomen generalissimum*,¹³⁷ appearing in ‘kaleidoscopic’¹³⁸ guises, with precise definition variously described as impossible,¹³⁹ undesirable,¹⁴⁰ or at best non-exhaustive description.¹⁴¹ It is said the scope of equitable fraud is not closed:¹⁴² fraud is the residuary legatee of that which offends conscience.¹⁴³

While they have been said to be perspicacious,¹⁴⁴ such catechisms are apt to confuse.¹⁴⁵ For this article, it is sufficient to rely on a subset of this definition: the

¹³¹ *PJS v News Group* (n 21) 1097 (Lord Mance JSC; Lord Neuberger PSC, Baroness Hale DPSC and Lord Reed JSC agreeing).

¹³² *Ibid* 1099 (Lord Mance JSC; Lord Neuberger PSC, Baroness Hale DPSC and Lord Reed JSC agreeing).

¹³³ *McKennitt v Ash* (n 21) 80 (Buxton LJ; Latham and Longmore LJ agreeing); *Campbell v MGN* (n 21) 465 (Lord Nicholls dissenting).

¹³⁴ See *OBG v Allan*; *Douglas v Hello! Ltd (No 3)* [2008] AC 1.

¹³⁵ *Mosley* (n 21) [184]–[186] (Eady J), citing *Aquaculture* (n 82) 301 (Cooke P).

¹³⁶ *Senior Courts Act 1981* (UK) s 50.

¹³⁷ *Torrance v Bolton* (1872) LR 8 Ch 118, 124 (James LJ). Trans: ‘a most general name’.

¹³⁸ *Stonemets v Head*, 248 Mo 243 (1913) 263 (Lamm J).

¹³⁹ JD Heydon, MJ Leeming, and PG Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 439–41 [12-035]–[12-040] (‘MGL’s Equity’); John Norton Pomeroy, *Equity Jurisprudence and Equitable Remedies* (Bancroft-Whitney, 3rd ed, 1905) vol II, 1553–4 (‘Equitable Remedies’). See also *Reddaway v Banham*, where equitable fraud is described as ‘infinite in variety’: [1896] AC 199, 221 (Lord Macnaghten).

¹⁴⁰ See, eg, *Lawley v Hooper* (1745) 3 Atk 278, 279; 26 ER 962, 963 (Lord Hardwicke LC); DM Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge University Press, 1890) 237 (‘Historical Sketch’).

¹⁴¹ See, eg, *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125, 155; 28 ER 82, 100 (Lord Hardwicke LC) (‘*Chesterfield v Janssen*’); Young, Croft and Smith, *On Equity* (n 88) 285–6 [5.35]; Browne, *Principles* 2nd Ed, 288–90; Spence, *Equitable Jurisdiction* (n 89) vol I, 625–6. See also LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman, 1957) 167 (‘*Fraud*’).

¹⁴² *Re La Rosa*; *Ex parte Norgard v Rocom Pty Ltd* (1990) 21 FCR 207, 288 (French J); Young, Croft and Smith, *On Equity* (n 88) 284 [5.20]; Sheridan, *Fraud* (n 141) 167.

¹⁴³ Heydon, Leeming and Turner, *MGL’s Equity* (n 139) 440 [12-035]; Sheridan, *Fraud* (n 141) 210. See also *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 194 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ) (‘*SZFDE*’).

¹⁴⁴ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 (Gummow J); Heydon, Leeming and Turner, *MGL’s Equity* (n 139) 443 [12-050].

¹⁴⁵ Cf discussion of ‘moral obloquy’ in *ASIC v Kobelt* (2019) 93 ALJR 743, 763–4 [91]–[92] (Gageler J).

concept of so-called ‘constructive fraud’,¹⁴⁶ encompassing conduct which is ‘fraudulent’ not because of conscious deceit,¹⁴⁷ but because it is inconsistent with the standard of conduct required by a normative rule enforced by equity’s morality *civilis et politica*.¹⁴⁸ This fraud is ‘constructive’ because the standard of conduct (and jurisdiction to enforce it) arises from application of normative rules to the parties’ circumstances regardless of subjective intent.¹⁴⁹ For example, breach of fiduciary duties entails ‘the stench of dishonesty — if not of deceit, then of constructive fraud’.¹⁵⁰

Analytically, this definition of equitable fraud is comprised of four concepts:

- (1) ‘conduct’ (the action or inaction complained of);
- (2) ‘normative rule’ (the rule/value/morality enforced by equity’s conscience and therefore warranting judicial enforcement. The determination of what offends this conscience is a matter of jurisprudence and judicial policy¹⁵¹);
- (3) ‘standard’ (the standard of conduct applicable in the specific circumstances as required for maintenance of the rule/value); and
- (4) ‘inconsistency’ (the degree of departure by the conduct from this standard).

The equitable obligation of confidence can be rationalised through this framework. The ‘normative rule’ is the value of confidentiality to interpersonal relations, commerce, social order, and relationships of trust and fidelity recognised by the courts for centuries. The ‘standard’ is imposed if the factual circumstances of receipt of information are such as to attract enforcement of the normative rule,¹⁵² that is, if a reasonable recipient of the information would realise on reasonable grounds that they were not free to deal with the information as their own,¹⁵³ or if a

¹⁴⁶ *Nocton* (n 15) 954 (Viscount Haldane LC). See also *Earl of Aylesford v Morris* (1873) 8 Ch App 484, 490–1 (Lord Selborne LC; Mellish LJ agreeing) (‘*Aylesford*’); *Chesterfield v Janssen* (n 141) 100 (Lord Hardwicke LC).

¹⁴⁷ *Aylesford* (n 146) 490–1 (Lord Selborne LC; Mellish LJ agreeing); George Goldsmith, *The Doctrine and Practice of Equity* (Butterworths, 6th ed, 1871) 178–9 (‘*Practice of Equity*’); Spence, *Equitable Jurisdiction* (n 89) vol I, 626; Sheridan, *Fraud* (n 141) 25; Pomeroy, *Equitable Remedies* (n 139) 1662–3.

¹⁴⁸ *Nocton* (n 15) 953 (Viscount Haldane LC), citing Lord Eldon in *Bulkley v Wilford* (1834) 2 Cl & F 102; 6 ER 1094 (‘*Bulkley*’). See also Story, *Commentaries* (n 89) vol I, 265 [285]–[289]; Goldsmith, *Practice of Equity* (n 147) 178–9; Spence, *Equitable Jurisdiction* (n 89) vol I, 626.

¹⁴⁹ *Nocton* (n 15) 955 (Viscount Haldane LC); *Bulkley* (n 148) 1121–2 (Lord Eldon). See, by way of example, equitable duties imposed on solicitors: *Nocton* (n 15) 956 (Viscount Haldane LC). See also *Digital Pulse* (n 45) 369, 407–9 (Heydon JA); *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592–3 (Rich, Dixon and Evatt JJ); *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, 471 (Lord Cranworth LC) (‘*Aberdeen Railway*’); Conaglen, *Fiduciary Loyalty* (n 93) 61–76.

¹⁵⁰ *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 246 (Ipp J; Malcom CJ and Seaman J agreeing), quoting *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361 (SC), 362 (Southin J). See also *McKenzie v McDonald* (n 15) 146 (Dixon AJ); *Nocton* (n 15) 954 (Viscount Haldane LC); Conaglen, *Fiduciary Loyalty* (n 93) 107.

¹⁵¹ Heydon, Leeming and Turner, *MGL’s Equity* (n 139) 440 [12-040].

¹⁵² *Moorgate Tobacco* (n 2) 438 (Deane J).

¹⁵³ See the test in *Del Casale* (n 2) 171 (Campbell JA).

confidant is ‘deemed to know’ information is confidential¹⁵⁴ (where the information is obtained surreptitiously,¹⁵⁵ is obviously confidential on its face,¹⁵⁶ or the confidant has actual¹⁵⁷ or constructive¹⁵⁸ knowledge that disclosure to them was in breach of confidence). The ‘conduct’ is the actual disclosure of information, and the inquiry as to whether this destroys its confidentiality. The ‘inconsistency’ is whether disclosure contravenes this standard — allowing, for example, the defence that there is ‘no confidence in an iniquity’.¹⁵⁹

Put alternatively: respect for confidentiality is a norm recognised in equity’s conscience. Where one person receives confidential information from another, equity will examine the circumstances to determine whether (and in what contexts) subsequent disclosure would be repugnant to this norm. The scope of permitted disclosure defines the existence and content of the recipient’s obligation of confidentiality, which is then enforced by courts of equity. Breach of this obligation, being conduct incompatible with standards of conduct mandated by equity’s conscience *civilis et politica*, falls within the ambit of equitable fraud.

Other doctrines derived from equitable fraud may similarly be described as restraint of impropriety:¹⁶⁰ exercises of legal rights contrary to the standards of conduct imposed by application of norms recognised by equity’s conscience to specific circumstances and relationships.¹⁶¹ For example, solicitors’ fiduciary obligations are imposed due to the normative value of their role as trusted advisors of selfless fidelity.¹⁶² Presumptions of undue influence arise from the possibility of abuse of trust in relationships characterised by dominance of one person over another — for example, parents, religious superiors, physicians.¹⁶³ Unconscionable conduct is restrained where a particular vulnerability is recognised by equitable norms as deserving of protection such that it ought not to be exploited by another to their advantage.¹⁶⁴

¹⁵⁴ *National Education Advancement Programs (NEAP) Pty Ltd v Ashton* (1995) 128 FLR 334, 344 (Young J); *Prince Albert v Strange* (1849) 2 De G & SM 652, 714; 64 ER 293, 320 (Knight-Bruce V-C).

¹⁵⁵ *Franklin v Giddins* [1978] Qd R 72, 79–80 (Dunn J). See also *Lenah* (n 2) 224 (Gleeson CJ), 272 (Kirby J), 317 (Callinan J); Aplin et al, *Gurry* (n 79) 267–9.

¹⁵⁶ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 (Lord Goff).

¹⁵⁷ *Lenah* (n 2) 227 (Gleeson CJ), 320 (Callinan J).

¹⁵⁸ *Ibid*; *Campbell v MGN* (n 21) 471–2 (Lord Hoffmann).

¹⁵⁹ Allowing disclosure of crimes to authorities: *Corrs Pavey* (n 75) 453 (Gummow J).

¹⁶⁰ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J) (*‘CBA v Amadio’*).

¹⁶¹ *Hart v O’Connor* [1985] AC 1000 (PC), 1024 (Lord Brightman) (*‘Hart v O’Connor’*), citing *Aylesford* (n 146) 491 (Lord Selborne LC). See also Holdsworth, *History of English Law* (n 12) vol I, 454–8; GW Keeton, *An Introduction to Equity* (Pitman & Sons, 6th ed, 1965) 224; *Chesterfield v Janssen* (n 141) 86, 100 (Lord Hardwicke LC).

¹⁶² *Maguire v Makaronis* (1997) 188 CLR 449, 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 (Gibbs CJ) (*‘Hospital Products’*); *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

¹⁶³ *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 51 (Starke J), 67 (McTiernan J), 84–5 (Williams J); *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ), 126 (Starke J), 134 (Dixon J; Evatt J agreeing), 142–3 (McTiernan J); *Allcard v Skinner* (1887) 36 Ch D 145, 171 (Cotton LJ); 182–3 (Lindley LJ) (*‘Allcard’*).

¹⁶⁴ *Louth v Diprose* (1992) 175 CLR 621, 629–30 (Brennan J), 637–8 (Deane J; Mason CJ, Dawson, Gaudron, and McHugh JJ agreeing), 650 (Toohey J); *CBA v Amadio* (n 160) 461 (Mason J), 474

Each of fiduciary duties,¹⁶⁵ undue influence,¹⁶⁶ and unconscionable conduct¹⁶⁷ has been expressly categorised as an example of equitable fraud. Each also shares the cardinal feature that breach of the obligation is censured due to its unconscionability:¹⁶⁸ the breach contravenes a standard of conduct derived by application of a normative rule to specific circumstances. The open texture of this concept (namely, application of the same norm to differing circumstances will result in variable standards of conduct) underlies equity's suppleness¹⁶⁹ in offering relief against 'every species of fraud'.¹⁷⁰

The inclusion of the obligation of confidence alongside the aforementioned examples of equitable fraud is not wholly novel. The learned authors of *On Equity*¹⁷¹ and *Principles of Australian Equity and Trusts*¹⁷² both categorise breach of confidence within equitable fraud. The authors of *On Equity* cite Privy Council authority that described 'abuse of confidence' as equitable fraud, but that made no reference to confidentiality.¹⁷³ Meanwhile the authorities cited in *Principles of Australian Equity and Trusts* categorise breach of confidence as 'unconscientious conduct'.¹⁷⁴ Presciently, in 1871 one author asserted that the jurisdiction exercised to restrain breach of confidence in *Prince Albert v Strange*¹⁷⁵ was that of remedying equitable fraud.¹⁷⁶

B Equitable Compensation

Australian law recognises the award of equitable compensation for breach of non-fiduciary equitable duties.¹⁷⁷ It is helpful to clarify the different monetary remedies

(Deane J); *Blomley v Ryan* (1956) 99 CLR 362, 385 (McTiernan J), 405 (Fullagar J), 428 (Kitto J) ('*Blomley v Ryan*').

¹⁶⁵ *McKenzie v McDonald* (n 15) 146 (Dixon AJ). See also Conaglen, *Fiduciary Loyalty* (n 93) 92–3, citing *SZFDE* (n 143) 194 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ).

¹⁶⁶ *Allcard* (n 163) 183 (Lindley LJ).

¹⁶⁷ *Blomley v Ryan* (n 164) 385 (McTiernan J).

¹⁶⁸ *CBA v Amadio* (n 160) 461–2 (Mason J), quoting *Blomley v Ryan* (n 164) 405 (Fullagar J), 415 (Kitto J).

¹⁶⁹ Heydon, Leeming and Turner, *MGL's Equity* (n 139) 446 [12-075].

¹⁷⁰ *Chesterfield v Janssen* (n 141) 100 (Lord Hardwicke LC).

¹⁷¹ Young, Croft and Smith, *On Equity* (n 88) 285–6 [5.35].

¹⁷² Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2016) 314 [12.4] ('*Australian Equity and Trusts*').

¹⁷³ *Hart v O'Connor* (n 161) 1024 (Lord Brightman; Lords Scarman and Bridge, and Sir Denys Buckley agreeing); citing R Megarry and PV Baker, *Snell's Principles of Equity* (Sweet & Maxwell, 27th ed, 1973) 545 et seq. Later editions of *Snell's* discussing *Hart v O'Connor* view 'abuse of confidence' as referring to undue influence and unconscionable conduct: John McGhee (ed), *Snell's Equity* (Sweet & Maxwell, 33rd ed, 2015) 200 [8-002].

¹⁷⁴ Radan and Stewart, *Australian Equity and Trusts* (n 172) 184 [9.30]; *R v Department of Health; Ex parte Source Informatics Ltd* [2001] QB 424, 437 (Simon Brown LJ; Aldous and Schiemann LJJ agreeing); *Lenah* (n 2) 227 (Gleeson CJ); *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556, 1562 (Lord Neuberger PSC; Lords Clarke, Sumption, Reed, and Carnwath JJSC agreeing).

¹⁷⁵ *Prince Albert* (n 3).

¹⁷⁶ Goldsmith, *Practice of Equity* (n 147) 154–5, 178.

¹⁷⁷ *Smith Kline* (n 2) 83 (Gummow J); *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 816 (McLelland J) ('*Hospital Products Trial*') (McLelland J's reasoning was immaterial to the appeal: *Hospital Products* (n 162)); *McKenzie v*

caught by the category of ‘concealed multiple reference’¹⁷⁸ of equitable compensation. To illustrate, a beneficiary has three options for monetary remedy against a defaulting trustee.¹⁷⁹ First, should an account of administration¹⁸⁰ reveal a disbursement in breach of trust (reducing the value of the beneficiary’s proprietary interest¹⁸¹ in the trust corpus), the beneficiary may recover an equitable debt equivalent in value to that reduction from the trustee¹⁸² by way of equitable compensation¹⁸³ (satisfaction of this debt is secured by a lien over any property acquired through the disbursement).¹⁸⁴ Second, rather than falsifying the disbursement, the beneficiary may affirm the disbursement and trace¹⁸⁵ into property (for example, money from sale) thereby acquired, such that it is held on trust for the beneficiary.¹⁸⁶ The beneficiary thereafter may require disgorgement of the property unto them (just as a fiduciary profiting in breach of fiduciary duty¹⁸⁷ or a recipient charged as constructive trustee under *Barnes v Addy*¹⁸⁸ must account to their beneficiaries). Third, where there is a reduction in trust corpus caused by a deficiency in the trustee’s performance of this duty (regardless of whether new property was acquired), compensation can be sought on the basis of ‘wilful default’: the beneficiary ‘surcharges’ the account (calculating what the value *should* be), and brings a claim in debt for the difference in value.¹⁸⁹

Each option entails two steps. First, equity recognises a debt presently due and payable to the beneficiary. In cases of wrongful disbursement or wilful default, this debt is ascertained by an account of administration revealing diminution in the trust corpus. In cases of tracing and disgorgement, it is the value of the thing called upon to be disgorged unto the beneficiary (whether by conveying property or

McDonald (n 15) 146 (Dixon AJ); *Nocton* (n 15) 946 (Viscount Haldane LC). See also Heydon, Leeming and Turner, *MGL’s Equity* (n 139) 210 [5–375].

¹⁷⁸ Heydon, Leeming and Turner, *MGL’s Equity* (n 139) 801 [23–015].

¹⁷⁹ Setting aside actions in contract, tort, or any nascent doctrine of unjust enrichment.

¹⁸⁰ *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681, [167]–[172] (Lord Millet NPJ) (*‘Libertarian Investments’*).

¹⁸¹ The characterisation of this proprietary interest will vary, see *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 109–12 (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ), quoting (at 112) *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 497.

¹⁸² *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1, 64 (Edelman J) (*‘Agricultural Land’*); *Ex parte Adamson* (n 15) 819 (James and Baggallay LJ).

¹⁸³ See, eg, *Libertarian Investments* (n 180); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 (*‘Youyang’*).

¹⁸⁴ *Foskett v McKeown* [2001] 1 AC 102, 131 (Lord Millet) (*‘Foskett’*). See also *Scott v Scott* (1963) 109 CLR 649, 662–4 (McTiernan, Taylor and Owen JJ).

¹⁸⁵ Regardless of whether tracing in equity operates by following ownership of value or by whether it is unconscionable for the owner to assert rights against the beneficiary: cf *Federal Republic of Brazil v Durant International Corporation* [2016] AC 297 (PC) 310 (Lord Toulson JSC for the Board) and JC Campbell *‘Republic of Brazil v Durant and the Equities Justifying Tracing’* (2016) 42(1) *Australian Bar Review* 32, 47–50.

¹⁸⁶ *Foskett* (n 184) 131 (Lord Millet), citing *Re Hallett’s Estate; Knatchbull v Hallet* (1880) 13 Ch D 696, 709 (Sir George Jessel MR).

¹⁸⁷ *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 561–2 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) (*‘Warman’*); *Phipps v Boardman* (n 102) 105–6 (Lord Hodson) 123, 129–30 (Lord Upjohn).

¹⁸⁸ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 358–60 [249]–[254] (Finn, Stone and Perram JJ); *Phipps v Boardman* (n 102) 105 (Lord Hodson); *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2 (Lord Selborne LC).

¹⁸⁹ *Libertarian Investments* (n 180) [170] (Lord Millet NPJ); *Agricultural Land* (n 182) 65 (Edelman J).

liquidating assets and crediting the beneficiary's bank account). The second step is the ordering of equitable compensation to satisfy this debt. In all cases, the quantum of debt is calculated at the date equitable compensation is ordered. This is why considerations of remoteness and foreseeability 'do not readily enter into the matter':¹⁹⁰ equity's analogues to remoteness and foreseeability go to establishing the existence and quantum of the debt, not the amount recoverable to discharge that debt.

Take a tangible example. Assume a trustee holds three widgets on trust, and sells one widget in breach of trust. The beneficiary procures an account, and elects to falsify the sale (rendering it a wrongful disbursement). Then the value of the sold widget (that is, the diminution in the trust corpus or the beneficiary's change in position) is ascertained. At this point the trustee, who is liable to make the beneficiary whole, owes the beneficiary a debt equivalent in value to the sold widget (calculated as at the date the debt is ascertained), and the trustee can be ordered to pay equitable compensation to discharge this debt.

