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THE END OF FIDUCIARY ACCOUNTABILITY

ROBERT FLANNIGAN*

Some judges and writers have been moving our regulation of opportunism off its conceptual rails. Numerous departures from convention presently are nesting in the jurisprudence and the literature. None of the departures are justified, and all should be purged. They choke the coherent expression of principle. If not dispatched, they may invite or license the collapse of our prudent strict supervision of the mischief that vitally undermines synergy and community.

I INTRODUCTION

In several previous articles I have examined various aspects of the law and literature on fiduciary accountability. Here I bring that work together in one relatively compact statement of principle and controversy in order to demonstrate that we appear to be at or near a tipping point where the conventional regulation may be replaced by an incoherent array of unjustified assertions and suppositions. I begin by summarising the function and content of the conventional regulation. I explain that it seeks to strictly constrain the opportunism that may compromise limited access undertakings.[1] I then turn to the obfuscation produced by the multiple departures that ostensibly either contract or expand the conventional design in disparate ways. The law, it appears, is working itself impure.[2] Each of the departures represents a challenge to conventional principle, and collectively they may signal the *collapse* of the conventional position. I will briefly describe each departure, and point the reader to my prior work where I show the departure to *be a departure*, and to be an *unjustified* departure.[3] Finally, I explain further why the departures ought to be

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1 See the discussion of limited access at R Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375, 376–85 ('Core Nature').

2 There is no pure state of the law. There is in the immediate context only a notorious mischief and a conventional response. To the extent the law moves away from that recognised mischief and response without credible justification, it works itself impure. My work demonstrates that the law is not necessarily geared to work itself pure. The status quo position will always be continuously contested simply because it is the status quo. Variation will occur, sometimes justifiably, sometimes not.

3 It will become apparent that the incorporation by reference of my prior work into this compact statement essentially produces a book-length treatment of the need for clarification of the law.

discarded. My objective is to confirm the singular function or *end* of the accountability, and dismiss the other ends that addle the law. That conceptual pruning or definition is required if we are to avoid the negligent *end*, whole or partial, of the conventional accountability. My hope is that judges will affirm conventional principle, or specify precisely what other norms or policies inform the accountability, and what different test(s) that ought to produce. The whole of the analysis is applicable to every jurisdiction that initially recognised the English law of fiduciary accountability.

II The Opportunism Mischief

Fiduciary accountability seeks to address the risk that the performance of an undertaking of service will be compromised by production opportunism.[4] That is not controversial.[5] The seeming disorder that presently confounds the jurisprudence is due to wayward assertions and suppositions about the function, test for, and content of, the accountability. I will address the disorder at a later point. My initial task is to explain the animating mischief and its conventional regulation.

Self-regard is not a social mischief per se. It is required for success or survival in all kinds of environments. It has been bred into sentient life from the beginning of time. Self-regard, even aggressive self-regard, often is virtue. Today it is

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4 Production opportunism is to be distinguished from exchange opportunism. See R Flannigan, 'The Economics of Fiduciary Accountability' (2007) 32 *Delaware Journal of Corporate Law* 393, 394–6 ('Economics of Fiduciary Accountability').

5 Opportunism regulation is a manifestation of or complement to the general social/legal norm of risk regulation. Those who project risk are accountable for any resulting adverse consequences. That regulation is required to prevent insulated risk-taking from elevating the level of risk in a community. The norm informs much of the law including, for example, the law of contract, tort and business organisation. On the operation of the risk regulation norm in the vicarious liability context, see R Flannigan, 'Enterprise Control: The Servant–Independent Contractor Distinction' (1987) 37 *University of Toronto Law Journal* 25, 26–36. In the present context, the risk regulation norm is applicable in two respects. Fiduciary accountability is required to protect beneficiaries from fiduciaries projecting risk through or in the form of opportunism. Fiduciary accountability is also required to protect third parties who potentially may be affected. The detriment of compromised performance, in addition to being felt by the beneficiary, may be transmitted through the beneficiary (or the assets) to third parties who are intended to benefit from the performance or who incidentally feel the effects. Consider separately that general forms of default regulation are public goods. They define our terms of interaction in default of revision, and thereby provide social structure. They are most valuable to us when they are intellectually accessible because they are uncomplicated manifestations of our social norms and social capital. Lawyers and judges capture undue increments of the value of a public good to the extent unnecessary complexity and uncertainty leads to its use or navigation requiring incremental advice, litigation and judicial resolution.

celebrated in market economies as desirable competition, and is generally accepted everywhere to some degree in every manner of social game (every human interaction).[6] That said, the immediately relevant feature of self-regard is that it may be projected through an undertaking to serve others distinctly or jointly.[7] That is, it often is in one's self-interest to pursue the interest of another. There are many such arrangements.[8] Actors choose to act for or on behalf of others because they anticipate benefits of various kinds (eg fees, salaries, a share of profit, gratitude, the satisfaction of a moral or spiritual duty). We thus subscribe to both serving self and serving self through serving others. Both may advance synergy and community.

An undertaking of service normally leads to an actor gaining access to the value of the assets of others.[9] That access may be acquired in different ways. Commonly access is acquired through a grant of authority. Trustees, agents and guardians, for example, may be given authority to enter into contracts (eg purchases, leases) or create or utilise assets (eg equipment, information). Access may also be acquired through authorised or incidental proximity. Agents or employees may in the course of performance be placed in a position where the value of assets simply is *available* to them, even though their use of the assets is not authorised. Access may also be acquired through the influence that may come with some undertakings of service.

The access that actors acquire through authority, proximity, influence or other means may be exploited for their personal gain.[10] That predation possibility creates the risk that the service will be compromised. Performance (or the performance environment) will be shaped, at some unclear cost to beneficiaries and others, to produce exploitable circumstances. To be opportunistic is to find a way to exploit the value of the assets of others. To an opportunist, access is currency. Consider an authority granted to an agent to find and contract with a supplier for a particular component required for the assembly of a widget. That

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6 Even charitable/nonprofit activity is self-interested. See R Flannigan, 'Tort Immunity for Nonprofit Volunteers' (2005) 84 *Canadian Bar Review* 1, 4–7.

7 R Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35, 36–54 ('Boundaries of Fiduciary Accountability').

8 Consider the variety of occupations discussed in R Flannigan, 'Fiduciary Mechanics' (2008) 14 *Canadian Labour & Employment Law Journal* 25 ('Fiduciary Mechanics').

9 Often the access is to the assets managed, developed or consumed to perform the function. But other assets are exposed to exploitation in the course of performance. For example, an employee tasked by an employer to perform a service for a third party often gains access to the value of assets of the third party. Benefitting from that access may be a breach to both the employer and the third party. See R Flannigan, 'Fiduciary Accessories' (2019) 38 *University of Queensland Law Journal* 41 ('Fiduciary Accessories').

10 See Flannigan, 'Core Nature' (n 1) 378–88. The actual means by which an actor acquires access does not imply a particularised kind of exploitation or regulation. The fact that the access is for a limited purpose, however obtained, alone raises the risk of compromised performance and alone justifies a generic regulation.

authority is a value-generating asset in two respects. First, it is a link or key to other assets. In the example, the other asset is the money that will be paid to the supplier that is selected by the agent. Thus an agent who selects a personally affiliated firm to supply the component, without disclosing the conflict, will have silently profited from the authority by arranging a contract that may not be the best for the principal. Secondly, the authority by itself is capable of generating exploitable value. The agent may in return for a fee or a kickback reveal to a potential supplier the terms on which the principal authorised the agent to contract. The supplier may ultimately choose to not proceed to bid, or the bid may not succeed for some reason, but the agent will have extracted value from the authority alone.

One form of authority deserves special mention because it is thought in some quarters to be exclusively definitive of fiduciary accountability. That authority is to exercise a discretion of some kind. Discretion, it should be evident, is not congruent with the risk of compromised performance. A solicitor may only be authorised to acquire information from third parties to produce a report respecting potential liability. A trustee or agent may only be authorised to execute transactions that are fully specified. An employee may only be authorised to transport a specified load of goods to a specified destination by a specified mode of transport. No discretion is granted to these actors, but the access to asset value they obtain through their authority may still be exploited. An authority to exercise a discretion is just one means (one kind of authority) that gives access to the value of the assets that are the object of, or incidentally proximate to, the discretion.

No exploitation of a limited access is benign. Consider two examples that might be thought to be unobjectionable. Receiving an undisclosed fee from a third party for performing some aspect of a service function might be regarded as unobjectionable if the function ostensibly was properly performed and the payment did not come out of the assets intended to benefit the beneficiary. Using confidential information to make trades on a public stock market might also appear to be unobjectionable because the information is not conveyed to competitors or others, the information seemingly does not lose its confidential character, and the gain comes through an external neutral institution. In both examples, however, there remains a risk that the service may be compromised by personal interest. The prospect of a fee or trading gains may consciously or subconsciously incent actors to take (or not take) actions in the course of performing their other-regarding function, including shaping the actions of co-workers or related processes, that will have the effect of distorting performance (eg shaping decisions to create exploitable share price spikes up or down). That is, the self-interest originally subordinated to others may reassert itself inconsistently with the undertaking to serve. It is not a new or different self-interest. It is the same self-interest that motivated the undertaking to serve, but which now potentially is corrosive of that service. A self-interest that defects from a voluntary undertaking of service becomes objectionable opportunism.

It is practically impossible in most cases to know whether an undertaking of service was actually compromised by opportunistic impulse. The extraction or diversion of value that is made possible through the access acquired may effectively be concealed or coloured.[11] It is the nature of an undertaking of service that, once engaged, it de facto enables or facilitates the unauthorised appropriation of value. The ceding of access to another for a limited purpose inherently creates the risk that the access will be turned to other purposes.

III THE CONVENTIONAL ACCOUNTABILITY

The courts have always understood that opportunism is latent in all relations of service. They also understood the difficulty in detecting and proving the actual operation of the opportunistic impulse. They therefore designed the strict regulation that we now identify as fiduciary accountability.[12] They concluded that those who undertake to serve others must not allow selective advantage to possibly compromise their function. Actors were made *accountable* because their undertaking of service led to an access that could be exploited.[13] That accountability then became *liability* where the risk of compromised performance was indicated by the presence of an unauthorised conflict or benefit. Both the accountability and the liability normally had a default operation. Either could be varied by the appropriate parties in whatever way and to whatever extent might

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[11] See R Flannigan, 'The Strict Character of Fiduciary Liability' [2006] *New Zealand Law Review* 209, 210–14 ('Strict Character'). To the extent that conflicts and benefits are unappreciated, undetectable, or unquantifiable, fiduciary accountability underperforms (or is incapable of performing) its assigned function. Consider ethnic, class, racial, ideological, gender and religious conflicts of interest and duty, or duty and duty. Consider remote, psychic and fraternity benefits. Consider further that sophisticated and intuitive opportunists know how to operate below *or through* most thresholds of detection.

[12] See R Flannigan, 'The Limits of Status Assertion' (1999) 21 *Advocates' Quarterly* 397, 398–404. As I will note at a later point, the term 'fiduciary' today is used as a generic descriptor for anyone who undertakes to act in the interest of another. That usage may lead one mistakenly to conclude that the 'fiduciary' duty of a fiduciary is to act in the interest of the other. The only conventional fiduciary duty is to avoid compromising an other-regarding function with unauthorised conflicts or benefits. Because of the potential for confusion, it might be preferable to find a different descriptor to identify generically those who serve others. We might, for example, resurrect and repurpose the moribund term 'servant'. Trustees, agents, employees, directors and all other fiduciaries would then generally be characterised as 'servants' in the new sense (those who undertake to serve others) and they would have a more precisely delimited *fiduciary* duty to not exploit the access that comes with their service.

[13] Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 37–8; Flannigan, 'Fiduciary Accessories' (n 9) 43–8.

be thought desirable.[14] And no service was privileged as being intrinsically valuable. Context was irrelevant if an access was assumed for a limited purpose. Every undertaking of service was equally entitled to not be compromised by opportunism.

A strong jurisprudence clearly elucidates that conventional position. The more familiar English cases include, in chronological order, *Keech v Sandford*,[15] *Ex parte Lacey*,[16] *Ex parte James*,[17] *Ex parte Bennett*, [18]*Aberdeen Railway Co v Blaikie Brothers*,[19] *Parker v McKenna*,[20] *Bray v Ford*,[21] and *Regal (Hastings) Ltd v Gulliver*.[22] One could fully comprehend the nature of the regulation by digesting those cases alone. There are thousands of other decisions across all common law jurisdictions that confirm conventional principle.[23]

From the beginning the accountability developed as an independent general jurisdiction. It did not develop merely by way of analogy to the trust, though the judges initially employed the language of trust and confidence. It was initially applied contemporaneously to several nominate relations.[24] In addition to trustees, it was applied to, for example, agents, employees, partners and attorneys.[25] Over time, through both simple repetition and recognition that the

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14 Though usually it is not prudent to agree to an exclusion of conventional fiduciary accountability, there are instances where parties might reasonably choose to do so. See Flannigan, 'Core Nature' (n 1) 388–98. See also R Flannigan, 'Collateral Contracting Implicitly May Vary Fiduciary Accountability' (2010) 126 *Law Quarterly Review* 496. Consider also that as the coherence or certainty of a default legal accountability deteriorates, it may become prudent to exclude its application entirely and replace it with a customised negotiated regulation.

15 (1726) Sel Cas T King 61; 25 ER 223.

16 (1802) 6 Ves Jun 625, 627; 31 ER 1228.

17 (1803) 8 Ves Jun 337; 32 ER 385.

18 (1805) 10 Ves Jun 381; 32 ER 893.

19 (1854) 23 LT 315 (HL).

20 (1874) LR 10 Ch App 96 (CA).

21 [1896] AC 44 (HL).

22 [1942] 1 All ER 378 (HL).

23 It is convenient here to also identify some of the cases that instituted distortion or enabled subsequent distortion. See, eg, *North-West Transportation Co v Beatty* (1887) 12 AC 589 (HL); *Robb v Green* [1895] 2 QB 315 (CA); *Re Smith and Fawcett Ltd* [1942] 1 Ch 304 (CA); *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592; *National Westminster Bank plc v Morgan* [1985] AC 686 (HL); *Nottingham University v Fishel* [2001] RPC 22 (QB).

24 A 'nominate' status is a named status. For example, the agency relation creates the nominate status of agent, the employment relation the nominate status of employee, and so on. There is an idiocratic nominate regulation associated with each nominate status (eg agency law, employment law). See R Flannigan, 'Fiduciary Control of Political Corruption' (2002) 26 *Advocates' Quarterly* 252, 253–8 ('Fiduciary Control of Political Corruption'). Consider also that there are *general* nominate categories of regulation (eg contract law, tort law, criminal law) that, like fiduciary accountability, apply a generic content generally.

25 See the cases listed at R Flannigan, 'Access or Expectation: The Test for Fiduciary Accountability' (2010) 89 *Canadian Bar Review* 1, 5 n 18 ('Access or Expectation'). The rationale and generality of

opportunism mischief was latent across the full scope of the undertaking, the accountability of those classes of actors (and others) became a status accountability. Proving the status of an actor (proving a formal or de facto undertaking to serve as a trustee, agent, etc) was enough to engage the accountability. The accountability, however, was not confined to the status classes. It was clear that anyone who undertook to act for another in some respect, thereby creating (in the early terminology of the courts) a relation of 'trust and confidence', was accountable.[26] Both the status and fact-based accountability rested on the same conceptual foundation. The only difference was that, instead of the usually easier burden of proving an actual nominate *status* (where the undertaking of service is express or implicit in the nominate definition of each particular status), fact-based accountability required proof of an actual limited access undertaking.

Not every undertaking attracts the accountability.[27] The discipline is imposed only for limited access undertakings. Access obviously is required. In the

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the accountability was concisely described by counsel in *York Buildings Co v Mackenzie* (1795) 8 Bro PC 42, 63–4; 3 ER 432, 446 (HL): 'The ground on which the disability or disqualification rests, is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expence [sic] of those for whom he is entrusted … The danger of temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation where the danger is imminent, and the security against discovery great, as it must be where the difficulty of prevention or remedy is inherent to the very situation which creates the danger. The wise policy of the law has therefore put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation … He is a trustee (in technical style) who is vested with property in trust for others; but every man has a trust, to whom a business is committed by another, or the charge and care of any concern is confided or delegated by commission. He that is employed by one either to sell or to buy land for him, is in that instance his trustee, and has a trust reposed in him.' See also *Greenlaw v King* (1841) 5 Jur 18, 19 ('[the rule is] one of universal application, affecting all persons who come within its principle'). See additionally the definitive review of the English jurisprudence by Chancellor Kent in the American case of *Davoue v Fanning* (1816) 2 Johns Ch 252.

[26] Possibly the best illustration of a proper fact-based analysis is the decision of the English Court of Appeal in *Tufton v Sperni* [1952] 2 TLR 516. See R Flannigan, 'Presumed Undue Influence: The False Partition from Fiduciary Accountability' (2015) 34 *University of Queensland Law Journal* 171, 197–8 ('Presumed Undue Influence').

[27] It should also be appreciated that some undertakings create only partial fiduciary accountability. I periodically use the example of the bank-depositor relation. The bank has an open access to the deposited funds, but only a limited access to depositor information. The bank will also be accountable as a fiduciary when it undertakes to advise depositors about investment options. That is, there may be a number of dimensions to a relation or function, some of which involve an open access, some of which involve a limited access. Another example would be a lender providing funds

absence of some kind of access to the value of the assets of others (including through one's own assets), there is nothing on which the opportunistic impulse can operate. Access by itself, however, is not sufficient. It must be limited by an other-regarding purpose. The access must have been acquired or assumed as part of, or in the course of, service (or purported or deemed service) on behalf of another. It is the limited access quality of an undertaking that directly identifies unauthorised self-regard as objectionable. Looking to self, however engineered, immediately compromises an other-regarding function. That limited access understanding of the onset of fiduciary accountability is explicit in numerous cases,[28] and otherwise implicit in every conventional authority.

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for a specified purpose. If the funds are not used for the specified purpose, they are held for the lender. The lender is the intended beneficiary of the borrower's limited access undertaking, the lender believing the limitation reduces the risk associated with the loan. The borrower is given open access to the funds within the specified purpose, but only a limited access outside the purpose. It would be a fiduciary breach, for example, for the borrower to take a bribe to redirect part of the funds to an unauthorised project. Recognise also that the nature of some undertakings cannot be determined until a variegated nominate category is reduced to its component arrangements. An example is a bailment undertaking. The nature of the access that a bailee acquires depends on the kind of bailment undertaken. A custodial bailment is a limited access undertaking, while a bailment for hire is an open access undertaking. See *Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107. Consider further that some writers doubt that an undertaking of service is necessary for fiduciary accountability. See Matthew Harding, 'Fiduciary Undertakings', in Paul Miller and Andrew Gold (eds), *Contract, Status and Fiduciary Law* (Oxford University Press, 2016) ch 3, 73–5. Harding bases his doubt on the parent–child relation. He asserts (at 73) that is a 'situation in which fiduciary norms are imposed absent an undertaking'. In fact there is an undertaking. There is a general social consensus that parents are to act in the best interest of their children. Most every community has implemented that consensus through legislative or judicial fiat. That is, the community has associated parent status with an undertaking of service. Accordingly, when an actor voluntarily chooses to become (or voluntarily risks becoming) a parent, that actor voluntarily undertakes to act in the best interest of the child. That nominate undertaking simultaneously activates the proscription on unauthorised conflicts or benefits. It is irrelevant that the actor did not willingly or knowingly become a parent. It is no different from other status relations. For example, actors who voluntarily assume the status of a trustee, agent or employee (even if they did not subjectively do so willingly or knowingly) thereby voluntarily assume the default fiduciary accountability that the community has tied to that status. Further, it is not proper to say (as Harding does at 75) that, because parents are already subject to norms such as the duty to maintain the child, an undertaking of service by a parent is 'superfluous in ascertaining whether parents are fiduciaries'. It should be appreciated that any state-defined parental duty to act in the best interest of a child actually confirms (rather than negates) the application of fiduciary accountability (the duty to not allow interest to compromise nominate function).

[28] See, eg, *Rothschild v Brookman* (1831) 5 Bligh NS 165, 190; 5 ER 273, 282 ('But the law which your lordships are to administer is a law of jealousy: it will not allow any man to be trusted with power, that will give him an opportunity of taking advantage of his employer'); *Carter v Palmer* (1842) 8 Cl & Finn 657, 705; 8 ER 256, 277 ('As agent, he necessarily became acquainted with all the circumstances connected with these securities, and most particularly with the means which existed of providing for payment of them'); *Robertson v Norris* (1858) 1 Giff 421, 424–5; 65 ER 983, 984 ('The legitimate purpose [of a mortgage power of sale] being to secure repayment of his

Two early cases are instructive. In *Whichcote v Lawrence* Loughborough LC described the 'principle of clear reasoning' as follows:

> [H]e who undertakes to act for another in any matter, shall not in the same matter act for himself. Therefore a trustee to sell shall not gain any advantage by being himself the person to buy. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain no profit. The consequence is beyond doubt, that, in whatever shape that profit redounds to him, whether by management, which is the common case, or by superior good fortune, it is not fit, that benefit shall remain to him. It ought to be communicated to those, whose interests being put under his care afforded him the means of gaining that advantage.[29]

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mortgage money, if he uses the power for another purpose — from any ill motive to effect other purposes of his own, or to serve the purposes of other individuals — the Court considers that to be a fraud in the exercise of the power, because it is using the power for purposes foreign to that for which it was intended'); *Shallcross v Oldham* (1862) 2 J & H 609, 616; 70 ER 1202, 1205 ('where a chattel is entrusted to an agent to be used for the owner's benefit, all of the profits which the agent may make by using that chattel belong to the owner'); *Merryweather v Moore* [1892] 2 Ch 518, 524 ('[Was there an abuse of the] confidence arising out of the mere fact of employment, the confidence being shortly this, that the servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information'?); *Lamb v Evans* [1893] 1 Ch 218, 230 (CA) ('these materials were not to be used otherwise than for the purposes of the employment in the course of which they were obtained') and 235 ('to allow you to use any of those materials for your own purposes would be allowing you to use them for a purpose for which they were not compiled'); *Reid and Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461, 480 ('a servant cannot use to the detriment of his master information of a confidential or secret nature entrusted to the servant or learnt by him in the course of his employment'); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [34] ('Similarly, a person entrusted with another person's money for a specific purpose has fiduciary duties to the other person in respect of the use to which those monies are put'); *581257 Alberta Ltd v Aujla*, 2013 ABCA 16, [45] ('where an employee is entrusted with the keys to the till and tasked with handling funds belonging to his or her employer, then that employee ought properly to be regarded as standing in a fiduciary relationship with his or her employer with respect to the handling of those funds'). See also the review of early judgments and texts at Flannigan, 'Access or Expectation' (n 25) 6–8.

[29] (1798) 3 Ves Jun 740, 750; 30 ER 1248, 1253. While the decision was conventional, Lord Loughborough (who became Lord Rosslyn) was criticised for suggesting that fiduciary accountability required proof of 'advantage'. See the review in *Davoue v Fanning* (1816) 2 Johns Ch 252, 260. That controversy, however, does not detract from the significance assignable to the judgment. Moreover, it is possible to understand the ostensible suggestion in a conventional way. While persons claiming fiduciary breach need not prove actual harm or unfairness, they must prove either a benefit or the possibility of a conflict. A benefit plainly is an 'advantage'. A conflict is as well. To act while conflicted is to permit a personal consideration (the conflict) to potentially (consciously or subconsciously) affect one's function. It is in that sense that it may be said that a claimant must prove 'advantage' (ie the presence of an unauthorised conflict or benefit). A collateral observation is that earlier, in *York Buildings Co v Mackenzie* (1795) 3 Paton 378, 398 (HL), Lord Loughborough rightly said that: 'A person who is an agent for another, undertakes a duty in which there is confidence reposed', but he then went on to say inexplicably that: 'The bargain must be perfectly fair and equal, at the best price'. That suggestion of a fairness criterion was not repeated in his later judgments, including *Whichcote*. See Flannigan, 'Presumed Undue Influence'

Loughborough LC made it clear that it was the undertaking that triggered the accountability.[30] The limited access acquired was the means ('interests being put under his care afforded him the means of gaining that advantage') that produced the risk (the 'temptation') that the function might be compromised.[31]

The second decision is that of Lord Eldon in *Ex parte Lacey*, involving a purchase by an assignee in bankruptcy of property of the estate.[32] Several aspects of the conventional regulation are illustrated. The first is that an actor who undertakes to serve another thereby assumes a parallel duty to forgo unauthorised personal advantage. According to Lord Eldon: 'A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself.'[33] It was thus again made clear that it was the undertaking to serve that initiated the parallel accountability. There was no suggestion of a requirement that an actor undertaking to serve must actually be trusted in some subjective sense (an intellectual or relational attachment or submission).[34] The imposition

(n 26) 176 n 35. See also the apparently unreported 15 March 1794 decision of Lord Loughborough referred to and affirmed in *Henchman v East India Co* (1797) 8 Bro 85, 102; 3 ER 459, 470.

30 See also *Massey v Davies* (1794) 2 Ves Jun 317; 30 ER 651, where Arden MR (at 320–1; 653) asked if 'a man undertakes to buy for me', could he be trusted to be the seller? And see *Bath v Standard Land Co Ltd* [1911] 1 Ch 618 (CA), where Buckley LJ (at 643) recognised that 'the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it'. See also (without assessing the case generally) *Vivendi SA v Richards* [2013] EWHC 3006 (Ch), where Newey J reviewed more recent statements of the need for an undertaking. On the significance of an undertaking, see further Flannigan, 'Core Nature' (n 1) 378-385; R Flannigan, 'Fact-Based Fiduciary Accountability in Canada' (2010) 36 *Advocates' Quarterly* 431, 439–46 ('Fact-Based Fiduciary Accountability in Canada'); Flannigan, 'Fiduciary Accessories' (n 9) 43–8.

31 Statements that the mischief is compromised performance are common and uncontroverted. See, eg, *Ex parte Bennett* (1805) 10 Ves Jun 381, 394; 32 ER 893, 897 (a trustee cannot purchase because 'human infirmity will in very few instances permit a man to exert against himself that providence, which a vendor ought to exert, in order to sell to the best advantage'); *Bentley v Craven* (1853) 18 Beav 75, 76–7; 52 ER 29, 30 ('an agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not best for his principal, and it is the plain duty of every agent to do the best he can for his principal'); *Bray v Ford* [1896] AC 44, 51–2 (HL) ('human nature being what it is, there is a danger of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect').

32 (1802) 6 Ves Jun 625; 31 ER 1228.

33 Ibid 626.

34 The language of 'reposing trust' appears in earlier cases, but in some of them it seems that the relevant 'trust' is rightly understood to be the trust arranged *by the law*. In *Bishop of Winchester v Knight* (1717) 1 P Wms 406; 24 ER 447, the Lord Chancellor said (at 407; 448) that the extraction of asset value was a breach 'of the trust which the law reposes in the tenant'. In *Welles v Middleton* (1784) 1 Cox 112; 29 ER 1086, the Lord Chancellor referred to the actual reposing of trust a number

of the legal accountability prompted by the undertaking essentially *made* the relation one of 'trust' or 'trust and confidence' in the sense that the beneficiary was entitled (by law) to 'trust' that the performance of the undertaking would not be compromised by the self-regard of the fiduciary.[35]

A second aspect illustrated by the judgment is that the undertaking party acquires an access that may be exploited, which exploitation often will be difficult to detect. Lord Eldon observed that 'the Law supposes him to have acquired all the knowledge a trustee may acquire [the access]; which may be very useful to him; but the communication of which to the *Cestuy que trust* the Court can never be sure he has made'.[36] Lord Eldon elaborated as follows:

> It is founded upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of a hundred, whether he has made advantage, or not. Suppose, a trustee buys any estate; and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that up in his own breast enters into a contract with *Cestuy que trust*: if he chooses to deny it, how can the Court try that against that denial? The probability is, that a trustee, who has once conceived such a purpose, will never disclose it: and the *Cestuy que trust* will be effectually defrauded.[37]

Importantly, the mischief described in Lord Eldon's example arose from the *access* acquired (to information), and not from the presence or exercise of discretion on the part of the trustee.[38] Beyond that, it is clear that the detection concern was of organic significance in the formulation of the strict character of the regulation.[39]

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of times before then (at 125; 1092) describing the guardianship relation in another case as one where the guardian has 'the confidence that relation derives [sic] to him'.

35 On the irrelevance of subjective trust, see R Flannigan, 'Fiduciary Obligation in the Supreme Court' (1990) 54 *Saskatchewan Law Review* 45, 48 ('Fiduciary Obligation in the Supreme Court'); Flannigan, 'Strict Character' (n 11); Flannigan, 'Fiduciary Accessories' (n 9) 43–8.

36 *Ex parte Lacey* (1802) 6 Ves Jun 625, 626–7; 31 ER 1228, 1228.

37 Ibid 627; 1229. Lord Eldon borrowed (and repurposed) his mine example from Lord Thurlow in *Fox v Mackreth* (1791) 2 Cox 320; 30 ER 148.

38 In a later discussion of *Fox v Mackreth*, Lord Eldon noted ((1802) 6 Ves Jun 625, 627; 31 ER 1228, 1229) that upon assuming trustee status the defendant 'had acquired a knowledge of the value of the estate'. The route to exploitation (as illustrated again and again by numerous other cases) was through the access acquired, not any discretion possessed.

39 The detection concern appears consistently in the jurisprudence. Other early cases include *Campbell v Walker* (1800) 5 Ves Jun 678; 31 ER 801; *Lister v Lister* (1802) 6 Ves Jun 631; 31 ER 1231; *Ex parte James* (1803) 8 Ves Jun 338; 32 ER 385; *Ex parte Bennett* (1805) 10 Ves Jun 381; 32 ER 893; *Greenlaw v King* (1840) 3 Beav 49; 49 ER 19; affd (1841) 5 Jur 18. See Flannigan, 'Strict Character' (n 11).

