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# Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law

Alysia Blackham\*

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## Abstract

Employment age discrimination cases are notoriously unsuccessful in Australia. While it is arguable that most strong cases are settled through conciliation, serious questions remain: are those cases that proceed to the courts particularly weak? Or are there procedural or substantive legal hurdles that operate as barriers to the success of claims? As the first rigorous study of age discrimination case law across all Australian jurisdictions, this article evaluates these two questions, drawing on employment age discrimination case law at federal, state and territory level up to 2017. This article interrogates and maps, both qualitatively and quantitatively, potential legal barriers to age discrimination claims. It offers original and innovative insights into the cases that proceed to court, and why they fail. It argues that while some cases may be weak, there appear to be procedural and substantive hurdles that limit the success of age discrimination cases. This article offers compelling evidence of the need for legal reform, or for a more sympathetic interpretation of existing statutes by the courts, if individual enforcement is to be used as a means of addressing age discrimination.

## I Introduction

Age discrimination remains prevalent in Australian society. In 2014, the Australian Human Rights Commission ('AHRC') interviewed 2109 Australians aged 50 years and over.<sup>1</sup> This *National Prevalence Survey* found that 27% of respondents reported experiencing age discrimination in employment in the previous two years.<sup>2</sup> Further, 32% of respondents were aware of other people experiencing discrimination in the

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<sup>1</sup> Australian Human Rights Commission ('AHRC'), *National Prevalence Survey of Age Discrimination in the Workplace: The Prevalence, Nature and Impact of Workplace Age Discrimination amongst the Australian Population Aged 50 Years and Older* (2015) ('*National Prevalence Survey*').

<sup>2</sup> Ibid 18.

workplace because of their age in the last two years.<sup>3</sup> Age discrimination is a fundamental barrier to older workers participating meaningfully in the workforce,<sup>4</sup> which is of increasing importance in the face of demographic ageing.

Despite the prevalence of age discrimination in Australia, employment age discrimination cases are notoriously unsuccessful. There has never been a successful case brought under the *Age Discrimination Act 2004* (Cth) ('*Age Discrimination Act*'). There are also noticeably few cases at state and territory level, and those that are brought are generally unsuccessful. It is likely that most strong cases are settled through conciliation, reducing the number of successful cases that proceed to hearing. At the same time, there is limited publicly available information about the relative strength of cases that are resolved through conciliation or settlement, as compared to those that proceed to court. Therefore, it is worth analysing why those cases that do proceed to the courts are unsuccessful: are the cases particularly weak? Or are there procedural or substantive legal hurdles that are operating as barriers to the success of claims?

This article evaluates these two questions, drawing on employment age discrimination case law at federal, state and territory level, and comparing cases under discrimination statutes to those under industrial relations legislation. It argues that while some cases may be weak, there appear to be procedural and substantive hurdles that limit the success of age discrimination cases. Thus, there is a need for legal reform or a more sympathetic interpretation of existing statutes by the courts if individual enforcement is to be used as a means of addressing age discrimination.

As has been mapped elsewhere, there are substantial differences between age discrimination laws in the Australian states and territories and federally.<sup>5</sup> Thus, in drawing on age discrimination case law from all Australian jurisdictions, this article spans diverse legal frameworks and substantial doctrinal differences. This can make analysis and synthesis of case law challenging. For this reason, most scholars (sensibly) do not attempt to consider state, territory and federal law simultaneously.<sup>6</sup> The risk of this approach, however, is that federal nations like Australia do not obtain an overall picture of how case law is developing — or, indeed, failing to develop — collectively across the various jurisdictions. It is difficult to accurately map trends or identify gaps in legal enforcement by studying one jurisdiction alone. Thus, there is a need for scholarship that attempts to bring together case law emerging from different jurisdictions.

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<sup>3</sup> Ibid 23.

<sup>4</sup> AHRC, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016) 38 ('*Willing to Work*').

<sup>5</sup> For detailed discussion of the statutory frameworks in each jurisdiction, see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018).

<sup>6</sup> See, eg, Therese MacDermott, 'Resolving Federal Age Discrimination Complaints: Where Have All the Complainants Gone?' (2013) 24(2) *Australasian Dispute Resolution Journal* 102 ('Resolving Federal Age Discrimination Complaints'). MacDermott considered only federal cases, not those at state and territory level.

It is beyond the feasible scope of one article to examine all relevant jurisdictional differences in detail,<sup>7</sup> and the detailed analysis of specific doctrinal provisions and differences is not the aim here. Rather, this article interrogates and maps, both qualitatively and quantitatively, potential legal barriers to age discrimination claims, noting jurisdictional differences as they emerge. This article, then, departs from traditional doctrinal scholarship in both its aims and methods, as set out in Part II. With this method, it is difficult to generalise across and between different jurisdictions. However, it does offer interesting description and rich insights into the case law as it stands.

In Part II, I outline the method of the article, and its use of quantitative and qualitative content analysis. In Part III, I consider existing scholarship and theories as to why employment age discrimination claims in Australia fail. In Part IV, I outline the results of this study, identifying trends in age discrimination cases from quantitative and qualitative content analysis, and examining points of failure. In Part V, drawing on these findings, I consider the implications of this study and, in Part VI, offer suggestions for reform.

## II Method

In this study, qualitative and quantitative content analysis was employed to analyse age discrimination cases handed down in Australian jurisdictions.<sup>8</sup> Content analysis, while similar to doctrinal research,<sup>9</sup> differs from traditional legal methods in two key ways. First, it can be used to analyse a broader range of texts than doctrinal analysis, which typically focuses on legal texts like cases and legislation. Second, and more relevantly here, content analysis analyses *themes* in texts, whereas doctrinal analysis focuses on harmonising, rationalising or systematising legal texts.<sup>10</sup>

According to Hall and Wright, content analysis is preferable for analysing judicial decisions where there are multiple decisions of similar weight (ie rather than a few decisions of significant precedential weight), and what matters is the pattern across cases rather than a deep understanding of one case.<sup>11</sup> Thus, what matters is collective — not individual — insights from cases: '[c]ontent analysts ... assemble a chorus, listening to the sound the cases make together'.<sup>12</sup> This is particularly important in discrimination law, where most decisions are of low precedential weight (being heard and decided in lower courts, and with few decisions establishing weighty legal precedent), and what is of interest is trends in how cases are decided.

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<sup>7</sup> On age discrimination law and its exceptions, see Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2018) 41(3) *Melbourne University Law Review* 1085 ('A Compromised Balance?').

<sup>8</sup> Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 941.

<sup>9</sup> See Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 1, 4.

<sup>10</sup> See *ibid* 11–17.

<sup>11</sup> Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63, 66.

<sup>12</sup> *Ibid* 76.

Content analysis involves identifying, coding and categorising documents.<sup>13</sup> In this study, research was undertaken in three parts. First, the ‘universe of documents’ to be analysed was identified. This included judgments relating to age discrimination, including those under discrimination legislation and industrial relations legislation (including unfair dismissal law where age was alleged to be a factor in the dismissal) handed down in all Australian jurisdictions, from the commencement of age discrimination legislation in Australia until 31 December 2017.<sup>14</sup>

Second, the *sample* of texts for analysis was determined. Documents were identified via keyword searches of case databases and annotated Acts.<sup>15</sup> This search identified 139 cases. To refine the sample, cases were excluded where: age discrimination was not significant to the decision (as where age discrimination was only mentioned incidentally in the judgment);<sup>16</sup> the case did not relate to work or employment; or where the case did not include an individual claim (as where the claim related to discriminatory terms in enterprise bargaining). Cases that were reported multiple times (for example, in preliminary hearing and/or on appeal) were only considered once, aggregating the issues for consideration across the various hearings and judgments. This refined the cases to a sample of 108 decisions, made up of 64 substantive and 44 procedural judgments.<sup>17</sup>

Third, the texts were coded using themes derived from the literature and the documents themselves,<sup>18</sup> and analysed using qualitative and quantitative methods.<sup>19</sup> Quantitative analysis can overlook nuances in judicial reasoning, and obscure important trends in judicial analysis. Thus, it is important to pair quantitative techniques with qualitative analysis, including traditional doctrinal analysis. As Hall and Wright argue, qualitative and quantitative analysis reveal different,

<sup>13</sup> Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (SAGE, 2<sup>nd</sup> ed, 1990) 381.

<sup>14</sup> The earliest cases in the sample were from 1996 (under the *Industrial Relations Act 1988* (Cth) and in the Northern Territory under the *Anti-Discrimination Act 1992* (NT)), though age discrimination was first added to the grounds of discrimination in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) from 1 January 1990 by the *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) reg 4(a)(i); and prohibited in South Australia from 1 June 1991. Compulsory retirement was progressively abolished in New South Wales from 1 January 1991: *Anti-Discrimination (Compulsory Retirement) Amendment Act 1990* (NSW).

<sup>15</sup> Including Barnett JADE <<https://jade.io/>>, individual Tribunal websites, LexisNexis AU cases <<https://www.lexisnexis.com.au/aus/products/lexisnexisau/>>, Westlaw AU cases <<https://legal.thomsonreuters.com.au/products/westlaw/>>, CCH Online (Discrimination Cases and Industrial Relations Cases) <<http://www.wolterskluwer.cch.com.au/our-products/content-solutions/intelliconnect>>, and the Fair Work Commission website <<https://www.fwc.gov.au/>>).

<sup>16</sup> Some cases were identified that related to the administration of retirement policies, but these were not challenged as a form of age discrimination, so were excluded from the sample: see *Stephen v Miller* (1913) 13 SR (NSW) 44; *St George Building Society Ltd v Federated Clerks' Union of Australia (NSW Branch)* (1986) 15 IR 110; *Australian Federation of Air Pilots v Bristow Helicopters Australia Pty Ltd* (1993) 52 IR 450; *Public Service Association (NSW) v Catholic College of Education Sydney Ltd* (1987) 23 IR 235.

<sup>17</sup> For this study, procedural decisions were retained in the sample, given that Australian interlocutory decisions reveal interesting insights into points of failure that might occur in procedural steps in the court process.

<sup>18</sup> Gery W Ryan and H Russell Bernard, ‘Data Management and Analysis Methods’ in Norman K Denzin and Yvonna S Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (SAGE, 2<sup>nd</sup> ed, 2003) 259, 275–6.

<sup>19</sup> Further details of these methods and results are on file with the author and available on request.

complementary insights into case law: the two methods combined are more powerful than each taken alone.<sup>20</sup>

In adopting this method, this study joins a strong tradition of quantitative analysis of case law in the United State ('US').<sup>21</sup> In relation to discrimination cases particularly, scholars such as Schuster and Miller,<sup>22</sup> and Feild and Holley<sup>23</sup> have used quantitative analysis to retrospectively study judicial reasoning. In their quantitative study of 153 US federal age discrimination cases using content analysis, Schuster and Miller found that a majority (81%) of age discrimination claimants were men, and most were in professional or managerial positions (57%).<sup>24</sup> The authors therefore concluded that age discrimination law had 'become the primary device used by white male professionals and managers to attack arbitrary personnel decisions', particularly in the areas of dismissal and involuntary retirement.<sup>25</sup> As part of her PhD research, Irving conducted qualitative and quantitative content analysis of Employment Tribunal decisions in age discrimination cases handed down in England and Wales between 1 October 2006 and 1 April 2010.<sup>26</sup> This dual approach allowed Irving to map the nature of complaints and trace trends in judicial reasoning.

### III Why do Cases Fail? Existing Hypotheses

Writing in 2013, MacDermott noted that few age discrimination complaints under the *Age Discrimination Act* proceeded to court, and none that did had ever succeeded.<sup>27</sup> The situation is no different writing in 2020. However, MacDermott did not analyse cases at state and territory level, and was writing before the successful use of the *Fair Work Act 2009* (Cth) ('FWA') adverse action provisions to address age discrimination in *Fair Work Ombudsman v Theravanish Investments Pty Ltd*.<sup>28</sup> Thus, it is timely to review and extend MacDermott's findings, to consider whether additional jurisdictions and different research methods offer new insights into the field.

Drawing on existing scholarship (which, admittedly, has largely focused on discrimination law in the federal jurisdiction), we can identify a range of hypotheses for why age discrimination complaints do not proceed to court, and why those that do might fail. Age discrimination cases can 'fail' or be unsuccessful at multiple

<sup>20</sup> Hall and Wright (n 11).

<sup>21</sup> See, eg, Fred Kort, 'Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases' (1957) 51(1) *American Political Science Review* 1. Kort used quantitative analysis to predict claim outcomes ('jurimetrics').

<sup>22</sup> Michael Schuster and Christopher S Miller, 'An Empirical Assessment of the *Age Discrimination in Employment Act*' (1984) 38(1) *Industrial and Labor Relations Review* 64.

<sup>23</sup> Hubert S Feild and William H Holley, 'The Relationship of Performance Appraisal System Characteristics to Verdicts in Selected Employment Discrimination Cases' (1982) 25(2) *Academy of Management Journal* 392.

<sup>24</sup> Schuster and Miller (n 22) 68.

<sup>25</sup> *Ibid* 74.

<sup>26</sup> LD Irving, 'Challenging Ageism in Employment: An Analysis of the Implementation of Age Discrimination Legislation in England and Wales' (PhD Thesis, Coventry University, 2012) <<http://curve.coventry.ac.uk/open/items/ffc88163-6994-4400-bead-121298f52bd1/1/>>.

<sup>27</sup> MacDermott, 'Resolving Federal Age Discrimination Complaints' (n 6) 102.

<sup>28</sup> [2014] FCCA 1170 ('*Theravanish*').

points: pre-claim, at conciliation, pre-hearing, at hearing or judgment. While the focus of this article is specifically on why reported cases fail in court, court proceedings are part of a larger process of enforcement that may affect a claim's success. Thus, the hypotheses presented below address a range of factors, at all stages of a claim.

First, the strong reliance on alternative dispute resolution ('ADR') in Australian discrimination law might redirect a substantial number of complaints away from formal legal processes.<sup>29</sup> In all jurisdictions except Victoria, it is compulsory to first lodge a complaint with the relevant equality commission or agency before proceeding to court, and to participate in compulsory conciliation.<sup>30</sup> A substantial number of age discrimination complaints are resolved via conciliation. The AHRC's *Willing to Work* report, for example, provides broad information about the outcome of age discrimination claims filed with statutory agencies. Of complaints by older workers relating to age discrimination in employment finalised by the AHRC between 2012 and 2015, nearly half were conciliated (45.4%, or 103 of 227 complaints).<sup>31</sup> The remainder were terminated,<sup>32</sup> not pursued or withdrawn. This is a lower conciliation statistic than for age discrimination claims generally at the AHRC: 51% of all age discrimination complaints were conciliated in 2015–16.<sup>33</sup> Thus, while many claims are being conciliated, this does not account for all age discrimination complaints: a substantial number are not being resolved through ADR. In 2014–15, for example, 26.6% of age discrimination complaints by older workers finalised by the AHRC were terminated due to no reasonable prospect of conciliation (representing 17 complaints in total):<sup>34</sup> these would appear particularly likely to proceed to litigation.

While many age discrimination complaints are not successfully conciliated each year, few progress to a court or tribunal hearing. The Federal Circuit Court of Australia, which receives applications in relation to federal discrimination statutes in its 'Human Rights' jurisdiction,<sup>35</sup> received only 75 applications in that jurisdiction

<sup>29</sup> MacDermott, 'Resolving Federal Age Discrimination Complaints' (n 6) 108. See also Therese MacDermott, 'Giving a Voice to Age Discrimination Complainants in Federal Proceedings' (2017) 19(2) *Flinders Law Journal* 233. On the use of conciliation in discrimination law generally, see Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253; Dominique Allen, 'In Defence of Settlement: Resolving Discrimination Complaints by Agreement' (2014) 14(4) *International Journal of Discrimination and the Law* 199.

<sup>30</sup> In Victoria, direct access to the Victorian Civil and Administrative Tribunal was introduced in 2011: *Equal Opportunity Act 2010* (Vic) s 122.

<sup>31</sup> AHRC, *Willing to Work* (n 4) 417 (Table 4).

<sup>32</sup> Complaints are terminated under s 46PH of the *Australian Human Rights Commission Act 1986* (Cth), including on the basis that 'the President is satisfied that ... there is no reasonable prospect of the matter being settled by conciliation': s 46PH(1B)(b). Complaints terminated on this particular basis would appear to be those most likely to progress to court.

<sup>33</sup> AHRC, *2015–16 Complaint Statistics* (2016) 26 (Chart 8) <<http://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016>> ('2015–16 Complaint Statistics').

<sup>34</sup> AHRC, *Willing to Work* (n 4) 417 (Table 4).

<sup>35</sup> The 'Human Rights' jurisdiction includes federal unlawful discrimination matters under the *Australian Human Rights Commission Act 1986* (Cth), and relates to complaints under the *Age Discrimination Act*, *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth), and *Sex Discrimination Act 1984* (Cth). These statistics do not include applications under the *Fair*



in 2015–16, compared with 2,013 complaints about discrimination and breaches of human rights received by the AHRC across all areas in that same year. As a ballpark figure, then, around 3.7% of AHRC complaints progress to the court application stage; substantially fewer would progress to hearing or judgment. This is broadly consistent with the AHRC's estimate of 3% of complaints proceeding to court.<sup>36</sup>

Second, then, it is necessary to consider substantive and procedural legal barriers that might prevent legitimate age discrimination complaints from proceeding to court, or undermine their success at hearing. MacDermott found in her study of federal case law that most cases related to questions of practice or procedure, rather than substantive discussions of whether age discrimination had occurred.<sup>37</sup> Around 25% of the cases at that stage were applications for summary dismissal,<sup>38</sup> leading MacDermott to hypothesise that cases were either particularly weak, or that it was particularly difficult to prove age discrimination.<sup>39</sup> Time limits may cause problems for some complainants, particularly for unfair dismissal applications under the *FWA*, where claims must be filed within 21 days.<sup>40</sup>

In relation to the substantive legal limitations of age discrimination law in Australia, I have mapped the extensive exceptions to the prohibition of age discrimination in the states, territories and federally, which might exclude many claims from legal protection.<sup>41</sup> I have also argued that Australian courts adopt a limited, narrow and non-purposive approach to age discrimination cases, which might deter claimants from pursuing legal avenues.<sup>42</sup> Federally, cases might also struggle due to: a lack of evidence;<sup>43</sup> difficulties in proving causation;<sup>44</sup> the comparator requirement;<sup>45</sup> an underdeveloped jurisprudence leading to legal uncertainty;<sup>46</sup> the need for legal representation;<sup>47</sup> no shifting of the burden of proof and difficulties proving that discrimination has occurred;<sup>48</sup> the cost of litigation, including the risk of having to pay the other side's costs;<sup>49</sup> the emotional toll of pursuing a complaint;<sup>50</sup> fear of victimisation;<sup>51</sup> and intersectionality.<sup>52</sup>

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*Work Act 2009* (Cth) ('FWA') or industrial legislation: see Federal Circuit Court of Australia, *Annual Report 2015–16* (Commonwealth of Australia, 2016) 6, 28–9.

<sup>36</sup> AHRC, *2015–16 Complaint Statistics* (n 33) 2.

<sup>37</sup> MacDermott, 'Resolving Federal Age Discrimination Complaints' (n 6) 105.

<sup>38</sup> *Ibid* 106.

<sup>39</sup> *Ibid*.

<sup>40</sup> *FWA* (n 35) s 774.

<sup>41</sup> Blackham, 'A Compromised Balance?' (n 7).

<sup>42</sup> Alysia Blackham, 'Defining "Discrimination" in UK and Australian Age Discrimination Law' (2017) 43(3) *Monash University Law Review* 760 ('Defining "Discrimination"').

<sup>43</sup> MacDermott, 'Resolving Federal Age Discrimination Complaints' (n 6) 107.

<sup>44</sup> *Ibid*.

<sup>45</sup> AHRC, *Willing to Work* (n 4) 324–5.

<sup>46</sup> MacDermott, 'Resolving Federal Age Discrimination Complaints' (n 6) 107.

<sup>47</sup> *Ibid* 108–9, 110–111; AHRC, *Willing to Work* (n 4) 321–2.

<sup>48</sup> MacDermott, 'Resolving Federal Age Discrimination Complaints' (n 6) 107; AHRC, *Willing to Work* (n 4) 323–4.

<sup>49</sup> MacDermott, 'Resolving Federal Age Discrimination Complaints' (n 6) 110; AHRC, *Willing to Work* (n 4) 322–3.

<sup>50</sup> AHRC, *Willing to Work* (n 4) 323–4.

<sup>51</sup> *Ibid* 325–6.

<sup>52</sup> *Ibid* 326.

To address these issues, the AHRC's *Willing to Work* report recommended a number of areas for review in relation to existing federal age discrimination laws. These included: approaches to standing, including by potentially allowing actions by representative organisations;<sup>53</sup> considering the use of positive duties;<sup>54</sup> removing the comparator test, and replacing it with a detriment test;<sup>55</sup> moving to a system where parties bear their own costs, with the court retaining a discretion to award costs if it is just to do so;<sup>56</sup> amending discrimination laws to encompass discrimination based on a combination of attributes;<sup>57</sup> and reviewing the 21-day time limit under the *FWA*.<sup>58</sup> Not all of these issues are relevant at state and territory level. For example, there is arguably no comparator test in Victoria or the Australian Capital Territory ('ACT').

Similar issues appear to emerge in England and Wales. Irving's analysis of Employment Tribunal age discrimination cases discovered a number of points of failure that impeded age discrimination claims, including: jurisdictional limits, such as employee status, time limits, and territorial issues;<sup>59</sup> difficulties shifting the burden of proof (particularly in relation to recruitment discrimination);<sup>60</sup> issues establishing the presence of 'discriminatory treatment';<sup>61</sup> exceptions;<sup>62</sup> the presence of 'justified' discrimination;<sup>63</sup> and cases that were underprepared or lacked evidence.<sup>64</sup> Thus, these failure points are well-established in England and Wales, and at the federal level in Australia. It is still unclear, however, whether these failure points are affecting potentially meritorious complaints. This study therefore sought to inquire further into these issues.

## IV Points of Failure in Age Discrimination Cases

### A An Overview of the Sample

Of the 108 cases in the sample, 33 related to recruitment and 63 to dismissal (including 12 relating to retirement and 10 relating to redundancy).<sup>65</sup> This differs dramatically from the results of the AHRC *National Prevalence Survey*, which found that the most common episodes of discrimination experienced by older workers were: limiting employment, promotion or training because of age (27%); jokes or derogatory comments based on age (21%); and perceptions that individuals had

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<sup>53</sup> Ibid 332–3 (Recommendation 48).

<sup>54</sup> Ibid 333–4 (Recommendation 49).

<sup>55</sup> Ibid 336 (Recommendation 50).

<sup>56</sup> Ibid 337–8 (Recommendation 51).

<sup>57</sup> Ibid 338 (Recommendation 52).

<sup>58</sup> Ibid 342–3 (Recommendation 56).

<sup>59</sup> Irving (n 26) 160–69.

<sup>60</sup> Ibid 171–80.

<sup>61</sup> Ibid 169–71.

<sup>62</sup> Ibid 189–94.

<sup>63</sup> Ibid 201–28.

<sup>64</sup> Ibid 195–6.

<sup>65</sup> Other areas included: training (6), promotion (5), demotion (4), working time (8), harassment (10), benefits (5), performance (2) and other (5). As cases could relate to multiple areas, these numbers do not add up to 108.

outdated skills, were too slow to learn new things or delivered an unsatisfactory job because of their age (21%).<sup>66</sup> The least common instances of discrimination — being threatened with redundancy or dismissal, or being asked to retire; and poor treatment resulting in leaving the job, being made redundant or dismissed because of age — were each reported by only 3% of respondents.<sup>67</sup> Thus, the cases in the sample are likely to be outliers, and the most extreme instances of age discrimination experienced. This makes sense, given the potential emotional, financial and reputational costs of pursuing an age discrimination claim: only the most serious cases are likely to be pursued.

Eighty-one cases featured a male claimant, and 28 featured a female claimant.<sup>68</sup> Over 90% of claims (99 cases) related to claimants who alleged they were too old; only six related to claimants who were too young. Ethnicity was raised in 21 cases, and disability in 19 cases. The majority of claimants (68%, or 73 claimants) were men bringing a claim on the basis that they were too old.

Where specified or possible to discern, claimants were represented in 53 cases (49% of the sample); 50 cases had litigants in person (three cases were unclear; in two the claimant did not appear). The vast majority of representatives were solicitors or barristers; unions acted as representatives in only two cases. The majority of cases (69) were brought against employers in the private sector, rather than the public sector (39). Where identifiable, more claims (54) were brought by blue collar or unskilled workers than white collar or professional workers (45).<sup>69</sup>

Where discussed, most claims alleged direct discrimination (58 cases), with only 17 cases discussing indirect discrimination. Cases were unevenly distributed across the jurisdictions: 34 cases were brought under the *FWA, Workplace Relations Act 1996* (Cth) or *Industrial Relations Act 1988* (Cth); 15 cases related to the *Age Discrimination Act or Human Rights and Equal Opportunity Commission Act 1986* (Cth). Table 1 (below), lists the number of age discrimination cases in each jurisdiction and their prevalence per capita.

As Table 1 illustrates, cases are far more likely per capita in Tasmania than any other jurisdiction. This is distorted, however, by one repeat litigant, who brought cases against three separate employers.<sup>70</sup> Even with these cases counted as one data point, Tasmania is still the most litigated jurisdiction, with one case per 104,940 residents. Victoria is the jurisdiction with the least age discrimination litigation per capita, despite the ability to apply directly to the Victorian Civil and Administrative Tribunal since 1 August 2011.<sup>71</sup>

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<sup>66</sup> AHRC, *National Prevalence Survey* (n 2) 38.

<sup>67</sup> Ibid 39.

<sup>68</sup> One case included both a male and female claimant, meaning these numbers add to 109, not 108.

<sup>69</sup> Schuster and Miller found that in the US, most claimants were professionals or managers: Schuster and Miller (n 22) 74. However, some occupations are difficult to categorise in this binary way: call centre workers, for example, are probably better categorised as unskilled workers than professionals, though they are more likely to be seen as white collar than blue collar workers.

<sup>70</sup> *Von Stalheim v Davey Accounting Plus* [2007] TASADT 7 ('*Davey Accounting*'); *Von Stalheim v KPMG* [2003] TASADT 12 ('*KPMG*'); *Von Stalheim v Garrotts* [2003] TASADT 9 ('*Garrotts*').

<sup>71</sup> *Equal Opportunity Act 2010* (Vic) s 122; see Dominique Allen, *Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria* (Monash Business School, 2019) 10–11. It is possible that some potential state claims have been displaced to the federal jurisdiction.

These jurisdictional trends may be explained partly by the demographics of each state and territory. For example, in 2017, Tasmania had the oldest median age in Australia at 42 years (compared with 37 years across the country).<sup>72</sup> As illustrated by Table 2 (below), Tasmania also has the largest proportion of older residents in the country, with nearly 40% of the state's population aged 50 or over. That said, Victoria does not have a particularly youthful population, but still has few age discrimination cases; and SA has a comparatively elderly population, but relatively few age discrimination cases. Thus, demographic trends do not fully explain the presence or absence of case law in each jurisdiction.

**Table 1:** Age discrimination cases for the Australian population by jurisdiction<sup>73</sup>

	Population in 2017 (‘000)	Age discrimination cases (number)	Population per case (‘000)
<b>Commonwealth (‘Cth’) / Australian population</b>	24770.7	49	505.52
<b>New South Wales (‘NSW’)</b>	7915.1	30	263.84
<b>Victoria (‘Vic’)</b>	6385.8	4	1596.45
<b>Queensland (‘Qld’)</b>	4965	11	451.36
<b>Western Australia (‘WA’)</b>	2584.8	3	861.60
<b>South Australia (‘SA’)</b>	1728.1	2	864.05
<b>Tasmania</b>	524.7	7	74.96
<b>Australian Capital Territory (‘ACT’)</b>	415.9	1	415.90
<b>Northern Territory (‘NT’)</b>	246.7	1	246.70

## B *Successful Claims*

Across all 108 (substantive and procedural) cases in the sample, claimants were successful in only 23 cases on the basis of age.<sup>74</sup> Claimants were successful in 12 substantive decisions, as detailed in Table 3 (below). This represents a claimant success rate in substantive cases of 18.75%.<sup>75</sup> The key common factor across the successful substantive decisions was compelling evidence of discrimination: age was expressly cited as a reason for dismissing<sup>76</sup> or not recruiting<sup>77</sup> the claimant in a

<sup>72</sup> ABS, *Australian Demographic Statistics, Jun 2017* (Catalogue No 3101.0, 14 December 2017).

<sup>73</sup> Source: Australian Bureau of Statistics (‘ABS’), *Australian Demographic Statistics, Dec 2017* (Catalogue No 3101.0, 21 June 2018) and author’s own calculations.

<sup>74</sup> But some were successful on a different basis.

<sup>75</sup> This is lower than the comparable figure for the US, where Schuster and Miller found that employers won nearly two-thirds of cases: Schuster and Miller (n 22) 70 (Table 3).

<sup>76</sup> *Theravanish* (n 28); *McEvoy v Acorn Stairlifts Pty Ltd* [2017] NSWCATAD 273 (‘*McEvoy*’); *Talbot v Sperling Tourism & Investments Pty Ltd* (2011) 211 IR 419 (‘*Talbot*’); *Lightning Bolt Co Pty Ltd v Skinner* (2003) EOC 193-260 (‘*Lightning Bolt*’); *Webforge Australia Pty Ltd v Richards* (2005) EOC 193-360 (‘*Webforge*’).

<sup>77</sup> *Bloomfield v Westco Jeans Pty Ltd* (2001) EOC 193-161 (‘*Bloomfield*’).

number of cases, or was explicitly asked for in recruitment material.<sup>78</sup> These claims were often supported by written evidence (such as letters citing age as a reason for dismissal); or testimony of others who witnessed or were later told about the discrimination.<sup>79</sup> The cases were fairly evenly spaced across time: one was decided before 1999; five between 2000–9; and six from 2010–17. The rate of legal representation in these successful substantive cases (67%) was similar to that for unsuccessful substantive cases (61%).

The largest number of successful cases (four) was in Queensland. Only two cases were successful at the federal level: one under the *FWA*<sup>80</sup> and one under the *Workplace Relations Act 1996* (Cth).<sup>81</sup>

Beyond these cases, there were also a number of successful unfair dismissal applications in the sample: in these cases, age might have been involved in the dismissal, but was not a basis for the decision.<sup>82</sup> In some cases, complainants were indirectly successful, for example, where the Commonwealth unsuccessfully sought judicial review of a Human Rights and Equal Opportunity Commission ('HREOC') decision.<sup>83</sup> Claimants were also successful in some procedural decisions, including in relation to: the grant of an extension of time;<sup>84</sup> successfully arguing that they had filed their application in time;<sup>85</sup> fending off an application for summary dismissal<sup>86</sup> or to strike out their claim;<sup>87</sup> seeking leave to proceed to Tribunal;<sup>88</sup> or establishing that the Commissioner's decision to dismiss the application was incorrect.<sup>89</sup> Overall, though, the vast majority (78%) of cases in the sample had unsuccessful claimants: success was the exception, not the norm.

<sup>78</sup> *Hosking v Faser* (1996) EOC 192-859 ('Hosking'); *Willmott v Woolworths Ltd* [2014] QCAT 601 ('Willmott').

<sup>79</sup> Cf *Carr v Blade Repairs Australia Pty Ltd (No 2)* (2010) 197 IR 307 ('Carr'), discussed below in text accompanying nn 177–80.

<sup>80</sup> *Theravanish* (n 28).

<sup>81</sup> *Carr* (n 79).

<sup>82</sup> See *Borg v NSW Greyhound Breeders, Owners & Trainers' Association* [2012] FWA 10013; *Martin v Donut King Chimside Park* [2012] FWA 2905 ('Martin v Donut King'); *Stewart v Kalari Pty Ltd* [2004] AIRC 27. See also *Anderson v Thiess Pty Ltd*, which illustrates that age may play a role in showing that a dismissal is unfair: [2015] FWCFB 478. Age could be relevant to the decision: see *Chakalakakis v M T Sullivan & Co Pty Ltd* [2008] AIRC 425, [63].

<sup>83</sup> *Commonwealth v Human Rights & Equal Opportunity Commission* (2000) 108 FCR 378 ('Commonwealth v HREOC (Hamilton)'); *Commonwealth v Human Rights & Equal Opportunity Commission* (2000) 104 FCR 464; *Commonwealth v Human Rights & Equal Opportunity Commission* (1999) 95 FCR 218 ('Commonwealth v HREOC (Bradley)'). In these cases, the Commonwealth brought an application for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of a Human Rights & Equal Opportunity Commission decision (that is, a finding and a recommendation under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)).

<sup>84</sup> *Edwards v Tiger Airways Australia Pty Ltd* [2017] FWC 4021 ('Edwards').

<sup>85</sup> *Forrester v Growers Market Express Pty Ltd* [2015] FWC 8874 ('Forrester').

<sup>86</sup> *Rochas v University of Sydney* [2004] NSWADT 14 ('Rochas'); *French v Gosford City Council* [2003] NSWADT 273 ('French').

<sup>87</sup> *Vanden Driesen v Edith Cowan University* (2012) 269 FLR 422.

<sup>88</sup> *Wells v Glen Innes Severn Council* [2010] NSWADT 281 ('Wells'); *Donohoe v Trustees of the Christian Brothers* [2008] NSWADT 51 ('Donohoe'); *Goyal v National Electricity Market Management Co Ltd* [2008] NSWADT 181 ('Goyal').

<sup>89</sup> *B v Naval Reserve Cadets* [2004] TASADT 11.

**Table 2:** Population of Australia ('000), by age, states and territories at 30 June 2017<sup>90</sup>

<b>Age group (years)</b>	<b>NSW</b>	<b>Vic</b>	<b>Qld</b>	<b>SA</b>	<b>WA</b>	<b>Tas</b>	<b>NT</b>	<b>ACT</b>	<b>Aus</b>
<b>50–54</b>	47.2	388.2	312.1	112.2	164.8	34.7	15.5	24.1	1,539.2
<b>55–59</b>	485.5	374.4	303.2	113.5	155.5	37.8	13.8	22.8	1,506.9
<b>60–64</b>	431.8	331.8	265.4	102.7	136.0	34.8	11.0	19.3	1,333.1
<b>65–69</b>	385.9	296.2	242.6	94.9	118.8	32.4	7.8	17.1	1,196.0
<b>70–74</b>	314.4	237.6	194.3	77.6	90.2	26.1	4.7	13.1	958.2
<b>75–79</b>	224.2	172.5	132.0	55.0	64.3	18.0	2.8	8.9	677.8
<b>80+</b>	328.0	252.8	173.0	84.0	86.6	23.8	2.4	12.1	962.8
<b>All ages</b>	7,861.1	6,323.6	4,928.5	1,723.5	2,580.4	520.9	246.1	410.3	24,598.9
<b>% of population 50+</b>	<b>33.8</b>	<b>32.5</b>	<b>32.9</b>	<b>37.1</b>	<b>31.6</b>	<b>39.9</b>	<b>23.6</b>	<b>28.6</b>	<b>33.2</b>

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<sup>90</sup> Source: ABS, *Australian Demographic Statistics, Dec 2017* (n 73) and author's own calculations.

**Table 3:** Successful substantive cases in the sample

Year	Jurisdiction <sup>91</sup>	Case	Outcome	Represented	Evidence	Area
2017	NSW	<i>McEvoy v Acorn Stairlifts Pty Ltd</i> <sup>92</sup>	Compensation: \$31,420	X	Witness (co-workers) Employer failed to counter	Dismissal
2014	Cth	<i>Fair Work Ombudsman v Theravanish Investments Pty Ltd</i> <sup>93</sup>	Compensation: \$10,000 Penalty: \$29,150	√	Written	Dismissal (just about penalty)
2014	Qld	<i>Willmott v Woolworths Ltd</i> <sup>94</sup>	Compensation: \$5,000	X	Written	Unlawful request for information/ Recruitment
2013	Qld	<i>McCauley v Club Resort Holdings Pty Ltd (No 2)</i> <sup>95</sup>	Compensation: \$35,490	√	Witness / reported to others	Treatment / Harassment
2011	NSW	<i>Talbot v Sperling Tourism &amp; Investments Pty Ltd</i> <sup>96</sup>	Compensation: \$25,323 Apology	√	Written	Dismissal

<sup>91</sup> Jurisdiction key: Cth = Federal; ACT = Australian Capital Territory; NSW = New South Wales; NT = Northern Territory; Qld = Queensland; SA = South Australia; Tas = Tasmania; Vic = Victoria; WA = Western Australia.

<sup>92</sup> *McEvoy* (n 76).

<sup>93</sup> *Theravanish* (n 28).

<sup>94</sup> *Willmott* (n 78).

<sup>95</sup> [2013] QCAT 243.

<sup>96</sup> *Talbot* (n 76).

Year	Jurisdiction <sup>91</sup>	Case	Outcome	Represented	Evidence	Area
2010	Cth	<i>Carr v Blade Repairs Australia Pty Ltd (No 2)</i> <sup>97</sup>	Compensation: \$0 (instead, damages awarded for breach of contract) Penalty: \$1000	√	Shifting onus of proof	Dismissal
2007	Qld	<i>Virgin Blue Airlines Pty Ltd v Stewart</i> <sup>98</sup>	Compensation \$5,000	√	Statistics	Recruitment
2005	WA	<i>Webforge Australia Pty Ltd v Richards</i> <sup>99</sup>	Compensation: \$22,267	√	Witness (co-workers)	Dismissal
2005	NSW	<i>Shop, Distributive and Allied Employees' Association, Broken Hill Branch v Gateway Investments Pty Ltd</i> <sup>100</sup>	Compensation: \$3514	√	Recruited other (junior) staff when said there was no work	Dismissal
2002	Qld	<i>Lightning Bolt Co Pty Ltd v Skinner</i> <sup>101</sup>	Compensation: • Skinner: \$72,582; • Smith: \$8,906	√	Employer untruthful  Other staff gave evidence	Dismissal

<sup>97</sup> *Carr* (n 79).

<sup>98</sup> (2007) EOC ¶93-457 ('*Virgin Blue Airlines*').

<sup>99</sup> *Webforge* (n 76).

<sup>100</sup> [2005] NSWIRComm 209 ('*Gateway Investments*').

<sup>101</sup> *Lightning Bolt* (n 76).



Year	Jurisdiction <sup>91</sup>	Case	Outcome	Represented	Evidence	Area
2001	ACT	<i>Bloomfield v Westco Jeans Pty Ltd</i> <sup>102</sup>	Compensation: \$250 Apology	X	Witness (daughter) Employer failed to counter	Recruitment
1996	NT	<i>Hosking v Faser</i> <sup>103</sup>	Compensation: \$1,500	X	Written	Seeking unnecessary information/ recruitment

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<sup>102</sup> *Bloomfield* (n 77).

<sup>103</sup> *Hosking* (n 78).

## C *Points of Failure*

Some failure points were jurisdiction-specific. For example, 12 cases were brought under the *FWA*, a further 18 in the *FWA* and *Workplace Relations Act 1996* (Cth) unfair dismissal jurisdiction, and another four under the *Industrial Relations Act 1988* (Cth). This constituted a sizeable proportion of the sample (31% of all cases). In the vast majority of these cases, the claimant failed. A key procedural failure point under the *FWA* was time limits. The *FWA* requires that unfair dismissal or general protections applications related to termination be filed with the Fair Work Commission ('FWC') within 21 days after the dismissal took effect.<sup>104</sup> The FWC may grant an extension of time if satisfied that there are 'exceptional circumstances' that warrant the extension. Only one application for an extension of time was granted;<sup>105</sup> seven were refused;<sup>106</sup> and one claim was held to be within time.<sup>107</sup> Causation was also a recurring issue in the cases, as discussed below in Part IVE. While there were 10 cases in the sample relating to the *Age Discrimination Act*, only two were substantive; four cases were successful applications for summary dismissal. At the federal level, some claims had deficient pleadings: failing to allege that the employer acted for a prohibited reason;<sup>108</sup> alleging behaviour that occurred before the commencement of the statute;<sup>109</sup> pursuing a party who was not a respondent to the HREOC complaint;<sup>110</sup> or failing to allege acts that amounted to discrimination, as opposed to bad practice.<sup>111</sup>

Thirty cases were brought in NSW. Claimants were successful on the basis of age in three substantive decisions<sup>112</sup> and five procedural decisions.<sup>113</sup> In NSW, nine cases were applications for leave for the appeal to be the subject of proceedings before the NSW Civil and Administrative Tribunal or Administrative Decisions Tribunal. Under s 96 of the *Anti-Discrimination Act 1977* (NSW), leave of the Tribunal is required before proceedings can commence if the matter is referred to the Tribunal at the requirement of the complainant. Seven cases failed at this hurdle.

Beyond these jurisdiction-specific issues, some factors affected cases across jurisdictions. For example, a number of claims fell beyond the scope of the statute: relating to a job 'interview' that was actually a career counselling session, and therefore did not count as 'recruitment';<sup>114</sup> or where no job was on offer;<sup>115</sup> claiming

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<sup>104</sup> *FWA* (n 35) s 774.

<sup>105</sup> *Edwards* (n 84).

<sup>106</sup> *Sternberg v Gables Reception Pty Ltd* [2016] FWC 7892; *Robb v Bond University Ltd* [2016] FWC 1552; *Armstrong v Police Citizens Youth Clubs* [2016] FWC 766; *Downie v Naladra Pty Ltd* [2015] FWC 8905. Under the *Workplace Relations Act 1996* (Cth), see *Lin v University of Melbourne* [2009] AIRC 61 ('Lin'); *Luppi v Spanish Club Ltd* [2008] AIRC 465; *Boes v Universal Rocks Water Garden Centre Pty Ltd* [2007] AIRC 552.

<sup>107</sup> *Forrester* (n 85).

<sup>108</sup> *Cavar v Green Gate Management Services Pty Ltd* [2017] FCA 471 ('Cavar').

<sup>109</sup> *Boyn v Schering Pty Ltd* (2008) 103 ALD 108.

<sup>110</sup> *O'Brien v Crouch* [2007] FMCA 1976.

<sup>111</sup> *Ibid* [29], [30].

<sup>112</sup> *McEvoy* (n 76); *Talbot* (n 76); *Gateway Investments* (n 100).

<sup>113</sup> *Rochas* (n 86); *French* (n 86); *Donohoe* (n 88); *Goyal* (n 88); *Wells* (n 88).

<sup>114</sup> *Retallick v Nestlé Australia Ltd* [2006] NSWADT 343, [14].

<sup>115</sup> *McIntyre v Tully* [2001] 2 Qd R 338, 344 [15] ('McIntyre').

against another employee, not an employer;<sup>116</sup> making a claim after retirement, when the claimant was no longer a ‘worker’;<sup>117</sup> or making a claim relating to a management agreement, which was not ‘work’.<sup>118</sup>

A thread running through many unsuccessful cases was a failure to produce sufficient evidence to support the claim.<sup>119</sup> Indeed, a lack of evidence was raised in 32 of the 108 cases. A lack of evidence could relate to the alleged detriment or adverse treatment; causation; or the relevant groups for an indirect discrimination claim. These substantive failure points are developed in more detail below.

## D Differential Treatment

In relation to differential treatment, some cases failed because there was no evidence of detriment<sup>120</sup> or unfavourable treatment<sup>121</sup> or different treatment.<sup>122</sup> In cases where the alleged adverse treatment was dismissal, courts and tribunals sometimes found there to be no ‘dismissal’ — the claimant resigned,<sup>123</sup> or casual employment came to an end,<sup>124</sup> or there was a genuine redundancy.<sup>125</sup>

The need for a comparator was flagged in 16 cases. The High Court’s decision in *Purvis v New South Wales (Department of Education and Training)*,<sup>126</sup>

<sup>116</sup> *Gabryelczyk v Hundt* [2005] NSWADT 94 (‘*Gabryelczyk*’).

<sup>117</sup> *Gladdish v Queensland* [2012] QCAT 721, [30].

<sup>118</sup> *Lidis v Top Dog Minders Pty Ltd* [2011] QCAT 232, [21].

<sup>119</sup> See, eg, *Keys v Sydney Night Patrol and Inquiry Co Pty Ltd*, where there was no evidence older workers were less able to comply with a recruitment test to found a claim of indirect discrimination: [2015] FCCA 776, [22] (‘*Keys*’); *Martin v Donut King* (n 82) [29]; *Vye v Secretary, Department of Finance, Services and Innovation (NSW)* [2016] NSWCATAD 117, [33]–[39] (‘*Vye*’); *Coady v Sutherland Shire Council* [2016] NSWCATAD 95, [18]–[19]; *Neeson v Director-General, Department of Education and Training* [2009] NSWADT 292, [46]; *Shirley v Director-General, Department of Education and Training (No 2)* [2009] NSWADT 235, [45], [48] (‘*Shirley*’); *Heber v Glen Henney & Son Pty Ltd (No 3)* [2008] NSWADT 168, [24] (‘*Heber*’); *Pignat v Richmond Valley Council* [2005] NSWADT 162, [28], [35] (‘*Pignat*’); *Kennedy v Director-General, NSW Department of Industrial Relations* [2002] NSWADT 186, [119] (‘*Kennedy*’); *Serewko v Queensland* [2009] QADT 5, [32]; *Arkley v CatholicCare Tasmania* [2017] TASADT 3, [15], [41], [45] (‘*Arkley*’); *Davey Accounting* (n 70) [57]; *KPMG* (n 70) [24]–[26]; *Garrotts* (n 70) [6]–[7]; *Udugampala v Essential Services Commission* [2016] VCAT 2130, [108] (‘*Udugampala*’).

<sup>120</sup> *Pomplun v Shoalhaven City Council* [2010] NSWADT 113 (‘*Pomplun*’); *Tanevski v Fluor Australia Pty Ltd* [2008] NSWADT 217; *Perera v Warehouse Solutions Pty Ltd* [2017] VCAT 1267, [243]–[244] (‘*Warehouse Solutions*’). See also *Navaratnam v Queensland*, which related to a proposed process, which meant a previous process was no longer relevant: [2013] QCAT 131.

<sup>121</sup> *Naidu v Causeway Inn Pty Ltd* [2015] VCAT 929, [31] (‘*Naidu*’).

<sup>122</sup> *Sidhu v Sydney Local Health District* [2015] NSWCATAD 70 (‘*Sidhu*’); *Plancke v Director General, Department of Education & Training* [2001] NSWADT 137 (‘*Plancke*’); *Allen v Newlands Coal Pty Ltd (No 2)* [2014] QCAT 522, [37]; *Perera v Director-General, Department of Education and Communities (Office of Communities)* [2012] NSWADT 108 (‘*Perera*’).

<sup>123</sup> *Sun v EP2 Management Pty Ltd* [2016] FCCA 1381, [37] (‘*EP2*’); *Heber* (n 119) [20]; *Ng v Citigroup Pty Ltd* [2008] AIRC 233, [49].

<sup>124</sup> *Bradford v Toll Personnel Pty Ltd* [2013] FWC 1062; *Thompson v Big Bert Pty Ltd* (2007) 168 IR 309 (‘*Thompson*’).

<sup>125</sup> *Maurer v S.U.M.M.S* [2013] FWC 1661; *Lin* (n 106); *Yaxley v Trust Bank of Tasmania* [1996] IRCA 132. And, in cases under the *Industrial Relations Act 1988* (Cth), claims failed where the dismissal was not at the ‘initiative’ of the employer: *Adams v Australia Post* (1996) 64 IR 309; *Griffin v Australian Postal Corporation* [1998] IRCA 15.

<sup>126</sup> (2003) 217 CLR 92 (‘*Purvis*’).

which related to the *Disability Discrimination Act 1992* (Cth), loomed large in these cases. In *Purvis*, the Court was asked to identify the appropriate comparator for determining whether there had been less favourable treatment of a student with disabilities who was suspended and excluded from school due to his behaviour, which included kicking, punching and verbal abuse.<sup>127</sup> The *Disability Discrimination Act 1992* (Cth) defines direct disability discrimination as occurring ‘if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different’.<sup>128</sup> The question for the Court was whether the student’s violent behaviour — which was attributable to his disability — should be also imputed to the comparator. The majority held that it should.<sup>129</sup> For Gleeson CJ, ‘[t]he required comparison is with a pupil without the disability; not a pupil without the violence. The circumstances are relevantly the same, in terms of treatment, when that pupil engages in violent behaviour.’<sup>130</sup> *Purvis* exemplifies a highly restrictive approach to the comparator requirement. This may well be an example of ‘hard cases making bad law’<sup>131</sup> (or, perhaps, bad legislation):<sup>132</sup> the absence of an unjustifiable hardship defence (which has now been extended to such cases) may have led the Court to distort the comparator requirement.<sup>133</sup> Regardless, the highly restrictive approach in *Purvis* had a substantial influence on cases in this sample, meaning the comparator selected tended to be very narrow.<sup>134</sup>

That said, narrow comparators were also evident in state case law, and in claims that preceded *Purvis*. In the NSW case of *Duncan v Chief Executive, NSW Office of Environment and Heritage (No 2)*, for example, an actual comparator (which Mr Duncan could not identify) would be

any person not of [Mr Duncan’s] race or age who, like him, was afforded a priority interview in similar circumstances and was appointed to the position, or at any rate treated more favourably, despite being considered unable ‘to demonstrate the capacity to competently undertake the position within six months with the support of appropriate training and management’.<sup>135</sup>

In *Kennedy*, a NSW claim by a call centre worker against the NSW Department of Industrial Relations as his employer, the comparator was identified as ‘a disgruntled employee who holds the strong and genuine view that they were

<sup>127</sup> Ibid 107–8 [34]–[38], 108 [40] (McHugh and Kirby JJ), 148 [183] (Gummow, Hayne and Heydon JJ).

<sup>128</sup> *Disability Act* (n 35) s 5(1) (emphasis added).

<sup>129</sup> Cf *Purvis* (n 126) 105–6 [27], 134 [129]–[130] (McHugh and Kirby JJ).

<sup>130</sup> Ibid 100 [11] (Gleeson CJ). See also at 160–2 [222]–[232] (Gummow, Hayne and Heydon JJ), 175 [273] (Callinan J).

<sup>131</sup> Colin D Campbell, ‘A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)’ (2007) 35(1) *Federal Law Review* 111.

<sup>132</sup> Susan Roberts, ‘The Inequality of Treating Unequals Equally: The Future of Direct Discrimination under the *Disability Discrimination Act 1992* (Cth)?’ (2005) 45 *AIAL Forum* 20, 30–1.

<sup>133</sup> Ibid 30; Campbell (n 131).

<sup>134</sup> *Travers v State of New South Wales (Board of Studies Teaching and Educational Standards NSW)* [2016] FCCA 905, [49] (*‘Travers’*).

<sup>135</sup> [2013] NSWADT 78 (*‘Duncan’*) [64].

not appointed to a position for reasons other than merit'.<sup>136</sup> These are extraordinarily narrow comparators; it would be surprising (to say the least) if they actually existed. Unsurprisingly, then, in most cases, the courts noted that no actual comparator was available,<sup>137</sup> meaning the courts had to rely on a hypothetical comparator.

In only two cases did the claimant successfully identify an actual comparator. In *Virgin Blue Airlines*,<sup>138</sup> the Court rejected the argument that older and younger job applicants were not in circumstances that were the same or not materially different:<sup>139</sup> all participated in the same recruitment process.<sup>140</sup> Using this comparator, less favourable treatment could be established on the basis of statistical evidence, which showed that 90% of applicants were aged 35 or under, but 99.9% of those appointed were aged 36 or under.<sup>141</sup> The claimants' case was obviously assisted by a large pool of job applicants, which meant a comparator was available, and helped to demonstrate the discriminatory impact of the recruitment process.

Similarly, in *Talbot*,<sup>142</sup> the claimant could identify other drivers with performance issues, and could illustrate that he received different, harsher treatment for driving infractions.<sup>143</sup> There was no documentary evidence that Mr Talbot had received counselling or warnings, as had other drivers with performance issues.<sup>144</sup> However, there was documentary evidence that explicitly cited the claimant's age as a reason for not engaging him.<sup>145</sup>

In other cases, when relying on a hypothetical comparator, as noted in *Duncan*, it is difficult to separate issues of proof relating to a hypothetical comparator from the question of causation; thus, '[i]t follows that the questions of *less favourable treatment* and *causation* should be approached ... as part of the same reasoning exercise.'<sup>146</sup> This means that the comparator requirement was of limited usefulness in most decisions in the sample; the question of the comparator was conflated with issues of causation. The question, then, is whether the comparator requirement adds any value to the legal reasoning process, if a hypothetical comparator is relied on in many cases, and thereafter conflated with causation. A better approach may be to allow claimants to rely on an actual comparator, if one exists, but otherwise to remove the comparator requirement.

It is noteworthy that a comparator may not be required in relation to *FWA* adverse action claims. In *EP2*,<sup>147</sup> the respondent's argument that the claimant needed

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<sup>136</sup> *Kennedy* (n 119) [129].

<sup>137</sup> *McEvoy* (n 76) [71]–[73]; *Hayne v YMCA NSW* [2016] NSWCATAD 14, [17] ('YMCA'); *Duncan* (n 135) [64]; *Shirley* (n 119) [40]; *Heber* (n 119) [7]–[8]; *Pignat* (n 119) [25]; *Kennedy* (n 119) [70]; *Peacock v Human Rights and Equal Opportunity Commission* [2005] FCAFC 45, [54]; *Donohoe* (n 88) [17]; *Goyal* (n 88) [18].

<sup>138</sup> *Virgin Blue Airlines* (n 98).

<sup>139</sup> *Ibid* 74628 [155].

<sup>140</sup> *Ibid* 74627–8 [154].

<sup>141</sup> *Ibid* 74628 [156], 74629 [167].

<sup>142</sup> *Talbot* (n 76).

<sup>143</sup> *Ibid* 434 [72].

<sup>144</sup> *Ibid*.

<sup>145</sup> *Ibid* 435 [75].

<sup>146</sup> *Duncan* (n 135) [65] (emphasis in original).