Equitable compensation paid in satisfaction of an equitable debt is equity's wergeld. The obligor has done a thing contrary to their duties. As a result, they have deprived the beneficiary of the obligation of the benefit of performance of those duties. This has resulted in a loss to the beneficiary equivalent in value to the difference between their present position and the position they would have been in had the obligation been performed. This loss can be recovered by way of an action for an equitable debt. A mediæval family would plead an almost identical case before Anglo-Saxon kings to recover wergeld from a murderer.

This analysis is consistent with precedent. In 1878, James and Baggallay LJJ stated that:

The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or *value of the thing*, of which the cheated party had been cheated.¹⁹¹

Similarly in *Nocton v Lord Ashburton*, Viscount Haldane LC noted that while (absent a contractual or tortious claim) a demurer for want of equity would lie to a bill seeking to enforce a claim to damages for negligence against a solicitor, the Chancery's exclusive jurisdiction retained the power to order the solicitor 'to make compensation if he had lost [property] by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him'.¹⁹² Breach of this 'special duty'¹⁹³ arising from the solicitor–client relationship constituted equitable fraud, and could be remedied by the 'old bill in Chancery'¹⁹⁴ to recover monetary

¹⁹⁰ *Re Dawson* (n 15) 215 (Street J). See also Steven B Elliott 'Restitutionary Compensatory Damages for Breach of Fiduciary Duty?' (1998) 6 *Restitution Law Review* 135, 140–1.

¹⁹¹ *Ex parte Adamson* (n 15) 819 (James and Baggallay LJJ) (emphasis added). 'Restitution' here is used in the sense of 'restoring' to the beneficiary their entitlement of the actual money or thing (or value thereof), rather than in the modern academic use of contradistinction to loss-based compensation.

¹⁹² *Nocton* (n 15) 956–7.

¹⁹³ *Ibid* 956 (Viscount Haldane LC).

¹⁹⁴ *Ibid* 946 (Viscount Haldane LC).

compensation.¹⁹⁵ To wit, in cases of equitable fraud (including breach of trust)¹⁹⁶ the defrauded party could recover from the fraudulent party the monetary value of the thing of which they were defrauded.

Davidson's notable 1982 article re-explored this jurisdiction, emphasising that such compensation is non-technical restitution in the form of the value of the thing of which the cheated party was cheated, where restitution in specie was not appropriate.¹⁹⁷ This echoes the description of equitable compensation by Dixon AJ (as the later Chief Justice then was) in *McKenzie v McDonald*, where an agent in breach of fiduciary duty procured sale by his principal to himself of certain land at below-market value. Rescission was unavailable (the property was sold to a bona fide purchaser),¹⁹⁸ but the breach of fiduciary duty (expressly categorised as a species of equitable fraud)¹⁹⁹ was remediable by equitable compensation to indemnify the principal for loss incurred by the below-market sale price.²⁰⁰ This was explicitly independent of any obligation to account for profits obtained by breach of fiduciary duty.²⁰¹ Similarly, in *Canson Enterprises Ltd v Boughton & Co* McLachlin J cited *Re Collie; Ex Parte Adamson* and *Nocton* as authority for the principle that equitable compensation is a remedy that acts by compensating the claimant for the value of the thing they were deprived of by the obligor's fraud.²⁰² This 'thing' may be property or some other interest,²⁰³ though in the latter case quantification may be challenging.²⁰⁴

Two points can thus be made. First, conduct constituting equitable fraud (often,²⁰⁵ but not exclusively,²⁰⁶ breach of fiduciary obligations) gives rise to a claim in equity for monetary compensation equivalent in value to the thing of which the claimant was deprived by the fraud. Second, it is not a requirement of such claims that the thing deprived be economic in character. For example, equitable compensation is available on the same basis to victims of breaches of the rule in

¹⁹⁵ Ibid 946, 956–8 (Viscount Haldane LC).

¹⁹⁶ *Ex parte Adamson* (n 15) 820 (James and Baggallay LJ). See also *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

¹⁹⁷ Ian E Davidson, 'The Equitable Remedy of Compensation' (1982) 13(3) *Melbourne University Law Review* 349, 372–6, 396 ('Equitable Compensation').

¹⁹⁸ *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

¹⁹⁹ Ibid 146 (Dixon AJ). See also Heydon, Leeming and Turner, *MGL's Equity* (n 139) 439 [12-030].

²⁰⁰ *McKenzie v McDonald* (n 15) 146–7 (Dixon AJ). See application in *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1, 20–1 (Besanko J; Finkelstein and Jacobson JJ agreeing); *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383, [171] (Sackville AJA; Meagher and Barrett JJA agreeing); *Breen v Williams* (n 19) 135–6 (Gummow J).

²⁰¹ *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

²⁰² *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, 547–52 (McLachlin J) ('*Canson Enterprises*'), citing *Re Dawson* (n 15) 216 (Street J); *Nocton* (n 15) 946 (Viscount Haldane LC); *Ex parte Adamson* (n 15) 819 (James and Baggallay LJ).

²⁰³ *Canson Enterprises* (n 202) 546–8 (McLachlin J), citing, inter alia, *Nocton* (n 15) and *Re Dawson* (n 15).

²⁰⁴ *Canson Enterprises* (n 202) 550–2 (McLachlin J).

²⁰⁵ *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 37 [88] (Gageler J) ('*Lifeplan Australia*'); *Youyang* (n 183) 500–1 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Nocton* (n 15) 946 (Viscount Haldane LC). See also *Warman* (n 187) 559–65 (Mason CJ, Brennan, Deane, Dawson, and Gaudron JJ) (though without description as "equitable fraud").

²⁰⁶ *Smith Kline* (n 2) 83 (Gummow J); *Hospital Products Trial* (n 177) 816 (McLelland J).

Barnes v Addy, fraud on a power, and misuse of confidential information:²⁰⁷ the jurisdictional precondition in each instance is simply that the conduct constitutes equitable fraud and has deprived the victim of a ‘thing’. There is no additional requirement that the ‘thing’ be economic in character.

C *Difficulties in Quantification*

There are two main objections to equitable compensation, as contemplated by this article, arising out of difficulties in quantifying emotional distress. The first is that equity does not deal with such matters, restricting itself to concerns of commerce. The second is that practical challenges in quantification render such awards inappropriate.

The first objection is unsupported by authority:²⁰⁸ case law indicates that confidence in information without economic value can be protected by injunction, such as the contents of personal letters,²⁰⁹ photographs,²¹⁰ and artistic etchings,²¹¹ or information obtained through personal contexts such as marriage²¹² or friendship.²¹³ For example, in 2000 it was held that for a nanny, bound by an obligation of confidence in both contract and equity,²¹⁴ disclosure of their employer’s financial records or that their employer was having an affair may equally be breaches of that obligation.²¹⁵

There is similarly no principled reason why monetary remedies ought to be restricted to economic interests. Cases such as *Paramasivam v Flynn* do not provide such a basis.²¹⁶ In that case, the Full Federal Court held that a claim for equitable compensation failed because ‘the interests which the equitable doctrines invoked by the appellant, and related doctrines, have hitherto protected are economic interests’²¹⁷ — however, the doctrine invoked was not that of breach of confidence. Mr Paramasivam brought an action for breach of fiduciary duty founded on allegations of sexual assault under the defendant’s guardianship (tortious claims being statute-barred). The guardian–ward relationship gives rise to incidental

²⁰⁷ JD Heydon and MJ Leeming, *Cases and Materials On Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) 1274–5 [41.10], citing *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153, *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46. See also Davidson, ‘Equitable Compensation’ (n 197) 396.

²⁰⁸ See, eg, Megan Richardson, Marcia Neave, and Michael Rivette, ‘Invasion of Privacy and Recovery for Distress’ in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Bloomsbury, 2018) 165, 173–5 (‘Recovery for Distress’).

²⁰⁹ *Lytton* (n 99).

²¹⁰ *Pollard* (n 3).

²¹¹ *Prince Albert* (n 3).

²¹² *Duchess of Argyll* (n 3).

²¹³ *Stephens v Avery* (n 3).

²¹⁴ *Hitchcock v TCN Channel 9 Pty Ltd* [2000] NSWSC 198, [64]–[65] (Austin J) (‘*Hitchcock*’), reasoning on this point affirmed on appeal: *Hitchcock v TCN Channel Nine Pty Ltd (No 2)* [2000] NSWCA 82 at [19] (Heydon JA; Spigelman CJ and Mason P agreeing).

²¹⁵ *Hitchcock* [65] (Austin J). See also *Cleary v Kocatekin* [2012] NSWSC 364, [32]–[33] (Davies J); *Maurice Blackburn Cashman v Ackland* [2001] NSWSC 863, [6] (Hamilton J).

²¹⁶ *Paramasivam* (n 56) 504–8 (Miles, Lehane and Weinberg JJ).

²¹⁷ *Ibid* 504.

equitable duties,²¹⁸ and in Canada encompassed avoidance of conflict between self-gratification (sexual assault) and the ward's well-being.²¹⁹ The Full Federal Court agreed that a central aspect of a guardian's legal obligations was to refrain from inflicting injury on their ward,²²⁰ however centrality did not make the obligation fiduciary.²²¹ Fiduciary duties to abhor conflict and abjure profit protect particular interests through preventing infidelity.²²² A doctor may be a fiduciary such that undisclosed kickbacks from certain prescriptions would breach their fiduciary obligations,²²³ but it does not follow that negligence or battery ought to be labelled as breach of fiduciary duties merely to improve the remedies available.²²⁴ Cases such as *Paramasivam* stand for the proposition that fiduciary claims cannot be used as a proxy for damages claims at law. They say nothing as to the availability of equitable compensation for breach of equitable obligations more generally.

The second objection (difficulties in quantification render such awards inappropriate) must fail, as factual uncertainty as to quantum of a debt does not negative its legal existence. Moreover, High Court of Australia authority in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* indicates that in cases of an accounts of profits there is no reason that the 'benefit' disgorged must answer the description of 'property' or be quantifiable with mathematical accuracy.²²⁵ As long as 'a substantial restitution'²²⁶ can be achieved, equity is still able to order monetary relief.²²⁷ There is no basis to take a different approach for equitable compensation in discharge of an equitable debt.

Moreover, difficulty in calculation does not generally preclude relief in law.²²⁸ Where the evidentiary basis for quantification is thin, but where it would be wrong to use that thinness as reason for valuing the loss at zero, ample authority

²¹⁸ Ibid. See also, in relation to fiduciary duties: *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136; *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417; and in relation to undue influence: *Re Pauling's Settlement Trusts* [1964] Ch 303; *Lamotte v Lamotte* (1942) 42 SR (NSW) 99.

²¹⁹ *M(K) v M(H)* (1992) 96 DLR (4th) 289.

²²⁰ *Paramasivam* (n 56) 506 (Miles, Lehane and Weinberg JJ), quoting *ibid* 327 (La Forrest J; L'Heureaux-Dubé, Sopinka, Gonthier, McLachlin and Iacobucci JJ agreeing).

²²¹ *Paramasivam* (n 56) 506 (Miles, Lehane and Weinberg JJ).

²²² Ibid 504–5 (Miles, Lehane and Weinberg JJ). See also *Lifeplan Australia* (n 205) 34 [78] (Gageler J); *Aberdeen Railway* (n 149) 471 (Lord Cranworth LC); Conaglen, *Fiduciary Loyalty* (n 93) 61–76.

²²³ *Paramasivam* (n 56) 507 (Miles, Lehane and Weinberg JJ), quoting *Breen v Williams* (n 19) 93–4 (Dawson and Toohey JJ), 110 (Gaudron and McHugh JJ), 136 (Gummow J).

²²⁴ *Paramasivam* (n 56) 507 (Miles, Lehane and Weinberg JJ); *Breen v Williams* (n 19) 110 (Gaudron and McHugh JJ).

²²⁵ *Lifeplan Australia* (n 205) 32–3 [75] (Gageler J; Kiefel CJ, Keane and Edelman JJ agreeing on orders), 72 [197]–[198] (Nettle J); affirming the Full Federal Court decision in *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1, 25–6 (Allsop CJ, Middleton and Davies JJ).

²²⁶ *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

²²⁷ *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149, 195 (Northop, Ryan and Merkel JJ); *McKenzie v McDonald* (n 15) 146 (Dixon AJ); *Robinson v Abbott* (n 15) 368 (Holroyd J). See also Kerly, *Historical Sketch* (n 140) 144–5.

²²⁸ Contract: *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 349 (Mason CJ, Dawson, Toohey, and Gaudron JJ); *Fink v Fink* (1946) 74 CLR 127, 143 (Dixon and McTiernan JJ); personal injury: *New South Wales v Moss* (2000) 54 NSWLR 536, 554–5 (Heydon JA); negligent misstatement: *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 242–3 (Brooking J; Tadgell and JD Phillips JJ agreeing); *Bowen v Blair* [1933] VLR 398, 401 (Mann ACJ, Gavan Duffy J and Wasley AJ agreeing).

supports the adoption of a figure that is little more than a guess.²²⁹ The term ‘guess’ does not suggest abandonment of rationality, but rather reflects that no judge is omniscient.²³⁰ As much certainty and particularity in calculation must be insisted on as, having regard to the circumstances, is reasonable: ‘[t]o insist upon more would be the vainest pedantry’.²³¹ Indeed, in the specific context of commercial obligations of confidence, where such quantification is ‘impossible with mathematical accuracy’,²³² equity will ‘guesstimate’.²³³

This does not liberate a claimant from the need to particularise loss. While admittedly easier in commercial contexts,²³⁴ the law has various tools of quantification, such as defamation damages ‘as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the judgment of a reasonable man’, with past decisions providing standards from which to determine each unique case.²³⁵ Settled benchmarks for quantification may take time to develop, but that does not erase an existing jurisdiction.

IV *Lord Cairns’ Act*

In *Giller (No 2)*, *Lord Cairns’ Act* was relied upon to award damages for breach of confidence.²³⁶ This is clearly correct, as the Victorian Lord Cairns’ provisions provide: ‘If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.’²³⁷ Given that the Victorian Court of Appeal has jurisdiction to hear an application for an injunction to restrain breach of confidence, statute confers on it the jurisdiction to award damages in substitution, definitively settling the matter in Victoria (and in the Australian Capital Territory (‘ACT’) and Queensland, which have near identical language).²³⁸ The same logic cannot be applied *mutatis mutandis* elsewhere in Australia, and therefore is not relied upon in this article.

²²⁹ *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 83 (Mason CJ and Dawson J), 102 (Brennan J), 118–9, 122 (Deane J), 138 (Toohey J); *Jones v Schiffmann* (1971) 124 CLR 303, 308 (Menzies J), 316 (Walsh J). See also *Ratcliffe v Evans* [1892] 2 QB 524, 532–3 (Bowen LJ; Lord Esher MR and Fry LJ agreeing) (‘*Ratcliffe*’); *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, 375–6 (Campbell JA) (‘*Zorom Enterprises*’).

²³⁰ *Zorom Enterprises* (n 229) 376 (Campbell JA).

²³¹ *Ratcliffe* (n 229) 533 (Bowen LJ; Lord Esher MR and Fry LJ agreeing).

²³² *Robb v Green* [1895] 2 QB 1, 19 (Hawkins J), affd *Robb v Green* (n 109). See generally *McKenzie v McDonald* (n 15) 146 (Dixon AJ); *Robinson v Abbott* (n 15) 365–8 (Holroyd J).

²³³ *Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd* [2002] QSC 222, [17] (Philippides J), cited in, inter alia, *Caves Beachside Cuisine Pty Ltd v Boydah Pty Ltd* [2015] NSWSC 1273, [195] (Kunc J); *Wilson* (n 5) [69] (Mitchell J); *Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd* (2014) 108 IPR 52, 89 [294] (Vickery J).

²³⁴ See Davidson, ‘Equitable Compensation’ (n 197) 396.

²³⁵ *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 349 (Hayne J; Gleeson CJ and Gummow J agreeing as to damages at 341) (‘*Rogers v Nationwide News*’), quoting *Prehn v Royal Bank of Liverpool* (1870) LR 5 Ex 92, 99–100 (Martin B) (‘*Bank of Liverpool*’). See also, in the context of negligence resulting in personal injury, *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118, 124–5 (Barwick CJ, Kitto and Menzies JJ) (‘*Planet Fisheries*’).

²³⁶ *Giller (No 2)* (n 5) 30 (Ashley JA), 95 (Neave JA; Maxwell P agreeing).

²³⁷ *Supreme Court Act 1986* (Vic) (n 43) s 38.

²³⁸ *Supreme Court Act 1933* (ACT) (n 43) s 34; *Civil Proceedings Act 2011* (Qld) (n 43) s 8.

A *The Nature of Lord Cairns' Act*

The jurisdiction to award damages created by *Lord Cairns' Act* is statutory in basis, originating in the English *Chancery Amendment Act 1858*.²³⁹ As this post-dates the *Australian Courts Act 1828* (Imp),²⁴⁰ early colonies enacted their own *Lord Cairns' Act* provisions. These have (with the exception of Victoria, Queensland, and the ACT) remained relevantly unchanged,²⁴¹ and (using NSW as an example) provide:

Where the Court has power:

- (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or
 - (b) to order the specific performance of any covenant, contract or agreement,
- the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.

As an obligation of confidence enforced in equity's exclusive jurisdiction is not an agreement or a contract, nor a promise under seal (that is, a covenant),²⁴² *Lord Cairns' Act* is of aid in NSW only if breach of confidence constitutes a 'wrongful act'. This article argues that it does not. As noted by Heydon, Leeming and Turner, the report of the Chancery Commissioners preceding *Lord Cairns' Act* indicates that the intent was to remedy the Chancery's inability to offer complete relief for claims at law.²⁴³ By contrast, in *Talbot* the Victorian Court of Appeal upheld a judgment describing breach of a purely equitable obligation of confidence as a 'wrongful act',²⁴⁴ despite the English authorities relied upon providing no reasoning beyond assertions in support.²⁴⁵

Complicating matters is the obiter dictum of the High Court of Australia in *Wentworth v Woollahra Municipal Council (No 2)*.²⁴⁶ That case dealt with damages in lieu of an injunction to restrain breach of a statutory planning ordinance²⁴⁷ — the Court's ratio decidendi being that *Lord Cairns' Act* does not apply to public wrongs.²⁴⁸ In passing, the High Court stated that an incidental object of *Lord Cairns' Act*

²³⁹ *Lord Cairns' Act* (n 40) s 2. For a history of the Act (and its amendments), see Katy Barnett and Michael Bryan 'Lord Cairns's Act: A Case Study in the Unintended Consequences of Legislation' (2015) 9(2) *Journal of Equity* 150 ('Lord Cairns' Act').

²⁴⁰ *Australian Courts Act 1828* (Imp), 9 Geo 4 c 83, s 24.

²⁴¹ *Supreme Court Act 1970* (NSW) s 68; *Supreme Court Act 1935* (SA) s 30; *Supreme Court Act 1935* (WA) s 25(10).

²⁴² *Randall v Lynch* (1810) 12 East 179, 182; 104 ER 71, 72 (Lord Ellenborough CJ).

²⁴³ Heydon, Leeming and Turner, *MGL's Equity* (n 139) 801 [23-020], citing Sir John Romilly (Attorney-General) et al, *The Third Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice, and System of Pleading in the Court of Chancery* (Eyre & Spottiswoode, 1852–1856) 1–4. See also Barnett and Bryan, 'Lord Cairns' Act' (n 239) 153–5.

²⁴⁴ *Talbot* (n 38) 241 (Harris J), 244 (Marks J).

²⁴⁵ *Seager* (n 4) 932 (Lord Denning MR); *Seager (No 2)* (n 118) 813 (Lord Denning MR); *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272, 213 (Lord Evershed MR); *Salman Engineering* (n 4) 415 (Lord Greene MR).

²⁴⁶ *Wentworth v Woollahra (No 2)* (n 44).

²⁴⁷ Ibid 674 (Gibbs CJ, Mason, Murphy and Brennan JJ).

²⁴⁸ Ibid 682 (Gibbs CJ, Mason, Murphy and Brennan JJ). See also ICF Spry, *Spry's Equitable Remedies* (Lawbook, 9th ed, 2014) 662.

Act was to provide relief in respect of all purely equitable claims.²⁴⁹ This obiter dictum is not supported by the four cases it purports to rely upon. Two of those cases (*Ferguson v Wilson*²⁵⁰ and *Elmore v Pirrie*²⁵¹) dealt with damages in lieu of specific performance of contractual promises, to prevent parties from being ‘bandied about’ between courts of law and equity. These are claims in equity’s auxiliary, not exclusive, jurisdiction.