A third aspect is that information often is the asset that is exploited.[40] Information may be conveyed (or exposed) to a fiduciary as part of enabling performance. The information may concern other assets, intentions, opportunities or the exploitable circumstances of third parties. Additionally, as Lord Eldon's example indicates, it may be acquired independently by a fiduciary, possibly in the course of performance, accidentally or through active collateral investigation. In every case the access to the information is acquired as a consequence of the limited access undertaking, and therefore on conventional principle must not be exploited. Information is just another asset, the value of which may be diverted by an opportunistic fiduciary. Recognise as well that fiduciaries may use their own information (their externally acquired knowledge of the context or circumstances of parties or transactions) to exploit the access to asset value associated with their undertaking. They might, for example, strategically distribute information to suggest that the beneficiary ought to pursue a course of action that effectively will increase the benefit the fiduciary will extract from the access the fiduciary has to assets intended to benefit the beneficiary.

Another feature of the accountability that appears in the judgment is that a personal conflict or benefit is permissible if the informed consent of the appropriate party is obtained. In the case itself the consent issue did not arise, but Lord Eldon discussed how personal advantage may be permitted if the fiduciary character of a relation is first dissolved by the termination of the relation. The decision also indicates that it is no excuse that an advantage was fair, fortuitous

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[40] There are other foundational cases where the fiduciary breach is the exploitation of information. See, eg, *Ex parte Bennett* (1805) 10 Ves Jun 381; 32 ER 893; *Boardman v Phipps* [1967] 2 AC 46 (HL). That negates the supposition that there is a breach of confidence doctrine that developed uniquely. Recognise separately that today the opportunistic exploitation of information is pervasive. Online undertakings of service, for example, often are designed deceptively to extract tradeable information. An undertaking to conduct a personality assessment (a 'free' personality test) may actually be a means to extract from the general population delicate information about individual circumstances. The information is formally sought (by the test provider), and implicitly delivered (by the test user), for a limited purpose, but is then exploited for a different (self-serving) purpose without consent (the user of the service having no knowledge of the remote secret benefit). Consider also an online calendar service. The information entered into a calendar may be highly valuable to third parties, who are willing to pay (or bribe) the provider (or provider employees) to disclose it. Clearly there is a role for fiduciary accountability (the same role as elsewhere) in the regulation of online interactions.

or of small value,[41] that the fiduciary acted morally or honestly,[42] or that the value of an advantage was set by an ostensibly neutral process (eg an auction).[43]

It is useful here to amplify the first point taken from *Ex parte Lacey*. Fiduciary accountability is a parallel general regulation that applies once an actor undertakes to serve. An undertaking to serve may be proved directly (a fact-based analysis) or by proving the nominate character of an arrangement (a status-based analysis). There are numerous nominate (named) relations for which the law (the community) has developed an idiocratic set of rules.[44] Arrangements that satisfy the applicable tests for what constitutes, for example, a trust, agency, employment or partnership each attract a distinct array of legal rules (ie trust law, agency law, employment law, partnership law). Fiduciary accountability is not concerned with whether those idiocratic nominate rules are breached. Rather, in its parallel application, it is concerned with whether the nominate function might be compromised by opportunistic impulse. Fiduciary accountability is not itself an idiocratic element of each particular nominate class. Its content is not defined by the idiosyncrasy of the nominate character. It is a general regulation (like contract and tort law) that applies generic rules across all limited access relations. That often is not understood. It is common for judges and writers to conflate nominate and fiduciary accountability.

The most frequent conflation is to directly equate the content of fiduciary accountability with the undertaking of service. That undertaking often is described as an undertaking to act in the interest or best interest of the beneficiary. Whether negotiated, or implied by the assumption of a status, the physical undertaking to serve becomes a legal duty to pursue best interest. But that is not the *fiduciary* duty. The undertaking of service merely activates or

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41 As to the 'small value' argument, see *Forbes v Ross* (1788) 2 Cox 113, 116; 30 ER 52, 54 ('there is no more sacred rule of a Court of Equity than that a trustee cannot so execute a trust as to have the least benefit from it himself') and 117; 54 ('a trustee cannot bargain with himself so as to derive through the medium of the contract any degree of forbearance or advantage whatever to himself'); *Docker v Somes* (1834) 2 My & K 655, 664; 39 ER 1095, 1098 ('yet for every farthing of profit he may make he shall be accountable to the trust estate'); *Kemp v Rose* (1858) 1 Giff 258, 266; 65 ER 910, 913 ('the smallest speck or circumstance which might unfairly bias his judgment'); *Turnbull v Garden* (1869) 38 LJ (Ch) 331, 334 ('What appears in this case shews the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting').

42 The courts have also said that the accountability does not necessarily impute moral failure. See *Ex parte Bennett* (1805) 10 Ves Jun 381, 393; 32 ER 893, 897; *Greenlaw v King* (1841) 5 Jur 18; *Boardman v Phipps* [1967] 2 AC 46 (HL).

43 On the concern with an auction, see *Ex parte James* (1803) 8 Ves Jun 338; 32 ER 385.

44 Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 40–2; R Flannigan, 'Fiduciary Duties of Shareholders and Directors' [2004] *Journal of Business Law* 277, 278–9 ('Fiduciary Duties of Shareholders and Directors').

initiates the fiduciary duty.[45] The content of that duty of 'loyalty' (as it is often described) so triggered is to forgo unauthorised conflicts or benefits, the discrete objective being to avoid compromised function. The proscription on unauthorised conflicts or benefits, it must be understood, is just one way in which the law requires a fiduciary to act in the best interest of a beneficiary. Fiduciaries are also required to act in the best interest of their beneficiaries by, for example, not exceeding their authority and not performing their functions negligently. Like the duty of loyalty, the duty to be authorised and the duty of care have an independent general and generic operation. Breaches of those three general duties (of authorisation, care and loyalty) constitute the great bulk of the failures to act in the best interest of a beneficiary. Accordingly, once those independent forms of accountability are addressed by a judge, there is little left to be addressed in an analysis of the duty to act in the best interest of the beneficiary.[46] Even then the claim of failed duty will be met by the assertion of the deference or 'business judgement rule' that courts will not interfere with actions simply because they do not regard them as the best option in the circumstances. In the absence of a recognised wrong, judges will defer to the person who was authorised to take the action. Ultimately there will be little prospect of success for a claim where there is no excess of authority, no negligence and no detectable risk of opportunism (because no detected conflict or benefit).

The above summary illuminates the rationality and simplicity of fiduciary accountability.[47] The objective is to check performance compromised by opportunism. Its application proceeds in two stages. The first stage is to determine *accountability*. Was the access of the actor limited by an undertaking of service? That is determined by the nominate status of certain actors, or pursuant to a fact-based analysis. The second stage is to determine *liability*. Was there an unauthorised conflict or benefit? Both questions may be asked at any time in order to guide the conduct of the actor. It is part of both stages of the analysis to determine whether there was informed consent. That is the whole of the analysis. There is no other analytical step (unless consent is treated as a separate question).

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45 R Flannigan, 'Compound Fiduciary Duty' (2017) 23 *Trusts & Trustees* 794, 803–4 ('Compound Fiduciary Duty').

46 R Flannigan, 'Judicial Disqualification of Solicitors with Client Conflicts' (2014) 130 *Law Quarterly Review* 498, 498–501 ('Judicial Disqualification of Solicitors with Client Conflicts'). It is conventional doctrine that it is not a defence to a claim of fiduciary breach to prove that one acted in the best interest of one's beneficiary. Accordingly, the duty of loyalty cannot be equated with the 'best interest' duty.

47 Note the assertion of Harding (n 27) 71–2 n 4, that '[a] sound general theory of fiduciary law is likely to be neither elegant nor simple'. That awkward assertion is senseless per se, and Harding did not explain himself. My analyses indicate that the source of the current trouble with the case law is deficient research and/or exposition (not overly simple conventional policy). Contrast the Harding view with the aspiration of Lord Neuberger in *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [35]: 'Clarity and simplicity are highly desirable qualities in the law.'

The design of that regulation was tailored precisely to deal with the prospect of opportunism. Its content was not fashioned to deal with other mischiefs. It does not, except incidentally, regulate authorisation, care, judgement or fairness.

The presentation of that simplicity has been shredding in multiple ways in multiple contexts for some time. Assertions and suppositions have ostensibly both contracted and expanded the conventional jurisdiction. The numerous departures from convention, most emerging quietly in the twentieth century, have seriously clouded the law. The effect is to diminish the efficacy of the regulation. It is not applied where it ought to apply and it is applied where it ought not to apply. Consider the various departures.

Before that, however, two observations are in order. First, the large number of asserted or supposed departures that I am about to describe might suggest to some that we, in our respective communities, are not actually committed to the regulation of opportunism in the conventional way. That sort of rationalisation in the present context amounts to little more than an unsupported effort to entrench the continuing failure of judges and writers to fully investigate the development of each of the departures. The deteriorating state of the jurisprudence (the incoherence creep) cannot plausibly be grounded in a public discomfort with the strict regulation of production opportunism. On any measure of social consensus, the public is rightly concerned with opportunistic defections from undertakings of service. The lack of commitment, if that is what it is, lies elsewhere. The reality is that there has been a collective (though disconnected or unlinked) negligence on the part of those who participate in the legal process. In many cases the departures are attributable to an initial misunderstanding, or misconceived articulation, of principle or precedent. In blunt terms, the main causes of the departures that are shredding the clarity of the regulation are the failures on the part of some judges and writers to (1) do their homework, or (2) articulate concepts carefully. The blame is mutual and serial. A departure initially occurs because a judge or writer misreads the jurisprudence (because of inadequate investigation), or reads it correctly but uses pregnant or imprecise terms to describe it (which terms accommodate alien functions). That departure is then absorbed into the jurisprudence by judges and writers who subsequently uncritically accept the new departure as dogma because they do not themselves do the research that would enable them to recognise the departure *as a departure*, or the terminology as *imprecise* (usually expansive). Most of the departures do not come with an acknowledgment of structural novelty. The challenge to the coherence of conventional principle is not recognised. The judges or writers involved typically have assumed that they were stating, or working from, accepted principle. There were few instances where judges or writers conceded that they were implementing or proposing a change in the law or a new way to

understand the law.[48] That is important, obviously, because an improper starting point often produces an improper conclusion.

The second observation is that some of the departures I will describe may be partly attributable to the way in which the 'fiduciary' descriptor is used. The term commonly is used as a class descriptor. That is, persons who undertake to act in the interest of others in different ways commonly are aggregated together and identified in an abstract way as 'fiduciaries'. While actors are individually identified by their nominate status (eg as trustees, agents, employees, partners), they are aggregated as a class under the 'fiduciary' designation. That has both positive and negative effects. The positive effects or uses include the availability of the abstraction to speak about common fiduciary issues and to use the abstraction to frame analyses of fact-based fiduciary accountability (where there is no initial recognised nominate status). The main negative effect, as I described above, is that the usage produces a misconception in the minds of some. Because fiduciaries are described as those who undertake to act in the interest of others in some respect, it often is wrongly assumed that the content of the fiduciary *duty* is to act in the best interest of those others. A best interest undertaking simply is the trigger for fiduciary accountability. It initiates the accountability because there is latent in such undertakings the risk that actors will exploit their other-regarding access. The *content* of the duty is then defined by that mischief. The mischief may have operated wherever there are unauthorised conflicts or benefits connected or related to the function involved. Comprehending that, the courts sculpted the content of the accountability to be a strict proscription on unauthorised conflicts or benefits. There is still a distinct duty to act in the best interest of the beneficiary, but that duty must not be construed overly broadly to include or

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[48] Perhaps the best example of a writer openly acknowledging that he was proposing a new way to understand the law is Paul Finn. His 1977 monograph was explicitly normative. See PD Finn, *Fiduciary Obligations* (Law Book Company, 1977). That said, Finn's thesis that there are numerous fiduciary duties (some of which actually are nominate duties per se), and that there are different duties in different contexts, cannot be accepted. The conventional authorities as a whole establish that the various perceived duties (other than the nominate duties) are but manifestations of the singular proscription on performance compromised by opportunism. The authorities also establish that the regulation is general and generic, and that it is not contextually sensitive because opportunism is not contextually sensitive. Finn later launched a more specific, and again openly normative, departure in claiming that the foundation for fiduciary accountability was reasonable expectation. See PD Finn, 'The Fiduciary Principle', in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) ch 1. That notion did not appear in the preceding fiduciary case law, but subsequently was adopted as animating principle by some courts. More recently the notion has faded, as it became clear that it does not itself do any analytical work. See Flannigan, 'Access or Expectation' (n 25) 22–7.

contemplate (or suppress the differentiation of) mischiefs that are governed by independent general forms of regulation (eg authority regulation, negligence regulation, loyalty regulation).

IV The Contraction of the Accountability

Some assertions or suppositions diminish the conventional accountability. I described one such departure earlier. The assertion is that the exclusive function of the jurisdiction is to regulate the exercise of discretion and that, accordingly, the presence of discretion is the test for the application of the accountability. That would radically narrow the circumstances where unauthorised conflicts or benefits would be actionable as *fiduciary* breaches. That cannot be accepted if the objective is to regulate opportunism, and in fact the idea is not supported by the conventional jurisprudence.[49] The opportunism mischief is congruent with the limited access one has, not merely the discretion held, and consequently that limited access must (and does) attract fiduciary accountability.

A second departure, also noted earlier, is the assertion that in order for fiduciary accountability to arise the ostensible fiduciary must *actually* be trusted in a familiar or subjective sense. That clearly is not the conventional position.[50] Prior to the wide adoption of 'fiduciary' terminology later in the nineteenth century, judges used the terms 'trust' and 'confidence', often together as 'trust and confidence', to describe the accountability.[51] However it was clear from the outset that those terms were intended to describe the nature of the relation that was produced by the limited access undertaking. That is, *because of the undertaking*, the relation was one of trust or confidence, and consequently the beneficiary was *entitled* to 'trust' or expect that the access of the fiduciary would not be exploited for unauthorised advantage. That understanding was disturbed

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49 See Flannigan, 'Core Nature' (n 1) 408–10; Flannigan, 'Fact-Based Fiduciary Accountability in Canada' (n 30) 446–53. See also the rejection of a discretion *requirement* in the American case law. Consider *Conkey v Bond* (1861) 34 Barb 276. And see *Trice v Comstock* (1903) 121 F 620, 626 ('Nor was discretion or authority to sell these [lands] requisite to disable this agent from buying and holding them adversely to his principals. Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principals to accomplish the purpose for which the agency was established').

50 See the discussion in the text accompanying nn 34–5 above.

51 R Flannigan, 'The [Fiduciary] Duty of Fidelity' (2008) 124 *Law Quarterly Review* 274, 274–5 ('[Fiduciary] Duty of Fidelity'); Flannigan, 'Access or Expectation' (n 25) 3–6. An incidental observation is that the continuing use of the 'trust and confidence' terminology in the fiduciary context may become increasingly problematic as the recently crafted distinct duty of 'trust and confidence' in employment law continues to develop.

only relatively recently in the 1998 judgment of Lord Millett in *Bristol and West Building Society v Mothew*, when he made the oft-cited statement that: 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.'[52] His words may be read to say that fiduciary accountability applies only to undertakings that produce relations of actual subjective trust and confidence. It is not clear, however, that he intended that interpretation.[53] It should be appreciated, in any event, that restricting fiduciary accountability to relations of actual trust and confidence would seriously complicate, and render uncertain and unpredictable, the application of the conventional regulation.

A third departure essentially would eliminate entirely the concept of a distinct *fiduciary* regulation. The assertion is that a fiduciary relation is simply a contractual one characterised by unusually high costs of specification and monitoring.[54] The argument has no substance. As I have explained elsewhere, it is defective in several respects.[55] It is enough to say here that the nature of a 'contract' matters. Some contracts create limited access arrangements; others do not.[56] The distinction is fundamental, and the regulation of the two types of contracts properly differs.

Fiduciary accountability would also contract (or possibly expand) without definitive guidance if the 'fairness' of an action or a consideration were to become the test. While the outcomes associated with fiduciary functions may always potentially be challenged on the basis of independent fairness standards (eg unconscionability, oppression),[57] they may only be challenged on a *fiduciary* basis

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52 [1996] 4 All ER 698, 711.

53 See R Flannigan, 'The Court of Appeal Recasts Fiduciary Accountability' (2019) 25 *Trusts & Trustees* 737, 740 ('Court of Appeal Recasts Fiduciary Accountability').

54 Flannigan, 'Economics of Fiduciary Accountability' (n 4).

55 Ibid 419–25.

56 Beyond direct diversions, the issue at the margin is who is entitled to benefit from the capacity of assets to produce residual value (where there is no immediately apparent loss to the beneficiary). In an 'ordinary' contract, as long as the contract is performed, either party normally is free to be conflicted or to extract personal gain from the access they acquire to the assets of others. That is not the case where a limited access relation is created (whether by contract or otherwise). The beneficiary alone is entitled because otherwise fiduciaries will compromise their functions by attempting to shape actions and transactions to generate opportunities to extract residual value.

57 Fairness per se has no actual analytical cut in any context. It is only descriptive of an outcome determined by other considerations. See Flannigan, 'Presumed Undue Influence' (n 26) 184–97. Consider that one writer has argued that the difference between the 'fairness rule' found in Delaware corporate law and the conventional English no-conflict rule is not as real or as important 'in practice' as some may assume. See Andrew Tuch, 'Reassessing Self-Dealing: Between No Conflict and Fairness' (2019) 88 *Fordham Law Review* 939. That argument is not compelling. See Flannigan, 'Strict Character' (n 11). Tuch asserts that we must focus on the exceptions to the loyalty standard in each case. His 'exceptions', however, mostly wash out as being just expressions of the

when the presence of an unauthorised conflict or benefit indicates that there is a risk that performance was compromised by opportunism. The highest courts, it should be noted, have consistently emphatically denied that fairness matters in a fiduciary analysis.[58] Still, however, the notion continues to appear, and to that extent the conventional regulation is distorted.

Another instance of narrowed application operates for politicians (and, possibly, political parties). On any conception of the accountability, political representatives individually are fiduciaries to their community.[59] They are not free to profit selectively from their undertaking to serve their community. That is recognised explicitly at the municipal level in most jurisdictions. Fiduciary accountability per se, however, appears to be largely ignored or suppressed for higher levels of government (state/province, national, federal). Although there is historical support for the accountability,[60] reference to 'fiduciary' principles is uncommon today in many jurisdictions. The reason for that seems to be less about mistakes by judges (other than the mistake of not including politicians on their lists of standard status fiduciaries), and more about the absence of a clear modern line of authority on which litigators can support claims. The reason for that absence of authority, in turn, is likely that a civil action on behalf of the community would be complicated (expensive) and that any success achieved (any value recovered) would accrue to the community as a political unit, rather than to the individuals pursuing the action. Other factors may include unwarranted suppositions on the part of judges that they would wrongly be interfering in political matters (the exercise of political discretion), or that the accountability

consent option. The one remaining difference he describes is that in Delaware there is a fairness defence (which allows self-dealing if it is fair). That is a critical difference. Delaware gives formal room to corporate fiduciaries to gain by covertly manipulating appearances to suggest 'fairness'. The conventional position, in contrast, permits gain only through informed consent. Tuch does not confront the detection concern that animates the conventional proscription. He also seems to think that claims that the conventional position is 'strict' overlook the widespread use of the consent option. It should be understood, however, that the proscription on unauthorised conflicts and benefits is a *default* strictness, and the fact that actors exercise the consent option, as they are entitled to, does not diminish the substantive difference between the two standards.

58 Eg, *Aberdeen Railway Co v Blaikie Brothers* (1854) 23 LT 315 (HL) *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, 391 (HL).

59 R Flannigan, 'Fiduciary Accountability for Public Service Opportunism' [2018] *Public Law* 241 ('Fiduciary Accountability for Public Service Opportunism'). The form of government does not matter. The mischief is as corrosive of democracy as it is of, for example, communism.

60 Flannigan, 'Fiduciary Control of Political Corruption' (n 24).

has been completely or adequately displaced by 'ethics' regulation.[61] This particular departure embarrasses both law and politics.[62]

Two other departures are found in the suppositions that the doctrines of breach of confidence[63] and presumed undue influence[64] are distinct from fiduciary accountability. Those suppositions are expressed without any plausible justification. The two doctrines in fact originally branched silently from the conventional trunk accountability. They gained ground as ostensibly independent doctrines because judges and writers did not do the research that would have indicated that they were unjustified departures. The effect of their seeming dissociation from the trunk accountability predictably has led to distortion, particularly in the case of presumed undue influence, that I and others have noted.[65]

There is another departure in the denial of some judges that employment is a status fiduciary category. The assertion usually is that junior or non-key employees are not fiduciaries. I have demonstrated that there is no basis whatsoever for that assertion.[66] The space one occupies in a hierarchy is not linked to the probability of opportunism. The distinction only generates legal fees for time wasted by litigators in trying to elevate or diminish the nominate function of a given employee. Proper research establishes that the confusion in the employment context is attributable in large part to past imprecise language. Though contemplating the conventional accountability, one English Court of Appeal judge in *Robb v Green* described it as a duty of 'fidelity'.[67] That linguistic

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61 Ibid. Fiduciary accountability does not address the merits of political matters. It is entirely appropriate, on the other hand, for courts to regulate the opportunism of political representatives. See ibid 262–3; R Flannigan, 'Contesting Public Service Fiduciary Accountability' (2016) 36 *University of Queensland Law Journal* 7, 24 n 80.

62 The failure of the judicial branch of government to apply fiduciary accountability to senior politicians (municipal politicians being regarded as mere managers) risks its legitimacy and its claim to independence. There is no evident reason in this context to deny the even application of the law to a generic mischief. See Flannigan, 'Fiduciary Accountability for Public Service Opportunism' (n 59).

63 Flannigan, '[Fiduciary] Duty of Fidelity' (n 51) 281–5.

64 Flannigan, 'Presumed Undue Influence' (n 26).

65 See R Bigwood, 'From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom', in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) ch 9; M Haughey, 'The Fiduciary Explanation for Presumed Undue Influence' (2012) 50 *Alberta Law Review* 129; R Bigwood, 'The Undue Influence of "Non-Australian" Undue Influence Law on Australian Undue Influence Law: Farewell *Johnson v Buttress*?' (2018–19) 35 *Journal of Contract Law* 56 (pt 1), 187 (pt 2); R Bigwood, 'Undue Influence as Constructive Fraud' (2019) 13 *Journal of Equity* 144.

66 R Flannigan, 'Employee Fiduciary Accountability' [2015] *Journal of Business Law* 189 ('Employee Fiduciary Accountability').

67 [1895] 2 QB 315, 320 (CA).

departure subsequently was taken to mean that employees had a duty of *fidelity* instead of a *fiduciary* duty. As I have explained, it was a semantic departure that opened the gate to an unjustified substantive departure.[68] I would add that I have written a number of articles on the position of employees,[69] including responses to critics,[70] because the denial of accountability has become deeply embedded in some jurisdictions and, perhaps more importantly, because it is in a sense a fulcrum issue that is widely intelligible.[71] On the one hand, if employees are not fiduciaries, the conventional position cannot (as with other departures) be regarded as descriptively coherent. On the other hand, if employees understand that they are fiduciaries, and why they are fiduciaries, they will understand why their supervisors, financial agents, political representatives and others are fiduciaries, and they will be more alert to when those actors may be exploiting their limited access. And with many more actors having reason to properly comprehend the accountability, deterrence ought to be enhanced.

Agency is another class of relation that some deny fully attracts fiduciary accountability. It is said that agents who are not actually trusted, or who have no discretion or advisory function, and only execute completely defined transactions, are not accountable. The supposition has traction only because of a lack of comprehension or research in a number of decisions and texts.[72] The lack of a sound foundation for the supposition is particularly evident in the case of stock brokers where, in some jurisdictions, it has had its strongest adoption.[73]

It is also supposed in some quarters that bare trustees are not fiduciaries. The arguments are that bare trustees lack discretion or that often their status is imposed rather than being voluntarily assumed. Again, I have explained that there is no sound basis for that supposition.[74]

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68 Flannigan, '[Fiduciary] Duty of Fidelity' (n 51).

69 See also R Flannigan, 'The Fiduciary Accountability of Ordinary Employees' (2007) 13 *Canadian Labour & Employment Law Journal* 283; Flannigan, 'Fiduciary Mechanics' (n 8); R Flannigan, 'The Fiduciary Duty of Departing Employees' (2008) 14 *Canadian Labour & Employment Law Journal* 355; R Flannigan, 'The Employee Status of Directors' (2014) 25 *King's Law Journal* 370.

70 See R Flannigan, 'Constructing an Employee Duty of Fidelity' (2016) 37 *Business Law Review* 50 ('Constructing an Employee Duty of Fidelity'); R Flannigan, 'Employee: Fiduciary' (2016) 19 *Canadian Labour & Employment Law Journal* 509.

71 The issue is generally intelligible because the conventional accountability is relatively simple. I must add that the unavoidable length of several of my articles is not a contrary indicator. The length is due to the need to track and counter the distortions that have been introduced through misinformed analysis.

72 R Flannigan, 'Fiduciary Agency Denied' (forthcoming in the *Journal of Business Law*).

73 Particularly in Canada. See R Flannigan, 'Stock Broker Mutation' (forthcoming in the *Canadian Business Law Journal*) ('Stock Broker Mutation'). See also Flannigan, 'Court of Appeal Recasts Fiduciary Accountability' (n 53) 740-41.

74 R Flannigan, 'Resolving the Status of the Bare Trust' (2019) 83 *Conveyancer* 207.

Solicitors are another class of actor that have had their accountability ostensibly diminished. On the question of the judicial power to disqualify solicitors who are conflicted, there has been a shift in focus from opportunism to negligence. As I have observed, that pares the regulation of opportunism.[75]

A narrowed accountability also is the result of the denial of its full application to assistants who are employed by fiduciaries to perform aspects of the fiduciary function. It is said that while those assistants may be accountable as fiduciaries to the fiduciaries that employ them, they have no fiduciary accountability directly to the beneficiaries of the fiduciary function. Their accountability is thought to be determined only by the lesser standard of knowing/dishonest assistance. The authorities differ, but recent cases support the denial. The denial, however, is not justified. Assistants who undertake to serve their employers simultaneously undertake to serve the beneficiaries, and therefore have only a limited access to the value of the associated assets.[76]

A narrowed application is also contemplated by assertions that fiduciary accountability does not apply to commercial or arm's-length relations. Although the assertions have no substance, they continue to resurface occasionally in modern judgments.[77]

Weakened requirements for the disclosure that is necessary to produce valid consent to a conflict or benefit also narrow the operation of the accountability. I have discussed how courts have departed from convention by allowing indirect or incomplete disclosure.[78]

The last instance of narrowed application I will describe is found in the corporate context. It commonly is asserted that shareholders are not accountable as status fiduciaries. That, as I have explained at length, is conceptual error.[79]

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75 Flannigan, 'Judicial Disqualification of Solicitors with Client Conflicts' (n 46).

76 Flannigan, 'Fiduciary Accessories' (n 9). In the United States the direct accountability of assistants was recognised in *Gardner v Ogden* (1860) 22 NY 327.

77 Eg, *Fujitsu Services Limited v IBM United Kingdom Limited* [2014] EWHC 752. See R Flannigan, 'Commercial Fiduciary Obligation' (1998) 36 *Alberta Law Review* 905.

78 Flannigan, 'Fiduciary Obligation in the Supreme Court' (n 35); Flannigan, 'Court of Appeal Recasts Fiduciary Accountability' (n 53).

79 R Flannigan, 'Shareholder Fiduciary Accountability' [2014] *Journal of Business Law* 1 ('Shareholder Fiduciary Accountability'). Consider separately that it is another contraction of the accountability in the corporate context to suppose that shadow directors are not fully subject to fiduciary accountability. An actor who exercises de facto control over a board of directors is a person who has undertaken an other-regarding function (governing the operations and affairs of the corporation) that carries with it fiduciary accountability. It is wrong to think that it matters that, while shadow directors have actual dominance, they do not have formal or direct legal powers. Fiduciary accountability depends only on the de facto assumption of a limited access (here, to *corporate* assets). Further, apart from other means of arranging deference (eg relational levers, bribery), shadow directors often acquire their de facto power to control through *legal* powers. Shadow directors, either alone or as part of a combination, may for example acquire a sufficient

Corporations must express their will through bodies tasked with the will definition function. The two bodies usually assigned that function are the board of directors and the shareholders in general meeting. It thus is widely understood that directors are accountable as fiduciaries to their corporation. However it is not well understood that *shareholders* also owe a fiduciary duty to their corporations when they exercise the will definition authority assigned to them. Shareholders are not entitled to benefit selectively from their authority. They may only benefit reflectively in the sense that they benefit when the corporation benefits.

V The Expansion of the Accountability

I now turn to the departures from conventional principle that broaden the accountability. I begin by returning immediately to corporate law. In many American states, and occasionally elsewhere, it is asserted that directors owe their fiduciary duty to the corporation *and* its shareholders. The assertion of a duty of directors to shareholders, it should be evident, is at odds with the separate entity status of the corporation. The corporation is a person with its own agenda. That agenda will rarely correspond with all of the various agendas of multiple shareholders. If directors were to have default dual duties, there would be an inherent conflict of duty and duty. Entity status dictates that directors are hired *by the corporation* to serve *the corporation*. They are not hired to serve the shareholders directly. Shareholders are just one of the stakeholder classes that corporations negotiate with in order to advance the objectives *of the corporation*.[80]

number of votes (often well below 50 per cent) to elect and remove directors. The formally appointed directors understand that reality and are quick to identify, and defer to, shareholders who reach that dominance position. In short, though they do not have formal legal authority to manage, significant shareholders do have legal power (their voting power) that gives them de facto control over the formal legal powers of the board. It is also wrong to suppose that the fiduciary accountability of shadow directors is determined by (restricted to) the scope of instructions actually given. That misconceives the status and the accountability. See that conceptual error in *Standish v Royal Bank of Scotland plc* [2019] EWHC 3116 (Ch). The instructions per se (unless they are instructions to selectively benefit the shadow director) actually are irrelevant to the scope of the accountability because they are merely a manifestation of the assumption of control. A shadow director is a person who controls the board, even though actual intervention may be required only occasionally on specific matters. That controller status *initiates* the accountability, but the accountability itself extends to the full expanse of the access to asset value that is associated with the whole of the other-regarding function (and not merely to the scope of the specific instructions). Any unauthorised conflict or benefit that is linked to the function assumed constitutes a breach. Thus, for example, taking a corporate opportunity or competing with the corporation, would potentially compromise the governance function, and so are proscribed.

[80] R Flannigan, 'The Political Imposture of Passive Capital' (2009) 9 *Journal of Corporate Law Studies* 139, 157–63.