<sup>147</sup> *EP2* (n 123).

to show that there was less favourable treatment by reference to a real or hypothetical comparator was held to be ‘misconceived’.<sup>148</sup> the claim was not based on discrimination, but that there was adverse action ‘because of’ protected attributes (here, race and age).<sup>149</sup> Therefore, there was no need ‘to establish the complex matters required by the anti-discrimination laws’,<sup>150</sup> including the comparator requirement. However, the claim still failed, as the claimant could not establish that he was dismissed: he resigned, so there was no adverse action.<sup>151</sup> Thus, the claim was summarily dismissed.<sup>152</sup>

There is arguably also no comparator requirement in Victoria or the ACT. Instead, for example, s 8 of the *Equal Opportunity Act 2010* (Vic) defines direct discrimination as occurring ‘if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute’.<sup>153</sup> In *Aitken v State of Victoria*,<sup>154</sup> the Victorian Court of Appeal held that it was ‘an unresolved question of law in Victoria’ as to whether the unfavourable treatment requirement still necessitated the use of a comparator.<sup>155</sup> This may be compared with the decision in *Re Prezzi and Discrimination Commissioner and Quest Group*,<sup>156</sup> where the ACT Administrative Appeals Tribunal held that the unfavourable treatment test in s 8(1)(a) of the *Discrimination Act 1991* (ACT) did not require a comparator: ‘[a]ll that is required is an examination of the treatment accorded the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with.’<sup>157</sup> Campbell and Smith have argued that it is possible to interpret the ‘unfavourable treatment’ test in a way that overcomes the comparator requirement, but doing so means it becomes ‘over-inclusive in ways that Parliament would not have intended’, as the test potentially encompasses a wide and ill-defined range of interests.<sup>158</sup> Thus, moving to an unfavourable treatment test is not necessarily a simple solution to the limitations of the comparator requirement.

## E Causation

Relatedly then, causation was a recurring issue in the case law: causation was discussed in 24 of the 108 cases. While the tests for causation vary from jurisdiction to jurisdiction, many cases fell at this hurdle.

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<sup>148</sup> Ibid [17].

<sup>149</sup> Ibid [2].

<sup>150</sup> Ibid [18].

<sup>151</sup> Ibid [37].

<sup>152</sup> Ibid [38].

<sup>153</sup> See also *Discrimination Act 1991* (ACT) s 8(2).

<sup>154</sup> [2013] 46 VR 676.

<sup>155</sup> Ibid 687 [45]–[46]. This was cited favourably in *Kuyken v Chief Commissioner of Police* (2015) 249 IR 327, 355–6 [93] (*‘Kuyken’*). In *Kuyken*, it was not suggested that the Victorian Civil and Administrative Tribunal was wrong in failing to require a comparator: at 356 [95].

<sup>156</sup> (1996) 39 ALD 729.

<sup>157</sup> Ibid 736.

<sup>158</sup> Colin Campbell and Dale Smith, ‘Direct Discrimination without a Comparator?: Moving to a Test of Unfavourable Treatment’ (2015) 43(1) *Federal Law Review* 91, 93, 101–2.

Under the *FWA*, for example, employers must not take adverse action ‘because of’ age.<sup>159</sup> If an employer can show that age is not a ‘substantial and operative factor’ in the adverse treatment, the claim will fail.<sup>160</sup> This affected a number of claims under the *FWA*.<sup>161</sup> Drawing on *Barclay*,<sup>162</sup> which related to industrial activity, an employer’s evidence as to the reason for their actions can be enough to show that age is not a reason for the treatment.<sup>163</sup> For French CJ and Crennan J in *Barclay*,

[t]here is no warrant to be derived from the text of the relevant provisions of the *Fair Work Act* for treating the statutory expression ‘because’ in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer’s reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains ‘why was the adverse action taken?’.

This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker’s evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer ...<sup>164</sup>

While this implies that courts look to the *subjective* reason for the treatment, Gummow and Hayne JJ expressly rejected the distinction between subjective and objective reasons in *Barclay*:

to engage upon an inquiry contrasting ‘objective’ and ‘subjective’ reasons is to adopt an illusory frame of reference. Such an inquiry into the “objective” reasons risks the substitution by the court of its view of the matter for the finding it must make upon an issue of fact.<sup>165</sup>

However, where an employer gives ‘direct evidence ... as to [their] state of mind, intent or purpose’,<sup>166</sup> that may well be decisive. Indeed, an employer’s reason for

<sup>159</sup> *FWA* (n 35) s 351(1).

<sup>160</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 522–3 [57]–[59] (French CJ and Crennan J), 542 [127] (Gummow and Hayne JJ), 546 [146] (Heydon J) (*‘Barclay’*). See also *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605, 619 (Mason J).

<sup>161</sup> *Silver v Rogers & Rogers* (2012) 224 IR 439, 446 [32] (*‘Silver’*); *Vink v LED Technologies Pty Ltd* [2013] FCA 443 (*‘Vink (FCA)’*); *Farah v Ahn* [2012] FMCA 44 (*‘Farah’*).

<sup>162</sup> *Barclay* (n 160).

<sup>163</sup> *Ibid* 517 [44]–[45] (French CJ and Crennan J). See also at 542 [127] (Gummow and Hayne JJ).

<sup>164</sup> *Ibid* 517 [44]–[45] (French CJ and Crennan J) (citations omitted). See also at 542 [127] (Gummow and Hayne JJ).

<sup>165</sup> *Ibid* 540–1 [121] (Gummow and Hayne JJ). See also at 541 [126] (Gummow and Hayne JJ).

<sup>166</sup> *Ibid* 517 [44]–[45] (French CJ and Crennan J).

acting will likely be accepted if the evidence is reliable, even if the reason itself is irrational. This makes causation a substantial and possibly determinative hurdle for claimants, which is nearly impossible to surmount, even with the reverse onus of proof under s 361 of the *FWA*.

In mapping the different approaches to the onus of proof and causation under the *FWA* and preceding legislation, Chapman, Love and Gaze compare the ‘*Barclay* approach’<sup>167</sup> with a ‘broader approach’, where courts apply a ‘wider lens’ to ‘independently consider the extent to which the stated innocent reason of the employer, and sometimes more broadly the decision of the employer, is linked to the alleged prescribed ground’.<sup>168</sup> These two approaches represent ‘two end points on a continuum or spectrum of judicial approaches to the reverse onus of proof and the causal link’.<sup>169</sup> Understandably, where the broader approach is adopted, claimants are far more likely to be successful.<sup>170</sup> Unfortunately for claimants, however, the *Barclay* approach appears to remain dominant.

In the sample of cases analysed in this article, the impact of *Barclay* is illustrated by *Vink*<sup>171</sup>. In that case, the employer ‘categorically denied that age was a factor in his decision to dismiss the applicant’.<sup>172</sup> The Federal Magistrate’s Court and, on appeal, the Federal Court of Australia, accepted that denial: ‘[i]t seems to me that, rightly or wrongly, Mr Ottobre believed that the applicant was incompetent when Mr Ottobre decided on 9 November 2011 to dismiss the applicant.’<sup>173</sup> Even if that belief was wrong, it would not affect the quality of the denial. In *Vink*, there was some evidence to support the employer’s belief of incompetence — even if that evidence was later proven to be false.<sup>174</sup> This

may well have weighed heavily in an unfair dismissal claim. ... In a case such as the present, however, where what was alleged was a contravention of s 351 of the *FW Act*, the focus was on the substantial and operative reasons which motivated Mr Ottobre to dismiss Mr Vink. Provided that those reasons did not include Mr Vink’s age, it mattered not that they were based on a mistaken assessment or were not supported by the weight of the evidence.<sup>175</sup>

This was the case even though Mr Vink was likely told that the employer wanted a ‘youthful and vibrant’ culture. The issue was what the employer actually (subjectively) intended:

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<sup>167</sup> Where, ‘if the decision-maker gives evidence that they did not take adverse action “because” of a prescribed ground, and that evidence is accepted, there will not be a breach. Evidence of surrounding circumstances may be relevant, but only to test the veracity of the evidence of the employer’: Anna Chapman, Kathleen Love and Beth Gaze, ‘The Reverse Onus of Proof Then and Now: The *Barclay* Case and the History of the *Fair Work Act*’s Union Victimisation and Freedom of Association’ (2014) 37(2) *University of New South Wales Law Journal* 471, 488–9.

<sup>168</sup> *Ibid* 498.

<sup>169</sup> *Ibid* 489.

<sup>170</sup> *Ibid* 498.

<sup>171</sup> *Vink (FCA)* (n 161) on appeal from *Vink v LED Technologies Pty Ltd* [2012] FMCA 917 (*‘Vink (FMCA)’*).

<sup>172</sup> *Vink (FCA)* (n 161) [26].

<sup>173</sup> *Ibid* [26] quoting *Vink (FMCA)* (n 171) [48]. See also *Vink (FCA)* (n 161) [36]–[38], [42]–[44], [46]–[49].

<sup>174</sup> *Vink (FCA)* (n 161) [45].

<sup>175</sup> *Ibid*.



[I]t is probable that Mr Clerk [the general manager] did tell the applicant that Mr Ottobre wanted a vibrant and youthful culture. However, that is not to say that Mr Ottobre did want a vibrant and youthful culture or that that was his reason for dismissing the applicant.<sup>176</sup>

Thus, the Court's approach indicates that any plausible explanation for dismissal — which does not include a protected ground — will be sufficient to exclude a claim under the *FWA*, and that courts are willing to second-guess employer statements to look for their 'true' motivation. This will operate as a substantial obstacle to successful claims under the *FWA*.

This outcome may be compared with that in the earlier (pre-*Barclay*) case of *Carr*.<sup>177</sup> In that case, the claimant gave evidence that he was told he was dismissed because the third party who was engaging his services did not 'want young blokes working on the wind farms anymore'.<sup>178</sup> The employer denied making this statement and claimed that Mr Carr's dismissal was due to a lack of work, his relative lack of experience, and the relative (lack of) quality of his work. The Court could not determine which account to prefer, and could not 'determine with sufficient certainty whether or not Mr Carr's age was a material and operative factor when Mr Van Kempen decided to terminate Mr Carr's employment'.<sup>179</sup> The employer had therefore 'failed to establish a defence that Mr Carr's termination "was for a reason or reasons that do not include a proscribed reason" for the purposes of s 664 of the Act', and Mr Carr's claim succeeded on this ground.<sup>180</sup> This may reflect the particular wording of s 664 of the *Workplace Relations Act 1996* (Cth), which explicitly did not require the claimant to prove causation, and re-framed causation as a defence, to be proven by the employer:

- (a) it is not necessary for the employee to prove that the termination was for a proscribed reason; but
- (b) it is a defence in the proceedings if the employer proves that the termination was for a reason or reasons that do not include a proscribed reason ...

The framing of this section is arguably clearer than that in s 361 of the *FWA*, which says:

- (1) If:
  - (a) ... it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
  - (b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

<sup>176</sup> *Vink (FMCA)* (n 171) [35]. See also *Farah* (n 161) [94].

<sup>177</sup> *Carr* (n 79).

<sup>178</sup> *Ibid* 312 [13].

<sup>179</sup> *Ibid* 315 [29].

<sup>180</sup> *Ibid*.

Regardless of the similarities or differences between these sections, it is unlikely that the comparatively benevolent interpretation in *Carr* would be adopted in other cases post-*Barclay*.

These issues with causation under the *FWA* were echoed in other jurisdictions. In *Travers*,<sup>181</sup> decided under the *Age Discrimination Act*, the reason for the treatment was ‘because the Board of Studies was dissatisfied with the manner in which Ms Travers supervised the examinations’, not age.<sup>182</sup> In other cases, the employer gave a plausible ‘innocent’ explanation for the claimant’s treatment:<sup>183</sup> age was therefore not the ‘real reason’ for their treatment.<sup>184</sup> As under the *FWA*, an employer’s denial of age discrimination could be sufficient to exclude a claim, particularly in the absence of other supporting material.<sup>185</sup> This reflects the fact that the onus of proof is generally on the claimant in non-*FWA* jurisdictions.<sup>186</sup>

In only one case did the court reject an employer’s ‘innocent’ explanation. In *Lightning Bolt*,<sup>187</sup> the Court rejected the argument that the claimants were dismissed due to a desire for more ambitious employees, as distinct from age discrimination:

Ambition is not necessarily a characteristic of the young, but neither can it be said that they are necessarily devoid of it. There is no inconsistency between desiring to employ people who are ambitious to advance beyond store work and who could be part of a trained pool who could be promoted to other areas as the need arose; and desiring to employ young people.<sup>188</sup>

Thus, the reason was not ‘innocent’. Further, the Court noted that even if there were other reasons for the treatment, this did not invalidate that age was a substantial reason.<sup>189</sup>

Other claimants provided insufficient evidence that the treatment was due to age,<sup>190</sup> meaning the case as to causation was ‘largely based upon speculation’.<sup>191</sup> Difficulties that claimants might encounter with proving causation, particularly in claims relating to recruitment, were acknowledged by the Tribunal in *Kennedy*:

A complainant seeking to establish that age ... played a role in a decision of an interview panel faces an onerous task. The notes (if any) taken by panel

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<sup>181</sup> *Travers* (n 134).

<sup>182</sup> *Ibid* [51]. See also cases decided under the previous s 16 of the *Age Discrimination Act*, which required that age be the ‘dominant’ reason: *Fernandez v University of Technology, Sydney* [2015] FCCA 3432; *Gardem v Etheridge Shire Council* [2013] FCCA 1324; *Thompson* (n 124) 320 [44]–[45].

<sup>183</sup> *YMCA* (n 137) [25]; *Sidhu* (n 122) [17]; *Pignat* (n 119) [35]; *Plancke* (n 122) [28]–[29]; *McKeown v Carcione Nominees Pty Ltd* [1998] WAEOT, [209], [213] (‘*McKeown*’).

<sup>184</sup> *Duncan* (n 135) [70]–[76].

<sup>185</sup> *North v City of Sydney Council* [2001] NSWADT 75, [51] (‘*North*’); *Choong v Bridgestone Australia Ltd* [2009] SAEOT 8, [28]–[29]. See also *Gunn v Electroboard Pty Ltd* [2003] TASADT 7, where the claimant’s evidence was rejected: [50].

<sup>186</sup> *North* (n 185) [51]. That said, the shifting of the onus of proof under the *FWA* (Cth) is not sufficient to address this hurdle: see above n 167 and accompanying text.

<sup>187</sup> *Lightning Bolt* (n 76).

<sup>188</sup> *Ibid* 77165 [12].

<sup>189</sup> *Ibid* 77166 [15]. The finding in this case was likely assisted by the fact some of the employer’s evidence was ‘completely untrue’: at 77166 [17].

<sup>190</sup> *Mooney v Commissioner of Police, New South Wales Police Service (No 2)* [2003] NSWADT 107 (‘*Mooney*’); *Arkley* (n 119) [15], [41], [45].

<sup>191</sup> *Vye* (n 119) [33]. See similarly *Arkley* (n 119) [15], [41], [45]; *Perera* (n 122) [89].

members, even where they survive, are not made available to applicants. The deliberations that led to the panel's final decision are not held in public or recorded. The recollection of panel members is often blurred where a significant time has elapsed since the interview. This is exacerbated where the interviewer sits on many panels, as is often the case in the Public Service. Even where a 'textbook' interview has been conducted, factors other than merit may consciously or otherwise creep into the decision. In short, if a panel has allowed improper factors to contaminate their decision it is extremely difficult for a complainant to establish that this was so. While we acknowledge these practical difficulties, the complainant is not excused from discharging their evidentiary onus.<sup>192</sup>

Thus, this claim failed due to a lack of evidence that age affected the recruitment decisions.<sup>193</sup>

In *McEvoy*,<sup>194</sup> a successful claim, causation was established as the employer failed to counter the claimant's evidence regarding why he was dismissed. This was not due to a lack of opportunity — as the Tribunal noted,

[t]he Board invited Acorn to comment on Mr McEvoy's account of his meeting with Ms Kelly. In a letter dated 22 May 2015, Solicitors for Acorn wrote that Acorn was unable to comment on Mr McEvoy's account as Ms Kelly was 'on leave of absence due to unfitness for work'. The Solicitors wrote that Mr McEvoy was dismissed from his employment due to 'on-going problems with his performance' but did not elaborate. In addition, the Solicitors wrote that Acorn denied 'the allegation that rude jokes, swearing and filthy language were commonplace in its workplace'.<sup>195</sup>

Ms Kelly, who dismissed the claimant, could not be found to give evidence in the proceedings — her employment had also ended, 'subject to the terms of a "confidential settlement"' <sup>196</sup> and she could not be found by a process server to serve a summons to appear.<sup>197</sup> This left a gaping hole in the employer's evidence:

Only Mr McEvoy and Ms Kelly were parties to their alleged conversation on 28 Februray [sic] 2014. In that sense, this is a case of word against word. Mr McEvoy gave sworn evidence and was cross-examined about his account. Ms Kelly, on the other hand, was not called by Acorn due to her unavailability. Instead, an unsworn statement was tendered and admitted in evidence. It is obviously relevant but, given the circumstances, especially the fact that it has not been directly tested, the weight it should receive is difficult to assess. On the other hand, on the face of it, Mr McEvoy presented as a plausible and truthful witness.<sup>198</sup>

It is unclear whether Mr McEvoy's claim would have succeeded had the employer given (any) evidence as to why he was dismissed. Thus, where an employer offers evidence of their motivation (which, of course, would rarely be

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<sup>192</sup> *Kennedy* (n 119) [72].

<sup>193</sup> *Ibid* [119].

<sup>194</sup> *McEvoy* (n 76).

<sup>195</sup> *Ibid* [15].

<sup>196</sup> *Ibid* [29].

<sup>197</sup> *Ibid* [30].

<sup>198</sup> *Ibid* [48].

acknowledged to be discriminatory), it appears that causation will be a difficult — if not insurmountable — hurdle for claimants.

## F *Exceptions*

While it has been hypothesised elsewhere that the wide-ranging exceptions to age discrimination law will preclude many claims in practice,<sup>199</sup> exceptions were raised in only 10 cases in the sample:

- Three cases related to exceptions for statutory provisions;<sup>200</sup>
- One case related to the setting of ‘reasonable and appropriate’ minimum ages by qualifying bodies under s 49ZYG(2) of the *Anti-Discrimination Act 1977* (NSW);<sup>201</sup>
- One case related to exceptions for superannuation fund conditions;<sup>202</sup>
- Five cases related to the inherent requirements of the position;<sup>203</sup> and
- One case related to positive action.<sup>204</sup>

This represents only a small subset of the sample; though, where an exception was relevant, it proved fatal to the claimant’s action in six cases.<sup>205</sup>

## G *Indirect Discrimination*

Indirect discrimination was raised in only a minority of cases (17). Establishing indirect discrimination caused serious issues for claimants, particularly in identifying groups for comparison;<sup>206</sup> and/or their ability to comply;<sup>207</sup> and/or

<sup>199</sup> Blackham, ‘A Compromised Balance?’ (n 7).

<sup>200</sup> *Keech v Metropolitan Health Service (WA)* (2010) 215 FCR 393 (*‘Keech’*) (see the analysis in Blackham, ‘Defining “Discrimination”’ (n 42) 786–7); *Harley v Commonwealth* [2011] FMCA 197 (*‘Harley’*); *Commonwealth v Human Rights & Equal Opportunity Commission* (1999) 57 ALD 623, 626 [15] (*‘Commonwealth v HREOC (Manning)’*).

<sup>201</sup> *Moore v TAB Ltd* (2004) EOC 193-348 (*‘Moore’*).

<sup>202</sup> *Martin v Powerlink Qld* (2005) EOC 193-363 (*‘Martin v Powerlink’*).

<sup>203</sup> *Setchell v Alkira Centre Box Hill Inc* [2009] FMCA 288 (*‘Setchell’*) (though this might be more closely relevant to the claimant’s disability); *Commonwealth v HREOC (Hamilton)* (n 83) 395 [62], 396 [67]–[68]; *Commonwealth v HREOC (Bradley)* (n 83) 233 [29], 234 [32]; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 (*‘Qantas Airways’*); *Khan v South Australia* [2000] SADC 1, [11] (*‘Khan’*).

<sup>204</sup> *Khan* (n 203) [13].

<sup>205</sup> *Keech* (n 200); *Commonwealth v HREOC (Manning)* (n 200); *Moore* (n 201); *Martin v Powerlink* (n 202); *Qantas Airways* (n 203); *ibid*. The application of the inherent requirements exception was rejected in *Commonwealth v HREOC (Hamilton)* (n 83); *Commonwealth v HREOC (Bradley)* (n 83). Two cases were procedural, meaning the exception was not fatal at that particular stage: *Setchell* (n 203); *Harley* (n 200).

<sup>206</sup> *Shirley* (n 119) [58]–[59]; *Kennedy* (n 119) [159]–[160]; *Dewan v Main Roads WA* [2004] WAEOT 7, [13]–[21], [30] (*‘Dewan’*).

<sup>207</sup> *Kennedy* (n 119) [159]–[160]; *Keys* (n 119) [22].

whether the requirement was (un)reasonable.<sup>208</sup> Only one of the 12 successful substantive decisions established indirect age discrimination.<sup>209</sup>

## H Jurisdictional Issues

Jurisdictional issues beset some claimants. Some attempted to bring both *Age Discrimination Act* and *FWA* claims.<sup>210</sup> Others sought to bring claims at both state and federal levels,<sup>211</sup> or to challenge federal legislation under state discrimination law.<sup>212</sup> The correct jurisdiction for bringing a claim is often far from clear. For example, in *B v Naval Reserve Cadets*,<sup>213</sup> part of the alleged conduct occurred on Federal Government property and part of it did not. Further, the Tribunal had to consider whether the Naval Reserve Cadets were an emanation of the Commonwealth, or whether the Commonwealth might be covered by state discrimination legislation. Resolving these questions necessarily entailed further submissions and an additional hearing:

The jurisdictional issue is a complex one and requires consideration of cases which have not been the subject of submissions. It would not be appropriate to determine the jurisdictional issue without the advantage of further submissions. The Tribunal is of the view that the appropriate course is to consider the jurisdictional issue at a later stage if the Commissioner's decision is overturned. The advantage of this course is that the issue may be determined during a preliminary hearing when evidence may be called.<sup>214</sup>

This reflects the complexity of identifying the best jurisdiction in which to bring a claim.

## V Discussion

In sum, then, the cases in this sample demonstrate a wide range of failure points, in both procedural and substantive areas. Based on this sample, it is nearly impossible to establish a claim of age discrimination in court. Of course, the vast majority of age discrimination complaints are resolved through conciliation and mediation before reaching court.<sup>215</sup> Thus, any attempt at quantitative analysis of judicial decisions only offers half (or, more accurately, much less than half) of the full picture of claims.<sup>216</sup> This analysis would therefore benefit from corroboration and triangulation with conciliation statistics. Given the limited information that is released by Australian equality bodies in their annual reports on these detailed

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<sup>208</sup> *Kennedy* (n 119) [159]–[160]; *Dewan* (n 206) [51], [60]–[63].

<sup>209</sup> *Virgin Blue Airlines* (n 98).

<sup>210</sup> *Cavar* (n 108).

<sup>211</sup> *Birch v Wesco Electrics (1966) Pty Ltd* (2012) 257 FLR 237; *Lin* (n 106).

<sup>212</sup> *Shore v Max Employment Solutions* [2016] VCAT 2200, [24] ('*Shore*').

<sup>213</sup> *B v Naval Reserve Cadets* (n 103).

<sup>214</sup> *Ibid* [26].

<sup>215</sup> Blackham and Allen (n 29). In the US, see Schuster and Miller (n 22) 74.

<sup>216</sup> Schuster and Miller (n 22) 74.

issues, this is difficult to do in practice.<sup>217</sup> From this (albeit limited) sample of claims, some thematic observations emerge, related to the demographics of age discrimination claimants, the acceptance of age discrimination in the workplace, the prevalence of poor human resources practices in many workplaces, and the challenges facing young workers.

## A *Claimant Demographics*

The prevalence of older, white male claimants in the sample reveals the potential for tensions between age discrimination law and other protected characteristics:<sup>218</sup> white men are not normally those who are seen as needing protection from discrimination. This potentially raises a fundamental challenge to age discrimination law's perceived legitimacy.

More generally, though, it is debatable why older women are so underrepresented in the sample of cases. This is unlikely to be because older women experience less age discrimination than men: in the AHRC *National Prevalence Survey*, there was no statistically significant difference in the rates at which men (28%) and women (26%) experienced age discrimination in employment.<sup>219</sup> Women were also more likely than men to report that their experience of discrimination affected their self-esteem, mental health or stress levels.<sup>220</sup> Thus, women may experience age discrimination at least as frequently as men, and may experience more severe personal repercussions. Thus, the absence of claims by older women is particularly concerning.

A few possible explanations may be put forward to explain these demographic trends. Older white men may have greater resources than women (both financial and otherwise), increasing their capacity to pursue a claim to court. By contrast, there is increasing recognition that older women are at risk of poverty and poor pension savings,<sup>221</sup> reducing their financial capacity to pursue their legal rights. This is particularly the case for older women in precarious or insecure work arrangements, who are likely to have limited financial resources.

Alternatively, older women may be less likely to identify and rail against discrimination, having experienced discriminatory treatment throughout their working lives. In the UK, Grant's study of women aged over 50 mapped the prevalence of discrimination on the basis of both gender and age against women across the life course, often spanning 30 or 40 years: 'discriminatory practices were

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<sup>217</sup> See the detailed discussion in Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the UK' (2019) 43(2) *Melbourne University Law Review* (advance).

<sup>218</sup> Schuster and Miller (n 22) 74.

<sup>219</sup> AHRC, *National Prevalence Survey* (n 2) 19.

<sup>220</sup> Ibid 53 (Figure 32).

<sup>221</sup> Nicola Heath, 'Aged over 60 and Female? Here's Why You Might Be at Risk of Poverty', *SBS News* (online, 5 December 2017) <<https://www.sbs.com.au/topics/life/culture/article/2017/11/24/aged-over-60-and-female-heres-why-you-might-be-risk-poverty>>.

part of [women's] everyday [work] experiences'.<sup>222</sup> Older women in the study felt that the progress made by equality law was too little, too late to affect their own experiences in work.<sup>223</sup> Drawing on these results, Grant argues that older women internalise discriminatory sentiment and a lack of belief in their own abilities. Thus, there is a 'legacy of negativity based on the dubiety of legislation, past personal experiences and current perceptions'.<sup>224</sup> It is possible that older women in Australia have experienced similar levels of discrimination across their own working lives, meaning they are less likely to complain about old age discrimination should they encounter it.

It may also be that there are simply more older men than women in employment in Australia, meaning men are also more likely to experience discrimination in employment. According to Australian Bureau of Statistics data, and as depicted in Table 4 (below), men had higher workforce participation rates than women for all age groups after the age of 50 in 2016–17 (when this study concluded).

**Table 4:** Australian labour force participation rate by age and gender, 2016–17<sup>225</sup>

Age group (years)	Males (%)	Females (%)
50–54	86.6	77.6
55–59	79.0	67.9
60–64	63.3	49.8
65–69	31.8	21.4
70–74	15.4	8.2
75 +	4.7	1.5

However, the difference in gender workforce participation rates is insufficient to account for the substantial disparity in claiming rates. In this sample, 81 cases (or 75%) featured a male claimant, and only 28 (26%) featured a female claimant.<sup>226</sup> Thus, cases featuring male claimants were three times more likely than those featuring female claimants. The AHRC *National Prevalence Survey* found that those aged between 60 and 64 were most likely to report experiencing age discrimination in employment in the last two years (at 32% of respondents).<sup>227</sup> In this age group, men aged 60 to 64 are only 1.27 times more likely to be in the labour

<sup>222</sup> Diane Grant, 'Older Women, Work and the Impact of Discrimination' in Malcolm Sargeant (ed), *Age Discrimination and Diversity: Multiple Discrimination from An Age Perspective* (Cambridge University Press, 2011) 41, 43.

<sup>223</sup> Ibid 62.

<sup>224</sup> Ibid.

<sup>225</sup> Source: ABS, *Gender Indicators, Australia, Sep 2017* (Catalogue No 4125.0, 19 September 2017).

<sup>226</sup> One case included both a male and female claimant, meaning these numbers do not add to 108.

<sup>227</sup> AHRC, *National Prevalence Survey* (n 2) 18. But cf (n 1) Figure 8.

force than women. The disparity in claiming therefore cannot be explained by workforce participation rates alone, though this may be part of the picture.

Finally, older women may have alternative grounds on which to pursue a discrimination claim, including on the basis of gender or caring responsibilities. Given the woeful success rates for age discrimination claims, it is possible that older women are strategically pursuing claims in other areas of discrimination law. This is a possibility that needs to be examined through further research.

## B 'Casual' Ageism

A number of cases illustrate the normative acceptance of age discrimination in the workplace. For example, some cases opined that discriminatory language might be used to 'save face' for older workers. In *Vink (FMCA)*, the Court suggested that: '[i]t may be that Mr Clerk told the applicant that Mr Ottobre (the managing director) wanted a vibrant and youthful culture because he thought that would be less hurtful than telling the applicant that Mr Ottobre thought he was incompetent.'<sup>228</sup> Similarly, in *Farah*,<sup>229</sup> the Court held that a reference to age in dismissal might have been a 'face saving' excuse to terminate the claimant's employment:

At most, I am prepared to accept that when Mr Ahn first mentioned the possibility that he might decide in the following week to dispense with Mr Farah's full-time services, at least temporarily, he might have made a comment that some staff might 'relate better' to a different manager whom he referred to as a 'younger manager'. However, I doubt whether this would have been said by Mr Ahn with any belief that Mr Farah's age was itself a real impediment to the continuance of his employment. I think it more likely that, if it was said, Mr Ahn made the statement as a 'face saving' excuse, which avoided the need to suggest any more personal failing by Mr Farah, or the need to admit that his doubts about employing Mr Farah went to the foundations of their previous mutual plans to take the café 'up market'.<sup>230</sup>

Other cases held that one-off comments did not mean that age was an operative factor in the claimant's treatment<sup>231</sup> and were not evidence of age discrimination.<sup>232</sup> 'Passing comment' about retirement did not lead to an inference that treatment was due to age.<sup>233</sup> In *Pomplun*,<sup>234</sup> one age-based comment in private, with no evidence of detriment, was held to be unlikely to constitute harassment.

Beyond age-based comments, some decisions accepted that what might be age-based discrimination was actually just good business practice. In *Martin v Donut King*,<sup>235</sup> it was held that a manager reducing a worker's hours, to employ younger

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<sup>228</sup> *Vink (FMCA)* (n 171) [35].

<sup>229</sup> *Farah* (n 161).

<sup>230</sup> *Ibid* [94].

<sup>231</sup> *Silver* (n 161) 446 [32].

<sup>232</sup> *Coote v Commissioner of Police, NSW Police* [2007] NSWADT 128, [11]. See also *Imielska v Director-General, NSW Health* [2012] NSWADT 25.

<sup>233</sup> *Mooney* (n 190) [50].

<sup>234</sup> *Pomplun* (n 120) [7].

<sup>235</sup> *Martin v Donut King* (n 82).



(cheaper) staff on junior rates, and avoid paying a higher rate of pay to an older worker, was not necessarily age discrimination:

It is also relevant to observe that the employer has the responsibility to manage the business in the most efficient and cost effective means and the lawful use of junior rates does not give rise to discrimination. There was no other allegation which went to the issue of age.<sup>236</sup>

This may be compared with the successful unfair dismissal claim in *Gateway Investments*,<sup>237</sup> where the employer's argument that there was no work for the claimant was rejected, due to evidence that the claimant was dismissed at the same time that younger (cheaper) staff were being recruited to work at junior rates of pay,<sup>238</sup> at the point where the claimant became eligible for senior rates of pay.<sup>239</sup> This implied that age was a reason for the dismissal.

These cases, then, illustrate a degree of acceptance of age discrimination in the workplace. It appears that age discrimination law is unsuccessful in practice for addressing this sort of 'casual' ageism: a different approach is required. This is particularly important given the prevalence of ageist jokes and stereotypes in employment.<sup>240</sup>

## C *Poor Human Resources Practices*

The cases illustrate the presence of poor human resources practices in some workplaces. While courts might acknowledge that claimants have been subject to poor practice, it is not within the scope of legislation to address such issues. For example, in *Vink (FMCA)*, the Court noted that:

It seems that Mr Clerk supported the applicant fixing the database, but Mr Ottobre simply wanted the applicant to fulfil his basic bookkeeping function. It seems that the applicant was the victim of a difference of opinion between Mr Clerk, as general manager, and Mr Ottobre, as managing director.<sup>241</sup>

As a result, Mr Vink was dismissed, but bad practice alone was not sufficient to support a claim of age discrimination.

Similarly, in *Arkley*,<sup>242</sup> the Tribunal noted that unfair practices were not necessarily discriminatory:

It is not uncommon for an employer or supervisor to treat an employee unfairly for any number of reasons, none of which have anything to do with discrimination. For example, the employer and/or supervisor may not give proper consideration to an employee's excuses, which he or she considers reasonable, in response to allegations put to that employee. In this case Ms Witt may not have acted properly when disciplining or dismissing Mr Arkley

<sup>236</sup> Ibid [23] (citations omitted). Though Ms Martin's dismissal was still unfair, and her claim was successful on that basis.

<sup>237</sup> *Gateway Investments* (n 100).

<sup>238</sup> Ibid [46].

<sup>239</sup> Ibid [47].

<sup>240</sup> See above n 66 and accompanying text.

<sup>241</sup> *Vink (FMCA)* (n 171) [52].

<sup>242</sup> *Arkley* (n 119).

because of a desire to save money or because she did not wish to trouble herself with Mr Arkley's excuses. Alternatively she might not have considered his excuses to be reasonable. This all might be unfair, but it does not mean Mr Arkley has been discriminated against. A full hearing of this matter might demonstrate that the reasons given for Mr Arkley's change in roster or the termination of his employment were unfair but that in itself is not enough to make out a case of discrimination or prohibited conduct on the basis of age.<sup>243</sup>

Thus, the Commissioner was correct in dismissing the complaint.

Finally, in *McKeown*,<sup>244</sup> the Tribunal was clear that it was not commenting on whether the dismissals concerned were inaccurate or unfair — just whether they were based on age.<sup>245</sup> The employer's argument that the employees who were let go lacked 'flexibility', and that junior cashiers tended to be more flexible, was accepted.<sup>246</sup> This flags issues of intersectionality: while younger women might be 'flexible', older women with caring responsibilities tend to be less flexible. This issue was not pursued in this case, even though all those dismissed were women, and many had caring responsibilities. Age discrimination law therefore presently appears ill-suited for addressing poor human resource practices, though many claims in the sample arose from deficient organisational practices.<sup>247</sup> As *McKeown* shows, there is a need for courts and advocates to interrogate organisational practices more deeply, to consider issues of intersectionality and assess whether poor practices might have disparate impact on particular age groups.

## D Young Workers

The sample reveals a noticeable absence of claims by younger workers: only six cases were brought on the basis of being too young. Those claims that are brought, however, often involve allegations of appalling behaviour and abuse of power. In *Gabryelczyk*,<sup>248</sup> for example, the claimant was told his treatment was 'character building';<sup>249</sup> this included being struck in the face with car keys, trying to touch his scrotum and crotch, being hit on the knee with pliers, having a lit cigarette stubbed out on his arm, having a cigarette lighter held to his neck, being chased through a car park and hogtied, having a lit cigarette flicked into his eye, having his lunch regularly stolen, and being called offensive names.<sup>250</sup> Despite the severity of the behaviour alleged, the claim in *Gabryelczyk* failed, as it was against the employee concerned, not the employer (the claim against the employer had already been conciliated successfully).<sup>251</sup> This case suggests that young workers are in a precarious position, and illustrates the extreme abuses of power that are possible in

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<sup>243</sup> Ibid [41].

<sup>244</sup> *McKeown* (n 183).

<sup>245</sup> Ibid [210]–[211].

<sup>246</sup> Ibid [17], [132], [152]–[153].

<sup>247</sup> In the US, see similarly *Schuster and Miller* (n 22) 74.

<sup>248</sup> *Gabryelczyk* (n 116).

<sup>249</sup> Ibid [27].

<sup>250</sup> Ibid [11]–[20]. 'Hogtied' means having limbs tied together, rendering the person immobile.

<sup>251</sup> Ibid [50]–[51].

the workplace. It also reveals the limitations of age discrimination law for correcting these power imbalances.

## VI Conclusion

The study reported here provides renewed support for existing scholarly critiques of the process and substance of Australian discrimination law, particularly as it relates to time limits under the *FWA*,<sup>252</sup> the comparator requirement at the federal level,<sup>253</sup> causation,<sup>254</sup> and the onus of proof.<sup>255</sup> More particularly, limiting High Court of Australia decisions — such as *Purvis* and *Barclay* — are having a substantial impact in practice on individual claims.

Some of these issues could be addressed by legislative reform. For example, as noted in Part III, the AHRC's *Willing to Work* report recommended a number of areas for review, with a view to amending existing age discrimination laws at the federal level.<sup>256</sup> To the AHRC's recommendations, we could add shifting the onus of proof, though this does not appear to have had much impact in the context of the *FWA*.

Of course, legislative reform will not cure all points of failure: even if, for example, we reviewed the comparator requirement, and replaced it with a test of 'detriment'<sup>257</sup> or unfavourable treatment, some meritorious claimants may still struggle to establish detriment or unfavourable treatment.<sup>258</sup> Thus, even if the comparator requirement was removed, some claims might still fail: this may mean that the claims are of low merit; or may reflect the limits of age discrimination law for addressing 'casual' ageism.

The best way to examine the possible impact of reform in this area is to review claims brought in Victoria or the ACT, where the statute requires unfavourable treatment rather than a comparator. Within this sample, the four claims in Victoria all failed — not due to the comparator requirement, but due to: a lack of discriminatory behaviour and detriment;<sup>259</sup> lack of evidence;<sup>260</sup> being beyond the scope of state legislation;<sup>261</sup> or lack of causation.<sup>262</sup> The case in the ACT,<sup>263</sup> while

<sup>252</sup> AHRC, *Willing to Work* (n 4) 342–3.

<sup>253</sup> See Campbell (n 131); Kate Rattigan, 'Case Note: *Purvis v New South Wales (Department of Education and Training)*: A Case for Amending the *Disability Discrimination Act 1992* (Cth)' (2004) 28(2) *Melbourne University Law Review* 532; Roberts (n 132).

<sup>254</sup> Chapman, Love and Gaze (n 167).

<sup>255</sup> Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579; Jonathan Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535.

<sup>256</sup> See above nn 53–8 and accompanying text.

<sup>257</sup> AHRC, *Willing to Work* (n 4) 336 (Recommendation 50).

<sup>258</sup> Cf Campbell and Smith, who have argued that the unfavourable treatment test could be over-inclusive, meaning claimants may not encounter difficulties on that basis: Campbell and Smith (n 158) 101–2.

<sup>259</sup> *Warehouse Solutions* (n 120) [243]–[244].

<sup>260</sup> *Udugampala* (n 119).

<sup>261</sup> *Shore* (n 212).

<sup>262</sup> *Naidu* (n 121).

<sup>263</sup> *Bloomfield* (n 77).

successful, did not include any detailed discussion of unfavourable treatment or the nature of the discrimination. Thus, at most it can be said that adopting an unfavourable treatment test will address one barrier to bringing a claim of age discrimination.

Even in the absence of legislative reform, more sympathetic and purposive judicial interpretation of existing statutes could do much to promote claimants' prospects of success.<sup>264</sup> This is illustrated, for example, by Chapman, Love and Gaze's comparison between the '*Barclay* approach' and a 'broader approach': where the broader approach is adopted, claimants are far more likely to be successful.<sup>265</sup> Thus, legislative change is not necessarily required in this area, but a more contextual and critical judicial approach to interpreting the law and facts is required.

Similarly, a highly restrictive approach to the comparator requirement, as exemplified by *Purvis* and subsequent case law, does not require legislative reform to address. The artificiality and narrowness of Australian cases on this point can be compared with the Supreme Court of New Zealand age discrimination case of *McAlister v Air New Zealand Ltd*,<sup>266</sup> which related to the demotion of pilots after the age of 60, in keeping with age-based rules in some airspaces like the US. The question for the Supreme Court was whether the comparator should be a pilot under the age of 60; or a pilot under the age of 60 who was unable to fly to destinations like the US (due to visa requirements or other conditions). The Court held that the latter, *Purvis*-style comparator was 'too much'<sup>267</sup> and would 'appear to lead to an obvious result'<sup>268</sup> by artificially ruling out discrimination at an early stage of the inquiry.<sup>269</sup> Thus, a *Purvis*-style comparator would be artificial and failed to reflect a purposive interpretation of the statute.<sup>270</sup> This decision throws the Australian case law into sharp relief: New Zealand courts adopt a dramatically different approach to Australian courts in the selection of a comparator in age discrimination claims. It would be open to the High Court of Australia to adopt a similar approach, without legislative intervention.

More generally, this study highlights the implications of a federal structure, and the non-uniform nature of Australian discrimination law. While particular hurdles (such as highly restrictive time limits) can be avoided by choosing a different jurisdiction, no legal framework appears ideal for claimants: levels of success were uniformly low. Further, choice of jurisdiction can lead to complex decision-making for claimants,<sup>271</sup> which can generate confusion and incorrect choices.

Returning to the original question, it is unclear whether the employment age discrimination claims that progress to court in Australia are inherently weak,

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<sup>264</sup> Indeed, as the *FWA* example shows, a sympathetic approach is required even where apparently generous legislative provisions are in place (such as the shifting of the onus of proof).

<sup>265</sup> Chapman, Love and Gaze (n 167).

<sup>266</sup> [2010] 1 NZLR 153.

<sup>267</sup> Ibid 171 [37] (Elias CJ, Blanchard and Wilson JJ).

<sup>268</sup> Ibid.

<sup>269</sup> Ibid 174 [51] (Tipping J).

<sup>270</sup> Ibid.

<sup>271</sup> Elizabeth Raper, 'Pick Me: Choosing the Right Discrimination Law Forum' (2010) 1 *Workplace Review* 30.

explaining the limited prospect of success. Instead, it is possible that a lack of legal representation, difficulty obtaining evidence and the importance of an employer's subjective intent mean that age discrimination claims are set up to fail.

Overall, the cases reveal the difficulties of addressing age discrimination through individual claims. Even when claims are successful, damages for loss of a chance to be employed are likely to be low.<sup>272</sup> While one successful claim achieved a high damages payout, this reflected the loss of a career,<sup>273</sup> recognising that few older workers will be re-employed after experiencing age discrimination. To achieve meaningful change for older workers requires a different approach. This also reflects the prevalence of poor human resource practices in the sample, including unfair dismissals that could not be challenged in the unfair dismissal jurisdiction, changes to working time and shift allocations, and the growing use of casual contracts. While age discrimination law was often used to address employee grievances — perhaps as a jurisdiction of last resort — it proved a limited tool for addressing poor organisational behaviour. Rather than relying on individuals to address these organisational failings, a more proactive and preventative approach is required. It is time for positive duties to be imposed on Australian employers to address inequality.

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<sup>272</sup> See *Virgin Blue Airlines* (n 98); *McIntyre* (n 115).

<sup>273</sup> *Lightning Bolt* (n 76).



# *In Whose Best Interests? Regulating Financial Advisers, the Royal Commission and the Dilemma of Reform*

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## *Abstract*

Following the Future of Financial Advice reforms, the ‘suitability’ and ‘appropriateness’ focus for financial advice has been relocated and supplemented by a ‘best interests’ focus in s 961B of the *Corporations Act 2001* (Cth). Yet, as the Australian Government’s Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has pointed out, structural issues may often work against best interests being paramount. Further, moves to make the statutory obligation replicate a fiduciary obligation have been resisted in the consultative process that developed s 961B and related obligation sections and any replication is far from clear. Another key issue is the extent to which aspects of the best interests duty are satisfied by a ‘tick a box’ approach. This aspect of s 961B is said to provide ‘safe harbour’ for advisers, yet has been criticised by the Royal Commission as more procedural rather than substantive. However, removing the safe harbour altogether may create more problems than it solves. We argue that a catch-all provision in s 961B(2)(g) preserves substantive flexibility, and caution against any reform that leaves no procedural guidance for financial advisers to anchor their behaviour in fulfilling the best interests duty.

## **I Introduction**

The interests of client, intermediary and provider of a product or service are not only different, they are opposed. An intermediary who seeks to ‘stand in

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more than one canoe' cannot. Duty (to client) and (self) interest pull in opposite directions.<sup>1</sup>

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('*Banking Royal Commission*') has laid bare a number of issues in Australia's multi-billion dollar financial services industry.<sup>2</sup> In an industry covering financial products including savings accounts, mortgages, financial planning and investments, superannuation and insurance, consumers have often turned to financial advisers for assistance in navigating complex products to make informed decisions in clients' best interests.<sup>3</sup> Given the critical role of financial advisers and the contribution of the financial services sector to the economy, Australia has maintained — and tightened, following the Global Financial Crisis ('GFC') — a complex regulatory regime seeking to hold financial advisers accountable.<sup>4</sup> It has been a challenge for Australian legislators and regulators to find an approach that enhances trust and confidence in the financial advice sector and improves the quality of personal advice, while at the same time maintaining reasonably affordable and available advice.<sup>5</sup>

Concerns about investor confidence in financial advisers led the Australian Government to enact the 'best interests' duty and related obligations under the Future of Financial Advice ('FOFA') reforms in 2012. The best interests duty under s 961B(1) of the *Corporations Act 2001 (Cth)* ('*Corporations Act*') specifically requires financial advisers to 'act in the best interests of the client when giving the advice'. Although the concept of 'best interests' is left undefined, s 961B(2), known as the 'safe harbour' provision, provides that financial advisers will satisfy such duty if several steps have been taken. Yet the Banking Royal Commission has questioned the operation of the 'safe harbour' provisions and whether they amount to a tick a box exercise rather than a substantive test.<sup>6</sup> While the aim of these provisions was clearly to improve the quality and reliability of financial advice,<sup>7</sup> questions remain about their operation and effectiveness.

The aim of this article is to appraise the effectiveness of the 'best interests' duty and related provisions, including a review of the latest relevant Federal Court

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<sup>1</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 2–3 ('*Banking Royal Commission Final Report*').

<sup>2</sup> Treasury (Cth), 'The Strength of Australia's Financial Sector', *Backing Australian FinTech* (Web Page) <<https://treasury.gov.au/publication/backing-australian-fintech/the-strength-of-australias-financial-sector>>.

<sup>3</sup> Between 20% to 40% of the Australian adult population use or have used a financial adviser: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Some Features of the Australian Financial Planning Industry: Background Paper 6 (Part A)* (April 2018) 4 <<https://financialservices.royalcommission.gov.au/publications/Documents/features-of-the-australian-financial-planning-industry-paper-6.pdf>>.

<sup>4</sup> See Dimity Kingsford Smith, 'Regulating Investment Risk: Individuals and the Global Financial Crisis' (2009) 32(2) *University of New South Wales Law Journal* 514.

<sup>5</sup> Treasury (Cth), *Key Reforms in the Regulation of Financial Advice: Background Paper 8* (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Background Paper, April 2018) 1 <<https://financialservices.royalcommission.gov.au/publications/Documents/key-reforms-in-the-regulation-of-financial-advice-background-paper-8.pdf>>.

<sup>6</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 177.

<sup>7</sup> Paul Latimer, 'Protecting the Best Interests of the Client' (2014) 29(1) *Australian Journal of Corporate Law* 8. See also Richard Batten and Gail Pearson, 'Financial Advice in Australia: Principles to Proscription; Managing to Banning' (2013) 87 (2–3) *St. John's Law Review* 511.



of Australia judgments and the *Banking Royal Commission Final Report*. The article has several interrelated objectives. First, to assess whether the government's objective of balancing improvements in the quality of advice and providing certainty in application of the law<sup>8</sup> will be achieved by the best interests duty or whether this focuses too much on process rather than substance, principle and outcome of advice.<sup>9</sup> Second, to assess how the duty of financial advisers to act in the best interests of clients might interact with the safe harbour provisions, which appear to give financial advisers a defence against an allegation of misconduct.<sup>10</sup> Third, to consider whether removing the safe harbour provisions would remove the focus on box ticking or whether this may make financial advisers overtly cautious in the way they provide advice or cause greater confusion in determining what behaviour is required for compliance — a point also made by the Australian Securities and Investments Commission ('ASIC') in its 2012 Regulation Impact Statement.<sup>11</sup> Finally, to consider how the best interests and related obligations provisions might ensure a generally principle-based approach — ensuring that financial advisers focus more on the quality and the independence of their advice.<sup>12</sup>

While favouring some reform to the best interests duty, we do see the need to provide some sort of guidance for financial advisers to anchor their behaviour in fulfilling this duty. In this regard, we see elements of a possible harmonised best interests model in that proposed by the United States ('US') Securities and Exchange Commission ('SEC') (see below Part IVB(2)), albeit modified to take account of differing business and corporate cultures and legislative histories, as providing one possible legal framework for Australia's future reform in this regard. We also note that the recently released Financial Adviser Standards and Ethics Authority ('FASEA') code of ethics has taken a principle-based approach by setting out key standards.

Part II of this article maps the developments leading up to the enactment of the best interests duty and outlining other major FOFA provisions. This is followed in Part III by a critical assessment of the best interests duty through the lens of a number of judgments in three recent Federal Court of Australia proceedings. The related obligations that we have referred to will also be briefly considered. Finally, in Part IV we assess some of the policy and regulatory enforcement issues flowing from the contents of *Banking Royal Commission Final Report*, as well as briefly considering best interests in other contexts.

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<sup>8</sup> Chris Bowen (Minister for Financial Services, Superannuation and Corporate Law), 'Overhaul of Financial Advice' (Media Release, 26 April 2010) <<https://ministers.treasury.gov.au/ministers/chris-bowen-2009/media-releases/overhaul-financial-advice>>.

<sup>9</sup> As to process, see Revised Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice) Bill 2011 (Cth), [1.22], [1.23], [1.24], [1.57].

<sup>10</sup> For the view of the Australian Securities and Investments Commission ('ASIC'), see ASIC, *Future of Financial Advice: Best Interests Duty and Related Obligations* (Regulation Impact Statement, December 2012) 6–7 [20], 14 [61]–[67], 15 [69], 24–5 [135].

<sup>11</sup> ASIC (n 10) 10 [36].

<sup>12</sup> *Ibid* 10 [38].

## II What are the ‘Best Interests’ Duty and Related Obligations?

The best interests duty and related obligations are contained in pt 7.7A of ch 7 of the *Corporations Act*, which regulates financial services and financial markets overall. Chapter 7 includes in s 912A the general obligation to provide financial services efficiently, honestly and fairly. Part 7.7 (ss 940A–953C) focuses upon disclosure requirements for licensed financial advisers to retail clients and pt 7.7A (ss 960–68) expands on this with best interests duty and related obligations. Previously, the conduct of financial advisers was regulated by the ‘suitability rule’ under the former s 945A of the *Corporations Act*, as analysed below in Part IIA. Knowing how the suitability rule operated is part of the context of understanding the aims and purposes of the legislature in enacting the best interests duty under s 961 and related obligations under ss 961G, 961H, 961J and 961L of the *Corporations Act*. Those related obligations require financial advisers to give appropriate advice (s 961G), warn clients if the advice is incomplete or inaccurate (s 961H), and prioritise clients’ interests over their own in the event of a conflict (s 961J). Finally, s 961L imposes an overall requirement that the holder of an Australian Financial Service Licence (‘AFSL’) to ‘take reasonable steps’ to ensure their representatives comply with the relevant statutory duties.

It should be noted that both the best interests duty and related obligations, and the suitability rule that preceded it, do not appear to be intended to impose a statutory fiduciary duty on financial advisers<sup>13</sup> — though the Banking Royal Commission noted that, ‘[d]epending on the nature of a client’s interaction with a financial adviser, a general law duty of care may also arise, as may a fiduciary duty.’<sup>14</sup>

### A Regulating Financial Advisers in the Pre-FOFA Era

First introduced by s 191 of the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1985 (Cth)*, the suitability rule, otherwise known as the ‘know your client’ or ‘appropriate advice’ rule, had been the touchstone governing financial advisers in Australia.<sup>15</sup> AFSL holders or their authorised representatives — referred to as ‘providing entities’ — were required to comply with the rule in giving personal advice to retail clients. The purpose of the suitability rule, per the judgment of Edelman J in a landmark pre-FOFA Federal Court case

<sup>13</sup> Stephen Corones and Thomas Galloway, ‘The Effectiveness of the Best Interests Duty — Enhancing Consumer Protection?’ (2013) 41(1) *Australian Business Law Review* 5, 19; Kevin Lindgren, ‘Fiduciary Duty and the Ripoll Report’ (2010) 28(7) *Company and Securities Law Journal* 435, 437.

<sup>14</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 100 [2.7] (‘Banking Royal Commission Interim Report’). See also Pamela Hanrahan, *Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households: Background Paper 7* (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Background Paper, April 2018) 29–37 <<https://financialservices.royalcommission.gov.au/publications/Documents/legal-framework-for-the-provision-of-financial-advice-background-paper-7.pdf>>.

<sup>15</sup> For a detailed account of the background, Andrew J Serpell, ‘Re-Evaluating the Appropriate Advice Rule in light of the Global Financial Crisis’ (2009) 4(2) *University of New England Law Journal* 33.

*Australian Securities and Investments Commission v Cassimatis (No 8)*, was to ensure financial advice was suitable for the client and had a reasonable basis.<sup>16</sup>

The suitability rule imposed three separate, but interrelated, obligations on financial services licence holders (not individual advisers). First, there was an obligation under s 945A(1)(a) of the *Corporations Act* to assess the client's relevant personal circumstances before giving advice. Second, there was an obligation under s 945A(1)(b) to consider and investigate the subject matter of the advice. Third, there was an obligation under s 945A(1)(c) to ensure that the advice is appropriate to the client having regard to that consideration and investigation.

*Cassimatis* shed further light on the interpretation of s 945A — in particular, on the financial adviser's obligations to consider and investigate the subject matter of the advice under s 945A(1)(b) and to provide appropriate advice under s 945A(1)(c).<sup>17</sup> The case related to the collapse of Storm Financial Limited ('Storm') — a financial advice company whose directors were Mr Cassimatis and his wife. ASIC launched legal proceedings against them in the Federal Court, alleging that they breached their duty of care and diligence under s 180(1) of the *Corporations Act* by causing Storm to provide advice through the so-called 'Storm model', which was inconsistent with s 945A(1) among others.