Justice Cross in *Landau v Curton*²⁵² noted that an incidental result of *Lord Cairns’ Act* was to enable awards of damages in a purely equitable claim made under *Tulk v Moxhay*.²⁵³ However, such a claim is to enforce a restrictive covenant against a successor in title, on the basis that ‘nothing would be more inequitable’ than for the original covenantor to defeat their covenant by sale to a knowing, subsequent purchaser unencumbered by the covenant.²⁵⁴ *Lord Cairns’ Act* would apply as such a claim is to enjoin a breach of covenant, which is expressly contemplated by the statute. In the fourth case, Viscount Finlay LJ held that *Lord Cairns’* damages were available in lieu of an injunction to restrain a wrongful act but, with reference to authority, explicitly defined ‘wrongful act’ as a tort.²⁵⁵

While *Lord Cairns’ Act* expanded the courts’ jurisdiction to award damages in equitable claims where traditionally monetary relief was only available at law, it cannot be read to transmogrify all conduct censured by equity into ‘wrongful acts’.²⁵⁶ However, were the proposition in *Talbot* to be accepted, damages under *Lord Cairns’ Act* are available for breach of confidence across Australia.

B *Amendment Jurisdictions*

In 1986, Victoria removed the ‘wrongful act’ requirement from the *Lord Cairns’ Act* jurisdiction,²⁵⁷ with the ACT (2010)²⁵⁸ and Queensland (2011)²⁵⁹ following suit. This means *Lord Cairns’ Act* is a one-stop-shop jurisdiction for award of money damages where the court has jurisdiction to hear an application for an injunction.²⁶⁰ Damages in lieu of an injunction are ordinarily calculated on a ‘*Wrotham Park*’²⁶¹ basis: what reasonable people in the position of the parties would negotiate for

²⁴⁹ *Wentworth v Woollahra (No 2)* (n 44) 676 (Gibbs CJ, Mason, Murphy and Brennan JJ). Cf *Grant v Dawkins* [1973] 1 WLR 1406, 1410 (Goff J); *Wroth v Tyler* [1973] 2 WLR 405, 429 (Megarry J).

²⁵⁰ *Ferguson v Wilson* [1866] LR 2 Ch App 77, 88 (Turner LJ) 91–2 (Cairns LJ).

²⁵¹ *Elmore v Pirrie* (1887) 57 LT (NS) 333, 335 (Kay J).

²⁵² *Landau v Curton* [1962] Estates Gazette 369, 374–5 (Cross J).

²⁵³ *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143.

²⁵⁴ *Ibid* 2 Ph 774, 777–8; 41 ER 1143, 1144 (Lord Cottenham LC).

²⁵⁵ *Leeds Industrial Co-Operative Society v Slack* [1924] AC 851, 858–9.

²⁵⁶ Barnett and Bryan, ‘Lord Cairns’ Act’ (n 239) 165.

²⁵⁷ *Supreme Court Act 1986* (Vic) (n 43) s 38.

²⁵⁸ *Supreme Court Act 1933* (ACT) (n 43) s 34, amended by *Justice and Community Safety Legislation Amendment Act 2010* (ACT) sch 1 pt 1.7 [1.31].

²⁵⁹ *Civil Proceedings Act 2011* (Qld) (n 43) s 8.

²⁶⁰ *Giller (No 2)* (n 5) 30 (Ashley JA), 95 (Neave JA; Maxwell P agreeing). See also Barnett and Bryan, ‘Lord Cairns’ Act’ (n 239) 161.

²⁶¹ *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [22]–[25] (Neuberger LJ; Scott Baker and Auld LJ agreeing). See also *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (‘*Wrotham Park*’).

release of the right being breached, including for breach of confidence.²⁶² In commercial breaches of confidence, *actual* refusal of the parties to negotiate is ignored on the ground that they could be assumed to act reasonably.²⁶³ While such analysis is more difficult in interpersonal settings, difficulty in quantification does not erase the statutory jurisdiction created by *Lord Cairns' Act*.

This jurisdiction (and the mechanics of calculating damages thereunder) was recently examined in *One Step (Support) Ltd v Morris-Garner*,²⁶⁴ wherein the UK Supreme Court emphasised that *Wrotham Park* or 'negotiating damages' are awarded 'to provide the claimant with an appropriate monetary substitute for an injunction in the circumstances of the particular case'.²⁶⁵ Where a claimant's interest in performance of an obligation is *non-economic*, there is no reason they should be restricted to compensation for economic loss.²⁶⁶

C *An Inherent 'Lord Cairns' Act' Jurisdiction?*

In *Wilson*, it was suggested that the 'cardinal principle of equity that the remedy must be fashioned' to meet the necessities of the case enables the award of 'equitable compensation' where required to do complete justice between the parties.²⁶⁷ Such an approach echoes the New Zealand and Canadian approaches discussed above, and reflects pre-*Judicature Act* awards of 'damages' in equity,²⁶⁸ such as the so-called action of 'equitable assumpsit'²⁶⁹ to recover contractual debts too complex to quantify at law without ordering of an account.²⁷⁰ On this view, there exists an equitable jurisdiction to award 'damages' independent of *Lord Cairns' Act* governed

²⁶² *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch.), [383]–[385] (Arnold J) ('*Force India F1*'); *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370, 2385–8 (Lord Walker JSC for the Board). See also *Attorney-General v Blake* [2001] 1 AC 268, 282–3, 286 (Lord Nicholls); RG Toulson and CM Phipps, *Confidentiality* (Sweet & Maxwell, 3rd ed, 2012) 231–2 [9-043]–[9-040].

²⁶³ *Force India F1* (n 262) [386] (Arnold J); *Wrotham Park* (n 261) 815 (Brightman J).

²⁶⁴ *One Step (Support) Ltd v Morris-Garner* [2018] 2 WLR 1353.

²⁶⁵ *Ibid* 1374 (Lord Reed JSC; Baroness Hale PSC, Lord Wilson and Lord Carnwath JJSC agreeing).

²⁶⁶ *Ibid* 1367–8, 1378, 1383 (Lord Reed JSC; Baroness Hale PSC, Lord Wilson and Lord Carnwath JJSC agreeing).

²⁶⁷ *Wilson* (n 5) [82] (Mitchell J), quoting *Warman* (n 187) 559 (Mason CJ, Brennan, Deane, Dawson, and Gaudron JJ); M Bryan, 'Injunctions and Damages: Taking *Shelfer* off the Shelf' (2016) 28(Special Issue) *Singapore Academy of Law Journal* 921, 925–6 ('*Shelfer* off the Shelf'), citing *Nocton* (n 15). See also discussion in Barnett and Bryan, 'Lord Cairns' Act' (n 239) 162.

²⁶⁸ See Young, Croft and Smith, *On Equity* (n 88) 1106–8 [16.1060]; Peter M McDermott, *Equitable Damages* (Butterworths, 1994) 8; Daniell, *High Court of Chancery* (n 17) vol II, 1238–9. See also *Untrue Suggestions in Chancery Act 1393*, 17 Rich 2 c 6.

²⁶⁹ CC Langdell, *A Brief Survey of Equity Jurisdiction* (Cambridge University Press, 2nd ed, 1908) 99–102.

²⁷⁰ See, eg, *Taff Vale Railway Co v Nixon* (1847) 1 HLC 111, 121–2; 9 ER 695, 699 (Lord Cottenham LC); *Kennington v Houghton* (1843) 2 Y & CCC 620, 628; 63 ER 278, 281 (Knight Bruce V-C).

by principles of general law,²⁷¹ eliminating the need to rely on a beneficent²⁷² construction of *Lord Cairns' Act*, or this article's concept of equitable wergeld.²⁷³

This line of argument is unsatisfying for three reasons. First, it elides the distinction between modern descendants of wergeld (that is, monetary awards in substitution for performance of an obligation) and descendants of botgeld (that is, monetary awards to compensate for injury incurred). Both equitable compensation and *Lord Cairns' Act* damages are awarded in substitution for performance: equitable damages providing compensation for injury are a wholly different concept. Second, there is some support for the view that justifications of monetary awards by reference to 'inherent jurisdiction to do complete justice'²⁷⁴ is the result of a failure to appreciate that equitable *compensation* is the appropriate remedy.²⁷⁵ On that view, the inherent 'damages' jurisdiction is just equitable compensation by another name. Third, although pragmatic, such reasoning is an argument of symmetry and form: that merely because an injunction could have *prevented* the harm, compensation should be able to *repair* the harm.²⁷⁶ Such reasoning lacks firm doctrinal roots: for better or worse, the elegance of symmetry is not itself a source of precedent.

V Questions of Coherence

A *Trespass upon Torts*

The coherence of this article's position with the remainder of the law could be called into question, for example, by suggestions that an 'equitable law of torts'²⁷⁷ would be inconsistent with (or superfluous to) existing law,²⁷⁸ notably tort law's supposedly settled face against recovery of damages for purely mental harm without proof of psychiatric injury. However, this is not true of all torts: damages for unquantifiable anxiety and distress are recoverable in actions for defamation,²⁷⁹ conversion,²⁸⁰ or deceit (for which aggravated damages are also available).²⁸¹ Moreover, alleviating policy concerns regarding liability of negligence confidants, there is a strong argument that existing civil liability regimes may be applicable. For example, in

²⁷¹ Bryan, 'Shelfer off the Shelf' (n 267) 925.

²⁷² *Attorney-General v Observer Ltd* [1990] 1 AC 109, 286 (Lord Goff); Heydon, Leeming and Turner, *MGL's Equity* (n 139) 1185 [42-195].

²⁷³ At least one article suggests, without elaboration, that the inherent jurisdiction referred to in *Wilson* (n 5) and *Giller (No 2)* (n 5) was the jurisdiction to award equitable compensation in *Nocton* (n 15), consistent with this article: Richardson, Neave, and Rivette, 'Recovery for Distress' (n 208) 172.

²⁷⁴ Bryan, 'Shelfer off the Shelf' (n 267) 926.

²⁷⁵ *Ibid* 925. See also Heydon, Leeming and Turner, *MGL's Equity* (n 139) 1185-6 [42-195].

²⁷⁶ Turner, 'Privacy Remedies' (n 11) 273.

²⁷⁷ *Ibid*.

²⁷⁸ Turner, 'Breach of Confidence' (n 9) 271-3. See also *Civil Liability Act 2002* (NSW) (n 32) s 31; *Magill* (n 32) 589 (Gummow, Kirby and Crennan JJ); *Tame v NSW* (n 32) 373-5 (Gummow and Kirby JJ).

²⁷⁹ *Rogers v Nationwide News* (n 235) 349 (Hayne J; Gleeson CJ and Gummow J agreeing as to damages at 341), quoting *Bank of Liverpool* (n 235) 99-100 (Martin B). See also *Planet Fisheries* (n 235) 124-5 (Barwick CJ, Kitto and Menzies JJ).

²⁸⁰ *Graham v Voigt* (n 30) 155-6 (Kelly J); *Jamieson's Tow* (n 30) 150 (Quilliam J).

²⁸¹ See, eg, *Archer v Brown* [1985] QB 401, 424 (Peter Pain J), citing *Rookes v Barnard* [1964] AC 1129, 1226-30 (Lord Devlin).

NSW, statute limits recovery of ‘any form of monetary compensation’²⁸² in actions for mental harm resulting from negligence ‘regardless of whether the claim is brought in tort, in contract, under statute *or otherwise*’.²⁸³ Given that ‘negligence’ is defined as a ‘failure to exercise reasonable care and skill’,²⁸⁴ as Leeming J has noted extra-curially, there is no obvious reason why this would not apply to a purely equitable action for breach of confidence.²⁸⁵

A related policy concern is that interpersonal relations should not be regulated by the law. For example, in *Magill v Magill*, the High Court of Australia declined to recognise tortious liability in an intramarital context.²⁸⁶ There, Gleeson CJ noted that the law of torts is underlain by a conception that, in certain circumstances, it is reasonable to expect people to act under threat of legal censure. In circumstances governed by subjective ethical standards and principles (such as marital relations), imposing general standards of responsibility and conduct may be inappropriate.²⁸⁷ However, the equitable obligation of confidence is not a generalised standard of conduct: like all equitable interpositions,²⁸⁸ the standard required by the obligation is moulded to the context-specific circumstances in which the obligation applies.²⁸⁹

A final argument is that this form of equitable compensation is precluded by equity’s refusal to award punitive damages,²⁹⁰ as equity and penalty are said to be strangers.²⁹¹ However, equitable compensation for breach of confidence is a restitutionary satisfaction of an equitable debt. It is not penal in character. To the extent such compensation is analogous to ‘aggravated damages’ for distress, aggravated damages are *also* compensatory, not punitive.²⁹²

B Conclusion

This article has argued that the jurisdictional basis of equity’s restraint of breach of confidence in all cases is equity’s jurisdiction to remedy equitable fraud. Accordingly, the character of the information (and whether hurt suffered by its disclosure is pecuniary) is irrelevant to the question of whether equitable compensation is available. Practical difficulties in quantification are no jurisdictional bar.

²⁸² *Civil Liability Act 2002* (NSW) (n 32) s 3 (definition of ‘damages’).

²⁸³ *Ibid* s 5A(1) (loss generally); s 28(1) (mental harm) (emphasis added).

²⁸⁴ *Ibid* s 5 (definition of ‘negligence’).

²⁸⁵ Leeming, ‘A Response to Peter Turner’ (n 63) 43–4.

²⁸⁶ *Magill* (n 32) 594–5 (Gummow, Kirby and Crennan JJ).

²⁸⁷ *Ibid* 570–1 (Gleeson CJ).

²⁸⁸ *Hart v O’Connor* (n 161) 1024 (Lord Brightman), citing *Aylesford* (n 146) 491 (Lord Selborne LC); *CBA v Amadio* (n 160) 461–2 (Mason J), quoting *Blomley v Ryan* (n 164) 405 (Fullagar J), 415 (Kitto J).

²⁸⁹ *Moorgate Tobacco* (n 2) 438 (Deane J), citing *John Fairfax* (n 2); *Duchess of Argyll* (n 3); *Salman Engineering* (n 4); *Morison v Moat* (n 3) (1851) 9 Hare 241, 255; 68 ER 492, 498 (Turner V-C).

²⁹⁰ See, eg, Turner, ‘Breach of Confidence’ (n 9) 270–1.

²⁹¹ See, eg, *Digital Pulse* (n 45) 347–8 (Heydon JA).

²⁹² *Lamb v Cotogno* (1987) 164 CLR 1, 8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 130 (Taylor J), 145 (Menzies J), 149 (Windeyer J).

Beyond mere academic interest, such a remedy partially fills the lacuna left in Australian law by the absence of any tortious remedy for invasion of privacy. Apart from providing a clear framework to litigants, it is repugnant to good conscience that hurt suffered by those whose trust and confidence is betrayed go without a remedy merely because methods of publishing confidential information have become too fast to intercept. As has been judicially noted, such an outcome would leave the obligation of confidence effectively unenforceable in many instances.²⁹³ It is the view of this author that the equitable jurisdiction holds in its existing arsenal all the tools necessary to avoid such a tragedy.

²⁹³ *Wilson* (n 5) [82] (Mitchell J).

Statutory Precedents under the “Modern Approach” to Statutory Interpretation

Lisa Burton Crawford* and Dan Meagher†

Abstract

This article considers when Australia’s superior appellate courts should overturn or depart from previous judicial interpretations of statute law, especially in light of the modern approach to statutory interpretation. In this age of statutes, it is vital to understand the circumstances in which superior courts should — and equally, should not — do so. Yet, the issue remains largely unexplored in the academic literature. The approach to statutory precedents is said to be informed by special constitutional considerations that do not apply to those of common law, and that require courts to overturn statutory precedents that they consider to be plainly erroneous. More recently, it has been suggested that the sensitivity to context demanded by the modern approach will lead superior courts to more readily conclude that a statutory precedent is wrong. While there is some truth to both claims, there are also compelling reasons why superior courts should exercise caution when dealing with statutory precedents, and in many instances, choose to ‘stand by what has been decided’.

I Introduction

This article considers the approach of superior courts in Australia to statutory precedents — and especially that of the High Court of Australia. By ‘statutory precedent’, we mean a previous decision of the same court, or a court lower in the judicial hierarchy, as to what a statute means. In particular, we examine how the treatment of statutory precedents might be informed by the ‘modern approach’ to statutory interpretation that has emerged in recent decades.¹

* Senior Lecturer, Faculty of Law, UNSW Sydney, Australia. Email: l.b.crawford@unsw.edu.au; ORCID iD: 0000-0003-1776-8895.

† Professor and Chair, Constitutional Law, Deakin University School of Law, Victoria, Australia. Email: d.meagher@deakin.edu.au; ORCID iD: 0000-0002-1239-2668.

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¹ *CIC Insurance v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (‘*CIC Insurance*’).

In Australia, this approach is now interpretive orthodoxy. Its essence was neatly distilled in the joint judgment of Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection*:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense.²

Likewise, the doctrine of precedent is regarded as a well-settled hallmark of the common law. This entails that a lower court must follow the binding precedent of a court higher than it in the same judicial hierarchy.³ Despite the central importance of *stare decisis* in our legal system, there are questions as to when a statutory precedent is binding, and when a court should choose to follow a statutory precedent that is not strictly binding for broader normative reasons.

Our interest in the matter was piqued by the decision of the High Court in *Aubrey v The Queen*.⁴ There, the High Court held by majority that transmitting HIV amounted to inflicting grievous bodily harm for the purposes of the *Crimes Act 1900* (NSW). In reaching its decision, the majority declined to follow a statutory precedent that it noted ‘had not been distinguished or judicially doubted in New South Wales’ for 130 years.⁵ The High Court was not, of course, bound to follow that precedent.⁶ Nevertheless, to choose not to do so was a significant decision — both for the appellant, who was consequently convicted for conduct which was not understood to be a crime at the time it was committed, and as matter of legal principle.

The legal principles governing the treatment of statutory precedents were laid down by the High Court in *Babaniaris v Lutony Fashions Pty Ltd*.⁷ The leading judgment of Mason J stated that the approach of a senior appellate court to a statutory precedent was necessarily informed by special constitutional considerations that do not apply to common law precedents.⁸ Since then, there have been suggestions by some judges and academic commentators that the strength of *stare decisis* considerations will, inevitably, be diluted by the modern approach to statutory interpretation.⁹ That approach is said to demand a sensitivity to context that will lead a superior court to more readily conclude that a statutory precedent ought to be departed from or overruled.

² *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (citations omitted) (*‘SZTAL’*).

³ *Viro v The Queen* (1978) 141 CLR 88, 120 (Gibbs J); 173–4 (Aickin J) (*‘Viro’*). For a recent discussion, see *PGA v The Queen* (2012) 245 CLR 355.

⁴ *Aubrey v The Queen* (2017) 260 CLR 305 (Kiefel CJ, Keane, Nettle and Edelman JJ; Bell J dissenting) (*‘Aubrey’*).

⁵ *Ibid* 324 [35].

⁶ As the final Australian court of appeal, the High Court is not bound by the decisions of any court, including its own: *Viro* (n 3) 93 (Barwick CJ); 120–2 (Gibbs J); 129–30 (Stephen J); 135 (Mason J); 150–2 (Jacobs J); 166 (Murphy J); 174–5 (Aickin J).

⁷ *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 (*‘Babaniaris’*).

⁸ See further Part IIA below.

⁹ See especially Justice Michael Kirby, ‘Precedent Law, Practice and Trends in Australia’ (2007) 28(3) *Australian Bar Review* 243 (*‘Precedent Law’*). See further the discussion in Part IIC below.

These are fascinating and, we think, controversial propositions, which raise obvious normative concerns. In this ‘age of statutes’,¹⁰ the rights, obligations, duties and powers of government and the people are primarily determined by statute law. And while it is the text of a statute that must govern, the nature of our constitutional arrangements is such that the courts make legally binding determinations about what that text means. So, when a court overrules a statutory precedent, it changes the law in this sense — and retrospectively so. For these reasons, it is vital to understand the circumstances in which courts should — and equally, should not — overrule a statutory precedent. To this end, this article outlines a set of principles which should inform the courts’ approach.