The shareholders, in other words, do not have default primacy. There is only default *corporation* primacy. It is of course possible for a corporation to agree that its directors will directly act in the best interest of its shareholders, but short of that there is no principled basis for a duty to the shareholders directly. The shareholders, it should be added, are not thereby exposed to the unconstrained opportunism of directors. The shareholders are protected indirectly by the fiduciary duty that the directors owe to the corporation. The shareholders benefit *reflectively* from that duty, just as they properly benefit reflectively from corporate gain.

The assertion that directors owe a fiduciary duty to creditors, other than where it is fact-based, is equally inconsistent with the entity status of the corporation.[81] It is doubly mistaken to say that the duty of directors to the *shareholders* of the corporation shifts to the *creditors* of the corporation as the corporation approaches insolvency. There is no status fiduciary duty to either class of stakeholder because there is no limited access undertaking to them with respect to their supplying the corporation. In the ordinary course, both shareholders and creditors deliver funds, materials or credit to the corporation on an open access basis. The assertion of a fiduciary duty to creditors seems in most cases to involve the mistaken conflation of nominate and fiduciary accountability. Properly understood, the interests of creditors are to be considered, but that occurs normally (including *before* insolvency approaches) in the ordinary course of determining the best interest of the corporation at a particular time. The ongoing relative balancing of all stakeholder interests is simply part of how directors do (or should) determine corporate best interest. In the absence of any indication of compromised performance (ie an unauthorised conflict or benefit), there is no issue of fiduciary accountability. Recognise as well that a corporation is particularly vulnerable as it approaches insolvency and plainly requires the uncompromised loyalty of it directors during that time. Directors often have incentives to cut deals with creditors that personally benefit themselves. If the fiduciary duty has shifted to the creditors, the corporation has no *fiduciary* recourse for what otherwise would be fiduciary breaches to it.

The corporate law of many American states has expanded 'fiduciary' accountability in another way. American courts assert that directors have a 'fiduciary' duty of *care* in addition to their duty of loyalty.[82] There is no basis for that general assertion, and the courts of other common law countries do not

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81 Flannigan, 'Fiduciary Duties of Shareholders and Directors' (n 44) 300–1.

82 Flannigan, 'Economics of Fiduciary Accountability' (n 4) 398–9.

accept it.[83] Negligence is a mischief that differs substantively from the mischief of opportunism. Breaches may overlap (eg shirking may be both negligent and an unauthorised consumption of leisure) but that is because the impugned action independently offends both standards.[84]

I have noted the impact of imprecise language above. Other illustrations of that impact appear in the corporate law context. Judges have referred to the powers granted to directors (and other fiduciaries) as 'fiduciary powers'. That habit wrongly implies that every breach of the power would be a fiduciary breach.[85] That would produce another expansion of the accountability into issues of authority, care and the merits of actions. Expansions also occur when judges assert that fiduciary accountability is about restraining 'improper', 'unfair' or 'capricious' action. Much action that can be described in those terms will not constitute a fiduciary breach.[86] The conventional accountability only restrains action that is improper, unfair or capricious where those terms reflect unauthorised conflicts or benefits.

Other expansions of fiduciary accountability are also conveniently illustrated by their appearance in the corporate law context. As I noted earlier, judges and

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83 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA); *Breen v Williams* (1996) 186 CLR 71 (HCA). Recently the Supreme Court of Canada inexplicitly reversed itself on this point. It did so without justification, or even discussion, apparently not comprehending that it was departing from its own long-standing position. See R Flannigan, 'A Fiduciary Duty of Care for Canada' (2018) 134 *Law Quarterly Review* 368 ('Fiduciary Duty of Care for Canada'). An incidental general observation about the Supreme Court of Canada is that its fiduciary jurisprudence has descended into radical incoherence over the past four decades. The court appears to have discarded conventional authority and to now contemplate possibly three distinct forms of the accountability (a general accountability, a governmental accountability, and a separate governmental accountability for aboriginal relations).

84 In my early work I made statements about the negligence mischief that could be read too broadly. See Flannigan, 'Fiduciary Obligation in the Supreme Court' (n 35) 51 ('Fiduciary responsibility would also conceptually apply to negligent behavior. Negligence is just another way in which one diverts value'). As I later clarified, fiduciary accountability applies to negligence that is opportunism ('shirking'). See Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 38 n 6; Flannigan, 'Economics of Fiduciary Accountability' (n 4) 397–9. Consider also that sometimes negligence terminology is used to express the concern with opportunism. See *Coggs v Bernard* (1703) 2 Ld Raym 909, 918, 92 ER 107, 112 ('for else these carriers [of goods] might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, … and yet doing it in such a clandestine manner, as would not be possible to be discovered') and 119, 113 ('For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him'); *Whichcote v Lawrence* (1798) 3 Ves Jun 740, 752; 30 ER 1248, 1254 ('where a trustee has a prospect of advantage to himself, it is a great temptation to him to be negligent; acting in a manner, that does not quite fix an imputation upon him').

85 R Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 *Law Quarterly Review* 449, 456–7 ('Adulteration of Fiduciary Doctrine').

86 Ibid 454ff.

writers often wrongfully equate the substantive content of fiduciary accountability with the triggering undertaking of service. That appears to be the most common mistake they make in their articulation of the nature of the accountability. It happens frequently in the corporate context,[87] but also in other contexts.[88] A physical undertaking of service is elevated by the law, whether by contract, trust or some other legal device, into its own *duty* to provide that service, invariably on a 'best interest' basis. The undertaking also simultaneously activates the parallel application of fiduciary accountability. The undertaking to serve, however, does not itself precisely identify the content of that parallel fiduciary accountability. Once again, it is a confusion to regard the duty to act in the best interest of the beneficiary as *the* fiduciary duty.[89] For example, on a conventional analysis, directors do not commit a fiduciary breach merely because some of the shareholders (or some other party) might (even rightly) conclude that an action of the directors was not actually in the best interest of the corporation. That is a dispute over the merits of an exercise of judgement. The only fiduciary question would be whether the performance of the undertaken function potentially has been compromised by opportunism. The test is whether there is an unauthorised conflict or benefit. Obviously then, if the best interest duty is to be treated as *the* fiduciary duty, the accountability has been radically expanded.

There are other examples of judges wrongly characterising individual or multiple nominate duties as fiduciary duties. Another common conflation is to treat affirmative duties to disclose information as fiduciary duties. Where such duties exist (for example, in trust law), they are matters of nominate performance. For fiduciary accountability, the disclosure of an unauthorised conflict or benefit is not a *duty*. Rather, it is an *option* that is available to fiduciaries to validate conflicts or benefits.[90] The fiduciary breach is not the failure to disclose the conflict or benefit. The breach is the performance of the fiduciary function while compromised by the conflict or benefit. It thus is an unwarranted departure to extend fiduciary accountability to a failure simply to erect the one defence to a future claim of fiduciary breach.

Expansion also occurs when judges or writers create new duties that they characterise as fiduciary duties. One example is the assertion of a duty that fiduciaries must confess their breaches. As I have explained, that takes fiduciary

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87 Flannigan, 'Fiduciary Duties of Shareholders and Directors' (n 44) 283 n 19, 288–9.

88 Consider Flannigan, 'Compound Fiduciary Duty' (n 45).

89 See also Flannigan, 'Adulteration of Fiduciary Doctrine' (n 85) 453–4; R Flannigan, 'Fiduciary Accountability Transformed' (2009) 35 *Advocates' Quarterly* 334 ('Fiduciary Accountability Transformed').

90 Flannigan, 'Presumed Undue Influence' (n 26) 172–3.

accountability too far.[91] Another example is a proposed compound duty that fuses best interest, care and loyalty without credible justification.[92]

A reasonable (or legitimate) expectation test, were it to have enduring traction, would also expand (and/or narrow) the accountability. Unlike the conventional accountability, it focuses on the expectation of the beneficiary, rather than the undertaking of the ostensible fiduciary. On its face, it begs the question. What expectations are actionable? What makes an expectation reasonable? Beyond that it should be evident that a reasonable expectation test is not linked, as a limited access undertaking is, to the risk of opportunism. Further, reasonable expectation is easily wrongly deployed to challenge the merits of an otherwise proper course of action. It could be construed as a fairness or oppression standard, offering no guidance per se as to what will constitute a breach. The notion had high support at one time,[93] but now is receding as a

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91 R Flannigan, 'Director Duties: A Fiduciary Duty to Confess?' (2005) 26 *Business Law Review* 258.

92 Flannigan, 'Compound Fiduciary Duty' (n 45). See also Flannigan, 'Constructing an Employee Duty of Fidelity' (n 70). Charles Mitchell argues that additionally there are duties of honesty and good faith. See Charles Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 *Trust Law International* 92. The former duty, he asserts (at 95), is a duty 'imposed by general law on everyone in society to behave honestly towards other people'. That is invention. There is no such general duty distinct from the various specific legal rules and doctrines that are directly or indirectly concerned with honesty. As for the duty of good faith, Mitchell describes it (at 96) as 'a sincere and serious commitment to the purposes for which her powers have been given', and (at 102) as a duty 'to exercise powers rationally and transparently, and not to exercise them capriciously or perversely'. He purports to distinguish his duty of good faith from his duty of 'self-denial' partly on the basis of the existence of cases 'where a defendant has been permitted to act in a self-serving way but is nevertheless bound by a duty of good faith' (at 96). He insists that there are five groups of such cases. Those various groups, however, all have a conventional explanation. Some are just cases where a fiduciary breach is described as a breach of good faith. Others are cases of consent to a conflict or profit. Still others involve the application of the best interest duty and the deference principle. His first group of cases, for example, address a mortgagee power of sale. That nominate power is regulated by fiduciary accountability because it was acquired by the mortgagee on a limited access basis. The access to the mortgaged asset is an open access (to satisfy the debt), but the access to the power and to the residual value is other-regarding. See Flannigan, 'Access or Expectation' (n 25) 11–14. Consider also Mitchell's third group, which concerns 'powers vested in the trustees of trusts for multiple beneficiaries including the trustees themselves' (at 97). There is consent to their personal interest, and it is the very function of the trustees in his example to discriminate between beneficiaries. There is only a fiduciary breach if the discrimination function is compromised by an unauthorised conflict or benefit. In the end, none of the groups of cases he identified require a distinct duty of good faith.

93 Notably from the Supreme Court of Canada in *Hodgkinson v Simms* (1994) 3 SCR 377. That court has also employed the reasonable expectation notion in attempts to define 'oppression'. See R Flannigan, 'Defining Corporate Law Oppression' (2018) 61 *Canadian Business Law Journal* 141.

definitive test. It is a departure that appears to be failing through the weight of its own vacuity.[94]

Consider also the expansion that occurs where it is thought that the accountability is solely concerned with regulating the exercise of discretion. The mistake regularly made is that regulating discretion is about regulating the *merits* of an exercise of discretion. Properly understood, the assumption of a discretion activates the accountability (because it is a limited access undertaking), but that accountability is only designed to protect against the exercise of the discretion being compromised by opportunistic impulse. The merits of the exercise of a discretion per se are not for courts to review.[95]

Another expansion of the accountability has been produced by equating it with the fraud on a power and improper purpose doctrines. As I have explained, those two doctrines formally regulate *authority*, not opportunism per se.[96] That said, the two doctrines coincidentally apply to fiduciary breaches because such breaches concurrently are a breach of authority. The two doctrines, however, are not congruent with fiduciary accountability. There will be breaches of authority that are not fiduciary breaches. Accordingly, the equation of the three doctrines leads to an expansion of fiduciary accountability.

My last illustration of expansion is the application of the accountability in the aboriginal context. Some courts have described nominate duties of the state to aboriginal communities as 'fiduciary' duties. There is no conventional basis for that.[97] The fiduciary duty of the state is exactly the same as the duty of every other fiduciary. The state must not exploit for its separate benefit its access to assets intended to benefit aboriginal communities. It is the same duty that applies *within* aboriginal communities, where tribal officials and employees are accountable to their communities when they divert community resources to themselves or their associates. As it is, there has been a recent move in some jurisdictions away from the 'fiduciary' characterisation to an 'honour of the Crown' notion. Still, some courts continue to assert a seemingly open-ended 'fiduciary' jurisdiction that indeterminately expands the conventional accountability.[98]

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94 Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 73-74; Flannigan, 'Access or Expectation' (n 25).

95 Flannigan, 'Fact-Based Fiduciary Accountability in Canada' (n 30) 451–3; Flannigan, 'Judicial Disqualification of Solicitors with Client Conflicts' (n 46) 498–501.

96 R Flannigan, 'Fraud on a Power, Improper Purpose and Fiduciary Accountability' (2019) 62 *Canadian Business Law Journal* 133 (pt 1), 249 (pt 2).

97 Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 61–7.

98 See R Flannigan, 'A Revised Canadian Test for Fact-Based Fiduciary Accountability' (2011) 127 *Law Quarterly Review* 505; Flannigan, 'Fiduciary Duty of Care for Canada' (n 83).

VI An Avoidable Collapse

On one view the above departures (both contractions and expansions) collectively signal the onset of the collapse of the conventional accountability. Another view might be that these departures together (despite their collective lack of conceptual integration) just represent the law working itself pure, informally inching (sometimes leaping) towards a state of regulation that more precisely reflects our true communal expectations. My view is that it we are nesciently moving towards a multi-point collapse that cannot be justified as subliminal visceral reform. That movement ought to be reversed by precise judicial statements that affirm conventional principle and discard every one of the identified departures. There are several reasons that add to or amplify the specific reasons I have enumerated in my prior work on each specific departure.

The first reason is that the conventional accountability, though dissembled or masked by misconceived assertion and supposition, remains untouched. It has never been credibly challenged. While norms may decay, this one has not. The classic cases endure. Everyone agrees that, whatever other functions (or content) might be asserted or proposed, the one established function is that fiduciary accountability regulates the risk that opportunism might compromise performance. The immediate problem is that the numerous departures shade or sideline that function, leaving it vulnerable to negligent or intentional displacement by misinformed or venturous judges or writers who mistake (or exploit) departures for principle. As the departures become, through action or inaction, firmly embedded in the jurisprudence, conventional principle will give way. But that need not happen. The departures could today properly be jettisoned to restore the clarity of the purpose and application of the conventional regulation.

The second reason to affirm conventional principle, introduced earlier, is that a significant part of the modern confusion is attributable to a flawed literature. A rather large number of the writers who today purport to describe the law have not done the necessary homework, and simply are misinformed because they have relied on judges or other writers who originally misconceived or misdescribed the substance of the jurisprudence. They typically do not themselves investigate the conventional logic, even if they sense that there is contradiction or inconsistency. Most importantly, with some exceptions, they do not address the opportunism mischief, or comprehend how it drives and constrains design. And there is little independent historical analysis of the development of the jurisprudence. Thus we see writers wrongly declaring, for example, that actual 'trust' is required, that discretion is the sole or definitive test for the accountability, that fairness matters, or that employees are not status

fiduciaries.[99] It certainly is understandable that mistakes initially may be made (and made more frequently as the disorder grows). The trouble is that writers rarely concede after the fact that they were mistaken or misled, and so the distorting assertions accumulate. I have myself made mistakes in my past expositions of the law, in some cases because like others I relied on popular or seemingly accepted propositions of law. The difference is that, having recognised the errors, I have publicly corrected them in subsequent articles.[100] Other writers have not done that. There are a variety of possible reasons. First, their public work is a *sunk* intellectual investment. Being sunk, denial or silence often are tactical responses to documented mistake. Writers are not open to conceding that they wrongly subscribed to misconceptions or failed to recognise that their inventions were opposed to established conventional principle. And the greater the magnitude of their mistake(s), the greater the incentive to cling to their positions and ignore (rather than confront) critical commentary. Secondly, they might believe that conceding mistakes may undermine their work or reputation generally. They apparently fail to appreciate that their uncorrected misconceptions will produce that result. Thirdly, the disorder they contributed to itself gives them cover in that it provides a basis for declining to recognise mistakes. They might point to others making the same mistake and claim that their view is the (or an) accepted view. Or they might insist that the law is in a

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99 The authors of general textbooks and casebooks on nominate subjects (eg trust law, corporate law) are perhaps the worst offenders. Many books are crammed with misinformed suppositions about the accountability. A Canadian example is the business organisation casebook by Robert Yalden et al, *Business Organizations: Practice, Theory and Emerging Challenges* (Emond, 2nd ed, 2018) ch 13. Corporate law, it is worth emphasising, is an area of the law that has contributed significantly to the distortion of conventional principle. See Flannigan, 'Adulteration of Fiduciary Doctrine' (n 85); Flannigan, 'Shareholder Fiduciary Accountability' (n 79).

100 Possibly my most significant error (which I shared with everyone) was to adopt the proposition that shareholders do not have a fiduciary duty to their corporation. See Flannigan, 'Fiduciary Duties of Shareholders and Directors' (n 44) 285–6. A subsequent full article was required to correct that proposition and my error. See R Flannigan, 'Shareholder Fiduciary Accountability' (n 79), particularly at 2 n 3. For other corrections, see Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 40 n 8; Flannigan, 'Employee Fiduciary Accountability' (n 66) 203 n 97; Flannigan, 'Contesting Public Service Fiduciary Accountability' (n 61) 11 n 25; Flannigan, 'Fiduciary Accessories' (n 9) 41 n 3. Consider also my initial analysis at R Flannigan, 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285, where in my novice enthusiasm to establish significance (at 285–6) I stated that the courts had offered only a 'broad outline' of the regulation and that much was 'tentative' and 'obscure'. Those remarks were prompted and misinformed by the conflicting descriptions of the accountability that already had clouded the regulation. Once one acquires a deeper knowledge of the development of the jurisprudence, it becomes clear that the courts had defined the accountability with precision, but that there were unjustified departures attributable largely to research or expression weaknesses. I clarified that initial work in later articles. See, eg, Flannigan, 'Fiduciary Control of Political Corruption' (n 24); Flannigan, 'Boundaries of Fiduciary Accountability' (n 7); Flannigan, 'Core Nature' (n 1).

state of flux or reorientation and is moving away from the older authorities that conflict with their position. Fourthly, as an indication of research due diligence, they might point to the backscratching review of their work by the persons cited in their first footnotes. They might also claim that their work was vetted by journal referees (if that was the case), even though the anonymity of the referees makes it impossible to ascertain what level of independence (objectivity, bias) or subject competence was applied.[101] Fifthly, there literally are no short-term consequences for weak research or scholarship. There is, for example, no realistic recourse for third parties who rely to their detriment on misinformed 'scholarship', at least when it is offered as a public good (rather than as a private opinion). In short, overall, writers are practically free to individually and collectively traffic in misinformation.

The convulsion or agitation of the literature seems only to be accelerating. And recently the disruption has become coordinated. Some writers, having perceived disorder, and wrongly sensing virgin space or foundational vacuum (because of their inadequate investigation), are pursuing an agenda to replace the 'uncertainty' with their own unconventional notions. A collection of writers, most based in the United States, have been closely or loosely aligned in a broad networking exercise in the past few years, the developing objective of which appears to be to reshape and dominate fiduciary scholarship.[102] They have been holding workshops or conferences and publishing the proceedings as edited books

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[101] I have come to understand that the double-blind refereeing process is a sham in fields where there are relatively few contributors with unique (or uniquely expressed) views. Referees often know the identity of an author, but do not reveal that in their reports. My own experience is that my relatively unique terminology (fiduciary accountability, limited access) invariably identifies me to every referee who has any depth in the literature. And because my analysis has been critical of several other writers in the area, and many widely held misconceptions, a number of my articles initially received heavily negative reviews. When that happens, some editors 'blindly' support their referees because that is their first self-regarding instinct, or because they (like the referee) (who may have been sought for that reason) have a stake in the matter. Consider, in that regard, that opportunistic referees will attempt to shape their reports to avoid the detection of their bias, and neither the editor nor the author will see even the tip of the smear. In short, and not unexpectedly, opportunism in the review process is a problem in the same way it is a problem for every other limited access arrangement.

[102] The individuals who are closely aligned may be ascertained by reviewing their acknowledgments of one another in their books and in the articles they independently publish. Paul Miller and Andrew Gold appear to be at the centre of the networking exercise. At this point I would make the incidental observation that the relative youth of some of these writers means that, through their volume and whatever ability they have to collectively maintain their mutual agenda (to recast, and become authoritative commentators about, fiduciary accountability), they may be able to twist the law for a long time. My one comfort is my understanding that the conventional regulation is rational and sapient and that, once its purpose is clearly understood, and absent some profound change in norm preference, it will prevail over bare assertion and ambition.

with titles that imply the transmission of core principle.[103] The chapters in the several books are essays of variable depth that often are pocked with references to departures from conventional principle that, in most instances, are not identified *as departures*. The books are not texts that convey a singular conception. They are just *collections* of essays that are not consistent with each other in various respects. The books nevertheless have achieved a presence in the area (at least in the United States) because there are no competing texts[104] and because the aligned writers constantly cite (and praise) one another. I have addressed the work of some of these writers elsewhere, and identified some of their departures, primarily their conflation of nominate and fiduciary accountability.[105] I suggest that it would be wrong to conclude that the mere alliance of writers (or the mere number of them) should somehow establish the substantive quality of their individual contributions. Judges need to test the literature, not assume that formal academic affiliation or ambitious networking is a signal of properly informed analysis.

The third reason courts ought to dismiss all of the departures is that each is incompatible with the conceptual structure of the regulation. Fiduciary

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103 Consider, eg, Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014); Paul Miller and Andrew Gold (eds), *Contract, Status and Fiduciary Law* (Oxford University Press, 2016); Evan Criddle, Evan Fox-Decent, Andrew Gold, Sung Hui Kim and Paul Miller (eds), *Fiduciary Government* (Cambridge University Press, 2018); D Gordon Smith and Andrew Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar, 2018); Evan Criddle, Paul Miller and Robert Sitkoff, *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019). In the introduction to their first collection (2014), Gold and Miller insisted (at 1) that 'fiduciary law has been woefully under-analyzed by legal theorists'. That is a curiosity they did not explain. They then proceeded to make grandiose claims about the authors and the content of the various essays, including (at 1–2) that the publication of the collection 'will set the agenda for philosophical study of fiduciary law for generations to come'. That remains to be seen. The main concern with the several collections as a group is the persistent theme or perception of the editors and other authors that fiduciary accountability is far more complex than the conventional jurisprudence indicates. One will certainly come to share that conclusion if the turbulent diversity of the assembled essays is absorbed without critical pause. From my reading, literally every issue raised by the multiple authors may be resolved promptly once one takes seriously the analytical predicate that every element of design must be driven or informed by the mischief addressed, and the social predicate that opportunism is a corrosive impulse that requires strict default regulation.

104 There are no academic textbooks. There are only a few monographs. In addition to the 1977 Finn contribution, see the monographs by Leonard Rotman, *Fiduciary Law* (Thomson Canada, 2005) and Matthew Conaglen, *Fiduciary Loyalty* (Hart, 2010). I have elsewhere examined the views expressed in those texts at R Flannigan, 'A Romantic Conception of Fiduciary Obligation' (2005) 84 *Canadian Bar Review* 391 and Flannigan, 'Access or Expectation' (n 25).

105 Flannigan, 'Contesting Public Service Fiduciary Accountability' (n 61). I understand that Paul Miller is now arguing that fiduciary law became recognised as a unified field in its own right only within the past five decades. That profoundly misreads or misrepresents the jurisprudence. Consider the observations of counsel in *York Buildings Co v Mackenzie* (1795) 8 Bro PC 42, 63–4; 3 ER 432, 446 (HL), noted above n 25.

accountability was designed by the judiciary to regulate a particular mischief. The judges understood that opportunism was latent in every undertaking to serve. They understood that it was the access that came with the undertaking that allowed for the diversion of the value of associated assets. They also understood that the access facilitated the concealment or fabricated validation of unauthorised advantage. They therefore proscribed any conflict or benefit that was not authorised by the informed consent of the appropriate party. No excuse was acceptable. That functional design, it will be appreciated, is precisely targeted. It does not comprehend cutting back access to the narrower access of, for example, discretion, actual trust or senior employees. Nor does it comprehend any expansion beyond regulating opportunism to regulating, for example, authority, care, best interest or fairness. The jurisdiction does not have the conceptual content to address any mischief other than opportunism.[106] It does not accommodate nuance, situational history, actual intention, level of sophistication or likely collateral effects. The courts have always regarded the mischief as most pernicious, and they explicitly crafted a particular default regulation to exclusively counter its corrosive operation.

In that regard it is important to understand that virtually all of the departures, if ultimately confirmed, will actually serve as new means for opportunistic fiduciaries to exploit their access. Opportunists (or their legal advisors) shape their relations and transactions to take advantage of such distinctions. Where, for example, there are distinctions between discretion and no discretion, senior and junior employees, and commercial and other arrangements, an opportunistic actor will use contractual and other means to cosmetically arrange relations and transactions so as to avoid fiduciary status. Beneficiaries and courts will not often detect that deceptive shaping or colouring. Stock brokers, for example, may insist on terms stating that they do not have discretion, or an advising function, and are only engaged on a 'mere execution' basis.[107] They nevertheless still effectively exercise discretion, and advise, when through their perceived confidence, aggression, charm or greater expertise, they use their access to arrange transactions that give them collateral unauthorised gains. Another example is where there is a 'fairness' criterion involved at any point in an analysis. Opportunists (sophisticated or not) often will attempt to groom the appearance of relations or transactions to meet a fairness test, while again still retaining considerable capacity to divert value. In that sense, the seemingly wholesome (though naïve) fairness criterion is made to work to the

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106 Ibid 36. See Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 65: Flannigan, 'Fiduciary Accountability Transformed' (n 89) 347; Flannigan, 'Fact-Based Fiduciary Accountability in Canada' (n 30) 453; Flannigan, 'Fiduciary Accountability for Public Service Opportunism' (n 59) 245.

107 R Flannigan, 'Stock Broker Mutation' (n 73).

advantage of the opportunist. Thus, departures become tools to project opportunism and avoid accountability.

It is of further importance here to dismiss the notion that fiduciary accountability must be revised because informed consent supposedly is not a realistic or adequate conceptual instrument to ensure that advantage to the fiduciary was actually intended. Securing informed consent, it may promptly be conceded, may not truly validate an interaction. Fiduciary businesses (eg trust companies) commonly insist on the full or partial exclusion of their fiduciary duty because they know that individuals, whether ingenuous or sophisticated, are incented more by product desirability, reputation, expertise, personal attributes, affiliations, necessity or other factors, and that they discount the perceived remote risk of compromised performance. And many customers and clients, even if they understand an exclusion, are reluctant to have an uncomfortable conversation about it. But that is on them. They have the autonomy, even if only for passing comfort, to risk compromised performance. There would of course be far less incentive for fiduciaries to try to import such exclusions if we all aggressively challenged their standardised attempts to obtain our informed consent to conflicts or benefits. Beyond that, issues with the reality of informed consent are not peculiar to fiduciary accountability. It is a problem in the law generally, and various legal doctrines are available to resist a defence of consent (eg proper notice, duress, misrepresentation, unconscionability).

Next, it sometimes is said that the courts have intentionally declined to fully define the accountability in order to retain flexibility to respond to the creativity of opportunists, or to do justice in the circumstances. No part of that supposition is accurate or justified. The courts have in fact defined with precision, and simplicity, the function and application of the conventional accountability.[108] The classic cases demonstrate that clearly. Moreover, courts are not seeking flexibility to respond to offensive creativity. That creativity has been constrained, to the full extent socially acceptable, by the structure of the regulation. It was the creativity of opportunists (the difficulty of detection) that compelled the courts to fully envelop the risk of opportunism by declaring that all unauthorised conflicts and benefits are proscribed. There is no conventional 'flexibility' to pursue *ad hoc* justice (that is, justice beyond the justice of established conventional principle). The lack of flexibility in fact is a *virtue* of the regulation. It is the 'justice' granted to beneficiaries, who even then remain vulnerable to compromised function due to conflicts or benefits that are never detected. The 'justice' for fiduciaries, in turn, is that they have the option to validate any conflicts or benefits by the simple means of ex ante or ex post consent.

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[108] Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 47–8; Flannigan, 'Access or Expectation' (n 25) 28–30.

It must also be observed that the acceptance of several of the departures (eg actual trust, discretion, junior employees, mere execution agents, bare trustees) would represent a rejection of *status* fiduciary accountability. Merely proving the nominate status of an actor would no longer suffice. A fact-based analysis would be required in each case. The established default fiduciary accountability would evaporate. That would fundamentally alter the conventional position, at least idiocratically, and potentially the general concept of status accountability. Such a change ought to be grounded in explicit judicial reasoning. To date there is no such reasoning.

It is useful here to add certain observations about the formal distinction between status and fact-based fiduciary accountability. A determination that a limited access relation exists is in a sense itself a status designation. Usually judges point to the nominate character of a relation to establish status accountability and to the presence of a limited access undertaking to establish fact-based accountability. Recognise, however, that a nominate status is, for the purposes of fiduciary accountability, just a proxy identifier for the limited access relation that exists in each nominate case. Accordingly, whether judges are assessing status or fact-based accountability, they are always determining whether a limited access relation has been created. That means essentially that it is the *status* of a *limited access relation* that leads to the imposition of fiduciary accountability. A person who undertakes a limited access relation (a 'service' relation), just like a person who assumes a trust or an agency, is assuming a *status* that attracts fiduciary accountability. Thus, in that sense, even a fact-based analysis is an investigation into status. Was the status of the parties that they were in a limited access relation? That analysis, it will be appreciated, could be performed independently of the determination of nominate status, and thereby initially bypass the distinction between status and fact-based accountability. But then the distinction is immediately reintroduced because one way to establish a limited access relation is to prove the existence of one of the nominate status relations. Accordingly, because a defined test for fact-based accountability creates a status, and because certain nominate relations satisfy a limited access test, status fiduciary accountability remains relevant in those two senses. We could, however, alter that. We might choose to formally eliminate the status accountability of the recognised classes in order to merge status and fact-based accountability into a single universal test of limited access. The effect of that would be that initially we would lose the familiar guidance provided by nominate class ascription, and claimants would lose the usually easier burden of proving fiduciary accountability by proving nominate character. On the other hand, an abstract limited access test may be preferable if our primary concern is to reduce confusion attributable to the notion that idiocratic nominate character should drive design. At this point, in my view, the considerations that support retaining classes of nominate status accountability are more compelling, at least until the jurisprudence is swept of the confounding departures.