Edelman J held that Mr and Mrs Cassimatis 'should have been reasonably aware that the application of the Storm model would be likely to (and did) cause contraventions of s 945A(1)(b) and s 945A(1)(c)'.<sup>18</sup> A breach of s 945A(1)(b) occurred, as Storm did not give such consideration or conduct such investigation into the subject matter of the advice as was 'reasonable in the circumstances'.<sup>19</sup> In particular, Edelman J took a broad interpretation of 'the subject matter', rejecting the directors' argument that it was limited to the particular product that was the subject of advice.<sup>20</sup>

As for s 945A(1)(c), Edelman J found that the financial advice provided was 'not appropriate to the investors having regard to the consideration and investigation of the subject matter of the advice that ought to have been undertaken'.<sup>21</sup> Despite the requirements to consider personal circumstances, Storm gave the same advice, regardless of each client's circumstances.<sup>22</sup> The interpretation given to the suitability rule by the Federal Court indicates that s 945A imposed a high standard of care in relation to the suitability and appropriateness of advice. Nevertheless, as will be seen, there was still concern in some quarters that the section did not go far enough and was inadequate, with the *Ripoll Report* opining there was no justification for the

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<sup>16</sup> (2016) 336 ALR 209, 316–18 [550], [551], [557] ('*Cassimatis*'). See also Explanatory Memorandum, *Companies and Securities Legislation (Miscellaneous Amendments) Bill 1985* (Cth), 20, 191–3.

<sup>17</sup> *Cassimatis* (n 16) 315–16 [549], 323–4 [592], 348 [729], 368 [818].

<sup>18</sup> *Ibid* 221 [23].

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* 326 [607].

<sup>21</sup> *Ibid* 221 [23]. See also 328 [619].

<sup>22</sup> Evidence to Parliamentary Joint Committee ('PJC') on Corporations and Financial Services, Parliament of Australia, Melbourne, 26 August 2009, 62 (Michael Davison, CPA Australia Ltd), quoted in PJC on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (Report, November 2009) 27 [3.33] ('*Ripoll Report*').

current arrangement where advisers could ‘provide advice not in their clients’ best interests, yet comply with section 945A of the *Corporations Act*’.<sup>23</sup>

In other words, advice could be ‘suitable’, but still not in the client’s best interests, the latter connoting a different and arguably higher standard. Thus, the suitability rule in s 945A would eventually be replaced by the best interests duty in the subsequent reforms, as noted further below.<sup>24</sup>

## **B     *The Best Interests Duty and Related Obligations***

Following the GFC, the Parliamentary Joint Committee (‘PJC’) on Corporations and Financial Services convened to inquire into the ‘issues associated with recent financial product and services provider collapse’, such as Storm and Opes Prime.<sup>25</sup> Chaired by Labor MP Bernie Ripoll, the Committee released its report in November 2009.<sup>26</sup> The *Ripoll Report* identified the need to, among other things:

- (i) improve the standard of advice to increase consumers’ confidence, be it ‘through enhanced legislative requirements about the standard of advice required or enhanced enforcement of existing standards, or both’;
- (ii) ‘better inform customers about the products signed up for’ so that consumers would only buy products that ‘entail a comfortable level of risk’; and
- (iii) ‘ensure that advisers are better informed about the products being sold’.<sup>27</sup>

At the PJC Inquiry, ASIC submitted that there is

a mismatch between the client’s expectation that the adviser is providing a ‘professional’ service (e.g. advice that is in their best interests) and the obligations of the adviser under the *Corporations Act* (that the adviser provides advice that is appropriate to the client and manages conflicts).<sup>28</sup>

ASIC suggested that investors may see advisers as similar to lawyers and accountants in terms of duties and professionalism. On the other hand, industry groups cautioned against imposing an undue legal and administrative burden on financial advisers. Professional Investment Service, for instance, expressed the view that:

Almost every industry has its bad eggs. In my time in the industry, the majority of advisers put their clients’ interests first at all times ... Whilst it is important for the committee to focus on the terrible issues at hand, I would encourage them not to use a sledgehammer to crack a pea ... without quality advice to consumers, they would be left to their own accord and make many, many more costly mistakes.<sup>29</sup>

The *Ripoll Report* recommended the creation of a statutory fiduciary duty for financial advisers, requiring they put the interests of their clients ahead of their own.<sup>30</sup> Acting on the Report, the then Labor Government’s first response in April

<sup>23</sup> Ibid 110 [6.28].

<sup>24</sup> See, generally, Hanrahan (n 14) 64–5.

<sup>25</sup> *Ripoll Report* (n 22) vii.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 30 [3.44].

<sup>28</sup> Ibid 86 [5.69].

<sup>29</sup> Ibid 95 [5.109]–[5.110].

<sup>30</sup> Ibid 150 [7.10] (Recommendation 1).

2010 was to foreshadow a statutory fiduciary requirement for advisers to act in the best interests of their clients, placing their interests ahead of their own.<sup>31</sup> However, key stakeholder groups such as the Australian Financial Markets Association ('AFMA') raised concerns with the proposed provision.<sup>32</sup> The then opposition Coalition responded that 'any reform in this area need[s] to strike the right balance between appropriate levels of consumer protection and ensuring the availability, accessibility and affordability of high quality financial advice'.<sup>33</sup>

In 2012, the FOFA legislation was passed with a statutory best interests duty and related obligations. Before discussing the best interests duty, a brief discussion of the related obligations is useful. Among these is s 961G, which requires advisers to 'only provide the advice ... if it would be reasonable to conclude that the advice is appropriate to the client'. According to the Explanatory Memorandum, s 961G mimics the requirement for advice to be appropriate to the client under the suitability rule, and the process-related elements forming this requirement have been included in the steps of the new best interests duty found in s 961B(2).<sup>34</sup>

Additionally, under s 961H financial advisers are required to warn their clients about the appropriateness of the advice if 'it is reasonably apparent that information relating to the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate'. Section 961J also imposes a 'priority' duty on financial advisers to prioritise their client's interests above their own in cases of conflict of interests. The FOFA reforms also contains a ban on conflicted remuneration and opt-in arrangements under which advice providers must renew their clients' agreement to ongoing fees every two years. Also, while the pre-FOFA suitability rule applies to the 'providing entity', the FOFA reforms expand the best interests and related obligations to cover advice providers.<sup>35</sup>

Section 961B(1) requires an adviser to 'act in the best interests of the client in relation to the advice'. Without defining the concept of 'best interests', s 961B(2) goes on to state that advice providers may satisfy this duty if they have met the safe harbour conditions, which can be summarised as:

- identifying the client's objectives, financial situation and needs (s 961B(2)(a)–(b));
- making reasonable inquiries to obtain complete and accurate information (s 961B(2)(c));

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<sup>31</sup> Bowen (n 8).

<sup>32</sup> The AFMA contended the best interests duty is about the process and '[a]t no point was it inferred or agreed that the outcome of a client following the advice would be an element of the test of whether the advice provider has acted in the client's best interests.': AFMA, Submission to ASIC on *Consultation Paper 182: Future of Financial Advice — Best Interests Duty and Related Obligations* (5 October 2012) <[https://afma.com.au/afmawtr/\\_assets/main/lib90055/o54-12%20asic%20cp%20182%20%20best%20interests%20duty.pdf](https://afma.com.au/afmawtr/_assets/main/lib90055/o54-12%20asic%20cp%20182%20%20best%20interests%20duty.pdf)>.

<sup>33</sup> Mathias Cormann, 'The Way Forward on Financial Advice Laws', (Media Release, Treasury (Cth), 20 June 2014) <<https://ministers.treasury.gov.au/ministers/mathias-cormann-2014/media-releases/way-forward-financial-advice-laws>>.

<sup>34</sup> Explanatory Memorandum, *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011*, 16–17.

<sup>35</sup> *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) sch 1 item 23.

- assessing whether it has the required expertise to advise on the subject matter (s 961B(2)(d));
- conducting a reasonable investigation into the relevant financial products (s 961B(2)(e));
- basing all judgments on the client's relevant circumstances (s 961B(2)(f)); and
- taking 'any other step that ... would reasonably be regarded as being in the best interests of the client' (s 961B(2)(g)).

Such qualifications to the best interests duty have been criticised by some commentators, who argue that the safe harbour clause provides an incentive for financial advisers to focus on the process over the substance or principles of their advice.<sup>36</sup>

On the other hand, the 'catch-all' provision in s 961B(2)(g) has been subject to questions about its necessity and lack of defined meaning. For example, the Law Council of Australia opined that this clause will likely create uncertainty as to the norms of behaviour required by the law.<sup>37</sup>

In response, the Australian Government Treasury indicated that s 961B(2)(g) was designed to discourage the 'tick-a-box' attitude that may otherwise be fostered by the safe harbour clause, and that the new law must balance competing interests.<sup>38</sup>

Similarly, ASIC argued for the inclusion of s 961(2)(g) in order to meet the policy objective to improve the quality of advice, stating:

The stark choice I am drawing is whether or not you want a tick-a-box approach, which you really get very close to if the provision in (g) is removed, or whether you want to transform this into a profession and have people exercising particular judgment in particular cases as other professionals do.<sup>39</sup>

Another issue arising from the introduction of the best interests duty was whether it was equivalent to a fiduciary obligation. Although the *Ripoll Report* recommended the introduction of a fiduciary-like duty, the Law Council of Australia suggested that as currently worded, the best interests duty is 'more akin to the adviser's duty of care at general law rather than to their fiduciary duties'.<sup>40</sup>

The preceding discussion indicates that the best interests duty had a somewhat controversial law-making history, in which issues regarding additional compliance burden and interpretive uncertainty were raised. Given this, the Federal

<sup>36</sup> Gerard Craddock, 'The Ripoll Committee Recommendation for a Fiduciary Duty in the Broader Regulatory Context' (2012) 30(4) *Company and Securities Law Journal* 216.

<sup>37</sup> PJC on Corporations and Financial Services, Parliament of Australia, 'Corporations Amendment (Future of Financial Advice) Bill 2011 and Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011' (Report, February 2012) 49 [4.23], quoting Law Council of Australia Submission <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Completed\\_inquiries/2010-13/future\\_fin\\_advice/report/c04](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2010-13/future_fin_advice/report/c04)>.

<sup>38</sup> PJC on Corporations and Financial Services (n 37) 49–50 [4.26].

<sup>39</sup> Ibid 50 [4.28] (Mr John Price (Senior Executive Leader, Strategy and Policy, ASIC), from Committee Hansard 24 January 2012).

<sup>40</sup> Department of Parliamentary Services (Cth), 'Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011' (Bills Digest No 96 2011–12, 7 February 2012) 6 <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1112a/12bd096](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1112a/12bd096)>.

Court of Australia's first decisions on the best interests duty were highly anticipated. These are examined in the next section.

### III Judicial Consideration of the Best Interests Duty

While compliance with the FOFA provisions has been mandatory since 2013, the best interests duty and related obligations had not been tested until cases brought by ASIC in June 2016. In what follows, we examine the Federal Court's interpretation of these duties in three related cases. We focus on how the Court interpreted the safe harbour and catch-all provisions, and consider whether the decisions provide more certainty for financial advisers while protecting consumers from poor quality advice.

#### A *NSG Services Pty Ltd Proceedings*

NSG Services Pty Ltd ('NSG') held an Australian Financial Services Licence ('AFSL') that permitted it to 'advise retail clients about and deal in life risk insurance and superannuation products'.<sup>41</sup> From time to time, this company employed and engaged persons to offer financial services on its behalf, including Messrs El-Helou, Chenh, Heneric, Trinh and Ozak (collectively 'NSG Representatives'). The former three were each contractors of NSG (defined in s 961A of the *Corporations Act* as 'authorised representatives'); the latter two were NSG's employees.<sup>42</sup>

According to the 'Agreed Statement of Facts', NSG's clientele predominantly consisted of retail clients who received personal financial advice.<sup>43</sup> In advising these clients, NSG Representatives: recommended a superannuation fund for which the client was not eligible; failed to disclose fees properly; rolled over a client's superannuation to other firms without permission; and failed to provide a statement of advice.<sup>44</sup>

Moshinsky J concluded that the NSG Representatives had contravened ss 961B (best interests) and 961G (advisers may only offer advice 'if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client'),<sup>45</sup> with NSG 'automatically' liable under s 961K(2)(b) for such violations by its employee representatives Trinh and Ozak.<sup>46</sup> NSG also breached s 961L for failing to take reasonable steps to ensure its representatives complied with these provisions.<sup>47</sup> The Court accordingly ordered Golden Financial Group Pty Ltd (formerly NSG) to pay penalties of \$250,000 and \$750,000 in respect of contraventions of ss 961K (2) and 961L.<sup>48</sup>

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<sup>41</sup> *Australian Securities and Investments Commission v NSG Services Pty Ltd* (2017) 122 ACSR 47 ('ASIC v NSG (No 1)') 48 [1].

<sup>42</sup> Ibid 54 [23].

<sup>43</sup> Ibid 67 (Appendix [18]).

<sup>44</sup> Ibid 80 [112], 85 [142].

<sup>45</sup> Ibid 48 [6]. See also admissions of contraventions at 67ff (Appendix).

<sup>46</sup> Ibid 55 [32].

<sup>47</sup> Ibid 60–2 [75]–[76]. See also admissions of contraventions at 67ff (Appendix).

<sup>48</sup> *Australian Securities and Investments Commission v Golden Financial Group Pty Ltd (formerly NSG Services Pty Ltd) (No 2)* [2017] FCA 1267 (ASIC v GFG (No 2')) [9], [35].

## **B     *The Wealth & Risk Management Proceedings***

In March 2017, ASIC launched a proceeding against Wealth & Risk Management Pty Ltd ('WRM'), JECA Holdings Pty Ltd ('JECA') and Yes FP Pty Ltd ('Yes FP'), alleging that they operated a cash rebate scheme that breached various provisions of the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'). WRM held an AFSL allowing it to advise retail clients on, and deal in, life risk insurance and superannuation products. WRM engaged its related company, Yes FP, as a corporate authorised representative, who in turn hired WRM authorised representatives to provide personal financial advice to retail clients. An unlicensed entity, JECA, was a marketing/advertising arm of WRM. Mr Fuoco, who directly or indirectly owned these firms and was a director of each of them, was added as the fourth defendant.

The complex cash rebate scheme operated generally as follows: JECA attracted customers with poor credit histories by advertising that it would provide 'fast cash', 'cash now', and 'debt management advice'.<sup>49</sup> To obtain cash payments and/or advice, applicants were required to submit forms detailing salary and superannuation information to JECA, which in turn referred them to WRM authorised representatives. WRM authorised representatives would then provide quotes for insurance (that is, life, total and permanent disability, and income protection insurance). Mr Fuoco would use the quotes to give WRM authorised representatives the indicative amount for a cash rebate and the advice fee.

JECA would then return to the applicant with recommendations that 'it may be appropriate for the applicant to alter their superannuation and insurance (after future consultation with a financial advisor employed by WRM) so as to obtain access to a cash payment' with fees for the financial advice and insurance premiums paid from their superannuation.<sup>50</sup> Meanwhile, JECA would obtain more details about the applicant (for example, financial goals, investment risk profile, superannuation details) and WRM authorised representatives would issue a 'limited statement of advice' typically recommending rearrangement of existing superannuation and insurance to be implemented by Yes FP.<sup>51</sup>

WRM received advice fees, a trailing commission and an upfront commission from the insurance provider for recommending the policies that WRM paid to JECA. JECA then made the cash payment to the client. The average payment from these commissions as 'rebates' totalled approximately \$3,623, with approximately \$5,707 in profit from each client, plus \$517 in ongoing commissions if the insurance policies were maintained.<sup>52</sup>

Moshinsky J found that this scheme incentivised WRM advisers to not act in the best interests of their clients, to give advice that was not appropriate and to not

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<sup>49</sup> *Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd* (No 2) (2018) 124 ACSR 351 361–2 [32]–[37] ('ASIC v WRM (No 2)').

<sup>50</sup> *ASIC v WRM* (No 2) (n 49) 361 [36].

<sup>51</sup> *Ibid* 362 [40].

<sup>52</sup> *Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd* [2017] FCA 477, [27] ('ASIC v WRM (No 1)').



prioritise their clients' interests.<sup>53</sup> Thus, commissions and fees drove their advice, rather than the best interests of the clients. Furthermore, none of the advertisements stated that applicants were required to change their current insurance and/or superannuation arrangements.

Clients' superannuation balances were reduced by between \$2,750 and \$15,663, equating to \$8,085.50 on average.<sup>54</sup> WRM contravened s 961L for failing to take reasonable steps to ensure that its authorised representatives complied with ss 961B, 961G, and 961 J of the Act.<sup>55</sup> On the same facts, WRM also breached s 912A of the *Corporations Act* and s 12CB of the *ASIC Act*, while JECA, Yes FP, and Mr Fuoco violated other relevant provisions.<sup>56</sup>

In the first judgment, Moshinsky J granted an interim injunction to restrain WRM, JECA, and Yes FP from carrying on such activities<sup>57</sup> with the second judgment confirming the breaches. WRM, JECA, and Yes FP were each subject to an 18-year ban restraining them from providing financial services; Mr Fuoco was also subject to an order restraining him from providing financial services for a period of ten years; all defendants ordered to pay penalties: WRM \$2.8 million; JECA, \$2.55 million; Yes FP \$1.8 million; Mr Fuoco \$650,000.<sup>58</sup>

## C The Financial Circle Proceedings

*Australian Securities and Investments Commission v Financial Circle Pty Ltd* was a 'sequel' to the WRM proceedings.<sup>59</sup> After the interim injunction was granted, evidence showed that Mr Fuoco and other individuals established three new companies, which then acquired Financial Circle Pty Ltd ('*Financial Circle*').<sup>60</sup> As a holder of an AFSL and an Australian Credit Licence, Financial Circle adopted a business model similar to that of the defendants in the WRM proceedings (WRM, JECA and Yes FP).<sup>61</sup> However, rather than a cash rebate scheme, it provided loans of between \$2,000 and \$5,000, in conjunction with offering financial advice. Loans were provided on the condition that the applicant: (i) engage its adviser to provide financial advice; (ii) implement such advice, which typically required rearrangements of existing superannuation and insurance; (iii) pay a financial advice

<sup>53</sup> *ASIC v WRM (No 2)* (n 49) 366 [63], 379 [150].

<sup>54</sup> *ASIC v WRM (No 1)* (n 52) [42].

<sup>55</sup> *ASIC v WRM (No 2)* (n 49) 377 [138]. Section 961L of the *Corporations Act* requires that '[a] financial services licensee must 'take reasonable steps to ensure that representatives of the licensee comply with sections 961B, 961G, 961H and 961J'.

<sup>56</sup> JECA violated s 911A of the *Corporations Act* for carrying on financial services without holding an AFSL: *ASIC v WRM (No 2)* (n 49) 367 [67]. JECA also breached s 1041H of the *Corporations Act*, as well as ss 12DA and 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') for making various misleading representations: *ASIC v WRM (No 2)* (n 49) 369 [80]–[81], 370 [85], 371 [99]. JECA, along with WRM and Yes FP, also contravened s 12CB of the *ASIC Act*: *ASIC v WRM (No 2)* (n 49) 373 [118]. Mr Fuoco was found to be knowingly involved in the various contraventions: *ASIC v WRM (No 2)* (n 49) 375 [128].

<sup>57</sup> *ASIC v WRM (No 1)* (n 52) [8]–[9], [64], [69].

<sup>58</sup> *ASIC v WRM (No 2)* (n 49) 356–7 [8], 381 [161], 383 [175].

<sup>59</sup> (2018) 353 ALR 137, 138 [2] ('*ASIC v Financial Circle (No 1)*'). See also (2018) 131 ACSR 484 ('*ASIC v Financial Circle (No 2)*').

<sup>60</sup> *ASIC v Financial Circle (No 1)* (n 59) 138 [2].

<sup>61</sup> *Ibid.*

fee from \$3,000–\$5,500; and (iv) commit to pay annual insurance premiums from their superannuation.<sup>62</sup> None of this information was adequately disclosed to applicants for loans.<sup>63</sup>

The advice fee was a substantial portion of the superannuation of the client.<sup>64</sup> Clients serviced by Financial Circle were, by and large, worse off: superannuation balances of twelve clients, for instance, were ‘immediately reduced by between 5% to 30%, and by between \$5,000 and \$10,000’, with such reductions ‘likely to be an average of \$11,500’ over five years.<sup>65</sup>

Based on the relevant facts, Moshinsky J granted an interim injunction restraining Financial Circle from engaging in the relevant businesses.<sup>66</sup> In the final hearing, O’Callaghan J confirmed that Financial Circle’s advice on insurance and superannuation failed to give priority to the clients’ interests, but otherwise enabled itself and/or its employees to receive commissions and advice fees. The company had therefore contravened its duties to take reasonable steps to ensure its representatives complied with ss 961B, 961G, and 961J, as s 961L requires.<sup>67</sup> O’Callaghan J also granted an order permanently disqualifying Financial Circle from carrying on financial services, and imposed a fine of \$1 million.<sup>68</sup>

## D *Lessons from the Decisions*

ASIC has become more active than ever in dealing with non-compliance with the best interests duty and related obligations in recent years. The Federal Court accepted many of ASIC’s submissions, though several issues remained unresolved.

### 1 *How Did the Court Interpret the ‘Best Interests’ Duty?*

In considering s 961B in *ASIC v NSG (No 1)*, Moshinsky J began by pointing out that the term ‘best interests’ is undefined.<sup>69</sup> Yet, His Honour expressed the view that sub-s (2) operates as a defence for advisers, adding that ‘[i]f the provider can prove that he or she has done each of the seven things in s 961B(2), he or she will have satisfied the best interests duty.’<sup>70</sup> The two parties placed a different emphasis on the relationship between the two provisions. NSG submitted that the duty in s 961B (1) could be satisfied, even if the advice provider did not satisfy the elements in the safe harbour.<sup>71</sup> ASIC accepted this, but contended that

[i]n a ‘real world’ practical sense, s 961B(2) was likely to cover all the ways of showing that a person had complied with s 961B(1) and, in this way, a

<sup>62</sup> *ASIC v Financial Circle (No 2)* (n 59) 488 [9].

<sup>63</sup> *Ibid* 490 [22], 492 [33].

<sup>64</sup> *Ibid* 505 [107].

<sup>65</sup> *ASIC v Financial Circle (No 2)* (n 59) 517 [173].

<sup>66</sup> *ASIC v Financial Circle (No 1)* (n 59) 139 [4]–[5] 159 [99].

<sup>67</sup> *ASIC v Financial Circle (No 2)* (n 59) 508–9 [122]–[135].

<sup>68</sup> *Ibid* 527 [236], 529–30 [236].

<sup>69</sup> *ASIC v NSG (No 1)* (n 41) 52 [17].

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid* 52–3 [18].

failure to satisfy one or more of the limbs of s 961B(2) is highly relevant to the Court's assessment of compliance with the best interests duty.<sup>72</sup>

Moshinsky J noted this difference in emphasis in the relationship between ss 961B(1) and (2), but concluded that it did not appear to be significant.<sup>73</sup>

The Federal Court was largely silent on this issue in the subsequent two cases, though O'Callaghan J reiterated the defence role of s 961B(2) in *ASIC v Financial Circle*.<sup>74</sup> Nevertheless, both cases followed *ASIC v NSG (No 1)*, using the factors of s 961B(2) as a proxy to assess the compliance of s 961B(1). In *ASIC v Financial Circle*, for instance, the Court accepted the expert's report that the various facts (for example, failure to identify the objectives and failure to make reasonable enquiries) indicated the defendant had contravened the best interests duty.<sup>75</sup> What is clear from the above is that while s 961B(1) is the primary obligation, its interpretation can, in practice, be informed by the enumerated factors of s 961B(2). Using s 961B(2) can be, in other words, the primary means of assessing compliance with the primary duty. Thus, it is actually fairly crucial for an AFSL holder to tick these boxes, in order to benefit from the safe harbour.

Intriguingly, however, the safe harbour clause arguably cannot eliminate the legal risk of non-compliance because of the open-ended nature of s 961B(2)(g) requiring 'any other steps that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client ... given the client's relevant circumstances'. If this imposes additional duties, what would they be? How can financial advisers meet this requirement? If, on the other hand, the other six steps are sufficient to ensure compliance with the best interests duty, should this catch-all clause be removed altogether, for the sake of certainty?<sup>76</sup> These issues remain somewhat unresolved. In *ASIC v WRM (No 2)*, evidence was given of such a failure to 'take any other step' as part of a body of expert evidence of failures to satisfy the multiple limbs of the s 961B(2) safe harbour provisions.<sup>77</sup> This body of evidence was noted as supporting the expert's conclusion that there was a failure to act in clients' best interests. The Court did not, however, examine the 'catch all' specifically, so it remains unclear how broadly the Court will interpret the catch-all provision.

On a broad interpretation of s 961B(2)(g), the catch-all clause means that, even if an adviser satisfies the other six steps, its actions could still be found

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<sup>72</sup> Ibid 53 [18].

<sup>73</sup> Ibid 52 [18].

<sup>74</sup> *ASIC v Financial Circle (No 2)* (n 59) 509 [130].

<sup>75</sup> Ibid 496 [52], 498 [67]. See also *ASIC v WRM (No 2)* (n 49) 365 [60]–[61], 373 [113].

<sup>76</sup> On 19 March 2014, the Australian Government introduced the Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014 into Parliament. One of the proposed changes was to remove the catch-all clause of the safe harbour provision. Shortly after, this change was implemented by regulation instead — though the Regulation was then disallowed by the Senate on 19 November 2014. Parts of the Regulation were reinstated by the *Corporations Amendment (Revising Future of Financial Advice) Regulation 2014*, commencing 16 December 2014. On 2 March 2016, a revised Bill was passed as the *Corporations Amendment (Financial Advice Measures) Act 2016* (Cth). That Act did not remove the catch-all: see ASIC, 'FOFA — Background and Implementation' (Web Page) <<https://asic.gov.au/regulatory-resources/financial-services/regulatory-reforms/future-of-financial-advice-fofa-reforms/>>.

<sup>77</sup> *ASIC v WRM (No 2)* (n 49) 366 [62].

inconsistent with the best interests duty. Arguably, the clause could be read as broadly as requiring advisers to show that they exercised sound professional judgment in giving the advice.

Simply put, s 961B(2)(g) seems to operate as a moving target, and thus advisers would be ill-advised to consider their compliance with the best interests duty as simply a box-checking exercise. The open-endedness of the best interests duty, as we see it, demands advisers at least tailor the process undertaken, and the advice given, to fit the particular circumstances of each client. This interpretation is consistent with other scholars' arguments that the 'open-endedness' of the best interests duty test in s 961B(2)(g) 'removes a static and inflexible advice model (box ticking) that may fail to take full account [of] all of the client's relevant circumstances'.<sup>78</sup>

In the *Banking Royal Commission Final Report*, Commissioner Hayne has noted, in relation to the best interests duty, that the current law does not require financial advisers to explain that they are not independent, and that 'the present safe harbour model does not prevent interest from trumping duty'.<sup>79</sup> The Report presented the options of removing or amending the safe harbour provision to prevent the possibility of the advisers' interests trumping their duty to act in the best interests of clients.<sup>80</sup> We will return to this in Part IVC(2) below.

## 2 *The Focus of ss 961B and 961G: Process or Substance?*

Another issue that has emerged concerning the s 961B best interests duty is the focus on the process rather than the substance, principle or outcome in giving the relevant advice. Moshinsky J noted in *ASIC v NSG (No 1)* that while the text of s 961B did not appear 'at first blush' to be about process or procedure, it was accepted by both parties that s 961B is concerned with 'the process or procedure involved in providing advice', while s 961G is concerned with 'the content or substance of that advice'.<sup>81</sup> Without reaching a concluded view, Moshinsky J found support for this formulation of s 961B in that section's context, including 'the language of s 961G, the legislative history, and the legislative materials'.<sup>82</sup> Moshinsky J's observations are consistent with the legislative intent revealed in the Explanatory Memorandum<sup>83</sup> and with

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<sup>78</sup> Latimer (n 7) 20. See also Sean Graham, 'It's an Uncertain Path to Safe Harbour on Best Interests' *Professional Planner* (online, 8 January 2018) <[www.professionalplanner.com.au/2018/01/its-an-uncertain-path-to-safe-harbour-on-best-interests/](http://www.professionalplanner.com.au/2018/01/its-an-uncertain-path-to-safe-harbour-on-best-interests/)>. For the same reason, this catch-all provision was criticised in the Dissenting Report by Coalition Members of the PJC, see Recommendation 6 and associated commentary in: PJC on Corporations and Financial Services, Parliament of Australia, *Dissenting Report by Coalition Members of the Committee* <[www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Completed\\_inquiries/2010-13/future\\_fin\\_advice/report/d01](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2010-13/future_fin_advice/report/d01)>.

<sup>79</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 177 [3.2.4].

<sup>80</sup> *Ibid.*

<sup>81</sup> *ASIC v NSG (No 1)* (n 41) 53 [21].

<sup>82</sup> *Ibid* 54 [21].

<sup>83</sup> The working assumption of the best interests duty is that 'good processes will improve the quality of the advice that is provided. The provision is not about justifying the quality of the advice by retrospective testing against financial outcomes'. Replacement Explanatory Memorandum, *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth) 10 [1.23].

ASIC's stated practice and intentions.<sup>84</sup> The Court again adopted this view in *ASIC v WRM* and *ASIC v Financial Circle*.

In *ASIC v WRM*, for instance, Moshinsky J noted the opinion of ASIC's expert who suggested the need for a compliance framework, including appropriate policies and procedures.<sup>85</sup> His Honour also considered the procedural deficiencies under s 961B.<sup>86</sup> In other words, the Court considered evidence of the adviser's conduct importing the 'process' the adviser followed. In *ASIC v Financial Circle*, the Court noted the expert's opinion condemning process deficiencies and non-compliance with reasonable industry practice,<sup>87</sup> and noted separately both lack of policies and processes and the substantive failure to comply with s 961B and the ss 961G and s 961J obligations.<sup>88</sup>

It is interesting that ASIC's stated view is that ss 961B (best interests), 961G (appropriate advice) and 961J (priority to client's interests) are separate obligations that operate alongside each other and apply every time personal advice is given.<sup>89</sup>

Our analysis of these cases and issues raises a related question: how clear is the distinction between 'process' and 'substance' ('substance' is sometimes also discussed as 'principle' or 'outcome')? While it is, in theory, possible to draw a line between the process of giving advice and the substance or outcome of the advice,<sup>90</sup> it can be problematic in practice. Though it is true that s 961B is more concerned with process, its wording nevertheless incorporates elements that have a direct bearing on the quality of advice. Providers must show that their advice identified the 'objectives, financial situation and needs of the client that were disclosed to the provider' (under s 961B(2)(a)) and that 'all judgments in advising the client' were based on their relevant circumstances (under s 961(2)(f)). Taken together, it appears that advice should be tailored to the needs of the particular client. It is thus likely that advisers who neglect to judge whether the advice given is appropriate, by mechanically treating s 961B as a checklist of process, may find it difficult to prove their compliance with the best interests duty in s 961B, much less the appropriateness duty in s 961G.

In *ASIC v WRM*, Moshinsky J agreed with the expert's opinion, which stated that 34 clients of WRM had received advice that was inappropriate and not in their best interests.<sup>91</sup> His Honour's approach might suggest that the quality of the process undertaken and the quality of advice — two separate focuses in theory — can inform each other in practice. In its Interim Report, the Banking Royal Commission echoed this view. It noted Westpac's acknowledgment that the advice given by its subsidiary's financial adviser was poor, inappropriate and involved a failure to

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<sup>84</sup> *ASIC, Licensing: Financial Product Advisers-Conduct and Disclosure* (Regulatory Guide 175, 14 November 2017) [175.234]–[175.236], [175.252]–[175.254] ('*ASIC RG 175*').

<sup>85</sup> *ASIC v WRM* (No 2) (n 49) 372 [111].

<sup>86</sup> *Ibid* 365–6 [62]–[63], [126].

<sup>87</sup> *ASIC v Financial Circle* (No 2) (n 59) 494–5 [45]–[46], 509 [131].

<sup>88</sup> *Ibid* 508 [122].

<sup>89</sup> *ASIC RG 175* (n 84) [175.235].

<sup>90</sup> Note that the reference to 'outcome' may be somewhat problematic as it may connote a temporal issue and resultant hindsight bias in relation to investments that later prove to be poor performers.

<sup>91</sup> *ASIC v WRM* (No 1) (n 52) [49].

explain that their clients' financial strategies were not viable and not in their best interests (which also involved a failure of process).<sup>92</sup> It is submitted, in short, that while process and substance/principle seem to be different notions, the evidence establishing these two matters can be mutually reinforcing.

### 3 *Compliance, Systemic Risk, and Corporate Culture under the Spotlight*

The NSG, WRM and Financial Circle judgments in relation to s 961B signalled to the financial sector that it must take its obligations more seriously. The Federal Court of Australia's interpretation of s 961L may also have an effect on financial services providers, and will be examined below.

Although ss 961B and 961G are generally applicable to individual advisers, any breaches of them may lead to an AFSL holder's breach of s 961L. Section 961L imposes an obligation on AFSL holders to 'take reasonable steps' to ensure their representatives comply with ss 961B, 961G, 961H or 961J. These provisions have now received detailed judicial consideration in these three cases.

In *ASIC v NSG (No 1)*, Moshinsky J began by noting that s 961L mirrors s 912A(1)(ca), which requires an AFSL holder to take reasonable steps to ensure its representatives comply with financial services laws.<sup>93</sup> His Honour then dealt with a disputed threshold issue.<sup>94</sup> ASIC, in its written submissions, read three tests into s 961L: NSG representatives' breaches of ss 961B and 961G; NSG's failure to take reasonable steps to prevent such breaches; and a causal link between the two.<sup>95</sup> By contrast, NSG argued that s 961L warrants consideration only of the 'reasonableness of the conduct' (that is, the steps taken by NSG), and that it was not necessary to show a contravention of ss 961B or 961G.<sup>96</sup> However, ASIC later submitted it was not necessary for the Court to reach a concluded view on this issue, as ASIC's higher threshold view was met in this case.<sup>97</sup> ASIC further submitted it did not hold a firm position on this point since, 'as a matter of practicality, some form of causal nexus was likely to exist in most cases'.<sup>98</sup> Moshinsky J found it unnecessary to decide and stated that the agreed facts not only 'establish the underlying contraventions of ss 961B and 961G' by NSG representatives, but show 'a causal relationship between the failure by NSG to take reasonable steps and the contraventions of ss 961B and 961G' by the NSG Representatives'.<sup>99</sup> O'Callaghan J, in *ASIC v Financial Circle (No 2)*, elaborated on this issue:

[T]here is nothing in the language of s 961L ... that make[s] actual (or proven) contraventions of the anterior provisions a precondition to a finding of contravention of s 961L in itself. In other words, there can be a failure to take

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<sup>92</sup> *Banking Royal Commission Interim Report* (n 14) vol 2, 179 [3.3.1] (and as to process see 177–8 [3.2.3]).

<sup>93</sup> *ASIC v NSG (No 1)* (n 41) 55 [31].

<sup>94</sup> *Ibid* 56 [36]–[39].

<sup>95</sup> *Ibid* 56 [36].

<sup>96</sup> *Ibid* 56 [37].

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid* 56 [38].

<sup>99</sup> *Ibid* 56 [39].

reasonable steps to procure compliance, even without proof that that failure led to an actual contravention of other provisions.<sup>100</sup>

His Honour's observation suggests that, as a matter of statutory construction, establishing a breach of a s 961L duty is not conditional on a breach of another FOFA provision. Yet, while this could help remove hurdles for ASIC, it raises the next question: what are some of the key factual matters that the Court considered in making the orders?

In *ASIC v NSG (No 1)*, Moshinsky J considered the following factors: the new client advice process, training, monitoring, external auditing, compliance policy, and remuneration.<sup>101</sup> Salient examples of NSG's failures in these areas were that its system for advising new clients 'was designed to be completed quickly'<sup>102</sup> with 'little or no time' for them to reflect upon the advice;<sup>103</sup> inadequate training of representatives about compliance with the best interests and related duties;<sup>104</sup> no internal audits of some of NSG's representatives during the relevant period;<sup>105</sup> failure to act on the pitfalls identified by external review;<sup>106</sup> compliance policies that were 'inadequate and, in many cases, not followed or enforced';<sup>107</sup> certain conflicts-of-interest related policies not updated to reflect the FOFA reform;<sup>108</sup> and remuneration structures directing employees to focus on sales, rather than compliance.<sup>109</sup>

The Court in *ASIC v WRM* and *ASIC v Financial Circle* exhibit similar reasoning. The judgments in both cases referred to the report of an expert, Mr Graham, who stated that 'reasonable steps' to ensure effective compliance with ss 961B, 961G and 961J depended on 'the nature, scale and complexity' of each business.<sup>110</sup> The report then identified that a licensee's compliance framework should at least include guidance on policies addressing relevant FOFA duties, 'a definition of, and commitment to, best interests, client priority and appropriateness', peer-review and escalating procedures, regular and targeted-based supervision, effective ongoing training, effective record-keeping, and training on managing conflicts of interest.<sup>111</sup>

While the decision in *ASIC v NSG (No 1)* rested on the Agreed Statement of Facts to identify various aspects of NSG's non-compliance,<sup>112</sup> the decisions in *ASIC v WRM* and *ASIC v Financial Circle* seemed to focus more on the expert reports. Mr Graham set out guidelines based on 'appropriate industry practice' drawn from his

<sup>100</sup> *ASIC v Financial Circle (No 2)* (n 59) 508 [123].

<sup>101</sup> *ASIC v NSG (No 1)* (n 41) 56–60 [41]–[74].

<sup>102</sup> *Ibid* 57 [45].

<sup>103</sup> *Ibid* 57 [46].

<sup>104</sup> *Ibid* 58 [51].

<sup>105</sup> *Ibid* 58 [53]–[54].

<sup>106</sup> *Ibid* 58–9 [58].

<sup>107</sup> *Ibid* 59 [62].

<sup>108</sup> *Ibid* 59 [65].

<sup>109</sup> *Ibid* 60 [73].

<sup>110</sup> *ASIC v WRM (No 2)* (n 49) 372 [110]; *ASIC v Financial Circle (No 2)* (n 59) 508 [125].

<sup>111</sup> *ASIC v WRM (No 2)* (n 49) 372 [111]; *ASIC v Financial Circle (No 2)* (n 59) 508 [126].

<sup>112</sup> *ASIC v NSG (No 1)* (n 41) 48–9 [8].

professional experience.<sup>113</sup> It remains to be seen, though, how much weight such expert evidence on guidelines will have with the Court in similar cases going forward.

One message is clear: an AFSL holder is expected and required to take legal compliance with the FOFA legislation more seriously, by way of clear instructions, effective training and monitoring, and perhaps more importantly, by avoiding any misaligned incentives and interests. As Moshinsky J highlighted, WRM's cash rebate scheme created 'incentives for advisors to not act in the best interests of their clients, to give advice that is not appropriate and to not prioritise their clients' interests',<sup>114</sup> while NSG's commission-based salary structures created a 'culture in which the best interests and appropriate advice duties were more likely to be overlooked'.<sup>115</sup>

The Federal Court's determination of penalties also reflects its concern about the systemic risks of non-compliance. The Court imposed significant penalties in all three cases. In relation to *ASIC v NSG (No 1)*, it ordered a penalty of \$250,000 for contraventions of s 961K(2) and \$750,000 for contraventions of s 961L.<sup>116</sup> In both *ASIC v WRM* and *ASIC v Financial Circle*, the Court ordered the maximum pecuniary penalty of \$1 million for a breach of s 961L.<sup>117</sup> In all three cases, the Court commented that it regarded the contraventions as 'very serious in nature'.<sup>118</sup> While *ASIC v NSG* involved only breaches of the FOFA provisions, and *ASIC v WRM* and *ASIC v Financial Circle* included breaches of other provisions, the Court's consideration for the penalties followed the same principles.<sup>119</sup>

Moshinsky J considered the following facts and circumstances, among others, when imposing the penalty in *ASIC v WRM*:

- (1) the contraventions were very serious in nature, deliberate, and persisted despite ASIC's involvement;
- (2) the reasonably high likelihood defendants would engage in similar conduct if not prevented from doing so by the Court;
- (3) the failure of defendants to demonstrate good character for the purposes of mitigation and;
- (4) the prevalent and systematic culture of non-compliance.<sup>120</sup>

<sup>113</sup> *ASIC v WRM (No 2)* (n 49) 372 [111]. Mr Graham was a financial services compliance consultant at Assured Support in Sydney. He has also underscored, in another context, the problematic nature of the catch-all provision: see Graham (n 78).

<sup>114</sup> *ASIC v WRM (No 2)* (n 49) 379 [150].

<sup>115</sup> *ASIC v NSG (No 1)* (n 41) 60 [73].

<sup>116</sup> *ASIC v GFG (No 2)* (n 48) [9], [35].

<sup>117</sup> *ASIC v WRM (No 2)* (n 49) 356–7 [8]–[10], 383 [175]; *ASIC v Financial Circle (No 2)* (n 59) 527 [236].

<sup>118</sup> *ASIC v WRM (No 2)* (n 49) 381 [163]; *ASIC v Financial Circle (No 2)* (n 59) 520 [190]; *ASIC v GFG (No 2)* (n 48) [27].

<sup>119</sup> The Court largely followed the principles set out in *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 and *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076, along with established principles of pecuniary penalties laid out in the Australian common law: *ASIC v WRM (No 2)* (n 49) 380–1 [153]–[156]; *ASIC v Financial Circle (No 2)* (n 59) 517 [177]–[179]; *ASIC v GFG (No 2)* (n 48) [18].

<sup>120</sup> *ASIC v WRM (No 2)* (n 49) 381–2 [163]–[171].



These same considerations were discussed in *ASIC v Financial Circle*, with O’Callaghan J commenting that the contraventions were substantially worse and warranted higher penalties than in the NSG proceedings.<sup>121</sup>

In the NSG proceedings, mitigating factors were present: NSG’s conduct was not suggested to involve dishonesty, there was cooperation with ASIC and contrition and NSG’s senior management had been substantially impaired due to a family bereavement in the 12 months leading up to the compulsory implementation of the FOFA provisions.<sup>122</sup>

In considering the defendant’s character as a key factor in determining the appropriate penalty, Moshinsky J in *ASIC v WRM* opined that the cash rebate ‘is not only non-compliant ... but involves the targeting and exploitation of financially disadvantaged and desperate people’.<sup>123</sup> His Honour noted the advice fee and insurance premiums were drawn entirely from customers’ superannuation funds, and the ‘substantial harm’ to customers from the rebate scheme.<sup>124</sup> Moshinsky J found ‘a systemic culture of non-compliance’ in each corporate defendant, condemning WRM, in particular, for its ‘disrespect for the financial services law’,<sup>125</sup> and concluded that WRM’s ‘systemic failures’<sup>126</sup> under s 961L ‘were not merely technical matters; they went to the heart of its business model’.<sup>127</sup> While it is still too early to predict how the Australian Government and society will react to all aspects and ramifications of the Banking Royal Commission, these decisions nevertheless mark a crucial step towards reversing prevailing practices too often driven only by self-interest.<sup>128</sup>

## IV Rethinking Regulatory Strategies in the Post Banking Royal Commission Era

In the *Banking Royal Commission Final Report*, Commissioner Hayne identified six principles for the effective application and enforcement of the law. These were:

- obey the law;
- do not mislead or deceive;
- act fairly;
- provide services that are fit for purpose;
- deliver services with reasonable care and skill; and
- when acting for another, act in the best interests of that other.<sup>129</sup>

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<sup>121</sup> *ASIC v Financial Circle (No 2)* (n 59) 520 [190]–[203], 525 [229].

<sup>122</sup> *ASIC v GFG (No 2)* (n 48) [30]–[34] [48]–[51]. See also *ASIC v Financial Circle (No 2)* (n 59) 525 [229].

<sup>123</sup> *ASIC v WRM (No 2)* (n 49) 381 [166].

<sup>124</sup> *Ibid* 381–2 [167]–[168].

<sup>125</sup> *Ibid* 382 [171].

<sup>126</sup> *Ibid* 382 [172].

<sup>127</sup> *Ibid*.

<sup>128</sup> *Banking Royal Commission Interim Report* (n 14) vol 1, 91 [2.1].

<sup>129</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 8–9 [1.5.1]. The recent decision of the Full Federal Court in *Australian Securities and Investment Commission v Westpac Securities Administration Ltd* (2019) 373 ALR 455 has been highlighted by some commentators as giving a dominant role to the fairness criterion and in a sense converging Commissioner Hayne’s six principles to one predominant legal obligation of fairness: see Michael Pelly, ‘Hayne’s Six Rules for

These principles led to the recommendation that ‘exceptions and carve outs’ be reduced as ‘[t]he more complicated the law, the harder it is to see unifying and informing principles and purposes.’<sup>130</sup>

The sections that follow will examine some of the recommendations of the Banking Royal Commission. We shall reflect on implications that could flow from suggestions to review and possibly abolish the safe harbour clause in s 961B, from the perspectives of both consumer protection and financial advisers. We argue that while removing the safe harbour clause may reduce the complexity of the law and make financial advisers more cautious about their duties towards clients, it may not necessarily lead to an optimal outcome. Imposing a best interests duty without any guiding principles may, as a matter of practice, make it problematic to set the expected behaviour norms for financial advisers. This could arguably defeat the Royal Commission’s intention that such legislation should, ‘as far as possible ... identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter’.<sup>131</sup>

Working on the Royal Commission’s call for reform, we map and assess several possible interpretations of a best interests duty if the safe harbour clause was abolished altogether. We also draw lessons from the US by discussing the practicability of replicating the SEC’s action to impose a ‘best interests’ duty on broker-dealers when giving recommendations to retail clients. To address the best interests duty more holistically, it is crucial to also consider the role of the regulator by taking into account the Banking Royal Commission’s recommendations on ASIC enforcement culture and relevant developments in this area.

## **A    *The Implications of the Banking Royal Commission Recommendation on the Best Interests Duty***

The *Banking Royal Commission Final Report* recommended that the Government should, no later than 31 December 2022 and in consultation with ASIC, review the effectiveness of the measures implemented to improve the quality of financial advice.<sup>132</sup> The review should consider, inter alia, the necessity of retaining the ‘safe harbour’ clause in s 961B(2), with the Royal Commission recommending repeal unless there is a clear justification.<sup>133</sup>

An immediate question arises: why should the safe harbour clause be removed? While some would see the provision as a box-ticking exercise that can undermine the whole purpose of the best interests duty, the potential value in the ‘catch-all’ provision under s 961B(2)(g) should not be overlooked. As seen in the three recent proceedings discussed in Part III above, the Court has left the reading of this clause open and thus subject to judicial interpretation. Considering that this

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Business Become One Legal Obligation: Be Fair’, *The Australian Financial Review* (Melbourne, 1 November 2019) 1.

<sup>130</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 44 [4.1].

<sup>131</sup> *Ibid.* See also vol 1, 42 (Recommendation 7.4).

<sup>132</sup> *Ibid* vol 1, 26 (‘Recommendation 2.3 – Review of measures to improve the quality of advice’).

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

could arguably make financial service advisers vigilant in advising their clients, one wonders if abolishing the safe harbour provision altogether is an overreaction.

If the recommendation to remove the safe harbour provision is to be adopted, it is also not clear how the Federal Court will interpret the ‘best interests’ duty. Rather than defining the ‘best interests’ duty head-on, the Court in the three recent proceedings used the safe harbour provision as a proxy to determine (non)compliance with this obligation. Absent s 961B(2) of the *Corporations Act*, it might be suggested that there would be less context and fewer obvious statutory parameters to aid the Court in its interpretation of acting ‘in the best interests of the client’.

If the safe harbour provisions were removed, interpretations of the meaning of the best interests duty based upon the three cases discussed above may become problematic. This is because in those cases the judges’ analyses rested to a degree on the safe harbour clause.

Absent the safe harbour clause and its influence on the prior decisions, courts may then need to look elsewhere to discover the object and purpose of the surviving bests interest duty. One approach may involve reference to other contexts. For instance, one might draw an analogy with directors’ duty to act in the best interests of the company. A key issue here is whether the Court would apply a subjective or objective standard to the adviser’s conduct and meeting of the standard in determining the best interests of the client. In the context of directors’ duty, courts generally defer somewhat to the directors’ judgment in determining what is in the best interests of the company given the circumstances.<sup>134</sup> Directors are typically given a fair amount of latitude in terms of business decisions and may also have access to the safe harbour defence in the business judgment rule.<sup>135</sup>

It is submitted that this should not be replicated here, as the goal in engaging a financial adviser — to be better off financially — is arguably simpler or narrower than for a director to act in the best interests of the company in running that company. Thus, this subjective standard for directors to act in the best interests of the company is not sufficient to inform the best interests duty under s 961B(1). Instead, a more objective approach should be adopted; whether the decision is one that a reasonable adviser would consider to be in the best interests of a client. This standard could arguably promote accountability, as advisers must consider the best interests of individual clients, make an assessment of the client’s financial position and, if necessary, demonstrate measures that have been taken to achieve this end. This approach may moderate Commissioner Hayne’s criticism in the *Banking Royal Commission Final Report* that advisers are required to make little or no independent inquiry into products.<sup>136</sup>

Another possibility is to align the reading of the best interests duty with the general law fiduciary obligation. Removing the safe harbour clause may remove the box-ticking exercise for financial advisers; instead, they have to look elsewhere to

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<sup>134</sup> There is debate as to how far an objective element should be incorporated into this subjective test. See *Hutton v West Cork Railway Co* (1883) 23 ChD 654, 671; *Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) (2008) 70 ACSR 1, 282 [4608].

<sup>135</sup> *Corporations Act* s 180(2).

<sup>136</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 177 [3.2.4].

anchor the way they advise their clients to discharge such duty. One such anchor is s 961J, which requires financial advisers to place the interests of the clients ahead of their own. By abolishing the safe harbour clause and reading the best interests duty in conjunction with the priority duty, the best interests duty may arguably be made more proscriptive. This might open the door for the court to interpret s 961B(1) similarly to the general law fiduciary duty.

Against this approach, however, are several arguments. First and foremost, it is inconsistent with the FOFA legislative history. Despite the *Ripoll Report* recommending a fiduciary duty, the Government did not use the word ‘fiduciary’ in the subsequent draft legislation and s 961B imposes prescriptive rather than proscriptive obligations on providers of financial advice.<sup>137</sup> In Australian law, a fiduciary obligation is proscriptive rather than prescriptive,<sup>138</sup> whereas the focus of FOFA legislation was not on prohibitions in the adviser-and-client relationship, but on prescribing a level of quality of financial advice. Fiduciary duty, according to Lindgren, is not ‘directly concerned with the quality of advice’, though the quality will be affected in such a relationship.<sup>139</sup>

Second, in contrasting the overall structure of the FOFA legislation with the general law fiduciary duty, we are reminded that these are two parallel duties. While not all advice-givers are fiduciaries, case law reveals that in certain situations where financial advice is held out, given, and relied upon by a client, financial advisers may be considered as fiduciaries.<sup>140</sup> Such a fiduciary duty is, as indicated by Rares J in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)*, subject to the terms of the contract of provision of services.<sup>141</sup> Indeed fiduciary duties as created in equity are fact specific — arising from a finding of fact as to the nature and incidents of the relationship and not otherwise.<sup>142</sup> In this sense, it may be that a statutory fiduciary duty goes against the grain of authority, with it being suggested that it is not a desirable course as it does not grapple with the underlying problems<sup>143</sup> (as well as standing principle ‘on its head’).<sup>144</sup>

This however, is not the case in relation to the best interests duty under s 961B. While the general law fiduciary duty may be discharged if a fiduciary makes full disclosure of the interests and obtains consent,<sup>145</sup> disclosure requirements

<sup>137</sup> *Exposure Draft* (Tranche 1), Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) s 961C. See also Corones and Galloway (n 13) 19.

<sup>138</sup> Batten and Pearson (n 7) 520.

<sup>139</sup> Lindgren (n 13) 437. See also Simone Degeling and Jessica Hudson, ‘Fiduciary Obligations, Financial Advisers and FOFA’ (2014) 32(8) *Company and Securities Law Journal* 527, 536.

<sup>140</sup> *Ali v Hartley Poynton Ltd* (2002) 20 ACLC 1006, 1050; *Aequitas Ltd v Sparad No 100 Ltd* (2001) 19 ACLC 1006, 1062–66 [306]–[325]; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35, 77–9 [282]–[292].

<sup>141</sup> *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1, 323–4 [1235]–[1240] (‘*Wingecarribee*’). Rares J concluded that the adviser’s fiduciary obligations were attenuated by contractual terms, but those terms did not extinguish the fiduciary obligations the adviser owed to the clients: at 209 [776], 211 [783].

<sup>142</sup> Craddock (n 36) 222, citing RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2002) [5-195].

<sup>143</sup> Lindgren (n 13) 436, 442.

<sup>144</sup> *Breen v Williams* (1996) 186 CLR 71, 137.

<sup>145</sup> *Wingecarribee* (n 141) 323–4 [1235]–[1240].

applied to financial advisers through the product disclosure statements and financial services guides,<sup>146</sup> do not discharge the statutory best interests duty. The remedies for breach of the best interests duty and the general law fiduciary duty are also different. There is no evidence in the Report that the best interests duty should be interpreted as aligned with fiduciary duty. That is not to say that the two may not be close in many ways and may not intersect in their practical application.

While it is true that removing the safe harbour clause can moderate criticisms against the box-ticking exercise, it is equally true that it will affect the understanding of the best interests duty going forward. There are questions as to what exactly constitutes the best interests duty. As a matter of practice, the lack of clarity can be rather problematic for financial advisers. It is perhaps due to the complex nature of these issues that the Banking Royal Commission added a qualification to its recommendation: there is no need to abolish the safe harbour clause at this stage, with such removal or amendment dependent in part on ‘how effective ... other changes have been in improving the quality of advice given by financial advisers’.<sup>147</sup> These remarks lead us to reflect on the next question: can the best interests duty be reshaped to improve the quality of advice? We discuss this below.

## **B     *How Far Have We Come and Where Are We Going?***

Although it may be too early to predict the exact future of the best interests duty, some broader points can be made here. First, it is useful to consider how far we have come from the pre-FOFA suitability rule to the best interests duty.

The pre-FOFA suitability rule required the adviser to reasonably assess the client’s relevant personal circumstances, give consideration to and investigate the subject matter of the advice and then ensure that the advice is appropriate to the client. The best interest duty also incorporated ‘reasonableness’ under s 961B(2)(g) by requiring the adviser must have ‘taken any other step that ...would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.’ Section 961B(2)(g) is arguably more onerous in that it captures all steps that would reasonably be considered as being in the best interests of the client.