The article proceeds as follows. Part II considers the current law. First, we outline the test articulated in *Babaniaris* — according to which a superior appellate court must overrule a statutory precedent it considers to be ‘plainly erroneous’.¹¹ We then unpack and critique this (elusive) overruling threshold and its application in more recent cases. Second, we provide a brief outline of the core tenets of the modern approach to statutory interpretation, before considering its methodological impact on this overruling threshold. Our analysis reveals some truth to the suggestion that considerations of *stare decisis* will be diluted by the modern approach. There are aspects of that approach that might destabilise, with increasing frequency, the foundations of statutory precedents — especially those of longstanding. That, in our view, is the consequence of judges applying common law reasoning and technique to the task of considering when (and why) statutory precedents ought to be re-evaluated and overruled. Indeed, contrary to the old view that statutory precedents were necessarily treated differently from those of common law, a methodological convergence between the judicial treatment of statutory and common law precedents may be emerging.

Yet, we argue that a more ‘activist’ approach to overruling statutory precedents is neither necessary nor desirable. Rather, there are still compelling reasons for superior courts to take a more cautious approach. Thus, in Part III, we outline three factors that courts should consider in deciding whether to depart from a statutory precedent. These factors, individually or taken together, may provide powerful reasons for a superior court to ‘stand by what has been decided’.

II Statutory Precedents and the Modern Approach to Statutory Interpretation

The doctrine of precedent is said to be ‘the hallmark of the common law’.¹² It is underpinned by powerful normative principles, as the Federal Court of Australia explained in *Telstra Corporation v Treloar*:

The rationale for the doctrine can be grouped into four categories: certainty, equality, efficiency and the appearance of justice. *Stare decisis* promotes

¹⁰ Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

¹¹ *Babaniaris* (n 7) 13 (Mason J).

¹² Sir Anthony Mason, ‘The Use and Abuse of Precedent’ (1988) 4(2) *Australian Bar Review* 93, 93 (‘Use and Abuse of Precedent’).

certainty because the law is then able to furnish a clear guide for the conduct of individuals. Citizens are able to arrange their affairs with confidence knowing that the law that will be applied to them in future will be the same as is currently applied. The doctrine achieves equality by treating like cases alike. *Stare decisis* promotes efficiency. Once a court has determined an issue, subsequent courts need not expend the time and resources to reconsider it. Finally, *stare decisis* promotes the appearance of justice by creating impartial rules of law not dependent upon the personal views or biases of a particular judge. It achieves this result by impersonal and reasoned judgments.¹³

As outlined at the outset, the core tenets of the doctrine of precedent are also clear enough, at least in formal terms:¹⁴ a lower court must follow the binding precedent of a court higher than it in the same judicial hierarchy. The High Court of Australia is not bound by any precedent of another court, nor its own. Yet even when a precedent is not strictly binding, there are strong reasons why a court might follow it nevertheless. The principles of certainty, equality, efficiency and the appearance of justice outlined above may all persuade a court that it should stand by what has been decided.

The vast majority of cases heard by Australian courts now turn, at least to some extent, upon the interpretation of legislation.¹⁵ And it has been said that statutory precedents must be treated differently from precedents of common law. In *Brennan v Comcare*, Gummow J observed that '[t]he judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law.'¹⁶ More specifically, it has been said that statutory precedents 'involve special considerations'¹⁷ relating to the nature of statutory interpretation, and the relationship between Parliament and the courts, which common law precedents do not.¹⁸ This reflects the basic fact that in the case of statutory interpretation, it is the statute that is the source of law and not the courts' exposition of it:

It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the

¹³ *Telstra Corporation v Treloar* (2000) 102 FCR 595, 602 [23] (Branson and Finkelstein JJ) ('*Treloar*').

¹⁴ Of course, the more detailed application of that doctrine, and the process of identifying, applying, or distinguishing precedent, is more complex. See, eg, *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Jones v Bartlett* (2000) 205 CLR 166; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ('*Farah Constructions*').

¹⁵ See, eg, Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 1 ('Common Law Statutes').

¹⁶ *Brennan v Comcare* (1994) 50 FCR 555, 572. See also 573.

¹⁷ Sir Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24(1) *Adelaide Law Review* 15, 25 ('Legislative and Judicial Law-Making').

¹⁸ See also *Carter v Bradbeer* [1975] 3 All ER 158, 161 (Diplock J): 'A question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application'.

law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.¹⁹

And this, Pearce and Geddes conclude, ‘reflects an activist approach to the court’s relationship with the legislature’.²⁰

This section explores and examines that approach. We begin with the decision of the High Court in *Babaniaris*, which outlined the threshold for overruling a statutory precedent. Then, we detail the modern approach to statutory interpretation which has emerged in recent decades. This grounds the critical analysis of the treatment of statutory precedents that we undertake in Part III.

A *Babaniaris: The Overruling Threshold for a Statutory Precedent*

In the 1987 decision of *Babaniaris*, the High Court outlined the threshold for when a superior court should overrule a (non-binding) statutory precedent. In the leading judgment, Mason J observed:

If an appellate court ... is convinced that a previous interpretation is *plainly erroneous* then it cannot allow previous error to stand in the way of declaring the true intent of the statute. It is no part of a court’s function to perpetuate error and to insist on an interpretation which, it is convinced, does not give effect to the legislative intention. ... The injustice or inconvenience which will result from displacement of a long-standing decision is certainly a very important factor to be considered, but there is no support in principle or authority for the proposition that the court should persist with a manifestly incorrect interpretation on the ground that it will cause injustice or inconvenience.²¹

The *Babaniaris* litigation considered a statutory precedent laid down decades earlier in *Little v Levin Cuttings Pty Ltd*.²² This was a decision of Judge Stretton of the Workers Compensation Board of Victoria regarding the definition of ‘outworker’ in s 3 of the *Worker Compensation Act 1958* (Vic). A person to whom that definition applied was not entitled to compensation under s 5 of the Act. Judge Stretton held that independent contractors were not ‘outworkers’, but rather ‘workers’, and so were entitled to statutory compensation.²³

The decision in the first instance in *Babaniaris* was, again, made by the Victorian Workers Compensation Board.²⁴ The applicant was an independent contractor. On the basis of the statutory precedent from *Little*, the Board held that she was not an ‘outworker’ and so entitled to workers compensation.²⁵ The company for whom she performed work then appealed, successfully, to the Full Court of the Supreme Court of Victoria in *Lutony Fashions Pty Ltd v Babaniaris*.²⁶

¹⁹ *Ogden Industries Pty Ltd v Lucas* [1970] AC 113 (PC), 127 (*‘Ogden Industries’*). See further DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 9.

²⁰ Pearce and Geddes (n 19) 15.

²¹ *Babaniaris* (n 7) 13 (emphasis added; citations omitted). See also Mason, ‘Use and Abuse of Precedent’ (n 12) 93; Mason, ‘Legislative and Judicial Law-Making’ (n 17) 25.

²² *Little v Levin Cuttings Pty Ltd* (1953) 3 WCBd (Vict) 71 (*‘Little’*).

²³ *Ibid*.

²⁴ *Babaniaris v Lutony Fashions Pty Ltd* (1987) WCC(Vic) 70-396.

²⁵ As explained in *Lutony Fashions Pty Ltd v Babaniaris* [1986] VR 469, 470–1 (Brooking J) (*‘Lutony’*).

²⁶ *Ibid*.

In a 2:1 decision, the Court held that the applicant was an ‘outworker’ for the purposes of the Act.²⁷ The matter was then appealed to the High Court, which upheld (also by majority) the decision of the Full Court majority. Relevantly, Wilson and Dawson JJ stated that the

[High] Court is reluctant to depart from long-standing decisions of State courts upon the construction of State statutes if the meaning is doubtful, particularly where those decisions have been acted on in such a way as to affect rights and obligations.²⁸

However, the majority held that the *Little* precedent was ‘plainly erroneous’²⁹ and that *stare decisis* ‘has no application where the meaning of a statute is plain and free from ambiguity’.³⁰ Without descending into the minutiae of the Full Court’s interpretive reasoning, the High Court concluded that the view of the majority in that case was preferable in light of the statutory text, the wider context of the Act and its practical outcome. The upshot of the *Little* precedent was that ‘an independent contractor who is an outworker would be a “worker” and entitled to compensation, whereas the employee who is an outworker would not be a “worker” and would not be entitled to compensation’.³¹ As Mason J later observed, ‘[t]his is not a rational and sensible outcome’.³² It would also mean that independent contractors were entitled to compensation, but not subject to the same pecuniary cap on compensation as others, which Mason J described as a ‘strange result’.³³ Finally, the interpretation in *Little* was said to give too much emphasis to this one provision (s 3(6)) of the Act.³⁴

As noted, the decisions of both the Full Supreme Court and the High Court were split. Even in dissent, Nicholson J of the Full Court acknowledged that ‘[o]n the face of the definition, it would appear on first reading that [the applicant] does’³⁵ constitute an ‘outworker’ for purposes of the Act. ‘However, when regard is had to the legislative history of the provision,’ his Honour continued, ‘I think the matter is by no means as clear.’³⁶ That history demonstrated that successive amendments to the Act operated to expand its protection by limiting those persons excluded by s 3.³⁷ And while Nicholson J acknowledged that there was ‘some attraction’ to the argument that *Little* produced ‘illogical’ outcomes (as outlined above),³⁸ it did have an alternative explanation:

I think the answer to it lies in the historical fact that the Act was never meant to apply to independent contractors at all. Parliament, having extended its ambit to cover certain independent contractors, it would in my view be illogical to similarly extend the ambit of what is on any view an

²⁷ Ibid 477 (Brooking J); 477 (Murray J); Nicholson J dissenting.

²⁸ *Babaniaris* (n 7) 22–3 (citations omitted).

²⁹ Ibid 13 (Mason J).

³⁰ Ibid 23 (Wilson and Dawson JJ).

³¹ Ibid 9 (Mason J).

³² Ibid.

³³ Ibid 10 (Mason J).

³⁴ Ibid 9 (Mason J).

³⁵ *Lutony* (n 25) 481.

³⁶ Ibid.

³⁷ Ibid 481–2.

³⁸ Ibid 482.

anachronistic exclusion to disentitle some of these independent contractors from obtaining compensation, and I cannot believe that Parliament ever intended such a result.³⁹

Nicholson J thought it relevant that Judge Stretton was ‘a judge with extensive experience in the workers compensation jurisdiction’,⁴⁰ and that the precedent his Honour set ‘ha[d] since stood unchallenged and has been frequently followed by the Board from 1953 until the present time [1985]’.⁴¹ While these facts, of course, did not necessarily mean that the precedent was correct, they were important considerations that should incline a court to stand by what had been decided.⁴²

Brennan and Deane JJ, the dissenters in the High Court in *Babaniaris*, also preferred the construction of s 3 reached by the majority of the Full Court of the Victorian Supreme Court:

If this were the first occasion when the underlying issue had arisen for judicial determination, we would be disposed to agree with the answers given ... Though we are not disposed to agree with Judge Stretton’s construction, we are quite unable to ‘say positively that it was wrong and productive of inconvenience’.⁴³

That finding was important. *Little* was, as a consequence, ‘a determination to which *stare decisis* might properly apply. Having been accepted for a long time as stating the law, that determination ought not now to be departed from.’⁴⁴

The ‘plainly erroneous’ test for overruling a statutory precedent has subsequently been endorsed.⁴⁵ It is similar to the test subsequently endorsed in a more specific, legislative context: namely the interpretation by courts of different jurisdictions of either national uniform, or federal, legislation. In *Australian Securities Commission v Marlborough Gold Mines Ltd*, the High Court stated that

uniformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.⁴⁶

While we do not attempt any detailed comparison of the way in which the tests from *Babaniaris* and *Marlborough Gold Mines* have been applied, they are patently similar. As we explain in Part III, both are informed by a particular

³⁹ Ibid.

⁴⁰ Ibid 481.

⁴¹ Ibid.

⁴² Ibid.

⁴³ *Babaniaris* (n 7) 28.

⁴⁴ Ibid 32.

⁴⁵ See, eg, *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646, 661 (McHugh, Gummow and Heydon JJ); *Jones v Daniel* (2004) 141 FCR 148, 155 (Moore J; Hill J agreeing at 149, Allsop J agreeing at 156); *Treloar* (n 13) 602 [26] (Branson and Finkelstein JJ).

⁴⁶ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (‘*Marlborough Gold Mines*’). See also *Farah Constructions* (n 14) 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

understanding of the judicial role and the nature of statute law. And both require the court to distinguish between interpretations of a statute that are ‘right’ and those that are ‘wrong’. Yet, this is plainly a difficult interpretive matter. As Mason J noted extra-curially ‘[t]he perennial problem is, of course, to arrive at the conviction that the old decision is wrong.’⁴⁷ Where is the dividing line, between a construction that does not appear to be the best to an appellate court, and one that is ‘plainly erroneous’? It is evidently one that courts have struggled to draw, including in cases such as *Babaniaris*.

We now turn to explore this critical question by outlining the different bases on which a court might conclude that this threshold has been met, and whether the modern approach to statutory interpretation that emerged after *Babaniaris* might have lowered this threshold, or increased the likelihood of a court concluding that it has been met. Before doing so, we begin with a brief overview of what the modern approach entails.

B *The Modern Approach to Statutory Interpretation: A Brief Outline*

This section provides a brief outline of recent developments in the field of statutory interpretation to identify the core tenets of the interpretive approach currently favoured by Australian courts. Three broad principles or features of the modern approach can be identified, which are relevant to the treatment of statutory precedents.

The first is what we consider the leitmotif of the modern approach: its emphasis on reading text in context. The second may be viewed as a more radical strand or offshoot of this approach, which appeared on the verge of forming a new orthodoxy under the High Court led by French CJ, but the place of which is now uncertain: that is, the view that statutory interpretation is not assisted by recourse to ideas of parliamentary intent. The third and more fundamental principle is the constitutional notion that in our system of government, it is an exclusively judicial function to make binding determinations as to what a statute means.

In *CIC Insurance v Bankstown Football Club Ltd*, Brennan CJ, Dawson, Toohey and Gummow JJ stated:

[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reports of law reform bodies], one may discern the statute was intended to remedy ...⁴⁸

As Dharmananda has observed, ‘neither ambiguity of the statutory text or the satisfaction of any other condition is required before [context] may be considered pursuant to the *CIC Insurance* principle.’⁴⁹ In addition

⁴⁷ Mason, ‘Use and Abuse of Precedent’ (n 12) 111.

⁴⁸ *CIC Insurance* (n 1) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted).

⁴⁹ Jacinta Dharmananda, ‘Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation’ (2014) 42(2) *Federal Law Review* 333, 341. See also Pearce and Geddes (n 19) 93;

though *CIC Insurance* itself was about reports of law reform bodies, the concept of context ‘in its widest sense’ has been construed to include parliamentary materials generally as well as the state of the law when the statute was enacted, its defects, the history of the relevant law, parliamentary history of the statute, and historical context.⁵⁰

Moreover, the *internal* context of a statute is always critical to the meaning attributed to a statute under the modern approach. That is so as ‘[t]he primary object of statutory interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.’⁵¹

Some judges insist that ‘context’ must be understood more broadly still. For example, Stephen Gageler, writing extra-curially when Commonwealth Solicitor-General, argued that the context relevantly includes ‘the way the statutory text is applied in the courts *after* the text is enacted’.⁵² He continued:

The meaning of a statutory text is reformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases. The meaning of a statutory text is also informed, and reformed, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists.⁵³

The emergence of this modern — contextual — approach to interpretation in Australia was clearly hastened by statute.⁵⁴ Yet the articulation, endorsement and development of the modern approach is nevertheless a distinctly common law phenomenon. Just a year after *CIC Insurance*, the essence of the modern approach (at common law) was confirmed in the now seminal statement of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*:

The duty of a court is to give words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁵⁵

Their Honours then endorsed the view of Bennion in *Statutory Interpretation*, which highlighted the distinction between legal and literal or grammatical meaning. In order to ascertain the former, ‘there needs to be brought to the

Matthew T Stubbs, ‘From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation’ (2006) 34(1) *Federal Law Review* 103, 115–17.

⁵⁰ Dharmananda (n 49) 341 (citations omitted).

⁵¹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) (‘*Project Blue Sky*’).

⁵² Gageler, ‘Common Law Statutes’ (n 15) 1 (emphasis in original).

⁵³ *Ibid* 1–2.

⁵⁴ See especially ss 15AA–AB *Acts Interpretation Act 1901* (Cth) and their state and territory equivalents.

⁵⁵ *Project Blue Sky* (n 51) 384 [78] (citations omitted).

grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense)'.⁵⁶

The core interpretive principles outlined in *CIC Insurance* and *Project Blue Sky* have since been routinely endorsed by Australia's senior appellate courts.⁵⁷ In a series of cases decided between 2009 and 2012, the High Court emphasised the centrality of the statutory text to the interpretive enterprise.⁵⁸ These cases remind us, and properly so, that context is critical and useful for its capacity to assist in working out the meaning of a statutory text. In a process, the aim of which is to attribute meaning to a statutory text, context necessarily plays an instrumental role.⁵⁹ But this refocusing on the statutory text has sharpened, rather than undermined, the core interpretive principles of the modern approach.⁶⁰ As Gageler J observed in *SZTAL*:

The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text' ...⁶¹

It is that contextual approach that the Court considers best equips a judge to discharge their interpretive duty to 'determine what Parliament meant by the words it used'.⁶²

While this much now seems orthodox, and fairly uncontroversial, recent case law on statutory interpretation does contain other more radical strands. Some judges have insisted that parliamentary intention — long understood to be the lodestar of the interpretive process — is an unhelpful 'fiction'.⁶³ This scepticism was fuelled by work in the realm of political theory and philosophy, which argued that it was impossible for a large and heterogeneous group of people (such as a Parliament) to form any meaningful intention. On this account, a statute should be treated as a kind of artefact quite independent of the legislature that enacted it and

⁵⁶ Ibid, quoting Francis Bennion, *Statutory Interpretation* (LexisNexis, 3rd ed, 1997) 343–4.

⁵⁷ '[T]oo often to be doubted', as the Federal Court put it *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40, 43 [5].

⁵⁸ See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 (Hayne, Heydon, Crennan and Kiefel JJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [43]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*'); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) ('*Consolidated Media*'); *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) ('*Thiess*').

⁵⁹ *Thiess* (n 58) 671–2 [22]–[23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ), quoting *Consolidated Media* (n 58) 519 [39].

⁶⁰ See Chief Justice James Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84(12) *Australian Law Journal* 822, 831.

⁶¹ *SZTAL* (n 2) 374 [37] (citations omitted).

⁶² Spigelman (n 60) 828.

⁶³ *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J); 345–6 (McHugh J); *R v Hughes* (2000) 202 CLR 535, 563 [60] (Kirby J); *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 411–12 (French J) ('*NAAV*'); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J) ('*Cross*'); *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38] (French CJ), 85 [146] (Gummow J) ('*Momcilovic*'); *Lacey* (n 58) 592 [43]–[44].

the motivations and objectives its members might have had⁶⁴ — and this focused attention even more closely on the specificities of a statutory text, and its internal logic and structure. Those who take the view that parliamentary intention is a judicial construct may be more likely to conclude that a statutory precedent ought to be overruled, for reasons that we will explain.

These shifts seemed to coincide, albeit in indistinct ways, with another more longstanding principle of Australian public law. It is emphatically said to be the role of the courts and not any other branch of government to declare and enforce the law.⁶⁵ While this is not a uniquely Australian view,⁶⁶ it has arguably been applied more rigidly here than in other jurisdictions. This is reflected, for example, in the fact that Australian courts do not defer to the Executive's interpretation of the law, or countenance the prospect that Parliament might legitimately delegate final say about how ambiguous provisions should be understood to the executive branch.⁶⁷ As a general proposition, then, the judicial role of conclusively interpreting statute law has been pointed to as one of fundamental constitutional importance, which must be performed with the strictest independence and in accordance with established legal rules.

C *The Impact of the Modern Approach on the Overruling Threshold*

Writing extra-curially in 2007, Justice Kirby said that 'the most significant change in the law that has occurred in recent times, relevant to the operation of the precedent in Australia, has been the shift towards statute law'.⁶⁸ In the specific context of statutory precedent, his Honour made the following observations:

The new emphasis by the High Court of Australia upon the importance of purpose and context in ascertaining legislative meaning means that the construction of a particular word or phrase, used in a new context, will need to be reconsidered when presented in a later case. It follows that the law of precedent, as it applies to legislative texts, is bound to have less significance than in the statement of the broad principles of the common law ... In giving meaning to a legislative text the necessary starting point, in every case, is the text itself — not what judges may have said on other texts or on the principles of the common law that preceded the adoption of the text.⁶⁹

⁶⁴ This position is explored further in Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39; Patrick Emerton and Lisa Burton Crawford, 'Statutory Meaning Without Parliamentary Intention: Defending the High Court's "Alternative Approach" to Statutory Interpretation' in Lisa Burton Crawford, Patrick Emerton and Dale Smith, *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 39.