Consider additionally that a number of the departures illustrate and thereby lend a degree of legitimacy to the 'silo' development of the law, where only the particular nominate character of the relation figures in the origination of the departure. The first concern with silo development is that the departure was not duly informed by the general and generic character of the accountability. The silo context (its nominate idiosyncrasy), and powerful silo stakeholders, may have unduly produced the outcome. The related concern is that, having been fashioned on silo considerations, the departure then bleeds into (or is rejected in) other silos where ostensibly there are different contextual considerations that might suggest different outcomes. Context then appears to be everything, and the law fragments. The law sheds its fundamental generic character and becomes ever more intricate, complex and incoherent. Consider, for example, the silo development of the 'mere execution' departure. If the departure is appropriate in the agency context, why is it not also appropriate in the trust context, given that the mischief is identical? And how would the mere execution departure be received in the employment context? Would it supplement or displace the unjustified distinction between senior and junior employees? Or would it be dismissed because it would tear apart the supposed duty of 'fidelity' of employees? Consider a second example involving the senior/junior employee distinction. It is the senior employee who supposedly is alone accountable as a fiduciary. How does that comport with the apparent distinction between different levels of politicians, where the municipal politician is the clearly recognised fiduciary? These kinds of analytical concerns do not arise if silo analysis is avoided and the generic character of the regulation affirmed. Silo considerations should only have relevance in the aggregate, in the sense that a proposal for a departure should have the benefit of the insight gained by assessing generic fitness across contexts. Thus, a mere execution departure should only be acceptable if it is properly justified as the new *generic* rule for all limited access relations. In that analysis the courts would have to conclude that the justification for the departure generally overrides the justification for the conventional strict regulation of opportunism. As the courts have not identified a plausible justification even in any one of the silo contexts, there is no prospect that they will credibly identify a generic justification.

It is also material to understand the cumulative effect of the *contracting* departures on what has always been definitive principle. Every contraction constitutes an independent defence that would not be available on a conventional analysis. That will give fiduciaries several ways to escape liability, eviscerating the conventional strict character of the regulation. Consider an agent who has digested a personal benefit. The agent's defence to a claim of breach might include that no discretion (whether possessed or not) was exercised, there was only the mere execution of a fully defined transaction, the agent was not actually trusted, the 'contractual' context excluded the default application of the accountability, and there were only commercial interactions. That turns the accountability on its

head. Instead of agents always being accountable for unauthorised conflicts or benefits, it appears that going forward they may rarely be accountable. There has been no discernible shift in public sentiment or in economic or social conditions generally that could justify the introduction of that (or any) level of fresh immunity. Individually each departure constitutes an explicit rejection of the conventional strict character, and the cumulation of departures is a strong indicator of impending wholesale collapse.

It is also relevant to observe that the default strict character of the liability is not, as some might assert, a harsh standard that ought to be abandoned.[109] The option of consent is a full answer to that assertion. Further, to the extent it might be *perceived* as a harsh standard, it is an *intended* standard that is justified by the difficulty in detecting opportunistic impulse. It should also be appreciated that while strict, the regulation is entirely ineffective to the extent that conflicts or benefits are never detected. Consider also that the strict character of the liability actually provides a breaching fiduciary with an effective *moral* defence. Because the liability is strict, every fiduciary who is not directly or implicitly identified by a court as having acted opportunistically is entitled to explain to others that there was no finding of actual misconduct. In that sense, oddly, there is no official reputational cost for a fiduciary breach.

There is also no real substantive concern that the prospect of liability will chill beneficial whistleblowing. An undertaking of service implicitly is an undertaking of *legal* service. A fiduciary cannot be required by the law of fiduciary accountability to essentially have to participate in or condone illegality. That would be incompatible with the very idea of regulating opportunism. The regulation cannot be used to enable the opportunism of beneficiaries in attempting to tie others to their wrongs. More generally, the disclosure of illegal action usually is not within the scope of a fiduciary undertaking. Fiduciary accountability is concerned with protecting beneficiaries from the opportunism of fiduciaries. It is not concerned with shielding beneficiaries from responsibility for their own wrongful actions. Essentially beneficiaries take the risk that their misconduct will be disclosed by their fiduciaries. We may say that beneficiaries, like everyone else, implicitly consent to the application to them of general default

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[109] Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 43–4; Flannigan, 'Strict Character' (n 11). Courts everywhere have long recognised that the strict character of the accountability is a virtue. Consider *Munson v Syracuse, Geneva and Corning Railroad Co* (1886) 103 NY 58 ('The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative').

communal standards of behavior. Consequently, it is not a fiduciary breach for a fiduciary to disclose illegality.[110] That is so even where the fiduciary discloses in anticipation of a payment. The payment is not an unauthorised benefit linked to the legal performance of the undertaking. The fiduciary is as much entitled to the payment as any other actor who might ascertain and disclose the illegality. Consider also disclosure by agents or employees of corporations. In that context it is clear in principle that there is no status fiduciary accountability for disclosure. The agents and employees owe their fiduciary duty to the corporation. The corporation itself has no physical capacity and so must always act through agents and employees. Consequently the whistleblower will always be disclosing the wrongs of other agents or employees (or perhaps shareholders) to whom the whistleblower has no status fiduciary duty. Not being accountable as a fiduciary to them, there can be no status fiduciary breach to them. As for their duty to the corporation, they actually are properly performing their nominate duty to act in the best interest of the corporation by reporting wrongful action. There is no compromise of whatever function they are performing for their corporation.

Another particularly compelling reason to affirm the conventional position is that there is no one general analysis or theory available to replace it. As discussed elsewhere, there are a variety of approaches and proposals reflecting diverse policies and agendas.[111] A court that rejects the conventional position will have to engage in a sorting or selection exercise, or fashion its own conception of accountability. A senior court that does that will launch a whole new era of analysis, and likely a great deal of controversy.

A final reason the conventional position should be exclusively endorsed is that it constitutes a fitting integration of community and autonomy. Limited access arrangements are the fibre of community. We link ourselves to others in other-regarding arrangements that are engines and channels for mutual and collective advancement. And because they build community, we endeavor to shield those arrangements from the opportunism that will corrode their general utility. We recognise that community withers proportionately with the level of opportunism tolerated. At the same time, our regulation of those arrangements simultaneously respects individual autonomy in two senses. There is no imposition of the accountability without the voluntary assumption of a limited access. The imposition of the accountability only affirms or respects our prior self-interested choices to serve others. That voluntary assumption, it should be appreciated, may be indirect. For example, a person who voluntarily risks agent,

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110 That said, fiduciary accountability is always possible on a fact-based analysis. Thus there would be a *fiduciary* breach where a fiduciary manufactured or fabricated the wrong that then was disclosed and attributed to the beneficiary. That fabrication would be a classic example of in-scope opportunism, and should properly attract the conventional regulation.

111 See Flannigan, 'Core Nature' (n 1) 399–429; Flannigan, 'Contesting Public Service Fiduciary Accountability' (n 61) 10ff; Flannigan, 'Compound Fiduciary Duty' (n 45).

director, parent or limited access status simultaneously *voluntarily* risks the parallel application of fiduciary accountability. The second sense is that there is no imposition of the accountability if the fully informed consent of the appropriate person has been obtained to the specific conflict or benefit. As a self-activated default accountability, the community benefits of the regulation are not realised at the cost of autonomy. While not everyone understands the term 'fiduciary' (eg those who refer to it as the 'F word', and those who market 'fiduciary' services), everyone intuitively understands corrosive opportunism. That specific mischief requires a dedicated effective regulation. If that regulation is kept simple and sharp, it remains widely comprehensible as virtuous discipline that still respects the autonomy of the actors involved.

VII Conclusion

The law of fiduciary accountability is negligently disintegrating. I say negligently because most of the numerous departures I have described have arisen through linguistic, conceptual or research weaknesses. Conventional principle has not been openly confronted and repudiated. Rather, the departures emerged negligently and then just lingered about without resolution of the contradiction they introduced. That has left the *presentation* of the law broadly internally conflicted. Though our anchoring norm has not waned, it currently is obscured by a fog of misinformed supposition. There now *appears* to be many unresolved questions. For example, is the test for accountability a limited access undertaking, or is it actual subjective trust, discretion, reasonable expectation or fairness? Does fiduciary accountability apply to every limited access arrangement, or is it excluded or diluted for commercial interactions? Are there fiduciary distinctions within conventional status classes (eg bare trustees, junior employees, agents with only a mere execution function)? Do political representatives have some sort of unspoken immunity from the accountability? Is there a fiduciary duty of care? Is the accountability concerned with fiduciaries exceeding their authority? Do directors have a fiduciary duty to both the corporation and its shareholders? Do shareholders have a fiduciary duty to their corporation? Does status-based fiduciary accountability still exist? May we still say that fiduciary accountability is strict? In short, the relative simplicity of the jurisdiction has been suppressed, and it now is impossible to identify a coherent regulation if we must accord equal credit to every judge and writer who has purported to describe the animating mischief, and content, of the law.

It perhaps is only when the numerous departures are collected together that the scale of the shading of principle becomes fully apparent. The breadth of the distortion is stupefying. The reality is that we appear to be approaching a tipping point. The issue of the survival of the conventional regulation is at hand. Judges need to understand that the coherence of the jurisdiction is crumbling, and that

they ought to act decisively. This is not an occasion for instrumentally ambiguous speech, or for cushioning those who facilitated or authored unjustified departures. We need intellectual investment that is properly informed, not merely sunk. Clear purpose should determine our communal regulation. Everything hinges on the imperative identification of the mischief that fiduciary accountability is designed to address. That mischief should drive every aspect of the design of the regulation. If the mischief is performance compromised by opportunism, the conventional analysis should be affirmed, and the departures rejected. The alternative is for the courts to identify a different or additional mischief, with a different or additional test, and then explain which of the departures are consistent with their new notion. A choice must be made. A failure or refusal to cleanse the jurisprudence one way or the other will only further abrade the legitimacy of our 'fiduciary' regulation.

INTENTIONAL CONDUCT AND THE OPERATION OF THE CIVIL LIABILITY ACTS: UNANSWERED QUESTIONS

JOACHIM DIETRICH*

The Civil Liability Acts place significant limitations and caps on the damages that are recoverable for claims caught by those Acts or relevant parts thereof. Such limitations and preclusions significantly impact on what were plaintiffs' existing common law rights prior to the passage of the CLAs. Importantly, however, many of those limitations do not apply to certain classes of claims excluded from the operation of the CLAs. The focus of this article is on some widely (but not uniformly) adopted exclusions to the operation of the CLAs, namely that many parts of the CLAs do not apply to claims arising from types of intentional conduct. Many of these limitations are express; but other limitations raise issues of intention that are less patent. The precise reach of the 'intentional conduct' exclusions in the CLAs has not been resolved and many important questions remain unanswered. This is despite the increasing number of cases coming before the courts in which plaintiffs are attempting to circumvent the operation of the CLAs. The issues will continue to attract judicial attention. This article considers the different interpretation and operation of the 'intentional conduct' exclusions in the CLAs and seeks to answer some of unanswered questions.

I INTRODUCTION

The various Civil Liability Acts[1] ('CLAs') place significant limitations and caps on the damages that are recoverable for claims caught by those Acts or relevant parts

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1 Although the title of this article refers to the 'Civil Liability Acts', the titles of the various Acts, like their content, are not uniform. The relevant CLAs in each jurisdiction are as follows: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA) (a renamed version of the *Wrongs Act 1936* (SA), substantially amended by the *Law Reform (Ipp Recommendations) Act 2004* (SA)); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic) (as substantially amended in particular by the *Wrongs and Other CLAs (Law of Negligence) Act 2003* (Vic) and the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic)); and *Civil Liability Act 2002* (WA). For convenience, each of these CLAs will be referred to in shorthand form in the text as the 'New South Wales CLA', 'Queensland CLA' (etc), and in the footnotes as 'NSW CLA', 'Qld CLA' (etc).

of them. These include caps on certain types of damages, such as loss of earning capacity, and minimum threshold requirements that must be met before some damages are available, such as gratuitous care awards (so-called '*Griffiths v Kerkemeyer* damages').[2] One of the most significant adverse impacts on plaintiffs' damages is the setting of five per cent or higher discount rates on lump sums, replacing the much more plaintiff-friendly three per cent that applies at common law.[3] Further, exemplary and aggravated damages are precluded altogether for certain claims in some jurisdictions. Such limitations and preclusions significantly impact on what were plaintiffs' existing common-law rights prior to the passage of the CLAs. Importantly, however, many of those limitations do not apply to certain classes of claims excluded from the operation of the CLAs. One exclusion, for example — in several, but not, all jurisdictions — is that the CLAs (or most parts thereof) do not apply to claims arising from dust-related conditions.[4] However, given that the CLAs are not uniform, their impact varies from state (or territory) to state. This makes generalisations difficult and dangerous. I will note exceptions to general statements of law, so far as I am aware, but the caveat applies: errors may easily occur and the interpretation of each CLA must start with its specific provisions and framework.

The focus of this article is on some widely (but not uniformly) adopted exclusions to the operation of the CLAs, namely, that many parts of the CLAs do not apply to claims arising from types of intentional conduct. For example, a common *express* exclusion is for an 'intentional act … done by the person [the defendant] with intent to cause injury or death' or for a sexual assault or sexual misconduct.[5] Other limitations raise issues of intention that are less patent; for example, many of the limitations of the CLAs apply only to awards of 'personal injury damages'. Such damages are typically sought in negligence claims,

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2 *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

3 See *Todorovic v Waller* (1981) 150 CLR 402. The Australian Capital Territory has retained the common-law position. For the various statutory provisions, see Harold Luntz et al, *Torts Cases and Commentary* (LexisNexis Australia, 8th ed, 2017) [8.2.39].

4 Jurisdictions without a general dust-diseases exclusion are as follows. In Western Australia, an exclusion applies only to asbestos-related diseases (WA CLA, s 3A). The Tas CLA, s 3B(4), excludes asbestos-related conditions arising from employment. The Vic CLA, 45(1)(b), excludes claims covered by the *Accident Compensation Act 1985* (Vic), which also applies to dust-related illnesses. The ACT CLA has no general exclusions, but specific sections and parts contain limited exclusions. The ACT CLA does not exclude from its operation claims for dust-related conditions.

5 For example, the NSW CLA relevantly states in s 3B, headed 'Civil Liability Excluded from this Act'
(1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
(a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person.

although they might also be sought in respect of intentional wrongs (such as trespass to the person). However, some claims founded on intentional acts and framed as trespass claims (known as 'intentional torts'), even if not *intended* to cause injury, are likely to be characterised as not being for personal injury *damages*. For example, is a claim for damages for false imprisonment one for 'personal injury damages'? If not, then the CLA limitations on damages may not apply, in particular those regarding non-pecuniary loss.[6] Further, in New South Wales, exemplary and aggravated damages are not allowed for 'negligence' claims and therefore are still available for intentional — that is, deliberate — conduct even if it was not intended to cause injury. In Queensland, the restriction on exemplary and aggravated damages is broader. Such damages are not available for personal injury claims generally, *other than claims* arising from conduct that is intended to cause injury. All of this is important because it means that plaintiffs who can frame their claims as arising from conduct that satisfies one or other of these different intentions are able to avoid many significant restrictions on their rights contained in the CLAs; in short, damages awards may be larger.

The precise reach of the 'intentional conduct' exclusions in the CLAs (or parts thereof) has not been resolved and many important questions remain unanswered. This is despite the increasing number of cases coming before the courts in which plaintiffs are attempting to circumvent the operation of the CLAs.[7] Although Peter Cane commented, prior to the enactment of the CLAs into Australian law, that 'mental states are often difficult to prove; and the legal advantages gained by establishing tortious intention may not be sufficient to justify the attempt',[8] the incentives for plaintiffs to avoid the operation of the CLAs appear to be sufficient to warrant such arguments in recent litigation.[9] The issue will continue to attract judicial attention.

One important aspect of the background to the issues raised in this article is the overlap between causes of action in negligence and trespass. In Australia, at

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6 See further Part III C below, and see *State of New South Wales v Le* [2017] NSWCA 290, [24]–[26] ('*Le*').

7 A plaintiff will also be able to avoid the operation of the CLAs (to obtain more generous damages awards and potentially also exemplary and aggravated damages) where the defendant is *vicariously liable* for an employee's act intended to cause harm. See *Zorom Enterprise Pty Ltd v Zabow* (2007) 71 NSWLR 354.

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

9 See, eg, *Dean v Phung* (2012) Aust Torts Reports 82-111; [2012] NSWCA 223 ('*Dean*'), where the NSW CLA was held not to apply and substantially higher damages were awarded as a result (see, eg, at [5]–[7] as to some of the differences in common-law versus CLA damages). Although in that case, the insurer refused to pay the increase in damages awarded by the Court of Appeal, which refusal was upheld: *Dean v Phung* [2015] NSWSC 816. For other cases in which higher damages were payable for intentional conduct, see Luntz et al (n 3) [11.4.5] and *Hamilton v State of New South Wales [No 13]* [2016] NSWSC 1311 ('*Hamilton*').

least, it is still possible for a plaintiff to bring an action in trespass even where the interference was a negligent act ('negligent trespass'). The survival of such claims has been extensively canvassed in cases and textbooks,[10] and I do not intend to traverse that ground here. It is worthwhile to note, however, relevantly for later discussion, that conduct that constitutes a trespass to the person can range across a whole gamut of moral blameworthiness: it can be negligent conduct ('negligent trespass'); deliberate conduct that was not intended to be wrongful, being based on a mistaken assumption of right, for example ('innocent trespass'); intentional infringements that were nonetheless not intended to injure the victim; and infringements that were intended to injure (that is, a 'double' intention can be proved).

More difficult is the question of whether a plaintiff can bring a negligence claim for conduct that is an intentional act. There are conflicting authorities on the point, and the issue is canvassed in some detail by Peter Handford, although the better view, as the law currently stands, is yes.[11] For the most part, that question is not relevant to the central issue addressed in this article — that is, when can a plaintiff avoid the limitations on damages in the CLAs? — but the question of whether intentional acts might fall within the concept of 'careless' or negligent conduct (or the cause of action in negligence) is touched on below.[12]

The article proceeds as follows. Part II provides an overview of the scope of the CLAs and, specifically, sets out the exclusions in the CLAs for intentional conduct. These exclusions vary in their ambit and use different terminology to delineate what is and is not covered by the CLAs. Part III addresses some of the issues that arise in interpreting the intentional conduct exclusions, including the meaning of 'intentionally caused injury' and how recklessness should be characterised for such purposes, and where damages for trespass fit within the personal injury damages regimes. Part IV briefly concludes the discussion.

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[10] See, eg, Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press , 4th ed, 2007) [2.3]; compare now the fifth edition, where the authors argue that negligent trespass is anomalous, but still part of Australian law: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [2.1]; Luntz et al (n 3) [11.3]. A recent case discussing the issue is *Croucher v Cachia* [2016] NSWCA 132 ('*Croucher*'), and see also *State of New South Wales v Ouhammi* [2019] NSWCA 225 (re whether a police officer slamming a door on the plaintiff in a holding cell constituted negligent battery).

[11] See Peter Handford, 'Intentional Negligence: A Contradiction in Terms' (2010) 32(1) *Sydney Law Review* 29.

[12] See text accompanying nn 44–5.

II The Scope of the CLAs

A *Generally*

The CLAs are broad in their potential operation. Most apply, subject to specific exceptions, to civil claims for recovery of damages for harm, including personal injury (physical or mental), damages to property and economic loss. Broadly speaking, each of the CLAs (other than that of the Northern Territory)[13] introduced four types of reforms. First, the CLAs set out general principles governing liability arising from a failure to take reasonable care, irrespective of whether such claims are brought in tort, contract or under statute.[14] Secondly, the CLAs set out certain exemptions from 'civil liability' for certain classes of defendants, as well as provisions disentitling certain classes of plaintiff from claiming damages. These exemptions and disentitlements generally apply not just to negligence actions, but to any forms of 'civil liability'. Some examples include the protection from civil liability of 'good Samaritans' and 'volunteers', and limitations upon the rights to recover imposed (in some jurisdictions) on criminals.[15] Thirdly, the CLAs introduce proportionate liability regimes that govern economic loss and property damage.

Fourthly and finally, the CLAs introduce principles governing (and generally limiting) the award of personal injury damages. Such principles apply generally to 'civil liability'; that is, they are not, in most jurisdictions, limited to claims arising from negligent conduct (let alone claims in the tort of negligence).[16] They are, however, subject to the general exclusions to the operation of each CLA (as to

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13 The Northern Territory legislation is more limited in its scope and does not include the first reform (principles of negligence), and the proportionate liability reforms are contained in separate legislation. See the *Proportionate Liability Act 2005* (NT).

14 ACT CLA: see ch 4, s 41 ('negligence claims'); NSW CLA: see s 5A (Part applies to claims for harm resulting from negligence, regardless of the precise cause of action pleaded to sustain such a claim); Qld CLA: see ch 2, pt 1 (most sections apply to 'breach of duty of care', defined to include claims in contract or under statute); SA CLA: see pt 6 (which is limited to claims in negligence, defined as a 'failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care'); Tas CLA: see s 10 (claims for breach of duty of care); Vic CLA: see s 44 (negligence claims). Under the WA CLA, oddly, the relevant part of the Act uses the term harm caused by 'fault' of another, whether damages are sought for breach of contract or other action (s 5A(1) and (2)). Section 5B, setting out the principles of negligence, also uses the more generic term 'fault' but the Division is headed 'Duty of Care'.

15 An early discussion of some of these exemptions can be found in J Dietrich, 'Duty of Care Under the "Civil Liability Acts"' (2005) 13(1) *Torts Law Journal* 17.

16 See ACT CLA, ss 92 and 93; NSW CLA, s 11A; Qld CLA, ss 4(1), 50; Vic CLA, s 28C(3); WA CLA, s 6(2). In South Australia, s 51 applies the damages part of the CLA to damages for personal injuries arising from breaches of duty of care (including in contract or under statute), other *unintentional* torts, but also *intentional* 'motor vehicle' accidents. The difficulties created by the term 'other unintentional torts' are discussed further below.

which, further below). Assuming no exclusions apply, this means that, even where negligence is not an element of the cause of action — such as breach of contract, nuisance or failure to meet some statutory standard of conduct — damages awards for personal injury would be governed by the relevant parts of the CLAs. In Tasmania, the damages part of the CLA (pt 7) only applies to civil liability for damages for personal injury from a 'breach of duty' (s 24), defined as including a 'duty of care' under contract or statute (s 3).

The focus of this article is on this fourth type of reform and the operation of — or, more importantly, the non-operation of — the CLAs to limit personal injury damages in relevant provisions, including the exclusion of exemplary and aggravated damages in some CLAs. It is necessary, then, to set out in greater detail the application of the various CLAs in relation to 'intentional conduct'.

B *Intentional Conduct Exclusions*

Most of the CLAs are set up so as not to apply (or for most parts not to apply) to intentional conduct or, more specifically, to conduct that is intended to cause injury. The effect is that such conduct will not be subject to the limitations and caps on personal injury damages.

As already noted, according to s 3B, the New South Wales CLA does not apply (although in limited circumstances, it does so apply)[17] as follows:

> (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
>
> (a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person — the whole Act except [certain provisions] …

That terminology has been described as 'somewhat awkward'[18] and 'curiously imprecise'.[19] For convenience, general references in this article to the 'intentionally caused harm exclusion' include sexual assault and sexual misconduct. The Western Australian CLA is similarly drafted, although it uses the phrase an 'unlawful intentional act' that is intended to cause injury (s 3A).[20]

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17 See, eg, the provision relating to damages for loss of capacity to perform domestic services provided by a plaintiff (NSW CLA, s 15B), which applies to intentionally caused harm: see s 3B(1)(a).

18 See Basten JA in *State of New South Wales v Ibbett* (2005) 65 NSWLR 168, 179 [197] ('*Ibbett*').

19 See *Dean* (n 9) [26] (Basten JA, Beazley JA agreeing).

20 Does the adjective 'unlawful' create a point of distinction? I will not consider this issue, but note that in the context of s 52 of the Qld CLA, Richard Douglas, Gerard Mullins and Simon Grant, *Annotated Civil Liability Act — Queensland* (LexisNexis Butterworths, 4th ed, 2016) 471 [52.5], consider that 'unlawful' would 'ordinarily' require a breach of criminal law, whereas in *State of*

The Tasmanian CLA is drafted in similar terms (s 3B(1)(a)), although that exclusion does not have as much significance as it does in other jurisdictions because the Part that governs personal injury damages in any case only applies to breaches of 'duty of care' (in tort, contract or under statute: s 3). The Victorian CLA is a more comprehensive piece of legislation (taking the form of amendments and additions to the *Wrongs Act 1958* (Vic), which is the correct title of the Act), such that relevant inclusions and exclusions are identified in relevant parts. Part VB ('Personal Injury Damages') excludes conduct in similar terms to those used in New South Wales: s 28C(2)(a) CLA (Vic). Interestingly, however, the Victorian provisions covering non-economic loss are contained in a separate pt VBA, and the application provision of that Part, s 28LC(2)(a), differs in its wording from s 28C(2)(a). Section 28LC(2)(a) excludes claims not only where the fault concerned is an intentional act intended to cause death or injury, but also where it '*relates to*' such acts. Such subtle differences in the choice of words can have significant consequences.[21]

In those jurisdictions, therefore, the chapters or parts of the CLAs on the assessment of damages do not apply to claims arising from acts intended to cause 'injury'.

Importantly, as will be seen below, the focus of these exclusions is therefore on the conduct giving rise to the claim rather than the cause of action pleaded. In other words, even if a claim is brought in trespass, such a claim need not involve conduct that was intended to cause injury and the exclusion will not automatically apply.[22]

The South Australian CLA does not directly exclude liability arising from intentional conduct, although it indirectly excludes intentional torts, since most of the relevant provisions are limited to negligence claims, and the personal injury damages chapter is also limited to accidents caused by negligence and 'other unintentional torts' (as well as intentionally caused motor vehicle

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New South Wales v McMaster (2015) 91 NSWLR 666, 704–5 [200]–[204] (Beazley P, McColl and Meagher JJA agreeing) ('*McMaster*'), in the context of self-defence provisions of the NSW CLA, it was held that 'unlawful' extends to conduct that is merely tortious. Both conclusions could, of course, be correct, given the very different statutory contexts.

[21] One consequence is that the personal injury damages provisions contained in pt VB of the Vic CLA would apply (and that Part is not excluded) where a defendant is held liable in negligence for failing to prevent an intentional attack on a plaintiff, whereas pt VBA does not apply to such circumstances. It has been held that a plaintiff who sues a defendant prison authority for failing to prevent the intentional stabbing of the plaintiff need not meet the relevant threshold requirements of pt VBA for non-economic loss: *State of Victoria v Thompson* [2019] VSCA 237 (there being a sufficient nexus between the intentional stabbing and the plaintiff's claim in negligence to satisfy the 'relating to' requirement (at [40])).

[22] *Croucher* (n 10) [33]–[35] and [117]. The Court relied on the earlier decisions of the New South Wales Court of Appeal in *Ibbett* (n 18), *Dean* (n 9) and *White v Johnston* (2015) 87 NSWLR 779 ('*White*').

accidents).[23] The use of the term 'unintentional torts' contrasts with the focus on the intent to cause harm in the jurisdictions noted above. Whether that term implicitly excludes all trespass claims, because they are often described as 'intentional torts' (even if that trespass was not intended to cause injury) will be discussed further below.

The Queensland CLA does not generally exclude intentionally caused injury, nor is the personal injury damages chapter (ch 3) in its terms limited to breaches of duty. Nonetheless, there is at least an argument that some parts of ch 3 do in fact apply *only* to breaches of duty, that is, negligent conduct, as is discussed further below (Part III(E)).

The damages chapter (ch 7) in the Australian Capital Territory CLA applies to any claims ('however described') for damages 'based on a liability for personal injury', whether that liability is based in tort or contract or on another form of action (including 'breach of statutory duty': ss 92, 93).[24] However, apart from limiting loss-of-earnings claims in s 98, the Australian Capital Territory CLA contains no other restrictions. This means that although the failure to exclude claims for harm suffered through intentional conduct might appear at first blush to be unusual, there are few impediments in the Australian Capital Territory to claiming one's full common-law rights to damages when compared to the other CLAs. The Australian Capital Territory CLA also does not limit rights to exemplary and aggravated damages. For these reasons, I will not further consider the Australian Capital Territory CLA in this article.

Similarly to the Australian Capital Territory CLA, the Northern Territory CLA applies to all personal injury claims, even those caused by intentional conduct (see ss 3 and 4), but unlike that of the Australian Capital Territory, the limitations imposed for personal injury damages are significant. Consequently, there is no incentive for a plaintiff to plead intentional conduct as the basis for their claim where they suffer personal injury. Again, therefore, I will not further consider the Northern Territory legislation.[25]

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23 Section 51 states that that Part of the CLA only applies to '(a)(ii) an accident caused wholly or in part by — (A) negligence; or (B) some other unintentional tort on the part of a person other than the injured person'.

24 Personal injury includes bodily harm, mental harm and death (Dictionary). Claims under the *Workers Compensation Act 1951* (ACT) are excluded: ACT CLA, s 93.

25 Section 19 of the NT CLA is also the widest in terms of excluding exemplary and aggravated damages for all claims 'in respect of personal injury'. Even intentionally caused personal injury would be caught by this prohibition, although if the reasoning from the Queensland cases discussed below is applied, it would not preclude such awards for trespass claims for battery, assault and false imprisonment where the damages sought are for the infringement of the plaintiff's rights (eg for humiliation, distress, etc). That was the conclusion reached in *Majindi v Northern Territory of Australia* (2012) 31 NTLR 150 ('*Majindi*') in relation to false imprisonment.

Apart from these express exclusions, the use of the term 'personal injury damages' may itself limit the application of damages restrictions — a point discussed in Part III(C) below.