Arguably, if we revisit the *Cassimatis* proceedings through the lens of FOFA legislation, Mr and Mrs Cassimatis — if they were financial advisers — may still be caught by the best interests duty since they may not be able to show, at a minimum, that they did what was required under s 961B(2)(g). That is: adequately determine the objectives of the advice;<sup>148</sup> conduct an adequate sensitivity analysis evaluating other factors such as the ramifications for the clients;<sup>149</sup> and give reasonable consideration to the income and expenditure of the clients.<sup>150</sup>

This analysis may be even more interesting if the Banking Royal Commission’s recommendation to abolish the safe harbour clause is adopted.

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<sup>146</sup> *Corporations Act 2001* (Cth) pt 7.9.

<sup>147</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 177 [3.2.4].

<sup>148</sup> *Cassimatis* (n 16) 260–61 [261].

<sup>149</sup> *Ibid* 263 [274].

<sup>150</sup> *Ibid* 265 [285].

Arguably, this will make the process and outcome/substance divide much less clear. In an ideal theoretical world it might be that such divide can be conceptually explained by suggesting that the best interests duty focuses on the process, while the appropriate advice duty is concerned about the substance or principles behind the advice. In practice, however, such a distinction is not necessarily so clear. In particular, it is unclear how the Court will interpret the best interests duty without guidance on the standard of care required. It might be argued that, absent the safe harbour provision, the best interests duty could be interpreted similarly to the suitability rule in the pre-FOFA era. However, a clearer exposition of the elements of best interests may need to be legislated in order for such interpretation to be possible. This route may also make the appropriate advice duty under s 961G redundant.

### 1 *Best Interests Duty in Superannuation*

The best interests duty has also been incorporated into s 52 of the *Superannuation Industry (Supervision) Act 1993* (Cth),<sup>151</sup> which applies to trustees of superannuation funds. It is accepted that the statutory provision reflects the general law duties of trustees.<sup>152</sup> Notably, there is no equivalent safe harbour clause for superannuation trustees. Although the application of the best interests duty may vary from that applicable to financial advisers, the interpretation of the provision may nevertheless offer some guidance. In the context of superannuation, the best interests duty is not only concerned with the process of decision-making, but the substance or principles of the decision itself.<sup>153</sup> With respect to a trustee's power to invest, in the seminal English case of *Cowan v Scargill* Megarry V-C noted:

When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.<sup>154</sup>

As noted, it appears that the best interests duty as applied to superannuation trustees is focused on both process and content. This may be different from the approach taken by the FOFA, under which the best interests duty and the appropriate advice duty govern process and content respectively. Thus, it may be open for debate as to whether there can be any future alignment of the best interests duty under the FOFA legislation with that applying to superannuation trustees.

A more crucial issue after the Banking Royal Commission is how to rebalance competing interests when undergoing reform. While removing the safe harbour provision could arguably make financial advisers more cautious about the

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<sup>151</sup> As repealed and substituted by *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) sch 1 item 12.

<sup>152</sup> Justice Mark Moshinsky, 'The Continuing Evolution of the 'Best Interests' Duty for Superannuation Trustees from *Cowan v Scargill* to the Current Regulatory Framework' (Conference Paper, 2018 Superannuation Conference: Order in the House, 9 March 2018) 16.

<sup>153</sup> *Ibid* 18.

<sup>154</sup> *Cowan v Scargill* [1985] Ch 270, 287.

way they provide advice, it is equally true that they may find it difficult to anchor their behaviour against the undefined best interests duty. One option is to rethink the use of a rule-based and principle-based approach. The safe harbour clause appears to be a rule-based approach — though ASIC's 2012 Regulation Impact Statement indicated otherwise.<sup>155</sup>

Such a prescriptive strategy was rejected by the Royal Commission, which specifically ruled out the option to 'amend the provision to be more prescriptive about how an adviser must pursue the client's best interests'.<sup>156</sup> According to the Banking Royal Commission, adopting a more prescriptive approach (for example, requiring advisers to make explicit in the statement of advice the comparisons they have made between products) would be unlikely to work as it only expands on the safe harbour model and that model does not prevent interests from trumping duty.<sup>157</sup>

The question arises: how to design a principle-based regulation to give financial advisers high-level instructions without overly detailed elements?

## 2 *Best Interests in the United States*

In the US, investment advisers have long been subject to fiduciary duties with broker-dealers subject to a less rigorous standard of suitability — a distinction said to be rooted in history, even though both may often perform similar functions.<sup>158</sup> In relation to the latter, the SEC in June 2019 adopted the *Regulation Best Interest: The Broker-Dealer Standard of Conduct* establishing a new standard of conduct for broker-dealers in relation to their recommendations to retail customers on a securities transaction or investment strategy.<sup>159</sup> Like the Australian approach, the US does not define the term 'best interests'. Unlike Australia's detailed, step-by-step safe harbour provision however, the US uses a more principle-based approach by underscoring several key points.<sup>160</sup> A broker-dealer would comply with this duty by

<sup>155</sup> ASIC (n 10) 10 [34].

<sup>156</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 177 [3.2.4].

<sup>157</sup> *Ibid.*

<sup>158</sup> Arthur B Laby, 'Selling Advice and Creating Expectations: Why Brokers should be Fiduciaries' (2012) 87(3) *Washington Law Review* 707.

<sup>159</sup> *Securities Exchange Act of 1934* § 240.15l-1, 17 USC (2019). By way of context, broker-dealers in the US are required to fulfil what is called a 'suitability obligation' considering the clients' personal circumstances, though less onerous than the fiduciary duty imposed on an investment adviser. Investment adviser's fiduciary duty was first read into the *Investment Advisers Act of 1940* 17 USC §275 (1940) by the US Supreme Court in *Securities and Exchange Commission v Capital Gains Research Bureau Inc*, 375 US 180 (1963). The SEC clarifies that the fiduciary duty includes a duty of care and duty of loyalty. The duty of care includes 'the duty to act and to provide advice that is in the best interest of the client' and 'the duty to seek best execution' of a client's transactions, and the 'duty to provide advice and monitoring over the course of the relationship'. See generally US SEC, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers* (Release No IA-5248, 5 June 2019) <<https://www.sec.gov/rules/interp/2019/ia-5248.pdf>>. For criticism of different treatments between these two categories, see Christine Lazaro, 'The Future of Financial Advice: Eliminating the False Distinction between Brokers and Investment Advisers' (2013) 87 (2-3) *St. Johns' Law Review* 381.

<sup>160</sup> Jay Clayton, 'Statement at the Open Meeting on Commission Actions to Enhance and Clarify the Obligations Financial Professionals Owe to our Main Street Investors' (Public Statement, US SEC, 5 June 2019) <<https://www.sec.gov/news/public-statement/statement-clayton-060519-iabd>>.

meeting four specified component obligations: the disclosure obligation, the care obligation, the conflict of interest obligation, and the compliance obligation.<sup>161</sup>

Under the US approach, the care obligation compels the broker-dealer to not act negligently while disclosure and conflict of interest obligations intend to tackle conflicts of interest issues. In particular, the care duty has also adopted an objective approach that a broker-dealer exercises reasonable diligence, care, skill and prudence, and has a reasonable basis to believe that each transaction is in the customer's best interests. Such an approach might, on the one hand, provide some practical anchors for financial advisers and, on the other, moderate the concerns about a mechanical, box-ticking exercise.

The conflict aspect means that the US approach essentially regulates broker-dealers through something like a fiduciary relationship. While the US model seems to offer some promising guidance, it does not square entirely with the rationale underlying the Australian best interests duty, which interacts with, but does not amount to, a general law fiduciary duty.

### 3 *Ethics Code*

The newly released ethics code may be of practical assistance to financial advisers in fulfilling the best interests duty. Following the earlier *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth), the Financial Adviser Standards and Ethics Authority released its legislative instrument for the code of ethics standard, namely, the *Financial Planners and Advisers Code of Ethics* ('*Ethics Code*'), effective from January 2020.<sup>162</sup>

By taking a principle-based approach, among other things, the *Ethics Code* requires financial advisers to 'act with integrity and in the best interests' of clients and 'must not advise, refer or act in any other manner where you have a conflict of interest or duty'.<sup>163</sup> In accordance with recommendations in the *Banking Royal Commission Final Report*,<sup>164</sup> the Code therefore intends to eliminate conflicts of interests, instead of reducing them. However, some have argued that this is impractical, considering that conflicts are prevalent and that advisers manage such conflicts.<sup>165</sup> Arguably, this imposes more onerous duties than the best interests duty under s 961B(1). It is not clear that breach of the relevant standards under the *Ethics Code* can, by itself, also result in contravention of the best interests duty (and relevant obligations), though the *Ethics Code* would serve as some sort of yardstick

<sup>161</sup> US SEC, *Regulation Best Interest: The Broker-Dealer Standard of Conduct* (Release No 34-86031, 5 June 2019) 13–16, 129–360 <<https://www.sec.gov/rules/final/2019/34-86031.pdf>>.

<sup>162</sup> *Financial Planners and Advisers Code of Ethics 2019* ('*Ethics Code*'). The Authority is a statutory body established pursuant to s 921X *Corporations Act* to 'set the education, training and ethical standards of licensed financial advisers in Australia'. See FASEA Standards Authority, 'Financial Adviser Standards and Ethics Authority' (Web Page) <<https://www.fasea.gov.au/>>.

<sup>163</sup> *Ethics Code* (n 162) Standard 2.

<sup>164</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 20 [3.1] (Recommendations 1.2, 1.3).

<sup>165</sup> Tahn Sharpe, 'Code of Ethics 'Impossible to Manage': AFA', *Professional Planner* (online, 5 June 2019) <<https://www.professionalplanner.com.au/2019/06/code-of-ethics-impossible-to-manage-afa/>> quoting Phil Anderson, Head of Policy and Professionalism, Association of Financial Advisers ('AFA').



for financial advisers. The manner in which the standards will be interpreted and enforced is yet to be seen.

### C *Changing Enforcement Culture and New Developments*

The profit-driven culture of financial companies and the sometimes cavalier attitudes of certain financial advisers toward the best interests duty, even several years after the FOFA reforms, indicates that bad corporate culture has persisted.<sup>166</sup> The problems are not confined to regulatory inadequacy, but may also extend to enforcement issues. Clearly law, by itself, is not sufficient to compel advisers to act in the best interests of the client. Something more has to be done to restore the public's trust in the system of financial advice, as suggested by the results of an April 2017 poll that found two-thirds of Australian voters favoured the establishment of a Banking Royal Commission.<sup>167</sup>

While we have discussed the Royal Commission's recommendations to this effect in relation to the best interests duty and related obligations, we now turn to further issues regarding regulatory culture. We then discuss recent government initiatives to hold financial advisers accountable.

First, putting aside issues with the current regulatory design, the lack of optimal enforcement, which undercuts the effectiveness of the law, has been a key theme in the Royal Commission reports. Over the past decade, the improvements made to the law — from the suitability rule to the best interests duties — indicate that financial service providers are already subject to increasingly extensive regulation. As seen in the aforementioned cases and Royal Commission findings, misconduct stemming from corporate culture remains a recurring problem in the Australian financial industry. The Banking Royal Commission supports this view by underscoring the entrenched sales-driven culture, and the confusion of different roles of relevant parties, despite the reforms:

[I]n almost every case, the conduct in issue was driven not only by the relevant entity's pursuit of profit but also by individuals' pursuit of gain, whether in the form of remuneration for the individual or profit for the individual's business. Providing a service to customers was relegated to second place. Sales became all important. Those who dealt with customers became sellers. And the confusion of roles extended well beyond front line service staff. Advisers became sellers and sellers became advisers.<sup>168</sup>

As the Banking Royal Commission suggested, although there are already mechanisms addressing conflicts of interest, 'experience shows that conflicts between duty and interest can seldom be managed; self-interest will almost always trump duty'.<sup>169</sup> The evidence indicated 'how those who were acting for a client too often resolved conflicts... in favour of the interests of the entity, adviser or

<sup>166</sup> Gail Pearson, 'Commission Culture: A Critical Analysis of Commission Regulation in Financial Services' (2017) 36(1) *University of Queensland Law Journal* 155.

<sup>167</sup> Katharine Murphy, 'Most Australian Want Banking Royal Commission — Guardian Essential Poll', *The Guardian* (online, 28 November 2017) <<https://www.theguardian.com/australia-news/2017/nov/27/most-australians-want-banking-royal-commission-guardian-essential-poll>>.

<sup>168</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 1–2 [1.1].

<sup>169</sup> *Ibid* vol 1, 3 [1.1].

intermediary and against the interests of the client'.<sup>170</sup> Such problems go hand-in-hand with the misaligned interests between financial service providers and customers. According to the Royal Commission, the industry has designed its incentive scheme to measure 'sales and profits', rather than 'compliance with the law and proper standards'.<sup>171</sup> Rewards are paid 'regardless of whether the person rewarded *should* have done what they did'.<sup>172</sup> In addition, many financial institutions are so vertically integrated that financial advisers have a tendency to recommend their in-house products.<sup>173</sup>

Further issues beyond regulatory design lie in the role of ASIC as a watchdog to enforce the law effectively. In the *Banking Royal Commission Final Report*, the Commissioner reaffirmed the view that 'the law has not been obeyed, and has not been enforced effectively'.<sup>174</sup> Although agreeing with ASIC that the role of a regulator is 'to oversee advisers' compliance with the law and not to supervise or monitor their work',<sup>175</sup> the Final Report identifies a 'robust approach to enforcement' as a critical element of the disciplinary system.<sup>176</sup> The Final Report underscored, specifically, that despite the existence of various provisions, the breach of which would attract civil penalties (including those addressed herein: ss 961B, 961G, 961H, and 961J), 'these civil penalty provisions have seldom been invoked'.<sup>177</sup>

As ASIC explained to the Banking Royal Commission, 'civil penalty proceedings generally ... "are time-consuming and resource intensive for ASIC"'.<sup>178</sup> Moreover, their outcomes are 'not proximate to the time of the misconduct', while the 'deterrent effect is limited by the (currently modest) size of the available penalty'.<sup>179</sup> While a banning order has thus served as one of the major regulatory tools to govern financial advisers over the past few years,<sup>180</sup> the Commissioner noted that these too are time-consuming and thus focused only on the 'most obviously serious cases'.<sup>181</sup> Further, 'a regulator's choice of regulatory steps should not be treated as requiring exercise of only one form of power'.<sup>182</sup>

While court proceedings might be expensive, as per the Commissioner, 'chosen wisely, cases pursuing civil penalty may be prosecuted to conclusions that lead to a public denunciation of [unlawful] conduct' and such denunciation is a 'deterrent and educative tool that is important to ... proper regulation'.<sup>183</sup> In a similar vein, the Commissioner warned of the role of enforceable undertakings as an

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid vol 1, 2 [1.1].

<sup>172</sup> Ibid (emphasis in original).

<sup>173</sup> ASIC, *Financial Advice: Vertically Integrated Institutions and Conflicts of Interest* (Report 562, 24 January 2018).

<sup>174</sup> *Banking Royal Commission Final Report* (n 1) vol 1, 12 [1.5.2].

<sup>175</sup> Ibid vol 1, 206 [4.1.2].

<sup>176</sup> Ibid.

<sup>177</sup> Ibid vol 1, 207 [4.1.2].

<sup>178</sup> Ibid, quoting Louise Macaulay (Senior Executive Leader of ASIC's Financial Advisers Team).

<sup>179</sup> Ibid.

<sup>180</sup> Ibid, citing Louise Macaulay.

<sup>181</sup> Ibid vol 1, 216 [4.2.2].

<sup>182</sup> Ibid vol 1, 208 [4.1.2].

<sup>183</sup> Ibid.

alternative governance tool, as ‘entities often only acknowledge ASIC’s “concerns” when they accept EUs [enforceable undertakings], rather than acknowledge or accept their breach of specific provisions’.<sup>184</sup> An enforceable undertaking can thus risk being considered ‘no more than the cost of doing business or the cost of placating the regulator’.<sup>185</sup>

The above observations, made by the Royal Commission, point to a matrix of issues about the choice of regulatory tools and their effectiveness for deterrence, which in turn raises a question about ASIC’s capacity and enforcement culture in overseeing the financial service industry appropriately. The Royal Commission has set forward recommendations in this regard. Among these is a ‘why not litigate’ approach to enforcement strategy: ASIC should consider ‘whether a court should determine the consequences of a contravention’ while recognising ‘the relevance and importance of general and specific deterrence’ in deciding whether to use enforceable undertakings.<sup>186</sup> The Royal Commission also called for the creation of a new oversight body for ASIC and its sister agency, the Australian Prudential Regulation Authority (‘APRA’).<sup>187</sup>

While enforcement can always be improved, particularly in relation to big industry players, it is unwise, in our opinion, to consider the litigation approach as a complete panacea. Litigation costs must also be considered, given that external counsel/barristers are usually required and cases can take up to several years.<sup>188</sup> It has since been suggested that a flood of prosecutions will follow the Banking Royal Commission,<sup>189</sup> marking the end of conciliatory financial regulatory culture and the beginning of ‘litigate first’ in Australia.<sup>190</sup> The Australian Financial Complaints Authority (‘AFCA’) has also seen an increase in complaints recently, with the body itself noting that the Royal Commission has brought issues to the

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<sup>184</sup> Ibid vol 1, 441 [3.6].

<sup>185</sup> Ibid vol 1, 442 [3.6].

<sup>186</sup> Ibid vol 1, 37–8 [3.6], 446 (Recommendation 6.2).

<sup>187</sup> Ibid vol 1, 480 (Recommendation 6.14).

<sup>188</sup> Clinton Free, Dimity Kingsford Smith and Hannah Harris, ‘In Defence of ASIC: There’s More to Regulation than Prosecution’, *The Conversation* (online, 15 November 2018) <<https://theconversation.com/in-defence-of-asic-theres-more-to-regulation-than-prosecution-106239>> (arguing that ‘[n]egotiated settlements avoid this extremely expensive and time-consuming use of ASIC’s resources’); Claire Bickers, ‘The One Big Problem with the New War on Banks’, *Daily Mercury* (online, 16 January 2019) <<https://www.dailymercury.com.au/news/banking-royal-commission-asic-calls-in-legal-help-/3623271/>> (noting potential external counsel costs \$1,000 an hour or so if there was a protracted legal fight).

<sup>189</sup> See, eg, Andrew Tillett, ‘Banking Royal Commission Final Report: Government to Extend Federal Court’s Jurisdiction’, *Australian Financial Review* (online, 4 February 2019) <<http://www.afr.com/business/banking-and-finance/banking-royal-commission-final-report-government-to-extend-federal-courts-jurisdiction-20190204-h1ausi>>.

<sup>190</sup> Mark Wilks, ‘A US State of Mind: The End of Conciliatory Financial Regulation in Australia’, *Corrs Chambers Westgarth* (Web Page, 1 May 2019) <<https://corrs.com.au/insights/a-us-state-of-mind-the-end-of-conciliatory-financial-regulation-in-australia>>. See also Andrew Lacey, ‘ASIC Takes Strong Stance to “Litigate First” following the Financial Services Royal Commission’, *Mccabe Curwood* (Article, 29 January 2019) <<https://mccabecurwood.com.au/asic-takes-strong-stance-litigate-first-following-financial-services-royal-commission/>>.

surface and ‘made the Australian public more aware of when things weren’t right with their financial firm’.<sup>191</sup>

Having said that, we note that limited resources can inhibit ASIC’s ability to conduct contested litigation actions though there is evidence that resourcing has been increased since the Royal Commission.<sup>192</sup> Moreover, litigation is just one among several regulatory tools for deterrence, and there must be room for the regulator to determine the optimal strategy in each context. Ultimately, what really matters is not just how to reshape the statutory best interests duty, but how to enhance the role of ASIC to secure compliance without overly deterring profitability in the banking and financial markets. In terms of law reform, history tells us that reforming the law to introduce anything approaching a statutory fiduciary duty has been politically sensitive, raising political concerns about overregulation and broader ramifications for the financial industry and the nation’s economy as a whole.<sup>193</sup>

To date there has been no reform proposal from the Government dealing with the best interests duty of financial advisers. There has been legislative action on a best interests requirement for mortgage brokers,<sup>194</sup> while at the same time, resistance to a fee-for-service proposal for such brokers.<sup>195</sup> This may illustrate the political difficulties of reform in this general area.

Finally, two other recent developments should be mentioned. The *Banking Executive Accountability Regime* (‘BEAR’), in addition to providing for prudential improvements, has imposed obligations on senior banking executives, including non-executive directors, to conduct business with honesty and integrity and with due skill, care and diligence.<sup>196</sup> This extends to ensuring that each of its accountable

<sup>191</sup> Lewis Panther, ‘AFCA Sees Complaints Soar after Royal Commission’, *InFinance* (online) 18 February 2019 <<https://finsia.com/insights/news/news-article/2019/02/18/afca-sees-complaints-soar-after-royal-commission>>, quoting David Locke (AFCA Chief Ombudsman and CEO). See also AFCA, *Six Month Report* (1 November 2018 to 30 April 2019) <<https://www.afca.org.au/news/statistics/six-month-report>>.

<sup>192</sup> ASIC, ‘Budget Estimates, Opening Statement by ASIC Chair James Shipton’ (10 April 2019) <<https://asic.gov.au/about-asic/news-centre/speeches/budget-estimates-opening-statement-asic-chair-james-shipton-10-april-2019>>. See also Katharine Murphy, ‘Budget Will Pump \$550m into Bank Regulators in Response to Royal Commission’, *The Guardian* (online, 23 March 2019) <<https://www.theguardian.com/australia-news/2019/mar/23/budget-will-pump-550m-into-bank-regulators-in-response-to-royal-commission>>.

<sup>193</sup> See for instance: Bevan Shields, ‘Scott Morrison Warns against Rash Response to Banking Royal Commission’, *The Sydney Morning Herald* (online, 31 January 2019) <[www.smh.com.au/politics/federal/scott-morrison-warns-against-rash-response-to-banking-royal-commission-20190130-p50uo1.html](http://www.smh.com.au/politics/federal/scott-morrison-warns-against-rash-response-to-banking-royal-commission-20190130-p50uo1.html)>. See also ‘Abbott Confirms Coalition Roll-back of FoFA’, *Riskinfo* (online, 13 November 2012) <<https://riskinfo.com.au/news/2012/11/13/abbot-confirms-coalition-rollback-of-fofa/>>.

<sup>194</sup> See *National Consumer Credit Protection Act 2009* (Cth) pt 3-5A div 2 inserted by the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth) sch 3 pt 1 with effect from 18 February 2020.

<sup>195</sup> The Banking Royal Commission recommended that the mortgage broker charge the borrower a fee instead of receiving commissions from lenders: *Banking Royal Commission Final Report* (n 1) vol 1, 20 [3.1] (Recommendation 3). The Government backed away from this recommendation in March 2019: Sarah Dankert, ‘Government Ditches Hayne Recommendation on Mortgage Broker Pay’, *The Sydney Morning Herald* (online, 12 March 2019) <<https://www.smh.com.au/business/banking-and-finance/government-ditches-hayne-recommendation-on-mortgage-broker-pay-20190312-p513lp.html>>.

<sup>196</sup> The regime is set out in pt IIAA of the *Banking Act 1959* (Cth) (‘Banking Act’).

persons meets his or her accountability obligations and that each of its subsidiaries that is not an Authorised Deposit-Taking Institution ('ADI') complies as if it were an ADI.<sup>197</sup>

Further, reforms to the *Corporations Act* in 2012 introduced measures to raise the education, training and ethical standards of financial advisers providing personal advice to clients on more complex financial products.<sup>198</sup> In 2018, in the midst of the Banking Royal Commission, the Australian Banking Association, the industry self-regulatory body, also issued a new *Banking Code* that provided greater protections for all bank customers including to 'take extra care when providing banking services to customers who are experiencing vulnerability'.<sup>199</sup>

## V Conclusion

The objective of ensuring that retail clients enjoy a high standard of financial advice from financial services providers has been a preoccupation of Australian legislators and regulators in recent times. The introduction of the best interests duty and related obligations was intended to achieve that end, while providing financial advisers with standards that are clear to assist compliance. However, our analysis of case law and Commissioner Hayne's *Banking Royal Commission Final Report* has shown that the current best interests duty and the related obligations are complex, with numerous exceptions and qualifications. Due to its complexity, the current law may, in our view, fail to expressly identify the fundamental norms of behaviour that are expected of financial advisers.

Turning our attention to the Final Report's recommendation to review and possibly abolish the safe harbour clause, we first note from the recent judgments that

<sup>197</sup> Australian Prudential Regulation Authority ('APRA'), *Implementing the Banking Executive Accountability Regime* (Information Paper, 17 October 2018) 8. The BEAR came into effect from 1 July 2018. According to the Explanatory Memorandum, the objective of the BEAR is to 'improve the operating culture of ADIs and increase transparency and accountability across the banking sector': Explanatory Memorandum, Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (Cth) 17 [1.44]. By setting out accountability obligations in the *Banking Act*, APRA may impose penalties of up to 1 million penalty units on the ADI and may apply to the Federal Court to have a director, senior manager or auditor disqualified from being or acting in that position: Explanatory Memorandum, Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (Cth) 12. More recently, the Treasury proposed to extend the BEAR regime to adopt the 'Financial Accountability Regime' to apply to all other APRA-regulated entities, including all general and life insurance licensees, all private health insurance licensees, all Registrable Superannuation Entity licensees, and licensed non-operating holding companies: Treasury (Cth), *Implementing Royal Commission Recommendations 3.9, 4.12, 6.6, 6.7 and 6.8 Financial Accountability Regime* (Proposal Paper, 22 January 2020) <<https://treasury.gov.au/sites/default/files/2020-01/c2020-24974.pdf>>.

<sup>198</sup> The *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth) provides that financial advisers must have a relevant bachelor or higher degree, pass an exam, meet continuing professional development requirements each year, complete a year of work and training and comply with the Ethics Code. From 1 January 2019, only financial advisers who meet the new standards can call themselves a 'financial adviser' or 'financial planner': ASIC, 'Professional Standards for Financial Advisers' (Web Page) <<https://asic.gov.au/for-finance-professionals/afsl-licensees/professional-standards-for-financial-advisers/>>.

<sup>199</sup> Australian Banking Association, 'New Banking Code' <<https://www.ausbanking.org.au/campaigns/new-banking-code/>>.

the open-ended nature of the catch-all provision in s 961B(2)(g) may help to moderate the concerns of the box-ticking exercise. Moreover, we caution that abolishing the safe harbour provision may create more uncertainties in interpretation. Such an outcome might be counterproductive. There is much to be said for the Royal Commission's suggestion of the need to simplify the law and in this article we have contended that the best interests duty should be mainly principle-based. In this regard, we point to the US SEC's proposed approach to setting the norms of conduct expected from broker-dealers to fulfil their obligation to act in the best interests of their retail clients when giving recommendations. Yet, while the US model seems promising in that it provides principle-based guidance to financial advisers, it is also apparent that Australia's FOFA legislation has already taken a somewhat different path. The US approach does not neatly square with our current system in that the latter might be seen as being less analogous with fiduciary principles. Another approach is to utilise the FASEA *Ethics Code* as a supplement for financial advisers to anchor their behaviour. Arguably, though, the scope of the *Ethics Code* is broader than s 961B and related provisions, with such interactions yet to be tested and clarified.

Clearly, improving public confidence in the financial industry requires regulators to pursue optimal enforcement of the law. Although there has been criticism of ASIC and of APRA by the Royal Commission and in some popular media, we advocate for a holistic review of regulatory provisions and enforcement strategies by considering the institutional capacities and resources, rather than blaming either of these regulators. We note, in particular, that the Government has already taken a multifaceted approach through measures like *BEAR* and the *Ethics Code*. Along with continuing judicial exposition and clarification of the duties, together, these efforts will hopefully help improve the quality of financial advice and regain the public's trust in our financial services industry.

# The New Psychology of Expert Witness Procedure

Jason M Chin,\* Mehera San Roque† and Rory McFadden‡

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## Abstract

Can procedural reforms effectively regulate expert witnesses? Expert procedures, like codes of conduct and court-appointed experts, remain controversial among academics and courts. Much of this discussion, however, has been divorced from the science of the reforms. In this article, the authors draw from emerging work in behavioural ethics and metascience that studies procedures analogous to those that are being used in courts. This work suggests that procedures can be effective, as they have been in science, if directed at key vulnerabilities in the research and reporting process. The authors' analysis of the metascience and behavioural ethics literature also suggests several nuances in how expert evidence procedure ought to be designed and employed. For instance, codes of conduct require specific and direct wording that experts cannot interpret as ethically permissive. Further, drawing on a recent case study, courts have an important role to play in establishing a culture that takes codes as serious ethical responsibilities, and not simply as pro forma requirements.

## I Introduction

In response to the threat of partisan expert witnesses, legal systems have developed a variety of procedural mechanisms (for example, expert codes of conduct, concurrent evidence, and court-appointed experts) to help manage experts and maintain public trust in the courts.<sup>1</sup> These procedures have inspired considerable academic and professional debate, and uneven adoption by courts.<sup>2</sup> However, this

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<sup>1</sup> See Gary Edmond, 'After Objectivity: Expert Evidence and Procedural Reform' (2003) 25(2) *Sydney Law Review* 131 ('After Objectivity'); David Paciocco, 'Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts' (2009) 34(2) *Queen's Law Journal* 565; Ian Freckelton et al, *Expert Evidence and Criminal Jury Trials* (Oxford University Press, 2016) 52–64. These reforms have also been inspired by the desire to make proceedings more efficient and cost effective, see New South Wales Law Reform Commission ('NSWLRC'), *Expert Witnesses* (Report No 109, June 2005) 40–41.

<sup>2</sup> See *ibid.* Compare the reluctance to enforce a code of conduct in *Chen v The Queen* (2018) 97 NSWLR 915 ('Chen'), with the earlier, stricter approach in *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2002] NSWSC 980 ('Cassegrain').

discussion has been almost entirely uninformed by empirical research.<sup>3</sup> In contrast with this experience in law, several sciences are enthusiastically enacting procedural reforms, which are being robustly tested and which rely on a large body of psychological research.<sup>4</sup> This new area of metascientific and psychological research provides a novel perspective on procedural reform, suggesting such reform can meaningfully contribute to the regulation of expert witnesses. It also suggests how procedures ought to be designed and implemented. In this article, we explore that connection and, in doing so, the possibilities and limits of expert witness procedure.

In law, procedural reform aimed at expert partisanship has been controversial, garnering professional and academic support,<sup>5</sup> but also sceptical and critical commentary.<sup>6</sup> In particular, the critics have pointed out that the focus on individual expert partisanship promotes a narrow understanding of current problems with expert evidence,<sup>7</sup> and also that expert procedures were designed without the benefit of empirical testing and may have perverse effects.<sup>8</sup> Moreover, in forensic science specifically, partisanship may be a less pressing concern than the fact that many practices have not been demonstrated to actually work.<sup>9</sup>

We seek to develop this discussion by highlighting an emerging corner of metascientific research (that is, the scientific study of science itself) that examines analogous procedural reform in science. These new procedures — grounded in the psychological study of ethical behavioural — have responded to a growing concern from many fields that many published studies cannot be reproduced by independent researchers.<sup>10</sup> Such reforms include procedural modifications to the way scientists

<sup>3</sup> See Paul Michell and Renu Mandhane, 'The Uncertain Duty of the Expert Witness' (2005) 42(3) *Alberta Law Review* 635, 663: 'One common element of the external controls discussed below is that they remain largely untested'.

<sup>4</sup> Marcus R Munafò et al, 'A Manifesto for Reproducible Science' (2017) 1(1) *Nature Human Behaviour* 1; Tom E Hardwicke et al, 'Calibrating the Scientific Ecosystem through Meta-Research' (2020) 7 *Annual Review of Statistics and its Application* (advance); Jennifer K Robbennolt and Jean R Sternlight, 'Behavioral Legal Ethics' (2013) 45(3) *Arizona State Law Journal* 1107, 1116–24.

<sup>5</sup> Justice Peter McClellan, 'New Method with Experts — Concurrent Evidence' (2010) 3(1) *Journal of Court Innovation* 259; Paciocco (n 1); *Caruana v Darouti* [2014] NSWCA 85, [123].

<sup>6</sup> Gary Edmond and Mehera San Roque, 'Just(.) Quick and Cheap? Contemporary Approaches to the Management of Expert Evidence' in Michael Legg (ed) *Resolving Civil Disputes* (LexisNexis, 2016) ch 7; Edmond, 'After Objectivity' (n 1); GL Davies, 'Court Appointed Experts' (2005) 5(1) *Queensland University of Technology Law and Justice Journal* 89; Michell and Mandhane (n 3); Justice Garry Downes, 'Problems with Expert Evidence: Are Single or Court-appointed Experts the Answer?' (2006) 15(4) *Journal of Judicial Administration* 185.

<sup>7</sup> Edmond and San Roque (n 6).

<sup>8</sup> Edmond, 'After Objectivity' (n 1); Michell and Mandhane (n 3) 663–71.

<sup>9</sup> Gary Edmond, 'Forensic Science Evidence and the Conditions for Rational (Jury) Evaluation' (2015) 39(1) *Melbourne University Law Review* 77. See also Emma Cunliffe, 'A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence' in Paul Roberts and Michael Stockdale (eds), *Forensic Science Evidence and Expert Witness Testimony: Reliability through Reform?* (Edward Elgar 2018) 310.

<sup>10</sup> See Francis S Collins and Lawrence A Tabak, 'Comment: NIH Plans to Enhance Reproducibility' (2014) 505(7485) *Nature* 612. Moreover, the research underpinning these reforms understands what it means to be 'biased' or 'self-serving' in more nuanced ways than has traditionally been the case in the legal context. For a detailed account of the psychology of bias in the context of judges and judging more generally, see Gary Edmond and Kristy A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82(4) *Modern Law Review* 633 ('Just Cognition').



typically see their findings reviewed by others and published. Importantly, these reforms have received empirical testing demonstrating they often work and have been endorsed by respected scientific bodies, which may increase their ethical and psychological force.<sup>11</sup> As we will discuss below, these insights from metascience help provide a roadmap for procedural reform in courts. Expert codes of conduct may especially benefit from recent research in metascience.

Our emphasis on codes of conduct — a procedural reform that spans civil and criminal trials in New South Wales ('NSW') — makes our analysis necessarily broad. That said, we recognise that criminal and civil litigation engage different policy considerations and practicalities (for example, the recent emphasis on efficiency in civil litigation).<sup>12</sup> As to the latter, criminally accused parties frequently cannot afford their own expert witnesses and must rely on the expert proffered by the Crown. So, in the criminal context, robust expert procedure may be especially important. Indeed, we will focus on criminal cases in our legal analysis.<sup>13</sup> Any application of our suggestions should mind the significant policy gap between civil and criminal cases.

In Part II, we briefly set the scene with some of the most significant procedural reforms that have been introduced to manage the presentation, form and content of expert evidence and expert reports. Part III introduces new research in metascience and behavioural ethics (that is, the psychological study of the situational factors that influence ethical behaviour) that founds a procedural reform movement in science. As we discuss, these reforms are being eagerly adopted in many scientific fields. Part IV then begins the discussion about how revelations from metascience and behavioural ethics could be leveraged to improve expert evidence procedure, putting them on firmer (meta)scientific footing. In Part V, we conclude with some limitations that can be expected of even the most scientifically grounded expert procedural reforms.

## II Legal Responses to the Problem of Expert Bias

The design and implementation of expert witness procedural rules and mechanisms need to be situated within the broader context of the admissibility rules and more conventional trial safeguards that also seek to regulate expert evidence. Admissibility regimes, whether restrictive or permissive, have not generally arisen or been designed to explicitly address problems of expert bias. Further, Australian courts have typically refrained from demanding that expert evidence be demonstrably reliable and adversarial safeguards such as cross-examination are not able adequately to fill this gap. This suggests there is a clear role for expert procedure — if carefully instituted and enforced — in managing expert partisanship and also in helping to address wider concerns relating to reliability and factual rectitude.

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<sup>11</sup> Lucy Turner et al, 'Does Use of the CONSORT Statement Impact the Completeness of Reporting of Randomised Controlled Trials Published in Medical Journals? A Cochrane Review' (2012) 1 *Systematic Reviews* 60; BA Nosek et al, 'Promoting an Open Research Culture' (2015) 348(6242) *Science* 1422.

<sup>12</sup> Edmond and San Roque (n 6).

<sup>13</sup> *Chen* (n 2); *R v Warwick* (No 33) [2018] NSWSC 1219 ('*Warwick*').

The rules of admissibility currently play a minimal role in limiting the admission of opinion evidence from witnesses designated as ‘experts’.<sup>14</sup> The exception to the opinion rule in the *Uniform Evidence Law* (‘UEL’) requires that the expert possess, ‘specialised knowledge’ based on ‘training, study or experience’, and that the opinion is based on that knowledge.<sup>15</sup> However, while some decisions have rejected an expert’s evidence on the grounds that the expert has not demonstrated a connection between their opinion and their ‘specialised knowledge’, these decisions have not addressed, at a more fundamental level, questions of reliability of expert opinion.<sup>16</sup> Rather, Australian courts have resisted reading into s 79 a requirement that expert opinion be shown to be reliable, explicitly rejecting this argument in several cases.<sup>17</sup>

The light touch apparent in the application of s 79 is matched by the weakening of the protection offered by ss 135–7 of the *UEL*. These sections purport to allow the trial judge to exclude evidence where the probative value of the evidence is outweighed by the danger of unfair prejudice to the accused. Recently, however, the High Court of Australia in *IMM v The Queen* seemed to make it difficult for a trial judge to reject expert opinion evidence for lack of information about its reliability.<sup>18</sup> In short, the High Court resolved conflicting appellate case law in NSW and Victoria by holding that the probative value of evidence (including its reliability) should be taken ‘at its highest’ for the ss 135–7 calculus.<sup>19</sup> While the applicability of *IMM* to scientific evidence has not been conclusively established, at least one appellate decision hesitantly applied it to evidence it would have admitted anyway.<sup>20</sup>

<sup>14</sup> The deficiencies in the application of the current rules have been canvassed elsewhere. See, eg, Gary Edmond and Mehera San Roque, ‘Before the High Court: *Honeysett v The Queen*: Forensic Science, “Specialised Knowledge” and the Uniform Evidence Law’ (2014) 36(2) *Sydney Law Review* 323; Rachel A Searston and Jason M Chin, ‘The Legal and Scientific Challenge of Black Box Expertise’ (2019) 38(2) *University of Queensland Law Journal* 237.

<sup>15</sup> *Uniform Evidence Law* (‘UEL’) s 79. In the majority of Australian jurisdictions, the admissibility of expert evidence is now regulated via ss 76–80 of the *UEL*. The *UEL* is incorporated into the laws of the Commonwealth (*Evidence Act 1995* (Cth)), the Australian Capital Territory (‘ACT’) (*Evidence Act 2011* (ACT)), NSW (*Evidence Act 1995* (NSW)), the Northern Territory (*Evidence (National Uniform Legislation) Act 2011* (NT)), Tasmania (*Evidence Act 2001* (Tas)) and Victoria (*Evidence Act 2008* (Vic)), as well as Norfolk Island (*Evidence Act 2004* (NI)). Queensland, Western Australia and South Australia have maintained a common law of evidence, supplemented by local legislation: see Searston and Chin (n 14). On the *UEL* reforms generally, see Jeremy Gans, Andrew Palmer and Andrew Roberts, *Uniform Evidence* (Oxford University Press, 3<sup>rd</sup> ed, 2019).

<sup>16</sup> *Honeysett v The Queen* (2014) 253 CLR 122; *R v Tang* (2006) 65 NSWLR 681, 712 (‘*Tang*’).

<sup>17</sup> *Tang* (n 16) 712 [137]; *Tuitt v The Queen* (2015) 49 VR 196, 217 [70] (‘*Tuitt*’) and, more recently, *Chen* (n 2) 926 [62]. A similar trend has occurred at common law, with courts unwilling to require that expert evidence be demonstrably reliable, with some exceptions: see Searston and Chin (n 14).

<sup>18</sup> *IMM v The Queen* (2016) 257 CLR 300 (‘*IMM*’); Kristy A Martire and Gary Edmond, ‘Rethinking Expert Evidence’ (2017) 40(3) *Melbourne University Law Review* 967. See generally, David Hamer, ‘The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v the Queen*’ (2017) 41(2) *Melbourne University Law Review* 689. For commentary suggesting that reliability still ought to play a significant role in the s 137 calculus, see Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 13<sup>th</sup> ed, 2018) 1249–50; Gary Edmond, ‘Icarus and the Evidence Act: Section 137, Probative Value and Taking Forensic Science Evidence ‘At Its Highest’’ (2017) 41(1) *Melbourne University Law Review* 106.

<sup>19</sup> *IMM* (n 18) 313 [44], 314 [47].

<sup>20</sup> *Langford v Tasmania* (2018) 29 Tas R 68, 84–6 [51]–[57] (‘*Langford*’). See also discussion below of *Chen* (n 2); below nn 145–60 and accompanying text.

Decisions that employ a narrow view of ss 135–7 often fall back on reliance on (or the mere existence of) traditional trial safeguards to expose deficiencies in the evidence.<sup>21</sup> In other words, courts regularly advert to the possibility of thorough cross-examination, judicial warnings, and rebuttal experts as ways to mitigate the risk of unfair prejudice that may arise in relation to expert evidence. However, this reliance may be misguided. Recent reviews of trial transcripts, for instance, find that cross-examination does not always assist in exposing controversies and uncertainties in expert evidence and, in some cases, may actually offer prosecution witnesses an opportunity to correct deficiencies in their evidence without consequences.<sup>22</sup> Moreover, judicial warnings cannot themselves provide the knowledge needed to resolve a dispute, but rather provide general admonitions. And while rebuttal experts may be helpful, there are systemic limits in the defence's ability to retain such experts in the criminal context.<sup>23</sup>

## A Expert Partisanship and Procedural Reform

Against the above backdrop, procedural mechanisms, which developed with the aim of controlling expert partisanship, are a relatively recent phenomenon. Just prior to the implementation of the first tranche of procedural reform, courts began to enunciate common law duties requiring the expert to remain independent from the litigation and to act in an impartial manner.<sup>24</sup> These duties responded to expressed (but not necessarily empirically-grounded) concerns about the effects of partisanship, costs, and delays in *civil* litigation.<sup>25</sup> Many of the concerns about partisanship merged with fears that 'junk science' was finding its way into courtrooms, presented by unscrupulous experts, willing to tailor their evidence to the needs of their instructing client.<sup>26</sup>

In Australia, the procedural reforms were incorporated into ancillary legislation, court rules, and jurisdiction specific Practice Notes.<sup>27</sup> These

<sup>21</sup> *R v Shamouil* (2006) 66 NSWLR 228, 239 [77]; *Tuite* (n 17) 236 [125]–[126]; *Collins Thomson Pty Ltd (in liq) v Clayton* [2002] NSWSC 366, [24]–[26]; *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454, [8] ('Fagenblat'); *Chen* (n 2) 928 [75]; *R v Cook* [2004] NSWCCA 52, [37]–[52].

<sup>22</sup> Gary Edmond et al, 'Forensic Science Evidence and the Limits of Cross-Examination' (2019) 42(3) *Melbourne University Law Review* 858; Gary Edmond, Kristy Martire and Mehera San Roque, 'Expert Reports and the Forensic Sciences' (2017) 40(2) *University of New South Wales Law Journal* 590 ('Expert Reports'); Searston and Chin (n 14).

<sup>23</sup> See Keith A Findley 'Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth' (2008) 38(3) *Seton Hall Law Review* 893.

<sup>24</sup> See *National Justice Compania Naviera SA v Prudential Assurance Company Ltd (Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 ('Ikarian Reefer'). For a prominent endorsement of *Ikarian Reefer* in Australia, see *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 739 [79]. See also NSWLRC (n 1) 27; Michell and Mandhane (n 3) 642–3.

<sup>25</sup> NSWLRC (n 1) 40–41.

<sup>26</sup> See Edmond, 'After Objectivity' (n 1) 141.

<sup>27</sup> In the ACT, see *Court Procedure Rules* 2006 (ACT) sch 1; in Queensland, see *Uniform Civil Procedure Rules* 1999 (Qld) regs 426, 428, 429A, 429B; in Western Australia, see *Consolidated Practice Direction – Civil Jurisdiction* (WA) PD annexure 3; in South Australia, see *Supreme Court Civil Supplementary Rules 2014* (SA) pt 9 div 2; in Tasmania, see *Supreme Court Rules 2000* (Tas) ss 514–17; in the Northern Territory, see *Practice Direction No 4 of 2009: Expert Reports*, in Victoria, see *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 44. Expert procedures in

developments occurred alongside other reforms to procedure supported by the Australian Law Reform Commission's inquiry into civil justice.<sup>28</sup> In this regard, it is worth emphasising that the anxieties that gave rise to procedural reform, in Australia and elsewhere, arose in relation to civil litigation, and largely in response to expert evidence being called by plaintiffs.<sup>29</sup> As a notable example, in most jurisdictions codes of conduct, as well as rules relating to court-appointed experts and concurrent evidence, remain part of the rules relating to civil procedure. These rules are unevenly extended to the criminal courts without any adaption or modification referable to the different conditions of a criminal prosecution.

Few mechanisms have been developed that are specifically adapted to the particular context of an accusatorial prosecution. Only in Victoria, and only very recently, has a Practice Note been developed specifically for criminal trials.<sup>30</sup> Given this history, it is perhaps not surprising that of the three procedural reforms outlined below (codes, court-appointed experts and concurrent evidence), only the first has been readily or regularly incorporated into criminal procedural practice. Consequently, this article focuses on the development and enforcement of codes of conduct, but we also briefly consider court-appointed experts, as well as joint testimony and pre-trial meetings between experts.

## B Codes of Conduct

The expert's overriding duty to the court and corresponding code of conduct fleshing out that duty have been described as the 'centrepiece' to the procedural reform effort.<sup>31</sup> For the sake of brevity, we will generally focus our review and analysis on the procedures in NSW (but highlight some relevant differences). The NSW Expert Witness Code of Conduct ('*NSW Code*') was initially adopted as a schedule to the *Supreme Court Rules 1970* (NSW)<sup>32</sup> and later incorporated into the *Uniform Civil Procedure Rules* ('*UCPR*').<sup>33</sup> It has been extended to apply in all criminal courts in NSW.<sup>34</sup>

The codes often echo the expert's duties of independence and impartiality, with some elaboration. The *NSW Code*, for instance, begins with a general enunciation of the expert's 'paramount duty' to the court.<sup>35</sup> It goes on to require that experts affirm that they have read and agree to be bound by the Code, and then lists a number of expectations and requirements that must be complied with when

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federal courts can be found in *Federal Court Rules 2011* (Cth) pt 23. We discuss procedural reform in NSW (and Victoria, to some extent) in more depth below, with a focus on criminal proceedings.

<sup>28</sup> These included enhanced case management and disclosure, see Australian Law Reform Commission ('ALRC'), *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000).

<sup>29</sup> NSWLRC (n 1) 40–41.

<sup>30</sup> Supreme Court of Victoria, *Practice Note SC CR 3: Expert Evidence in Criminal Trials*, 30 January 2017 ('*Victorian Code*'), a reissue of the same Practice Note issued in 2014.

<sup>31</sup> Edmond, 'After Objectivity' (n 1) 193.

<sup>32</sup> Initially introduced as *Supreme Court Rules 1970* (NSW) sch 6.

<sup>33</sup> *Uniform Civil Procedure Rules 2005* (NSW) ('*UCPR*') sch 7, which was amended in 2016 to bring the wording in line with the *Harmonised Expert Witness Code* approved by the Council of Chief Justices.

<sup>34</sup> *Supreme Court Rules 1970* (NSW) pt 75 div 1, 3J; *District Court Act 1973* (NSW) s 171D.

<sup>35</sup> *UCPR* (n 33) sch 7 cl 2.

producing their report (as well as formal requirements for the report, like providing a summary if it is long).<sup>36</sup> These more focused attestations concern the foundations and limitations of the opinion. They ask the expert to connect the opinion to any research and testing performed,<sup>37</sup> as well as to any assumptions that have been made in formulating the opinion.<sup>38</sup> The expert must also confirm that all appropriate inquiries and qualifications have been made,<sup>39</sup> and whether or not any part should be considered preliminary due to insufficient information.<sup>40</sup>

Proponents of codes have suggested that they will help with experts who would have been otherwise unaware of their duty to the court, and that they will encourage impartiality the same way normal oaths to tell the truth might be effective.<sup>41</sup> Conversely, it has been pointed out that the effect of requiring explicit acknowledgement of a code may be limited to minor increases in frankness and changes in the form of expert reports.<sup>42</sup> In particular, while they may raise the spectre of some remedial measure, there is a great deal of professional judgment that goes into forming opinions that is difficult to police.<sup>43</sup>

### C *Court-appointed Experts and Concurrent Evidence*

In addition to the codes, other reforms have been introduced that moderate the traditional adversarial presentation of expert evidence: court-appointed experts and concurrent evidence. All of these reforms have been justified on the basis that not only will they reduce delay and cost, but also they have the capacity to combat bias.<sup>44</sup> Court-appointed experts and concurrent evidence procedures are rarely deployed in criminal proceedings, but are now a regular feature of civil (including family) proceedings.<sup>45</sup> The *UCPR*, for instance, give the court power to appoint an expert, authorise that expert to make inquiries into specific issues, and limit the number of party experts who may be called upon to provide opinions on the same matter.<sup>46</sup>

Support for court-appointed experts draws on the assumption that one of the key threats to expert independence and impartiality is the fact that parties typically

<sup>36</sup> Some have argued that including these purely procedural requirements ‘dilute’ codes of conduct, see NSWLRC (n 1) 141 [9.15].

<sup>37</sup> *NSW Code* (n 33) cl 3(g).

<sup>38</sup> *Ibid* cl 3(d).

<sup>39</sup> *Ibid* cls 3(i)–(j).

<sup>40</sup> *Ibid* cl 3(k).

<sup>41</sup> See, eg, Paciocco (n 1) 589 (emphasis added): ‘Second, requiring experts to advert to that role when preparing and offering their opinions is apt to work in much the same way as oaths and affirmations are **believed** to work.’ Note that Paciocco does not refer to psychological research examining whether oaths and affirmations have an effect: see Part III of this article. The NSWLRC also suggests that codes might reduce unconscious bias, without explaining how that might work: (n 1) 74–5 [5.20].

<sup>42</sup> ‘The duties sought to be imposed by these Rules are, in practice, unenforceable. Their expression is no more than a pious hope.’: Davies (n 6) 89. See also Edmond, ‘After Objectivity’ (n 1) 148–9; Edmond and San Roque (n 6) [7.13].

<sup>43</sup> *Ibid*.

<sup>44</sup> Edmond and San Roque (n 6) [7.6].

<sup>45</sup> Though it is worth noting that court-ordered reports in the context of fitness inquiries and of sentencing hearings may be considered analogous to court-appointed experts (and are an underexplored area).

<sup>46</sup> *UCPR* (n 33) r 31.46.

appoint those experts.<sup>47</sup> As a result, they may be selected for a particular view (that is, selection bias) and see their opinions tintured through their association with one side of the dispute. However, though court-appointed experts may assuage some concerns, they do raise other challenges. For instance, court-appointed experts may carry professional and ideological biases, but these may go unexplored because they seem more neutral.<sup>48</sup> More generally, a great deal of weight and importance will naturally attach to the judge's choice of expert, and in many cases that choice may determine the outcome of the dispute. Possibly as a result of these challenges, courts seem reluctant to exercise their power to appoint experts.<sup>49</sup>

Turning to procedures involving two (or more) experts, the typical justification is the expectation that they will incline experts to moderate their views, discover areas of agreement, and abandon more tenuous claims.<sup>50</sup> In other words, proponents of these rules suggest that another expert's scrutiny will expose or ward off some biases and reduce reliance on 'junk science'.<sup>51</sup> Similarly, pre-trial meetings between two experts may also help narrow issues and thus promote more efficient dispute resolution.<sup>52</sup> However, sceptics point out that experts meeting before trial or providing concurrent evidence will still be subjected to pressures from the parties tendering them.<sup>53</sup> More fundamentally, just because two experts from a field agree, that is not necessarily a good reason to think their opinion is factually accurate. There are many matters within fields on which there is no expert consensus,<sup>54</sup> and there is limited empirical evidence that reforms concerning the use of multiple experts are working in the ways that were intended, especially in terms of whether such processes are more efficient overall.<sup>55</sup>

### III The Metascience and Psychology of Expert Procedure

While expert procedural reform has attracted a great deal of scrutiny, much of the existing discussion has not had the benefit of direct empirical research (which would be difficult to conduct in the context of courts).<sup>56</sup> Now, with several scientific fields enthusiastically implementing and testing their own procedural reforms, we have a new lens through which to evaluate expert procedure. In particular, we can say whether — in light of the experience in science — broadly analogous expert procedures can be expected to work, and under what conditions. We can also provide suggestions for empirically-guided improvements to our current web of procedural expert safeguards. We will begin by reviewing new insights from metascience with

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<sup>47</sup> See Davies (n 6) 90–2.

<sup>48</sup> Michell and Mandhane (n 3) 666. For an encouraging, albeit limited, example of court-appointed experts being used to combat adversarial bias, see NSWLRC (n 1) 34–6 [3.37]–[3.42].

<sup>49</sup> See NSWLRC (n 1) 33–4 [3.33]–[3.36].

<sup>50</sup> See Edmond, 'After Objectivity' (n 1) 141.

<sup>51</sup> Ibid.

<sup>52</sup> ALRC, *Review of the Federal Civil Justice System* (Discussion Paper 62, 1999) 493–4 [13.44]–[13.46].

<sup>53</sup> Davies (n 6) 94–5; Michell and Mandhane (n 3) 670–71.

<sup>54</sup> Edmond, 'After Objectivity' (n 1) 150–51.

<sup>55</sup> Edmond and San Roque (n 6) [7.10]. See also Simon McKenzie, 'Concurrent Evidence in the Kilmore East Bushfire Proceeding' [2016] VicSCLRS 2, 13.

<sup>56</sup> Michell and Mandhane (n 3) 663.

a view to identifying how this emerging area of research could inform the regulation of expert witnesses in the legal context.