⁶⁵ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153–4 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

⁶⁶ It is, after all, rooted in the United States ('US') Supreme Court decision in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

⁶⁷ Unlike in the US. See further Justice Stephen Gageler, 'Deference' (2015) 22(3) *Australian Journal of Administrative Law* 151.

⁶⁸ Kirby, 'Precedent Law' (n 9) 251.

⁶⁹ *Ibid* 252.

The following sections explore the plausibility of these claims, and their cogency, as part of a broader discussion of the bases on which a court might (now) conclude that a statutory precedent is ‘plainly erroneous’.

1 *Changes in the Social, Economic, Scientific and Technological Context of a Statute*

One of the possible bases for overruling a statutory precedent is that it has been rendered unsatisfactory by broader economic, social, scientific or technological changes. Yet the ways in which such changes may (legitimately) lead a court to conclude that a statutory precedent ought to be overruled are complex. We note, but leave to one side, the notion that courts can ‘update’ the meaning of a statute in order to ensure that it coheres with contemporary values or public expectations. This appears to be something that the courts in other jurisdictions (such as the United Kingdom) may be willing to do, but which would be difficult to square with the mainstream understanding of judicial power and the constitutional parameters of statutory interpretation.⁷⁰

However, Australian courts have endorsed the idea that statutes are ‘always speaking’, most recently and emphatically the High Court in *Aubrey*.⁷¹ The idea that a statute is always speaking could be taken to mean several different things. Least controversially, it is shorthand for conveying the results of applying the well-known distinction between connotation and denotation. That is, ‘the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change’.⁷² Conventionally understood, then, the application of the ‘always speaking’ approach does not involve any change to the core or essential meaning of a statute, and hence it is a relatively uncontroversial basis on which a court may legitimately overrule a statutory precedent. A court may conclude that a statutory precedent ought not to be followed, not because it is incorrect or ‘plainly erroneous’ in the relevant sense, but because the denotation of the statutory text has changed since the time that precedent was laid down.⁷³

Consequently, and importantly for present purposes, it is an interpretive technique that can accommodate changes in the social, economic, scientific and technological context of a statute. Consider the decision in *Aubrey* for example. There the High Court stated that ‘[t]he approach in this country allows that, if things not known or understood at the time an Act came into force fall, on a fair construction, within its words, those things should be held to be included’.⁷⁴ The

⁷⁰ As the United Kingdom Supreme Court arguably did in *Yemshaw v London Borough of Hounslow* [2011] 1 All ER 912. See Richard Ekins, ‘Updating the Meaning of Violence’ (2013) 129(Jan) *Law Quarterly Review* 17; Dharmananda (n 49); Justice James Edelman, ‘2018 Winterton Lecture Constitutional Interpretation’ (2019) 45(1) *University of Western Australia Law Review* 1, 25–7; Andrew Burrows, *The Hamlyn Lectures: Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 21–34. See further Part IIIA below.

⁷¹ *Aubrey* (n 4) esp 325–6 [39].

⁷² *R v G* [2004] 1 AC 1034, 1054 [29] (Lord Bingham). This is how the ‘always speaking’ principle appears to have been understood in, for example, *R v A2* (2019) 93 ALJR 1106, 1134 [141] (Bell and Gageler JJ).

⁷³ See, eg, *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327.

⁷⁴ *Aubrey* (n 4) 321 [29] (Kiefel CJ, Keane, Nettle and Edelman JJ).

Court held that the approach was available and its application meant the transmission of a serious sexual disease now amounted to ‘inflicting grievous bodily harm’ for the purposes of the *Crimes Act 1900* (NSW). In doing so, as noted, the Court declined to follow a precedent established in 1888 that ‘until this case ... had not been distinguished or judicially doubted in New South Wales’.⁷⁵ That precedent stood for the proposition ‘that the “uncertain and delayed operation of the act by which infection is communicated” does not constitute the infliction of grievous bodily harm’.⁷⁶ But as the generality of the statutory language attracted the operation of the always speaking approach, the joint judgment in *Aubrey* reasoned that

even if the reckless transmission of sexual diseases were not within the ordinary acceptance of ‘inflicting grievous bodily harm’ in 1888 ... subsequent developments in knowledge of the aetiology and symptomology of infection have been such that it now accords with ordinary understanding to conceive of the reckless transmission of sexual disease by sexual intercourse without disclosure of the risk of infection as the infliction of grievous bodily injury.⁷⁷

On this account, the reasoning in *Aubrey* provides an example in which advances in medical science rendered a statutory precedent unfit for (contemporary) purpose. It was overruled as a consequence.

If, however, the always speaking approach means something more or different from the connotation/denotation technique, then it becomes more controversial. For example, a court may update the meaning of a statute by giving its words and phrases ‘whatever meaning they happen to have at the time in the future when they are read and interpreted’.⁷⁸ But it would be problematic, on separation of powers grounds, for courts to change the core or essential meaning of a statute. In *Pape v Commissioner of Taxation*, Heydon J stated:

[T]he idea that a statute can change its meaning as time passes, so that it has two contradictory meanings at different times, *each of which is correct at one time but not another*, without any intervention from the legislature which enacted it, is, surely, to be polite, a minority opinion.⁷⁹

Yet, there is an argument that this is what the joint judgment did in *Aubrey*.⁸⁰ On that view, the Court updated the meaning of the word ‘inflicts’ to accommodate the changes in medical science and make the criminal statute fit for (contemporary) purpose, which changed the core meaning of ‘inflicts grievous bodily harm’ in the *Crimes Act 1900* (NSW).⁸¹

⁷⁵ Ibid 324 [35].

⁷⁶ Ibid 332 [55] (Bell J), quoting *R v Clarence* (1888) 22 QBD 23, 41–2 (Stephen J, Huddleston B, Mathew, AL Smith and Grantham JJ agreeing).

⁷⁷ Ibid 320 [24].

⁷⁸ Jack Tsen-Ta Lee, ‘The Text through Time’ (2010) 31(3) *Statute Law Review* 217, 219. For an argument along these lines, see T Alexander Aleinikoff, ‘Updating Statutory Interpretation’ (1988) 87(1) *Michigan Law Review* 20.

⁷⁹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 145 [423] (emphasis added).

⁸⁰ See Dan Meagher, ‘The “Always Speaking” Approach to Statutes (and the Significance of its Misapplication in *Aubrey v The Queen*)’ (2020) 43(1) *University of New South Wales Law Journal* 191.

⁸¹ See Jacinta Dharmananda, ‘The “Always Speaking” Principle: Not Always Needed?’ (2017) 28(3) *Public Law Review* 199, 202.

In any event, as explained in Part IIB above, what is distinctive about the modern approach is that it requires consideration of statutory context in the first instance and in its widest sense. So, legislative ambiguity is not required before recourse may be had to extrinsic materials to assist in fixing the legal meaning of a statute. The relevant context also includes ‘the state of the law when the statute was enacted, its defects, the history of the relevant law, parliamentary history of the statute, and historical context.’⁸² If this wider context also includes the contemporary social and economic milieu in which a statute now operates, might it may lead a court to conclude that a long-settled statutory precedent ought to be overruled?

This appears to be what Justice Kirby had in mind when he suggested that the modern approach will, inevitably, erode the doctrine of *stare decisis* in the context of statutory precedents.⁸³ In the United States (‘US’), Eskridge has forcefully argued for a similarly relaxed approach in this context.⁸⁴ Relevantly, he advocates ‘an “evolutive” approach, under which a statutory precedent might be overruled if its reasoning has been exposed as problematic and its results pernicious, *and* it has not broadly influenced subsequent lawmaking and private planning.’⁸⁵ These ideas are not alien to Australian law. They are broadly consistent with the principles that guide the High Court in determining whether to overrule one of its own common law or constitutional precedents:

The first was that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second was a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration ...⁸⁶

We argue below that this methodological parallel is both significant and no coincidence.⁸⁷ Yet the evolutive approach appears to go further, and considerably so. Eskridge rhetorically asks that

[i]f subsequent legislative developments may justify overruling a statutory precedent, why shouldn’t other subsequent developments — in social mores, public policy, and social trends — also justify such overruling, if they expose the precedent as a wrong turn in the judiciary’s development of a statutory scheme?⁸⁸

This aspect of the evolutive approach is consistent with his preference for, and sophisticated theory of, dynamic statutory interpretation.⁸⁹ It contemplates that the wider, external and contemporary (social, economic, scientific, technological)

⁸² Dharmananda (n 49) 341.

⁸³ Kirby, ‘Precedent Law’ (n 9).

⁸⁴ William N Eskridge Jr, ‘Overruling Statutory Precedents’ (1988) 76(4) *Georgetown Law Journal* 1361.

⁸⁵ *Ibid* 1385 (emphasis in original).

⁸⁶ *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9.

⁸⁷ See Part IIC(4) below.

⁸⁸ Eskridge, ‘Overruling Statutory Precedents’ (n 84) 1392.

⁸⁹ See William N Eskridge Jr, *Dynamic Statutory Interpretation* (Harvard University Press, 1994).

context may render a statutory precedent ‘obsolescent’.⁹⁰ This is, we think, quite different from saying that the reasoning that underpinned the original precedent was unprincipled, conflicted or without use or reliance. Moreover, it seems at some remove from the ‘plainly erroneous’ test articulated in *Babaniaris* — for one may accept the soundness of the original reasoning, but still decide it is ill-suited to its contemporary context. The evolutive imperative of ‘that was then, this is now’ dilutes the normative and doctrinal force of *stare decisis*.

It is this kind of evolutive account that animates Justice Kirby’s conception of the proper relationship between the modern approach to interpretation and statutory precedents. That is the significance of his assertion that under such an approach ‘the construction of a particular word or phrase, used in a new context, will *need* to be reconsidered when presented in a later case’.⁹¹ On this account, the lodestar of the modern approach is to attribute a meaning to a statutory text that best fits and furthers its purpose *in the contemporary context in which operates* — and that entails a more relaxed approach to statutory precedents.

2 *Changes in the Legal Context of a Statute*

As explained in Part IIB above, the context which informs the meaning of a statute includes the broader legal framework within which it must operate. This point was emphasised by Gageler in an article highlighting what he claimed to be unappreciated similarities between the common law method and the process of statutory interpretation.⁹²

A statute must necessarily be read in light of existing statute and common law, Gageler argued, because of the institutional context in which statutory interpretation occurs. While it is often examined in that way by academic commentators, statutory interpretation is not an end in itself. Rather, it is part and parcel of the performance of the judicial role of determining the relevant law, so as to resolve a dispute about its application. When we refer here to the relevant law, we necessarily mean a complex mix of legal norms derived from both statute and the common law. On Gageler’s account, the context of a statutory text legitimately includes the accumulated experience of a court in interpreting legislation so as to apply it to an ever-changing range of legal disputes.⁹³ Whereas some have argued that statutory precedents ought to be treated differently to precedents of common law, this seems to be a call for methodological convergence.

While Gageler gave the point fresh emphasis, the idea that a statute ought to be construed in light of its legal context is not a controversial one.⁹⁴ It has long been accepted that statutes should be interpreted in light of other statutes *in pari materia*.⁹⁵ Beyond this, examples can be found in which the provisions of one

⁹⁰ See Eskridge, ‘Overruling Statutory Precedents’ (n 84) 1388.

⁹¹ Kirby, ‘Precedent Law’ (n 9) 252 (emphasis added).

⁹² Gageler, ‘Common Law Statutes’ (n 15).

⁹³ *Ibid* 2–3.

⁹⁴ See also Bennion (n 56) 589.

⁹⁵ That is, ‘reference may be made to similar statutes within the same [or another] jurisdiction in ascertaining the meaning of an Act before the court’: Pearce and Geddes (n 19) 128.

statute are taken to inform the meaning of another. For example, in *Federal Commissioner of Taxation v Futuris Corporation Ltd*, the High Court concluded that s 175 of the *Income Tax Assessment Act 1936* (Cth) — which stated that non-compliance with that Act did not affect the validity of a taxation assessment — did not excuse *deliberate* failures to comply.⁹⁶ This reading was informed by another key piece of legislation governing the powers and duties of public servants: the *Public Service Act 1999* (Cth). That Act enjoined public servants

to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest.⁹⁷

This contextual evidence, the majority concluded, ‘point[ed] decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms’.⁹⁸

The point for present purposes is that the extended conception of the context, which is central to the modern approach, may make it more likely that the meaning of that text will evolve. For the context, so defined, is never static: the common law evolves, albeit ideally via slow and incremental steps; legislation is inherently vulnerable to change, and in the Australian legal system it does so frequently. As courts are called upon to apply legislation to resolve new controversies within an always developing legal (common law and statutory) matrix, they will continually see that legislation in a fresh light — which might lead to the view that previous interpretations of that statute are now ‘wrong’, or at least no longer fit for purpose.

3 *Statutory Context and the Common Law Canons*

The seminal passage of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky*⁹⁹ outlines other principles that inform the courts’ reading of a statute — and that may lead a superior court to conclude that it is ‘plainly erroneous’. For example, the importance of the canons of construction was recognised in *Project Blue Sky*. One of the unique features — if not, internal contradictions — of the modern approach case is its twin emphases on the primacy of statutory text, and a rich and robust set of interpretive canons that may lead a court to conclude that the legal meaning of that text is not the same as its ordinary or grammatical meaning. Perhaps this can be understood as but another example of reading *text in context*. The point for present purposes is that a statutory precedent may be challenged on the basis that the prior court failed to apply, or to properly apply, one of the many canons of construction.

⁹⁶ *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

⁹⁷ *Ibid* 164 [55] (Gummow, Hayne, Heydon and Crennan JJ).

⁹⁸ *Ibid* 164–5 [55] (Gummow, Hayne, Heydon and Crennan JJ).

⁹⁹ See above n 55 and accompanying text.

Consider the decision of the Full Federal Court of Australia in *Minister for Immigration and Citizenship v Haneef*.¹⁰⁰ The legislation in question in that case empowered the Minister to cancel a visa on character grounds. Section 501(6)(b) of the *Migration Act 1958* (Cth) provided that a person failed the character test if he or she had an ‘association’ with someone whom, or with a group or organisation which, the Minister reasonably suspected had been involved in criminal conduct. Emmett J had previously ruled that the word ‘association’ encompasses an ‘innocent association’, and did not require ‘that there be some nexus between the visa holder and the criminal conduct of the person with whom the visa holder was associated’.¹⁰¹ The Full Court overruled this statutory precedent as Emmett J failed to give adequate weight to the principle of legality. Relevantly, the Court emphasised that ‘Acts should be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms’.¹⁰² The legislation in question here had the potential to affect the ‘valuable rights’ afforded by a visa: rights to ‘be at liberty’ in Australia, ‘to work here’, and to continue residing with his wife.¹⁰³ For this and other reasons, the Full Federal Court concluded that the word ‘association’ should be construed more narrowly than Emmett J decided.

In some instances, it may be relatively uncontroversial for a court to conclude that a statutory precedent is ‘wrong’ on this kind of basis. For example, there may be easy cases where it is clear that the prior court simply failed to apply a canon, the existence and content of which is clear (such as one of the relatively straightforward rules prescribed in an Acts Interpretation Act). But in many cases, the position will be more complex and fluid.

The first reason for this is that the content of many of the canons of construction is not clear or uncontested — especially not those canons that are creatures of the common law. Consider, for example, the principle of legality, which was the focal point in *Haneef*. Different judges have explained and applied this principle in different ways.¹⁰⁴ It is not entirely clear which rights and principles are protected by this presumption.¹⁰⁵ The level of ambiguity required to engage the principle of legality — or, put differently, the level of clarity that is required to rebut it — is also a matter of particular debate.¹⁰⁶

Second, in stating that another court misapplied a canon of construction, the superior court may in fact be developing that canon. Indeed, this might be viewed

¹⁰⁰ *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 (‘Haneef’).

¹⁰¹ Ibid 433–4 [69]–[73], esp quoting *Minister for Immigration and Multicultural Affairs v Chan* (2001) 34 AAR 94, [7] (Emmett J).

¹⁰² *Haneef* (n 100) 442 [107]. See also 447 [128]–[129].

¹⁰³ Ibid 443 [110].

¹⁰⁴ See Bruce Chen, ‘The Principle of Legality: Issues of Rationale and Application’ (2015) 41(2) *Monash University Law Review* 329.

¹⁰⁵ For example, in recent years there has been particular confusion as to whether the principle only protects ‘fundamental’ rights (and if so, what these are); Francis Cardell-Oliver, ‘Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality’ (2017) 41(1) *Melbourne University Law Review* 30; *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* (No 2) (2016) 95 NSWLR 157, 167 [46] (Basten JA).

¹⁰⁶ Cardell-Oliver (n 105); Dan Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36(3) *Sydney Law Review* 413. See further and generally Jason NE Varuhas, ‘Conceptualising the Principle(s) of Legality’ (2018) 29(3) *Public Law Review* 196.

as an alternative basis on which a superior court might overrule a statutory precedent. That is, the court may decide that the previous understanding of the canons of construction, which produced the precedent, was itself wrong; that a different interpretive approach is required, and hence a different result. While judges often insist that the interpretive principles they apply have a long and unbroken lineage, it is clear that almost all of the interpretive principles presently applied by Australian courts have changed over time. Some of those changes have been subtle, others more dramatic. In recent case law, some judges have openly championed such change.

In *Plaintiff M79/2012 v Commonwealth*, for example, Hayne J advocated for the recognition of a new presumption of statutory interpretation that should be deployed if Parliament purports to permit the Executive to dispense with general legal requirements; this would entail reading any such provision narrowly.¹⁰⁷ In *Hossain v Minister for Immigration and Border Protection*, a majority of the High Court held that statutory conferrals of executive power should now be interpreted on the presumption that Parliament does not intend ‘immaterial’ errors to invalidate the exercise of that power, whereas this was not previously the case.¹⁰⁸ And in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*, Gageler J argued that we should no longer presume that Parliament does not intend to restrict judicial review, or at least, not in such indiscriminate terms: rather, we must pay close attention to the basis on which review is being sought.¹⁰⁹ As his Honour explained it:

The common law principles of interpretation applicable to determining whether legislation manifests an intention that a decision or category of decisions not be quashed or otherwise reviewed are not static. As with other common law principles or so-called ‘canons’ of statutory construction, they have contemporary interpretative utility to the extent that they are reflective and protective of stable and enduring structural principles or systemic values which can be taken to be respected by all arms of government. And as with other common law principles of statutory construction, they are not immune from curial reassessment and revision.¹¹⁰

It therefore seems undeniable that the canons of construction — as creatures of the common law — do change. Yet, this sits in obvious tension with another principle that is central to the modern approach to statutory interpretation. That is the idea that the canons of construction derive some legitimacy from the fact that they are known to, and accepted by, the other branches of government.¹¹¹ If the canons of construction change, it becomes difficult to say that these are effective tools for

¹⁰⁷ *Plaintiff M79/2012 v Commonwealth* (2013) 252 CLR 336, 366–7 [85]–[87].

¹⁰⁸ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ); 146 [67] (Edelman J). The novelty of this presumption is highlighted by the fact that Nettle and Gordon JJ railed against it in *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 458–60.

¹⁰⁹ *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 23 [59]–[60], 30–1 [77]–[78]. While their Honours did not put the point so clearly, the conclusion reached by the plurality indicates that they endorsed this approach.

¹¹⁰ *Ibid* 22 [58].

¹¹¹ See, eg, *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ) (‘Zheng’).

ascertaining what Parliament intended. That is especially so if (as in the case of the examples given above) the changes seem to be motivated by judicial concerns about the protection of systemic values and principles, and not facts that alter the courts' perception of what Parliament *actually* intends.

The problem is more pertinent for those who argue that parliamentary intention is not real in any meaningful sense; on that view, the fact that the canons of construction are known and accepted is sometimes said to provide an independent normative justification for their application. As French J said in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*, in a passage subsequently endorsed by the High Court:

Where the words expressed by Parliament are interpreted by the Court according to commonly understood rules of interpretation a court is entitled to make the normative statement that it has interpreted them in accordance with the legislative intention.¹¹²

This is a particularly difficult proposition. It suggests that we have a clear and accepted catalogue of what the canons of construction are, and moreover that they are organised into some sort of hierarchy that stipulates the proper relationship between them. This, of course, is not the case. We need not necessarily go so far as Llewellyn and suggest that the principles of interpretation are so malleable that they can be marshalled in an endless number of combinations, capable of justifying any interpretive conclusion a judge chooses.¹¹³ However, this is a potential danger of the modern approach, or at least its more radical manifestations.