C *Exemplary and Aggravated Damages*

Both Queensland and New South Wales have enacted provisions that exclude both exemplary (punitive) and aggravated damages in certain circumstances. Before considering the relevant sections, it is necessarily briefly to reiterate the purpose of those damages. Although both types of damages focus on the circumstances and manner of a defendant's wrongdoing,[26] exemplary and aggravated damages have very different purposes, with only the latter being compensatory in nature.[27] As the Queensland Court of Appeal stated in *Bulsey v State of Queensland* ('*Bulsey*'):

> The conceptual distinction between exemplary damages and aggravated damages is that aggravated damages are assessed from the plaintiff's perspective, whereas an assessment of exemplary damages focuses upon the defendant's conduct.[28]

In other words, aggravated damages focus on the impact of the defendant's wrongdoing on the plaintiff; the manner of the defendant's wrongdoing 'aggravates' the impact of the wrong such that additional compensation is necessary to remedy such impact. Exemplary damages, by way of contrast, seek to achieve the broader social impact of punishing a defendant (and deterring future defendants) where there has been an outrageous or contumelious disregard for a plaintiff's rights.[29] For our purposes, since aggravated damages compensate, it is necessary to stress at the outset how these damages differ from ordinary compensatory damages for trespass — assault, battery and false imprisonment — where such trespasses do not cause personal injury. Ordinary damages here compensate for injured feelings, such as outrage, humiliation, indignity and insult, even in the absence of aggravating circumstances. Importantly, however, where aggravating circumstances exist that increase such humiliation, indignity, etc, aggravated damages increase the plaintiff's compensation to account for that aggravation.[30] As Michael Tilbury has stated,

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[26] See Michael Tilbury, 'Aggravated Damages' (2018) 71(1) *Current Legal Problems* 215, 219–20, referring to aggravated damages.

[27] See, eg, the detailed discussion in Tilbury, ibid.

[28] [2015] QCA 187, [94] (Fraser JA, Atkinson and McMeekin JJ agreeing) ('*Bulsey*'), citing *Lamb v Cotogno* (1987) 164 CLR 1, 8 ('*Lamb*').

[29] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149–50 (Windeyer J); *Lamb* (n 28).

[30] See Tilbury (n 26) 219–20; cf the High Court in *New South Wales v Ibbett* (2006) 229 CLR 638, 646–7 [31] ('*Ibbett (HC)*'), which does not expressly make this point.

aggravated damages compensate for the increased distress attributable to the indignity caused to a plaintiff by the defendant's motives or the circumstances of the wrongdoing; such damages 'can be separately identified from basic compensatory damages as the increased loss that "rubs salt in the wounds inflicted" by the wrong'.[31]

Turning now to the relevant provisions. Section 52 of the Queensland CLA states:

> **52 Exemplary, punitive or aggravated damages can not be awarded**
>
> (1) A court can not award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages.
> (2) Subsection (1) does not apply to a claim for personal injury damages if the act that caused the personal injury was —
> (a) an unlawful intentional act done with intent to cause personal injury; or
> (b) an unlawful sexual assault or other unlawful sexual misconduct.

This provision reflects the fact that, in Queensland, the CLA does not contain a general exclusion for intentionally caused injury. Contrast the wording of the New South Wales CLA, which does contain such exclusion. Section 21 states:

> **21 Limitation on exemplary, punitive and aggravated damages**
>
> In an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.

Section 21 of the New South Wales CLA assumes that the only awards that are relevantly being considered are ones where death or injury was caused by 'negligence'. Although that term is not specifically defined for that part of the CLA, it has been held to mean negligent conduct, irrespective of the cause of action pleaded. This is consistent with other parts of the New South Wales CLA, which make clear that 'negligence' encompasses all causes of action where careless conduct is the basis of the claim.[32] This means that pleading trespass does

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[31] See Tilbury (n 26) 222–3, citing *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, 170 (Lord Donaldson MR), and discussing *Richardson v Howie* [2004] EWCA Civ 1127; [2005] PIQR Q3. See also *State of New South Wales v Riley* (2003) 57 NSWLR 496, 528 [131] (Hodgson JA), and Tilbury (n 26) at 225–6. Tilbury's analysis is supported by the fact that conduct post-wrongdoing can constitute aggravating circumstances. This principle is well-established in the tort of defamation but has also been applied to awards of aggravated and exemplary damages for trespass; see, eg, *Cruse v State of Victoria* [2019] VSC 574, [210]–[215] (aggravated damages further justified by subsequent acts of defendant in 'blaming the victim' for the serious batteries committed during an unlawful arrest and in mischaracterising his alleged offences as suspected 'terrorism'); *Ibbett* (HC) (n 30); *Cheng v Fajudi* (2016) 93 NSWLR 95 (conduct of civil proceedings justified award of exemplary damages).

[32] See *Ibbett* (n 18) [118] (Ipp JA), [209] (Basten JA), and generally [200]–[209]; *Croucher* (n 10) [35].

not circumvent that restriction if the act constituting the trespass was negligent. It does mean, however, that where a defendant *intentionally* trespasses, even if he or she did not intend to cause injury, s 21 does not preclude exemplary and aggravated damages. Therefore, for example, a doctor who performs surgery without consent would potentially be subject to such damages. This potential has seen litigation where patients have, with mixed success, sought to characterise medical malpractice as trespasses[33] — of which more below.

More problematic still is whether it can be said that, where an intentional trespass results in (unintended) consequential injury, or where gross negligence causes injury, the 'act or omission' that caused the injury was 'negligence' for the purposes of excluding exemplary damages under s 21 of the New South Wales CLA.[34]

Interestingly, the South Australian, Tasmanian, Victorian[35] and Western Australian CLAs still allow for exemplary and aggravated damages for negligence-based claims, albeit that that possibility is only ever likely to arise in exceptional circumstances.[36]

III Interpreting the Intention Exceptions: Some Questions that Arise

A *The Relationship between Different Fault Criteria*

In establishing their application, the CLAs refer to numerous different fault criteria: negligence, breach of duty, conduct intended to cause harm, 'unintentional torts'. Even within individual CLAs, several fault criteria are used and, if they are defined, such definitions are at best obvious — for example, a 'breach of duty' is a 'failure to take reasonable care'.[37] Some of these fault criteria may involve overlapping concepts and the relationships between those concepts, and with established causes of action, are not spelt out. Some of these criteria determine when a part or provision of a CLA operates. For example, s 21 of the New South Wales CLA applies where the conduct that caused injury 'was negligence'. Other fault criteria determine when a part or provision of a CLA does not operate. Importantly, these criteria do not necessarily interlink in a logical way. The

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33 See, eg, *Dean* (n 9); *White* (n 22).

34 The latter question was left open by Basten JA in *Ibbett* (n 18) [210].

35 In Victoria, however, exemplary damages are prohibited under workplace and motor accident statutes, even where a defendant acted intentionally.

36 See *Lamb* (n 28), and *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9 [22] (Gleeson CJ, McHugh, Gummow and Hayne JJ): 'there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff'.

37 See, eg, Qld CLA, sch 2.

reference to 'unintentional torts' in the South Australian CLA is an example; that nomenclature is not a defined or established legal concept and it is not clear whether it refers to all torts that are not 'intentional torts', which is a more commonly used (but also itself, as explained below, a misleading) term. Nor is it clear whether it refers to causes of action, or to the underlying conduct that gives rise to a cause of action (on which, more below). It is worthwhile, therefore, as a preliminary matter, to note how these various fault criteria might inter-relate.

The New South Wales Court of Appeal has noted in relation to s 3B of the New South Wales CLA that the language of the exceptions in para (a) (intentionally caused injury), when considered as a whole,

> is not suggestive of concepts having some specific legal connotation, but is rather language which encompassed a broad policy objective. Thus, subject to the limited express exceptions, the purpose was to leave those who committed intentional torts to the operation of the general law.[38]

Different fault criteria may well overlap. For example, can it be said that conduct that is intentional (deliberate) or even intended to cause injury (what we might call malicious) also amounts to negligent conduct? After all, to hit someone intentionally is also, it would seem, a failure to meet the standard of reasonable care towards that person. This idea, that more blameworthy conduct also constitutes less blameworthy conduct, is based on a concept of 'nesting'. Peter Cane has noted that fault criteria have two components — mental elements and standards of conduct — and that '[l]egal fault consists either of a failure to comply with a specified standard of conduct, or a failure to comply with a specified standard of conduct accompanied by a specified mental state'.[39] According to Cane, those fault criteria are 'nested' within each other as a matter of evidence: it will be easier to prove defendants were negligent even where they acted intentionally. This would also seem to follow as a matter of definitional logic.[40] Iain Field summarises the point: 'conduct that *does* satisfy the definition of intentional conduct *will*, by logical necessity, satisfy the definition of reckless conduct, negligent conduct', etc.[41] Also, as Peter Handford has stated:

> [I]f inadvertently caused injury that entails unreasonable risk of harm constitutes a breach of [the] standard [to take reasonable care], then presumably injury inflicted deliberately or recklessly constitutes a more egregious departure from the norm set by the law. In terms of general principle, therefore, there is nothing illogical in breach of

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38 *Dean* (n 9) [26] (Basten JA, Beazley and Macfarlan JJA agreeing).
39 Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 78.
40 Ibid 88.
41 Iain Field, 'Good Faith Defences in Tort Law' (2016) 38 *Sydney Law Review* 147, 163–4.

> duty for the purposes of the tort of negligence extending to harm deliberately, as well as carelessly, inflicted.[42]

One can find judicial support for such views.[43]

Of course, a plaintiff who was the victim of intentionally caused harm may not be able to prove such intention; or he or she may simply disavow such an attempt, being satisfied with more restricted damages under the CLAs for negligence claims. However, does this mean that a defendant could argue that, even where a plaintiff does prove intention, he or she nonetheless should be limited by personal injury damages provisions that apply to 'negligence' (relevantly only in South Australia) because negligence includes, on the logic of nesting, intentional acts?[44] This argument can be dealt with quickly. A plaintiff who can show a higher level of culpability ought not to have his or her damages limited by provisions that apply to negligence, even if his or her claim is in the tort of negligence and proof of that higher level of culpability is therefore unnecessary to establish liability. To conclude otherwise would be inconsistent with the legislative intention discernible in the CLAs. This follows from the stated purposes of the CLAs to implement the recommendations of the *Review of the Law of Negligence Final Report* ('*Ipp Report*'),[45] which was only concerned with the tort of negligence and other failures to take reasonable care. The *Ipp Report* recommendations were not purporting to alter the law in relation to intentionally

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42 Handford (n 11) 30.

43 See, eg, the various judgments in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, in the context of whether suicide constitutes 'contributory negligence'. Lord Hoffmann stated: 'I recognise, of course, that it is odd to describe [the intentional act of committing suicide] as having been negligent. [The deceased] acted intentionally and intention is a different state of mind from negligence. On the other hand, the "defence of contributory negligence" at common law was based upon the view that a plaintiff whose failure to take care for his own safety was a cause of his injury could not sue. One would therefore have thought that the defence applied a fortiori to a plaintiff who intended to injure himself. The late Professor Glanville Williams, in his book *Joint Torts and Contributory Negligence* (1951), p 199, expressed the view that "contributory *intention* should be a defence." ... Logically, it seems to me that Professor Glanville Williams is right (at 369–70).' Presumably, Lord Hoffmann's reference to a 'state of mind' for negligence is intended to mean a standard of conduct. See also Lord Jauncey at 377 (no difference between accidentally or intentionally pushing one's hand into a vat of boiling water), and Lord Hope at 383.

44 This argument has the strongest potential in South Australia because intentionally caused harm has not been expressly excluded (whereas it has been excluded in the Tasmanian CLA, which also only applies the damages restrictions to 'breach of duty'). In Tasmania, however, such a nesting argument could also make a difference where a defendant intentionally trespassed, but without an intent to cause injury. In such a case, the exclusion of the operation of the CLA in relation to conduct intended to cause injury would not apply, but the personal injury damages provisions would nonetheless still not apply (being limited to negligence claims) unless such a nesting argument were accepted.

45 *Review of the Law of Negligence* (Final Report, September 2002) ('*Ipp Report*'). The *Ipp Report* can be accessed at <https://treasury.gov.au/review/review-of-the-law-of-negligence>.

caused injury.[46] The scheme of the other CLAs is that conduct that meets higher thresholds of culpability than negligence should not be subject to the same restrictions as claims based on failures to take care, and the South Australian CLA should be interpreted consistently with that approach.

B *The Meaning of 'Intentionally Caused Injury'*

What does conduct that is 'intended to cause injury' mean? The answer to this question is important both for determining (1) whether, in many jurisdictions, the personal injury damages limitations apply, and (2) whether, in Queensland, exemplary (and aggravated) damages are available.[47]

As noted above, it has been held that s 3B(1)(a) of the New South Wales CLA looks to the nature of the conduct found to occur, rather than to the cause of action that has been pleaded. As Leeming JA stated in *Croucher v Cathia*, s 3B(1)(a)

> does not operate upon the particular *cause of action*, but instead upon the particular *act* which gives rise to the civil liability and the *intent* of the person doing that act (I pass over the question whether and if so how s 3B(1)(a) applies to intentional omissions to act). This was the point made by Basten JA in *Dean v Phung* [2012] NSWCA 223 at [10]: 'the statutory scheme is not identified by reference to a particular cause of action'.
>
> A cause of action in battery may be established where the defendant's conduct is either intentional or alternatively merely negligent. The former would engage s 3B(1)(a) and the latter would not. In other words, the language of 'intentional tort' is an unsafe guide to whether s 3B(1)(a) is engaged ... [48]

References to 'intentional torts' are therefore unhelpful for establishing exclusions under the New South Wales CLA (and those jurisdictions with a similar framework). In any case, that label is a misnomer, since the intention refers to the doing of the act with volition; it does not require 'an understanding as to its nature and quality'.[49] For the purposes of the s 3B(1)(a) exception, however, such an understanding is required. This makes it more difficult for plaintiffs to establish the requisite intention and, therefore, the exclusion. In effect, a plaintiff needs to show that the defendant acted with two intentions: first, that his or her *act* was intentional or volitional; and, secondly, that that act was done subjectively with

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46 See, eg, *Ibbett* (n 18) [116]–[119] (Ipp JA). The *Ipp Report* (n 45) notes, at [1.14], that it does not consider 'liability for intentionally or recklessly caused personal injury'.

47 In the NSW CLA, s 21 excludes exemplary damages only for 'negligence'; therefore, such damages will be available for an intentional trespass that is not intended to cause injury.

48 *Croucher* (n 10) [33]–[34], citing *White* (n 22) [132].

49 *Fede v Gray* [2018] NSWCA 316, [170]–[172] (Basten JA, Meagher JA agreeing) ('*Fede*'). See also *Croucher* (n 10) [20].

the intent to injure.[50] In *Fede v Gray*, the mentally disturbed and delusional defendant bit the plaintiff police officer in the leg, drawing blood.[51] Although the New South Wales Court of Appeal held, unanimously, that the act of biting was intended, as it was not involuntary,[52] nonetheless the Court held, by majority, that the bite was not intended to cause injury, given that the defendant did not understand the nature or quality of his act.[53] Consequently, the CLA damages caps applied.

Particular difficulties have arisen in applying the exclusion in the New South Wales CLA to claims in the medical context. A defendant who provides medical procedure without consent, although clearly committing a trespass, does not necessarily 'intentionally cause injury' thereby. Instead, the plaintiff would need to show that the medical procedure was motivated solely by a non-therapeutic purpose and unnecessary, such that the patient's consent was for a different, and presumed necessary, procedure. In such a case, it appears to suffice that the procedure was objectively unnecessary, that is, 'it was not capable of constituting a therapeutic response to the patient's condition'.[54] Further, unnecessary medical procedures can be said to have been intended to cause injury.[55] The legislative caps on damages will not apply and exemplary damages are available. If the procedure has some therapeutic purpose, but the patient did not consent to it, being able to prove a fraudulent intent on the part of the practitioner, going at least to the nature of the acts done,[56] then that conduct also constitutes trespass.[57] It does not necessarily follow, however, that the conduct therefore qualifies as being done

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50 *Fede* (n 49) [191] (Basten JA, Meagher JA agreeing): the term 'intent' is therefore used in two senses. As to the first, as was stated in *Carter v Walker* (2010) 32 VR 1, 38 [215] (Buchanan, Ashley and Weinberg JJA), 'if the act is voluntary, and the defendant "meant to do it" in the sense of meaning to contact the plaintiff, it will be relevantly intentional' (footnote omitted).

51 *Fede* (n 49).

52 Ibid [121]–[122], [137] (McColl JA), [195]–[196] (Basten JA, Meagher JA agreeing).

53 Ibid [206] (Basten JA, Meagher JA agreeing), [119], [138] (McColl JA dissenting).

54 *White* (n 22) [73], summarising the majority position in *Dean* (n 9) [65] (Basten JA and Beazley JA). It will not be necessary to show that the defendant acted fraudulently at least by being reckless as to the necessity of treatment, as required by the dissenting judge, Macfarlan JA at [94]. Leeming JA in *White* noted that there is support for both positions but did not indicate which view he preferred (at [74]).

55 *Dean* (n 9). One would assume this only applies to invasive or substantive medical procedures and not, say, to an x-ray. Similarly, an innocent trespasser who mistakenly believes that consent has been given, eg, because of an administrative error, and performs an unnecessary procedure, can probably not be said to have intended such injury, but the question was not considered in the cases under consideration.

56 *White* (n 22). It may also be argued that fraud not going to the nature of the acts being done may be sufficient to vitiate consent where the defendant's purpose is not within the plaintiff's consent. See the discussion at [53]–[72].

57 Ibid.

with the intent to cause injury. If it does not, the limitations on personal injury damages in the CLA will apply. That said, however, under the New South Wales CLA, for the latter type of trespass at least, exemplary and aggravated damages are not excluded (the claim not being in 'negligence').[58]

One issue that has arisen is what constitutes 'injury' for the purposes of the requisite intent to cause injury. In *Hamilton v State of New South Wales [No 13]*, Campbell J held that the 'infliction of a deliberate blow accompanied with the intent to cause some injury even of a temporary nature would be sufficient' to meet this requirement, as would 'the deliberate infliction of physical violence intended to cause pain and submission to the will of the police officer'.[59] That conclusion seems warranted, for otherwise conduct such as torture that is intended to cause pain, but which may not be intended to leave lasting physical damage, would not qualify as relevantly intentional. Further, in *New South Wales v Ibbett* ('*Ibbett*'), the New South Wales Court of Appeal held that an intent to cause an apprehension of physical violence satisfies the 'intentional injury' requirement. Hence, an intentional assault qualifies, even where no physical injury results.[60] This conclusion is perhaps more questionable for reasons discussed in Part III(C) below.

It is not clear whether the same can be said for an intentional false imprisonment. Is the intent to restrain or imprison — albeit an obvious infringement of a person's liberty — also an intent to cause injury? That question was left open in *State of New South Wales v Le*.[61]

In South Australia, the legislature has not used the language of 'intended to cause injury' to *disapply* the CLA and, specifically, the personal injury damages provisions, but instead *applies* those provisions to negligence and other 'unintentional torts'.[62] By inference, does this suggest that all 'intentional torts' are excluded from the relevant provisions? And does 'intentional torts' encompass all claims that are framed as causes of action in trespass? If so, and if

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58 In *White*, ibid, the issue of exemplary damages did not arise, as the Court had dismissed the claim that the consent was vitiated by fraud, leaving the plaintiff with her sole claim in negligence.

59 *Hamilton* (n 9) [184]–[194].

60 *Ibbett* (n 18) [11] (Spigelman CJ), [120]–[130] (Ipp JA) and [217] (Basten JA) reaching the same conclusion. This issue was not considered on appeal to the High Court: *Ibbett (HC)* (n 30). Does the conclusion apply where the acts of trespass are intended (ie deliberate) but are innocent, perhaps even reasonable, where, eg, a defendant mistakenly believes they have statutory authority to commit the assault (or, similarly, the false imprisonment or battery)?

61 *Le* (n 6). Perhaps, the answer to this question depends on whether the focus of the term 'injury' is on intended substantial consequences (eg mental distress, humiliation, etc, from an assault) or merely on an intended interference in the right (namely, liberty) itself. However, even if the former is the case, any non-trivial infringement of liberty would also involve humiliation, etc.

62 See SA CLA, s 51.

a plaintiff were able to frame his or her claim as one for trespass to person, even though the injury was negligently caused,[63] then he or she might be able to avoid the limitations on personal injury damages. Trespass is generally described as an intentional tort; the plaintiff need only show the elements of direct contact and need not allude to fault.[64] Therefore, if the reference to 'torts' is a reference to causes of action, this would allow for the circumvention of the damages restrictions even for negligently caused harm (that is, the trespass claim is not one for an 'unintentional tort'). The more likely interpretation, however, is that 'unintentional *torts*' refers to the underlying *act* or *wrong* causing the plaintiff's loss and, therefore, if the alleged 'trespass' was a negligent infringement, that 'tort' is, indeed, unintentional. There do not appear to be any decisions that consider the point.

C *Intentional Torts and Personal Injury: The Relevance of the Damages Sought*

In Queensland, the CLA does not expressly exclude claims for 'intentionally caused injury', except where exemplary or aggravated damages are sought (s 52). The Queensland Court of Appeal has nevertheless interpreted s 52 so as to reach a similar outcome to that in New South Wales, namely, that the CLA restrictions on damages do not apply to trespass claims for damages for outrage, humiliation, indignity and distress, etc, because such damages are not included within the concept of personal injury damages.[65] It also follows from this conclusion that exemplary and aggravated damages are available for trespass claims, even where the trespass was not intended to cause injury. It is necessary to explain in greater detail how the Court arrived at that conclusion.

Section 50 of the Queensland CLA states:

> **50 Application of ch 3**
>
> Subject to section 5, this chapter applies only in relation to an award of personal injury damages.

Section 52 (which is found in ch 3), recall, states:

> **52 Exemplary, punitive or aggravated damages can not be awarded**
>
> (1) A court can not award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages.

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63 As already noted, this is clearly still permitted by common law. See *Williams v Milotin* (1957) 97 CLR 465; *Croucher* (n 10).

64 For discussion of the history of trespass claims, see *Croucher* (n 10) [19]–[26].

65 See *Bulsey* (n 28), discussed further below. That conclusion is probably also supported in New South Wales, but in *Ibbett* (n 18) [21]–[22], Spigelman CJ and Basten JA left the question open.

> (2) Subsection (1) does not apply to a claim for personal injury damages if the act that caused the personal injury was —
>
> (a) an unlawful intentional act done with intent to cause personal injury; or
>
> (b) an unlawful sexual assault or other unlawful sexual misconduct.

How do these sections impact on claims in trespass? Subject to the issue considered in Section E of this Part below, the absence of a general exclusion for intentionally caused injury potentially leads to the harsh outcome that, unlike in other jurisdictions, personal injury damages in Queensland are subject to the limitations in ch 3 even where the injury was intended. Obviously, if a trespass was intended to cause personal injury, then s 52(2)(a) does allow for exemplary and aggravated damages in such cases, but other limitations on damages would still potentially apply. But what if such intention cannot be proved?

A plaintiff who has a claim in trespass, such as for false imprisonment or battery, may not be able to show that the defendant intended to cause injury[66] (and, indeed, no physical harm may have been caused).[67] For example, a defendant may have acted under a mistaken view as to the plaintiff's consent, or on a mistaken belief as to the lawfulness of his or her actions. In such cases, do the general ch 3 restrictions apply? The answer is 'yes' if personal injury is suffered and damages are claimed for that injury, but 'no' if the plaintiff claims damages for the trespass itself. Further and more specifically, are exemplary and aggravated damages available? The answer is 'yes'. These answers follow from the conclusion that the trespass claim per se is not one for personal injury damages.

The issue turns on whether the term 'claims for personal injury damages' includes damages for humiliation, distress, indignity, and the like, caused by an assault, battery or false imprisonment. As already noted above, such compensatory damages are available in response to an infringement of the plaintiff's right — that is, they apply to any 'run of the mill' trespass claim. Where, however, aggravating circumstances exist, the damages may be increased to provide larger compensation. In Queensland, the Court of Appeal in *Bulsey* held that damages for humiliation (etc) are not caught by ch 3, as they are not for personal injury damages.[68] The Court relied on the High Court authority of *New*

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66 Ibid [92].

67 Even a battery need not cause personal injury: *New South Wales v Williamson* (2012) 248 CLR 417, 428–9 [33] (French CJ and Hayne J) ('*Williamson*'), citing *Watson v Marshall and Cade* (1971) 124 CLR 621.

68 *Bulsey* (n 28). Only a few of those restrictions are probably relevant in any case, although the statutory regime for calculating non-pecuniary ('general') damages would apply to restrict such non-pecuniary losses (Qld CLA, s 62). See *Bulsey* (n 28) [81]–[82]. Procedural requirements under the *Personal Injury Proceedings Act 2002* (Qld) would also apply.

South Wales v Williamson ('*Williamson*') to support that conclusion.[69] In *Williamson*,[70] French CJ and Hayne J (Kiefel J agreeing) held that the phrase 'personal injury damages' as used in s 11 of the New South Wales CLA does not extend to a claim for damages for the deprivation of liberty, despite the broad definition of 'injury' in that Act as meaning 'personal injury', which in turn includes 'impairment of a person's physical or mental condition'.[71] Their Honours held that the

> claim for false imprisonment was necessarily a claim for damages on account of the deprivation of liberty with any accompanying loss of dignity and harm to reputation. The deprivation of liberty (loss of liberty and harm to reputation) is not an 'impairment of a person's physical or mental condition' or otherwise a form of 'injury' within s 11 of the [New South Wales CLA].[72]

Implicitly, their Honours' reasons also lend support to the further conclusion that damages for loss of dignity, humiliation (etc) caused by a battery or assault are also not 'personal injury damages' under the relevant CLA provisions.[73] Certainly, the Queensland Court of Appeal in *Bulsey* took that view,[74] relying also on Spigelman CJ in *Ibbett*, who stated:

> The concept of 'personal injury' … has rarely, if ever, been used to refer to harm to reputation, deprivation of liberty, or to injured feelings such as outrage, humiliation, indignity and insult or to mental suffering, such as grief, anxiety and distress, not involving a recognised psychological condition. … An award for the emotional harm involved in the apprehension of personal violence would not generally be regarded as an award for 'personal injury damages'.[75]

It followed from this that aggravated damages were available in *Bulsey* even though the defendants had not intended to cause injury:

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69 *Bulsey* (n 28) [85]–[86] (Fraser JA; Atkinson and McMeekin JJ agreeing). See also *Majindi* (n 25) (exemplary damages for false imprisonment available as not a claim for personal injury).

70 *Williamson* (n 67).

71 See NSW CLA, s 11.

72 *Williamson* (n 67) [34] (French CJ and Hayne J), [45] (Kiefel J). The question arose for the purposes of applying the legal cost limitations in the *Legal Profession Act 2004* (NSW). Section 337(1) of that Act, however, defines 'personal injury damages' as having the same meaning as in pt 2 of the NSW CLA. The other two judges, Crennan and Bell JJ, did not express any opinion on the matter, having decided the case on other grounds. See *Williamson* at [38[–[39] and the related case of *Certain Lloyd's Underwriters Subscribing to Contract No IHOOAAQS v Cross* [2012] HCA 56.

73 *Williamson* (n 67) [32]–[33] (French CJ and Hayne J). That conclusion appears to find further support in *Moore v Scenic Tours Pty Ltd* [2020] HCA 17 and in its approval of *Williamson*.

74 *Bulsey* (n 28) [85]–[86]. Under the Schedule to the Qld CLA, 'personal injury' includes '(c) psychological or psychiatric injury', and 'personal injury damages' means 'damages that relate to the death of or injury to a person'. It could be argued, contrary to the Court's conclusion, that humiliation, distress (etc) are a form of psychological injury.

75 *Ibbett* (n 18) 172 [21].

> An award of aggravated damages for the assault, battery and wrongful imprisonment which makes no allowance for personal injury is not an award of personal injury damages.[76]

What if the plaintiff who has been assaulted or battered also suffers other, consequential physical losses, which were not intended, such as where he or she runs in fear and injures him- or herself while doing so?[77] Although the consequential damages themselves will be capped by the personal injury restrictions in the CLA (s 50, applying ch 3 to any 'award' of personal injury damages), are exemplary and aggravated damages available? Or does s 52 restrict such damages because the personal injury was not intended (albeit that the *act* was), such that s 52(2)(a) does not apply? Clearly, where a plaintiff abandons his or her claim for personal injury damages, then s 52 has no operation.[78] The Court in *Bulsey* went further, however, and held that the fact that a plaintiff pleads both consequential personal injury damages and other damages, such as humiliation, insult and distress resulting from assault and false imprisonment, does not preclude an award of exemplary or aggravated damages:

> In so far as personal injury results from those torts, it may be said that they create a liability for personal injury, but that is not so insofar as a plaintiff is entitled to compensation for his or her humiliation, indignity, distress, discomfort, and the like. It seems natural in this context to read s 52(1) as precluding an award of aggravated damages only in relation to the death of or personal injury to a person.[79]

Nor is compensation for humiliation, distress (etc) 'in relation to' such a claim or award precluded.[80] Accordingly, aggravated (or, less likely, exemplary) damages may be awarded to a plaintiff in addition to ordinary damages for trespasses to the person, but not in addition to any personal injury damages awards that also arise from the same trespass. That must be right. Otherwise, a plaintiff who suffers some consequential personal injury from a trespass would be unable to claim aggravated (and exemplary) damages, whereas a plaintiff who is not physically harmed would be able to so claim. As the Queensland Court of Appeal stated in *Bulsey*, '[i]t is not easy to accept that the legislative purpose was that adding injury to insult should limit the damages for the insult in that way.'[81]

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76 *Bulsey* (n 28) [98].

77 See *ACN 087 528 774 Pty Ltd (formerly Connex Trains Melbourne Pty Ltd) v Chetcuti* (2008) VR 559 ('*Chetcuti*'). Another example of consequential injury arising from trespass to the person is *New South Wales v Riley* [2003] NSWCA 208 (prisoner unlawfully arrested and suffered fractured wrist in police wagon; injury was unintended and indirect consequence of 'assault' (battery) and false imprisonment).

78 *Bulsey* (n 28) [97].

79 Ibid [100].

80 Ibid [98]; and see at [98]–[102].

81 Ibid [101].

Interestingly, however, as was noted above, the New South Wales Court of Appeal has also held that an intentional assault or battery not causing physical harm falls within the statutory meaning of 'injury' when that term forms part of the phrase 'intentionally caused injury'.[82] Is this reasoning consistent with that of the Queensland Court of Appeal in *Bulsey*? Although the terms are contained within different statutory schemes and parts thereof, there nevertheless appears to be a fundamental contradiction here, at least at a broad conceptual level. If it can be said that an intentional threat[83] that causes the apprehension of imminent physical violence causes the victim of that threat an intentional injury (according to cases interpreting the New South Wales CLA), how can it be that where damages for an assault are sought, those damages are not themselves ones for 'personal injury damages' (according to *Bulsey* in the Queensland CLA). This latter phrase also uses the term 'injury', and if the monetary award to remedy the assault is not 'personal *injury* damages', it is difficult to see how, consistently with this conclusion, the assault itself can cause 'injury', intentionally or otherwise (albeit for the purposes of a different section under a different Act).