## A Metascience and Scientific Procedural Reform

The field of metascience — the scientific study of science itself — is flourishing and has generated substantial empirical evidence for the existence and prevalence of threats to efficiency in knowledge accumulation.

Data from many fields suggests reproducibility is lower than is desirable; one analysis estimates that 85% of biomedical research efforts are wasted, while 90% of respondents to a recent survey in *Nature* agreed that there is a ‘reproducibility crisis’.<sup>57</sup>

Over the past decade, scientists have begun to confront — with modern empirical tools — the biases in their research. As described in the above quote, this metascientific study has given credence to longstanding worries about the degree to which human nature can tincture the research and reporting process. In particular, it has provided evidence for a ‘reproducibility crisis’ whereby researchers have sought to reproduce an initial study’s findings by following its protocol as closely as possible, but failed to find evidence for the initial result.<sup>58</sup>

The primary evidence for the reproducibility crisis comes from large-scale, multi-laboratory efforts seeking to reproduce peer-reviewed and published studies in eminent journals. For example, researchers recently re-performed, with large sample sizes, 21 social scientific studies originally published in *Nature* and *Science*. They found the same results as the original study in 13 of those replications (62%) and the size of the effects found were 50% smaller.<sup>59</sup> Similarly, in pre-clinical medical research (that is, studies performed before the drug is tested in humans), the findings of 53 landmark cancer studies could only be confirmed in six cases.<sup>60</sup> This finding contributed to the conclusion, expressed in the above quote, that 85% of pre-clinical medical research is wasted.<sup>61</sup> Such findings recently prompted the United

<sup>57</sup> Munafò (n 4) 1 (references omitted).

<sup>58</sup> Ibid.

<sup>59</sup> Colin F Camerer et al, ‘Evaluating the Replicability of Social Science Experiments in *Nature* and *Science* between 2010 and 2015’ (2018) 2(9) *Nature Human Behaviour* 637. Similar results have been found in large-scale reproduction efforts focused on economics research: Andrew C Chang and Phillip Li, ‘Is Economics Research Replicable? Sixty Published Papers from Thirteen Journals Say “Usually Not”’ (Board of Governors of the Federal Reserve System, Finance and Economics Discussion Series Paper 2015–083). In the largest effort in psychology, the researchers attempted to reproduce the findings of 100 studies, finding the same result in just 39% attempted replications: Open Science Collaboration, ‘Estimating the Reproducibility of Psychological Science’ (2015) 349(6251) *Science* 943 aac4716.

<sup>60</sup> C Glenn Begley and Lee M Ellis, ‘Comment: Raise Standards for Preclinical Cancer Research’ (2012) 483(7391) *Nature* 531.

<sup>61</sup> Above n 57 and accompanying text. See also Leonard P Freedman, Iain M Cockburn and Timothy S Simcoe, ‘The Economics of Reproducibility in Preclinical Research’ (2015) 13(6) *PLoS Biology* e1002165, 1. For similar problems in behavioural ecology, see Daiping Wang et al, ‘Irreproducible Text-Book “Knowledge”: The Effects of Color Bands on Zebra Finch Fitness’ (2018) 72(4) *Evolution* 961. For issues in neuroscience, see Anders Eklund, Thomas E Nichols and Hans Knutsson, ‘Cluster Failure: Why fMRI Inferences for Spatial Extent Have Inflated False-Positive Rates’ (2016) 113(28) *PNAS (Proceedings of the National Academy of Sciences of the United States of America)* 7900.

States ('US) Defense Advanced Research Projects Agency ('DARPA') to fund a project (in collaboration with an Australian meta-research group) to develop algorithms aimed at determining the *indicia* of studies with spurious findings.<sup>62</sup>

More importantly — for our purposes — metascientists are developing an understanding of why some research findings prove more robust than others. Far from drawing awkward distinctions between science and 'junk-science' (a dichotomy that has been criticised in the legal sphere),<sup>63</sup> this research is studying the often-hidden practices by which researchers can make their (often spurious) research seem more superficially convincing. This research is, in turn, informing procedural reform in science.

These hidden practices are often referred to as questionable research and reporting practices ('QRPs').<sup>64</sup> They are termed 'questionable' because they fall below the level of research fraud, which appears generally uncommon (fraud is difficult to study, but most estimates put its prevalence at about 2% of researchers).<sup>65</sup> Rather, questionable practices rest in a grey area, with, in some cases, 60% of researchers anonymously admitting to using them.<sup>66</sup>

QRPs allow researchers to portray their findings as speciously probative of their preferred conclusion and thus inflate their field's false discovery rate.<sup>67</sup> For example, one QRP is excluding outliers in an ad hoc way, giving rise to the possibility that these exclusions are driven by an unconscious desire to see one's hypothesis borne out.<sup>68</sup>

A large simulation found that use of just four QRPs can allow researchers to take a random set of data and demonstrate any effect they wish in a way that meets traditional statistical standards of proof.<sup>69</sup> This study confirmed anecdotal findings showing that, with enough data and flexibility, any pattern can be made to appear superficially compelling.<sup>70</sup>

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<sup>62</sup> Adam Rogers, 'Darpa Wants to Solve Science's Reproducibility Crisis with AI', *Wired* (online, 15 Feb 2019) <<https://www.wired.com/story/darpa-wants-to-solve-sciences-replication-crisis-with-robots/>>; *The RepliCATS Project: Collaborative Assessment for Trustworthy Science* (Website) <<https://replicats.research.unimelb.edu.au/>>.

<sup>63</sup> See Edmond, 'After Objectivity' (n 1) 147.

<sup>64</sup> Leslie K John, George Loewenstein and Drazen Prelec, 'Measuring the Prevalence of Questionable Research Practices with Incentives for Truth Telling' (2012) 23(5) *Psychological Science* 524; Hannah Fraser et al, 'Questionable Research Practices in Ecology and Evolution' (2018) 13(7) *PLoS ONE* e0200303; Joseph P Simmons, Leif D Nelson and Uri Simonsohn, 'False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant' (2011) 22(11) *Psychological Science* 1359.

<sup>65</sup> Daniele Fanelli, 'How Many Scientists Fabricate and Falsify Research? A Systematic Review and Meta-Analysis of Survey Data' (2009) 4(5) *PLoS ONE* e5738.

<sup>66</sup> John, Loewenstein and Prelec (n 64).

<sup>67</sup> Simmons, Nelson and Simonsohn (n 64).

<sup>68</sup> *Ibid* 1360.

<sup>69</sup> *Ibid* 1360–62.

<sup>70</sup> Eric-Jan Wagenmakers et al, 'An Agenda for Purely Confirmatory Research' (2012) 7(6) *Perspectives on Psychological Science* 632, 633–4.



A recent study by de Vries and colleagues provides a vivid demonstration of the combined effects of QRPs and other biases within science.<sup>71</sup> They researched the published and unpublished literature studying one depression medication, finding that only about 50% of studies reported it effective. But this was not what the main message from the *published* studies showed. This was because de Vries and colleagues found rampant publication bias (for example, the phenomenon whereby studies showing some effect are more likely to be published than those that failed to find anything),<sup>72</sup> QRP usage,<sup>73</sup> citation bias (that is, studies finding an effect are more likely to be cited than inconclusive or null findings),<sup>74</sup> and spin (that is, within a study, positive effects are emphasised and complicating factors are hidden in the body or footnotes).<sup>75</sup> Through the combined force of these factors, the published literature made it seem as if the treatment — which was only successful in 50% of studies — was effective in the vast majority of studies.

Drawing upon the above research, a host of new procedures are being employed to expose undisclosed flexibility in the research process. Many of these methods are fairly simple and not mandatory, but have found recent empirical support and endorsement by a 2018 report of the National Academies of Sciences, Engineering and Mathematics.<sup>76</sup> We will review these reforms now: preregistration and two modifications to the peer review process, checklists and pre-submission review.

Preregistration limits QRPs by asking researchers to pre-commit to the specifications of their studies before performing them and seeing the data. For example, researchers may pre-establish how they will exclude outliers beforehand to ensure they do not drop observations ad hoc out of an unconscious desire to confirm their hypothesis.<sup>77</sup> As to publication bias, preregistration can assist by creating a public record that a study has been performed (and what its specifications were) so that, if a null effect is found, there will still be a record even if the study is not published in a journal. These preregistrations are typically made on non-profit open science websites that include several focused questions about the planned research.<sup>78</sup>

Early results for preregistration are promising. As we have noted, it has historically been very rare for journals to publish findings that did not support the

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<sup>71</sup> Y A de Vries et al, 'The Cumulative Effect of Reporting and Citation Biases on the Apparent Efficacy of Treatments: The Case of Depression' (2018) 48(15) *Psychological Medicine* 2453.

<sup>72</sup> Ibid 2453. See also Kay Dickersin, 'The Existence of Publication Bias and Risk Factors for Its Occurrence' (1990) 263(10) *JAMA* 1385.

<sup>73</sup> In the de Vries study, this was only reporting positive findings in study, sometimes called 'reporting bias': de Vries et al (n 71) 2453.

<sup>74</sup> Ibid 2453.

<sup>75</sup> Ibid. See also Kellia Chiu, Quinn Grundy and Lisa Bero, "'Spin'" in Published Biomedical Literature: A Methodological Systematic Review' (2017) 15(9) *PLoS Biol* e2002173.

<sup>76</sup> National Academies of Sciences, Engineering, and Medicine, Committee on Toward an Open Science Enterprise, *Open Science by Design: Realizing a Vision for 21<sup>st</sup> Century Research* (National Academies Press, 2018)107–20.

<sup>77</sup> Brian A Nosek et al, 'The Preregistration Revolution' (2018) 115(11) *PNAS* 2600 ('Preregistration Revolution').

<sup>78</sup> Center for Open Science, *Open Science Framework (OSF)* <<https://osf.io>>; *AsPredicted* <<https://aspredicted.org>>.

researcher's hypothesis (only about 5–20% of such findings are published).<sup>79</sup> One recent study found that preregistered studies buck this trend, reporting such null result findings about 55% of the time.<sup>80</sup> These meta-scientific findings converge with the experience in medical research. After the US required preregistration for clinical trials, the percentage of large National Heart, Lung, and Blood Institute funded studies showing cardiovascular drugs had no effect changed drastically, from 43% to 92%.<sup>81</sup> In tandem with these encouraging results about the efficacy of preregistration, some fields are reporting increases in their use.<sup>82</sup>

Another way of encouraging researchers to more faithfully disclose the limitations of their methods and findings is by requiring or recommending they complete a checklist when submitting an article for peer-review.<sup>83</sup> While checklists may seem simplistic, they have proven surprisingly effective in applied contexts, such as in improving surgery outcomes.<sup>84</sup> In the research context, these checklists encourage authors to disclose important details that explain the limits of the study, like changes they made to the protocol after the study started and why they excluded any observations.<sup>85</sup>

The most well-studied and widely-adopted checklist is produced by the Consolidated Standards of Reporting Trials ('CONSORT') initiative.<sup>86</sup> It is used in the reporting of clinical medical trials. Systematic analyses of CONSORT find that studies published in endorsing journals (which range from mere references to CONSORT to requiring authors submit the checklist along with their manuscripts) show improved reporting over a variety of measures.<sup>87</sup> These effects occur despite the checklist not being mandated or policed in many cases.<sup>88</sup> In fact, checklists can even encourage researchers to report weaknesses in their studies, like the failure to randomly assign animals to experimental conditions and to blind experimenters to

<sup>79</sup> Chris Allen and David MA Mehler, 'Open Science Challenges, Benefits and Tips in Early Career and Beyond' (2019) 17(5) *PLoS Biol* e3000246, 9.

<sup>80</sup> *Ibid.*

<sup>81</sup> Robert M Kaplan and Veronica L Irvin, 'Likelihood of Null Effects of Large NHLBI Clinical Trials Has Increased over Time' (2015) 10(8) *PLoS ONE* e0132382, 1.

<sup>82</sup> For psychology, sociology, economics and political science, see David Birke et al, 'Open Science Practices Are on the Rise across Four Social Science Disciplines' (Presentation, Berkeley Initiative for Transparency in the Social Sciences, Annual Meeting, 30 November 2018) <<https://osf.io/kvbnh/>>.

<sup>83</sup> David Moher, Alison Jones and Leah Lepage, CONSORT Group (Consolidated Standards for Reporting of Trials), 'Use of the CONSORT Statement and Quality of Reports of Randomized Trials: A Comparative Before-and-After Evaluation' (2001) 285(15) *JAMA* 1992; Turner et al (n 11).

<sup>84</sup> J Bergs et al, 'Systematic Review and Meta-Analysis of the Effect of the World Health Organization Surgical Safety Checklist on Postoperative Complications' (2014) 101(3) *British Journal of Surgery* 150.

<sup>85</sup> See CONSORT, 'CONSORT 2010 Checklist of Information to Include When Reporting A Randomised Trial' (Checklist, 2010) 3b ('Important changes to methods after trial commencement (such as eligibility criteria), with reasons'); 13b ('For each group, losses and exclusions after randomisation, together with reasons') <<http://www.consort-statement.org/download/Media/Default/Downloads/CONSORT%202010%20Checklist.doc>>.

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

<sup>87</sup> Turner et al (n 11); Moher, Jones and Lepage (n 83).

<sup>88</sup> Turner et al (n 11) 61; SeungHye Han et al, 'A Checklist is associated with Increased Quality of Reporting Preclinical Biomedical Research: A Systematic Review' (2017) 12(9) *PLoS ONE* e0183591.

conditions.<sup>89</sup> We caution, however, that studies examining less widely adopted checklists (those without a widely respected backer like CONSORT) have found mixed or no support for their efficacy.<sup>90</sup>

Pre-submission review (that is, registered reports) tweaks the typical peer-review timing by front-ending the review process.<sup>91</sup> In other words, studies are reviewed before data are collected based on their rationale and methodology. If reviewers find the methods and planned analysis are sufficiently sound and accept the report, then publication is nearly guaranteed as long as the authors follow through with the approved plan. Pre-submission review therefore includes many of the benefits of preregistration by creating a record of the planned study and its specifications, thus making it possible to examine any discrepancies. It also has salutary motivational consequences. Researchers should be less likely to overstate their findings because the publication decision is independent of the results and the record of pre-accepted method would make any changes to that method more obvious anyway. Indeed, a recent study found that pre-publication review was associated with fewer retracted papers.<sup>92</sup>

So, why are these new scientific procedures working? And what principles are they based on? We will now discuss two mechanisms, both of which help explain how scientific reforms might be extended and applied to expert evidence procedure. First, these procedures nudge researchers towards tempered claims and fuller disclosure by tying those acts to research ethics; ‘questionable’ research practices are becoming no longer questionable, but expressly unethical. Second, they help control and record unconscious bias in ways that pre-existing scientific safeguards failed to do.

## B Behavioural Ethics

Research on behavioral ethics has flourished in recent years, providing much new insight into how people make ethical decisions; the dynamic and malleable nature of ethical preferences and behavior; and the variety of cognitive, situational, and social factors that influence ethical decisions.<sup>93</sup>

As Robbennolt lays out in the above quote, a growing body of research is developing to explain the psychology of ethical decision-making. Robbennolt goes on to explain how behavioural ethics can be leveraged to help improve the ethics of lawyering.<sup>94</sup> Its implications for expert witnesses, to our knowledge, has gone unexplored. This gap is somewhat surprising given the impact that expert evidence has on the trial

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<sup>89</sup> Han et al (n 88) 9.

<sup>90</sup> For a review, see Adrienne Stevens et al, ‘Relation of Completeness of Reporting of Health Research to Journals’ Endorsement of Reporting Guidelines: Systematic Review’ (2014) 348 *British Medical Journal* g3804.

<sup>91</sup> SPJM Horbach and W Halfman, ‘The Ability of Different Peer Review Procedures to Flag Problematic Publications’ (2019) 118(1) *Scientometrics* 339, 350–1 (‘Ability of Peer Review to Flag Problems’). See generally SPJM Horbach and W Halfman, ‘The Changing Forms and Expectations of Peer Review’ (2018) 3 *Research Integrity and Peer Review* 8.

<sup>92</sup> Horbach and Halfman, ‘Ability of Peer Review to Flag Problems’ (n 91) 350.

<sup>93</sup> Jennifer K Robbennolt, ‘Behavioral Ethics Meets Legal Ethics’ (2015) 11 *Annual Review of Law and Social Science* 75, 76.

<sup>94</sup> *Ibid*; Robbennolt and Sternlight (n 4).

process. It may be explained, however, by courts' typically narrow view of bias as purely based on adversarial (rather than cognitive psychological) processes.<sup>95</sup>

In this subsection, we will review the foundations of behavioural ethics. This research illuminates the processes that encourage scientists and expert witnesses to overstate their findings and downplay the limits of their expertise. It explains how they can do these things and still see themselves as upstanding actors in their field. Importantly, it also suggests ways to improve this situation (and provides reasons why the new procedures discussed above in Part IIIA seem to be working).

Behavioural ethics generally seeks to move away from a purely dispositional approach to ethics — one focused on bad apples — to one that takes into account the situation and the way in which choices are framed.<sup>96</sup> Much of this research finds that individuals generally seek to behave ethically because they wish to maintain a positive self-concept and will even do so when it is costly (for example, whistleblowing at great personal risk).<sup>97</sup> However, various situational and cognitive factors can nudge us towards less careful ethical thinking and behaviour.<sup>98</sup> This perspective aligns with results from metascience, wherein outright fraud is seemingly rare, but questionable research practices pervade in an environment with 'considerable latitude for rationalization and self-deception'.<sup>99</sup> It also aligns with the circumstances in courtrooms whereby strong situational pressures may encourage experts to stretch the boundaries of their personal ethics.

Before we continue, however, we add a note of caution. Recall that Part IIA (above) reviewed the metascientific research finding that much of the published literature contains false positive findings and exaggerated results. As a result, the studies supporting the propositions below should not be taken without question. Still, in the below review of behavioural ethics, we have reviewed the studies to ensure they have not been contradicted by subsequent research. Moreover, research drawn from the same theoretical perspective has proven robust in the face of large-scale replication attempts.<sup>100</sup>

<sup>95</sup> See Edmond and Martire, 'Just Cognition' (n 10).

<sup>96</sup> See Gerd Gigerenzer, 'Moral Satisficing: Rethinking Moral Behavior as Bounded Rationality' (2010) 2(3) *Topics in Cognitive Science* 528.

<sup>97</sup> See Nina Mazar and Dan Ariely, 'Dishonesty in Everyday Life and Its Policy Implications' (2006) 25(1) *Journal of Public Policy & Marketing* 117.

<sup>98</sup> Ibid 118–19. Our use of the word 'nudge' is intentional. The field of behavioural ethics is just one part of a broader social scientific movement finding that classic economics (and the assumption of a 'rational actor') fails to explain a great deal of human decision-making and behaviour. See, eg, the field of behavioural economics: Richard H Thaler and Cass R Sunstein, *Nudge* (Penguin Books, 2009).

<sup>99</sup> John, Loewenstein and Prelec (n 64) 524. Likewise, one account of the problems with expert evidence suggests they are doing just what these scientists are doing — 'Moreover, it is unlikely that most expert witnesses purposefully lie under oath; rather, they likely believe that they are just putting the best face on the truth.': Michell and Mandhane (n 3) 661.

<sup>100</sup> For example, Amos Tversky and Daniel Kahneman's choice framing research in behavioural economics (suggesting, as with behavioural ethics, that the situation impacts behaviour in a way that goes beyond the typical costs and benefits) was recently replicated with a sample size of 7,228: see Richard A Klein et al, 'Many Labs 2: Investigating Variation in Replicability Across Samples and Settings' (2018) 1(4) *Advances in Methods and Practices in Psychological Science* 443. It was also replicated with a sample size of 6,271: Richard A Klein et al, 'Investigating Variation in Replicability: A "Many Labs" Replication Project' (2014) 45(3) *Social Psychology* 142.

So, what are the processes by which average people, who are motivated to see themselves as good, might do morally questionable acts? Research has uncovered many, but we will focus on those especially relevant to expert witness practice.

One process documented by research is ‘ethical fading’, by which people operate on auto-pilot, losing sight of the ethical component of what they are doing.<sup>101</sup> One way this may happen is through following scripts, preset ways of approaching tasks.<sup>102</sup> This might include, in science, researchers following their field’s protocol of performing a study, discussing the results with their lab-mates, developing a narrative to frame the results, and then cutting away the findings that do not fit with this narrative.<sup>103</sup> Similarly, expert witnesses might follow the script of an adversarial trial without considering the ethics of their actions.

Researchers have uncovered several ways to combat fading by making salient the ethical part of the judgment.<sup>104</sup> For example, signing an honour code or reciting the Ten Commandments substantially reduces cheating, an effect that outweighs quadrupling the monetary incentive to cheat.<sup>105</sup> These manipulations appear to work by making participants more mindful of their internal standards and thus the possibility of betraying those standards. In the same vein, children are less likely to take more from a common pool when there is a mirror present.<sup>106</sup>

Humans also appear adept at mentally recasting their behaviour to help fade the moral implications of the act. For example, one group of researchers found that people were more willing to cheat to obtain tokens than cash.<sup>107</sup> This was despite the fact that the tokens were directly redeemable for cash. The researchers posited that cheating to obtain tokens provides ‘room for interpretation’ of the participants’ actions, thus ‘making the moral implications of dishonesty less accessible’.<sup>108</sup> Supporting these findings, an analysis of 137 studies in behavioural ethics found the strongest predictor of ethical behaviour was a lack of opportunity to self-justify.<sup>109</sup>

Additional research — more closely related to giving opinion evidence — concerns conveying information that is inherently imprecise and subject to multiple interpretations.<sup>110</sup> In this field, psychologists find that people will make more

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<sup>101</sup> Robbenolt and Sternlight (n 4) 1120–24.

<sup>102</sup> Robert P Abelson, ‘Psychological Status of the Script Concept’ (1981) 36(7) *American Psychologist* 715.

<sup>103</sup> This approach contains several QRPs, see Wagenmakers et al (n 70) 633–4.

<sup>104</sup> See Nina Mazar, On Amir and Dan Ariely, ‘The Dishonesty of Honest People: A Theory of Self-Concept Maintenance’ (2008) 45(6) *Journal of Marketing Research* 633.

<sup>105</sup> Ibid 635–7.

<sup>106</sup> Arthur L Beaman et al, ‘Self-Awareness and Transgression in Children: Two Field Studies’ (1979) 37(10) *Journal of Personality and Social Psychology* 1835.

<sup>107</sup> Mazar, Amir and Ariely (n 104) 637–8.

<sup>108</sup> Ibid 638.

<sup>109</sup> Nicola Belle and Paola Cantarelli, ‘What Causes Unethical Behavior? A Meta-Analysis to Set an Agenda for Public Administration Research’ (2017) 77(3) *Public Administration Review* 327.

<sup>110</sup> Maurice E Schweitzer and Christopher K Hsee, ‘Stretching the Truth: Elastic Justification and Motivated Communication of Uncertain Information’ (2002) 25(2) *Journal of Risk and Uncertainty* 185; Russell Golman and Sudeep Bhatia, ‘Performance Evaluation Inflation and Compression’ (2012) 37(8) *Accounting, Organizations and Society* 534; Laetitia B Mulder, Jennifer Jordan and Floor Rink, ‘The Effect of Specific and General Rules on Ethical Decisions’ (2015) 126 *Organizational Behavior and Human Decision Processes* 115. See generally Jason Dana, Roberto A

moderate offers in sales and negotiations when they have less discretion in how they determine the value of what they are offering.<sup>111</sup> In other words, when a decision is based on increasingly elastic and unclear criteria, individuals can stray from strict ethical guidelines without jeopardising their moral self-concept (and will do so when motivated by external rewards like prestige and money). Similarly, strict rules appear to reduce the opportunity for rationalisation and, in turn, promote ethical behaviour.<sup>112</sup>

Ethical fading is helped along by various other situational factors. For example, time pressure and lack of sleep contribute to unethical decision-making.<sup>113</sup> Social pressures, such as that from authority figures, have a similar effect.<sup>114</sup> Even just observing one group member behaving unethically can negatively affect the observer's ethical decision-making.<sup>115</sup> This changes the social norm and also allows the observer to rationalise away small divergences because there are people out there doing it much worse. More generally, the ethical culture of an organisation exerts a significant impact on individual decision-making.<sup>116</sup> The culture's effect on the individual includes both the social impact of seeing peers and trusted advisors behave in a certain way, and seeing the way in which the system rewards or penalises those who adhere to a strict ethical code (or not).<sup>117</sup> Further, when multiple parties carry some responsibility, a 'diffusion of responsibility' may cause each party to assume the other is policing them.<sup>118</sup> This may occur in court where an expert may be more inclined to overstep because they assume a judge, opposing lawyer, or opposing expert will surely step in if they go too far.

Other factors like ethical blind spots and slippery slopes may be especially relevant to expert witnesses. Most of us have 'bias blind spots', tending to see ourselves as objective and others as biased.<sup>119</sup> This tendency is related to a more general 'above-average effect' whereby we tend to be overconfident in our abilities.<sup>120</sup> In forensic science, one survey found that 71% of practitioners agreed that cognitive bias is a problem in forensics, but only 26% would concede that it impacted their own conclusions.<sup>121</sup> Ethical slippery slopes may also contribute to expert witnesses pushing the bounds of ethical behaviour. For example, an expert

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Weber and Jason Xi Kuang, 'Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness' (2007) 33(1) *Economic Theory* 67.

<sup>111</sup> Schweitzer and Hsee (n 110).

<sup>112</sup> And these results hold even when the situation is engineered such that the person cannot expect others to know about their behaviour — suggesting they are not driven by the possibility of reciprocation: Mulder, Jordan and Rink (n 110).

<sup>113</sup> Robbennolt and Sternlight (n 4) 1140–42.

<sup>114</sup> Ibid 1146–9.

<sup>115</sup> Francesca Gino, Shahar Ayal and Dan Ariely, 'Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel' (2009) 20(3) *Psychological Science* 393.

<sup>116</sup> Robbennolt and Sternlight (n 4) 1165–7.

<sup>117</sup> Ibid.

<sup>118</sup> Michael J Saks and Barbara A Spellman, *The Psychological Foundations of Evidence Law* (New York University Press, 2016) 216.

<sup>119</sup> Emily Pronin, Daniel Y Lin and Lee Ross, 'The Bias Blind Spot: Perceptions of Bias in Self Versus Others' (2002) 28(3) *Personality and Social Psychology Bulletin* 369.

<sup>120</sup> David Dunning, Chip Heath and Jerry M Suls, 'Flawed Self-Assessment: Implications for Health, Education, and the Workplace' (2004) 5(3) *Psychological Science in the Public Interest* 69, 72.

<sup>121</sup> Jeff Kukucka et al, 'Cognitive Bias and Blindness: A Global Survey of Forensic Science Examiners' (2017) 6(4) *Journal of Applied Research in Memory and Cognition* 452, 454.

may fail to provide important cautions in one case, justify that act, and then continue along that path in future cases because it is easier to do that than admit that the first act was wrong.<sup>122</sup>

### C *Protection against Cognitive Biases*

Finally, the procedural reforms underway in science expressly acknowledge the aim of protecting the research process from cognitive biases.<sup>123</sup> Safeguards like randomly assigning participants to control and experimental conditions have long been orthodox in many fields. Still, less-obvious flexibilities in the research process (for example, QRPs) allowed researcher biases to creep in. Scientific reforms help protect against cognitive biases by: removing flexibility to slant results one way or another (for example, preregistration); recording the opportunities for bias to creep in (for example, checklists); and, removing the motivation to frame results in a more publishable way (for example, pre-submission review).

As we discussed in Part II, while legal procedural reform was initially designed to combat bias, it had a relatively narrow view of bias in mind — for example, witnesses selected for a certain view, expert witnesses taking on the role of advocates. Perhaps not surprisingly then, subsequent jurisprudence has generally ignored or downplayed more subtle forms of bias, such as unconscious contextual bias (that is, when irrelevant details of the case affect the expert's judgment).<sup>124</sup> Or, it regards such bias as a matter that can simply be exposed to the fact-finder and corrected for by that fact-finder as they weigh the evidence.<sup>125</sup> This runs counter to the advice of peak scientific bodies and inquiries into the causes of wrongful convictions, which have been clear about the corrosive effects of unconscious bias in expert evidence.<sup>126</sup>

Thus, one criticism of expert witness procedures is that — as currently designed and enforced — they do little to protect against unconscious bias.<sup>127</sup> In many cases, simply understanding that one's duty is to the court will not prevent

<sup>122</sup> Robbenolt and Sternlight (n 4) 1118–19.

<sup>123</sup> Munafo (n 4) 3 (Table 1). In forensic science, bias-limiting procedures exist, but have not yet reached mainstream: Itiel Dror et al, 'Letter to the Editor — Context Management Toolbox: A Linear Sequential Unmasking (LSU) Approach for Minimizing Cognitive Bias in Forensic Decision Making' (2015) 60(4) *Journal of Forensic Sciences* 1111.

<sup>124</sup> Edmond and Martire, 'Just Cognition' (n 10); Jason M Chin, Michael Lutsky and Itiel E Dror, 'The Biases of Experts: An Empirical Analysis of Expert Witness Challenges' (2019) 42(4) *Manitoba Law Journal* 21.

<sup>125</sup> Edmond, Martire and San Roque, 'Expert Reports' (n 22) 619–22.

<sup>126</sup> Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, 'Strengthening Forensic Science in the United States: A Path Forward' (National Academies Press, 2009) 122–4 ('NAS Report'); The President's Council of Advisors on Science and Technology, 'Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods' (Executive Office of the President, 2016) 31–2 ('PCAST Report'); Ontario Ministry of the Attorney General, *Inquiry into Pediatric Forensic Pathology in Ontario* (Report, 2008) 69 (vol 1), 79 (vol 1), 447–8 (vol 3) ('Goudge Report').

<sup>127</sup> For instance, expert witnesses sometimes acknowledge the possibility of unconscious bias, but deny that they are susceptible to it: see Edmond, Martire and San Roque, 'Expert Reports' (n 22) 620, quoting *JP v DPP (NSW)* [2015] NSWSC 1669, [23].

experts from being exposed to biasing details (or even seeking them out).<sup>128</sup> In Part IV, we will suggest that expert procedures could be designed and employed in a way that helps address unconscious bias.

## IV Improving Expert Evidence Procedure

To summarise the above, the peer-review and reporting process within science has not historically been designed in a way that effectively regulated the findings being published. Questionable, but not necessarily fraudulent, practices have long been used, allowing the biases of the researcher to impact published findings. New reforms, based in part on behavioural ethics, are being tested and employed to help control these biases. In this way, Part III suggests that, by analogy, procedure can be an effective way to control experts as witnesses by encouraging them to be transparent about the limits of their opinions. We now turn to the potential application of this research to expert evidence procedure. These applications range from establishing a general culture that takes expert procedure seriously, to specific tweaks to existing procedural mechanisms.

### A *Culture Changes and the Courts*

Even if codes are reformulated to more effectively engage the ethics of experts (as we discuss in Part IVB below), their effectiveness will be hindered by a wider ethical culture that tolerates ‘experts’ overstating their claims and does not effectively enforce the requirements of the codes of conduct. Here, as we noted above, legal-behavioural ethicists find that it is not just the explicit rules that matter, but the broader system and what it appears to value:

Importantly, the ethical culture of an organization depends not only on its expressed ethical codes and policies but also far more broadly on its systems and practices. Just as group norms may have a negative impact, so too may group norms set the stage for attorneys to do the right thing.<sup>129</sup>

Robbennolt and Sternlight go on to explore the ethical cultures that arise at law firms that may hinder ethical lawyering; a similar analysis could be undertaken with respect to expert witnesses. Consider, for instance, forensic pathology’s overarching value as prescribed by Cordner, a pathologist who led the Victorian Institute of Forensic Medicine (Australia) for years and provided measured opinions in many criminal trials: ‘forensic pathology expertise should be focused on minimising or avoiding any adverse outcomes associated with its contribution.’<sup>130</sup> Then compare that statement with the conclusion of an inquiry in Ontario (Canada)

<sup>128</sup> However, as we will discuss below, early civil decisions at least adverted to ‘human psychology’ and construed the policy behind expert codes of conduct as the avoidance of preformed decisions. In *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd*, Campbell J generally agreed that codes of conduct had an important role to play in heading off bias whereby the expert may, without knowledge of the Code, form a view that is ‘difficult to retreat from ... This can happen as a matter of ordinary human psychology’: [2003] NSWSC 870, [15] (*Lopmand*). See also *Kirch Communications Pty Ltd v Gene Engineering Pty Ltd* [2002] NSWSC 485, [14].

<sup>129</sup> Robbennolt and Sternlight (n 4) 1165–6.

<sup>130</sup> Stephen Cordner, ‘Expert Opinions and Evidence: A Perspective from Forensic Pathology’ (2015) 17(2) *Flinders Law Journal* 263, 268.



into the wrongful convictions that resulted from the work of forensic pathologist Dr Charles Smith:

He acknowledged that, when he first began his career in the 1980s, he believed that his role was to act as an advocate for the Crown and to “make a case look good.” He explained that the perception originated, in some measure, from the *culture of advocacy* that he said prevailed at SickKids at the time.<sup>131</sup>

In terms of culture, courts, as the final arbiter for what is admitted into evidence, may play some role in establishing the ethical force ascribed to expert procedures. In other words, if judges take procedures like codes of conduct seriously and demand they be carefully followed, then lawyers will be more exacting in ensuring that their experts understand and follow the codes. The experts, in turn, may be more likely to attend to the specifics of the codes and take seriously their ethical qualities. Such a stance towards codes of conduct may also make experts see them as more legitimate forms of authority.<sup>132</sup> By analogy, the CONSORT checklist may be effective because it is endorsed by a widely-respected organisation. This position contrasts to one in which codes of conduct are seen as pro forma by all actors.

Here, however, diverging from what we have prescribed, the trend has been for courts to take codes of conduct increasingly *less* seriously, perhaps robbing them of their ethical force. In the early days of the *NSW Code*, courts gave some consideration as whether to forgive non-compliance with the Code. Two early cases, for instance, suggested that failure to read and sign the Code could be cause to exclude experts, unless they knew of the Code’s provisions when forming their opinions but simply failed to follow it formally.<sup>133</sup> The onus appeared to be on the breaching party to justify non-compliance with the Code, and it appeared to be a heavy onus.<sup>134</sup>

This position gave way to increasingly flexible views on the *NSW Code*’s role. Non-compliance could be forgiven, for instance, if there were objective differences between the views of the experts that the court could parse (for example, the experts were clearly relying on different data).<sup>135</sup> Another decision held that an expert who was not initially aware of the *NSW Code* could give testimony because, among other reasons, he ‘would not have changed his approach or opinion’ had he known of the Code.<sup>136</sup> He was also aware of a similar code in South Australia.<sup>137</sup> The same reasoning appeared in a contemporaneous decision, with the Court expressly stating it was moving from the earlier ‘strict compliance’<sup>138</sup> view of the *NSW Code* to one with more ‘leeway’.<sup>139</sup> Here, we note that numerous psychology studies have demonstrated that individuals (including scientists themselves) cannot examine their own unconscious biases, making it unlikely that the expert would

<sup>131</sup> ‘Goudge Report’ (n 126) 16–17 (vol 1) (emphasis added).

<sup>132</sup> Robbennolt and Sternlight (n 4) 1127–8.

<sup>133</sup> *Cassegrain* (n 2); *Barak Pty Ltd v WTH Pty Ltd* [2002] NSWSC 649, [4]–[5].

<sup>134</sup> *Cassegrain* (n 2) [4], [14].

<sup>135</sup> *Lopmand* (n 128) [16], [19].

<sup>136</sup> *Langbourne v State Rail Authority* [2003] NSWSC 537, [13].

<sup>137</sup> *Ibid.*

<sup>138</sup> *Jermen v Shell Co of Australia Ltd* [2003] NSWSC 1106, [32].

<sup>139</sup> *Ibid* [27].

know whether his or her opinion would be different if he or she had fully accept the applicable code.<sup>140</sup>

Courts have also considered whether non-compliance with the *NSW Code* could result in exclusion under ss 135 and 137 of the *Evidence Act 1995* (NSW). One prominent appellate decision suggested exclusion could result from a ‘sufficiently grave breach’.<sup>141</sup> This was, however, before the High Court of Australia’s decision in *IMM*, which directed judges to take evidence’s credibility and reliability at its highest when assessing its probative value (thus reducing the likelihood it *could* be excluded under the trial judge’s discretion).<sup>142</sup> As noted above, while there is, as yet, no clear answer in the jurisprudence, it would appear that violation of the requirements in a code of conduct would be seen to reflect on either the reliability evidence, or the credibility of the witness (or both) and thus unavailable as a factor to be considered in the ss 135 and 137 balancing task.<sup>143</sup> We are only aware of one Australian decision (which was pre-*IMM*) to exclude an expert under the trial judge’s discretion (*UEL* or *Christie*) for failing to follow a code of conduct.<sup>144</sup>

The most recent extensive analysis of the *NSW Code* is the NSW Court of Criminal Appeal’s recent decision in *Chen*.<sup>145</sup> The outcome in *Chen*, a drug trafficking case, hinged on the translations of phone transcripts between the accused and others in Fuqing, an under-described Chinese dialect.<sup>146</sup> These translations were provided by a Crown’s witness Ms Yang, who was an accredited interpreter in Mandarin.<sup>147</sup>

Despite initially claiming that she had complied with the Code, Yang admitted on cross-examination that she had not in fact encountered the *NSW Code* prior to that cross-examination.<sup>148</sup> Critically, the most incriminating of her translations was the designation of a word spoken by the accused in an intercepted phone call, of the Fuqing word ‘la’ to ‘granule’, which was the particular form in

<sup>140</sup> For a review of research detailing one’s inability to explore one’s own biases, see Timothy D Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious* (Belknap Press, 2002). See also Pronin, Yin and Ross (n 119).

<sup>141</sup> *Wood v The Queen* (2012) 84 NSWLR 581, 620 [729] (‘Wood’). See also *Chen* (n 2) 923 [34]–[45].

<sup>142</sup> *IMM* (n 18) 313 [44], 314 [47].

<sup>143</sup> Indeed, a Tasmanian court recently struggled to determine whether an expert’s reliance on an unknown source (which may have breached the *NSW Code*, if heard in that jurisdiction) could reduce the opinion’s probative value post-*IMM*. The Court noted that *IMM* seemed to indicate that the expert’s reliance on the unknown source could not impact its probative value, but that this seemed inconsistent with other parts of the majority’s opinion in *IMM: Langford* (n 20) 85–6 [56]. Ultimately, the Tasmanian court did not need to decide on this issue: at 86 [57].

<sup>144</sup> *Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage (NSW)* (2013) 298 ALR 532, 546–7 [62]–[68]. Canadian courts regularly exclude experts for failing to follow codes of conduct, see Jason M Chin & Rory McFadden, ‘Expert Witness Codes of Conduct for Forensic Practitioners: A Review and Proposal for Reform’ *Canadian Journal of Law and Justice* (forthcoming) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3505769](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3505769)>.

<sup>145</sup> *Chen* (n 2).

<sup>146</sup> *Ibid* 929 [80]. Fuqing is a tonal dialect related to the better described Fuzhou dialect, see ‘Dialect: Fuzhou’, *Glottolog 4.0* (Web Page catalogue of languages and families) <<https://glottolog.org/resource/languoid/id/fuzh1239>>.

<sup>147</sup> *Chen* (n 2) 926 [65].

<sup>148</sup> *Ibid* 919 [18].

which the pseudoephedrine (the supply of which was the subject of the charge) was produced.<sup>149</sup>

The facts in *Chen* are such that it would have been expected that the witness called by the Crown as an expert would and should have been both aware of the Code and have formulated an opinion with a view to comply with it. It also appears to be the type of case in which adherence to a code of conduct would be of benefit if the aim is to prevent both partisanship and more subtle forms of cognitive bias. Indeed, there were many opportunities for bias to creep into the interpreter's judgment because she was involved in the case at an early stage, was present when a search warrant was executed, and was aware of the physical appearance of the drug in question.<sup>150</sup> Furthermore, translation is a subjective task in which early-stage exposure to biasing information may be particularly dangerous.<sup>151</sup> Indeed, translation affords the translator wide discretion, especially in instances in which a word has no obvious equivalent.<sup>152</sup> In *Chen*, it was common ground that 'la' has no direct English translation, with its appropriate translations not even limited to small-sized items.<sup>153</sup> Yang gave no explanation as to why 'granule' was 'the most verbatim translation of how the word "la" was used' in the context, rather than some other equally viable, connotatively neutral English equivalent.<sup>154</sup>

Attending closely to a strongly worded code of conduct may have made Yang's ethical duties more salient to her and guided her interactions with the police and her approach to the translation. It may have also caused her to offer alternative translations of 'la' and disclose more uncertainty in her conclusion. As it was, an unusually robust challenge aimed at Yang's opinion and impartiality drew out many of these details.<sup>155</sup> Accused parties do not always (or typically) have access to such assistance.<sup>156</sup>

Unfortunately, the appellate court did not engage with the *NSW Code's* role in regulating the knowledge proffered into court. The Court did not consider its

<sup>149</sup> Ibid 918–9 [14]. In its closing address, the Crown said: 'So what does it really come down to? It comes down to this word "la"': at 929 [80]. However, 'la' appears to be a classifier, that is to say a word with highly abstract meaning used in combination with nouns. As noted in *Chen*, the way that it would need to be translated or interpreted into English *would* vary according to context (at 924 [47]). But this does not justify, without more, the selection of the highly specific English word of granule.

<sup>150</sup> Ibid 925 [54].

<sup>151</sup> This will especially be the case when the word being interpreted or translated is polysemous: see discussion in David Wayne Gilbert, 'Electronic Surveillance and Systemic Deficiencies in Language Capability: Implications for Australia's National Security' (PhD Thesis, RMIT University, 2014) ch 5 <<http://researchbank.rmit.edu.au/eserv/rmit:161277/Gilbert.pdf>>. See also, generally, Samuel Nunn, "'Wanna Still Nine-Hard?': Exploring Mechanisms of Bias in the Translation and Interpretation of Wiretap Conversations' (2010) 8(1) *Surveillance & Society* 28. On the effect of biasing information in listening more generally, see Helen Fraser and Bruce Stevenson, 'The Power and Persistence of Contextual Priming: More Risks in Using Police Transcripts to Aid Jurors' Perception of Poor Quality Covert Recordings' (2014) 18(3) *The International Journal of Evidence & Proof* 205.

<sup>152</sup> Furthermore, translations are not susceptible to a single theory of qualitative assessment. See generally: Julianne House, *Translation Quality Assessment: A Model Revisited* (Gunter Narr Verlag, 1997).

<sup>153</sup> *Chen* (n 2) 929 [78]–[79].

<sup>154</sup> Ibid 929 [79].

<sup>155</sup> Ibid 925 [52]–[57].

<sup>156</sup> See Edmond and San Roque (n 6).

potential to control and reveal bias, or the importance of disclosing flexibility and uncertainty in the expert's process (for example, QRPs). Rather, the Court embarked in a lengthy statutory analysis that served to undermine, rather than strengthen, the role of the Code as an effective mechanism to regulate or restrain the type of evidence presented to the fact finder under the guise of expert opinion evidence.<sup>157</sup> The Court ultimately concluded that the *Supreme Court Act 1970* (NSW), unlike the *Evidence Act 1995* (NSW), was primarily concerned with procedure and practice and thus failure to follow the Code was not itself a matter of admissibility.<sup>158</sup> As to s 137 of the *Evidence Act 1995* (NSW), the Court did not seem to accept submissions that cognitive bias may have rendered Yang's translation of little probative value.<sup>159</sup> Instead, the Court noted that trial safeguards could ably handle any danger it posed.<sup>160</sup> This reasoning is simply not in step with the current scientific position that would suggest courts should establish a culture in which codes of conduct are serious ethical matters (by excluding the evidence of experts who breach them) and that broadly analogous 'codes' in science produce salutary effects.

## B Reforming Expert Procedure

While judicial enforcement of codes of conduct is a logical first step in bringing them in line with empirical research, there is still work to do in reforming the specific provisions of those codes. From behavioural ethics, we saw that codes may be effective by making the moral and ethical component of the expert's job salient and thus avoiding ethical fading. Here, it is worth noting that the notion of self-concept maintenance has long (implicitly) been applied to the task of controlling fact witnesses through the use of oaths. This oath serves at least two purposes: to remind the witness of his or her internal standard for honesty, and to make salient the possibility of an external punishment for lying (that is, the rule against perjury).<sup>161</sup>

Matters of expert opinion are more complicated because they are naturally subject to more judgment and interpretation than factual recollections. As a result, sanctions against experts who provide problematic opinions have met resistance.<sup>162</sup> Moreover, time pressures and the social-adversarial structure of the legal system may make expert witnesses especially susceptible to ethical fading — for example, rationalising behaviour as in the client's best interest or that it should be caught by the supervising lawyer.<sup>163</sup> That said, there may be considerable room to improve

<sup>157</sup> *Chen* (n 2) 919–23 [15]–[34].

<sup>158</sup> *Ibid* 923 [33].

<sup>159</sup> See *ibid* 924–28 [43]–[75]. Similarly, at the leave to appeal application before the High Court of Australia, the panel did not engage with submissions about cognitive bias: Transcript of Proceedings, *Chen v The Queen* [2018] HCATrans 240. *Chen* was subsequently followed in *Warwick* (n 13) to forgive an expert's failure to be aware of the *NSW Code*. In *Warwick*, the Court merely referred to *Chen*'s discussion of the jurisdiction of the *Supreme Court Act 1970* (NSW) and did not consider at all the effect of cognitive bias (let alone behavioural ethics and metascience): *Warwick* (n 13) [41]–[42].

<sup>160</sup> *Chen* (n 2) 928 [75].

<sup>161</sup> Edmond, 'After Objectivity' (n 1) 140.

<sup>162</sup> *Ibid* 148–9; NSWLRC (n 1) 158–9; Michell and Mandhane (n 3) 661. See *Wood v New South Wales* describing the difficulty in sufficiently associating the expert witness with the prosecution so as to support a claim of malicious prosecution, and in the potential application of expert witness immunity: [2018] NSWSC 1247, [206], [564], [568].

<sup>163</sup> Robbennolt and Sternlight (n 4) 1140–42.

expert testimony by engaging the expert's self-concept, and to do so through specific, carefully drafted codes of conduct. These may operate in much the same way that specific and demanding checklists have been shown to be effective in the mainstream sciences.<sup>164</sup>

First, as with oaths, an expert code of conduct can serve to remind the expert of his or her duty to the court. It should interrupt the typical script and any favourable social comparisons that the expert may make (for example, by comparing him or herself to an unscrupulous expert). Similarly, the codes should make it clear that while there are safeguards in place, the expert is solely responsible for the content of his or her opinion (to avoid diffusion of responsibility).

Further, codes should be drafted in a way that makes self-justification as difficult as possible. Simply reminding an expert of a flexible and amorphous duty may not be very effective because those acts easily give way to rationalisation (a strong predictor of straying from strict ethical duties).<sup>165</sup> In the legal sphere, expert witnesses have a great deal of flexibility in reporting their results, allowing them to portray them in a misleading way.<sup>166</sup> Reforms in Australia have done little to curb this flexibility.<sup>167</sup>

So, how do the current codes of conduct stack up in light of this research? In short, they show some promise, but there is still much to improve on. For instance, consider cl 3(i) of the *NSW Code*:

a declaration that the expert has made all the inquiries which the expert *believes are desirable and appropriate* (save for any matters identified explicitly in the report), and that *no matters of significance* which the expert *regards as relevant* have, to the knowledge of the expert, been withheld from the court<sup>168</sup>

This item is on the right track in reminding the expert of his or her duty to make inquiries and report relevant findings. But, it still provides several avenues for rationalisation. It is not hard for an expert in an area to construct reasons why a line of research that may have called into question the client's preferred outcome was not 'desirable' or 'appropriate'. For example, forensic practitioners sometimes fail to discuss parts of reports that cast doubt on their methods.<sup>169</sup> Moreover, those accustomed to the adversarial trial may be particularly adept at developing such rationalisations.<sup>170</sup>

On the other hand, consider a construction we devised that more directly engages the expert's personal ethics and removes some chances for rationalisation: 'I [the expert hand-writes his or her name here], have conducted and reported all

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<sup>164</sup> Turner et al (n 11); Han et al (n 88).

<sup>165</sup> Belle and Cantarelli (n 109).

<sup>166</sup> NAS Report (n 126) 185–6.

<sup>167</sup> Edmond, Martire and San Roque, 'Expert Reports' (n 22) 604–19.

<sup>168</sup> (emphasis added). The *Victorian Code* (n 30) 6.1(h) provision is nearly identical and reads: 'a declaration that the expert has made all the inquiries and considered all the issues which the expert believes are desirable and appropriate, and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld'.

<sup>169</sup> Searston and Chin (n 14).

<sup>170</sup> Adam Benforado, *Unfair: The New Science of Criminal Injustice* (Broadway Books, 2016) 85.

inquiries that the strongest critic of my opinion would make. \_\_\_\_ [initial here].’ This revamped provision removes some ambiguity in the original’s language. It also removes some subjectivity as to how to deem what is relevant, moving it from solely the expert’s judgment to that of the strongest critic.<sup>171</sup> The latter helps avoid the ethical fading technique of comparing oneself to a less diligent person. Alternatively, coder reformers may prefer simply a ‘strong’ critic — the key is to move towards a more objective observer.

Another problem with the *NSW Code* is that items like cl 3(i) are also part of a long list of ‘requirements’ that can easily be glossed over and thus lose their ethical salience (especially for repeat players). For that reason, the expert should not just provide an omnibus signature confirming adherence with the Code (thus permitting various rationalisations, such as it *generally* being complied with), but should actively confront each aspect of the Code. For that reason, experts should write their initials at each step.<sup>172</sup>

Metascientific reforms like checklists and preregistration are also confronting one of the prime QRPs that produce false positive findings — conducting tests and making observations, but only reporting them if they are consistent with the researchers’ interests.<sup>173</sup> On this point, the CONSORT checklist has been effective in encouraging researchers to distinguish between planned and unplanned analyses so that it will be clearer when they have tried various analyses to find the one that gets a publishable result.<sup>174</sup>

Current codes of conduct are not well-designed to avoid post-hoc framing of the facts on which experts base their opinions. For instance, the *NSW Code* cl 3(g) requires that an expert report contain:

any examinations, tests or other investigations on which the **expert has relied**,  
identifying the person who carried them out and that person’s qualifications<sup>175</sup>

While this item seems admirably aimed at encouraging the expert to report the source of his or her opinion, it is deficient. It allows the expert to rationalise away non-reporting of examinations, tests, or investigations that they conducted or were aware of, but on which they did not directly rely.

In light of the social science reviewed in Part IIIA above, cl 3(g) of the *NSW Code* might be amended to:

I [the expert hand-writes his or her name here] have reported all examinations, tests, or other investigations conducted by myself or others since I was contacted to provide an opinion, despite the outcomes of those inquiries.  
\_\_\_\_ [initial here]

<sup>171</sup> The critical reviewer standard may also be used for other items that advert to the expert’s judgement about what ought to be reported, such as cls 3(j) and (k) of the *NSW Code* (n 33).

<sup>172</sup> We acknowledge that simply initialling each item provides a minimal safeguard. However, we think that, in conjunction with other reforms aimed at engaging the expert’s ethics, initialling can help.

<sup>173</sup> Munafò (n 4) 4–5.

<sup>174</sup> Turner et al (n 11) 65. The CONSORT Checklist asks scientists to report ‘[r]esults of any other analyses performed, including subgroup analyses and adjusted analyses, distinguishing pre-specified from exploratory’: CONSORT (n 85).

<sup>175</sup> *NSW Code* (n 33) cl 3(g) (emphasis added). See cl 6.1(g) of the *Victorian Code* (n 30) for its analogous provision.

This construction not only makes salient the requirement of reporting tests, but it removes the flexibility of reporting only those tests that the expert ‘relied’ on. It demands, very clearly, that the expert report not just those tests that support the opinion, but those that might not.

While asking expert witnesses to decisively attest that they have reported all tests (and controversies) is an improvement, scientists are now acknowledging that such attestations may not always go far enough in curbing their biases. Rather, as we discussed above, it is very easy for researchers to deceive themselves into thinking that the conclusion they came to was unavoidable (that is, hindsight bias), thus convincing themselves that it is perfectly ethical to not report the weaknesses in their design, analysis, and data.<sup>176</sup> Moreover, they may simply ‘forget the details’ of the study that supported an alternative hypothesis.<sup>177</sup> In other words, experts, like scientists, generally understand the importance of impartiality but may require constraints on their reasoning to fulfil that aim: ‘The values of impartiality and objectivity are pervasive, particularly for scientists, but human reasoning is not reliably impartial or objective.’<sup>178</sup>

Following from the trend in science, courts may wish to supplement codes of conduct with elements of preregistration to help reveal and control post-hoc rationalisations of analytic choices. In other words, experts may be asked — before they are exposed to the facts of a case — to specify how they will go developing their opinion. In the civil sphere, this might involve experts explaining how they go about valuing real estate before they are told the precise property they are valuing.<sup>179</sup> This would prevent them from choosing, after the fact, the methodology that leads to their preferred outcome and then rationalising away (or forgetting) reasons for applying a different methodology. We note that it may be perfectly appropriate for experts to shift methodologies in some circumstances. Preregistration (likely at an early case conference) would at least create a record of the initial choice and compel the expert to explain the decision to change.

In the criminal sphere, many choices that forensic scientists make have been criticised for being overly fact-driven and post-hoc.<sup>180</sup> For example, one forensic scientist who gave evidence in the trial of Jeffrey Gilham, an acknowledged wrongful conviction, applied a controversial methodology to find a pattern of stab

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<sup>176</sup> Nosek et al, ‘Preregistration Revolution’ (n 77) 2600–1.

<sup>177</sup> Brian A Nosek, Jeffrey R Spies and Matt Motyl, ‘Scientific Utopia: II. Restructuring Incentives and Practices to Promote Truth over Publishability’ (2012) *Perspectives on Psychological Science* 7(6) 615, 617.

<sup>178</sup> Nosek et al, ‘Preregistration Revolution’ (n 77) 2601.