Historically, the concept of parliamentary intention may have provided a yardstick against which a judicial interpretation could be judged: it was a sound interpretation if it was the one that Parliament was most likely to have intended. If the canons of construction are untethered from the concept of parliamentary intention, then some other, alternative standard is needed in order to assess whether a precedent-setting interpretation of a statute is 'right' or 'wrong' in the relevant sense. As others have noted, those who would jettison parliamentary intention as our interpretive 'lodestar' are yet to articulate any satisfactory alternative.¹¹⁴ Given this, it might be pondered whether this more radical form of the modern approach is more likely to lead judges to conclude that the overruling threshold has been met, and a statutory precedent is wrong.

4 *The Judicial Treatment of Statutory and Common Law Precedents: The Emergence of Methodological Convergence under the Modern Approach?*

Part II of this article sought to clarify the nature and scope of the overruling threshold for (non-binding) statutory precedents and the various bases that the

¹¹² *NAAV* (n 63) 412 (French J); endorsed in *Zheng* (n 111) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Cross* (n 63) 389 [25] (French CJ and Hayne J); *Momcilovic* (n 63) 44–5 [38] (French CJ); 85 [146] (Gummow J); *Lacey* (n 58) 592 [43]–[44].

¹¹³ Karl N Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rule or Canons about How Statutes are to be Construed' (1950) 3(3) *Vanderbilt Law Review* 395.

¹¹⁴ Ekins and Goldsworthy (n 64) 43.

application of the modern approach may generate for doing so. In *Babaniaris*, the High Court stated that it could — and indeed, must — overrule a statutory precedent that is ‘plainly erroneous’. Yet our analysis of *Babaniaris* and subsequent cases highlighted the ambiguity of that test. There are many reasons that apparently now justify a court in concluding that a statutory precedent ought to be overruled, which are difficult to describe as manifest errors. That is especially so given the sensitivity to a wide and fluid range of contextual material that the modern approach to statutory interpretation requires.

Relevantly, the foundations of a statutory precedent may be destabilised by changes in the social, economic, scientific and technological context of a statute, the wider legal context in which a statute must operate, and the common law interpretive framework that is applied to determine its legal meaning. Thus considerations of *stare decisis* are diluted under the modern approach to statutory interpretation. In other words, a statutory precedent might now be overruled because it is anachronistic, obsolescent or incompatible with the wider legal (constitutional, statutory and common law) context in which it is situated — not because it is ‘plainly erroneous’ in any meaningful sense.

As noted above, the foundation of the approach to statutory precedents is that ‘the judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law’.¹¹⁵ Yet the modern approach may in fact entail a methodological convergence, according to which judges apply common law reasoning and technique to the task of considering when (and why) statutory precedents ought to be re-evaluated and overruled. Justice Gordon recently observed that ‘[t]he common law must respond to “developments of the society in which it rules”’. A previously understood principle of the common law may become ill-adapted to modern circumstances.’¹¹⁶ There are indications, at least from some judges and in some cases, that a similar outlook now animates the manner in which Australian courts evaluate statutory precedents. That is, the application of the modern approach has resulted in judges seeking to ensure that statutes are fit for (contemporary) purpose and a willingness to overrule those interpretations which are not.

As we noted above, the emergence and development of the modern approach was (and remains) a distinctly common law phenomenon. It may be seen as the result of judges refining and reframing what they considered to be the proper approach to their core task of statutory interpretation. Given this, the application of common law reasoning and technique to the task of considering when (and why) statutory precedents ought to be re-evaluated and overruled should come as no surprise. Even so, we consider that statutory precedents have particular characteristics and raise distinctive issues that ought to inform the judicial role in this context. These are the focus of Part III.

¹¹⁵ *Brennan v Comcare* (n 16) 572 (Gummow J). See also 573.

¹¹⁶ Justice Michelle Gordon, ‘Analogical Reasoning by Reference to Statute: What is the Judicial Function?’ (2019) 42(1) *University of New South Wales Law Journal* 4, 21 (citations omitted).

III Overruling Statutory Precedents under the Modern Approach: Relevant (*Stare Decisis*) Considerations

In this Part, we turn to squarely confront the question of whether and when a court should decide not to follow a statutory precedent, by examining the constitutional and broader normative principles that are implicated by its decision to consider doing so. To this end, we outline a number of important *stare decisis* considerations which may arise under the modern approach and which ought, then, to inform the decision of a superior court whether to overrule a statutory precedent. Thus, it is neither inevitable nor desirable that the contemporary re-evaluation of a statutory precedent ought to lead to its overruling. Before doing so, we note that there are potentially additional, specific reasons why the court of one state should follow that of another with regards to national uniform or federal legislation — the most obvious of which is consistency across the nation. However, we focus on the general principles that should inform the courts' approach.

A *Parliamentary Supremacy, the Separation of Powers and Statutory Precedents*

At the outset, we noted that the approach to statutory precedents is said to be informed by special considerations that do not apply to precedents of common law, and that countervail the concerns of certainty, equality, efficiency and the appearance of justice, which are said to justify the doctrine of precedent. The particular considerations highlighted in *Babaniaris* are those of parliamentary supremacy and the separation of powers. Relevantly, the courts are said to have a constitutional duty to give effect to the law laid down by Parliament, and so cannot perpetuate erroneous constructions of legislation or allow them to stand.

Thus the High Court stated in *Weiss v The Queen* that '[i]t is the words of the statute that ultimately govern, not the many subsequent judicial expositions of that meaning which have sought to express the operation of the proviso'.¹¹⁷ The Court has made similar statements in the context of national uniform legislation. While, in the interests of consistency, intermediate appellate courts should generally follow the interpretation of national uniform legislation placed on it by intermediate appellate courts in other jurisdictions,

that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are

¹¹⁷ *Weiss v The Queen* (2005) 224 CLR 300, 305 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Weiss*'). See also *Brennan v Comcare* (n 16) 572–3 (Gummow J).

guides to, but cannot control, the meaning of legislation in the court's jurisdiction.¹¹⁸

Though our focus is on the approach taken by Australian courts, similar ideas have been espoused elsewhere.¹¹⁹ These principles seem to lead inevitably to the conclusion that it is the constitutional duty of a superior court to find and give effect to the 'right' interpretation of a statute.¹²⁰ But on closer inspection, the position is more complex.

It is not the purpose of this article to delve into theoretical disputes about the content of the law. However, even brief recourse to legal theory reveals the difficulty of asserting that one interpretation of a statute is 'right', and another 'plainly wrong'. Some theorists appear to argue that there is one right answer to every legal question that at least a judicial Hercules could discover.¹²¹ But most would agree that the claim that 'legal texts ... contain ... answers to every question, which merely await judicial discovery' is little more than a fairy tale.¹²² The reasons for this include the fact that Parliament is not omniscient and that the English language is fallible, and hence no legislature could ever eradicate ambiguity or vagueness from the law.

The ubiquity of ambiguity and vagueness should inform the court's approach to statutory precedents.¹²³ If it is difficult to ascertain the meaning of a statute, and reasonable minds are likely to differ as to what it is, then it is problematic for a judge to assert that another's interpretation is 'plainly erroneous'. Courts must frankly assess the benefit of overturning a longstanding precedent as against its potential detriments — detriments that we examine in Parts IIIB–C below. But if a statute is vague, this does not merely mean that it is difficult to precisely ascertain what it means. It means that *there is no precise meaning*. The legislation itself does not determine what it means in this regard. In other words, there is a gap in the legislation, or a place at which the law runs out.

Yet, as noted, the 'plainly erroneous' test articulated in *Babaniaris* seems to assume that interpretations of a statute can be categorised as 'right' or 'wrong'. On

¹¹⁸ *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270 [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 632–3 [62] (McHugh J).

¹¹⁹ See *Ogden Industries* (n 19) 127.

¹²⁰ Mason J stated as much in *Babaniaris* (n 7) 14 (citations omitted):

Although the use of expressions [such] as 'plainly' and 'manifestly' erroneous has been criticized in contexts where the question is one on which different minds might reach different conclusions, this criticism does not diminish the utility of the expression in their application to a case in which the question on analysis is capable of but one answer.

See also Wilson and Dawson JJ at 23.

¹²¹ See, eg, Ronald Dworkin, 'On Gaps in the Law' in Paul Amselek and Neil MacCormick (eds), *Controversies About Law's Ontology* (Edinburgh University Press, 1991) 84. Specifically, Dworkin seems to argue that vagueness in (for example, statutory) language does not necessarily generate indeterminacy in the law, for the law provides resources that allow a judge to determine what the right answer should be. See further Timothy A O Endicott, *Vagueness in Law* (Oxford University Press, 2000) 57.

¹²² Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 230.

¹²³ As the Federal Court appeared to acknowledge in *Treloar* (n 13) 602–3 [27] (Branson and Finkelstein JJ).

the other hand, it is now increasingly common for Australian judges to speak of ‘constructional choice’.¹²⁴ That language acknowledges that many statutes will be open to more than one reasonable interpretation.

Relatedly, it is commonly asserted that it is the exclusive role of the judiciary to make binding determinations about the meaning and effect of statute law — but beyond the powers of the courts to decide what the content of the law should be.¹²⁵ Strictly speaking, it is difficult to reconcile this proposition with the inevitability of statutory ambiguity and more importantly, vagueness. It seems to suggest that, confronted with an indeterminate statute, an Australian court must simply throw up its hands and admit that there is no law that governs the dispute before it. It may be possible to identify cases where courts have adopted something close to this approach,¹²⁶ but these are extremely rare. It seems altogether more likely that courts routinely step in to fill the gaps in vague legislation in the course of exercising judicial power. Most theorists would accept that this is sound and does not undermine parliamentary supremacy.¹²⁷

The preceding analysis raises difficult questions of legal theory and the nature of judicial power that it is not possible to resolve in this article. Nonetheless, the complexities revealed are clearly relevant for our understanding of statutory precedents. The first and obvious point that follows is that it is difficult for a court to simply assert that a statutory precedent is ‘plainly erroneous’. To push the point, it might be argued that to state that a precedent is ‘plainly erroneous’ at this level of the judicial hierarchy ‘may be [to express] little more than a difference in judicial temperament and expression’.¹²⁸

Consider, for example, the history of the litigation and the nature of the interpretive disagreement that culminated in the High Court’s decision in *Babaniaris*. The relevant statutory precedent was established in 1953 by a judge (Judge Stretton) with extensive knowledge of the relevant jurisdiction. That precedent was affirmed and applied by the expert tribunal (Workers Compensation Board of Victoria) for over 30 years including in the *Babaniaris* matter. During that time there were successive amendments to the *Workers Compensation Act 1958* (Vic) to extend its protection, and the Victorian Parliament did not legislate to disturb or clarify that precedent.¹²⁹ An experienced member of a senior appellate

¹²⁴ Including, for example, in the case of *Haneef* discussed above nn 100–3 and accompanying text. See further Gordon Brysland and Suna Rizalar, ‘Constructional Choice’ (2018) 92(2) *Australian Law Journal* 81. As Brysland and Rizalar note, the phrase was a favourite of Chief Justice French.

¹²⁵ *Momicilovic* (n 63) 92 [169] (Gummow J).

¹²⁶ See, eg, *DPP (Vic) v Walters* (2015) 49 VR 356. In this case, the Victorian Court of Appeal held (by majority) that legislation enacted by the Victorian Parliament (which, broadly speaking, purported to direct courts to issue criminal sentences in such a way as to ‘raise’ the median sentence for certain crimes) could not be given any effect. A sentencing judge could not know how an individual sentence would affect the median.

¹²⁷ See Goldsworthy (n 122) 231. See also Justice Nye Perram, ‘Context and Complexity: Some Reflections by a New Judge’ [2010] *Federal Judicial Scholarship* 19, [6]: ‘the Parliament authoritatively speaks, the Courts authoritatively interprets. The writer cannot stop writing and the reader cannot give the author up no matter how inaccessible it finds the prose style.’

¹²⁸ Kirby, ‘Precedent Law’ (n 9) 247.

¹²⁹ *Babaniaris* (n 7) 25–6 (Brennan and Deane JJ).

court (Nicholson J) then held that the interpretive reasoning that underpinned the precedent was correct. To be sure, the other two members of that Court rejected that view and even the two dissenting judges on High Court were ‘not disposed to agree with Judge Stretton’s construction’.¹³⁰ Even so, one might query whether characterising the statutory precedent as ‘plainly erroneous’ or ‘manifestly incorrect’ in these circumstances was entirely satisfactory. One might reasonably suggest that the detailed, careful and plausible reasoning of Nicholson J’s dissent on the Full Court alone cast at least some doubt on the meaning of the statute.

This may suggest the wisdom of Brandeis J’s famous observation that ‘[s]tare decisis is usually the wise policy, because, in most matters it is more important that the applicable rule of law be settled than that it be settled right.’¹³¹ Indeed, it reveals a need for caution — and judicial humility — in speaking about ‘right’ and ‘wrong’ interpretations of a statute.

Second, the relationship between parliamentary supremacy and statutory interpretation must be understood in light of the constitutional role of the court to decide legal disputes that come before it. This permits a court to choose between possible interpretations of ambiguous statutes,¹³² and fill gaps or add meaning when the statute is truly indeterminate. Where a court has reached a conclusion about the meaning of a statute of this kind, the precedent it sets does not rest in its entirety upon the text of the legislation enacted by Parliament. Rather, it ‘consists of the statute *plus* the decision of the Court’.¹³³ Given this, it is far from clear that parliamentary supremacy demands courts to take a more activist approach to statutory precedents than to those of common law.

B *Statutory Precedent as Context: Predictability, Prospectivity and the Rule of Law*

As explained, the modern approach calls for courts to read statutes in context, understood in its widest sense and in the first instance. To that end, the analysis undertaken in Part IIC above explained how the expanding matrix of materials and (fluid) contextual factors that now inform the determination of statutory meaning might make the courts more likely to conclude that previous interpretations were ‘plainly erroneous’ or, more accurately, unfit for their (contemporary) purpose.

Yet, the modern approach itself may guard against this instability — and, indeed, require that a court give considerable weight to statutory precedent. For example, in his sophisticated account, Gageler argues that a statutory precedent itself forms a crucial part of the context in which the correctness of a statutory

¹³⁰ Ibid 28 (Brennan and Deane JJ).

¹³¹ *Burnet v Coronado Oil & Gas Co* (1932) 285 US 393, 406. See also at 407–8.

¹³² As noted above in Part IIB, this may raise an issue if one subscribes to what we have described as the more radical strands of the modern approach. The orthodox position would probably be that, when faced with ambiguity, a court should choose the meaning that is most likely to reflect Parliament’s (authentic) intentions. If one does not take this approach, a tension between statutory interpretation and parliamentary supremacy may emerge.

¹³³ Frank E Horack Jr, ‘Congressional Silence: A Tool of Judicial Supremacy’ (1947) 25(3) *Texas Law Review* 247, 251 (emphasis in original).

precedent must be assessed.¹³⁴ The very existence of the statutory precedent is a significant weight on the scales that a superior court must balance against other concerns in deciding whether it ought to be overruled.

The broader point is that, of course, no statute exists in a vacuum. In Australia, statutes are enacted into, and must interpreted in light of, a constitutional system of government underpinned and informed by the common law. Two fundamental features of this constitutional framework are pertinent here, both of which have already been noted. The first is the supremacy of Parliament; the second is that it is the exclusive province of the judicial branch to make legally binding determinations as to what a statute means, and in doing so resolve disputes about its application. The High Court plays a special role as it has *final* say as to what a statute means, from which there is no further avenue of appeal. If Parliament is unhappy with the way in which its legislation has been interpreted, its only option is to attempt to make its ‘intentions’ plainer, via the enactment of more or different statutory text.

The significance of this for present purposes is that, while legislation is undoubtedly a superior source of legal norms than common law, our constitutional arrangements dictate that it is the judicial exposition of statutes that is legally binding. A great many statutory provisions may never be the subject of judicial scrutiny. In those instances, ordinary people and government actors alike must form their own view of what the statute means. But when a statute is considered by a court, its exposition of the statute — in other words, the statutory precedent — is, for all intents and purposes, the law. When a court overrules a statutory precedent, it changes the law in this practical sense — and retrospectively so.

The joint judgment decision of the majority in *Aubrey* provides a particularly stark example of this kind of retrospective change. The High Court’s decision not to follow the relevant 130-year-old statutory precedent resulted, necessarily, in the retrospective operation of the criminal offence.¹³⁵ Relevantly, the application of the always speaking approach ‘change[d] the legal status of previous acts on a backward-looking as well as forward-looking basis’.¹³⁶ It meant that the transmission of a serious sexual disease would now — and regarding the facts that gave rise to *Aubrey* — amount to inflicting grievous bodily harm for purposes of the *Crimes Act 1900* (NSW). In doing so, the decision in *Aubrey* extended criminal liability to new circumstances and developments. The upshot was a conviction (and lengthy jail term) for conduct that would have led to an acquittal on the earlier, long-settled interpretation of that criminal statute. This was an interpretive step that Bell J, in dissent, was not prepared to take: ‘[I]t is a large step to depart from a decision which has been understood to settle the construction of a provision, particularly where the effect of that departure is to extend the scope of criminal liability.’¹³⁷

¹³⁴ Gageler, ‘Common Law Statutes’ (n 15) 7.

¹³⁵ See Dan Meagher, ‘Two Reflections on Retrospectivity in Statutory Interpretation’ (2018) 29(3) *Public Law Review* 224, 236–7.

¹³⁶ Stephen R Munzer, ‘Retroactive Law’ (1977) 6(2) *Journal of Legal Studies* 373, 383.

¹³⁷ *Aubrey* (n 4) 332 [55]. See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 596 (Kirby J) (‘*Brodie*’).

Similar observations can be made about the precedent overruled in *Babaniaris*. The relevant precedent stood unchallenged and undisturbed by the legislature — that is, it was the law in the sense described above — for over 30 years. Over that time, it was frequently relied upon by claimants and routinely followed by the relevant expert tribunal. That being so, the outcome of the majority approach was particularly unfair on the appellant and others similarly situated, as Brennan and Deane JJ explained in dissent:

The present case is one where intervention to correct an error is likely to create serious embarrassment for those who acted on the faith of the earlier decision. Independent contractors like Mrs Babaniaris have been working, some of them (we should think) for the greater part of their working lives, believing themselves to be covered by workers' compensation and perhaps abstaining from seeking other insurance. No doubt insurers have been charging the 'employers' of independent contractors premiums assessed on the footing that independent contractors ... are covered and, if *Little's Case* were now overruled, insurers would obtain a windfall liberation from the risk of undischarged liabilities to independent contractors against which the employers were insured. There is no practical injustice in leaving *Little's Case* stand, especially as the operation of the Act will fall away as the *Accident Compensation Act 1985* (Vict.) comes into effect.¹³⁸

Of course, the age of a statutory precedent alone cannot and should not insulate it from critical judicial reassessment, especially by an ultimate appellate court. But the length of its existence will often generate relevant considerations of *stare decisis*.¹³⁹ In *Babaniaris*, concerns of context strengthened rather than undermined the case for standing by the precedent. Those concerns included the individual injustices highlighted in the above quoted passage, and the commercial consequences of discarding the statutory precedent, especially in light of the wider legislative context that soon would cover independent contractors.¹⁴⁰

As this makes clear, overruling a statutory precedent has real and serious consequences for the predictability, accessibility and retrospectivity of the law. These concerns are often captured in the notion and ideal of 'the rule of law'. There is always a need to treat that phrase with caution, for the rule of law is an internally complex and contested concept. Yet, despite that complexity and contestation, one of its core and uncontroversial characteristics is that the law should be knowable. The first reason for this is a pragmatic one: if the people who are supposed to be bound by the law cannot know what it is, then they are less likely to follow it.¹⁴¹ The second is a point of principle. Law is a tool of governance that is — or at least, should strive to be — distinct from coercion or brute force.¹⁴² Governing through law acknowledges that the people are

¹³⁸ *Babaniaris* (n 7) 30–1.

¹³⁹ See, eg, the powerful dissenting judgment of Gleeson CJ in *Brodie* (n 137) 534–6.

¹⁴⁰ See *Accident Compensation Act 1985* (Vic) ss 8–9.