Indeed, Spigelman CJ in *Ibbett* was alive to the possible contradiction. Although his Honour ultimately left open the question of whether damages for humiliation, distress (etc) resulting from an assault were awards of personal *injury* damages, his judgment certainly lends support to the view that they were not. This was despite his conclusion that an intentional assault was intended to cause *injury*. That conclusion was sustained by the definition of 'injury' (in s 11) for the purposes of the personal injury damages restrictions of pt 2 of the New South Wales CLA, which definition did not apply to the term 'injury' as used in s 3B(1)(a). That latter term, according to Spigelman CJ, should be 'given its natural and ordinary meaning. That meaning would encompass the harm occasioned by an apprehension of violence.'[84] The difficulty with this conclusion is that the s 11 definition is itself inclusive and to some extent circular: '"injury" means personal injury', and 'personal injury damages' is defined to mean 'damages that relate to the death of or injury to a person'. 'Injury' also includes, it should be noted, impairment of a 'mental condition'. Although Ipp JA agreed that the 'intent to injure' exception in s 3B(1)(a) was activated by the intentional assault, his Honour did not address the question of whether damages for such an injury are personal injury damages; nonetheless, his judgment appears to hint that the meaning of the two references to 'injury' may well be the same.[85] If that were so, then

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82 *Ibbett* (n 18). A battery may also be intended merely to humiliate P (ie not cause physical injury), but such a battery would also be one that was intended to injure: *Hamilton* (n 9).

83 It is questionable whether a negligent assault is possible, albeit some recent cases have confirmed that it is. See, eg, *McMaster* (n 20); *Sahade v Bischoff* [2015] NSWCA 418, [71]–[73].

84 *Ibbett* (n 18) [5]–[12], Basten JA agreeing at [216]–[218].

85 Ibid [121]–[125].

presumably, on that reasoning, 'personal injury damages' would include damages for an assault.

D *How Does 'Reckless' Conduct Fit into the Scheme of the CLAs?*

One significant issue is whether reckless conduct constitutes conduct that is *intended* to cause injury. If it does, then for those jurisdictions that have excluded intentionally caused injury from the CLAs, the personal injury damages restrictions would not apply (and, in Queensland, the restriction on exemplary and aggravated damages would not apply).

The issue therefore arises: does reckless conduct — a reckless indifference to another's safety (as defined further below) — come within the purview of intended injury, or does it only constitute negligently caused injury? A related issue is whether one can be said to intend the inevitable, or natural and probable, consequences of one's intentional act.[86]

The issue was discussed but not resolved in *Croucher v Cachia*.[87] In that case, one issue was whether a claim in battery engaged s 3B(1)(a) and therefore was not subject to the CLA restrictions on damages. Leeming JA for the New South Wales Court of Appeal noted that if the battery was done with the intent to injure, then clearly the CLA would not apply. However, the conduct in question was engaged in by a defendant who 'was recklessly indifferent to the prospect that opening and shutting the shears and thrusting them at [the plaintiff] would cause injury'.[88] Leeming JA went on to state:

> It is far from clear that conduct which is reckless, even if it amounts to an 'intentional tort' such as battery, engages s 3B(1)(a). It is perfectly clear that a battery which involves merely negligent conduct will not engage s 3B(1)(a) …
>
> … In *Hayer v Kam* [2014] NSWSC 126, when dealing with a strike out application, Hoeben CJ at CL expressed the view that, subject to authority, he would have accepted the submission that s 3B(1)(a) 'excluded any reliance upon concepts such as "recklessness"': at [38]–[39], a view which I regard as being not without force. However, even so his Honour regarded an allegation of recklessness as sufficiently arguable not to be struck out. It may also be noted that D Villa, *Annotated Civil Liability Act 2002 (NSW)* (2nd ed, 2013, Lawbook Co) at 55–56 notes that the position is unclear but expresses the view that 'it would be consistent with the purpose of the exclusion that recklessness be sufficient for the purposes of s 3B(1)(a)'.
>
> I do not think that it is appropriate to determine this point. …[89]

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86 *Dean* (n 9) [27] left this issue open.

87 *Croucher* (n 10). The Court relied on the earlier decisions of the New South Wales Court of Appeal in *Ibbett* (n 18), *Dean* (n 9) and *White* (n 22).

88 *Croucher* (n 10) [116].

89 Ibid [117]–[119].

Recklessness is a concept to which resort is made in different areas of law and it has been given different meanings; indeed, there is no inherent reason as to why recklessness cannot be given different meanings in different legal contexts. This applies even more so where the question is one of statutory interpretation. Of course, the issue here is not what 'recklessness' means for the purposes of the CLAs, since those statutes do not use that terminology. The issue under the CLAs is whether the phrase 'intended to cause injury' encompasses what might, on some definitions, be considered merely reckless conduct. Different conclusions might be reached in different jurisdictions given the different statutory contexts of each CLA. But before proceeding, it is necessary to at least start with a workable meaning of reckless conduct.

Recklessness has been usefully defined as 'awareness of a risk that certain consequences will result from conduct, and indifference to that risk'.[90] The risk must be so substantial as to have been an unreasonable one to take;[91] that is, there must be a 'conscious disregard of a substantial and unjustifiable risk',[92] as opposed to a merely foreseeable one. Awareness of the risk can be founded on the person's actual knowledge of the risks, or at least actual knowledge of facts combined with the reasonable predictions that could be drawn from those facts leading to a finding of reckless indifference. The definition of 'recklessness' given in § 2 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* is as follows:

> (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.[93]

If 'recklessness' indicates fault that sits somewhere between carelessness and intentional conduct and, specifically, conduct that is intended to cause injury, then we might say that a reckless defendant must surely also have been negligent. As a matter of logic, it appears that this higher level of fault — awareness of substantial risks — is necessarily 'nested' within the standard of reasonable care. It is a very different argument, however, to say that recklessness is a lesser form,

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90 See Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 3rd ed, 1999) 184–5, cited in Cane (n 8) 535.

91 Ibid, and Cane (n 39) 80: the required knowledge of the actor is of a risk that, *because of the likelihood* of *its outcome*, is unreasonable to take. See also Jim Evans, 'Choice and Responsibility' (2002) 27 *Australian Journal of Legal Philosophy* 97, 106.

92 *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* [2008] FCA 1920, [28] (Finkelstein J).

93 American Law Institute, *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2005).

but still a form, of establishing intention: that is, D recklessly disregarded P's safety when D caused P's injury and therefore D intended to cause that injury. Nonetheless, such an argument can certainly be made.

As Peter Cane has said, fault criteria have two components: mental elements and standards of conduct.[94] Importantly, recklessness can refer both to a mental element of legal fault and to standards of conduct, that is, the quality of that conduct.[95] In the context of the CLAs, references to an intention to cause injury go to the mental element of fault. This is because it focuses on the defendant's reason for acting (that is, to cause injury).[96] As Iain Field has noted, this distinguishes intention from recklessness, which does not describe a person's reasons for acting.[97] However, since recklessness does also include a state of mind — a reckless person has subjective knowledge of a substantial risk (or of facts that establish the obviousness of such a risk) and deliberately acts with conscious disregard for that risk — the question still remains: might such knowledge and conduct function as a substitute for proving intention, or as a basis for inferring it for the purposes of circumventing restrictions set out in the CLAs? Ultimately, the legislation does not give any real guidance to answer that question, but I tend to agree with Villa:[98] the policy of restricting damages that underpins the CLAs does not apply as forcefully to a plaintiff injured through another's reckless conduct.[99]

E *Do the Damages Limitations in the Queensland CLA Apply to Intentional Conduct?*

In most jurisdictions, the CLAs do not apply to acts that are intended to cause personal injury or death, either directly via express limits on the applicability of the CLAs, or indirectly by limiting key parts to claims arising from 'breaches of duty of care'.[100] Queensland, as always, appears to be a special case. No such general exclusion for intentionally caused injury exists in the Queensland CLA.

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94 Compare Cane (n 39) 78.

95 Ibid 79–82.

96 Ibid 82.

97 See Field (n 41) 162.

98 As cited by Leeming JA in the text above at n 89.

99 In the context of establishing intention for the purposes of trespass — ie intention in the first sense of volitional acts — Barker et al (n 10) 39–40 consider that that concept extends to where it is 'substantially certain that the act will result in contact with the plaintiff; and perhaps also if the act is reckless with respect to contact with the plaintiff'. See generally Barker et al at 37–41.

100 In Tasmania, this means that the damages restrictions do not apply even for damages for injuries that are consequential upon an intentional trespass (that was not intended to cause injury).

However, some chapters of the CLA are limited in their application to 'breach of duty' 'to take reasonable care or to exercise reasonable skill' (sch 2).[101] 'Breach of duty' is also a prerequisite to some provisions that seek to limit plaintiffs' rights.[102]

Importantly, however, ch 3 of the Queensland CLA ostensibly applies to 'awards of personal injury damages' generally (s 50) and is not limited to breaches of duty. That chapter contains similar caps and limitations on damages awards as apply in other jurisdictions. That apparent result is reinforced by the different way in which the Queensland CLA deals with exemplary damages and aggravated damages, when compared to other jurisdictions. The Queensland CLA seems to assume that intentional conduct would be captured by s 52, but for the sub-s (2) exceptions (which expressly exclude intentionally caused injury).

This would appear to be a significant difference and potentially harsh in its consequences. A defendant who intentionally injures a plaintiff, although subject in Queensland to exemplary damages, would nonetheless appear to be able to invoke the CLA's restrictions on damages contained in ch 3. Such a defendant would not be subject to higher damages awards as apply at common law (and in other jurisdictions). However, there is an unresolved question as to whether all of the provisions within ch 3 do, in fact, apply to all personal injury claims, or only ones that arise from a 'breach of duty'.

Although s 4(1) of the Queensland CLA states that the Act 'applies to *any civil claim* for damages for harm',[103] later subsections set out when various provisions of the Act *commence* their operation. These subsections, however, contain odd restrictions that seemingly could narrow the scope of the operation of the Queensland CLA. For example, s 4(4) states that many of the restrictive personal injury sections apply 'in relation to *a breach of duty*' happening after the date of assent.[104] On the other hand, other sections in ch 3 covering personal injury damages 'apply *in relation to personal injury damages* regardless of when the injury

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101 This is defined as a duty of care in tort, or a contractual duty that is 'concurrent and coextensive with a duty of care in tort', or a statutory duty that is 'concurrent 'with such a duty: Qld CLA, sch 2.

102 For example, s 45 concerning plaintiffs who have committed an indictable offence. Section 45 applies to such plaintiffs if their claims are for a defendant's 'breach of duty' but not, it would seem, if they arise in battery, assault or false imprisonment, for example. As the Queensland Court of Appeal in *Corliss v Gibbings-Johns* [2010] QCA 233, [39] and [41] ('*Corliss*'), suggested, albeit not conclusively, 'there is a substantial argument' that s 45 does not apply to such action: 'The text of s 45 therefore indicates that the section is concerned with a duty of care in tort or a concurrent duty of care … Neither the text of s 45, nor its statutory context, indicate that it applies to a case in which civil liability arises from an intentional tort, such as an assault.'

103 Emphasis added.

104 Emphasis added.

happened' (s 4(6)).[105] These provisions, although purporting to be commencement provisions, use inconsistent language as to what *sort of claims* are to commence. Some sections of ch 3 commence their application for claims for breach of duty, others in relation to claims for personal injury damages more generally. All of this may simply be the unintended consequences of poor drafting and, perhaps, inconsistently or haphazardly borrowing language used in other, differently constructed, legislative schemes or from within parts of the Queensland CLA itself.[106]

Judicial decisions have not resolved the questions. The Queensland Court of Appeal, in the earlier case of *Corliss v Gibbings-Johns*,[107] seemed to assume that 'many of the CLA's provisions extend beyond claims for damages for personal injury or death resulting from negligence' and, specifically, gave the example of ch 3 provisions about the assessment of damages for personal injury. It noted that these 'would appear to apply to a wide variety of causes of action, including intentional torts'. [108] More recently, however, in *Bulsey*, the same Court left open the question of whether all or some of ch 3 applies to the intentional torts at all, since these do not involve a 'breach of duty'. [109] As Douglas et al have observed, s 4 is undoubtedly 'clumsily drawn' and '[c]urial interpretation is awaited'.[110]

IV Conclusion

The legislative schemes of the CLAs are complex, and this complexity extends to basic questions such as the circumstances in which the CLAs (or parts thereof) apply. This article has considered some of the difficulties that have arisen in interpreting whether, and, if so, what, types of intentional conduct are subject to the application of the CLA provisions, specifically those provisions that restrict or limit plaintiffs' damages awards. Much of the case law discussed in this paper is from New South Wales, which is not surprising given that that State has some of the most significant restrictions and is the largest of Australia's jurisdictions. The rationale behind some of the legislative choices made is not always clear. It is therefore useful, by way of conclusion, to attempt to summarise the conclusions reached in this article, at least with respect to the New South Wales CLA, by way of the following table.

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105 Emphasis added.

106 Similarly, although s 5 of the Qld CLA does not expressly exclude conduct that intends to cause injury, the introduction to it (sub-s (1)) states: 'This Act does not apply in relation to deciding liability or awards of damages for personal injury if the harm resulting *from the breach of duty* is …' (emphasis added).

107 *Corliss* (n 103).

108 Ibid [36].

109 *Bulsey* (n 28) [103].

110 Douglas et al (n 20) 18 [4.5].

Type of conduct	Do restrictions on damages apply?	Are exemplary/aggravated damages available?
Negligent conduct	Yes	No
Personal injury consequential upon intentional trespass (ie injury not intended)	Yes	Yes (not 'negligence')
Personal injury intended	No	Yes (intentional injury exclusion applies and not 'negligence')
Intentional trespass in form of wholly unnecessary medical procedure	No (constitutes 'intended injury')	Yes (ditto)
Intentional trespass and no physical or psychiatric injury	No, for assault and battery ('injury' in form of assault, battery is intended). Question open re false imprisonment. Open question in NSW whether qualifies as award of personal injury damages at all (compare Qld)	Yes, for all (ditto)
Intentional but innocent trespass with or without consequential physical or psychiatric injury	Uncertain (is there an intent to injure; are damages for the indignity, etc, personal injury damages?)	Yes, in theory (as claim not in 'negligence'), but unlikely in practice

Table 1: Application of Damages Restrictions of Different Types of Intentional Conduct

CYBER-SYSTEMICS, SYSTEMIC GOVERNANCE AND DISRUPTION OF THE CRIMINAL LAW

BRENDAN WALKER-MUNRO*

Criminal law regulators face difficulties in adapting to technological change. They must often operate in environments of significant uncertainty, with changing policy aims and legislative provisions that fail to 'move with the times'. Rather than engaging with robust, let alone radical theoretical examination of their actions and structure, regulatory organisations struggle to enforce laws in communities affected by technological or systemic change, often leading to claims of overcriminalisation, inadequacy, regulatory overreach or inconsistency. This article suggests that dealing with disruptive criminality solely through legal instruments is a policy failure. Instead, a radical new framework is proposed, embedded in cybernetics (a transdiscplinary approach to exploring regulatory systems). Such a framework — systemic governance — offers a substantially altered way of managing regulatory relationships that resists disruptive change and challenges regulators to find new ways of engaging with the population they seek to influence.

I INTRODUCTION

Over the past 20 years, criminal law regulators[1] have experienced a range of difficulties in dealing with crime in the face of increasingly evolving technology. The uptake by society of digital transactions, the increasing diversity of mobile devices, and the advent of the Big Data revolution present new and diverse policy challenges for the sciences of regulation, crime control, policing and law enforcement. Yet many policymakers and regulatory agencies continue to adhere to tried and trusted theoretical constructs without considering more radical opportunities for strategic transformation. The approach taken in this article is a

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1 For the purposes of this article, 'criminal law regulators' are those whose purpose is to engender compliance by their regulated populations with legislation that the legislature warrants sufficiently important to protect with punitive sanctions. Although such regulators may also have access to administrative, disciplinary or civil sanctions, those sanctions traditionally invoke a protective jurisdiction.

proposal for such consideration. It advances a novel approach — 'systemic governance'[2] — to regulation by government bodies, which is founded in cyber-systemic[3] theoretical and methodological practice. The approach is informed by the inevitable uncertainty inherent in the types of challenges faced by modern criminal law regulators.

This article proceeds as follows. In Part II, regulation is discussed, and disruption is introduced as a fundamental policy challenge by virtue of its creation of regulatory uncertainty. In Part III, systemic governance as a response mechanism is introduced, its use in two Australian contexts explored, and several lessons learned in those contexts noted. Part IV then discusses the ways in which systemic governance can be articulated within a criminal law enforcement context. Finally, in Part V, the article concludes by suggesting a number of domains for further scholarly inquiry.

II The Issue of Disruption

For some years now, governments, particularly in Australia, have been expressing various views on the future of regulatory activity.[4] One of the most public discussions occurred after 4 February 2019, when the report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was tabled in Australia's Parliament.[5] That report detailed a litany of bad behaviour on the part of banks and other financial institutions, such as the charging of deceased clients for financial advice and providing loans to

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2 The term is defined as 'institutional change to involve the deliberate, or purposeful, replacement of existing formal and informal institutions or the creation of new institutions in a socially desired way': Raymond L Ison, Kevin B Collins and Philip J Wallis, 'Institutionalising Social Learning: Towards Systemic and Adaptive Governance' (2015) 53 *Environmental Science & Policy* 105, 106.

3 Cyber-systemics is defined here as the use of rational, dynamic and holistic approaches to guide responses to social and environmental feedback, much like a sailor steers a ship. See Ray Ison, Jason Alexandra and Philip Wallis, 'Governing in the Anthropocene: Are There Cyber-Systemic Antidotes to the Malaise of Modern Governance?' (2018) 13 *Sustainability Science* 1209.

4 Peter Homel, *The Whole of Government Approach to Crime Prevention* (Australian Institute of Criminology Trends and Issues in Criminal Justice Series No 287, November 2004); Australian Taxation Office, *Targeting Tax Crime: A Whole-of-Government Approach* (September 2012) <https://www.ato.gov.au/assets/0/104/300/362/844028fb-8bb1-447d-a2f3-b655496bf442.pdf>; Department of Home Affairs, *Commonwealth Serious Organised Crime Strategic Framework: Overview* (November 2016) <https://www.homeaffairs.gov.au/criminal-justice/files/organised-crime-strategic-framework-overview.pdf>; Joint Committee on Law Enforcement, Commonwealth Parliament, *Inquiry into Human Trafficking* (Final Report, 18 May 2017) 9.

5 Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2019) vol 1 ('*Royal Commission 2019 Report*').

customers who had no feasible means of repayment. However, it was also scathingly critical of the financial regulators — the Australian Securities and Investments Commission ('ASIC') and the Australian Prudential Regulatory Authority ('APRA') — finding that 'the law was too often not enforced at all, or not enforced effectively'.[6] In response to the Royal Commission's findings, ASIC was quick to announce that it had changed its enforcement approach to one dubbed 'why not prosecute'?[7]

ASIC's position is understandable, especially in response to such fierce criticism. Many modern regulators utilise Ayres and Braithwaite's compliance pyramid, derived from the theory of responsive regulation.[8] ASIC's compliance pyramid (shown in Figure 1) draws its name from the theoretical construct of sanctions, which is 'intended to reflect the theoretical less frequent use of the most severe sanctions, which form the apex of the pyramid, compared to the persuasion-focused methods of resolution that form the pyramid's base'.[9]

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6 Ibid ch 7, 413.

7 Stephen Long, 'ASIC eyeing criminal prosecutions after royal commission', *ABC News* (online, 19 February 2019) <https://www.abc.net.au/news/2019-02-19/asic-says-it-is-getting-tough-post-banking-royal-commission/10826442>.

8 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (Oxford University Press, 1992).

9 Aakash Desai and Ian Ramsay, 'The Use of Infringement Notices by ASIC for Alleged Continuous Disclosure Contraventions: Trends and Analysis' (University of Melbourne Legal Studies Research Paper No 547, 2011) 22–3.

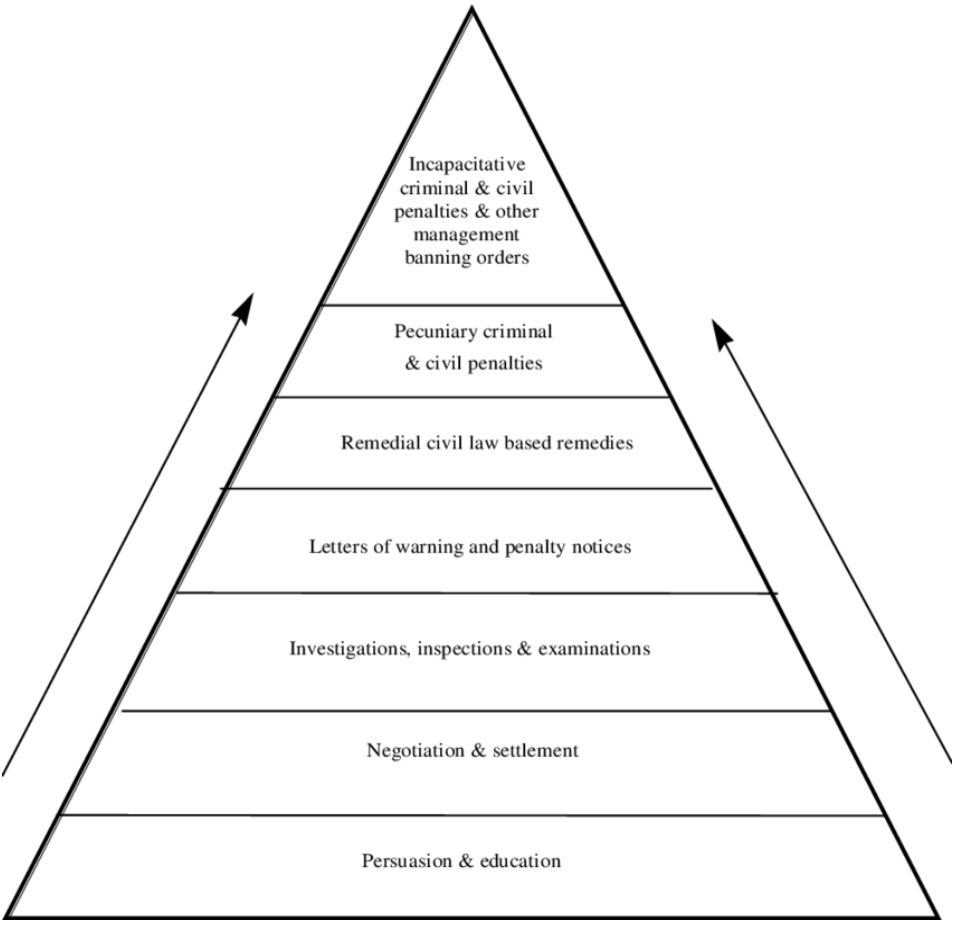

Figure 1 — The ASIC compliance model[10]

Ayres and Braithwaite's responsive regulation suggests that criminal law regulators should only escalate their sanctions based on persistent non-compliance or recalcitrance, thus reserving the 'big guns'[11] of criminal prosecution for the most high-risk or egregious offenders. Objectively however, ASIC has *lowered* the threshold at which it will apply the peak of its enforcement powers, such that those whose conduct attracts criminal sanction under

[10] George Gilligan, Paul Ali and Andrew Godwin, 'An Analysis of Penalties under ASIC Administered Legislation: Scoping the Issues' (Centre for International Finance and Regulation and Melbourne Law School, Working Paper No 71, 31 May 2015), 16.

[11] See John Braithwaite, 'Convergence in Models of Regulatory Strategy' (1990) 2(1) *Current Issues in Criminal Justice* 59.

corporations law will now be brought to account through the courts, rather than having to comply with some form of enforceable undertaking. However, when such an approach is viewed subjectively by a potential offender, the penalty itself has not changed, and neither has the possibility of being caught or the culture of the regulated environment. In the words of the former chairman of the United Kingdom Financial Standards Authority, holding people accountable to legislative principles 'does not work with individuals who have no principles'.[12]

The historic failings of ASIC are therefore broader than simply an unwillingness to prosecute, or, perhaps more accurately, an over-subscription to the use of enforceable undertakings. The Royal Commission was also clear in its views on the challenges of ASIC's participation in and promotion of self-regulation. With self-regulation, participants are responsible for regulating each other's conduct by approbation, custom and honourable adherence to best practice in a manner often referred to as 'government by gentlemen'.[13] Unfortunately, when parties are left to their own devices in an environment where it is logistically impossible for ASIC to constantly oversee and monitor every possible individual to which the corporations law applies or could apply,[14] this has resulted in massive under-reporting of relevant incidents — from charging clients who were deceased and giving inadequate financial advice, to failures to report suspected financial crime and money laundering.[15]

ASIC's historic failures present an interesting lens through which to examine the nature of regulatory practice as a system, and for determining whether that system remains fit for purpose. Whether regulation is described as a mechanism of control by the State over certain aspects of our lives that have 'shared meaning or value',[16] the 'realization of public goals' through interventionism,[17] or a

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12 Julia Finch, 'No More Mr Nice Guy — Hector Sants is Dirty Harry', *The Guardian* (online, 13 March 2009) <https://www.theguardian.com/business/2009/mar/13/fsa-hector-sants-london>.

13 Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford University Press, 2003) 7.

14 That ASIC is incapable of surveilling everyone, and must therefore pick and choose its regulatory targets, is observed by Dimity Kingsford Smith, 'A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector' (2011) 44(3) *University of British Columbia Law Review* 698; Vicky Comino, 'Towards Better Corporate Regulation in Australia' (2011) 26(1) *Australian Journal of Corporate Law* 36; Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 2018) vol 1, 271–2.

15 Royal Commission (n 5) 107.

16 Philip Selznick, 'Focusing Organizational Research on Regulation', in Roger Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press, 1985), 383.

17 Tom Christensen and Per Laegreid, 'Agencification and Regulatory Reforms' (Paper presented to the SCANCOR/SOG Workshop Automization of the State: From Integrated Administrative Models to Single Purpose Organisations, Stanford, 1–2 April 2005), 3.

process of rule-creation and enforcement,[18] such regulation inevitably involves the exercise of social or State influence in the spheres of private or economic life.[19] Regulated entities find aspects of their behaviour constrained or shaped by legal, economic or normative strictures,[20] and thus their behaviour is shaped towards producing outcomes in line with the State's expectations of behaviour (see Figure 2).[21]

Figure 2 — The process of regulation

Yet if the process of regulation as outlined in Figure 2 is the result of this system, then non-compliance surely indicates a failure of the system. Even if minor, unintended or inconsequential, each instance of inability or unwillingness of a regulated environment to do what is required of it by law or custom indicates a failure in the regulatory system as a whole. After all, 'if the system is not doing what it is supposed to do — when it is not fulfilling its purpose — it is failing'.[22] There has been a flurry of scholarship suggesting that contemporary governance

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18 Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford Scholarship Online, 2001); Karen Yeung, 'Design for the Value of Regulation', in Jeroen van den Hoven, Pieter E Vermaas and Ibo van de Poel (eds), *Handbook of Ethics, Values, and Technological Design: Sources, Theory, Values and Application Domains* (Springer, 2015) 447–72.

19 Julia Black, 'What is Regulatory Innovation?', in Julia Black, Martin Lodge and Mark Thatcher (eds), *Regulatory Innovation* (Edward Elgar, 2005); Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2nd ed, 2012) 3.

20 Peter Grabosky, 'Beyond the Regulatory State' (1994) 27(2) *Australian & New Zealand Journal of Criminology* 192; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103; Peter Grabosky, 'Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process' (2013) 7(1) *Regulation & Governance* 114.

21 Cary Coglianese, *Measuring Regulatory Performance* (OECD Expert Paper No 1, August 2012).

22 Sandro Luis Schlindwein and Ray Ison, 'Confronting Total Systemic Failure? The May 2018 Truckers' Strike in Brazil' (2019) 37(1) *Systems Research and Behavioural Science* 119, 120.

systems are no longer achieving their primary role — that is, the achievement of compliance (whether with legislative requirements or social and economic norms).[23]

Therrien et al describe exactly such failures in the context of the Lac-Mégantic rail disaster of 2013. Lac-Mégantic, a small province in Quebec, was the site of a derailment and explosion of a train transporting over seven million litres of petroleum, killing 47 and destroying half of the city. There were a number of indications prior to the accident that a governance failure was occurring or about to occur, and blame was attributed variously to the rail operator, the train conductor and the train's mechanics. The rail operator ultimately declared bankruptcy when it could not afford the clean-up costs. Therrien et al suggest that

> [t]he refusal or inability of the risk governing network to act on these weak and strong signals of wicked problems may originate in the lack of efficiency to govern loosely coupled problems. In such context where the ability of regulatory authorities to fulfil their mission to manage risk and protect the population was repeatedly criticised, these organisations found themselves in a legitimacy crisis.[24]

The term 'wicked problems' employed by Therrien et al has a specific meaning and a long history.[25] It was originally coined by mathematician Horst Rittel to describe complex, uncertain, multi-jurisdictional problems with no easily designed solutions: a wicked problem is one involving a 'class of social system problems which are ill-formulated, where the information is confusing, where there are many clients and decision makers with conflicting values, and where the ramifications in the whole system are thoroughly confusing'.[26] There are numerous spheres of industry where illicit or unwanted behaviour cannot be targeted (or targeted adequately) by a regulatory process to produce outcomes

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23 Stein Ringen, *The Economic Consequences of Mr Brown: How a Strong Government was Defeated by a Weak System of Governance* (Bardwell Press, 2009); Ed Straw, *Stand and Deliver: A Design for Successful Government* (Treaty for Government, 2014); Paul Kelly, *Triumph and Demise: The Broken Promise of a Labour Generation* (Melbourne University Press, 2014); John Micklethwait and Adrian Wooldridge, *The Fourth Revolution: The Global Race to Reinvent the State* (Penguin Books, 2014); Laura Tingle, 'Political Amnesia. How We Forgot How to Govern' (2015) *Quarterly Essay* 60; RW Johnson, *How Long Will South Africa Survive? The Looming Crisis* (Jonathan Ball, 2015).