<sup>179</sup> For example, the discounted cash flow (‘DCF’) approach to valuation is often viewed suspiciously by courts for being outside the mainstream, but there may be reasons it is preferable in some cases: see *Downie v Sorell Council* (2005) 141 LGERA 304. If an expert were to state a preference for the DCF before knowing the specific property in question, then this may provide reason to think it was not chosen simply because it was beneficial to the client’s case. Similarly, battles are often fought in valuation cases over what properties are comparable to the instant property: see *Warren v Lawton (No 3)* [2016] WASC 285, [50]–[51]. If experts were to say before they see the property how they choose comparator properties, then this may also shed light on the reliability of their analysis.

<sup>180</sup> See ‘PCAST Report’ (n 126) 10; Jason M Chin and D’Arcy White, ‘Forensic Bitemark Identification Evidence in Canada’ (2019) 52(1) *University of British Columbia Law Review* 57.

wounds across the bodies of two deceased individuals.<sup>181</sup> This suggested a common assailant. In short, the forensic scientist found that if she focused on one subset of the wounds (those made after the deceased parties were disabled) and disregarded the others, there seemed to be a pattern.<sup>182</sup> The prosecution relied considerably on this conclusion.<sup>183</sup>

The forensic practitioner's process and conclusions were sharply criticised by another forensic scientist<sup>184</sup> and largely dismissed by the NSW Court of Criminal Appeal.<sup>185</sup> She was interpreting data (stab wounds) that were highly uncertain and varied, and was attempting to identify a pattern within that noise. Such situations are ripe for apophenia (that is, seeing structure in randomness), which she may have succumbed to by focusing her opinion on the subset of the wounds that showed some similarity. However, if she had pre-specified (before seeing the wounds) what constitutes a pattern and what does not, it would have been easier for the jury to assess the probative force of her opinion at the first instance.<sup>186</sup>

*Gilham* is not uncommon; experts often must conduct analyses in an ad hoc manner. For instance, in *Wood v The Queen*, an expert had a woman thrown repeatedly into a swimming pool, in an effort to support the prosecution's contention that a deceased could have been thrown to her death by the accused (alone or in the company of another).<sup>187</sup> These types of experiments may benefit from measures such as preregistration and code of conduct compliance to encourage not only those results that favour the expert's theory are reported.

In contrast to the *NSW Code*, the *Victorian Code* is more implicitly attuned to the behavioural ethics of providing expert opinions, especially in requiring disclosure of controversies in the field:

Where an expert is aware of any *significant and recognised disagreement or controversy* within the relevant field of specialised knowledge, which is *directly relevant* to the expert's ability, technique or opinion, the expert *must disclose* the existence of that disagreement or controversy.<sup>188</sup>

This item has the right idea in demanding that experts disclose disagreements or controversies. Its language does, however, provide some ethical leeway in providing the disagreement must be 'directly' relevant to the opinion and 'significant and recognised'.

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<sup>181</sup> *Gilham v The Queen* [2012] NSWCCA 131, [280] ('*Gilham*'). See generally Gary Edmond, David Hamer and Andrew Ligertwood, 'Expert Evidence after *Morgan*, *Wood* and *Gilham*' (September/October 2012) 112 *Precedent* 28.

<sup>182</sup> *Gilham* (n 181) [281].

<sup>183</sup> *Ibid* [248]–[250].

<sup>184</sup> *Ibid* [351]–[370].

<sup>185</sup> *Ibid* [346].

<sup>186</sup> See Mehera San Roque, 'A Woman Like You': Gender, Uncertainty and Expert Opinion Evidence in the Contemporary Criminal' (2013) 3(2) *feminists@law* 1, 6. It is important to note here that the evidence presented by the different experts in this case was framed by questionable Crown tactics including a failure to call a material expert witness who had provided an opinion to the Crown that contradicted the evidence led at trial as to the significance of the 'pattern'.

<sup>187</sup> *Wood* (n 141) 590 [45].

<sup>188</sup> *Victorian Code* (n 30) 6.2 (emphasis added).



Finally, revelations from metascience and behavioural ethics reinforce existing worries that court-appointed experts and concurrent procedures may not be as useful as once thought. Chiefly, they bring all of their field's norms and practices — many of which can be questionable — into the courtroom. As we saw above, peer-review, which is something of an analogue for experts testifying concurrently (with, of course, many key differences), has not worked as well as it could have in many fields. In particular, there is vast publication bias where null findings are much less likely to be published. Moreover, several fields are finding that their false discovery rates are higher than expected, and perhaps close to 50%.<sup>189</sup> With experts concurrently reviewing each other's work based on deficient field standards, there is little reason to think this procedure will help very much. Similarly, court-appointed experts may be unbiased in that they are not paid or selected by a party, but they may still use the questionable practices of their field.<sup>190</sup> None of this is to say that these practices are useless. For instance, in many cases it will be likely that a court-appointed expert will be subjected to fewer adversarial pressures than those that are party-appointed.

That said, the metascientific reforms going on in the mainstream sciences should lend both some optimism and some tangible guidance. For example, checklists that have found some demonstrable success may be used alongside court-appointed experts to encourage them to go beyond their field's standards and present their findings with the appropriate cautions and levels of uncertainty. Here we note that Edmond and colleagues have discussed the NSW Police's revised template for preparing their expert reports, which is an effort to better comply with the *NSW Code*.<sup>191</sup> While this new template still understates the error in the field, it appears to be an improvement over practitioners' previous way of providing evidence.<sup>192</sup> Similar industry-specific templates that correspond more closely to checklists like CONSORT may represent important and empirically-justified reforms to expert procedure.

## V Conclusions and the Limits of Procedure

In this article, we have made a case for procedure. Specifically, we think that procedure that is designed with reference to effective scientific procedural safeguards and that is enthusiastically enforced by courts may provide serious benefits to the trial process. Now, we should mitigate our own conclusions.

First, we do not mean to suggest that expert procedure is a silver bullet in ensuring factual rectitude. Yes, procedure may encourage experts to be transparent about the weaknesses of their methods (for example, codes of conduct) and control some biases that were not previously controlled (for example, preregistration). But

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<sup>189</sup> See the sources at n 59 above.

<sup>190</sup> Edmond, 'After Objectivity' (n 1) 153–4.

<sup>191</sup> Edmond, Martire and San Roque, 'Expert Reports' (n 22) 604.

<sup>192</sup> Ibid: 'The first thing to say about the Revised Certificate template is positive'.

even an expert who discloses some of his or her opinion's weaknesses may still strongly hold to that opinion in a way that is persuasive to the factfinder.<sup>193</sup>

Second, the effectiveness of codes can be undermined by failures of counsel to take advantage of the tools offered, as well as countervailing procedural reforms that may discourage comprehensive reporting.<sup>194</sup> These countervailing trends create barriers and disincentives for parties, and anecdotally raise the possibility of higher costs being imposed on defendants and their representatives who request more comprehensive reporting.<sup>195</sup>

Third, there is the applied shortcoming that we saw in *Chen* and its progeny whereby, despite the critical outward posture adopted towards the partisan expert, courts are reluctant to enforce codes of conduct (and this often occurs in the criminal context).<sup>196</sup> Indeed, beyond the codes of conduct cases we discussed above, Australian courts have been careful to note that even serious questions of bias go to the weight, rather than the admissibility, of the evidence.<sup>197</sup> Similarly, expert procedures can be circumvented when witnesses are characterised as providing lay opinion or 'ad hoc' expert opinion based on repeated exposure to case-specific facts.<sup>198</sup>

Against this sobering backdrop, we want to argue nonetheless that we should not be vacating the procedural field. Rather — especially given weakened admissibility rules and trial safeguards that do not demonstrably work — there is a place for procedure to fill the gaps. Science, our culture's chief means of answering factual questions, is undergoing serious changes, with many of these changes being procedural in nature. Law should be aware of this revolution within science and take advantage of the research it has produced — research that reinforces the importance of taking procedure seriously.

<sup>193</sup> Consider, for instance, the High Court's recent decision in *Lee v Lee* (2019) 372 ALR 383 ('*Lee*'). In *Lee*, one expert admitted that bloodstain pattern analysis is a 'notoriously inexact science': at 391 [34]. Still, that same expert refused to resile from her position when made aware of evidence casting serious doubt on her opinion. The High Court ultimately described her opinion as 'to a high degree, improbable': at 398 [63].

<sup>194</sup> See, eg, discussion in Carol McCartney, 'Streamlined Forensic Reporting: Rhetoric and Reality' (2019) 1 *Forensic Science International: Synergy* 83; Gary Edmond, Sophie Carr and Emma Piasecki, 'Science Friction: Streamlined Forensic Reporting, Reliability and Justice' (2018) 38(4) *Oxford Journal of Legal Studies* 764.

<sup>195</sup> In NSW, there is a new 'Early Appropriate Guilty Pleas' regime that includes a 'short form' of forensic reporting, which, like the Streamlined Forensic Reporting regime in the UK, significantly reduces the level of detail initially provided in relation to forensic evidence: see NSWLRC, *Encouraging Appropriate Early Guilty Pleas* (Report 141, December 2014) and Legal Aid of New South Wales, 'Early Appropriate Guilty Pleas' (website) <<https://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/early-appropriate-guilty-pleas>>. The impact of the NSW regime has yet to be evaluated.

<sup>196</sup> *Chen* (n 2); *Warwick* (n 13); Edmond and Martire, 'Just Cognition' (n 10).

<sup>197</sup> *Fagenblat* (n 21) [7]; *Flavel v South Australia* (2007) 96 SASR 505, 523 [102]; *Haoui v The Queen* (2008) 188 A Crim R 331, 354 [127].

<sup>198</sup> See Gary Edmond, Kristy Martire and Mehera San Roque 'Unsound Law: Issues with ('Expert') Voice Comparison Evidence' (2011) 35(1) *Melbourne University Law Review* 52; *Nguyen v The Queen* (2017) 264 A Crim R 405, 415–17 [41]–[51].

# Before the High Court

## *Hocking v Director-General of the National Archives of Australia: Can Kerr's Correspondence with the Queen Be Kept Secret Forever?*

Anne Twomey\*

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### *Abstract*

For decades, there has been much speculation over the contents of the correspondence between the Governor-General, Sir John Kerr, and the Queen concerning the dismissal of the Whitlam Government in 1975. This appeal to the High Court of Australia concerns whether these documents are 'Commonwealth records' that must be released to the public in accordance with the *Archives Act 1983* (Cth), or are the private property of the former Governor-General, with access controlled by the Queen. The answer turns on whether the documents are the 'property' of the Commonwealth or a Commonwealth institution. The Full Federal Court of Australia held that these documents were Kerr's personal property and that he therefore controlled the conditions of access to them. The appellant argues that the documents were made in the course of exercising official Commonwealth functions and are the property of the Commonwealth. This column contends that 'property' must be interpreted consistently with the purposes of the Act and accordingly includes documents created by the highest officers of the nation in the exercise of their official functions.

## I Introduction

Nearly all documents concerning the dismissal of the Whitlam Government in 1975 have been released by the National Archives of Australia ('NAA'), including the personal records and notes of the Governor-General of Australia, Sir John Kerr. The last remaining records of note are the 'Kerr–Palace correspondence' between Sir John and the Queen leading up to, and in the aftermath of, the dismissal.

The Kerr–Palace correspondence, which occurred between 15 April 1974 and 5 December 1977, is held by the NAA. Section 31 of the *Archives Act 1983* (Cth) ('*Archives Act*') requires the NAA to give public access to any Commonwealth record that is in the open access period, is in the care of the NAA and is not an exempt record. The open access period for the Kerr–Palace correspondence commenced on 1 January, 31 years after the year they were created — that is, on 1 January 2005, 2006, 2007 or 2008, depending on the date of the document.

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Even though these documents are in the care of the NAA and in the open access period (and no claim of exemption has yet been raised), the NAA has refused to release them for public access. This is because they were treated by the NAA as personal and private documents, rather than Commonwealth records.

*Hocking v Director General of the National Archives of Australia*<sup>1</sup> involves a legal challenge to this decision. Both the Federal Court of Australia at first instance<sup>2</sup> and the Full Federal Court of Australia on appeal<sup>3</sup> held that the documents were ‘personal’ communications, not ‘Commonwealth records’, and that the NAA was therefore entitled not to release them. The appellant was granted special leave to appeal these decisions to the High Court of Australia.<sup>4</sup>

## II The Nature of the Correspondence

Neither of the courts below viewed the Kerr–Palace correspondence, so it was discussed in the judgments in the abstract.<sup>5</sup> Nonetheless, some observations can be made about the likely nature of it, given knowledge of comparable correspondence between the Queen and her vice-regal representatives, including in relation to exercises of the reserve powers.<sup>6</sup>

All correspondence between a vice-regal officer and the Sovereign goes through the Sovereign’s Private Secretary. This is because the correspondence is ‘official’ in nature, not personal. The Kerr–Palace correspondence will therefore not contain any letters from the Queen setting out her views. The agreed facts note that the correspondence from the Queen’s side is ‘by means of Her Private Secretary’.<sup>7</sup>

From the Palace side, the letters are most likely to contain short notes from the Private Secretary, thanking the Governor-General for updating the Queen, encouraging him to continue to do so, expressing solicitude for the difficult circumstances in which he finds himself, and perhaps querying some points he has made or seeking further information.

In the United Kingdom (‘UK’), any correspondence from the Queen’s Private Secretary that found its way onto government files (including correspondence with the Foreign Office and the UK Prime Minister addressing constitutional crises in Commonwealth countries) was routinely publicly released under the 30-year rule.<sup>8</sup>

<sup>1</sup> High Court of Australia, Case No S262/2019.

<sup>2</sup> *Hocking v Director-General of the National Archives of Australia* (2018) 255 FCR 1, 29 [107] (Griffiths J) (*Hocking (FCA)*).

<sup>3</sup> *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1, 18 [86], 20 [99], 21 [107] (Allsop CJ and Robertson J) (*Hocking (FCAFC)*).

<sup>4</sup> Transcript of Proceedings, *Hocking v Director-General of the National Archives of Australia* [2019] HCATrans 160.

<sup>5</sup> Note the discussion by Flick J of the unsatisfactory consequences, as some documents, if examined, might be characterised as ‘personal property’ while others, such as newspaper clippings and reports to the Queen might not: *Hocking (FCAFC)* (n 3) 24 [118] (Flick J, dissenting).

<sup>6</sup> For examples of what is included in such correspondence, see Anne Twomey, ‘Constitutional Law: The Queen’s Letters’ (2019) 93(4) *Australian Law Journal* 267.

<sup>7</sup> *Hocking (FCAFC)* (n 3) 11 [46].

<sup>8</sup> This was the case until the law was altered by the *Constitutional Reform and Governance Act 2010* (UK). See the discussion of the history of the secrecy of royal correspondence in: Anne Twomey,

Hence, all such correspondence was carefully written with an eye to publication in the long run.<sup>9</sup>

From Kerr's side, the letters will contain reports upon the political situation in Australia, including newspaper clippings and other relevant documents. It was part of vice-regal duty to report regularly (usually quarterly) to the Sovereign about political, economic, agricultural, industrial and social matters within the jurisdiction, with special reports being made in relation to events of importance, such as elections, national disasters and constitutional crises.<sup>10</sup> The purpose was to ensure that the Sovereign was well informed in fulfilling her constitutional and symbolic functions with respect to the Realm concerned. Hence, all parties were acting in the fulfilment of their constitutional offices by participating in the correspondence.

Kerr's correspondence will also contain an explanation and justification of his actions in dismissing the Whitlam Government. This is because the Governor-General, as the representative of the Queen, under s 2 of the *Australian Constitution*, is obliged to report to her regarding any exceptional exercise of the powers of the office.

This duty of vice-regal officers was previously set out in *Royal Instructions*, which provided that if a vice-regal officer acted in opposition to the opinion of his ministerial advisers, he had to report 'the matter to Us without delay, with the reasons for his so acting'.<sup>11</sup> Even without such formal instructions, this obligation continues to apply to vice-regal officers. For example, when the Governor-General of Pakistan dismissed his Government in 1953 and failed to send a report to the Queen justifying his action, he was swiftly reminded of his obligation to do so. The Governor-General's subsequent report and the Queen's Private Secretary's comment on it are all publicly available on the relevant file in the UK National Archives, released under the 30-year rule.<sup>12</sup>

Accordingly, Kerr was obliged, as part of his official duties, to report to the Queen on any exercises of his powers that were taken contrary to the advice of his responsible ministers. The Kerr–Palace correspondence would contain that report.

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'Peering into the Black Box of Executive Power: Cabinet Manuals, Secrecy and the Identification of Convention' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart, 2019) 399, 402–8.

<sup>9</sup> Note that the Royal Family's website says: 'Papers that originate in the Royal Household but are held by bodies subject to the *Public Records Act 1958*, for example The National Archives, are public records.'; 'Information held by bodies subject to the *Public Records Act*', Freedom of Information (Web Page) <<https://www.royal.uk/freedom-information>>.

<sup>10</sup> See, eg, in the UK National Archives: 'Governor-General, West Indies: Periodic Reports 1960–1961' (CO 1031/4159); 'Governor-General's Report, Federation of Nigeria 1960' (CO 554/2479); 'Western Australia: Governor's Quarterly Reports 1948–1952' (DO 35/3196); 'Victoria: Governor's Quarterly Reports 1951–1952' (DO 35/3195), which also included a report on the Governor's exercise of a reserve power in 1952.

<sup>11</sup> See, eg, *Royal Instructions to the Governor of New South Wales*, 29 October 1900, cl VI.

<sup>12</sup> UK National Archives, 'Dismissal of Kwaja Nazimuddin's Government by Governor-General of Pakistan' (DO 35/5106).

### III Private Collections and Commonwealth Records

The legal question in the *Hocking* case is relatively simple to identify, but difficult to answer. It is whether the Kerr–Palace correspondence, held by the NAA, is comprised of ‘Commonwealth records’ within the meaning of s 3(1) of the *Archives Act*. A ‘Commonwealth record’ is defined as ‘a record that is the property of the Commonwealth or a Commonwealth institution’. A ‘Commonwealth institution’ is defined as including ‘the official establishment of the Governor-General’, but not the Governor-General himself or herself.

There was much discussion in the lower courts of the practice of past Governors-General taking such correspondence with them on leaving office. Griffiths J in the Federal Court observed that this was ‘redolent of ownership’.<sup>13</sup> But the practice of senior office holders, such as Prime Ministers, Ministers, and Governors-General, taking with them copies of documents that relate to their time in office, is relatively common. It does not necessarily involve a transfer of property from the Commonwealth to the officer concerned.

These documents are often later deposited in a governmental institution, such as the National Library,<sup>14</sup> a state library,<sup>15</sup> the NAA, or a university.<sup>16</sup> They usually contain a mix of private and official papers. Access to the papers is generally governed both by conditions imposed by the donor of the documents and conditions imposed by legislation in relation to the release of official documents.

In the case of the NAA, this is dealt with by ss 6(2) and (3) of the *Archives Act* as follows:

(2) Where, in the performance of its functions, the Archives enters into arrangements to accept the care of records from a person other than a Commonwealth institution, those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records and any such arrangements have effect notwithstanding anything contained in Division 3 of Part V.

(3) Where an arrangement entered into by the Archives to accept the care of records from a person other than a Commonwealth institution relates to a Commonwealth record, then, to the extent that that arrangement, in so far as it relates to such a record, is inconsistent with a provision of Part V, that provision shall prevail.

These provisions recognise that private collections of records that are deposited with the NAA may indeed include Commonwealth records. This was also

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<sup>13</sup> *Hocking (FCA)* (n 2) 31 [117] (Griffiths J).

<sup>14</sup> See, eg, the Papers of Edmund Barton, James Scullin, Lord Hopetoun, Lord Tennyson, Lord Dudley, Lord Denman, Sir Ronald Munro Ferguson, Lord Stonehaven, Sir Isaac Isaacs, Lord Gowrie, Sir Paul Hasluck, Sir Zelman Cowen, Sir Ninian Stephen and Bill Hayden.

<sup>15</sup> See, eg, the correspondence between Sir Philip Game and King George V regarding the Lang dismissal, in the State Library of New South Wales.

<sup>16</sup> See, eg, the Whitlam Institute at Western Sydney University, the Bob Hawke Prime Ministerial Library at the University of South Australia, the John Curtin Prime Ministerial Library at Curtin University, the Malcolm Fraser Collection at the University of Melbourne and the Howard Library at the Museum of Australian Democracy.

noted in the Explanatory Memorandum to the *Archives Act*, which stated that the purpose of s 6(3) was to ‘ensure that normal government controls over Commonwealth records, will apply to any Commonwealth records which might appear in collections of personal papers deposited with the Archives’.<sup>17</sup>

Mere possession of those records by individuals does not cause them to cease being the property of the Commonwealth. Nor does any practice or custom of an officeholder taking such records with him or her on leaving office have that effect. Equally, private lodgement of those documents with the NAA does not cause all the documents lodged to be regarded as non-Commonwealth records that are exclusively controlled by the wishes of the depositor.

Where a record is a Commonwealth record, the access requirements in Part V of the *Archives Act* override any conditions imposed by the donor. A Commonwealth record cannot be released prior to coming into the open access period, and *must* be released (subject to any exemption) after coming into the open access. This is not something that the conditions imposed by the donor can affect.

For example, if one gains the permission of a former Minister to access his or her private papers, lodged with the NAA, one is informed that most, if not all, of the documents will be Commonwealth records and cannot be accessed until the requisite confidentiality period for Commonwealth records has expired and the documents have been scrutinised for any additional exempt material.

It is therefore not sufficient, in responding to a request for access to privately lodged documents, for the NAA to state that the conditions of lodgement do not permit access. The NAA must also assess whether any of those documents is a Commonwealth record and apply the law accordingly. That is why the determination of whether such correspondence amounts to the property of the Commonwealth is critical to the *Hocking* case.

## IV Property in Commonwealth Records

The issue of whether the Commonwealth holds property in the Kerr-Palace correspondence that is currently in the care and custody of the NAA, is a difficult one. When it comes to letters written in the course of official duties, a number of questions arise. Should one look to:

- ownership of the piece of paper on which the letter is written;
- copyright in the original work;
- the rights of senders and recipients of letters;
- the capacity in which the letter was written;
- the understanding of the author and recipient as to ownership;
- the relationship between the author and recipient; or
- who currently possesses the letter?

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<sup>17</sup> Explanatory Memorandum, Archives Bill 1983 (Cth) 12.

The submissions of the respondent helpfully explain the complicated law with respect to the ownership of letters generally.<sup>18</sup> But in this case, the key issue is what the *Archives Act* meant in its reference to ‘property’ of the Commonwealth and how that should be interpreted consistent with the purposes of the Act.

There are various ways in which archival legislation can identify the documents to which it applies, including by reference to provenance (was it created by or received by the Commonwealth?) or custody (is it currently under the custody and control of the Commonwealth?). But the Commonwealth chose instead to rely on the concept of ‘property’ due to the greater clarity of its legal meaning.<sup>19</sup> As this case shows, that was wishful thinking.

A majority of the Full Federal Court rejected the argument that the correspondence was a Commonwealth record because it was created in the exercise of the official duties of the Governor-General and the Queen of Australia. The Court did so because this would introduce ‘an administrative provenance definition’, which had previously been rejected in the drafting of the Act.<sup>20</sup> But it is difficult to see how provenance and custody (or ‘possession’) are not relevant to determining ownership of correspondence. Who created a document, the capacity in which they acted when they created it, and the person who currently possesses it, would all appear to be relevant factors in determining who holds property in it.

The majority of the Full Federal Court went on to say that

[n]o doubt some of the records written by the Governor-General would be the property of the Commonwealth and one general example may be records of the exercise by the Governor-General of the executive power of the Commonwealth within the meaning of s 61 of the *Constitution*.<sup>21</sup>

Yet this brings provenance back into play in determining ‘property’. If a document recording the Governor-General’s exercise of the executive power to dismiss the Prime Minister is regarded as a Commonwealth record, then how is the record of the reasons for so acting, sent by the Governor-General to the person he represents and whose executive power he exercises, not also a Commonwealth record? At the very least, the making of the document is incidental to the exercise of executive power. It is not a mere ‘personal’ reflection that ‘relates’ to the exercise of a power, such as an entry in a personal diary.<sup>22</sup> Such correspondence fulfils a formal duty of the Governor-General to report to the Monarch and ensure that the Monarch is sufficiently informed to be able to fulfil his or her role with respect to Australia.

Two justifications were given by the Full Federal Court, neither of which were convincing. The first was that correspondence with the Queen is different because the Queen is not able to act in relation to what she is told or to direct the

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<sup>18</sup> Director-General of the National Archives of Australia and Attorney-General (Cth), ‘Joint Submissions of the Respondent and Attorney-General for the Commonwealth’, Submission in *Hocking v Director-General of the National Archives of Australia*, Case No S262/2019, 1 November 2019, [13]–[17].

<sup>19</sup> *Hocking (FCAFC)* (n 3) 7 [26], 13 [62] (Allsop CJ and Robertson J).

<sup>20</sup> *Ibid* 18 [86] (Allsop CJ and Robertson J).

<sup>21</sup> *Ibid* 19 [91] (Allsop CJ and Robertson J).

<sup>22</sup> Compare *ibid* 18 [89] (Allsop CJ and Robertson J).



Governor-General.<sup>23</sup> It is true that the Queen, at least according to convention, could only dismiss the Governor-General if she was advised by the Australian Prime Minister to do so.<sup>24</sup> Her Majesty also could not reverse the exercise by the Governor-General of a power that is expressly conferred upon the Governor-General by the *Australian Constitution*, such as the power in s 64 to appoint and remove the Prime Minister. But what was not clear from the Full Federal Court judgment was why this inability to discipline or override affected property in the correspondence.

It would seem implausible that a letter written by the Prime Minister to a State Premier would not be a Commonwealth record simply because neither could discipline nor override the actions of the other. The power relationship between the sender and recipient of the letter would seem to have little relevance to the ownership of a letter if the letter was written in the course of exercising the functions or powers of a particular office.

The second justification given by the Full Federal Court was based on a policy reason. The respondent argued that if the correspondence between the Governor-General and the Queen comprised Commonwealth records, then a Prime Minister could choose to release them immediately and that this was a possibility ‘that should not lightly be embraced’.<sup>25</sup> A majority of the Court accepted that view.<sup>26</sup>

However, if the respondent and the majority of the Full Federal Court were correct, and such correspondence is personally owned by a former Governor-General or whoever inherits his or her property, then this person could immediately go to Sotheby’s and sell the correspondence for a large amount of money, making it immediately public or locking away Australian history in a private collection forever.

As the appellant noted in her submissions to the High Court, this would mean that the Governor-General could profit financially from the performance of his or her office, and that the profit would be greater the more controversial his or her actions were, creating a private financial incentive for the exercise of the reserve powers.<sup>27</sup>

This would seem to fly in the face of the principles of responsible and representative government, which require Members of Parliament, Ministers and other officers of the Crown always to act in the public interest and never place themselves in a position where their private financial interest may be seen to conflict with their public duty. If, in 1977, Kerr had sold copies of his correspondence with

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<sup>23</sup> *Hocking (FCAFC)* (n 3) 20 [97].

<sup>24</sup> Note that Her Majesty could still issue a ‘rebuke’ to the Governor-General (as she did to the Queensland Governor in 1975) or express support for the Governor-General’s conduct (as she did publicly in relation to the Governor-General of Fiji in 1987), or encourage particular conduct (as she did, through her Private Secretary, to the Governor of Queensland in 1987): see Anne Twomey, *The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems* (CUP, 2018) 787, 805, 275 (respectively).

<sup>25</sup> *Hocking (FCAFC)* (n 3) 13 [61] (Allsop CJ and Robertson J).

<sup>26</sup> *Ibid* 18 [88] (Allsop CJ and Robertson J).

<sup>27</sup> Jennifer Hocking, ‘Appellant’s Submissions’, Submission in *Hocking v Director-General of the National Archives of Australia*, Case No S262/2019, 4 October 2019, [38] (‘Appellant’s Submissions’).

the Queen for \$1 million, one cannot but imagine that the Commonwealth would have gone to court to argue that the documents were indeed Commonwealth records and not within the power of the Governor-General to sell.

The risk that a beneficiary under the will of a former Governor-General might sell such documents would seem to be far greater than the risk of the Commonwealth Government immediately exposing correspondence with the Sovereign, especially given that a Prime Minister must maintain a working relationship with both the Sovereign and the current Governor-General.

Commonwealth records are protected by both the *Archives Act* and the *Freedom of Information Act 1982* (Cth), with long periods of secrecy and exacting scrutiny to determine what exemptions may apply in relation to matters such as national security and international relations, before the records can be publicly released. Property owned by a former Governor-General is not subject to any particular legal protection from publication, no matter how damaging its release might be to the public interest. From a public policy point of view, it is far more dangerous to leave official correspondence between the Governor-General and the Queen in the hands of any impecunious relative of the former Governor-General who may have inherited it, than it is for it to be protected by law in Commonwealth archives.

In addition, there is a further policy argument that the purpose of the *Archives Act* is to preserve and make publicly available important Australian historical documents for the benefit of the nation.<sup>28</sup> The term ‘Commonwealth record’ should be applied in accordance with its natural and ordinary meaning, ‘read in the context and consistent with the purpose of the *Archives Act*’.<sup>29</sup> To the extent that there is any uncertainty as to who holds ‘property’ in official correspondence between the holders of the highest ranking offices of the Commonwealth of Australia, the Governor-General and the Queen of Australia, then an interpretation should be made in favour of preserving and making publicly available such correspondence for the benefit of the nation.

## V The Conditions on Release of the Kerr–Palace Correspondence

The Kerr–Palace correspondence was lodged with the NAA by the Official Secretary to the Governor-General, David Smith, acting in his official capacity.<sup>30</sup> The NAA has stated that it ‘remains under the effective and immediate control of the Office of the Governor-General through the Official Secretary of the Governor-General’ and that the NAA has no ‘power or authority to give access to the record

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<sup>28</sup> *Archives Act* s 2A.

<sup>29</sup> *Hocking (FCAFC)* (n 3) 23 [113] (Flick J, dissenting).

<sup>30</sup> *Ibid* 10 [42]. Note the argument that as he acted in his official capacity, the correspondence was lodged by a ‘Commonwealth institution’, being the official establishment of the Governor-General. This meant that s 6(2) of the *Archives Act* was not applicable, the conditions of lodgement were not binding, and the documents were in fact lodged as ‘Commonwealth records’. Note also that the *Archives Act* did not come into effect until after Kerr’s letters were deposited, so transitional provisions are relevant.

other than in accordance with the instrument of deposit and arrangements specified by the offices of the Queen and the Governor-General'.<sup>31</sup>

At the time the correspondence was lodged with the NAA, it was on the condition that the papers were to 'remain closed until 60 years after the end of [Kerr's] appointment as Governor-General' and that their release after 60 years 'should be only after consultation with the Sovereign's Private Secretary of the day and with the Governor-General's Official Secretary of the day'.<sup>32</sup> This is a strong indication of the official (not personal) nature of the correspondence, because it is officials (not Kerr's personal representatives) who must be consulted before the documents are released.

In July 1991, the Queen, by way of a letter from the Official Secretary to the Governor-General, instructed that the secrecy period for the correspondence between herself and Sir John Kerr, Sir Ninian Stephen and Sir Zelman Cowen, be reduced to 50 years, but instead of them then being subject to release after 'consultation' with the Queen's Private Secretary and the Official Secretary to the Governor-General, the 'approval' of both was required.<sup>33</sup>

This gave the Sovereign an absolute veto over the release of the correspondence. Kerr died in March 1991. The change in the conditions under which his correspondence was held appears to have been unilaterally made by the Queen, despite the fact that she neither deposited the documents nor held property in them.

The NAA also applied 'new arrangements decided by the Queen' to the records of other Governors-General, including those of Lord Casey, who was Governor-General from 1965 to 1969. Lord Casey's documents were lodged with the NAA by his daughter on 2 June 1992. The instrument of deposit stated that she understood that the provisions of the *Archives Act* would apply to any Commonwealth records contained in the deposit. It also stated that documents that would otherwise be exempt if they were Commonwealth records, such as those that would endanger national security or the safety of a person, would be exempt from public access until they had lost this sensitivity, and that other records would be made available for public access when 30 years old. The depositor imposed this 30-year period *after* the Queen had instructed the NAA on the 'new arrangements'.

Nonetheless, the 30-year period appears to have been unilaterally changed to comply with the Queen's instructions so that it was extended to 1 May 2019, 50 years after Casey's term as Governor-General ended.<sup>34</sup> This lengthened the confidentiality period by 20 years. In addition, a condition was added that public access could only occur with the 'approval' of the Sovereign's Private Secretary and the Official Secretary of the Governor-General. No such condition had been originally applied by the depositor.

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<sup>31</sup> *Hocking (FCAFC)* (n 3) 2 [4] quoting the letter from the NAA refusing access to the relevant files

<sup>32</sup> *Ibid* 10 [43]. It appears that Smith imposed these conditions after consultation with the Palace and that Kerr was not certain of the detail of them: *Hocking (FCA)* (n 2) 12 [19]–[20], 30 [112] (Griffiths J).

<sup>33</sup> *Hocking (FCAFC)* (n 3) 10 [42].

<sup>34</sup> I am unaware of the depositor agreeing to alter the terms of the deposit, although it is possible this occurred. If so, the Queen was exercising soft power to achieve the same result as an exercise of hard power.

As the access period for Lord Casey's records opened in May 2019, approval was sought by the NAA to open the correspondence to public access. Approval was very recently refused by the Queen's Private Secretary.<sup>35</sup> He stated that approval would not be given for the release of the correspondence during the Queen's lifetime and for five years after the end of the Queen's reign. Even then, it would not be released without the approval of the Private Secretary of the new Sovereign. If the need for the approval of the Sovereign's Private Secretary for the release of such documents is legally binding, Australia's constitutional history concerning its relationship with the Queen is lost to Australian control, despite sitting in the custody of an Australian institution.

If these documents were the personal property of the former Governor-General, then only the depositor could have controlled access — not the Queen or the current Governor-General. As the appellant noted in her submissions, '[t]he Queen having such an entitlement was inconsistent with Sir John Kerr's personal ownership of the Records.'<sup>36</sup>

The irony here is that a majority of the Full Federal Court accepted the view of the primary judge that the correspondence did not form Commonwealth records, because although the Governor-General is the representative of the Monarch, the Monarch cannot exercise executive power in Australia and has no capacity to direct the Governor-General.<sup>37</sup> Yet it is that very Monarch who has, through her Private Secretary, directed both the Governor-General and the NAA to change the conditions of access to documents in Australia under Australian law, so that the documents cannot be released in future without the agreement of her Private Secretary (who acts on her behalf), and who has now, again through her Private Secretary, refused access to the correspondence with Lord Casey.<sup>38</sup>

In 2015, the then Prime Minister of Australia, Malcolm Turnbull, stated that he intended to advise the Queen to approve the release of the Kerr–Palace correspondence.<sup>39</sup> If he did so, the Queen refused to act upon his advice.

Turnbull's communications with the Queen, which would reveal whether he advised her to approve the release of the documents and whether she declined to act upon his advice, have been the subject of a freedom of information application. The Department of the Prime Minister and Cabinet refused to release this correspondence on the grounds that it would damage the international relations of the Commonwealth and the deliberative processes of the Government. The Australian Information Commissioner rejected the application of these exemptions

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<sup>35</sup> Letter from Paul Singer MVO, Official Secretary to the Governor-General, to David Fricker, Director-General NAA, 20 December 2019, setting out the position of the Queen's Private Secretary, Mr Edward Young.

<sup>36</sup> *Appellant's Submissions* (n 27) [53].

<sup>37</sup> *Hocking (FCAFC)* (n 3) 16 [75], 20 [96] (Allsop CJ and Robertson J). Note, to the contrary, that the Monarch can exercise executive power in Australia: *Royal Powers Act 1953* (Cth); *Australia Act 1986* (Cth) s 7(4). The Monarch can also issue Royal Instructions upon ministerial advice.

<sup>38</sup> It is not apparent that in either case action was taken with ministerial advice.

<sup>39</sup> Paul Kelly and Troy Bramston, 'Malcolm Turnbull's Bid to Unlock John Kerr's Letters', *The Australian* (Sydney, 9 November 2015); Paul Kelly, 'Malcolm Turnbull to Try Recovering John Kerr's Letters to Queen', *The Australian* (Sydney, 11 November 2015).

and found that it was in the public interest to release the correspondence.<sup>40</sup> The Administrative Appeals Tribunal overturned that finding, treating the correspondence as exempt on the two grounds claimed by the Commonwealth.<sup>41</sup>

Hence, whether the Queen refused to accept the advice of her Prime Minister to release the Kerr–Palace correspondence remains unknown. Knowledge of how the Queen exercises her powers in relation to Australia and whether, as is believed, she acts only upon the advice of her responsible ministers, is fundamental to an understanding of Australia’s constitutional system. No such understanding can exist if all evidence is locked behind secrecy laws for long or indefinite periods.

Although the conditions placed on the release of royal correspondence held by the NAA do not bear directly on whether such correspondence is comprised of Commonwealth records, they are still relevant for the following reasons. First, the degree of control exercised by the Queen suggests that, in practice, the letters have not been treated as the personal property of the Governor-General. Second, it shows the weakness in the argument that the Queen has no capacity to direct the Governor-General or exercise power in Australia. Third, the refusal by the Queen’s Private Secretary to approve the release of vice-regal correspondence, even after 50 years, shows that one consequence of a finding that such documents are not Commonwealth records will be the loss to the nation of control over records of national historical importance, contrary to the purposes of the *Archives Act*.

## VI Conclusion

Secrecy of government records, for a reasonable period of time, is necessary to ensure the effective running of government and so that frank advice can be given when needed. But the value of that secrecy diminishes over time. At a point, it becomes oppressive and potentially toxic, creating distrust in the institutions of government and fuelling conspiracy theories. This is why secrecy periods have been progressively reduced over the last century, from 50, to 30 and now 20 years. Even the most sensitive of Commonwealth documents, the Cabinet Notebooks which record what was said in Cabinet Meetings, have had their secrecy period reduced from 50 to 30 years.

The same consideration has not been given to royal correspondence, fuelling corrosive speculation about what it may contain. While the appearance was given of reducing the period from 60 to 50 years in 1991, in fact the effect of this change was to introduce a complete veto by the Sovereign’s Private Secretary to any release. This has been recently evidenced by the refusal to release Lord Casey’s correspondence, despite the 50 years having passed. It also means that the Kerr–Palace correspondence is unlikely to be released in 2027, when 50 years have passed from the end of Sir John Kerr’s term as Governor-General.

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<sup>40</sup> *William Summers and Department of the Prime Minister and Cabinet (Cth) (Freedom of Information)* [2018] AICmr 9, [52]–[53].

<sup>41</sup> *Secretary, Department of Prime Minister and Cabinet (Cth) and Summers (Freedom of Information)* [2019] AATA 5537, [145]–[146].

Any rational person, if asked whether a letter from the Governor-General of Australia to the Queen of Australia, reporting upon and justifying the Governor-General's exercise of a reserve power, was a Commonwealth record or a personal letter, would answer that it was a Commonwealth record. To contend that it is a private and personal document defies common sense. As Flick J noted in his dissenting judgment in the Full Federal Court, it is 'difficult to conceive of documents which are more clearly "Commonwealth records" and documents which are not "personal" property'.<sup>42</sup>

It would be a very poor policy choice for the Commonwealth to attribute personal ownership of critical constitutional correspondence of this kind to the Governor-General, so that it could be sold to the highest bidder at any time. Such documents deserve the protection of Commonwealth archives laws for a reasonable period, be it 20 or 30 years, or perhaps even longer. But they should also remain under the control of officials in Australia. To interpret the *Archives Act* in a manner that cedes all local control of these documents is contrary to the entire purpose of the Act and would be a perverse and unreasonable interpretation of it.

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<sup>42</sup> *Hocking (FCAFC)* (n 3) 22 [110] (Flick J).

# *Before the High Court*

## He ‘Came Across as Someone Who Was Telling the Truth’: *Pell v The Queen*

Andrew Dyer\* and David Hamer†

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### *Abstract*

When the jury at Cardinal Pell’s second trial convicted him on 11 December 2018 of five charges of historical sexual offending, were the verdicts unreasonable or insupportable having regard to the evidence? A majority of the Court of Appeal of Victoria (‘VSCA’) held that they were not, and Pell has now asked the High Court of Australia (‘HCA’) to reverse that decision. It is argued in this column that, if the HCA grants Pell special leave to appeal, it should reject his argument that the VSCA majority reversed the onus of proof when reaching the conclusion that it did. That, however, is not necessarily to say that the jury was entitled to find Pell guilty largely on the strength of the complainant’s testimony. Evidence that Pell had no opportunity to offend was powerful, and it appears to us that the jury *might* have acquitted. Whether it *must* have done so is a more contentious question. Especially given the highly controversial nature of these proceedings, it might be that, if it decides this question, the HCA will attach much weight to the established principle that jury verdicts are not lightly to be disturbed.

## **I Introduction**

In *Pell v The Queen*,<sup>1</sup> the High Court of Australia (‘HCA’) has been asked to decide whether the Court of Appeal of Victoria (‘VSCA’) was right to find, by majority,<sup>2</sup> that it was open to the jury at Cardinal Pell’s trial to convict him of one charge of sexual penetration of a child under the age of 16 and four charges of performing an indecent act with a child under that age. Alternatively, was this a case where, however compelling the complainant’s testimony, the jury should have had a reasonable doubt about the accused’s guilt?

Pell’s submission that his case falls into the latter category is partly based on his contention that, regardless of whether the complainant ‘came across as someone

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We thank the referee for his or her fair, helpful and constructive comments.

<sup>1</sup> High Court of Australia, Case No M112/2019.

<sup>2</sup> *Pell v The Queen* [2019] VSCA 186, [14] (Ferguson CJ and Maxwell P) (‘*Pell (VSCA)*’). Weinberg JA dissented at [1051]–[1112].

who was telling the truth’,<sup>3</sup> inconsistencies between his evidence and other witnesses’ testimony that Pell was accompanied and elsewhere when the alleged offending occurred, prevent our being sure that such offending took place.<sup>4</sup> Indeed, according to Pell, on the VSCA majority’s own analysis, the Crown failed to disprove his ‘alibi’ beyond reasonable doubt.<sup>5</sup> Pell submits that their Honours’ analysis reversed the onus of proof.<sup>6</sup>

Even if the HCA rejects this argument, however, a large question remains. A significant body of evidence<sup>7</sup> made it difficult for the Crown to prove that Pell offended as alleged. Could the jury really be satisfied that there was no reasonable possibility of Pell’s innocence? We believe that the HCA is *entitled* to find that it could not; but we doubt whether their Honours will make this finding. In *Chamberlain v The Queen (No 2)*, Brennan J noted that, if appellate courts were to set aside jury verdicts as unreasonable wherever those courts had a reasonable doubt about the accused’s guilt, ‘the function of returning the effective verdict would be transferred from the jury to the court ... which would ... erode public confidence in the administration of criminal justice’.<sup>8</sup> Similar considerations apply here. While Pell has his defenders,<sup>9</sup> there is much hostility in the community towards him.<sup>10</sup> An appellate court’s decision to override the jury’s assessment of the complainant’s evidence could be viewed by a significant part of the community as constituting an impermissible usurpation of that jury’s role, thus weakening the courts’ legitimacy. Given some High Court Justices’ expressed concern to do their work unobtrusively, lest the reputation of the courts be damaged,<sup>11</sup> their Honours might be unwilling to risk creating such a perception. That is, especially in such a controversial case, the Court might attach much weight to the undoubted rule that appellate courts must show appropriate respect for jury verdicts.

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<sup>3</sup> Ibid [91].

<sup>4</sup> George Pell, ‘Applicant’s Submissions’, Submission in *Pell v The Queen*, Case No M112/2019, 3 January 2020, [35]–[38] (*‘Pell Submissions’*).

<sup>5</sup> Ibid [48].

<sup>6</sup> Ibid [45], [48].

<sup>7</sup> See *Pell (VSCA)* (n 2) [841], [855], [875].

<sup>8</sup> (1984) 153 CLR 521, 603 (*‘Chamberlain (No 2)’*). It is true that Brennan J has been seen — including by himself (*Jones v The Queen* (1997) 191 CLR 439, 441–2 (*‘Jones’*)) — as having favoured greater restraint in this area than the HCA ultimately determined to be suitable. Nevertheless, his Honour’s approach is uncontroversial insofar as it insists that, ‘for both constitutional and practical reasons’ (*M v The Queen* (1994) 181 CLR 487, 502) appellate courts should not too readily interfere with juries’ verdicts; and, for the reasons developed below, the HCA might give this principle particular prominence in this case.

<sup>9</sup> See, eg, Keith Windschuttle, ‘George Pell and the Jury’ (2019) 63(4) *Quadrant* 4.

<sup>10</sup> Three books about Pell are currently on sale: David Marr, *The Prince: Faith, Abuse and George Pell* (Black Inc, 2019); Louise Milligan, *Cardinal: The Rise and Fall of George Pell* (Melbourne University Press, 2019); Lucie Morris-Marr, *Fallen: The Inside Story of the Secret Trial and Conviction of Cardinal George Pell* (Allen and Unwin, 2019). All portray him unfavourably.

<sup>11</sup> See, eg, Justice Virginia Bell, ‘Judicial Activists or Champions of Self-Restraint: What Counts for Leadership in the Judiciary?’ (General Sir John Monash Leadership Oration, 4 August 2016) 17–18.



## II The Trial, the VSCA's Decision and the HCA Proceedings

### A The Trial

At trial, the Crown alleged that, following Sunday Solemn Mass at St Patrick's Cathedral in 1996, the complainant, A, and his friend, B, who were choristers aged about 13, detached themselves from the choir as it left the Cathedral.<sup>12</sup> After re-entering the Cathedral, they proceeded to the Priests' Sacristy, where Pell robbed and disrobed that year.<sup>13</sup> Upon entering the Sacristy, the two boys located and started drinking some sacramental wine.<sup>14</sup> Shortly afterwards, however, Pell appeared in the doorway.<sup>15</sup> After saying something like 'You're in trouble', Pell manoeuvred his penis out of his robes, grabbed B's head and lowered it towards Pell's genitalia.<sup>16</sup> Pell then turned to A.<sup>17</sup> After forcing A to fellate him, Pell instructed A to remove his own pants, which he did.<sup>18</sup> While touching A's bare genitals, Pell touched his own penis with his other hand.<sup>19</sup> The whole episode took five or six minutes.<sup>20</sup>

A alleged that a second incident occurred at least a month later, again following Sunday Solemn Mass at the Cathedral.<sup>21</sup> As A was processing with the choir back through the Sacristy corridor to the choir room, Pell pushed himself against A<sup>22</sup> and squeezed A's genitals over his robes.<sup>23</sup>

The 'critical issue' at trial was 'whether A's evidence was credible and reliable'.<sup>24</sup> B died the year before the complainant first complained to the police.<sup>25</sup> Before his death, when his mother asked him whether he had ever been 'touched up' when a chorister, he denied it.<sup>26</sup> Pell emphatically denied the allegations.<sup>27</sup> The jury at his first trial could not reach a verdict.<sup>28</sup> Pell's second jury convicted him on all charges.<sup>29</sup>

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<sup>12</sup> *Pell (VSCA)* (n 2) [43].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid* [44].

<sup>15</sup> *Ibid* [44].

<sup>16</sup> *Ibid* [44]–[45].

<sup>17</sup> *Ibid* [46].

<sup>18</sup> *Ibid* [46]–[47].

<sup>19</sup> *Ibid* [47].

<sup>20</sup> *Ibid* [45]–[47].

<sup>21</sup> *Ibid* [50].

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid* [53].

<sup>25</sup> *Ibid* [51].

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid* [181]–[185].

<sup>28</sup> *Ibid* [1].

<sup>29</sup> *Ibid* [1], [4].

## B *The VSCA Proceedings*

Before the VSCA, Pell argued that his convictions were unreasonable<sup>30</sup> and that the Court should substitute verdicts of acquittal for them.

All judges agreed upon the applicable principles.<sup>31</sup> '[T]he question', said the HCA majority in *M v The Queen*, 'is whether ... upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt' of the accused's guilt.<sup>32</sup> This, the VSCA observed, was the relevant test, and — contrary to some judges' claims<sup>33</sup> — it does not differ from Hayne J's formulation in *Libke v The Queen*, where he said that the question is whether the jury 'must as distinct from might' have entertained a reasonable doubt.<sup>34</sup> The pertinent enquiry is, however, distinct from the trial judge's consideration, as a matter of law, whether there is evidence on which a jury could convict.<sup>35</sup> The appellate court must undertake its own 'independent assessment' of the evidence's sufficiency and quality.<sup>36</sup> If, after doing so, it experiences a reasonable doubt about the accused's guilt, it must acquit him/her — unless the 'jury's advantage in seeing and hearing the evidence' can resolve that doubt.<sup>37</sup>

Underlying this are two competing considerations. The first concerns the jury's role. As the HCA has repeatedly stated, not only has the jury seen and heard the witnesses; it has primarily been entrusted with deciding questions of criminal guilt.<sup>38</sup> Thus, it is a 'serious step'<sup>39</sup> to overturn its findings. But this step can be taken. That is because of the second consideration. Because the law recognises that 'juries sometimes make mistakes',<sup>40</sup> and because of society's unwillingness to tolerate the miscarriages of justice that can result from such mistakes,<sup>41</sup> a jury's verdict will be set aside as unreasonable if 'there is a significant possibility that an innocent person has been convicted.'<sup>42</sup>

As noted above, the VSCA majority found that it was open to the jury to be satisfied beyond reasonable doubt that Pell was guilty as charged.<sup>43</sup> '[T]here was nothing about A's evidence', their Honours held, or about the evidence that Pell had no opportunity to offend, that required the jury to acquit.<sup>44</sup> Indeed, their Honours did

<sup>30</sup> *Criminal Procedure Act 2009* (Vic) s 276(1)(a).

<sup>31</sup> *Pell* (VSCA) (n 2) [19]–[24] (Ferguson CJ and Maxwell P), [590], [613]–[618] (Weinberg JA).

<sup>32</sup> *M v The Queen* (n 8) 493 (Mason CJ, Deane, Dawson and Toohey JJ).

<sup>33</sup> See, eg, *MFA v The Queen* (2002) 213 CLR 606, 623 [55] (McHugh, Gummow and Kirby JJ). Cf, however, eg, *Chidiac v The Queen* (1991) 171 CLR 432, 443 (Mason CJ), 451 (Dawson J), 457–8 (Toohey J) ('*Chidiac*').

<sup>34</sup> *Libke v The Queen* (2007) 230 CLR 559, 596–7 [113] (emphasis in original).

<sup>35</sup> *MFA v The Queen* (n 33) 615 [26].

<sup>36</sup> *Morris v The Queen* (1987) 163 CLR 454, 473 (Deane, Toohey and Gaudron JJ).

<sup>37</sup> *M v The Queen* (n 8) 494 (Mason CJ, Deane, Dawson and Toohey JJ).

<sup>38</sup> See, eg, *SKA v The Queen* (2011) 243 CLR 400, 405 [13] (French CJ, Gummow and Kiefel JJ).

<sup>39</sup> *R v Baden-Clay* (2016) 258 CLR 308, 329 [65].

<sup>40</sup> *Chamberlain (No 2)* (n 8) 569 (Murphy J).

<sup>41</sup> *MFA v The Queen* (n 33) 624 [59].

<sup>42</sup> *M v The Queen* (n 8) 494 (Mason CJ, Deane, Dawson and Toohey JJ).

<sup>43</sup> *Pell* (VSCA) (n 2) [14] (Ferguson CJ and Maxwell P).

<sup>44</sup> *Ibid.*

not experience doubt ‘about the truth of A’s account or the Cardinal’s guilt’.<sup>45</sup> Therefore, it was unnecessary to consider whether the jury’s advantage in seeing and hearing the witnesses could resolve any such doubt.<sup>46</sup>

Concerning A’s reliability and credibility, according to the majority he fared well under cross-examination; and while his account might have differed in certain ways from that which he had given previously, this often happens where someone repeatedly describes events from the ‘distant past’.<sup>47</sup> The jury’s attention was drawn to the relevant inconsistencies,<sup>48</sup> the majority observed, and it was well-placed to decide whether A’s evidence was honest and accurate.<sup>49</sup>

The majority then considered Pell’s submission that the offending was highly improbable. Would he really have risked his career and reputation by offending so brazenly?<sup>50</sup> Their Honours dealt with this submission as they had Pell’s attack on A’s credibility and reliability. The arguments from improbability were ‘powerful’.<sup>51</sup> But they had been placed fairly before the jury, and it had rejected them. If an appellate court were to override the jury in these circumstances, their Honours suggested, it would be paying insufficient regard to the established principle that, because juries are primarily responsible for deciding questions of criminal guilt, their verdicts are not lightly to be disturbed.<sup>52</sup> Sexual offenders do sometimes offend where there is a high risk of detection.<sup>53</sup>

Finally, the majority dealt with Pell’s argument that he had no opportunity to offend, making the offending impossible.<sup>54</sup> Their Honours found that, although certain witnesses had pointed to the unlikelihood of: (a) choristers detaching themselves from the choir during the procession out of the Cathedral; and (b) returning unnoticed to it after the incident, none of this evidence compelled a conclusion that Pell lacked an opportunity to offend.<sup>55</sup> For example, Rodney Dearing’s evidence that someone would have noticed if choristers had left the procession, was just an opinion.<sup>56</sup> And even though there was a choir rehearsal after Mass on the only two dates on which the first incident could have occurred, there was evidence that the choir often took up to 15 minutes to disrobe before rehearsals.<sup>57</sup> Whether the complainants would have been noticed walking late into a rehearsal,<sup>58</sup> they could less conspicuously have rejoined the choir when it was disrobing.<sup>59</sup>

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<sup>45</sup> Ibid [39].

<sup>46</sup> Ibid.

<sup>47</sup> Ibid [73].

<sup>48</sup> Ibid [76].

<sup>49</sup> Ibid [75].

<sup>50</sup> Ibid [98].

<sup>51</sup> Ibid.

<sup>52</sup> Ibid [107]–[109].

<sup>53</sup> Ibid [99]–[102].

<sup>54</sup> Ibid [135].

<sup>55</sup> Ibid [326].

<sup>56</sup> Ibid [313]–[314].

<sup>57</sup> Ibid [227].

<sup>58</sup> See *ibid* [566].

<sup>59</sup> Ibid [325].