¹⁴¹ See especially Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009) 210–232. In more recent work, Raz acknowledged that the rule of law serves other broader purposes: 'The Law's Own Virtue' (Columbia Public Law Research Paper No 14-609, 6 October 2018) <<https://ssrn.com/abstract=3262030>>.

¹⁴² Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 33–91. This aspect of Fuller's theory is highlighted and explored at length in Kristen Rundle, *Forms Liberate: Reclaiming the*

autonomous agents who are entitled to know what the law is, and choose whether to obey it. Of course, not every law will be just or fair, no matter how clear and accessible its content. But every unknowable law is unjust in a particular way: in that it fails to treat its subject as agents deserving of respect as such.

This analysis suggests that unknowable laws are problematic for reasons that transcend the particular unfairness that results when a person relies upon the law and it is subsequently changed. Nonetheless, reliance interests are a powerful reason for a superior court to adhere to a longstanding statutory precedent. As Mason J observed in *Babaniaris*:

There is certainly strong authority for the view that a decision of long-standing, on the basis of which many persons will have arranged their affairs, should not be lightly disturbed by a superior court.¹⁴³

That is especially so ‘when departure from precedent would prejudice the security of transactions and vested rights’:¹⁴⁴

Take, for example, title to property and the rules and practices according to which business contracts are made. Likewise, changes in criminal law and practice which would prejudicially affect the rights of an accused person. So also with changes in administrative law that adversely affect arrangements made respecting personal liberty.¹⁴⁵

These are no small matters in a common law system (like Australia), presumptively hostile to retrospective lawmaking for its capacity to undermine the core rule of law values of certainty, accessibility and prospectivity.¹⁴⁶ That hostility is an institutional and doctrinal recognition of retrospectivity’s core vice, which is to ‘defeat the expectations of citizens formed in reliance on the existing state of law’.¹⁴⁷ The rule of law — understood in a particular sense — is a core constitutional value, which the text and structure of the *Australian Constitution* evidently protects and promotes in various ways.¹⁴⁸ If it is to be taken seriously, then interpretive principles — including the doctrine of precedent — must be articulated and applied in a way that is consistent with it, so far as constitutional norms allow.¹⁴⁹

In addition, if the executive branch is to administer the law within the legal parameters that have been set, it is imperative that the legal meaning of statutes be reasonably ascertainable. If statutory precedents are routinely overruled, government actors and their legal advisors are put in an invidious position. What is

Jurisprudence of Lon L Fuller (Hart Publishing, 2012). See also Colleen Murphy, ‘Lon Fuller and the Moral Value of the Rule of Law’ (2005) 24(3) *Law and Philosophy* 239.

¹⁴³ *Babaniaris* (n 7) 13 (citations omitted).

¹⁴⁴ Mason, ‘Use and Abuse of Precedent’ (n 12) 106.

¹⁴⁵ *Ibid.*

¹⁴⁶ See Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford University Press, 2006).

¹⁴⁷ Andrew Palmer and Charles Sampford, ‘Retrospective Legislation in Australia: Looking Back at the 1980s’ (1994) 22(2) *Federal Law Review* 217, 229.

¹⁴⁸ See Lisa Burton Crawford, ‘The Rule of Law’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 77.

¹⁴⁹ For example, it is this normative concern that, arguably, underpins the common law interpretive presumption against the retrospective operation of legislation: *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

the conscientious actor to do: follow the existing statutory precedent, or the interpretation of the statute that they think is likely to find favour with a court if it is reconsidered? Again, the constitutional purist may simply reply that the Executive must comply with the statute *correctly* interpreted, and that there is no virtue in complying with a statutory precedent if it does not accord with a senior appellate court's view. But the complexity of statutes, the interpretive reality of 'constructional choice' and the constitutional value of the rule of law are all important parts of the wider legal context in which legislation operates that must be considered under the modern approach — and all seem to call for a more nuanced view of and approach to statutory precedents and the *stare decisis* considerations that inform it.

C *Constitutional Responsibility for Correcting 'Plainly Erroneous' Statutory Precedents*

The constitutional distribution of powers between Parliament and the courts is said to require the courts take a more activist approach to statutory precedents than those of common law, correcting any that they subsequently consider to be 'wrong'. Yet, maybe the separation of powers requires courts to take a rather different approach. In short, it could be argued that constitutional responsibility for correcting statutory precedents — or keeping them fit for (contemporary) purpose — rests with the legislature. Bell J, for example, expressed support for this approach in her dissenting judgment in *Aubrey*:

It is, of course, the responsibility of the court to give effect to the legislative intention expressed in s 35(1)(b) of the *Crimes Act* [1900 (NSW)]. Nonetheless, it is a large step to depart from a decision which has been understood to settle the construction of a provision, particularly where the effect of that departure is to extend the scope of criminal liability. ... If that settled understanding is ill-suited to the needs of modern society, the solution lies in the legislature addressing the deficiency ...¹⁵⁰

This might be understood as a more limited argument, that courts should not overrule statutory precedents in order to keep pace with social developments. But it could be expanded to a broader proposition — that far from requiring courts to vigilantly monitor the 'correctness' of statutory precedents, the constitutional distribution of powers entrusts that task to the legislative branch. This proposition is well-established in the US, as Eskridge, Frickey and Garrett have explained:

[T]he Court does say that Congress is the more appropriate body for correcting erroneous constructions of statutes. At least in part the difference between the supposed 'ordinary' *stare decisis* for common law decisions and the heightened *stare decisis* for statutory decisions is based on a rather formalistic distinction between legislative and judicial roles. The basic idea is that, although the legislature can, by ordinary legislation, override both common law decisions and decisions interpreting statutes, the legislature has greater responsibility to monitor the latter (where the courts have interpreted

¹⁵⁰ *Aubrey* (n 4) 332 [55].

a legislative product) than the former (where, arguably, courts have a larger, ongoing responsibility to monitor a judicial product, the common law).¹⁵¹

This is a proposition that ought to resonate in Australia where, as in the US, the *Constitution* insulates the judicial power from the political arms of government.¹⁵² It would seem particularly powerful in instances where the statutory precedent is longstanding, or the consequences of overruling it would be significant in some of the ways discussed above — for example, where there is evidence that various parties have relied upon the previous understanding of the law, as in the case of *Babaniaris*, or where overruling would retrospectively extend criminal liability, as in the case of *Aubrey*. As Bell and Gageler JJ stated in *R v A2*, it is a ‘fundamental principle that a criminal norm should be certain and its reach ascertainable by those who are subject to it’.¹⁵³

In addition to these constitutional principles, the merit or otherwise of the argument should be informed by an understanding of how the two branches of government operate in practice.¹⁵⁴ As Pearce and Geddes have observed: ‘Unlike the common law, which is largely left to the courts to develop with only occasional forays by the legislature, legislation emanates from the parliament and can be altered somewhat more easily than the common law.’¹⁵⁵

Courts must wait until they are presented with a case that requires them to (re)interpret a statute, whereas the legislature is not so constrained. Further, it is said that courts should only construe those parts of the legislation that they are required to in order to resolve the particular dispute before them.¹⁵⁶ These institutional constraints were demonstrated in the recent case of *Plaintiff M47/2018 v Minister for Home Affairs*,¹⁵⁷ where the High Court was invited to depart from or overrule the notorious statutory precedent from *Al-Kateb v Godwin*.¹⁵⁸ That precedent, in short, entailed that provisions of the *Migration Act 1958* (Cth) authorised potentially indefinite detention of certain asylum seekers. Many would argue that this precedent was ‘wrong’, either because it gave insufficient weight to constitutional principle or interpretive canons like the principle of legality. Yet, the Court could (or at least, would) not decide the interpretive question, as on the facts it was not clear that Plaintiff M47 faced potentially indefinite detention as Mr Al-Kateb had done.¹⁵⁹ By contrast, Parliament would be free to alter the meaning of these parts of the *Migration Act 1958* (Cth) as and when it thought fit.

¹⁵¹ William N Eskridge Jr, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (Foundation Press, 2nd ed, 2006) 286.

¹⁵² *New South Wales v Commonwealth* (1915) 20 CLR 54; *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

¹⁵³ *R v A2* (n 72) 1134 [141].

¹⁵⁴ See generally Cass R Sunstein and Adrian Vermeule, ‘Interpretation and Institutions’ (2003) 101(4) *Michigan Law Review* 885.

¹⁵⁵ Pearce and Geddes (n 19) 13–14.

¹⁵⁶ See further Gageler, ‘Common Law Statutes’ (n 15) esp. 3; Paul Yowell, ‘Legislation, Common Law and the Virtue of Clarity’ in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis, 2011) 101, 124–5.

¹⁵⁷ *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 (‘*Plaintiff M47/2018*’).

¹⁵⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562.

¹⁵⁹ *Plaintiff M47/2018* (n 157) 291 [7] (Kiefel CJ, Keane, Nettle and Edelman JJ; Bell, Gageler and Gordon JJ agreeing at 302 [49]).

Whether there would be political impetus to do so is, of course, another question. If legislative dysfunction — or inertia at the very least — is widespread, then it may not be appropriate to rely upon the legislative branch to actively monitor and correct the courts' interpretation of legislation. The argument has particular salience in the US, where increasing congressional gridlock is the new norm.¹⁶⁰ In Australia, however, this argument has less purchase. The constitutional principle of responsible government, which lies at the core of our parliamentary system,¹⁶¹ provides the 'efficient secret'¹⁶² that makes navigation of the legislative process considerably easier for governments.¹⁶³ A government can always, by definition, secure passage of its legislation through the lower house of Parliament. And recent experience suggests that even a government with minority status and without a Senate majority can be remarkably successful in securing its legislative agenda.¹⁶⁴ Moreover, the convention that Parliament will provide the government with supply ensures the latter can properly discharge its executive and legislative responsibilities.¹⁶⁵ It makes legislative rectification of statutory precedents much easier in Australia as a political and constitutional matter.

In any event, one should not assume that legislative inertia shifts responsibility for 'fixing' statutory precedents to the courts. A failure to legislate does not translate to (implicit) legislative endorsement of a statutory precedent.¹⁶⁶ But the length of non-disturbance — especially if it extends over multiple parliaments and governments of different political stripes — might signal that the legislature is not interested in, or willing to, change the existing law, or at least has not reached a consensus as to *how* it should be changed. The point for present purposes is that the separation of powers does not necessarily demand that courts be particularly willing to overrule statutory precedents. A more nuanced inquiry is required, which will involve consideration of how the branches of government actually interact in practice, and the normative implications of those interactions.

IV Conclusion

This article did not seek to develop a fully-fledged theory of precedent (and overruling) in the context of the judicial interpretation of statutes. Our aim was far more modest. We sought to outline and critique the current overruling threshold for

¹⁶⁰ See Derek Willis (ProPublica) and Paul Kane (The Washington Post), 'How Congress Stopped Working' *ProPublica* (online, 5 November 2018) <https://www.propublica.org/article/how-congress-stopped-working?fbclid=IwAR29vxf3Qxk1vaH14vo_Y7BK7nv3Hf-DIo5EHu7weW92Sfj20WkNwJbPjgU>.

¹⁶¹ *Egan v Willis* (1998) 195 CLR 424.

¹⁶² Walter Bagehot, *The English Constitution* (Collins, The Fontana Library, 1963) 65.

¹⁶³ Of course bicameralism qualifies this point. But even when the Government of the day does not control the Upper House, it still has far greater control over the legislative agenda than is the case in the US: see Bagehot (n 162) 65–81.

¹⁶⁴ For example, the Labor Government led by Prime Minister Julia Gillard (2010–13) successfully implemented its legislative agenda notwithstanding that it was a minority government and did not control the Senate: see Nick Evershed, 'Was Julia Gillard the Most Productive Prime Minister in Australia's History?' *The Guardian* (online, 28 January 2013) <<https://www.theguardian.com/news/datablog/2013/jun/28/australia-productive-prime-minister>>.

¹⁶⁵ See George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 5–11.

¹⁶⁶ See *Babaniaris* (n 7) 24 (Wilson and Dawson JJ).

statutory precedents in Australian law. The orthodox view is that statutory precedents ought to be treated differently to those of common law, for it is the text of the statute — not the courts' exposition of it — that is the law. Courts are said to have a constitutional duty to give effect to the law laid down by Parliament, and so cannot allow 'plainly erroneous' interpretations of legislation to stand.

Yet the very distinction between statutory and common law precedents raises questions. Some cases (particularly *Aubrey*) and some judges (particularly Gageler J) seem to call for greater methodological convergence: for the application of common law reasoning and technique to the interpretive task. This reflects the fact that statutory interpretation is not an end in itself, but part and parcel of the performance of the judicial function of ascertaining and enforcing the law, which is now a complex mix of statutory and common law norms.

Our analysis did suggest that the modern approach to statutory interpretation may dilute the strength of statutory precedents. In particular, its emphasis on reading text in *context*, broadly understood, seems to generate many bases on which a superior court might conclude that a previous interpretation ought not now be followed. Even so, we argued that there are still compelling reasons for a court to uphold a statutory precedent. While one cannot deny that '[i]t is the words of the statute that ultimately govern',¹⁶⁷ the nuance and complexity of statute law and the interpretive task require a cautious approach. The line between 'right' and 'wrong' statutory precedents is elusive, and the interpretive questions that reach senior appellate courts are, by definition, hard. These are simple but important facts.

In deciding whether to depart from a statutory precedent, we outlined three factors that a court ought to consider. The first of these is internal to the modern approach itself. Properly understood, the existence of a longstanding precedent, and the (potentially, negative) implications of departing from it, are important parts of the context to which the modern approach demands a court must have regard. Second, while statutory precedents must be viewed in light of the constitutional principles of parliamentary supremacy and the separation of powers, neither necessarily demands a more activist approach to statutory precedents than those of the common law; at the very least, the position is more complex. Third, broader (one might say, 'small c') constitutional concerns of predictability, prospectivity and the rule of law may provide powerful reasons for a superior court to stand by what has been decided.

¹⁶⁷ *Weiss* (n 117) 305 [9].

Review Essay

On Property in Equity

Legal and Equitable Property Rights by John Tarrant
(2019), Federation Press, 176 pp, ISBN 9781760022044

Stephen Puttick*

Abstract

This essay reviews *Legal and Equitable Property Rights* by Professor John Tarrant. Through a focus on the meaning and content of ‘equitable property’, it is argued that the central thesis of Tarrant’s book provides a valuable, alternative conception of equitable rights to that postulated by many leading scholars. However, while Tarrant’s thesis is supported by authority and does much to challenge prevailing academic perspectives, it also has several limitations.

I Introduction

What is ‘property’? What is ‘equitable property’? Is ‘equitable property’ really ‘property’? The answers to these questions, still unsettled, have been elaborated over many thousands of pages and demand inquiries of a fundamental kind about, for example, the legal significance of ‘ownership’ and ‘possession’;¹ and the relationship to the law of obligations,² remedies,³ and the wider superstructure of private law.⁴

In *Legal and Equitable Property Rights*, Professor John Tarrant seeks to address such questions through the development of a comprehensive theory of legal and equitable property. In terms of structure and approach, Tarrant first seeks to identify what *things* can be, or perhaps more precisely have been, the subject of property rights.⁵ Importantly, Tarrant argues that ‘our legal system has adopted a thinghood approach to property ... the courts and the legislature determine what

* Adjunct Research Fellow, UWA Law School, The University of Western Australia, Perth, Australia; Solicitor, New South Wales, Australia. Email: stephen.puttick@uwa.edu.au.

¹ See, eg, Lee Aitken, ‘Antipodean Vivisection? Recent Analysis of “Ownership” of Sperm, Body Parts, and Other *Disiecta Membra*’ (2019) 47(3) *Australian Bar Review* 266.

² Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 28–38.

³ See, eg, Elise Bant and Michael Bryan, ‘A Model of Proprietary Remedies’ in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Lawbook, 2013) 211.

⁴ See, eg, Birks (n 2) chs 2, 12.

⁵ John Tarrant, *Legal and Equitable Property Rights* (Federation Press, 2019) ch 2.

things can be the object of property rights'.⁶ This is a key footing in the development of Tarrant's broader theory. There is, however, a potential circularity in this reasoning: setting out to identify what things can be the subject of property then to conclude that the law has adopted a 'thinghood' approach. That aside, Tarrant next identifies the different characteristics of property rights, noting that (for Tarrant) not all recognised 'property' rights have the same characteristics.⁷ Relevantly, Tarrant analyses these different types of rights through an examination of the different duties that can arise: duties of non-interference; duties of obligation; and unilateral property rights, being those property rights that 'do not have a correlative duty or obligation' (for example, on Tarrant's view, rescission).⁸ The third concept (the 'unilateral right') is here noted: seemingly incongruous to Hohfeldian classification, rescission might better be understood as a 'power'.⁹

Next, Tarrant seeks to explain how it is characteristic of some property rights that the right can attach to a 'thing' that is already subject to existing property rights (whereas other property rights do not) and the implications that this has for third parties. He argues that these different characteristics between property rights are based on 'policy considerations'.¹⁰ Tarrant then considers 'how some private law property rights also have a public law aspect'.¹¹ In so doing, he seeks to maintain, and to explain, the distinction between private and public law.¹² Tarrant examines how 'property rights' (both at common law and in equity) fit within the broader private law superstructure.¹³ Finally, Tarrant considers conceptions of ownership (at law and in equity)¹⁴ and then the utility of deploying two levels of property (again, at law and in equity) particularly as regards the availability of remedies.¹⁵

In this review essay, I argue that Tarrant's thesis has limitations for at least two reasons. First, private law protects interests other than 'proprietary' rights, particularly if one defines a 'proprietary' right as being a relationship to, or with, a *thing*. Second and relatedly, by characterising all private law rights as 'property', the label 'property' as a classificatory device is deprived of much normative content and thereby loses considerable explanatory utility.

In this regard, of principal consequence is Tarrant's classification, or taxonomy, of the private law superstructure. As adverted to in the above summary, putting aside the law of evidence and the law of procedure,¹⁶ Tarrant adopts a binary classification: on the one hand, rights that protect the individual from physical and mental harm (termed the 'rights to personal integrity') which, it is said, are *not* property rights;¹⁷ and on the other, all other private law rights which, it is said, are all

⁶ Ibid 8.

⁷ Ibid ch 3.

⁸ Ibid.

⁹ Consider Adam Reilly, 'Is the "Mere Equity" to Rescind a Legal Power? Unpacking Hohfeld's Concept of "Volitional Control"' (2019) 39(4) *Oxford Journal of Legal Studies* 779.

¹⁰ Tarrant (n 5) 8.

¹¹ Ibid 9.

¹² Ibid.

¹³ Ibid chs 4–5.

¹⁴ Ibid ch 6.

¹⁵ Ibid ch 7.

¹⁶ Ibid 10.

¹⁷ Ibid 9.

to be classified as property rights.¹⁸ Crucially, Tarrant rejects the proposition that only rights in rem are properly recognised as ‘property rights’:¹⁹ ‘all private law rights that are not concerned with the protection of personal integrity are property rights’.²⁰ Tarrant premises this on the footing that private law has only two purposes: the protection of personal integrity and the protection of private property (that is, ‘our things’).²¹ From this premise, Tarrant proposes that, while it is not necessary to identify which of these rights are ‘property rights’ (because all of the rights within his second category are proprietary), it is necessary to identify the different characteristics of those property rights.²² However, a difficulty with such a conception of property is that it is so wide as to have very limited analytical utility. How is, for example, a claim on a *quantum meruit* properly seen as proprietary in nature when the relevant service may yield no end product, no ‘thing’, no *res* and the remedy not be in specie? Similarly, what function is served by classifying all such rights as ‘property’ if the precise meaning and content of ‘property’ varies so widely?

Notwithstanding these arguments, Tarrant’s analysis usefully controverts alternative conceptions proposed by some of the leading academic contributions. Further still, some of the divergences, at least in relation to the meaning of ‘equitable property’, may be less marked than initial appearance suggests.

The balance of this essay focuses on Tarrant’s theory of ‘equitable property’. Such a focus is revealing for several reasons. First, the meaning of ‘equitable property’ has been the focus of a considerable body of recent literature and is thereby a useful point for comparative analysis. Second, Tarrant’s conception of ‘equitable property’ is central to his overall thesis, particularly his conceptions of ‘property’ and ‘ownership’ and his subsequent analysis of remedies. Third and following, this focus on ‘equitable property’ elucidates the implications of Tarrant’s thesis for the wider private law superstructure. This essay is structured as follows. Part II considers the theory, increasingly supported by leading scholars, that ‘equitable property’ is really a misnomer and, rather than as ‘property’, is better understood as a peculiar kind of persistent right being a right against a right. Part III examines the central thesis of Tarrant’s book, within the overall text, that ‘equitable property’ is properly conceived as involving a property right and that our legal system does recognise two levels of property (at common law and in equity). Part IV draws out some implications of this, including for the cogency of Tarrant’s overall thesis.