24 Marie-Christine Therrien et al, 'Tightly Coupled Governance for Loosely Coupled Wicked Problems: The Train Explosion in Lac-Mégantic Case' (2016) 19(4) *International Journal of Risk Assessment and Management* 260, 261–2.

25 See, eg, C West Churchman, 'Wicked Problems' (1967) 14(4) *Management Science* 14, B141; Horst Rittel and Melvin M Webber, 'Dilemmas in a General Theory of Planning' (1973) 4(2) *Policy Sciences* 155; Richard Buchanan, 'Wicked Problems in Design Thinking' (1992) 8(2) *Design Issues* 5.

26 Churchman (n 25) B142.

because the wicked problem has caused the displacement of the law or its intended implementation.[27]

Regulatory challenges can be heightened when the causes or effects of an original wicked problem become exacerbated by the influence of new technology.[28] As an example, the supply of illicit narcotics has been a public-policy nightmare since the early 1800s and became such a problem that President Nixon famously declared the 'war on drugs' in 1971.[29] Forty years later, the popularisation of the darkweb nurtured an environment of anonymity and legal impunity such that unlawful marketplaces — notably Silk Road and Agora — operated brazenly, even though the legal provisions prohibiting the supply of narcotics were the same in 2011 as they were in 1971.[30] Offences relating to domestic violence might have had a more ponderous emergence in legal history, but likewise they demonstrate a wicked problem made more difficult by technological advance.[31] Bennett Moses describes this phenomenon: 'copying digital music is still a breach of copyright … but ease of copying has affected social norms so that rates of copying have increased despite copyright laws'.[32] Commissioner Hayne was clearly live to this issue, indicating that many of the complications which the Royal Commission into Financial Services dealt with seemingly arose from 'the present uncertainty about the impact of technological developments … [T]he industry itself will very probably look very different in five years' time.'[33] In summarising the Commission's findings, however, he cautioned against using disruption as a pejorative. He stated quite firmly that, without context, fears of disruption were 'nothing but a naked appeal to fear of the future'.[34] Yet disruption (and the uncertainty it causes) poses a very real and live threat to the ongoing operations of many criminal law regulators.

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27 Bert-Jaap Koops, 'Ten Dimensions of Technology Regulation: Finding Your Bearings in the Research Space of Emerging Technologies', in Morag Goodwin, Bert-Jaap Koops and Ronald Leenes (eds), *Dimensions of Technology Regulation* (Wolf, 2010) 309–24; see also Brendan Walker-Munro, 'A Case for Systemic Design in Criminal Law Techno-Regulation' (2019) 43(5) *Criminal Law Journal* 306 ('Systemic Design in Criminal Law Techno-Regulation').

28 In this article, the term 'disruption' is used to describe the circumstances that arise when a regulator becomes distanced from the target of their enforcement by new developments in technology, systems, practices or customs.

29 See Tom Wainwright, *Narconomics* (PublicAffairs, 2017).

30 Walker-Munro, 'Systemic Design in Criminal Law Techno-Regulation' (n 27) 309–10.

31 Carolyn Briggs, 'An Emerging Trend in Domestic Violence: Technology-Facilitated Abuse' (2018) 15(1) *Australian Journal of Child and Family Health Nursing* 2.

32 Lydia Bennett Moses, 'How to Think about Law, Regulation and Technology: Problems with "Technology" as a Regulatory Target' (2013) 5(1) *Journal of Law Innovation and Technology* 1, 8.

33 *Royal Commission 2019 Report* (n 5) 195.

34 Ibid 19.

The uncertainty created by technological disruption can be defined, examined and articulated in many ways. For present purposes, it is perhaps apposite to note that two broad classes of uncertainty may exist: uncertainty from the *regulator* (which is driven by the regulator and is 'top-down' in nature), and uncertainty about the *regulation* (which is driven by the population and is 'bottom-up' in nature). Uncertainty from the regulator manifests itself when the regulator cannot or does not properly detect and act on matters falling within its regulatory purview. Uncertainty about the regulation, on the other hand, arises most frequently in circumstances involving incomplete law because, '[w]hen law is incomplete, neither actors nor law enforcers can stipulate whether a particular action will fall within the scope of a law and will therefore face sanctions'.[35] Both classes of uncertainty become heightened in fields where the technology is untested and no contiguous principles exist for assessing how the regulator will act.[36] Under both forms of uncertainty, the regulatory system exhibits signs of strain, limitation and, ultimately, failure.

The starting point of examination, therefore, must be to frame regulation as a system, with wicked problems as their target, irrespective of what industry is being regulated. This approach is necessary because, as individuals and as a society, when we cannot solve a problem ourselves (by resort to existing legal solutions), we usually ask regulators to solve problems for us.[37] Therefore, the concept of framing — the way that we choose to view, articulate and define problems that require some form of governance response — becomes critically important to the debate. As Ison, Collins and Wallis explain, 'how situations are framed is a choice that can be made' by regulators (amongst others) in response to wicked problems, and this framing is important because '[f]raming choices, knowingly or not, direct thinking and practice'.[38]

III The Posits of Cyber-Systemics and Systemic Governance

An increasing number of scholarly works have examined complex, multi-faceted, multi-causal issues with a range of actors operating through and across local, state, national and transnational boundaries (in other words, wicked problems).

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35 Chenggang Xu and Katharina Pistor, *Law Enforcement under Incomplete Law: Theory and Evidence from Financial Market Regulation* (Discussion Paper No TE/02/442, London School of Economics and Political Science, December 2002) 2.

36 Nicole Mirjanich, 'Digital Money: Bitcoin's Financial and Tax Future Despite Regulatory Uncertainty' (2014) 64(1) *DePaul Law Review* 213.

37 Xu and Pistor (n 35) 32–3.

38 Ison, Collins Wallis (n 2) 106.

These problems have included the emergence of drug-resistant bacteria in health settings, illicit drugs and smart city frameworks.[39] In response, regulatory systems are almost always designed to confront these types of wicked problems head-on.[40] These systems of regulation generally fail because:

1. they do not actually achieve compliance, as they usually fail to deter those who do not comply;[41]
2. they do not consider the strategic or systemic effects of how their intervention may make the problem worse;[42] and/or
3. they lack the flexibility to respond in a meaningful and agile way to contemporary issues and become mired in arguments with political, legal or financial overtones.[43]

Take as an example the chequered history of financial services regulation in the United Kingdom over the past 50 years. Until 1998, regulatory control over the banking sector was exercised by the Bank of England. However, its authority was so significantly undermined by the collapse of Johnson Matthew Bankers, BCCI and Barings Bank in the late 1990s that the Financial Services Authority ('FSA') was created to take over, seemingly replacing nine other regulatory agencies with similar mandates.[44] In the early-to-mid 2000s, the FSA adopted a 'light touch' regulatory approach that failed to adequately spot and address the failures of Northern Rock's liquidity crisis or the ill-fated purchase of ABN Amro by the Royal Bank of Scotland.[45] The FSA was disbanded again in 2013 and replaced by three separate regulators.[46]

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39 John Alford and Brian W Head, 'Wicked and Less Wicked Problems: A Typology and a Contingency Framework' (2017) 36(3) *Policy and Society* 397; Johan Colding, Stephan Barthel and Patrik Sörqvist, 'Wicked Problems of Smart Cities' (2019) 2(4) *Smart Cities* 512. See also Ray Ison, *Systems Practice: How to Act in Situations of Uncertainty and Complexity in a Climate-Change World* (Springer, 2017).

40 Nicola Lacey, 'Criminalisation as Regulation: The Role of Criminal Law' (Oxford Legal Studies Research Paper No 50, 2004) 144–67.

41 Xu and Pistor (n 35) 6.

42 Jon Barnett and Saffron O'Neill, 'Maladaptation' (2010) 2(20) *Global Environmental Change* 211.

43 John Micklethwait and Adrian Wooldridge, *The Fourth Revolution: The Global Race to Reinvent the State* (Penguin, 2015).

44 Marianne Ojo, *The Financial Services Authority: A Model of Improved Accountability?* (MPRA Paper No 50, University of Munich, 2016).

45 Jill Treanor, 'Farewell to the FSA — and the Bleak Legacy of the Light-Touch Regulator', *The Guardian* (online, 24 March 2013) <https://www.theguardian.com/business/2013/mar/24/farewell-fsa-bleak-legacy-light-touch-regulator>.

46 Noam Noked, *Financial Services Act 2012: A New UK Regulatory Framework* (Harvard Law School Forum on Corporate Governance, 24 March 2013) <https://corpgov.law.harvard.edu/2013/03/24/financial-services-act-2012-a-new-uk-financial-regulatory-framework/>.

As earlier mentioned, Therrien et al confront the wicked problem paradigm through the lens of the Lac-Mégantic rail disaster in 2013, and in particular three themes (or narratives) — networked governance, sense-making and risk-regulation — that emerged following the post-incident investigation, both to explain what went wrong and to minimise the risk of similar events occuring in the future. The authors' analysis is insightful not in its analysis of the disaster itself, but rather in the framing of each of these narratives in the face of uncertainty and in its observation that each of these narratives 'presents a partial analytical response to system failure for the management of wicked problems'.[47] By bringing the salient points of these three narratives together, it is possible to elicit a cogent series of principles derived from 'cyber-systemics' that have clear application to regulatory problems. These principles can then be embedded at the core of the model of 'systemic governance' proffered in this article.[48] The precise meaning of these terms, and the relationship between them, requires further explanation.

A *Cyber-Systemics*

'Cyber-systemics' is the application of the principles of 'cybernetics' — that is to say, a transdiscplinary approach to exploring regulatory systems. Put simply, the concept of cyber-systemics recognises that our world is composed of multi-layered ecosystems with complex and complicated interrelationships, which interrelationships are important for understanding how an environment acts normally and how it responds to intervention. Ison and Schlindwein describe the challenge in terms of environmental regulation, where wicked problems are described as 'problems of relationship', and where uncertainty arises because of failures to properly recognise or maintain such important relationships.[49] From the regulatory perspective, regulators who enact governance with cyber-systemics do so despite uncertainty because they recognise, respect and build on the linkages between the environment, society and the individual, and seek to leverage different elements of the relationships in order to achieve behavioural change. Perhaps the easiest analogy of cyber-systemics to regulatory practice is

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47 Therrien et al (n 24) 264–70.

48 In doing so, the term '*systemic* governance' is distinguished from '*systematic* governance', the latter of which Ison, Alexandra and Wallis (n 3) caution involves 'linear, step-by-step thinking and action, whereas systemic ones are holistic comprising relationally dynamic thinking and acting' (at 1213).

49 Ray Ison and Sandro Schlindwein, 'Navigating through an "Ecological Desert and a Sociological Hell": A Cyber-Systemic Governance Approach for the Anthropocene' (2015) 44(6/7) *Kybernetes* 891.

the idea that a regulator stands as 'a helmsperson (sailor) steering, or charting, an ongoing viable course in response to feedback (from currents, wind, etc) and in relation to a purpose that is negotiated and renegotiated within an unfolding context — that is, in response to uncertainty'.[50] While some comparison to existing regulatory scholarship is inevitable,[51] cyber-systemics is a new paradigm because it focuses on the complex nature of relationships rather than seeking to throw resources at a problem and trying to solve it. Cyber-systemic design is a useful tool to consider when crafting regulators and regulator responses because the concept is 'intended for challenges characterised by complexity, uniqueness, value conflict, and ambiguity over objectives'.[52] A key concept of systemics is interdependence: webs of reciprocal influence between parts of a greater whole and their environment.[53] Therrien et al concisely explain:

> These wicked problems are problems spread out, in and across networks of organisations, public and private, that stay unattended or unnoticed, and being loosely coupled one with the other. A crisis emerges when several problems happen simultaneously and become simultaneously tightly coupled to generate disastrous consequences.[54]

B *Systemic Governance*

Systemic governance involves the use of cyber-systemic approaches (ie relationship-building) to craft systems that embed relationship-management as a core of regulatory practice. The concepts of cyber-systemics and systemic governance are closely linked. However, whereas cyber-systemics describes the application of the principles of cybernetics (such as using requisite variety as well as the steering analogy of Ison, Grant and Bawden mentioned above) in a systemic way to ensure complete coverage of the regulatory target, 'systemic governance' uses the principles of cyber-systemics to achieve a regulatory or goverance outcome. In effect, then, systemic governance is 'governance using cyber-systemics'.

Systemic governance becomes important because many of the solutions to wicked problems are regulatory in nature. Policymakers and politicians frame

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50 Ray Ison, Andrea Grant and Richard Bawden, 'Scenario Praxis for Systemic Governance: A Critical Framework' (2014) 32(4) *Environment Planning C: Government and Policy* 623, 626.

51 See, eg, John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475.

52 Alex J Ryan, 'A Framework for Systemic Design' (2014) 7(4) *FORMakademisk* 1, 12.

53 Ibid 2.

54 Therrien et al (n 24) 262.

wicked problems as issues, challenges or puzzles in need of solutions, and they craft solutions that frequently rely on various flavours or colours of prohibition and the invocation of criminal sanctions. There is little doubt that the threat of punishment and criminal sanctioning are effective — the literature on deterrence theory is largely united on this point — but deterrent methodologies inevitably become 'subject to interpretation by different rationalities … [Deterrents are] controversial and difficult to implement'.[55] Although the academic studies in using cyber-systemic approaches are in their infancy, there is some evidence emerging in the literature that considering social problems from the holistic perspective of their wickedness is starting to bear fruit.[56] The approach proposed here can be seen in Figure 3, and is articulated in other work on the subject.[57]

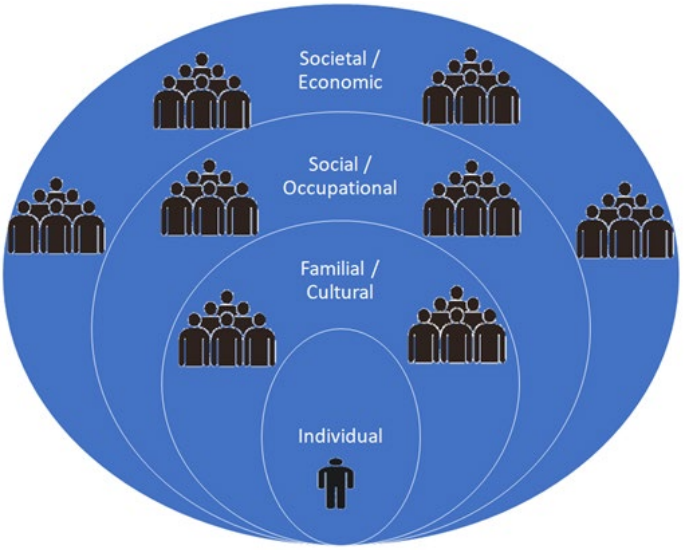

Figure 3 — A model of systemic governance as 'recognition of environment'[58]

[55] Robert F Durant, 'Institutional Values and the Future of Administrative State', in David H Rosenbloom and Howard E McCurdy (eds), *Revisiting Waldo's Administrative State: Constancy and Change in Public Administration* (Georgetown University Press, 2006) ch 10, 180.

[56] Patamawadee Jongruck, 'Network Governance and the Contemporary Opium Problem in Northern Thailand' (2019) 8(4) *Asian Education and Development Studies* 364; Malin Olsson, *Public Collaborations and Wicked Issues: A Study of Collaboration Structures in Dealing with Violence in Close Relationships* (PhD Thesis, Lund University, May 2019).

[57] Walker-Munro, 'Systemic Design in Criminal Law Techno-Regulation' (n 27) 316–18.

[58] Adapted from Peter H Jones, 'Systemic Design Principles for Complex Social Systems', in Gary Metcalf (ed), *Social Systems and Design* (Springer, 2014) 91.

The model in Figure 3 is constructed thus: at its centre sits a human being who, as Lessig would state, ultimately makes the rational decision whether or not they will comply with a given set of rules.[59] Around the individual sits a web of close relationships that bear the strongest influence on their behaviour (either for or against the ruleset). These relationships may be family-oriented or culturally oriented, and provide a series of normative and supportive mechanisms for the individual's behaviour. They also frame in some ways how the individual will respond to certain types of regulatory interventions. As we move outwards in rings, the relationships involve more people, but they are more loosely connected to the individual. Influence is less easily exerted in these outer relationships, and the impact of a regulatory intervention on one or more of them is less likely to be felt by the individual at the centre. Finally, the outermost ring of relationships supports the general 'feeling' of the community or society at large, and the normative influences thereof.

By adopting such a model for regulatory interventions, we can see that the management and maintenance of relationships becomes increasingly important by regulators in a cyber-systemic approach. We can see that the nature, duration and influence of each relationship will differ where different crime types are considered — a finding supported by crime control literature.[60] Conversely, regulators taking a cyber-systemic approach can map and target the webs of influence around a particular individual, seeking to interrupt flows in commodity and power between individuals and segments of their closest influence groups.[61] Cyber-systemics also involves utilising the influence of environment, and broader elements of the holistic society, which is a topic generally ignored in criminological studies.[62] A cyber-systemic approach is also consistent with both the rule of law and the protection of fundamental civil rights, such as privacy, autonomy, fairness and transparency.[63] This is because governance through

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59 Lawrence Lessig, 'The Zones of Cyberspace' (1996) 48(5) *Stanford Law Review* 1403, 1408.

60 Mark Andrejevic, 'To Preempt a Thief' (2017) 11 *International Journal of Communication* 879.

61 Jeffrey S McIllwain, 'Organized Crime: A Social Network Approach' (1999) 32(4) *Crime, Law and Social Change* 301; Gail Wannenburg, 'Links between Organised Crime and Al-Qaeda' (2003) 10(2) *South African Journal of International Affairs* 77; Carole Gibbs, Edmund F McGarrell and Mark Axelrod, 'Transnational White-Collar Crime and Risk: Lessons from the Global Trade in Electronic Waste' (2010) 9(3) *Criminology & Public Policy* 543.

62 David Weisburd, Cody Telep and Anthony Braga, *The Importance of Place in Policing: Empirical Evidence and Policy Recommendations* (Swedish National Council for Crime Prevention, 2010); Pamela Wilcox and John Eck, 'Criminology of the Unpopular: Implications for Policy Aimed at Payday Lending Facilities' (2011) 10(2) *Criminology & Public Policy* 473; David Weisburd et al, *Displacement of Crime and Diffusion of Crime Control Benefits in Large-Scale Geographic Areas* (Campbell Database of Systematic Reviews, Protocol, 2011); John Eck and Emily Eck, 'Crime Place and Pollution: Expanding Crime Reduction Options through a Regulatory Approach' (2012) 11(2) *Criminology & Public Policy* 281.

63 See, eg, Brendan Walker-Munro, 'Use of Big Data Analytics by Tax Authorities', in Margaret Jackson and Marita Shelly (eds), *Legal Regulations, Implications, and Issues Surrounding Digital Data* (IGI Global, 2020) ch 5.

cyber-systemics does not aim to disrupt the interrelationships in a given environment but rather recognises them, categorises them, understands them, and utilises them to promote compliance with normative, economic or social requirements.

Thus, regulators can achieve a great deal with the adoption of a cyber-systemic approach and the use of systemic governance. By looking to influence civil behaviour by leveraging relationships (of which more below) in a holistic manner and cognisant of the cyber-systemic principles outlined above, a regulator can restructure and rebrand itself to better achieve its statutory objectives while increasing legitimacy and authority in environments characterised by uncertainty.

C *The Australian Experience of Systemic Governance*

The Australian regulatory environment has, like many other jurisdictions, had difficulty accepting the utility of cyber-systemics and systemic governance approaches to regulatory practice.[64] Although the Australian Public Service Commission is hardly ignorant of the public-policy failures associated with handling wicked problems,[65] there exists no current research or policy guidance in respect of regulators seeking to adopt a cyber-systemics approach.[66] Although a complete analysis of Australian experiences with cyber-systemic responses and systemic governance would not be possible in an article of this nature, it suffices to observe that both the scholarly and legislative debate around the topic is seriously lacking. Nonetheless, there are at least two case studies that present a glimpse of how cyber-systemics and systemic governance could be used to promote compliance in response to wicked problems.

Whether one is watching it, betting on it or participating in it, professional sport has long been a part of Australia's social and cultural fabric. Much of Australia's cultural identity is supported by its keen participation in sport at the state, national and international level. However, because of, or despite, its level of interest across broad swathes of Australian society, sport is a notoriously difficult field to regulate. Successive reports over the last decade have demonstrated that it remains a haven for drug misuse, corruption and money-

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64 See, eg, Straw (n 23).

65 Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (2007); Australian Public Service Commission, *Building Better Governance* (2007).

66 The current guidance has not been reviewed since 2007: Council of Australian Governments, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* (Department of Prime Minister and Cabinet, 2007).

laundering (generally via sports betting).[67] Adding to this significant challenge is the consideration that sport has evolved into a system where an athlete's individual success 'increasingly depend[s] on the performance capacity of the system they represent[…], including all the organizing resources, the means of regulation, and the interest groups which maintain[…] and promote[…] high performance sport at that time'.[68]

Ferkins and van Bottenburg describe how (at least in an ad hoc way) Australia has approached the implementation of cyber-systemic approaches in the regulation of sport. Although those authors do not refer to it by name, they nonetheless describe concepts of steering, accountability and responsibility across organisational boundaries by reference to the management of relationships between statutory bodies, international and national authorities, player associations and unions, and corporate sponsors and sports clubs (from incorporated entities with Boards and shareholders through to grassroots associations).[69] In analogous work published at the same time, van Bottenburg was at pains to compare the regulation of elite sport in Australia and the Netherlands as a problem of framing, where the Dutch government was extremely slow to recognise the importance of sport as a public good rather than a private pursuit.[70] Interestingly, the issues of framing pervade even in authoritarian countries such as China and Colombia.[71] Similar examinations of Australia's elite sport program have yielded suggestions that inform the concept that each stakeholder must manage their relationships and exert influence through the webs of connection with others in the environment, as none of the bodies have any law-based powers to enforce compliance (excepting, perhaps,

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67 Australian Crime Commission, *Organised Crime and Drugs in Sport* (2013); Joint Committee on Gambling Reform, Parliament of Australia, *Inquiry into the Advertising and Promotion of Gambling Services in Sport* (Final Report, 2013); Samantha Bricknell, 'Corruption in Sport' (2015) 490 *Trends & Issues in Criminal Justice* 1.

68 Kalevi Heinilä, 'The Totalization Process in International Sport: Toward a Theory of *the Totalization* of Competition in Top-Level *Sport*' (1982) 12(3) *Sportwissenschaft* 235, 238.

69 Lesley Ferkins and Maarten van Bottenburg, 'The Governance of High Performance Sport', in Popi Sotiriadou and Veerle de Bosscher (eds), *Managing High Performance Sport* (Routledge, 2013) ch 7.

70 Maarten van Bottenburg, 'Passion Alone is No Longer Enough: The Reframing of Elite Sport from a Private Trouble to a Public Issue', in Peter Leisink et al (eds), *Managing Social Issues* (Edward Elgar, 2013) ch 8.

71 Laura Villareal, *Exploring a Sustainable Autonomy of Sport Organizations: A Study of Relationship between Government and Elite Sport Organizations in Colombia* (PhD Thesis, Seoul National University, 2015); Jinming Zheng et al, 'Interorganisational Conflict between National and Provincial Sport Organisations within China's Elite Sport System: Perspectives from National Organisations' (2019) 22(5) *Sport Management Review* 667.

statutory bodies or those empowered under international law such as the International Olympic Committee).[72]

Australia's government regulators have not escaped from this process unscathed. Consistent examination of the conduct of sporting events in Australia identified the disparate and fractured regulatory environment that has encouraged uncertainty and illegality.[73] The Australian response was to establish Sports Integrity Australia ('SIA') by subsuming the Australian Sports Anti-Doping Authority, the National Integrity in Sport Unit in the Department of Health, and certain integrity functions from Sports Australia.[74] In his second reading speech, Darren Chester opined that the creation of the SIA was fundamental because

> [s]ports integrity matters are now beyond the control of any single stakeholder. They are complex, globalised and connected, forming a complicated threat matrix exposing vulnerabilities that require a robust and nationally coordinated response across sports, governments, regulators, the wagering industry, law enforcement and other stakeholders …
>
> … Sport Integrity Australia will improve the coordination of Australia's sports integrity response and reduce the regulatory burden on sport, athletes and others who are currently required to interact with multiple agencies across the spectrum of sports integrity issues.[75]

Time will of course tell as to whether the SIA will be more successful than its predecessors.

As a further example, Australia also has a difficult time managing its natural resource environment. Conflicting state and national legal frameworks, together with substantially different concentrations of primary industries across its substantial landscape, result in a patchwork of mismatched regulatory requirements that continue to consider natural resources in the form of 'hydrological or biophysical entities, later ecological but until the present never as structurally coupled social-biophysical systems'.[76] Although not expressed at

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72 Lisa Gowthorp, Kristine Toohey and James Skinner, 'Government Involvement in High Performance Sport: an Australian National Sporting Organisation Perspective' (2017) 9(1) *International Journal of Sport Policy and Politics* 153; Steffie Lucidarme, Kathy Babiak and Annick Willem, 'Governmental Power in Elite Sport Networks: A Resource-Dependency Perspective' (2018) 18(3) *European Sport Management Quarterly* 348.

73 Australian Crime Commission (n 67); Joint Committee on Gambling Reform (n 67). See also James Wood, David Howman and Ray Murrihy, *Report of the Review of Australia's Sporting Integrity Arrangements* (Final Report, 2018) 53–68.

74 *Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Act 2020* (Cth).

75 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 October 2019, 4497 (Darren Chester, Minister for Veterans and Defence Personnel).

76 Ison and Schlindwein (n 49) 897.

a political or policy level, the learnings of cyber-systemics in water management have been successfully studied in Australia. By embracing the use of cyber-systemics to inform a systemic governance framework, the relationships have been more appropriately and sustainably managed between local landowners, water users and licence holders, and resource regulators.[77] Godden and Ison, in particular, describe the concepts of framing and legitimacy (again, similar to issues identified above in relation to criminal law regulators) as forming substantive barriers to the proper formation of solutions in governing access to, and usage of, Australia's water resources. They also identify a substantial number of actors in the regulatory environment, including the media, industry participants and landowners, as well as governmental and non-governmental research and policy bodies. They argue for the adoption of not just consolidated legislative reform, but also the inclusion of widened community forums, devolution of decision-making power, and the use of market power to encourage and enforce compliance with both social and financial norms. In doing so, Godden and Ison suggest that cyber-systemic approaches decrease uncertainty, improve regulatory legitimacy and enhance community involvement.[78]

Collectively, these examples suggest that regulators who adopt a cyber-systemic approach in their statutory objectives, or reconstruct themselves in such a manner as to utilise systemic governance, are better placed to regulate the environments within which those regulators are embedded. An attempt will now be made to show how these various relationships may be leveraged by regulators of the criminal law to enact behaviour change towards compliance.

IV Systemic Governance in Criminal Law

The concepts and principles of cyber-systemics as articulated in the form of systemic governance are worth exploring from the perspective of responses to crime and criminal offending. This is especially the case for criminal offending associated with the disruption engendered by new technologies and practices, as the nature of the disruption often forces criminal law regulators to scramble for influence and legitimacy in the face of new or modified challenges to their authority. Cyber-systemics enacted in the form of systemic governance is attractive to criminal law regulators for the following reasons:

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77 Ray Ison and Philip Wallis, 'Mechanisms for Inclusive Governance', in Eiman Karar (ed), *Freshwater Governance for the 21st Century* (SpringerOpen, 2017) ch 9; Lee Godden and Ray Ison, 'Community Participation: Exploring Legitimacy in Socio-Ecological Systems for Environmental Water Governance' (2019) 23(1) *Australasian Journal of Water Resources* 45.

78 Ison and Wallis (n 77) 47–9.

1. Cyber-systemics evolved in response to the widely acknowledged regulatory deficits observed in the literature,[79] which deficits are defined by 'relatively widespread inadequacies in perception and management of governance risks at the organisational level, coupled with insufficiently comprehensive and/or effective regulative and market-based mechanisms within society'[80] — results similar to the regulatory disconnection suffered by regulators as a result of technological shift.[81]
2. At its core, systemic governance involves the multi-jurisdictional collation of effort by multiple public actors in the protection of established rights and utilises the influence of relationships to achieve compliance in protection of those rights[82] — which protection remains one of the fundamental requirements of the penal law and one of its central tenets in the eyes of the public.
3. The concepts of cyber-systemics and systemic governance are not inconsistent with (and indeed can wholly incorporate) responsible use of law-enforcement strategies such as profiling, data-mining and algorithmic analysis.[83] Because cyber-systemics focuses on the maintenance and protection of relationships within a democratic, free and human-rights-based society, it can in fact support the protection of

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79 Peter Haas, 'Addressing the Global Governance Deficit' (2004) 4(4) *Global Environmental Politics* 1; Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transmittal New Governance: Overcoming the Orchestration Deficit' (2009) 42(2) *Vanderbilt Journal of Transnational Law* 501; Yaqing Qin, 'Power Shift, Governance Deficit and a Sustainable Global Order' (2013) 1(1) *Economic and Political Studies* 89; Victor Bekkers, Geske Dijkstra and Menno Fenger, *Governance and the Democratic Deficit: Assessing the Democratic Legitimacy of Governance Practices* (Routledge, 2016); Agus Pramusinto, Eko Prasojo and Wahyu Sutiyono, 'In Conclusion — Bridging the Governance Deficit' (2018) 39(6) *Policy Studies* 638.

80 Naila Podrug, Davor Filipović and Lara Jelenc, 'Theoretical Exploration of Selected Corporate Governance Challenges' (Proceedings of the GAI International Academic Conference, New York, 22–5 May 2016) 50.

81 Roger Brownsword, *Law, Technology and Society: Reimagining the Regulatory Environment* (Routledge, 2019).

82 Nuria Cunill Grau, Maria Fernández and Marcos Vergara, 'Systemic Governance for a Human Rights Approach to Health: An Analysis Based on the Chilean Case' (2011) 7(1) *Salud Colectiva* 21.