Regarding Pell's submission that the Priest's Sacristy was a 'hive of activity',<sup>60</sup> just after Mass, thus eliminating any reasonable possibility that the first incident had occurred, the majority noted two altar servers' evidence that the Sacristy would be unlocked after Mass and then left unattended for five or six minutes.<sup>61</sup> If the jury accepted this, it could also accept that, even if the Sacristy then became very busy indeed, Pell was not thus prevented from offending as alleged.<sup>62</sup> He could have offended within the five or six minute period.

This last conclusion did depend, however, upon whether anything else deprived Pell of criminal opportunity. Certain witnesses testified that: (a) the Archbishop was always attended while in the Cathedral<sup>63</sup> (pursuant to 'centuries old Church law'<sup>64</sup>); and (b) would invariably wait on the Cathedral's steps after Mass to greet parishioners.<sup>65</sup> Indeed, some said they specifically recalled Pell's remaining on the steps for an extended period on one<sup>66</sup> or both<sup>67</sup> of the dates when the first incident could have occurred. But the majority observed<sup>68</sup> that Pell's Master of Ceremonies, Charles Portelli, had conceded both that he might occasionally not have accompanied Pell back to the Sacristy, and that Pell might sometimes have remained on the steps only very briefly.<sup>69</sup> Other witnesses claimed that they had sometimes seen Pell in the Cathedral unaccompanied in his robes.<sup>70</sup> And the majority regarded as unpersuasive the evidence of those who said they recalled seeing Pell on the steps on the particular days. These witnesses' memories had become considerably vaguer when asked to recall other events that had occurred at the time.<sup>71</sup>

## C *The HCA Proceedings*

On 13 November 2019, Gordon and Edelman JJ referred to the Full Court, for argument as on an appeal, Pell's application for special leave to appeal to the HCA.<sup>72</sup> At the Full Court hearing, their Honours will consider Pell's contention that the VSCA majority erred by treating its 'belief in the complainant' as determinative.<sup>73</sup> According to Pell, however believable the complainant was, the jury could convict only if it was entitled to find that the prosecution had proved beyond reasonable

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<sup>60</sup> Ibid [158], [299].

<sup>61</sup> Ibid [294]–[295].

<sup>62</sup> Ibid [296].

<sup>63</sup> Ibid [243], [285]–[286].

<sup>64</sup> Ibid [285].

<sup>65</sup> See, eg, *ibid* [246], [279].

<sup>66</sup> Ibid [268]–[272].

<sup>67</sup> Ibid [248]–[249], [875].

<sup>68</sup> Ibid [283].

<sup>69</sup> Ibid [246].

<sup>70</sup> See especially *ibid* [289].

<sup>71</sup> See, eg, *ibid* [253]–[254].

<sup>72</sup> Transcript of Proceedings, *Pell v The Queen* [2019] HCATrans 217. Of course, the Full Court might not grant Pell special leave. Our focus in this column is not on this procedural issue, but rather on the arguments that Pell has urged upon the Court. Even if their Honours refuse to grant special leave, they might still consider those arguments in a reasoned judgment: see, eg, *Clayton v The Queen* (2006) 81 ALJR 439.

<sup>73</sup> *Pell Submissions* (n 4) [55].

doubt that Pell had an opportunity to offend;<sup>74</sup> and the jury had no such entitlement. '[E]vidence which placed [Pell] on the front steps [of the Cathedral] or with others at the time of the alleged offending'<sup>75</sup> was 'effectively, alibi evidence', which was not disproved to the criminal standard.<sup>76</sup> The VSCA majority, Pell submits, erred by instead requiring *the defence* to 'demonstrate the events were impossible'<sup>77</sup>; this reversed the onus and standard of proof.<sup>78</sup>

### III Will Pell's Argument Succeed?

As noted above, the VSCA majority's reasoning contained three main prongs: A's evidence was compelling and the jury was well-placed to weigh any inconsistencies in it; the Court should not intervene because of the allegations' improbability; and Pell had an opportunity to offend. While Pell's complaint of error in the majority's approach relates primarily to its findings about opportunity, he has also queried whether it correctly found that it was 'open to the jury to find the offending proven beyond reasonable doubt'.<sup>79</sup> Accordingly, we will examine each aspect of their Honours' reasoning.

#### A A's Evidence

In *Chidiac v The Queen*, Mason CJ stated that, because 'issues of credibility and reliability ... are matters for the jury', an appellate court will only 'infrequently set aside a conviction as being unsafe because the evidence of a vital Crown witness' was lacking in either regard.<sup>80</sup> Nevertheless, his Honour noted, 'occasions do arise' where a conviction is based on evidence that is 'so unreliable or wanting in credibility' as to render that verdict unreasonable.<sup>81</sup> Accordingly, in *GAX v The Queen*,<sup>82</sup> the HCA set aside as unreasonable a conviction that depended upon the complainant's evidence that the appellant had touched her genitals. Because the complainant was suggestible,<sup>83</sup> had limited intelligence<sup>84</sup> and a poor memory,<sup>85</sup> and had originally said she was sleeping at the relevant time,<sup>86</sup> her later evidence that she recalled being touched was quite possibly a 'reconstruction'.<sup>87</sup> In other cases, a sexual offence complainant's credibility — as opposed to her/his reliability — has been damaged sufficiently to require the jury to doubt the accused's guilt. In *Mejia v The Queen*,<sup>88</sup> for instance, a VSCA majority attached much importance to

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<sup>74</sup> Ibid [54].

<sup>75</sup> Ibid [35].

<sup>76</sup> Ibid.

<sup>77</sup> Ibid [46].

<sup>78</sup> Ibid [45].

<sup>79</sup> Ibid [6].

<sup>80</sup> *Chidiac* (n 33) 444.

<sup>81</sup> Ibid.

<sup>82</sup> (2017) 344 ALR 489 ('GAX').

<sup>83</sup> Ibid 493 [17].

<sup>84</sup> Ibid 492 [11].

<sup>85</sup> Ibid.

<sup>86</sup> Ibid 496 [29].

<sup>87</sup> Ibid.

<sup>88</sup> [2016] VSCA 296, [150]–[163].

the consideration that, in its view, the complainant had lied about an uncharged act — and had therefore ‘made a false allegation of sexual abuse’<sup>89</sup> against the accused.

The majority in *Pell* was right to conclude that this is not such a case. Certainly, as Weinberg JA observed, dissenting, there were inconsistencies and discrepancies in A’s account.<sup>90</sup> A said that Pell had pulled aside his robes to expose his penis.<sup>91</sup> The robes could not be parted.<sup>92</sup> He claimed that he had drunk red wine in the Sacristy.<sup>93</sup> The Sacristy wine was probably white.<sup>94</sup> He insisted that the two incidents happened in the same year.<sup>95</sup> The Crown ultimately accepted that he was mistaken about that.<sup>96</sup> Moreover, A withdrew his claim that Pell had actually delivered Mass before each incident.<sup>97</sup> As Vanstone J stated in *R v LKB*,<sup>98</sup> however, ‘variation ... almost inevitably creeps into accounts of such events ... where the witness ... give[s] evidence ... some years [later]’.<sup>99</sup> Accordingly, Australian courts have repeatedly held that, where, as here, the inconsistencies were before the jury and were relatively minor and/or related to matters peripheral to the offending, the conviction(s) were not unreasonable because of them.<sup>100</sup>

## B *Implausibility*

The VSCA majority was also right to hold that the implausibility of the allegations, by itself, did not justify intervention. Certainly, in *M v The Queen*, the majority held the appellant’s convictions to be unreasonable primarily because of ‘the improbability of [his] ... acting as ... alleged’.<sup>101</sup> Did he really molest his daughter ‘on a squeaky bed in an unlocked bedroom’, with his wife nearby?<sup>102</sup> But, as Gans has noted, this decision has ‘aged badly’.<sup>103</sup> Dissenting in *M v The Queen*, Brennan J observed that ‘I might well have acquitted had I been a [juror]’.<sup>104</sup> ‘Yet’, he continued, ‘I am unable to say that the jury were not entitled to bring in an adverse verdict.’<sup>105</sup> His Honour’s approach is consistent with more recent authority.<sup>106</sup>

<sup>89</sup> Ibid [161].

<sup>90</sup> *Pell* (VSCA) (n 2) [455].

<sup>91</sup> Ibid [435], [437].

<sup>92</sup> Ibid [438].

<sup>93</sup> Ibid [827].

<sup>94</sup> Ibid [828].

<sup>95</sup> Ibid [666]–[667].

<sup>96</sup> Ibid [681].

<sup>97</sup> Ibid [419]–[420].

<sup>98</sup> (2017) 127 SASR 274.

<sup>99</sup> Ibid 281 [35].

<sup>100</sup> See, eg, *Dyers v The Queen* (2002) 210 CLR 285, 310–11 [68] (Kirby J), 331 [134] (Callinan J) (‘*Dyers*’); *R v Haak* (2012) 112 SASR 315, 326–7 [45]–[52], 327 [55]; *R v Lyaal* (2016) 264 A Crim R 172, 188 [77]–[78].

<sup>101</sup> *M v The Queen* (n 8) 500 (Mason CJ, Deane, Dawson and Toohey JJ).

<sup>102</sup> Ibid.

<sup>103</sup> Jeremy Gans, ‘A Judge’s Doubts’, *Inside Story* (online, 29 August 2019) <<https://insidestory.org.au/judges-doubts/>>.

<sup>104</sup> *M v The Queen* (n 8) 507.

<sup>105</sup> Ibid.

<sup>106</sup> See, eg, *Dyers* (n 100) 310 [67] (Kirby J), 331 [134] (Callinan J); *DeSilva v The Queen* [2015] VSCA 290, [78]; *Spence v The Queen* [2016] VSCA 265, [50]–[51].

Appellate judges commonly note, as Martin CJ did in *JJR v Western Australia*,<sup>107</sup> that while apparent implausibilities in the complainant's account *might* have caused the jury to experience a reasonable doubt, it was not *bound* to acquit. Judges will not too readily substitute their views for the jury's assessment of such matters.<sup>108</sup>

In *Pell*, Weinberg JA thought that the complainant's second allegation was one of those rare instances where the implausibility rose so high as to render the relevant verdict unreasonable.<sup>109</sup> His Honour could not believe that such conduct 'would take place in public, and in the presence of numerous potential witnesses'.<sup>110</sup> As the majority observed, however, the alleged touching was 'fleeting'.<sup>111</sup> And their Honours rightly, in our view,<sup>112</sup> implied that Weinberg JA was in no position to override the jury's verdict, based as it presumably was on 'life experience'<sup>113</sup> that 'confined spaces facilitate furtive sexual touching, even when others are [present]'.<sup>114</sup>

### C Opportunity

In *Palmer v The Queen*,<sup>115</sup> McHugh J described as 'very persuasive' the complainant's evidence that the appellant had committed various sexual offences against her. Nevertheless, for his Honour<sup>116</sup> and three other Justices,<sup>117</sup> because the Crown could not eliminate the reasonable possibility that the appellant was elsewhere at the relevant time, his convictions could not stand. How sound is Pell's claim that, similarly to *Palmer*, the Crown failed to disprove beyond reasonable doubt testimony that he was elsewhere when the alleged offending occurred?

Pell has placed some emphasis<sup>118</sup> on the VSCA majority's finding that the jury was entitled to have 'reservations'<sup>119</sup> and 'doubts'<sup>120</sup> about the reliability of claims by Portelli and by the Sacristan, Maxwell Potter, that they specifically recalled Pell's being in company and on the steps on the relevant dates: having reservations about exculpatory evidence does not imply satisfaction beyond reasonable doubt of guilt. But we doubt whether there is much substance in Pell's claim that the majority reversed the onus of proof. In *Dyers*, Kirby J held that the jury had been entitled to 'discount' certain alibi evidence, because it was contradicted and given by individuals who were not 'completely independent of the appellant'.<sup>121</sup> Similar considerations apply here. Certainly, the Crown was

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<sup>107</sup> (2018) 272 A Crim R 209, 225 [68].

<sup>108</sup> *Ibid* 225 [69].

<sup>109</sup> *Pell* (VSCA) (n 2) [1095]–[1096].

<sup>110</sup> *Ibid* [1096].

<sup>111</sup> *Ibid* [112].

<sup>112</sup> For a similar analysis, see Gans (n 103).

<sup>113</sup> *M v The Queen* (n 8) 508 (Brennan J).

<sup>114</sup> *Pell* (VSCA) (n 2) [112].

<sup>115</sup> (1998) 193 CLR 1, 30 [75].

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid* 14–15 [21]–[22] (Brennan CJ, Gaudron and Gummow JJ).

<sup>118</sup> *Pell Submissions* (n 4) [48].

<sup>119</sup> *Pell* (VSCA) (n 2) [253].

<sup>120</sup> *Ibid* [267].

<sup>121</sup> *Dyers* (n 100) 311 [70].

prohibited from suggesting,<sup>122</sup> and did not suggest,<sup>123</sup> that Portelli or Potter had any allegiance to Pell. But their testimony was contradicted — albeit only by the complainant — and, most importantly, when asked, they could not recall other events on the particular days.<sup>124</sup> Further, the majority's remarks about 'reservations' were made as their Honours accepted<sup>125</sup> a Crown submission<sup>126</sup> that his re-examination 'demonstrated' that Portelli had no independent recollection of the relevant days. In these circumstances, the other language the majority used probably does not evidence any forgetfulness about the onus of proof.

## D *Might Pell Nevertheless Succeed?*

If this is correct, the VSCA majority did not err as alleged. Nor do we agree with Finnis's similar contention<sup>127</sup> that their Honours reversed the onus of proof when they observed that they were 'not persuaded that the evidence ... *established* impossibility in the sense contended for by the defence'.<sup>128</sup> Elsewhere, their Honours clearly implied that it would have been enough if the jury had '*had a doubt*' about whether Pell had a realistic opportunity to offend.<sup>129</sup> And it was perfectly acceptable for them to note that, once the offending was possible — which it *was* once the Crown 'persuade[d] the jury',<sup>130</sup> to the requisite standard to reject the alibi evidence — there was no logical bar to proof of Pell's guilt beyond reasonable doubt.

That is different from saying, however, that the jury was necessarily entitled to find Pell guilty because of the complainant's testimony.

Pell has correctly noted that it is insufficient for a jury to believe a complainant;<sup>131</sup> it must further be convinced of the accused's guilt beyond reasonable doubt.<sup>132</sup> Pell has also claimed that

[t]he law recognises the dangers in overvaluing demeanour are such that no jury is to make the manner in which a witness gives evidence the only or even the most important factor in its decision as to whether the prosecution has proved guilt beyond reasonable doubt ...<sup>133</sup>

The law, however, rightly allows for convictions based largely or solely on the complainant's evidence.<sup>134</sup> A different approach would undermine the prohibition

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<sup>122</sup> *Pell (VSCA)* (n 2) [988].

<sup>123</sup> *Ibid* [995].

<sup>124</sup> *Ibid* [250], [265].

<sup>125</sup> *Ibid* [253]–[255].

<sup>126</sup> *Ibid* [251].

<sup>127</sup> John Finnis, 'Where the Pell Judgment Went Fatally Wrong' (2019) 63(10) *Quadrant* 20, 22.

<sup>128</sup> *Pell (VSCA)* (n 2) [143] (emphasis added).

<sup>129</sup> *Ibid* [351] (emphasis added).

<sup>130</sup> *Ibid* [151].

<sup>131</sup> *Pell Submissions* (n 4) [41].

<sup>132</sup> *Liberato v The Queen* (1985) 159 CLR 507, 515 (Brennan J), 520 (Deane J); *De Silva v The Queen* (2019) 94 ALJR 100, 104–5 [12] (Kiefel CJ, Bell, Gageler and Gordon JJ).

<sup>133</sup> *Pell Submissions* (n 4) [41] (citations omitted).

<sup>134</sup> *DL v The Queen* (2018) 92 ALJR 636, 652 [85] (Bell J).



against child sexual assault.<sup>135</sup> Moreover, in the cases that Pell has cited as authority for the proposition about demeanour, the crucial oral testimony was, respectively, demonstrably wrong<sup>136</sup> and so ‘glaringly improbable’<sup>137</sup> as to require its rejection — ‘no matter how impressive[ly]’ it was delivered.<sup>138</sup> This distinguishes those cases from *Pell*.

Sometimes, however, appellate courts hold guilty verdicts to be unreasonable because of the ‘cumulative effect’<sup>139</sup> of various factors.<sup>140</sup> It appears *open* to the HCA to overturn the *Pell* verdicts on this basis.<sup>141</sup> We have noted much of the evidence that Pell had/would have had no opportunity to offend.<sup>142</sup> Viewed overall, it is powerful. As Weinberg JA observed,<sup>143</sup> to convict, the jury had to be satisfied that: Pell did not linger on the steps on the relevant days (despite much evidence<sup>144</sup> that, from the time he became Archbishop,<sup>145</sup> he invariably did so); he was unaccompanied (despite much evidence that he invariably *was* accompanied);<sup>146</sup> the Sacristy was not a ‘hive of activity’ at the time of the first incident (despite evidence that it would have been);<sup>147</sup> and A and B detached themselves from the choir and then rejoined it without being noticed (despite much evidence that this was most unlikely).<sup>148</sup> Once we also consider: the inconsistencies in A’s account (however understandable); the unlikelihood that Pell would take such risks; and B’s and Pell’s denials,<sup>149</sup> it becomes apparent that a reasonable jury *might* not have convicted. Indeed, the case seems close to the borderline between one where the jury was entitled to return a guilty verdict, and one where it should have had a doubt.<sup>150</sup>

<sup>135</sup> David Hamer, ‘Delayed Complaint, Lost Evidence and Fair Trial: Epistemic and Non-epistemic Concerns’ in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, 2012) 215, 224.

<sup>136</sup> *Fox v Percy* (2003) 214 CLR 118, 130–1 [37]–[38] (Gleeson CJ, Gummow and Kirby JJ), 148 [95]–[96] (McHugh J).

<sup>137</sup> *Fennell v The Queen* (2019) 93 ALJR 1219, 1233 [81].

<sup>138</sup> *Fox* (n 136) 148 [96] (McHugh J).

<sup>139</sup> *R v Parbery* (2003) 141 A Crim R 43, 52 [37].

<sup>140</sup> See, eg, *ALS v R* [2015] NSWCCA 70, [26]–[37], [123]–[127]; *PLR v Western Australia (No 2)* [2015] WASCA 149, [93]–[107]; *Tyrrell v The Queen* [2019] VSCA 52, [153].

<sup>141</sup> The Crown contends that, if the HCA rejects Pell’s submission that the VSCA majority made specific errors, it should not determine for itself whether it was open to the jury to convict: Crown, ‘Respondent’s Submissions’, Submission in *Pell v The Queen*, Case No M112/2019, 31 January 2020, [7] (‘*Crown Submissions*’). That contention seems inconsistent with cases such as *GAX* (n 82).

<sup>142</sup> See text accompanying nn 54–67.

<sup>143</sup> *Pell* (VSCA) (n 2) [1064]; see also [841].

<sup>144</sup> See, eg, *ibid* [683].

<sup>145</sup> *Ibid* [706].

<sup>146</sup> See, eg, *ibid* [714]–[715].

<sup>147</sup> *Ibid* [725], [730]–[731].

<sup>148</sup> *Ibid* [766]–[776], [805]–[806].

<sup>149</sup> By itself, Pell’s denial would be of limited significance: *PH v R* [2017] NSWCCA 194, [38].

<sup>150</sup> Pell also argues that, because of the delay in complaint, he sustained forensic disadvantage of the type noted in *Longman v The Queen* (1989) 168 CLR 79, 91 (Brennan, Dawson and Toohey JJ): *Pell Submissions* (n 4) [33], [38], [54]. Certainly, the delay ‘may have ... deprived [him] of a cast iron alibi’: *Jones* (n 8) 455 (Gaudron, McHugh and Gummow JJ). It equally might have deprived the Crown of inculpatory evidence: David Hamer, ‘Trying Delays: Forensic Disadvantage in Child Sexual Assault Trials’ [2010] (9) *Criminal Law Review* 671, 671. Any forensic disadvantage seems relatively unimportant on an unreasonableness appeal. Historical child sexual abuse trials are common: this attests to the law’s acceptance that, where there is delay in complaint, proof beyond reasonable doubt is nevertheless possible.

If, however, it *is* open to the HCA to enter verdicts of acquittal, that does not necessarily mean that it will do so. Immediately before the VSCA hearing, Gans noted that ‘Anne Ferguson, Chris Maxwell and Mark Weinberg would surely rather not be [Pell’s] judges’.<sup>151</sup> The same must be true of the High Court Justices who will hear his application. For, as the VSCA majority noted, these proceedings are highly controversial.<sup>152</sup> Pell has been widely criticised for his handling of sexual abuse allegations against Catholic priests while he was Archbishop of Melbourne and then Sydney. Many of his critics are sure of his guilt. Others, however, have come ‘ferocious[ly]’<sup>153</sup> to his defence. If, as Bell J has recently suggested, the judiciary wishes ‘not ... to be seen very much at all,’<sup>154</sup> their Honours would surely prefer to avoid this case. Their decision *will* be noticed.

In such circumstances, and without indisputable grounds for intervening, might the Court be inclined to preserve the status quo? Whatever ridicule the VSCA majority’s decision attracted in some quarters,<sup>155</sup> this might not have seriously affected the VSCA’s broader reputation. A decision, in an emotive case, to override the judgment of the defendant’s peers, might arouse more concern.

This is not to express a cynical attitude about how the HCA exercises its powers. Rather, considerations of judicial restraint are relevant here and assist the Crown.<sup>156</sup> The two most senior Justices have recently written approvingly of Brennan CJ’s judicial philosophy.<sup>157</sup> At the heart of his approach was an appreciation of the need for restraint if public confidence in the courts was to remain.<sup>158</sup> Crucially, his Honour thought that it was only in ‘exceptional cases’<sup>159</sup> that an appellate court should overturn a jury’s verdict. For, might not the courts’ reputation suffer<sup>160</sup> if appellate judges were too liberally to substitute their views for those of ‘the constitutional arbiter of guilt’?<sup>161</sup> Or, to return to *Pell*: will the Court’s legitimacy be damaged if it decides to release the Cardinal?

## IV Conclusion

In 2002, at an internal Catholic Church inquiry, Alec Southwell QC was not satisfied that allegations of sexual offending against the then Archbishop of Sydney, George

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<sup>151</sup> Jeremy Gans, ‘Pell’s Judges’, *Inside Story* (online, 3 June 2019) <<https://insidestory.org.au/pells-judges/>>.

<sup>152</sup> *Pell (VSCA)* (n 2) [2] (Ferguson CJ and Maxwell P).

<sup>153</sup> Russell Marks, ‘George Pell’s appeal to the High Court’, *Saturday Paper* (Melbourne, 16–22 November 2019) 4.

<sup>154</sup> Bell, above n 11, 17.

<sup>155</sup> See, eg, Keith Windschuttle, ‘The Contradictions of the Choirboy’ (2019) 63(10) *Quadrant* 26.

<sup>156</sup> As it recognises: *Crown Submissions* (n 141) [20]–[22].

<sup>157</sup> Bell, above n 11, 13–15; Chief Justice Susan Kiefel, ‘Social Values and the Criminal Law’s Adaptability to Change’ (Speech, International Criminal Law Congress, 6 October 2018) 5, 8.

<sup>158</sup> See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 319 (Brennan J); *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ).

<sup>159</sup> *Jones* (n 8) 442 (Brennan CJ).

<sup>160</sup> See text accompanying n 8.

<sup>161</sup> *Jones* (n 8) 442 (Brennan CJ).

Pell, had been established.<sup>162</sup> The case was similar to the present one. There was delay in complaint, limited corroboration and Pell had made emphatic denials — but, while Southwell found that some criticisms could be made of the complainant's credibility, he also gained 'the impression that he was speaking honestly from an actual recollection'.<sup>163</sup> Because Southwell was also impressed by the Archbishop's evidence, however, he gave him the benefit of the doubt.<sup>164</sup>

The jury *might* have done the same at Pell's recent trial. Whether it *must* have done so is more questionable. Pell's claim that the VSCA majority reversed the onus of proof is dubious. But the evidence that Pell had no opportunity to offend was strong; and it does seem open to the HCA plausibly to insist that Pell's convictions were unreasonable — as indeed Weinberg JA has shown. Against that, however, are considerations of judicial restraint. Especially in such a high-profile case, their Honours will be cognisant of the established principle that the power to overturn a jury verdict must 'be exercised with caution and discrimination'.<sup>165</sup>

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<sup>162</sup> AJ Southwell QC, *Report of an Inquiry into an Allegation of Sexual Abuse against Archbishop George Pell* (2002) <[https://web.archive.org/web/20030527160009/http://www.catholic.org.au/statements/2002\\_oct14b.pdf](https://web.archive.org/web/20030527160009/http://www.catholic.org.au/statements/2002_oct14b.pdf)>.

<sup>163</sup> Ibid 15.

<sup>164</sup> Ibid.

<sup>165</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 688 (Dawson J).



# *Before the High Court*

## *Lewis v Australian Capital Territory: Valuing Freedom*

Jason NE Varuhas\*

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### *Abstract*

It has long been a principle of the common law that where basic rights in person, liberty and property are infringed, such violations will be met with an award of substantial damages. This approach to damages has served to strongly protect and vindicate the importance of these basic rights, especially in the face of unlawful action by government. However, this longstanding tradition is now in jeopardy. Lower courts in Australia have begun to deny awards for significant breaches of the right to liberty on the basis that, albeit the public defendant unlawfully detained the plaintiff, the defendant could and would have otherwise detained the plaintiff lawfully. In *Lewis v Australian Capital Territory*, the High Court of Australia must decide authoritatively whether to endorse this deviation from orthodoxy. This column argues that the Court should reject this novel approach and maintain the orthodoxy that substantial damages follow infringements of basic rights.

## **I Introduction**

Torts actionable per se have long performed a fundamental role in protecting and vindicating the basic rights of individuals, whether rights in liberty protected by false imprisonment, rights in land protected by trespass, or rights in the person protected by battery. By virtue of the principle of equality, which holds that the same ordinary law applies equally to private citizen and public official alike, these actions have played, and continue to play, a fundamental constitutional role in protecting these ancient rights specifically against excessive official action.

A fundamental feature of these actions, which has ensured they are able to perform this protective and vindicatory function, is that where protected rights are infringed absent lawful justification, such infringement will as of course be met with substantial (in the sense of more than nominal) damages. However, this longstanding tradition, which has served as a bulwark against governmental invasions of liberty, risks being lost. In *Lewis v Australian Capital Territory*, which now comes before the High Court of Australia,<sup>1</sup> the Australian Capital Territory ('ACT') Court of Appeal held that albeit Lewis had been unlawfully imprisoned by the defendant for

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<sup>1</sup> High Court of Australia, Case No C14/2019.

82 days, he should only receive nominal damages.<sup>2</sup> The Court accepted that Lewis had been subject to false imprisonment: the defendant could not make out a defence of lawful excuse, as the Sentencing Administration Board's decision to cancel Lewis's periodic detention, which led to his incarceration, was unlawful and void for want of procedural fairness. However, when it came to damages, substantial damages were denied on the basis of 'but for' causal analysis. The Court held that Lewis had suffered no loss because but for Lewis's unlawful detention, the defendant could have and would have lawfully detained him anyway. In other words, the tort left him no worse off compared to the position he would inevitably have been in: 'the appellant was always going to serve the 82 days in prison'.<sup>3</sup> As such, he was awarded a token sum of \$1. If entitled to compensatory damages, he would have recovered \$100,000.<sup>4</sup>

In coming to this conclusion, the ACT Court of Appeal followed the United Kingdom ('UK') Supreme Court in *R (Lumba) v Secretary of State for the Home Department*, a case concerning foreign national prisoners.<sup>5</sup> The principle in that case holds that only nominal damages should be awarded where the plaintiff was unlawfully imprisoned, but could and would have otherwise been imprisoned lawfully. In *Fernando v Commonwealth (No 5)*, the Full Federal Court of Australia applied *Lumba* to deny substantial damages for a false imprisonment of over 1,000 days in the immigration context.<sup>6</sup> In the immigration case of *CPCF v Minister for Immigration and Border Protection*, discussed further below, the *Lumba* principle was considered by four of the seven High Court Justices.<sup>7</sup> However, as a majority found no liability on the facts, the damages discussion was obiter dicta.

In the appeal from *Lewis*, the High Court must authoritatively decide whether to approve the causal principle that derives from *Lumba*. This column argues that the High Court should reject this principle. The central problem with *Lumba* is that the decision was reached absent full understanding of the longstanding damages tradition within false imprisonment, according to which damages are awarded for breach of the right to liberty in itself, irrespective of what would have happened but for the wrong. In turn, the UK Supreme Court deviated from orthodoxy without recognising the deviation — or justifying it. At this late stage in the development of the common law, the High Court would require an overwhelming justification to support such a fundamental change to longstanding norms and concomitant downgrading of the protection afforded to liberty, a right sacred to the common law.

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<sup>2</sup> *Lewis v Australian Capital Territory* [2019] ACTCA 16 ('*Lewis*').

<sup>3</sup> *Ibid* [25].

<sup>4</sup> *Ibid* [24].

<sup>5</sup> [2012] 1 AC 245 ('*Lumba*').

<sup>6</sup> *Fernando v Commonwealth (No 5)* (2014) 231 FCR 251.

<sup>7</sup> *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 ('*CPCF*').

## II Orthodoxy

### A *Two Types of Loss*

Let us commence by introducing a distinction that was mislaid in *Lumba* and *Lewis*, and which is critical to understanding why substantial damages ought to have been awarded in both cases. That is, the fundamental distinction between two types of compensatory damages: damages for ‘factual loss’ and damages for ‘normative loss’.<sup>8</sup>

Damages for *factual or material loss* compensate for the negative physical, emotional, psychological or economic effects actually suffered by the claimant in consequence of the wrong, such as costs of repairing a machine or distress. These types of loss are subjective in that whether they are suffered and their extent varies according to the actual consequences the claimant experiences as a result of the wrong. Recovery is subject to rules of factual causation, such as ‘but for’ analysis, and to remoteness rules, such as reasonable foreseeability, albeit the exact rules vary among torts. Factual losses are recoverable across the law of torts, including as consequential losses for torts actionable per se, albeit specific heads vary among actions.

Damages for *normative loss* are radically different in nature. Their availability is, in general, limited to those torts such as trespass to land, battery, defamation and, importantly, false imprisonment, all of which are actionable per se and constituted to afford strong protection from outside interference to fundamental interests. Within these torts, a claimant may recover damages for the injury to those of his/her interests that are directly protected by the tort. Thus, one recovers in false imprisonment for the damage to one’s interest in liberty inherent in the wrongful imprisonment under the head of ‘loss of liberty’, a standalone head distinct from the physical, mental or economic effects of the wrong. Similarly, one may recover in defamation under the head of damage to reputation, and in trespass simply for wrongful interference with exclusive possession of land, regardless of whether these wrongs lead to consequential harms.

Unlike damages for factual loss, normative damages compensate for a damage that is constructed by and only exists on the plane of the law. In contrast to factual losses, normative damage does not correlate to felt real-world effects as such. In this, damages for normative damage in the law of torts are akin to expectation damages in contract. There is no such thing as an expectation loss outside of the law, but without construction of this head of loss, contractual promises would be rendered hollow. As Hayne J said in *Clark v Macourt*: ‘The loss which is compensated reflects a normative order in which contracts must be performed’.<sup>9</sup> I refer to these types of damages as ‘normative damages’ because, in constructing such heads, the law is

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<sup>8</sup> For a full elaboration of this distinction, see Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) chs 2–3 (*‘Damages and Human Rights’*); Jason NE Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34(2) *Oxford Journal of Legal Studies* 253 (*‘Concept of “Vindication”*’). Others recognise a similar distinction: see, eg, Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) ch 4. Albeit the normative damage thesis should be preferred to other accounts: Varuhas, ‘Concept of “Vindication”’ (n 8) 271ff.

<sup>9</sup> *Clark v Macourt* (2013) 253 CLR 1, 7 [11].

seeking an end or goal — that is, to give effect to the policies that underpin creation of the primary rights. As I have argued in depth elsewhere,<sup>10</sup> torts such as false imprisonment are characterised by a primary function of affording strong protection to basic interests from outside interference, and vindicating these interests, in the sense of affirming and reinforcing their importance within a hierarchy of legally-protected interests and that they ought to be respected. These functions are reflected in shared common features of torts actionable per se, including actionability per se, strict liability, and strict construction of defences<sup>11</sup> — but also, importantly, in the approach to damages. The law, by responding to every unjustified rights infringement with substantial damages for the interference in itself, and regardless of the happenstance of whether factual losses are suffered, affords strong protection to the interest in itself, and sends a signal that these are interests of the utmost importance which have inherent value and ought to be maintained inviolate. As the English Court of Appeal observed in *Dumbell v Roberts*, it is important that ‘sufficient damages’ should follow false imprisonment ‘to give reality to the protection afforded by the law to personal freedom’.<sup>12</sup> Thus, the ‘macro’ protective and vindicatory functions of torts actionable per se shape the conceptualisation of compensatory damages: ‘there may be no actual loss’, but ‘the law takes the view as a matter of policy that the claimants ... are entitled to substantial compensation for the mere invasion of their rights’.<sup>13</sup>

Significantly for our consideration of *Lewis*, for normative damages causation is irrelevant. Normative damage is inherent in the wrong. As Holt CJ famously observed in *Ashby v White*, an injury imports a damage when a person is hindered in their right.<sup>14</sup> Reflecting this, in *Ashby* the plaintiff was ultimately awarded damages for denial of his right to vote, notwithstanding that the candidate he would have voted for was elected, so that he was factually no worse off. The idea that damage is inherent in the wrong has often been captured in the idea of a presumption of damage within torts actionable per se. In the formative case of *Ratcliffe v Evans*, the English Court of Appeal observed, the law ‘implies’ general damage ‘in every breach of contract and every infringement of an absolute right’; ‘[i]n all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of rights’.<sup>15</sup> In contrast, with torts only actionable upon proof of loss, ‘it is the damage done that is the wrong; and the expression “special damage”, when used of this damage denotes the actual and temporal loss which has, in fact, occurred’.<sup>16</sup> It is particularly important to reiterate this distinction between torts actionable per se, for which normative damages are available, and loss-based torts, for which only factual loss is generally recoverable, as there is a propensity to unthinkingly conflate the whole of torts with the loss-based tort of negligence, which dominates the field of torts today. For example, senior British judges have made sweeping statements that the goal of all torts is to

<sup>10</sup> Varuhas, *Damages and Human Rights* (n 8) ch 2; Varuhas, ‘Concept of “Vindication”’ (n 8).

<sup>11</sup> Varuhas, *Damages and Human Rights* (n 8) 25–46; Varuhas, ‘Concept of “Vindication”’ (n 8) 261–7.

<sup>12</sup> *Dumbell v Roberts* [1944] 1 All ER 326, 329.

<sup>13</sup> *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch 390, 444 [36].

<sup>14</sup> *Ashby v White* (1703) 2 Lord Raymond 938, 955 (‘*Ashby*’).

<sup>15</sup> *Ratcliffe v Evans* [1892] 2 QB 524, 528 (emphasis in original) (‘*Ratcliffe*’); *Nicholls v Ely Beet Sugar Factory Ltd* (No 2) [1936] 1 Ch 343, 350–51; *Embrey v Owen* (1851) 155 ER 579, 585.

<sup>16</sup> *Ratcliffe* (n 15) 528.



provide compensation for those who have suffered material loss, not to vindicate the rights of those who have not.<sup>17</sup> While in the United States ('US'), the Supreme Court has, in its constitutional torts jurisprudence, conflated damages for negligence with damages for breach of fundamental rights.<sup>18</sup> It is fundamental therefore to recall Weir's warning that 'awareness of the difference' in function between vindicatory torts and negligence 'is vital if negligence is not to take over completely, with unfortunate effects on the rights of the citizen'.<sup>19</sup>

## B *Damages Practice across Vindicatory Torts*

The outstanding modern example in any common law jurisdiction of this vindicatory tradition is the High Court of Australia's iconic decision in *Plenty v Dillon*.<sup>20</sup> Officers committed a trespass by entering the plaintiff's property to serve a summons absent lawful authority. All members of the High Court held that substantial damages simply follow the wrong as a matter of course: 'Their entry was wrongful, and the plaintiff is entitled to ... an award of some damages.'<sup>21</sup> Whereas the lower court judge denied substantial damages as his Honour considered the wrong 'trifling', Mason CJ, Brennan and Toohey JJ responded: 'But this is an action in trespass not in case and the plaintiff is entitled to some damages in vindication of his right to exclude the defendants from his farm'.<sup>22</sup> Gaudron and McHugh JJ said that 'once a plaintiff obtains a verdict of trespass ... he or she is entitled to an award of damages'.<sup>23</sup> Damages are a reflex of the wrong. While the entry 'caused no damage' to the land,

the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land ...<sup>24</sup>

As such 'the appellant is entitled to have his right of property vindicated by a substantial award of damages'.<sup>25</sup> The 'right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric'.<sup>26</sup> *Plenty* has since been followed. For example, in *TCN Channel Nine Pty Ltd v Anning* the trespass caused no physical damage or pecuniary loss while mental trauma was not recoverable, yet the New South Wales ('NSW') Court of Appeal awarded \$25,000 to 'reflect the significant purpose of vindicating the respondent's right to exclusive occupation'.<sup>27</sup> In *Smethurst v Commissioner of Police*, Kiefel CJ, Bell and Keane JJ

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<sup>17</sup> *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 403 [9] ('*Watkins*').

<sup>18</sup> Varuhas, *Damages and Human Rights* (n 8) 159–64. On US constitutional torts more generally, see 446–69.

<sup>19</sup> Tony Weir, *An Introduction to Tort Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 134.

<sup>20</sup> (1991) 171 CLR 635 ('*Plenty*').

<sup>21</sup> *Ibid* 645.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* 654.

<sup>24</sup> *Ibid* 654–5.

<sup>25</sup> *Ibid* 655.

<sup>26</sup> *Ibid*, quoting Geoffrey Samuel, 'The Right Approach?' (1980) 12 *Law Quarterly Review* 12, 14.

<sup>27</sup> *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, 365 [178]. See also *New South Wales v Ibbett* (2006) 229 CLR 638, 644 [20].

recognised that the concept of ‘injury’ is ‘somewhat wider’ in trespass than in some other torts.<sup>28</sup> Gageler J, drawing on *Plenty*, said the policy underpinning trespass is protection of the right to exclusive possession, and damages compensate for infringement of that right in itself, vindicating the interest in maintaining one’s land free from intrusion.<sup>29</sup>

Similarly, in trespass cases concerning ‘use’ of land, substantial damages are given for the wrong in itself — regardless of causal analysis.<sup>30</sup> If someone camps on my land without consent, I may recover substantial damages notwithstanding that I would not have leased the property but for the trespasser’s use, and regardless of whether I could or would have used the land myself. Materially I am no worse off, but I still recover as my right to exclusive possession has been violated. As Allsop P explained in *Bunnings Group Ltd v CHEP Australia Ltd*, there is no need for recourse to heterodox restitutionary analysis to explain such damages as the notion of compensatory damages can be applied ‘flexibly’: damages are not limited to actual consequences of the wrong, but include ‘the denial and infringement of [the owner’s] rights’.<sup>31</sup> Allsop P quoted Lord Shaw in *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*: ‘wherever an abstraction of property has occurred ... the law ought to yield a recompense’.<sup>32</sup> There is no ‘but for’ caveat here. In the UK Supreme Court decision in *One Step (Support) Ltd v Morris-Garner*, Lord Reed JSC described user damages as compensating loss, but ‘not loss of a conventional kind’; they address loss of the right to control, which goes with exclusive possession.<sup>33</sup> Lord Sumption JSC said the law treats the right to exclusive possession as having a value independent of any actual detriment suffered in consequence of wrongful interference.<sup>34</sup> As Nicholls LJ explained in a seminal statement of principle, approved in *Morris-Garner*,<sup>35</sup> normative loss is distinct from factual loss to which counterfactual analysis applies: ‘loss or damage’ here has a ‘wider meaning than merely financial loss calculated by comparing the property owner’s financial position after the wrongdoing with what it would have been had the wrongdoing never occurred’.<sup>36</sup>

We find a similar approach in relation to goods. In *The Mediana*, the Earl of Halsbury LC asked:

Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?<sup>37</sup>

<sup>28</sup> *Smethurst v Commissioner for Police* [2020] HCA 14, [73] (‘*Smethurst*’).

<sup>29</sup> *Ibid* [120]–[121].

<sup>30</sup> For fuller consideration of user damages, see Varuhas, ‘Concept of “Vindication”’ (n 8) 284–9.

<sup>31</sup> *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420, 467 [174]–[175].

<sup>32</sup> *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119.

<sup>33</sup> *One Step (Support) Ltd v Morris-Garner* [2019] AC 649, 671 [30] (‘*Morris-Garner*’).

<sup>34</sup> *Ibid* 694 [110].

<sup>35</sup> *Ibid* 671 [29] (Lord Reed JSC); 695 [110] (Lord Sumption JSC).

<sup>36</sup> *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406, 1416.

<sup>37</sup> *The Mediana* [1900] AC 113, 117. See also *Smethurst* (n 28) [120]–[121].

It would be ‘absurd’ to reduce damages on this basis.<sup>38</sup> That the owner would have been no worse off but for the wrong is irrelevant; causal analysis was relevant to ‘special damage’ only. In conversion, if you convert my airplanes, I can recover substantial damages even though it was inevitable that if you had not converted them, someone else would have.<sup>39</sup> I would not have had my planes in any case, but I still recover.

In defamation, as Windeyer J explained in *Uren v John Fairfax & Sons Pty Ltd*, the plaintiff ‘gets damages because he was injured in his reputation, that is simply because he was publicly defamed’.<sup>40</sup> Or as English courts have put it, ‘[d]efamation constitutes an injury to reputation’<sup>41</sup> and such injury ‘will always sound in damages’.<sup>42</sup> In contrast to recovery for consequential factual losses that may flow from a libel such as lost earnings or distress, for damage to reputation there is no ‘but for’ inquiry; damage is inherent in being defamed. In battery, courts have awarded more than nominal damages where a claimant is subject to unwanted touching even though he/she suffers no pain, suffering, loss of amenity or pecuniary loss.<sup>43</sup> As Lord Walker said in *Watkins v Secretary of State for the Home Department*, the ‘most trifling and transient physical assault’ would give a claimant an action ‘sounding in damages (and if appropriate aggravated or exemplary damages)’.<sup>44</sup> This vindicatory model, by which damages are awarded for the wrongful interference in itself, has been recognised and extended to new contexts where basic rights are protected through liability, including under the *Racial Discrimination Act 1975* (Cth)<sup>45</sup> and other statutes,<sup>46</sup> in actions for damages under rights-charters,<sup>47</sup> and in the new privacy actions recognised across the common law world.<sup>48</sup>

The approach has been the same in false imprisonment. Loss of liberty is conceptually distinct from factual losses such as mental or physical injury.<sup>49</sup> One recovers substantial damages even if one is left materially no worse off by the wrong or better off. In *Huckle v Money*, the plaintiff was treated very civilly and fed beefsteaks and beer while detained.<sup>50</sup> Albeit he suffered no injury or discomfort,

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<sup>38</sup> Ibid.

<sup>39</sup> *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1093 [82], 1106 [129] (‘Kuwait’).

<sup>40</sup> *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150.

<sup>41</sup> *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 398 [119].

<sup>42</sup> Ibid 391 [93].

<sup>43</sup> See, eg, *Hurst v Picture Theatres Ltd* [1915] 1 KB 1; *Pelling v Johnson* [2004] EWHC 492 (QB); *Shah v Gale* [2005] EWHC 1087 (QB), [52]; *Forde v Skinner* (1830) 4 Car & P 239; *Loudon v Ryder* [1953] 2 QB 202; *B v NHS Hospital Trust* [2002] 2 All ER 449, 474 [99].

<sup>44</sup> *Watkins* (n 17) 421 [68].

<sup>45</sup> *Wotton v State of Queensland (No 5)* (2016) 352 ALR 146, 525–6 [1626]–[1629] (‘Wotton’).

<sup>46</sup> See, eg, *Lloyd v Google LLC* [2020] 2 WLR 484, 498–504 [44]–[70] (‘Lloyd’); *Marshall v IDEA Services Ltd (HDC Act)* [2020] NZHRRT 9, [66]–[131].

<sup>47</sup> See, eg, *Dunlea v Attorney-General* [2000] 3 NZLR 136, 151 [41]–[42]. See further Jason NE Varuhas, ‘The Development of the Damages Remedy under the *New Zealand Bill of Rights Act 1990*: From Torts to Administrative Law’ [2016] 1 *New Zealand Law Review* 213, 218–29.

<sup>48</sup> See those cases cited at n 97 below. See further Jason NE Varuhas, ‘Varieties of Damages for Breach of Privacy’ in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018) ch 3 (‘Varieties of Damages’).

<sup>49</sup> *New South Wales v Williamson* (2012) 248 CLR 417, 429 [34].

<sup>50</sup> (1763) 2 Wils KB 205.

substantial damages were awarded as his liberty right was infringed. Senior judges explicitly recognise normative damages are different *in kind* from factual damages. In *Ruddock v Taylor*, Kirby J said: ‘the principal function of the tort is to provide a remedy for “injury to liberty”. ... Damages are awarded to vindicate personal liberty, rather than as compensation for loss per se.’<sup>51</sup> In *Wotton v State of Queensland (No 5)*, Mortimer J said that within vindicatory torts, including false imprisonment, ‘what is being vindicated by an award of damages is the infringement of a right itself, rather than compensation for actual loss or damage’.<sup>52</sup>

There are examples of damages being awarded for false imprisonment where ‘but for’ analysis would lead to their denial. In *New South Wales v Abed*, damages of \$10,000 were awarded for three hours’ false imprisonment. The arresting officers had reasonable suspicion based on reasonable grounds to conduct the arrest, but the arrest was nonetheless unlawful as they failed to state their reason for it.<sup>53</sup> Damages followed notwithstanding that had the officers followed proper procedure, the plaintiff could and would have been otherwise lawfully arrested. In *Christie v Leachinsky*, the plaintiff was similarly arrested without notice of the charge.<sup>54</sup> On the *Lumba* principle, damages would likely have been denied, given the officer could otherwise have lawfully arrested the plaintiff by giving notice. Yet, as Lords Rodger and Brown JSC observed in *Lumba*, there is no hint of a suggestion in *Christie* that only nominal damages would be given.<sup>55</sup> Indeed Lord du Parc, giving the most comprehensive speech, said the plaintiff ‘is entitled to recover damages for false imprisonment’.<sup>56</sup> In *New South Wales v TD*, the plaintiff, an Indigenous woman suffering mental illness, was awarded \$80,000 for false imprisonment where she inevitably would have been detained.<sup>57</sup> An order was made that she be imprisoned in a hospital, but she was imprisoned in a cell not so gazetted. No one disputed that she would have been imprisoned in any case, but substantial damages followed. It was observed that how the conditions in which the plaintiff was confined compared to the conditions in which she should have been confined may affect quantum.<sup>58</sup> But this likely refers to that part of damages dedicated to factual losses, such as distress, and importantly there was no suggestion damages could be denied altogether. In *Kuchenmeister v Home Office*, substantial damages were awarded for false imprisonment despite the Judge accepting that the defendant could have otherwise detained the plaintiff lawfully, and despite the plaintiff suffering no ill treatment nor pecuniary loss.<sup>59</sup> The Judge considered ‘it would be quite wrong for the court to award a contemptuous figure’ where the ‘very precious right of liberty’ was at stake; the sum awarded represented a ‘fair figure which will vindicate the plaintiff’s rights’.<sup>60</sup> In *Roberts v Chief Constable of Cheshire Constabulary*, the plaintiff was

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<sup>51</sup> *Ruddock v Taylor* (2005) 222 CLR 612, 651 [141] (citations omitted) (*‘Ruddock’*).

<sup>52</sup> *Wotton* (n 45) 525 [1626].

<sup>53</sup> [2014] NSWCA 419 (*‘Abed’*).

<sup>54</sup> *Christie v Leachinsky* [1947] AC 573 (*‘Christie’*).

<sup>55</sup> *Lumba* (n 5) 353 [345] (Lord Brown JSC; Lord Rodger JSC agreeing).

<sup>56</sup> *Christie* (n 54) 603.

<sup>57</sup> [2013] NSWCA 32.

<sup>58</sup> *Ibid* [62].

<sup>59</sup> [1958] 1 QB 496, 512–13.

<sup>60</sup> *Ibid* 513.

imprisoned and periodic reviews were legally required.<sup>61</sup> The defendant's failure to conduct reviews rendered the imprisonment unlawful until the next properly conducted review. The plaintiff was awarded substantial damages, and his entitlement to damages was held to arise regardless of whether the reviews, if properly carried out, would have led to his release. The outcomes in these cases are consonant with general statements of principle that one is 'entitled' 'to mandatory compensation' for false imprisonment,<sup>62</sup> and that damages are awarded for loss of liberty 'inherent in *any* unlawful detention'.<sup>63</sup>

Some might argue that in some of these cases the point in *Lewis* was simply not raised. But the point was never raised because it is, and has long been, axiomatic that damages follow breaches of basic rights as of course. The stronger argument is that there is no evidence of the *Lewis* principle because it is foreign to the common law of false imprisonment. If it were a recognised principle of the common law, one would expect to locate easily many examples of it being applied. This is especially so as the principle could be relied on in many cases concerning exercise of public powers of detention, which make up the vast bulk of false imprisonment claims. Yet there are no examples. In *Lumba*, no authority was invoked to support the complete denial of damages for proven false imprisonment on causal grounds (while, in *Lewis*, no authority was invoked except *Lumba* and cases applying *Lumba*). The fact is the practice that damages follow wrongful deprivations of liberty is a longstanding one stretching back to old jury practice.<sup>64</sup> Dicey and Blackstone recalled the practice of juries giving awards for every interference of liberty, whether petty or grave. This practice 'seems to us such a matter of course as hardly to call for observation'.<sup>65</sup> Blackstone, having observed that juries 'will give adequate damages'<sup>66</sup> for battery 'though no actual suffering is proved',<sup>67</sup> said for 'the injury of false imprisonment' one 'shall recover damages'.<sup>68</sup>

Even in *Lumba*, while there was a majority for the outcome of nominal damages, closer inspection reveals that a majority of the nine-judge panel, as a matter of legal principle, favoured the proposition that some substantial damages should follow false imprisonment. Three Justices (Lord Hope DPSC, Lord Walker and Baroness Hale JJSC) would have awarded more than nominal damages, driven by a concern that an invasion of liberty ought to be met with a more than nominal award. Lord Walker JSC recalled: 'the common law has always recognised that an award of more than nominal damages should be made to vindicate an assault on a person or reputation, even if the claimant can prove no special damages'.<sup>69</sup> Two further Justices, Lords Brown and Rodger JJSC, while they would not have found liability on the facts, maintained that substantial damages ought to follow false

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<sup>61</sup> *Roberts v Chief Constable of Cheshire Constabulary* [1999] 1 WLR 662 ('*Roberts*').

<sup>62</sup> *ID v Home Office* [2005] EWCA Civ 38, [109].

<sup>63</sup> *Kerman v City of New York*, 374 F 3d 93 (2004) 130 (emphasis added). See also 129, 131–2.

<sup>64</sup> As acknowledged by Baroness Hale JSC in *Lumba* (n 5) 315 [217].

<sup>65</sup> AV Dicey, *Lectures Introductory to the Law of the Constitution* (Macmillan, 1885) 224–5 (and restated in every edition thereafter).

<sup>66</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–1769) Bk III, 121 (emphasis added).

<sup>67</sup> *Ibid* Bk III, 120.

<sup>68</sup> *Ibid* Bk III, 138 (emphasis added).

<sup>69</sup> *Lumba* (n 5) 308 [195]. See also 304–5 [181].

imprisonment. The foregoing, as well as the fact *Lumba* was a split decision, weakens *Lumba*'s force as an authority for denying substantial damages altogether based on the novel causal principle.

In *CPCF*, the two Justices who would have denied substantial damages did so simply by applying *Lumba*,<sup>70</sup> without addressing the correctness of that decision or analysing the damages issue in depth; after all, the damages point was moot. However, notably, the two Justices that considered damages in more detail reached a different view. Hayne and Bell JJ rejected the Commonwealth's argument that the plaintiff should receive only nominal damages because they could and would have otherwise been detained lawfully. Their Honours said it was probably sufficient to reject the Commonwealth's argument that, in the hypothetical alternative, the plaintiff would likely have been detained in different conditions (thereby suggesting some damages for actual loss might be awarded if the plaintiff would otherwise have been detained in better conditions, for example).<sup>71</sup> But Hayne and Bell JJ gave a 'more fundamental reason' for rejecting the Commonwealth's argument: the argument implicitly assumed that loss is the gist of the action.<sup>72</sup> That is wrong: '[l]ike all trespassory torts, the action for false imprisonment is for vindication of basic legal values'.<sup>73</sup> The right is not a right not to suffer mental distress or pecuniary loss through invasion of liberty, but simply a right to liberty. Absence of actual loss neither denies the action, nor provides a defence. Absence of actual loss could affect damages: quantum would be lower absent any component for factual loss. But even where there is no 'substantial loss' to speak of, this would not 'require the conclusion that only nominal damages may be awarded'.<sup>74</sup> In other words, more than nominal damages could be awarded even if the plaintiff suffered no actual or material loss. What would these damages be for? Their Honours' reasoning provides the clue: the common law has 'long assigned' 'value' to liberty in itself.<sup>75</sup>

Hayne and Bell JJ's reasoning illustrates the fundamental importance of starting with the nature of the action: issues of damages and causation do not arise in a vacuum, but against the background of an action based in certain normative concerns, and the approach to remedies ought to cohere with those concerns.

Lastly, it might be asked: if substantial damages follow as a matter of course, what role do nominal damages play? Nominal damages are reserved for fleeting or miniscule interferences. For example, in trespass, if a person fleetingly places their foot on another's land. But specifically in relation to false imprisonment — nominal damages, while available in principle, have historically played an extremely limited role, so it is difficult to locate *any* case of a nominal award prior to *Lumba*. In turn,

<sup>70</sup> *CPCF* (n 7) 610–11 [324]–[325] (Kiefel J), 655–6 [510]–[512] (Keane J).

<sup>71</sup> *Ibid* 569 [154].