II ‘A Right against a Right’

This Part explores the conception of ‘equitable property’ which has been posited in various forms by leading scholars such as Burrows,²³ Smith,²⁴ McFarlane and

¹⁸ Ibid 9, 77, 82.

¹⁹ Ibid 9, 82 cf Birks (n 2) 29.

²⁰ Ibid 10.

²¹ Ibid 10, 77.

²² Ibid 10.

²³ Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2010) 191–3.

²⁴ Lionel Smith, ‘Unravelling Proprietary Restitution’ (2004) 40(3) *Canadian Business Law Journal* 317.

Stevens,²⁵ and Justice Edelman.²⁶ On this approach, while a common law property right must relate to a thing (the *res*), an equitable property right is an interest against the rights of that person holding the legal property right.²⁷

For example, in *Shell UK Ltd v Total UK Ltd*,²⁸ Total disputed liability for Shell's loss of profits consequential to the destruction of, or damage to, various assets held on trust for Shell and others, for which destruction and damage Total was vicariously liable. Total relied on the rule that only the legal owner, or someone with an immediate right to possession, can claim damages for economic loss consequential to property damage.²⁹ The Court of Appeal held that, if and where a trustee is joined to the action, a beneficiary under the trust can recover for consequential loss, including those losses that only the beneficiary has suffered: 'if formality is necessary, then [in any such case, the trustee owners] can recover the amount which [the beneficiary] has lost but will hold the sums so recovered as trustees for [the beneficiary]'.³⁰ The Court reasoned that '[o]n the face of things, it is legalistic to deny Shell a right to recovery ... It is, *after all*, *Shell who is ... the "real" owner*, the "legal" owner being little more than a bare trustee of the pipelines.'³¹

Justice Edelman, writing extra-curially, has observed that '[t]he reason why the Court of Appeal reached this conclusion was essentially that the [C]ourt did not consider that *equitable title should be treated any differently from legal title*.'³² Such reasoning is said to be 'problematic' because it proceeds on the footing that:

at the heart of the common law lies a monstrous contradiction. The common law and equity are both looking at the same bundle of rights but reaching diametrically opposed conclusions. *The common law sees one person as the owner. Equity sees another*.³³

Similarly, McFarlane and Stevens have described it as 'the orthodox, *but unattractive*, view that English law contains two competing laws of property'.³⁴

Meanwhile, in *MCC Proceeds Inc v Lehman Brothers International (Europe)*,³⁵ Hobhouse LJ observed that '[the prohibition on a claim by the equitable interest holder] is not a quirk of history ... Equitable rights *are of a different character*'.³⁶ That 'different character' being that the beneficiary's interest is not proprietary, but rather an encumbrance on the proprietary rights of the trustee. As was described in the first edition of what is now *Jacobs' Law of Trusts in Australia*:

²⁵ Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4(1) *Journal of Equity* 1.

²⁶ Justice James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129(January) *Law Quarterly Review* 66 ('Two Fundamental').

²⁷ *Ibid* 66.

²⁸ [2011] QB 86 ('*Shell*'). Leave to appeal to the Supreme Court of the United Kingdom was granted (UKSC Case No 2010/0073, Lords Hope and Kerr JJSC and Sir John Dyson JSC, 20 May 2010), but the matter was ultimately settled.

²⁹ *Ibid* 93 [5] cf *Caltex Oil (Australia) Pty Ltd v Dredge "Willemstad"* (1976) 136 CLR 529.

³⁰ *Shell* (n 28) 103 [144].

³¹ *Ibid* 99 [132] (emphasis added).

³² Edelman, 'Two Fundamental' (n 26) 69 (emphasis added).

³³ *Ibid* 70 (emphasis added).

³⁴ McFarlane and Stevens (n 25) 2 (emphasis added).

³⁵ *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675.

³⁶ *Ibid* 701 (emphasis added).

‘[a] trust exists when the holder of a legal or equitable interest in certain property is *bound by an equitable obligation* to hold his interest in that property not for his own exclusive benefit, but for the benefit ... of another person or persons’.³⁷

Similarly, in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*, Hope JA observed that:

the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons.³⁸

On this conception, the rights of the beneficiary have been said to be unique: they are neither personal rights (that is, rights against a person), nor are they proprietary (that is, rights against a thing). Rather, those rights might be seen as rights (or powers) to the trustee’s rights: ‘a right against a right’³⁹ or ‘persistent rights’.⁴⁰ McFarlane argues that

we need to reject the assumption that all private law rights are either personal or proprietary. The recognition of persistent rights as a discrete category means that we do not need to distort equitable property rights by forcing them into one of two ill-fitting boxes.⁴¹

This is the key tenet of the ‘right against a right’ theory and, if accepted, has the necessary implication that ‘there is no such thing as equitable property; it is a myth’⁴² — at least if one adheres to the Roman law dichotomy of rights in personam and rights in rem and a definition of ‘property’ as meaning a right against a thing *prima facie* binding upon anyone who interferes with that thing.

III ‘Equitable Property’ as ‘Property’

In apparent contradistinction, Tarrant postulates that such equitable rights are indeed ‘property’. Specifically, he argues that equitable property rights are properly conceived of as ‘a second level, or second tier, of property rights’;⁴³ and following, while legal property rights are rights *to things*, equitable property rights are rights *to obtain a legal property right*. By way of example, the beneficiary electing to collapse the trust and thereby obtain a legal property right to the trust property; or in Tarrant’s terminology, to elect to ‘move from a second-tier property right to a first-tier

³⁷ K S Jacobs, *The Law of Trusts in New South Wales* (Butterworths, 1958) 7.

³⁸ *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510, 519 [16]. See also, eg, Walter G Hart, ‘What Is a Trust?’ (1899) 15(3) *Law Quarterly Review* 294, 302.

³⁹ McFarlane and Stevens (n 25) 1.

⁴⁰ For this reason, McFarlane has suggested that the beneficiary’s rights should be described as ‘persistent rights’: Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 364.

⁴¹ See Ben McFarlane, ‘Equity, Obligations and “Third Parties”’ [2008] (2) *Singapore Journal of Legal Studies* 308, 322.

⁴² McFarlane and Stevens (n 25) 1.

⁴³ Tarrant (n 5) 10. See particularly ch 5.

property right'.⁴⁴ Tarrant places some emphasis on this example in the text and it is a key footing on which the thesis is advanced.

Tarrant propounds a historical account to support this analysis. While acknowledging authoritative scholarship (including that of Maitland)⁴⁵ opposed to recognising the rights of a beneficiary as a form of ownership⁴⁶ and that scholars such as Honoré argued that utilisation of the trust does not depend on recognition of dual-ownership,⁴⁷ Tarrant contends that 'our legal system considered this issue on two occasions and on both occasions decided to continue with a dual system of property rights'.⁴⁸ He identifies the first instance as being Lord Mansfield's judgment in *Burgess v Wheate*⁴⁹ where his Lordship stated, as to legal and equitable estates, that 'the *forum* where [these rights] are adjudged *is the only difference* between trusts and legal estates'⁵⁰ and that a beneficiary 'is actually and absolutely seised of the freehold in consideration of this court'.⁵¹ Tarrant argues that, by that dictum, Lord Mansfield clearly favoured only a single level of property rights, but says that this position was not adopted subsequently. The second instance identified by Tarrant is found in those authorities post-dating the Judicature Acts where 'common law courts decided to recognise equitable rights *in addition to* existing common law rights and remedies',⁵² rather than recognising only one estate or level of proprietary right.⁵³ At this juncture, it should be fairly accepted by those adhering to the 'right against a right' analyses that the weight of authority seems to support Tarrant's position. After all, as mentioned, McFarlane and Stevens describe it as the 'orthodox' view.⁵⁴

Tarrant contends that, contrary to scholars such as McFarlane and Stevens, the right of the beneficiary is not a right *against* a right but, rather, a right *to obtain* a right.⁵⁵

IV Implications and Observations

There are, ostensibly, significant differences between the approach advanced by McFarlane, and others, and that proposed by Tarrant — not least that Tarrant expressly recognises equitable property as *property*. It is said 'ostensibly' because,

⁴⁴ Ibid 11.

⁴⁵ See, eg, FW Maitland, *Equity: A Course of Lectures* (Cambridge University Press, 2nd ed, 1949) 29. In medieval law, the *cestui que trust* was considered as conferring merely a personal right against the trustee: see Edward Coke, *The First Part of the Institutes of the Lawes of England: Or a Commentary upon Littleton* (London, 1639) 272b.

⁴⁶ Tarrant (n 5) 90.

⁴⁷ Ibid 90. Consider also Tony Honoré, 'Trusts: The Inessentials' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, 2003) 7.

⁴⁸ Tarrant (n 5) 90.

⁴⁹ *Burgess v Wheate* (1759) 1 Eden 177; 28 ER 652.

⁵⁰ Ibid 670 (emphasis added).

⁵¹ Ibid 671.

⁵² Tarrant (n 5) 91 (emphasis in original).

⁵³ Tarrant (n 5) 91–2, citing *Metropolitan Railway Company v Defries* [1877] 2 QBD 189, 193 (Field J) cf *Walsh v Lonsdale* (1882) 21 ChD 9, 14 (Jessel MR).

⁵⁴ McFarlane and Stevens (n 25) 2.

⁵⁵ Tarrant (n 5) 96.

upon closer inspection, this divergence may be more chimerical than real. For instance, how is it relevantly different to say, as does Tarrant, that equitable property rights are rights to obtain a legal property right; as opposed to the beneficial right being a right against the trustee's right? This Part considers the implications of the foregoing points and offers some additional observations.

Tarrant argues that several proprietary remedies are only available because of the judicial adoption of equitable ownership and the 'flexibility inherent in a legal system that has two levels of property rights and two levels of ownership rights'.⁵⁶ By contrast, he suggests that the remedies available in a legal system that deploys only one level of property right (and ownership) are 'more likely' to be limited to monetary remedies.⁵⁷ This is because, Tarrant argues, a system with a 'dual level' of ownership can recognise two (or more) persons as having ownership rights to the same thing, particularly as a remedial response to a wrong.⁵⁸

In support of this contention, Tarrant cites the decision in *Attorney-General (Hong Kong) v Reid*⁵⁹ and suggests that there the Privy Council deployed 'two levels of property rights'⁶⁰ in order to deny a fiduciary, Reid, the equitable ownership of property obtained using the proceeds of a bribe (taken in breach of fiduciary duty).⁶¹ Tarrant argues that this is a clear example of a court recognising the creation of equitable ownership rights while preserving Reid's legal ownership. The consequence was that the Crown could 'convert that equitable ownership into legal ownership by collapsing the trust'.⁶² Meanwhile, McFarlane and Stevens have argued that the result in *Reid* is explicable on the basis that, once it is decided (or assumed) that the false fiduciary is under a duty to transfer a specific right to their principal, the principal automatically acquires a right *against* the rights obtained by the fiduciary.⁶³ Thus, the result in *Reid* is explicable under both conceptions.

Nevertheless, it is submitted that the right against a right approach has greater normative and explanatory force. This is because the approach directs the focus to the relevant *duty* that is engaged and demands a particular (possibly in specie) remedy. It is imperative, in this regard, to recognise that not all wrongs are to be remedied by the wrongdoer transferring a specific right (for example, as in *Reid*, the freehold title) to the plaintiff: while a defaulting trustee or breaching fiduciary will generally be made subject to specific relief, a negligent motorcar driver will not. This is important because, by focusing on that specific duty and the resulting right (against the defendant's right), the ambit of the remedy can be accurately identified and the normative justification for that particular remedial response precisely interrogated. A model predicated simply on recognising two levels of proprietary right (and, more broadly, a binary taxonomy of private law) is of more limited explanatory utility.

⁵⁶ Ibid 126.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324 ('*Reid*').

⁶⁰ Tarrant (n 5) 133.

⁶¹ The Privy Council found that Reid held the freehold on trust for the Crown: *Reid* (n 59) 339.

⁶² Tarrant (n 5) 134.

⁶³ See McFarlane and Stevens (n 25) 18.

It is also illustrative, in this respect, to briefly consider the operation of tracing. Returning to *Reid*, the appellant there relied on equitable tracing in order to show that Reid's interests in the land were acquired by the proceeds of the bribe.⁶⁴ It is difficult to explain this result, and more generally still the rules of tracing, consistently with a thesis that two levels of property right are being engaged: the only way to do so, it seems, is to say that the 'equitable property right' is, in effect, moving through one item of 'property' to the next and so on.⁶⁵ However, a difficulty with that explanation is that there is no 'thing' involved in a usual case of tracing (at least conventionally speaking, the right to money in a bank account is an obligation, not a *res*). Relatedly, as McFarlane and Stevens observe, tracing can very rarely, or 'almost never', be used to support acquisition by the plaintiff of a right against a thing.⁶⁶ Indeed, it is tolerably more rational to say that the plaintiff's right can annex to, and thereby be traced with, any right acquired by the defaulting party.

On the same theme, Justice Edelman has described as 'the greatest conceptual obstacle'⁶⁷ to any conception of the trust as involving two owners as being that personal rights — not only property rights (or, rights in *rem*) — can be held on trust:⁶⁸ '[i]t is, at best, a great strain in language to speak of the trustee "owning" the debt [in the bank account and owed by the bank]. It is even more confused to speak of the beneficiary, unknown to the bank, owning the debt'.⁶⁹ Indeed, Cotton LJ and Lindley LJ, in *Lister & Co v Stubbs*, opined that this confuses ownership with obligation.⁷⁰ The decision in *Trustee of the Property of FC Jones & Sons v Jones* is on point.⁷¹ There, a firm in which Mr Jones was a partner went bankrupt. After the event of bankruptcy, cheques were drawn on a partnership account in favour of Mrs Jones. The money, subsequently profitably invested in brokering transactions, ultimately ended up in Mrs Jones' bank account. At the time, a doctrine of relation back applied such that dispositions of partnership assets after the event of bankruptcy were void.⁷² The question was: who could get the money?

Again, it is conventional to describe the relationship between Mrs Jones and the bank as contractual: the bank has an obligation to Mrs Jones (and no one else) to pay, on her demand, the money in the bank account.⁷³ Notwithstanding, in the result, the trustee in bankruptcy was able to obtain the money. Notably, the Court of Appeal reasoned to this result by holding that Mr Jones' partners could assert a *direct right*

⁶⁴ Reid (n 59) 330.

⁶⁵ See generally Denis SK Ong, *Ong on Tracing* (Federation Press, 2019) cf Lionel D Smith, *The Law of Tracing* (Oxford University Press, 1997) 320–32.

⁶⁶ See McFarlane and Stevens (n 25) 20. McFarlane and Stevens note the exception where 'the mixture of A's thing and B's thing produces a new thing possessed by A. In such a case, B can acquire a legal co-ownership right in the new thing': at 20 n 90, citing *Indian Oil Corp Ltd v Greenstone Shipping SA (Panama)* [1988] QB 345. Though, McFarlane has elsewhere argued that, in such a case, B should instead acquire only a right against A's right: see McFarlane (n 40) 162.

⁶⁷ Edelman, 'Two Fundamental' (n 26) 71.

⁶⁸ Ibid 70.

⁶⁹ Ibid.

⁷⁰ *Lister & Co v Stubbs* (1890) 45 ChD 1, 12 (Cotton LJ), 15 (Lindley J).

⁷¹ *Trustee of the Property of FC Jones & Sons v Jones* [1997] Ch 159 ('Jones').

⁷² McFarlane and Stevens (n 25) 21.

⁷³ See, eg, Lionel Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125(April) *Law Quarterly Review* 338, 347.

as against the bank.⁷⁴ Indeed, this decision too seems to lend authoritative support for Tarrant's thesis. Meanwhile, McFarlane and Stevens argue that such reasoning commits the fallacy of overlooking the concept of a right against a right and thereby failed to identify that, in substance, what had occurred was that the partners had obtained a right against Mrs Jones' right (while at all times the bank still owed the duty to Mrs Jones).⁷⁵ This is surely a more plausible view if one adheres to the difference between obligation and ownership. There are many decisions that have conflated 'equitable' and 'legal' property, or obligation and ownership, in this or a similar way.⁷⁶

Meanwhile, on Tarrant's approach, the bank account is 'property' — recalling that, for Tarrant, all relevant private law rights are property. In this way, it can be said that the problems, or weaknesses, identified can be accommodated (at least semantically). However, this itself raises difficulties: again, why is it meaningful, or what is the utility, in recognising all such rights as proprietary only if, by doing so, the precise content of each of those rights is to vary on policy or other grounds? Indeed, if Tarrant's binary classification is rejected, then it is more difficult to see how these examples cohere with his theory of dual-levels of property.

As observed at the outset, the meaning of, and implications that follow from, something being defined as 'property' is far from settled. We have seen that those implications include the availability, explanation, and justification of particular remedies. Additionally, there are also implications regarding statute. As to statute, a substantial part of McFarlane and Stevens' thesis, as well as that of Tarrant, is devoted to explaining how their respective approaches best accord with the operation of applicable statutory schemes — for example, the statutory formalities regulating (or, perhaps more precisely, not regulating) equitable assignments and also those regimes regulating bankruptcy and insolvency.

To a considerable extent, these debates turn heavily on perceived differences, or conversely similarities, between the meaning and content of 'property' at common law, in equity, and under statute. As Justice Edelman has observed:

[The contrast with the label 'property' at common law and in equity] is striking. At common law, the notion of a property right to a tangible thing is often taken to involve a right to prevent others from interfering with the asset. Interference with property rights involves strict liability ... But a third party who "interferes" with a debt which is held on trust will not be liable to the beneficiary unless the third party's involvement amounts to knowing assistance in a breach of trust nor liable to the trustee unless the third party intentionally induces a breach of contract.⁷⁷

Again, any such differences can certainly be accommodated in Tarrant's thesis if it is accepted that all such 'rights' are proprietary (and that different property rights have different characteristics).

⁷⁴ *Jones* (n 71) 169–70 (Millet LJ), 171–2 (Beldam LJ), 172 (Nourse LJ).

⁷⁵ McFarlane and Stevens (n 25) 22.

⁷⁶ See, eg, *International Factors Ltd v Rodriguez* [1979] QB 351.

⁷⁷ Edelman, 'Two Fundamental' (n 26) 71.

V Conclusion

In conclusion then, as Justice Edelman has said, the quest for a ‘single unitary theory of “property”’ is a ‘hopeless ideal’.⁷⁸ The thesis proposed by Tarrant — particularly, the proposed dual system of ‘property’ and its adoption of a binary taxonomy of private law — may lack the coherence of the other conceptions presented. In this regard, Tarrant’s own thesis may raise more questions than it answers.

Nevertheless, on many of the key points discussed above, the balance of authority, or at least obiter dicta, seems to support Tarrant’s thesis. Moreover, there is much to be said for a text that challenges an approach which (at least recently) has found support in a corpus of scholarly literature and, thereby, contributes to and enhances our understanding of the law. In this regard, others have also recently questioned the right against a right theory for conceptual, methodological, and pragmatic reasons; not least by arguing that the alternative conception of the beneficiary’s ‘right’ as being an interest in a sub-property (or that of an indirect right in rem) is, perhaps, better capable of explaining the beneficiary’s power over the asset and is more consistent with traditional English legal taxonomy.⁷⁹ Further, while the above discussion draws mainly on the common law and trusts literature, Tarrant also seeks to consider, and accommodate into his theory, decisions that fall outside the habitual focus of authors writing on this topic (which, largely, attends examination of the trust).⁸⁰

⁷⁸ Justice James Edelman, ‘Property Rights to Our Bodies and Their Products’ (2015) 39(2) *University of Western Australia Law Review* 47, 53.

⁷⁹ See, eg, Elena Christine Zaccaria, ‘The Nature of the Beneficiary’s Right under a Trust: Proprietary Right, Purely Personal Right or Right against a Right’ (2019) 135(July) *Law Quarterly Review* 460.

⁸⁰ For example, *Yanner v Eaton* (1999) 201 CLR 351 is considered by Tarrant at several junctures. Perhaps, a focus on the common law and equity divide does not fully take account of some specifically Australian aspects of the elastic term ‘property’ as used in our legal system. See also *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, 303–4. I thank an anonymous reviewer for this point.