<sup>72</sup> *Ibid* 569 [154]–[155]. Importantly, the Commonwealth's submissions in the appeal from *Lewis* (n 2) omit any mention or consideration of Hayne and Bell JJ's 'more fundamental reason', so that the Commonwealth's account of *CPCF* is, with respect, incomplete: see Commonwealth, 'Submissions of the Commonwealth Seeking Leave to Intervene or Appear as Amicus Curiae', Submission in *Lewis v Australian Capital Territory*, Case No C14/2019, 5 February 2020, 8–9 [20]–[24] ('*Commonwealth Submissions*').

<sup>73</sup> *CPCF* (n 7) 569 [155]. See also *Ruddock* (n 51) 650–51 [140].

<sup>74</sup> *CPCF* (n 7) 569 [155].

<sup>75</sup> *Ibid*.

this reflects that the *Lumba* principle is foreign to false imprisonment; if it were a recognised principle we would expect to find many examples of substantial damages being denied based on the causal principle, and nominal damages awarded. More generally, the paucity of cases in which nominal damages have been awarded reflects the primacy of liberty in the common law's hierarchy of protected interests; even what may seem a technical or miniscule interference will sound in substantial damages. Thus, substantial awards have been made routinely for brief imprisonments of hours or even minutes,<sup>76</sup> the High Court observing in such a case that '[a]n interference with personal liberty even for a short period is not a trivial wrong'.<sup>77</sup> As the great tort scholar Weir observed, 'while a transitory trespass to land can be paid off by the tender of a tiny sum ... that could hardly apply where the trespass was an infringement of liberty'.<sup>78</sup>

### C Reference Point for Assessment of Normative Loss

If judges in vindictory actions do not consider the position the claimant actually would have been in but for the wrong, what is their reference point or benchmark for assessment of normative damages? To answer this, we need to go back to the nature of these torts as torts concerned with protecting basic interests from outside interference. The law's starting assumption is that the position each person ought to be in is one in which their basic interests are inviolate; thus the starting point in false imprisonment is that each person is entitled to be free.<sup>79</sup> Wherever there is an interference with those interests that cannot be justified, the law takes the view that the claimant has been subject to an interference to which they ought not to have been subjected. Absent a justified interference, the claimant 'was in principle entitled to his liberty'.<sup>80</sup> Normative damages redress the imbalance between the position the claimant is entitled to be in — one in which their interests are in pristine form — and their position given the wrongful interference, where their interests are subject to an unjustified encumbrance. This approach is most explicit in conversion. Damages are assessed by reference to 'the owner's position had he retained his goods'<sup>81</sup> — that is, the position he ought to have been in — as opposed to the position he actually would have been in but for the defendant's wrongful actions.

<sup>76</sup> *Abed* (n 53) (\$10,000 for three hours); *Neilsen v Attorney-General* [2001] 3 NZLR 433, 446 [50]–[51] (NZ\$5,000 for one-and-a-half hours); *Petticrew v Chief Constable Royal Ulster Constabulary* [1988] NI 192, 204 ('*Petticrew*') (£300 for thirty-five minutes); *Nellins v Chief Constable Royal Ulster Constabulary* (High Court QBD (NI), Sheil J, 20 February 1998) (£45 for five minutes); *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 515 ('*Thompson*') (£500 for first hour).

<sup>77</sup> *Watson v Marshall* (1971) 124 CLR 621, 632 (\$200 for detention during a drive in a police car). See also *Petticrew* (n 76) 204: 'any detention even for a very short period, is not insignificant and deserves something more than mere nominal damages for a technical false imprisonment'.

<sup>78</sup> Weir (n 19) 136.

<sup>79</sup> See, eg, *Christie* (n 54) 585, 587–8; *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299, 1321–2 [54] ('*Kambadzi*'). See also Richard O'Sullivan, 'A Scale of Values in the Common Law' (1937) 1 *Modern Law Review* 27, 27: 'The reasonable man of the law is naturally also a freeman. Freedom in the conception of the Common Law is a thing native to man as man.'

<sup>80</sup> *Roberts* (n 61) 667.

<sup>81</sup> *Kuwait* (n 39) 1094 [83]. See also 1093–4 [80]–[82].

As McHugh J observed, ‘the issue of causation cannot be divorced from the legal framework that gives rise to the cause of action’.<sup>82</sup> How we frame the damages inquiry depends on the normative concerns of the law, and in vindictory, protective torts the inquiry is framed so as to maximally protect basic interests.

The recognition that normative damages redress the normative imbalance generated by a wrong in turn explains quantification.<sup>83</sup> Unlike factual loss, quantum does not vary with the specific emotional or physical effects experienced by the plaintiff. Rather, quantum varies with the extent of the interference with protected interests; that is, damages respond proportionately to the degree of normative imbalance produced by the wrong. Thus, *ceteris paribus*, a person imprisoned for a short period in a large warehouse shall receive less than a person confined for a long time in a small cell, given the degree of interference with the liberty interest is proportionately greater in the latter case.<sup>84</sup>

## D *Against Lumba*

The main reason for exploring the fundamental distinction between factual and normative loss is that it does not appear that the majority in *Lumba*, nor the judges in *Fernando*, *Lewis* and *CPCF* who applied *Lumba*, had brought to their attention or properly considered this core distinction and the common law’s longstanding vindictory tradition. Even iconic High Court of Australia authorities, such as *Plenty*, were not considered in *Lewis*, *Fernando* and *CPCF*. The net result in these cases, as in *Lumba*, was to assume wrongly that the only form of damages available in false imprisonment are those for factual loss. This is reflected in the language used in *Lumba* and its progeny: no ‘real loss’;<sup>85</sup> what was the ‘actual impact’ of the imprisonment?;<sup>86</sup> and ‘actual loss’.<sup>87</sup> Moreover, because there was no recognition of departure from longstanding norms, no justification has been proffered for the novel causal principle. If longstanding principles protective of basic rights are to be departed from, this should be with eyes-wide-open and on the basis of a proper understanding of the normative underpinnings of those principles and a transparent, fully articulated justification.

Furthermore, *Lumba* creates two types of incoherence. First, the traditional approach to damages ensures coherence as between the approach to remedies and the policy underlying creation of primary rights. In contrast, that policy of strong protection and maintaining respect for basic interests is seriously undermined at the remedial stage if damages can be denied altogether for an actually unlawful imprisonment on the basis that the imprisonment could hypothetically have been effected lawfully. Indeed, if this is going to be the remedial approach, one may ask what is the point of being ever so strict as to liability criteria. As Lords Rodger and

<sup>82</sup> *Henville v Walker* (2001) 206 CLR 459, 491 [98]. See also *Kuwait* (n 39) 1106 [129].

<sup>83</sup> On quantification, see further: Varuhas, *Damages and Human Rights* (n 8) 67–9, 130–34; Varuhas, ‘Varieties of Damages’ (n 48) 72–3.

<sup>84</sup> On time, see *Thompson* (n 76) 515. On area, see *Iqbal v Prison Officers Association* [2010] QB 732, 747 [46], 747–8 [48]–[49].

<sup>85</sup> *Lumba* (n 5) 281 [93].

<sup>86</sup> *Ibid* 324 [253].

<sup>87</sup> *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238, 2263 [108] (‘Parker’).



Brown JJSC said in dissent in *Lumba*, to adopt such an approach would ‘seriously devalue the whole concept of false imprisonment’.<sup>88</sup>

Second, it is well-established in vindictory torts that damages can be recovered for the interference in itself. Why single out liberty for weaker remedial protection than interests in land, goods, person and reputation? Is liberty any less basic? Common law judges do not seem to think so, given they consistently state that protection of liberty is of supreme importance, and that such basic matters should not become ‘the stuff of empty rhetoric’.<sup>89</sup> As Edelman J has said, ‘[i]t would be remarkable if today the remedies for infringement of rights to property were somehow elevated to a privileged position over bodily integrity or liberty’.<sup>90</sup> The inconsistency created by the *Lumba* deviation is all the more stark given false imprisonment is of the same genus as trespass and battery, being a trespassory tort.<sup>91</sup>

These arguments for maintenance of orthodoxy are reinforced by rule-of-law principles. First, meeting unlawful invasions of basic rights by government with significant awards reinforces the normative force of legal constraints on public power and thus the principle of government under law. As Dicey observed, the strict remedial tradition in actions such as false imprisonment ‘has gone a great way both to ensure the supremacy of the law of the land and ultimately to curb the arbitrariness of the Crown’.<sup>92</sup> In contrast, as Lord Walker JSC observed in *Lumba*, to meet false imprisonment by government with a nominal award ‘sits uncomfortably with the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action’.<sup>93</sup> This constitutional tradition, of meeting unlawful official invasions of liberty with effective remedies is part of Australia’s ‘common law inheritance’, to be ignored or devalued ‘at our peril’.<sup>94</sup> Second, albeit the *Lumba* principle is formally one of general application, the reality is that only public actors will be able to take advantage of it to insulate themselves from liability, as only officials generally have legal authority to detain. Indeed, the Commonwealth’s first stated reason for intervening in the *Lewis* appeal is its special interest in the outcome.<sup>95</sup> Creation of what is effectively a special protection for government runs counter to the principle of equality, a principle enshrined in s 64 of the *Judiciary Act 1903* (Cth).<sup>96</sup>

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<sup>88</sup> *Lumba* (n 5) 353 [343]; *Kambadzi* (n 79) 1337 [108].

<sup>89</sup> *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 529.

<sup>90</sup> *Smethurst* (n 28) [239].

<sup>91</sup> *CPCF* (n 7) 569 [155].

<sup>92</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1960) 210.

<sup>93</sup> *Lumba* (n 5) 304–5 [181].

<sup>94</sup> *Smethurst* (n 28) [126]. See also [111], [122]–[125], [127], [169]. *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 157 [56].

<sup>95</sup> *Commonwealth Submissions* (n 72) 1 [3].

<sup>96</sup> *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 262–3; *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 427–8; *Ruddock* (n 51) 644–5 [120]–[121], 648 [132]; *Smethurst* (n 28) [111], [153].

## E *Vindictory Damages*

For completeness, normative damages in the common law tradition are conceptually distinct<sup>97</sup> from the novel head of ‘vindictory damages’ recognised in several overseas constitutional law cases,<sup>98</sup> and by a minority in *Lumba*. The issue of whether to recognise this novel form of damages arises in cases such as *Lumba* and *Lewis* because these cases contemplate complete denial of compensatory damages for lengthy false imprisonments; vindictory damages are mooted as a possible gap-filler. I have considered vindictory damages in detail elsewhere.<sup>99</sup> For present purposes, it suffices to say: it would be illogical to depart from longstanding damages orthodoxy by adopting the *Lumba* principle, only to have to correct for that departure through a further deviation from orthodoxy.

## III ‘But For’: Getting the ‘Wrong’ Right

Thus normative damage, which responds to the wrong in itself, is *not* subject to ‘but for’ analysis. Where a person is subject to false imprisonment, they ought to receive a substantive award notwithstanding what could or would have happened but for the wrong.

However, even if one were to adopt the heterodoxy that such damages depend on ‘but for’ analysis, one would need to consider how to frame the causal question. This was not the subject of considered analysis in *Lumba* or *Lewis*. Yet there are different ways of framing the analysis and it is open to serious question whether the approach adopted in *Lumba* and *Lewis* is a normatively attractive one, given other alternatives.

In counterfactual analysis, one compares the claimant’s position given the wrong with their position had the wrong never occurred. But what is the wrong in false imprisonment? There are two possibilities.<sup>100</sup> On the first view, the wrong is breach of a duty not to imprison another without lawful justification. On this conception the result in *Lumba* is likely supportable: but for the unjustified imprisonment the plaintiff could and would have been subject to a justified imprisonment.

On the second view, the wrong is breach of a duty not to confine another; justification does not go to the nature of the wrong, but to defences to the wrong. On this view, compensatory damages might have been awarded in *Lumba*. Given this conception of the wrong, the counterfactual question is: what would the plaintiff’s position have been if the defendant had not imprisoned the plaintiff? In many cases if the plaintiff had not been imprisoned by the defendant, he/she would have been free (unless there is convincing evidence someone else would have detained them,

<sup>97</sup> See *Gulati v MGN Ltd* [2016] FSR 12, [132], approved in *Gulati v MGN Ltd* [2016] 2 WLR 1217, 1234 [48]; *Lloyd* (n 46) 499 [50]–[51], 500 [54], 502 [63].

<sup>98</sup> See, eg, *Attorney-General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328.

<sup>99</sup> Varuhas, *Damages and Human Rights* (n 8) 125–9; Varuhas, ‘Varieties of Damages’ (n 48) 87–90.

<sup>100</sup> See John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) ch 4; Varuhas, *Damages and Human Rights* (n 8) 62–3.

for example), so substantial damages follow as the wrong leaves the plaintiff in a worse position.

There are at least four reasons to favour the second view. First, by characterising every interference with liberty as wrongful, notwithstanding whether the wrong is ultimately justified, the law signals liberty is of such importance that normative significance ought to be attached to every interference with it. The law signals it is not ambivalent between non-interference and justified interference, maintaining a preference for preservation of liberty in pristine form. This is consonant with the tort's basic concern to vindicate the importance of liberty, and its analytical starting-point that individuals are entitled to their liberty.

Second, justifications are analogous to explanations for one's conduct and have also been said to be 'in the nature of an apology for the defendant's conduct'.<sup>101</sup> If imprisonment is not wrongful in itself, why should the defendant explain themselves or apologise for detaining the plaintiff? As Lord Hobhouse said in *R v Governor of Brockhill Prison; Ex parte Evans (No 2)*: 'Imprisonment involves the infringement of a legally protected right and therefore must be justified.'<sup>102</sup>

Third, the first view requires the court, in the course of counterfactual analysis, to ask what would have happened if the defendant had acted lawfully: would they have still detained the plaintiff? This requires the court to effectively stand in the shoes of an executive officer and ask how they would have exercised their public powers. Such approach appears to impermissibly require judges to go beyond simply determining the legality of an exercise of power, to determining how a governmental power would be exercised on the merits. Consider *R (OM (Nigeria)) v Secretary of State for the Home Department*, where the English Court of Appeal applied the *Lumba* principle in circumstances where government had adopted a policy document to guide exercise of a detention power.<sup>103</sup> To determine whether the power would have been exercised to detain the plaintiff, the Court had to interpret the government policy document and apply that document to the plaintiff's case.<sup>104</sup> It is difficult to imagine how, in the Australian setting, a court effectively standing in the shoes of an executive officer and applying a government policy document to determine how a governmental power would be exercised, can be squared with the constitutional separation of powers.

Fourth, to adopt the first view is effectively to create an irrebuttable presumption of legality in favour of defendants, as the court will ask: what would have happened *assuming the defendant acted lawfully*? But why, in the counterfactual, should courts adopt an assumption that defendants — typically officials — will invariably act lawfully, especially given that when the defendant had the chance to exercise their powers, they *in fact* exercised them unlawfully? Significantly, such an assumption would require judges to assume a lawful invasion of liberty where, as a matter of fact, an unlawful interference was the only possible

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<sup>101</sup> *Warwick v Foulkes* (1844) 12 M & W 507, 509; 152 ER 1298, 1299.

<sup>102</sup> *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [2001] 2 AC 19, 42. See also *Christie* (n 54) 592 ('right of every citizen to be free from arrest').

<sup>103</sup> *R (OM (Nigeria)) v Secretary of State for the Home Department* [2011] EWCA Civ 909.

<sup>104</sup> *Ibid* [28]–[39].

outcome. Consider *Parker*,<sup>105</sup> where the defendant officer acted unlawfully in arresting the plaintiff as he lacked requisite information to form a reasonable belief. The trial judge, effectively applying the second view, held that but for the arrest by the defendant, another officer at the scene would have most likely arrested the plaintiff, but on the balance of probabilities he too would have acted unlawfully as he also lacked the requisite information.<sup>106</sup> As such, substantial damages were awarded. But on appeal, the Court of Appeal held that *Lumba* demanded an approach equivalent to the first view: 'The test ... is not what would, in fact, have happened had PC Cootes not arrested Mr Parker but what would have happened had it been appreciated what the law required.'<sup>107</sup> Only nominal damages were awarded.<sup>108</sup>

How to frame the counterfactual analysis involves a normative choice. It is difficult to think of a good normative argument for courts abandoning the longstanding law of damages within false imprisonment to adopt an irrebuttable assumption of legality that will be applied to deny damages for invasion of basic rights in circumstances where we know an unlawful arrest was the only possible outcome. This is to turn the tort on its head. Underpinning the tort is an assumption that the plaintiff ought to have their freedom, based in the normative importance of vouchsafing liberty, not an assumption of legality for the benefit of government.

More generally, the High Court of Australia should treat the conceptualisation of the wrong in *Lumba* with caution. Indeed, much of the explanation for why the UK Supreme Court mislaid damages orthodoxy lies in the Justices' conceptualisation of the wrong. The focus in *Lumba* was on public law principles that went to the question of lawful justification, and the case commenced as a judicial review claim. Perhaps because of this, the public law dimensions of the case eclipsed the private law dimensions. Specifically, the relevant wrong was seemingly conceptualised as public law illegality *simpliciter*. For example, Lord Collins JSC said 'breach of principles of public law can found an action at common law for damages for false imprisonment'<sup>109</sup> and Lord Hope DPSC in *Kambadzi* spoke of *Wednesbury* principles 'founding' an action for false imprisonment.<sup>110</sup> This is wrong. Damages for false imprisonment are not a form of administrative law compensation. The normative event that founds liability for damages is breach of an individual's private law right. By treating public law error as the wrong, the Supreme Court effectively treated loss of liberty as a material harm consequential upon the wrong, which may or may not be suffered in false imprisonment, as opposed to normative damage inherent in the wrong. This is evident in Lord Dyson JSC's statement: 'they suffered no loss or damage *as a result of* the unlawful exercise of the power to detain'.<sup>111</sup> It is also evident in the surprising observation in *Parker* that *Lumba* stands for the proposition that procedural errors do not merit substantial

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<sup>105</sup> *Parker* (n 87).

<sup>106</sup> *Parker v Chief Constable of Essex Police* [2017] EWHC 2140 (QB), [150]–[153].

<sup>107</sup> *Parker* (n 87) 2262 [104].

<sup>108</sup> *Ibid* 2268 [132].

<sup>109</sup> *Lumba* (n 5) 316 [221], citing *Mohammed-Holgate v Duke* [1984] AC 437, 443. There are many similar statements in *Lumba* (n 5): see, eg, 275 [68] (Lord Dyson JSC), 308 [194] (Lord Walker JSC).

<sup>110</sup> *Kambadzi* (n 79) 1317 [40].

<sup>111</sup> *Lumba* (n 5) 282 [95].

damages.<sup>112</sup> Damages are not for breach of procedural fairness — which goes to lawful justification — but for violation of the plaintiff's liberty rights.

## IV Conclusion

In *AIB Group (UK) plc v Mark Redler & Co Solicitors*, Lord Reed JSC observed, 'that the loss resulting from a breach of duty has to be measured according to legal rules, and that different rules apply to the breach of different obligations', these rules in turn reflecting the distinctive 'nature' and 'rationale' of the obligations breached.<sup>113</sup> As such, it makes little sense to speak of 'ordinary'<sup>114</sup> or 'normal'<sup>115</sup> compensatory principles. Compensatory principles vary across private law, and the 'but for' test is far from universal.<sup>116</sup> Within vindicatory torts, the protective and vindicatory policies that underpin creation of primary rights shape the remedial approach, so every unjustified interference with basic rights is met with substantial damages. If this orthodoxy ensures damages strongly protect and reinforce the inherent value and importance of liberty, the *Lumba/Lewis* approach, which would meet unlawful imprisonments of months and years with \$1 awards, achieves the opposite.

If the High Court of Australia is to make the choice to deviate from orthodoxy, it must do what the *Lumba* majority and the ACT Court of Appeal in *Lewis* did not: it must approach its task with a full understanding of orthodoxy and provide a fully articulated justification for deviating from centuries of authority in a way that downgrades ancient rights.

It is important to recognise that any deviation would have significant ripple effects. *Lewis* arises in the prisons context. But the High Court's decision will have ramifications wherever governments have powers to detain, including in mental health, police, immigration, and quarantine contexts. If the *Lumba* principle is endorsed in the false imprisonment context, it will be open to government to argue for its recognition in the context of other fundamental common law rights including rights to physical and psychological integrity and property, as well as statutorily enacted fundamental rights, such as anti-discrimination rights.

It may be tempting to base any legal change on public policy concerns, including 'usual suspects' such as 'chilling effects', 'flood of claims' and impact of damages liability on public finances. But notwithstanding that such considerations offer a fraught basis for judicial decision-making,<sup>117</sup> the High Court has, probably

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<sup>112</sup> *Parker* (n 87) 2262 [104].

<sup>113</sup> *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, 1534 [92]. And see *Morris-Garner* (n 33) 671 [31].

<sup>114</sup> *Lumba* (n 5) 303 [176].

<sup>115</sup> *Kambadzi* (n 79) 1322 [56].

<sup>116</sup> See, eg, *Wrongs Act 1958* (Vic), s 51(2) (exceptions to 'but for' in negligence); *Gould v Vaggelas* (1985) 157 CLR 215, 236, 250–51 ('a factor' test of factual causation in deceit); *Wyzenbeek v Australasian Marine Imports Pty Ltd (in liq)* (2019) 373 ALR 79 (no counterfactual analysis for *Australian Consumer Law* damages); *Agricultural Land Management v Jackson (No 2)* (2014) 48 WAR 1, 66 [345]–[346], 70 [368] (no 'but for' analysis for 'substitutive' awards in equity); *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465, 469 (no 'but for' analysis in non-disclosure cases).

<sup>117</sup> Varuhas, *Damages and Human Rights* (n 8) 361–404.

for well-founded separation-of-powers reasons, signalled that decisions over tortious liability should not be made on the basis of public policy, but according to more recognisably ‘legal’ criteria such as precedent, principle and coherence.<sup>118</sup> Yet, as we have seen, all arguments of precedent, principle and coherence are against overturning damages orthodoxy. Moreover, as Gageler J has reiterated recently: ‘In the vindication of common law rights against unauthorised official invasion, considerations merely of convenience have no place.’<sup>119</sup>

If longstanding protections of individuals’ fundamental rights are to be downgraded based on calculations as to the public good, such a decision is properly for democratic institutions with the legitimacy to weigh rights and policy concerns to determine what course lies in the public interest. Commonwealth, state and territory legislatures are perfectly capable of effecting such change — and delineating its scope — if they consider such change warranted. Australia is not a country in which the political branches have shied away from reforming the law of torts, including the adoption of reforms protective of government.

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<sup>118</sup> *Sullivan v Moody* (2001) 207 CLR 562, 579–80 [49]–[53].

<sup>119</sup> *Smethurst* (n 28) [134]. And to the same effect, see *Plenty* (n 20) 654.

# Review Essay

## *The Role of Judges in Managing Complex Civil Litigation*

### *Justice and Efficiency in Mega-Litigation*

by Anna Olijnyk (2019), Hart Publishing, 240 pp,  
ISBN 9781509910892

Peter Cashman\*

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### *Abstract*

Delay and cost have bedevilled civil litigation in most if not all jurisdictions for some time. Such problems have been the subject of numerous inquiries by law reform bodies and judicial officers. A concern to ameliorate such problems has precipitated major changes to the judicial management of cases by various courts, aided by jurisprudence developed by higher courts and ‘overriding’ objectives incorporated in civil procedure rules and statutes. The problems of costs and delay have also spawned the creation of a variety of alternative approaches to dispute resolution. In *Justice and Efficiency in Mega-Litigation*, Australian academic Anna Olijnyk examines these issues in some detail, with particular reference to large, complex cases, based largely on interviews with senior judges in Australia and England. This review examines the methodology used, the findings derived and a number of strengths and limitations of both the research and the reliance on proactive judicial management to achieve more expeditious and economical resolution of civil disputes.

## **I Introduction**

Seeking to provide access to justice in an efficient (and cost-effective) manner is one of the paramount goals of most civil justice systems. How to achieve this is a complex matter, causing considerable controversy. In her book *Justice and Efficiency in Mega-Litigation*,<sup>1</sup> University of Adelaide academic Anna Olijnyk provides valuable insights into how judicial officers seek to reconcile and achieve these goals in ‘mega-litigation’ in Australia and England and Wales.

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<sup>1</sup> Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019).

The book is based on interviews with 28 senior judges in Australia and England. Sixteen Australian judges were interviewed in the period 2011–12. They comprised present or former members of the Federal Court and the Supreme Courts of New South Wales ('NSW'), Victoria, South Australia and Western Australia.<sup>2</sup> Twelve English judges, who were present or former members of the High Court of Justice, were interviewed in 2017. Only 6 of the 28 interviewees were women. The methodology is discussed further in Part II below.

The 'mega-litigation' that is the main focus of the book encompasses mainly commercial litigation between commercial parties. Such litigation is said to be characterised by 'high stakes, multiple parties, lengthy hearing time, legal and factual complexity, and a large volume of documentation'.<sup>3</sup> It is the combination of these factors that is said to be the hallmark of mega-litigation. As Olijnyk observes:

The proliferation of issues, backed by virtually limitless resources, in turn leads to the production of massive piles of documents. Add to this a party not inclined to concede any ground in a fight, with a purse large enough to ensure that they never have to do so, and you have mega-litigation.<sup>4</sup>

Part I of *Justice and Efficiency in Mega-Litigation* examines justice and efficiency as aims of civil procedure. The nature of mega-litigation and its burdens and benefits are discussed and evaluated. Part II analyses different approaches to the problem of mega-litigation with reference to various theoretical perspectives, the historical process of civil procedure reform, current procedural rules and the doctrines and jurisprudence developed by trial and appellate courts.

Part III of the book examines the characteristics of judicial officers handling mega-litigation, the procedural techniques for managing such litigation and methods used by judges to reconcile the aims of justice and efficiency. In the chapter, Olijnyk sets out a number of conclusions concerning the differences and similarities between the approaches of Australian and English judges. Important practical consequences, with respect to case allocation, judicial education and recruitment, follow from her finding that the management of mega-litigation is heavily dependent on the skill, personality and commitment of the individual judge. The question of procedural reform is also considered.

Each of the book's three parts is discussed in more detail below. Before doing so, I examine some of the strengths and limitations of the methodology employed.

## II The Methodology Used

One of the major strengths of *Justice and Efficiency in Mega-Litigation* is that it is based on qualitative data derived from the views of numerous senior judges with detailed knowledge and experience based on their direct involvement in the conduct and management of mega-litigation. All too often, the conduct of civil litigation and the issue of procedural reform are discussed in an empirical vacuum. In the

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<sup>2</sup> This formed part of the author's doctoral research: Anna Olijnyk, 'Justice and Efficiency in Mega-Litigation' (PhD Thesis, University of Adelaide, 2015).

<sup>3</sup> Olijnyk (n 1) 19.

<sup>4</sup> Ibid 36.



Australian context, this has been ameliorated in recent years by the pioneering empirical research on class actions carried out by Professor Vince Morabito at Monash University.<sup>5</sup>

The views of the judges interviewed by Olijnyk do not purport to be representative of the views of judicial officers generally, unlike some other studies where attempts have been made to survey all judicial officers.<sup>6</sup> As she notes: ‘The aim of my study was not to obtain a statistically representative data set from which generalizations could be drawn with confidence; instead it was to develop deep insights into the world of the mega-litigation judge.’<sup>7</sup>

There was a marked difference in the response rate of judges approached in Australia and England. Seventeen of the 19 Australian judges who were approached agreed to be interviewed; 16 of these 17 were interviewed. Of the 27 English judges approached, only 8 agreed to participate. An additional four English judges were then approached and agreed to be interviewed.

The participants had the option of remaining anonymous. Eleven of the 12 English judges chose to remain anonymous. This was no doubt due to the fact that it was a condition of the approval of the research by the Judicial Office that the English High Court judges remain anonymous. Although Olijnyk states that nine of the 16 Australian judges elected to remain anonymous,<sup>8</sup> it would appear that, in fact, nine chose not to remain anonymous<sup>9</sup>.

The interview topics were based on an initial literature review on civil procedure and an analysis of judgments and publications on mega-litigation. This was modified in the course of the study based on Olijnyk’s experience in interviews. The result was a focused but open-ended series of topics and questions that sought

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<sup>5</sup> Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments* (January 2019) <<https://ssrn.com/abstract=3326303>>; Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Closed Class Actions, Open Class Actions and Access to Justice* (October 2018) <<https://ssrn.com/abstract=3272089>>; Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia* (July 2018) <<https://ssrn.com/abstract=3212527>>; Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) <<http://ssrn.com/abstract=3005901>>; Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (July 2016) <<http://ssrn.com/abstract=2815777>>; Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Third Report: Class Action Facts and Figures — Five Years Later* (November 2014) <<http://ssrn.com/abstract=2523275>>; Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (September 2010); Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, First Report: Class Action Facts and Figures* (December 2009).

<sup>6</sup> See, eg, the study conducted by the author of this review essay for the Australian Law Reform Commission (‘ALRC’) in connection with its reference on sentencing: Peter Cashman, ‘A National Survey of Judges and Magistrates Preliminary Report’ in ALRC, *Sentencing of Federal Offenders* (Interim Report, ALRC Report 15, 1980) appendix B.

<sup>7</sup> Olijnyk (n 1) 199.

<sup>8</sup> Ibid 205.

<sup>9</sup> See the List of Interview Participants: ibid 211 (Appendix C).

to combine 'structure with flexibility'.<sup>10</sup> Participants were provided with an outline of topics prior to the interview.<sup>11</sup> This encompassed the concept of mega-litigation; the experience of interviewees in such litigation; the rules, principles and mechanisms governing the approach to procedural decisions and reform of procedural law.

Each of the participants was provided with a copy of the draft of what was proposed to be published based on their responses. The participants were given an opportunity to withdraw or amend material and '[a] small number of participants withdrew or amended some substantive material.'<sup>12</sup>

### III Grappling with Theories on the Aims of Procedural Law

More problematic is Olijnyk's attempt to elicit the views of participants in relation to four 'leading academic theories on the aims of procedural law'.<sup>13</sup> Interviewees were provided with a brief summary of what was said to be the views of Adrian Zuckerman<sup>14</sup>, Richard Posner<sup>15</sup>, Ronald Dworkin<sup>16</sup> and Robert Summers.<sup>17</sup> The views of each of these writers were summarised by Olijnyk in one paragraph or, in the case of Posner, two paragraphs, provided to participants as part of the outline of topics provided in advance of the interview.

The first obvious problem is that such complex and diverse perspectives are not readily susceptible to being reduced to one or two paragraphs. As Olijnyk notes, some found it difficult to grasp the theories based on the summaries provided. A further problem was that some interviewees had not reviewed or considered the material in advance of the interviews. Furthermore, in two instances, this part of the interview was omitted due to time constraints.<sup>18</sup>

To the extent to which the participants were able to discuss whether such 'theoretical' perspectives had any resonance with their own experience of procedure in mega-litigation, the judicial responses are of interest. Some respondents had read and reflected on the 'theoretical' perspectives and were able to relate this to their personal experience and in a broader context. Even where participants were unfamiliar with the theories, Olijnyk notes that this part of the interview often

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<sup>10</sup> Ibid (n 1) 201 n 7, citing Robin Legard, Jill Keegan and Kit Ward, 'In-Depth Interviews' in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE Publications, 2003) 138, 141.

<sup>11</sup> This is provided in Olijnyk (n 1) 207 (Appendix B).

<sup>12</sup> Ibid 205.

<sup>13</sup> Ibid 208.

<sup>14</sup> Paraphrased from Adrian AS Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in AAS Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999) 3.

<sup>15</sup> Summarised from Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer, 7<sup>th</sup> ed, 2007).

<sup>16</sup> Summarised from Ronald Dworkin, *A Matter of Principle* (Clarendon Press, 1986).

<sup>17</sup> Summarised from Robert S Summers, 'Evaluating and Improving Legal Processes — A Plea for "Process Values"' (1974) 60(1) *Cornell Law Review* 1.

<sup>18</sup> Olijnyk (n 1) 205.

yielded insights into the philosophical approach of judges and elicited further discussion about the relationship between justice and efficiency.<sup>19</sup>

#### IV A Valuable Comparative Perspective

A further strength of *Justice and Efficiency in Mega-Litigation* is the comparative perspective on Australian and English practices, procedures and judicial views. One advantage of this is that a variety of issues are considered. A corresponding limitation is that many complex and important procedural and substantive issues are touched on somewhat superficially. Moreover, many of the interviews were conducted some time ago (in 2012 and 2013) and judicial attitudes and practices continue to evolve over time.

Overall, the methodology employed elicited important and interesting judicial insights into the way in which the participants sought to manage mega-litigation so as to achieve both justice and efficiency in the jurisdictions studied. However, as Olijnyk acknowledges, participants were ‘to a degree, self-selecting’ and may have tended to be persons with strong views whose active case management style and concern for efficiency may not be universal.<sup>20</sup> Moreover, it is not clear whether judges’ positive views as to how they effectively and efficiently manage mega-litigation are shared by other participants in the process, including litigants, lawyers, insurers and litigation funders.

#### V Limitations on Judicial Control through Case Management

Furthermore, the study and views of many of the judicial participants are focused primarily if not exclusively on judicial control of the conduct of litigation through procedural case management. This reflects the underlying rationale of much recent civil procedure reform in both Australia and England and Wales, which has been designed to facilitate a transition from party control to judicial management of cases. There are, however, other approaches to the problem of controlling costs and delay, referred to at the end of this review, which are not adverted to by Olijnyk or her judicial interviewees.

Olijnyk and a number of participants in her study do, however, concede that there are obvious limitations on the exercise of judicial power and discretion to control the forensic conduct of litigants and lawyers. Issues of procedural fairness and due process, together with a concern about perceived judicial bias, loom large and are acknowledged in *Justice and Efficiency in Mega-Litigation*. Yet other limitations receive little attention.

Information asymmetry is a problem in most civil litigation. Busy judges do not have the same time or resources as the parties to be on top of the relevant information and evidence, at least in advance of the final trial, which eventuates in

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<sup>19</sup> Ibid 52.

<sup>20</sup> Ibid 206.

only a small number of cases. Disputing parties will often have large numbers of corporate personnel, lawyers, consultants and experts deployed. The presiding judge will usually not be privy to the various complex commercial, economic, strategic and legal considerations bearing upon the forensic conduct of litigants and those financing or indemnifying them. Moreover, a large number of those participating in the conduct of the case will be professionally engaged on the matter full-time, whereas the judge will usually only have intermittent pre-trial involvement at periodic intervals during directions hearings or case management conferences, etc.

Problems of cost and delay in civil litigation are often caused or exacerbated by factors over which judges have little, if any, effective control. Many of these are inherent in our traditional adversarial civil justice system and have persisted despite changes to civil procedure rules. Time costing, the divided legal profession, party-appointed expert witnesses and inefficient and costly processes for the identification and review of relevant, or potentially relevant, documents by large numbers of legal personnel are some of the many factors that have endured to increase costs and delay.

## VI The Review of Modern Civil Procedure Reforms

*Justice and Efficiency in Mega-Litigation* examines many historical<sup>21</sup> and modern civil procedure reforms in both Australia<sup>22</sup> and the United Kingdom.<sup>23</sup> In recent times, these have been predicated on the assumption that expanded judicial powers and discretions in relation to procedural case management, coupled with mantras incorporated in procedural rules or legislation,<sup>24</sup> will enhance access to justice and efficiency.

While necessary, it is apparent that these procedural reforms are not sufficient to deal with the problems of costs and delay. To some extent, such reforms have been supplemented by case management jurisprudence developed by both trial and appellate courts in England and Australia. Olijnyk provides a useful summary of the relevant case law<sup>25</sup> and an interesting analysis of the views of judges on the impact of procedural reforms and appellate decisions on the management of mega-litigation.

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<sup>21</sup> Ibid ch 6.

<sup>22</sup> Ibid ch 8.

<sup>23</sup> Ibid ch 7.

<sup>24</sup> In England and Wales, the overriding objective is in *Civil Procedure Rules 1998* (UK) r 1.1 ('CPR'). Also of relevance is art 6 of the *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 ('*European Convention on Human Rights*'), which is applicable in English courts pursuant to the *Human Rights Act 1998* (UK). In Australia, there are some variations from jurisdiction to jurisdiction and the provisions in the *Victorian Civil Procedure Act 2010* (Vic) are discussed in further detail in Part XI below (although not referred to by Olijnyk or her interviewees). In the Federal Court of Australia, ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) set out the overriding objectives and the obligations on parties and lawyers to conduct proceedings consistent with the overriding purpose.

<sup>25</sup> In the Australian context, including the decisions of the High Court, discussed in Olijnyk (n 1) 105–16: *Sali v SPC Ltd* (1993) 67 ALJR 841; *JL Holdings Pty Ltd v Queensland* (1997) 189 CLR 146; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

Notwithstanding procedural reforms and doctrinal development, complex civil litigation in most Australian and English jurisdictions remains prohibitively expensive and protracted. As noted by Olijnyk and a number of the English participants in her study, the first wave of civil justice reforms in England and Wales in the aftermath of the Woolf Report<sup>26</sup> fell short of achieving their stated objectives. It is not clear, to this writer at least, whether the second wave of reforms following the Jackson Report<sup>27</sup> have brought about desired changes in terms of ‘proportionality’ in the civil justice system in England and Wales. Olijnyk notes that Lord Justice Jackson found that judges had not taken a robust approach to case management and an ongoing failure to enforce compliance with the *Civil Procedure Rules 1998* (UK) (‘CPR’) had been a cause of excessive cost and delay.<sup>28</sup> His Lordship recommended, among other things, that costs considered to be disproportionate should be disallowed on an assessment of costs, even if they had been reasonably incurred.<sup>29</sup>

Although not making a specific recommendation to this effect, but, as Olijnyk observes, in line with the spirit of his report, the CPR were amended in 2013 to add to the overriding objective in r 1.1 an obligation to ensure that cases are dealt with ‘at proportionate cost’. To this end, one procedural innovation in England and Wales that has not, to date, been generally adopted in Australia, and that does not appear to be dealt with by Olijnyk, is a requirement of parties, in certain cases commenced after 1 April 2013, to submit, for judicial review, a costs budget no later than 21 days before the first case management conference.<sup>30</sup> Once a budget is approved by the court recoverable costs are restricted to the budget unless a party can persuade the court that there is a good reason to depart from it.<sup>31</sup>

As Olijnyk notes, in the context of mega-litigation, following the somewhat disastrous *Bank of Credit and Commerce International* (‘BCCI’)<sup>32</sup> and *Equitable Life* cases,<sup>33</sup> the Commercial Court and the Financial List in London are now said to facilitate the trial or resolution of commercial cases efficiently and effectively.<sup>34</sup> In part, this has been due to: the allocation of a significant number of judges with commercial expertise; the adoption of innovative case management techniques; and the relocation of the Commercial Court to the Rolls building in 2011 with state-of-the-art facilities. Moreover, the Commercial Court appointed a Users Committee,

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<sup>26</sup> Lord Woolf, *Access to Justice: Final Report* (1996) (‘Woolf Report’); Lord Woolf, *Access to Justice: Interim Report* (June 1995).

<sup>27</sup> Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009) (‘Jackson Report’).

<sup>28</sup> Olijnyk (n 1) 90–91.

<sup>29</sup> Ibid 90.

<sup>30</sup> CPR r 3.13(1)(b).

<sup>31</sup> Ibid r 3.18(b). See also *Practice Direction 3E*, which supplements CPR Part 3 Section II: *Practice Direction 3E — Costs Management* (30 November 2017) <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/practice-direction-3e-costs-management>>.

<sup>32</sup> The BCCI litigation (*Three Rivers District Council v Bank of England*) is discussed by Zuckerman: Adrian Zuckerman ‘A Colossal Wreck: The BCCI–Three Rivers Litigation’ (2006) 25(Jul) *Civil Justice Quarterly* 287, cited by Olijnyk (n 1) 96 n 72.

<sup>33</sup> The BCCI and *Equitable Life* cases are discussed by Sir Anthony Clarke MR, ‘The Supercase — Problems and Solutions: Reflections on BCCI and *Equitable Life*’ (KPMG Forensic’s Annual Law Lecture 2007, 29 March 2007), cited by Olijnyk (n 1) 96 n 72.

<sup>34</sup> Olijnyk (n 1) 98.

including judges, solicitors, barristers and representatives of major repeat litigants.<sup>35</sup> Finally, the Long Trial Working Committee, formed under the auspices of the Users Committee, made a number of user-driven recommendations<sup>36</sup> which were implemented swiftly.

## VII Social, Legal and Cultural Causes of Mega-Litigation

In chapter 3 of *Justice and Efficiency in Mega-Litigation*, Olijnyk examines the social, legal and cultural causes of mega-litigation. Five factors were said to emerge from the literature and the interview data. These are: the complexity of commercial life; the proliferation of documents due to technology; the availability of funding for litigation; the content of the substantive law and the culture of the legal profession. She reviews each of these factors in some detail.

In terms of the substantive law, several trends are identified. These include a transition in the substantive law towards individualised discretionary solutions, rather than the principled application of general rules.<sup>37</sup> The complex and flexible content of the substantive law is said to be a contributing factor to mega-litigation, including through the proliferation of alternative causes of action.

The analysis of 'legal culture' is, as Olijnyk notes, 'a perennial theme in discussions of the cost, complexity and delay' in civil litigation.<sup>38</sup> She refers to the concern about 'adversarialism'<sup>39</sup> and notes the observation of Zuckerman that 'sanctions against wasteful procedural posturing' were

bound to be ineffectual, if the incentives for such behaviour are not removed at the same time. The forensic practices of the legal profession are, inevitably, bound up with the profession's financial interest in litigation. Accordingly, as long as practitioners are paid by the hour or by the day, they will continue to have an interest in ... expanding the litigation process.<sup>40</sup>

The views of a number of judges interviewed endorsed such concerns, although some were complimentary about the 'efficient, cooperative and reasonable' conduct of legal practitioners conducting litigation.

Other legal, cultural or attitudinal factors identified included: the increasing tendency for barristers to become involved as part of the forensic team, rather than

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<sup>35</sup> See, eg, *Commercial Court User's Group: Latest Minutes* (Web Page, 3 February 2020) <<https://www.judiciary.uk/announcements/commercial-court-users-group-latest-minutes/>>.

<sup>36</sup> As Olijnyk notes, '[t]he impetus for the report was dissatisfaction in the business community about the length and cost of commercial litigation': Olijnyk (n 1) 97. See Judiciary of England and Wales, *Report and Recommendation of the Commercial Court Long Trial Working Party* (December 2007).

<sup>37</sup> Olijnyk (n 1) 29, referring to a 1995 observation to this effect by then Chief Justice of NSW (and later Chief Justice of the High Court of Australia): Chief Justice Gleeson in 'Individualised Justice — The Holy Grail' (1995) 69(6) *Australian Law Journal* 421, 421.

<sup>38</sup> Olijnyk (n 1) 30.

<sup>39</sup> Ibid 31.

<sup>40</sup> Ibid, quoting Adrian Zuckerman, 'Reform in the Shadow of Lawyers' Interests' in AAS Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure: Essays on 'Access to Justice'* (Clarendon Press, 1995) 61, 76–7.

to exercise independent judgment; a reluctance to abandon any arguable point; a failure to limit the issues to be litigated and a ‘battlefield mentality’.<sup>41</sup>

From this writer’s experience in the conduct of complex class actions, both in the United States and in Australia, each of the factors identified by Olijnyk and her judicial interviewees has resonance. While identifying such matters, *Justice and Efficiency in Mega-Litigation* fails to analyse them in any detail. Although a shortcoming, this is understandable given the nature of the research in question and the limited length and scope of the publication.

## VIII The Burdens and the Benefits of Mega-Litigation

Chapter 4 of *Justice and Efficiency in Mega-Litigation* seeks to explore both the burden and the benefits of mega-litigation with reference to what are described as the ‘broader themes of the book: justice and efficiency, from the point of view of the parties to litigation and also that of the public’.<sup>42</sup>

As Olijnyk and a number of interviewees note, such litigation impacts negatively on the parties, the individual judges handling cases, the court system as a whole and the community. Olijnyk also refers to a number of notorious cases where the legal costs incurred by the parties were very substantial.

*Justice and Efficiency in Mega-Litigation* raises concern about the direct public costs incurred through the court system in dealing with such cases. However, neither Olijnyk nor her interviewees refer to the hidden cost to the public purse through the tax system as a result of the tax deductibility of the legal costs incurred by commercial parties engaged in corporate litigation.

In terms of the ‘benefits’ of mega-litigation, Olijnyk notes some divergence of views between Australian and English judges. In England, such litigation was sometimes perceived ‘as a boon for the local economy (because it attracts business to London) and a source of pride for the court system’.<sup>43</sup> It was considered desirable to continue to attract large commercial disputes in the face of competition from other jurisdictions, including New York and Singapore. This was said to have a positive consequence in that the capacity to attract such litigation both rests on and contributes to the perception (and, hopefully, the reality) that the jurisdiction will provide litigants with ‘fair, efficient and high quality processes’.<sup>44</sup>

## IX The Attitudes and Characteristics of Judges

Chapter 9 of *Justice and Efficiency in Mega-Litigation* focuses on the approaches and attitudes that judges bring to mega-litigation and the characteristics of such judges. Those interviewed were clearly very proudly proactive in their management

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<sup>41</sup> Olijnyk (n 1) 31–2.

<sup>42</sup> Ibid 38.

<sup>43</sup> Ibid 42.

<sup>44</sup> Ibid 43 n 24, citing Eva Lein et al, *Factors Influencing International Litigants’ Decisions to Bring Commercial Claims to London Based Courts* (Ministry of Justice Analytical Series, 2015) 14–16.

of cases. From the data derived from the interviews with participants, Olijnyk characterised them as active, creative, flexible and fair.<sup>45</sup> The interview data was said to indicate that the manner in which they managed mega-litigation was (not surprisingly) heavily influenced by their experience and personality.<sup>46</sup> This involved understanding and managing human behaviour and not just applying the law.

Having analysed the experience and attributes of the participants in the study, in chapter 10 Olijnyk focuses on the ways in which procedural techniques are used by the participants in mega-litigation. This encompasses: active and continuous case management; seeking to define (and limit) the issues at an early stage; dealing with the problem of document discovery; the separate determination of specific issues, which may facilitate settlement or dispose of the litigation; sharing the burden of the judicial task(s) with others; control over the structuring of the trial and the presentation of evidence; controlling and limiting submissions; using technology and managing the complex relationships. The judicial techniques used in mega-litigation were found to be ‘broadly similar’ in Australia and England.<sup>47</sup> A detailed consideration of each of these issues is outside the scope of the present review.

In chapter 11, Olijnyk offers three answers to the central question of how judges reconcile the demands of justice and efficiency in mega-litigation:

first,... judges use innovative means to achieve both efficiency and justice; secondly, ... sharp focus on the issue promotes efficiency without diminishing the quality of justice; and, thirdly,... any conflict between justice and efficiency is likely to be resolved by recourse to the judge’s expert intuition.<sup>48</sup>

As Olijnyk notes, despite the various theoretical, legislative and doctrinal responses to the problem of justice and efficiency in civil proceedings, the individual judge is left with a wide discretion. She contends that there may not be any realistic alternative to the ad hoc balancing approach and the ultimate reliance on expert judicial intuition. In her view:

[t]he fact that procedural decision-making is not governed by a consistent normative principle may indicate that judges, scholars and law makers have not yet hit upon a satisfactory normative basis for procedural law... Perhaps there is no normative principle capable of capturing this intensely practical and human task.<sup>49</sup>

This leads to her conclusion that in seeking to reconcile conflicting aims and objectives in mega-litigation and in civil litigation generally, it is ‘not necessarily a bad thing’ to entrust the resolution of this ‘to the expert intuition of the individual judge’.<sup>50</sup>

This relatively benign and narrow focus on the role of the individual judge in seeking to achieve justice and efficiency in mega-litigation is not unexpected given the parameters of the study and the focus on the role and attitude of judges who were interviewed.

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<sup>45</sup> Olijnyk (n 1) 122–36.

<sup>46</sup> Discussed at *ibid* 136–41.

<sup>47</sup> *Ibid* 175.

<sup>48</sup> *Ibid* 177.

<sup>49</sup> *Ibid* 189.

<sup>50</sup> *Ibid* 190.



## X Other Factors that Impact on Mega-Litigation

However, from a broader policy perspective, there are a variety of factors that impact on the conduct of mega-litigation, and which are a cause of ongoing prohibitive cost and inordinate delay, which are to some extent outside the ambit of judicial discretion and control, or at least are unlikely to be curtailed by the exercise of judicial power in many, if not most, cases. The fact is that mega-litigation in Australia, and class actions in particular, continue to give rise to substantial delay and excessive cost notwithstanding procedural and doctrinal reforms and despite the proactive use of judicial management techniques. A detailed consideration of the reasons for this is outside the scope of the current review.

## XI Transcending the Constraints on Proactive Judicial Control

In her analysis of civil procedural reform in Australia, Olijnyk makes no mention of a somewhat radically different approach adopted by the Victorian Law Reform Commission ('VLRC').

In its *Civil Justice Review Report*,<sup>51</sup> the VLRC noted that, in response to concerns about costs and delays, provisions had been introduced in a number of jurisdictions into statutes and rules of court to impose certain obligations on courts in the management of civil litigation.<sup>52</sup> The VLRC further noted that, in some instances, obligations have also been imposed on litigants and lawyers to assist the court in achieving the overriding objectives. These procedural reforms are the focus of the analysis by Olijnyk.

Although the VLRC considered that these are important initiatives, which the Commission had in large measure drawn on, it concluded that given constraints on the judicial control of litigation, a primary focus should be on a more direct method of seeking to improve the conduct of participants in civil litigation. Such participants are the parties, their lawyers and others who exercise commercial or other influence or control over the conduct of proceedings, including litigation funders and insurers.

The VLRC recommended 'a new set of statutory provisions to expand the overriding obligations and duties (the "overriding obligations") to be imposed on all key participants in civil proceedings before Victorian courts, and to more clearly define the "overriding purpose" sought to be achieved by the courts in civil proceedings'.<sup>53</sup> These provisions sought to address one of the key policy objectives of the review; namely, 'improving the standards of conduct of participants in the

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<sup>51</sup> Victorian Law Reform Commission ('VLRC'), *Civil Justice Review* (Report 14, 2008) ('*Civil Justice Review Report*').

<sup>52</sup> One of the Victorian judges interviewed by Olijnyk, David Harper, was a member of the VLRC and involved in the *Civil Justice Review*. The writer of this book review was the Commissioner in charge of the Review.

<sup>53</sup> *Civil Justice Review Report* (n 51) 149 [1.1]. See generally ch 3 ('Improving the Standards of Conduct of Participants in Civil Litigation').

civil justice system to facilitate early dispute resolution, to narrow the issues in dispute and to reduce costs and delay'.<sup>54</sup>

The overriding obligations comprised a set of positive obligations and duties. 'These commence with a statement of a paramount duty to the court to further the administration of justice' (consistent with procedural reforms in other Australian jurisdictions and in England and Wales, which are discussed by Olijnyk). However, in a somewhat radical departure from other procedural reforms, the VLRC also proposed 10 more specific obligations and duties to be imposed by statute.<sup>55</sup>

In summary, the VLRC proposed that:

Each of the persons to whom the overriding obligations are applicable:

- shall at all times act honestly
- shall refrain from making or responding to any claim in the proceeding, where a reasonable person would be of the belief that the claim or response (as appropriate) is frivolous, vexatious, for a collateral purpose or does not have merit
- shall not take any step in the proceeding unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding
- has a duty to cooperate with the parties and the court in connection with the conduct of the proceeding
- shall not engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive or knowingly aid, abet or induce such conduct
- shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution (ADR) processes
- where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute
- shall use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute
- shall use reasonable endeavours to act promptly and to minimise delay
- has a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.<sup>56</sup>

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<sup>54</sup> Ibid 149 [1].

<sup>55</sup> Ibid 150 [1.1].

<sup>56</sup> Ibid.

‘In addition to the overriding obligations various [quite onerous] certification provisions were proposed in relation to both parties and legal practitioners.’<sup>57</sup>

The overriding obligations were proposed to apply not only to litigants and lawyers (as is the case with other civil procedure reforms), but also to litigation funders and insurers (to the extent that such entities or persons exercise any direct or indirect control or influence over the conduct of any party in a civil proceeding),<sup>58</sup> and (in a limited respect) to expert witnesses.<sup>59</sup> They were also applicable to not only the conduct of proceedings in court, but to ancillary processes, such as mediation.<sup>60</sup>

The proposed provisions were accompanied by

a broad range of sanctions and remedies available to the court to deal with nonconforming behaviour. Some of these are compensatory as well as punitive. They included payment of legal costs, expenses or compensation, requiring that steps be taken to remedy the breach and precluding a party from taking certain steps in the proceeding.<sup>61</sup>

The rationale for the recommendations was to impose affirmative statutory obligations on participants in the civil justice system, and those funding and influencing their conduct, with serious consequences for non-compliance, so as to improve the standards of forensic behaviour in a manner analogous to that sought to be achieved by model litigant guidelines adopted by various governments and agencies.<sup>62</sup> They were accompanied by a range of other recommendations designed to address the problems of cost and delay in civil proceedings.

As the VLRC noted, the rationale for its recommendations in relation to overriding obligations

did not arise out of any serious concern about widespread ‘improper’ conduct on the part of the ... legal profession. In part, the proposals arose out of the view that what has been traditionally regarded as ‘proper’ or normal professional conduct, and in particular the adversarial approach to litigation and the primacy often given to the partisan interests of clients, has not always been conducive to the quick, efficient or economical resolution of disputes.<sup>63</sup>

Many of the VLRC recommendations, including most of the above-mentioned proposals in respect of overriding obligations, were adopted and incorporated, with some modifications, in the *Civil Procedure Act 2010* (Vic). This reflects a very different approach to the management and conduct of civil litigation generally, and mega-litigation in particular, than the primary reliance on judicial management that is the subject of the study by Olijnyk and the focus of the judges who were interviewed.

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid 181–2 [3.7].

<sup>59</sup> Ibid 172–81 [3.5].

<sup>60</sup> Ibid 191 [5.1].

<sup>61</sup> Ibid 151.

<sup>62</sup> Ibid 152–5.

<sup>63</sup> Ibid 153–4.

## **XII Conclusion**

Notwithstanding the above comments concerning the limits of the scope of the research, *Justice and Efficiency in Mega-Litigation* is a very valuable contribution to the scholarship on civil procedure, presents important insights into how judges seek to achieve the goals of justice and efficiency in complex mega-litigation and is essential reading for those interested in civil justice reform.