83 See, eg, Margot E Kaminski, 'Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability' (2018) 92(6) *Southern California Law Review* 1529; Mirko Bagaric and Dan Hunter, 'Introducing Disruptive Technology to Criminal Sanctions: Punishment by Computer Monitoring to Enhance Sentencing Fairness and Efficiency' (2019) 84(4) *Brooklyn Law Review* 1227.

civil rights in the adoption of technology-based law-enforcement solutions.[84]

4. The maintenance of relationships through systemic governance is supported by a substantial body of literature emphasising the importance of cooperation, and appropriate coordination among several government sectors, which are key resourcing constraints on public regulators combatting wicked problems.[85]

The consideration of cyber-systemics and systemic governance in the scope of the criminal law provokes the question of just how a regulator should seek to build, maintain and protect the relationships and webs of influence to which a cyber-systemic framework speaks. Some of these methodologies have been examined in other works (albeit from different perspectives),[86] but they are considered to be of relevance here to the implementation of a systemic governance framework to regulate the conduct of disruptive criminal offending. In those other works, four regulatory methodologies — hierarchy, competition, community and design — were examined. These were modelled broadly on the concepts set out by Murray and Scott,[87] which concepts are embedded within a broader matrix involving ongoing monitoring of the regulated population. Each regulatory methodology is cyber-systemic in nature in that it leverages on the development and maintenance of a particular relationship or class of relationships, with surveillance or monitoring permitting the regulator to understand how influence is created and transferred within the web of relationships.[88] The methodologies also represent regulatory opportunities to enact a cybernetic principle known as requisite variety, where 'single-use methodologies are doomed to failure, and the deployment of the widest possible set of regulatory responses against a disruptor … is crucial'.[89] It is worth

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84 Jens K Roehrich and Michael A Lewis, 'Procuring Complex Performance: Implications for Exchange Governance Complexity' (2014) 34(2) *International Journal of Operations and Production Management* 221; Cunill Grau et al (n 82) 30–1; Kaminski (n 83) 1611–13.

85 Cunill Grau et al (n 82) 23.

86 Brendan Walker-Munro, 'Regulating Disruption and Development of the Disruption Calculus' (2019) 46(1) *University of Adelaide Law Review* 111; Brendan Walker-Munro, 'A Shot in the Dark: Australia's Proposed Encryption Laws and the Disruption Calculus' (2019) 40(3) *University of Western Australia Law Review* 783 ('A Shot in the Dark'); Walker-Munro, 'Systemic Design in Criminal Law Techno-Regulation' (n 27).

87 Andrew Murray and Colin Scott, 'Controlling the New Media: Hybrid Responses to New Forms of Power' (2002) 65(4) *Modern Law Review* 491.

88 Sergio Barile et al, 'People, Technology and Governance for Sustainability: The Contribution of Systems and Cyber-Systemic Thinking' (2018) 13(5) *Sustainability Science* 1199.

89 Walker-Munro, 'A Shot in the Dark' (n 86) 804.

examining each of these methodologies through the lens of cyber-systemics, to determine how systemic governance might apply in a criminal law environment.

The etymology of hierarchy as a regulatory methodology acknowledges that the tools of the substantive law (ie statutes, ordinances and regulations enacted by the legislature, and the behavioural control enacted by pecuniary and penal sanctions) do not and cannot address all of the possible permutations of wicked problems, especially those involving disruptive technologies or practices. There is a substantial body of literature already discussed above outlining this 'governance deficiency', but cyberneticists likewise recognise that hierarchical law-focused structures alone are ill-suited to modern regulatory responses.[90] A specific example is presented by McIntyre-Mills, who describes the challenges of youth crime control in the Northern Territory, and the failures of single lines of hierarchical control to address that problem.[91] Under a systemic governance framework (endorsed in recent literature on climate change[92]), the purpose of the hierarchy methodology is to use legal and quasi-legal instruments to shape and limit the scope and manner of how relationships may be formed, both within the regulated environment and also as between regulator and regulatee. These relationships may be transitory, mutative or time-dependent depending on the circumstances and foci of each of the parties, but they should certainly be embedded with incentives, either positive or negative, that promote compliant behaviour in the formation and maintenance of such relationships. Criminal law regulators can therefore consider incorporating hierarchical crime controls that challenge, filter, funnel and allow or block relationships between parties by coding economic costs to non-compliance. Influence can then be exerted by any regulator (ie not just the one that enacted the hierarchical control) within the web of interdependence in which the relationship is constructed.[93]

Under the competitive methodology, the cyber-systemic approach seeks to foster relationships between parties who are subject to a regulator's jurisdiction or control, with a view to providing market-based incentives that foster

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90 Ray Ison, *Systems Practice: How to Act in Situations of Uncertainty and Complexity in a Climate-Change World* (Springer, 2nd ed, 2017). See also Gerard Fairtlough, *The Three Ways of Getting Things Done: Hierarchy, Heterarchy and Responsible Autonomy in Organizations* (Triarchy Press, 2007); Jason Alexandra, 'Australia's Landscapes in a Changing Climate — Caution, Hope, Inspiration, and Transformation' (2012) 63(3) *Crop and Pasture Science* 215.

91 Janet McIntyre-Mills, *Systemic Governance and Accountability: Working and Re-Working the Conceptual and Spatial Boundaries* (Springer, 2007) vol 3, 188–95.

92 Ison (n 90); Alexandra (n 90); Le Thi Hong Phuong, G Robbert Biesbroek and Arjen EJ Wals, 'Barriers and Enablers to Climate Change Adaptation in Hierarchical Governance Systems: The Case of Vietnam' (2018) 20(4) *Journal of Environmental Policy & Planning* 518.

93 Fred Phillips, 'Inter-Institutional Relationships and Emergency Management' (2011) 3(1–2) *International Journal of Society Systems Science* 49; Petri Virtanen and Jari Stenvall, 'Systemic Governance Challenges and Well-Being', in Petri Virtanen and Jari Stenvall (eds), *Intelligent Health Policy* (Springer, 2018) ch 2; Ray Ison and Ed Straw, *The Hidden Power of Systems Thinking: Governance in a Climate Emergency* (Routledge, 2020) ch 10.

compliant behaviour. This can take the form of creating markets or sub-markets to solve regulatory challenges, providing licences or permits to engage in otherwise illegitimate behaviour, fostering 'certification' as a mechanism for promoting brand awareness or social endorsement, or encouraging members of a market to contribute to the surveillance or monitoring of the market.

The Australian Federal Police ('AFP') engaged in one such cyber-systemic competitive approach on 11 October 2019, when it performed the first crowdsourced intelligence operation, the National Missing Persons Hackathon. This Hackathon, a joint venture between the AFP and not-for-profit organisation Trace Labs, encouraged competitors from a number of locations around Australia to participate in a six-hour challenge. Using only open-source intelligence (ie intelligence freely available from the Internet and darkweb, and obtained only using lawful means), competitors competed to track down the whereabouts of 12 missing persons supplied by the National Missing Persons Coordination Centre. Points were awarded for each piece of intelligence submitted and successfully 'validated' by the AFP, with the top three entrants receiving a prize. By the end of the Hackathon, the 354 participants had identified nearly 4,000 new leads across the 12 cases.[94]

Water regulation in the United Kingdom[95] and the regulation of high-performance sport[96] have also demonstrated substantial benefits from competition-focused approaches. Competition can be an incredibly powerful compliance mechanism, particularly in commercial environments, where the incentives offered are directly linked to both general and specific behaviours in observable populations. Similar to hierarchy, and reinforcing the concept of requisite variety, competition should not be used in isolation from other forms of cyber-systemic control.[97]

The regulatory methodology of community has significant drivers when utilised as a tool of cyber-systemic control, because it seeks to strengthen and leverage relationships within the community to aid the regulator in its modification of behaviour. These relationships not only boost the capability of the regulator to perform surveillance and monitoring (generally by increasing tip-offs or dob-ins by members of the regulated community for non-compliant

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94 Australian Federal Police, 'Australia's First Large Scale Hackathon Combines Innovative Approach with Crowdsourced Talent to Find National Missing Persons' (Media Release, 11 October 2019); AustCyber, 'Adelaide Team Wins Australia's First Hackathon to Find National Missing Persons' (Media Release, 18 October 2019).

95 Natalie Foster et al, 'Water Governance in England: Improving Understandings and Practices through Systemic Co-Inquiry' (2016) 8(11) *Water* 540.

96 Ferkins and van Bottenburg (n 69).

97 Naila Podrug and Domagoj Račić, 'Corporate Governance as a Learning Process: Organisational and Societal Levels' (2011) 8(1) *Megatrend Review* 95.

behaviour), but also perform an important normative role for compliant behaviour. As was illustrated in Figure 3 in Part III(B) above, relationships between an individual and his or her surrounding community (cultural, religious or familial) have a strong influence on compliance and can exist even in the absence of strict legal controls. Although these relationships are often leveraged in relation to social problems like illicit drugs,[98] cyber-systemics recognises and elevates them to the status of 'ecosystems of control', where participants both influence and can be influenced.[99] Community controls can also be used in such circumstances to address unethical or unwanted behaviour that may strictly be legal, such as in cases where behaviour may offend the spirit rather than the letter of the law.[100] However, like the other regulatory methodologies, community cannot operate in a vacuum. Although cybernetics scholars encourage regulation by self-organisation or responsible autonomy (where 'individuals or groups make decisions yet are accountable for their outcomes'[101]), it is suggested that engaging in community-based controls, particularly those involving self-regulation, without other methodologies is inappropriate. The discussion of ASIC's shortcomings exposed by the Royal Commission in the introduction to this article ought to be persuasive enough on this point.

The final methodology discussed in this article is that of design. Design encompasses the use of controls that foreclose the behavioural cause of non-compliance by preventing its occurrence; in essence, an offence cannot occur because the preconditions for the offence never arise. Sparrow describes the earliest attempts at the design methodology by reference to the United States Customs Service, who used chicanes to physically prevent trucks from speeding through drug checkpoints.[102] In a more modern sense, technology plays a key role in the design methodology by putting in place specific controls that coerce or enforce socially desirable relationships[103] — a mechanism that Kerr described as

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98 Joshua Newman and Brian W Head, 'Wicked Tendencies in Policy Problems: Rethinking the Distinction between Social and Technical Problems' (2017) 36(3) *Policy and Society* 414.

99 Barile et al (n 88) 1201.

100 Sharon Yadin, 'Regulatory Shaming' (2019) 49(2) *Environmental Law* 1.

101 Ison, Alexandra and Wallis (n 3) 1219.

102 Malcolm K Sparrow, *The Character of Harms: Operational Challenges in Control* (Cambridge University Press, 2008) ch 2.

103 Benoît Macq, Patrice Rondao Alface and Mireia Montanola, 'Applicability of Watermarking for Intellectual Property Rights Protection in a 3D Printing Scenario' (Conference Paper, International Conference on 3D Web Technology, 18–21 June 2015); Roger Brownsword and Alon Harel, 'Law, Liberty and Technology: Criminal Justice in the Context of Smart Machines' (2019) 15(2) *International Journal of Law in Context* 107.

the 'automation of virtue'.[104] Design in a cyber-systemic sense also has the capacity to step beyond the implantation of technological controls and embrace the meta-level of 'crafting' entire organisations designed to foster more productive and virtuous relationships in the protection of civil rights.[105]

Bringing these four regulatory methodologies together and embedding them in a matrix requiring surveillance or monitoring of the regulated population is the sum of the *systemic governance* framework proposed in this article.[106] Systemic governance is thus a mixture of all four regulatory methodologies against the backdrop of a strong and consistent monitoring or surveillance regime. Again, an adaptive and reactive mixture of all four methodologies is needed to ensure that we meet the principle of requisite variety, and to ensure that criminal law regulators avoid the stagnancy of single-domain approaches (such as a sole reliance on changes in the law to give new powers or create new offences). A robust program of monitoring or surveillance is also required to ensure that criminal law regulators not only identify and target the correct actors in the network, but also observe the environmental reactions to chosen methodologies. This requires that these regulators continue to be agile and responsive to environmental stimuli, much like the sailor navigating a difficult river.[107]

As has been said already, systemic governance not only identifies the linkages between the environment, society and the individual, it also seeks to leverage those linkages to achieve a change in behaviour. Now, in terms of applying this framework to the criminal law, it is worth acknowledging the some scholars consider the penal law and regulatory law to be discrete constructs.[108] Specifically, Larkin cautioned against the indiscriminate use of the criminal law in a regulatory sense when he said:

> The marriage of the regulatory law and the criminal law poses difficulties not present when either doctrine stands alone … Just as using any tool for a purpose it was not designed to serve is likely to damage both the tool and the object of its intended use,

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104 Ian R Kerr, 'Digital Locks and the Automation of Virtue', in Michael Geist (ed), *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Irwin Law, 2010) ch 9.

105 Christian Bason, *Design for Policy: Design for Social Responsibility* (Gower Press, 2014); Gillian Metzger, 'The Constitutional Duty to Supervise' (2014) 124(6) *Yale Law Journal* 1836; Daphna Renan, 'The Fourth Amendment as Administrative Governance' (2016) 68(5) *Stanford Law Review* 1039; Ison and Schlindwein (n 49) 897; Bruna de Castro e Silva, 'Humanizing (Anti) Corruption: The Socio-Legal Values of a Human Rights-Based Approach to Corruption' (2019) 5 *Kyiv-Mohyla Law and Politics Journal* 59.

106 Effectively, systemic is defined as governance as 'governance through cyber-systemics'.

107 Ison Grant and Bawden (n 50) 626.

108 Anthony Ogus, 'Criminal Law and Regulation', in Gerrit de Geest (ed), *Encyclopedia of Law and Economics* (Edward Elgar, 2nd ed, 2009) vol 3, ch 3.

> using the criminal law for regulatory purposes will impose serious costs on both the criminal justice system and the public. At the end of the day, society may deem those costs justifiable in pursuit of a more important goal, but that decision cannot be made without considering precisely how the purposes and uses of the regulatory and criminal law differ, whether those disparate purposes can be reconciled without doing violence to either one, and if that reconciliation can be achieved in a better manner. That decision can only be made after taking into account the specific elements of a particular regulatory program and how the criminal law would be used as an enforcement tool.[109]

Yet Larkin's caution is built upon several foundations that systemic governance does not disturb. First, there appears to be little difficulty with systemic governance where the criminal or regulatory laws are used without overlap. Systemic governance does not expand or broaden the use of hierarchical controls such as the scope of criminalisation under the law without support from the other methodologies. Increasing criminalisation with no other form of regulatory methodology simply encourages offenders to rationalise their behaviour.[110] Systemic governance, on the other hand, recognises that the criminal law is simply one tool among many that might be employed to encourage compliance, and that it should not be used in isolation. Larkin cautions that the criminal law may 'damage both the tool and the object of its intended use'; however, systemic governance encourages criminal law regulators to look to other mechanisms to promote compliance. This proposition is supported by recent literature in criminology, which as a field has shied away from overreliance on the criminal law to solve social problems, instead considering the wider apparatus of crime through the lens of actuarial risk, security and regulation.[111]

Secondly, by adopting the concept of requisite variety, systemic governance supports Larkin's observation that regulators should always consider whether the disparate purposes of the criminal and regulatory law might be reconciled without damage to either. While there exists a temptation to subject a given social target to both criminal and regulatory law treatments, systemic governance encourages a divergent approach. Using two hierarchical tools (both criminal law

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109 Paul J Larkin Jr, 'Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law' (2014) 42(3) *Hofstra Law Review* 745, 758.

110 Todd Haugh, 'Overcriminalization's New Harm Paradigm' (2015) 68(5) *Vanderbilt Law Review* 1191.

111 Jason Snead and John-Michael Seibler, *The FAA Drone Registry: A Two-Month Crash Course in How to Overcriminalize Innovation* (Issue Brief No 4525, The Heritage Foundation, 8 March 2016); Anna Gurinskaya and Mahesh Nalla, 'The Expanding Boundaries of Crime Control: Governing Security through Regulation' (2018) 679(1) *Annals of the American Academy of Political and Social Science* 36; Benjamin Levin, 'Mens Rea Reform and Its Discontents' (2019) 109(3) *Journal of Criminal Law & Criminology* 491; Mark Button, 'The "New" Private Security Industry, the Private Policing of Cyberspace and the Regulatory Questions' (2019) 36(1) *Journal of Contemporary Criminal Justice* 39.

and regulatory law) serves only to *increase* uncertainty rather than resolve it. Consider the following:

1. Is an offender prejudiced in a criminal trial if he/she first answers to civil or administrative proceedings?[112] This might occur where the conduct or nature of the alleged offending is also a breach of some civil or disciplinary standard, and the offendor is under either a compulsion to defend themselves to the allegations, or wishes to do so voluntarily, to the prejudice of their defence in the criminal proceedings. There may also be circumstances where the higher bar of criminal proceedings results in an acquittal, whereas the lower evidentiary threshold results in a finding of no liability or fault in civil or disciplinary proceedings.
2. How does the criminal law and regulatory law resolve unlawful behaviour involving multiple actors who may not be subject to the jurisdiction of that law (such as the involvement of the foreign crew of the foreign-flag vessel the Ruby Princess in the COVID-19 outbreak)?[113]
3. Where a regulator has both criminal and regulatory powers, which takes priority? And to what extent do the expectations of the regulated environmentanticipate or influence the use of those powers?[114]

Thirdly, Larkin was clearly open to the reconciliation of the aims and purposes of the criminal and regulatory law, merely advising that the reconciliation could be achieved in a better manner. This proposition stands well alongside a systemic governance approach, where the regulator's focus is on the creation, maintenance and strengthening of trusted relationships both within a regulated environment and as between regulator and regulated.[115] The enhancement of

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112 *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378; cf *Construction, Forestry, Mining and Energy Union v Australian Competition and Consumer Commission* [2016] FCAFC 504; *Psychology Board of Australia v Ildiri* [2011] VCAT 1036. See also Joshua Kulawiec, 'Double Jeopardy in the Regulatory State' (2001) 78 (Autumn) *Australian Law Reform Commission Reform Journal* 60; Scott McLean, 'Evidence in Legal Profession Disciplinary Hearings: Changing the Lawyers' Paradigm' (2009) 28(2) *University of Queensland Law Journal* 225.

113 Evidence to the Special Commission of Inquiry into the Ruby Princess, Sydney, 21–2 April 2020 (Dr Ilse von Watzdorf).

114 Recalling ASIC's experience in the *Royal Commission 2019 Report* (n 5).

115 Mireille Hildebrandt, 'Criminal Law and Technology in Data-Driven Society', in Markus D Dubber and Tatjana Hornle (eds), *Oxford Handbook of Criminal Law* (Oxford University Press, 2014) ch 9; Geoffrey R Skoll, 'Stealing Consciousness: Using Cybernetics for Controlling Populations' (2014) 4(1) *International Journal of Cyber Warfare and Terrorism* 27; Arianna Visconti, 'A "Narrative" of the Individual-Community Relationship through the "Lenses" of Criminal Law: Three Sketches of Mystification' (2017) 11(2) *Pólemos* 299; Victoria MacGill, 'A Social Cybernetic View of Violence and Some Paradoxes of Working with Violent Abusers' (2018) 12 *Open Cybernetics & Systemics Journal*

trusted relationships also builds regulatory confidence and legitimacy in the system, avoiding the costs to both the system and the public.

V Conclusions and Future Directions

The systemic governance framework proposed in this article, as well as the principles that underpin it, are derived substantially from the domain of cybernetics and its intersection with regulatory science. This is an area that has lacked substantial and consolidated scholarship but which is beginning to achieve prominence because of the issues associated with overcriminalisation, State-sanctioned intrusions into privacy, and the increasingly disrupted economic and social environment in which we now live. These are wicked problems in and of themselves, and to which there are no easy answers. For example, while earlier work has made clear that surveillance and monitoring is a vital part of a cyber-systemic solution in the application of the criminal law,[116] it is recognised that these technologies can also be invasive, prone to abuse, and able to undermine or destroy the very relationships that a cyber-systemic response seeks to foster.[117] The subjective and objective impact of surveillance and monitoring on the regulated population and its interpretation of the authority, legitimacy and trust of the regulator is worthy of further examination, not only to inform regulators who intend to adopt a cyber-systemic approach, but also to guard against and protect the valuable civil rights upon which such a program may impinge.

The nature, duration and circumstances of relationship-building lie at the heart of a cyber-systemic approach and the overall implementation of systemic governance. Therefore, it is logical that the actual implementation of such relationships in a practical setting is equally of interest to scholars and regulatory practitioners. Some of the literature has already demonstrated the benefits of an enhanced relationship nature in the form of community or competitive control,[118] but further research is needed. When does a regulator encourage competition over community, or hierarchy over design? Although it is possible that a suitably balanced blend of all four regulatory methodologies — offset with an appropriately robust monitoring framework — would be the most ideal regulatory stance to take, such a proposal has not been empirically proven. The balance of regulatory methodologies, and therefore the maintenance and focus of

20; Clarissa Meerts, 'Corporate Investigations: Beyond Notions of Public-Private Relations' (2020) 36(1) *Journal of Contemporary Criminal Justice* 86.

116 Walker-Munro, 'Systemic Design in Criminal Law Techno-Regulation' (n 27) 320. See also Brendan Walker-Munro, 'Disruption, Regulatory Theory and China: What Surveillance and Profiling Can Teach the Modern Regulator' (2019) 8(1) *Journal of Governance and Regulation* 23 ('Disruption, Regulatory Theory and China').

117 Walker-Munro (n 117), 'Disruption, Regulatory Theory and China', 23–6.

118 MacGill (n 116); Meerts (n 116).

resources on the relationships that those methodologies require, may also differ between regulatory contexts. For example, a specific focus of cyber-systemic relationships may be suitable for regulating tax or corporate 'white collar' crime, but inappropriate for the pursuit or regulation of sexually based offences or environmental crime. The approach to be taken in each context should be subject to its own scrutiny.

Finally, there is very little (if any) outcomes-based consideration of the methodologies. While theoretical benefits can be easily considered and perhaps quantified (although such is beyond the scope of this article), there exists no examination in the fields of behavioural economics or applied criminology that would support empirical findings. Certainly, these fields warrant greater clarity, not least of which because of the attractiveness to politicians and policymakers of improving compliance by reference to a dollar figure. These so-called compliance dividends, informed by a cyber-systemic approach, would go a long way toward embedding this framework as a contemporary response to disruption.

Overall, the possible benefits of cyber-systemics and systemic governance in the regulation of the criminal law are exciting. They provide an opportunity for criminal law regulators to move away from overcriminalisation of targeted behaviour and towards prompting compliance. They provide numerous avenues for further policy or economic research, with a demonstrable series of potential outcomes. They offer opportunities for a canny regulator to foster trust and improve legitimacy in environments often characterised by uncertainty, and it is this author's hope that cyber-systemics and systemic governance become a substantial field in the areas of regulatory and policy research in the years to come.

Learning from Experience: Interpreting the Interpretive Provisions in Australian Human Rights Legislation

Benedict Coxon*

Human rights legislation in the Australian Capital Territory ('ACT'), Victoria and Queensland contains interpretive provisions to the effect that legislation is to be interpreted consistently or compatibly with the rights set out in the relevant statute. This article is an attempt to analyse these interpretive provisions as a matter of statutory interpretation; that is, the rules of statutory interpretation are applied to the interpretive provisions. Courts in the ACT and Victoria have interpreted the provisions as conferring modest powers, similar to the common law principle of legality. As a matter of the application of the principles of statutory interpretation, this appears to be the correct approach. Queensland courts may be expected to follow their ACT and Victorian counterparts in this respect.

I Introduction

The *Human Rights Act 2019* (Qld) ('*QHRA*') came fully into force on 1 January 2020.[1] The *QHRA* is modelled on the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') and the Australian Capital Territory's *Human Rights Act 2004* (ACT) ('*ACTHRA*').[2] Each of these statutes contains an interpretive provision to the effect that legislation is to be interpreted consistently or compatibly with the rights set out in the statute.[3]

There is as yet little literature on the *QHRA*.[4] The literature on the Victorian and Australian Capital Territory ('ACT') legislation tends to adopt the perspective

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1 Proclamation, Subordinate Legislation 2019 No 224 (14 November 2019). Certain provisions came into force earlier, on 1 July 2019: Proclamation, Subordinate Legislation 2019 No 97 (13 June 2019).

2 Explanatory Notes, Human Rights Bill 2018 (Qld) 11.

3 *Human Rights Act 2019* (Qld) s 48 ('*QHRA*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32 ('*Charter*'); *Human Rights Act 2004* (ACT) s 30 ('*ACTHRA*').

4 See Editorial, 'The Human Rights Act 2019' (2019) 38(2) *Queensland Lawyer* 73, 73–4; Dan Rogers, 'Guarding the Rights of All Queenslanders: Human Rights Bill 2018 (Qld)' (2019) 39 (February)

of human rights law,[5] constitutional theory[6] or comparative law.[7] Less common is analysis from the perspective of statutory interpretation.[8] This article is an attempt to analyse the interpretive provisions in this Australian human rights legislation as a matter of statutory interpretation. That is, the rules of statutory interpretation are applied to interpret the interpretive provisions, adopting a contextual approach.[9] This allows for an assessment of the correctness of the courts' approaches to those provisions to date.

The history of proposals for bills of rights and similar legislation in Australia is long and mostly fruitless;[10] it has been argued that there is an 'Australian reluctance about rights'.[11] This background makes it likely that courts will be

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Proctor 20. See also George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81.

5 See Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths Australia, 2008); Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019).

6 See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) esp ch 8; Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) esp ch 11.

7 See Ronagh JA McQuigg, *Bills of Rights: A Comparative Perspective* (Intersentia, 2014).

8 But see Dan Meagher, 'The Scope of Judicial Rights Interpretation under Bills of Rights (and Its Political Consequences)' (2009) 20(3) *Public Law Review* 214; Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006* (2013) 74 *Australian Institute of Administrative Law Forum* 67; Matthew Groves, 'Interpreting the Effect of Our Charters', in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (Federation Press, 2017) 2.

9 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow J). This approach is broadly consistent with the 'spiral' approach advocated by a current Justice of the Supreme Court of New Zealand: Susan Glazebrook, 'Filling the Gaps', in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ, 2004) 169–76. See also, in the Australian context, Jeffrey Barnes, 'Contextualism: The Modern Approach to Statutory Interpretation' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1090.

10 See Brian Galligan and Emma Larking, 'Rights Protection: The Bill of Rights Debate and Rights Protection in Australia's States & Territories' (2007) 28(1) *Adelaide Law Review* 177, 182–4; Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths Australia, 2009) 143–8; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 26–34; George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017) 97–111.

11 Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195; Hilary Charlesworth, 'The Australian Reluctance about Rights', in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, 1994) 21; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press, 2002) 35–9. See also Brian Galligan, 'Australia's Rejection of a Bill of Rights' (1990) 28(3) *Journal of Commonwealth & Comparative Politics* 344; Brian Galligan and Ian McAllister, 'Citizen and Elite Attitudes towards an Australian Bill of Rights', in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (Federation Press, 1997) 144; George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30(3) *Melbourne University Law Review*

cautious when approaching the *ACTHRA*, the *Charter* and the *QHRA*. Furthermore, there are constitutional considerations affecting the scope of the interpretive provisions, which militate against overly expansive uses of such provisions (these are considered in Part III below, in which Victoria is discussed, as they received the most prominence in a High Court case on appeal from Victoria[12]).[13] The most striking feature, however, of the legislative history and context of the Australian interpretive provisions is the importance of their express references to purpose, and the fact that those references were clearly designed to distinguish what is often seen as a radical approach taken by United Kingdom ('UK') courts to the equivalent interpretive provision in that country, s 3 of the *Human Rights Act 1998* (UK) ('*UKHRA*').[14]

The UK approach is exemplified by the case of *Ghaidan v Godin-Mendoza* ('*Ghaidan*'),[15] and in particular by the following passage in the speech of Lord Nicholls:

880, 883–5; Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 20–4.

12 *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic* (HCA)').

13 See Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (2009) 11 (May/June) *Constitutional Law and Policy Review* 86, 91–4; cf Meagher (n 8) 229–30; Richard McHugh, 'Implications of the Proposed *Human Rights Act* for the Rule of Law as Manifested in Australian Courts' (Is the Rule of Law under Challenge in Australia? Conference, 20 November 2009) 13 <http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Media-3-12-09-Implications-of-the-proposed-Human-Rights-Act-for-the-rule-of-law-as-manifested-in-Australian-courts-Richard-McHugh.pdf>; Jim South, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2009) 28(1) *University of Queensland Law Journal* 143, 149 (see also at 149–52, 159–64); Pamela Tate, 'A National Charter on Human Rights in Australia? Views from Victoria' (2009) 18 *Commonwealth Lawyer* 27, 32–3; Helen Irving, 'The Dilemmas in Dialogue: A Constitional [sic] Analysis of the NHRC's Proposed Human Rights Act' (2010) 33(1) *University of New South Wales Law Journal* 60, 77–80; Wendy Lacey, 'Beyond the Legalese and Rhetoric: Improving Human Rights Protection in Australia' (2010) 16(1) *Australian Journal of Human Rights* 1, 10–18. For brief overviews, see Will Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1, 11–17; David Erdos, 'The Rudd Government's Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?' (2012) 65(2) *Parliamentary Affairs* 359, 372–4. Certain constitutional doctrines are also increasingly protecting rights: Ronald Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters' (2011) 18(2) *Australian Journal of Administrative Law* 67.

14 *Raytheon Australia Pty Ltd & ACT Human Rights Commission* [2008] ACTAAT 19, [77] (Mr Peedom, President) (leave to appeal refused: *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55); *Re Application for Bail by Islam* (2010) 4 ACTLR 235, 261 [107] (Penfold J) ('*Islam*'); Evans and Evans (n 5) 95–6 [3.32]; James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 84–5; Byrnes, Charlesworth and McKinnon (n 10) 60–1. Cf Kris Gledhill, 'Rights-Promoting Statutory Interpretive Obligations and the "Principle" of Legality', in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 93, 103.

15 [2004] 2 AC 557 ('*Ghaidan*').

> In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.[16]

A similar reading of the Australian interpretive provisions has been expressly rejected in both the ACT[17] and Victoria[18] (as it had been in New Zealand, albeit on the basis of rather different legislative history and context[19]).

The express references to purpose in the Australian interpretive provisions are not themselves conclusive of how those provisions are to be applied, in light of the flexibility of the concept of purpose. The purposes of legislation are capable of identification at varying levels of abstraction and it is therefore possible to characterise *Ghaidan* as consistent with purposive interpretation.[20] However, to reiterate, the importance of the references to purpose lies in what their inclusion reveals about the design of the interpretive provisions, which informs contextual interpretations of the provisions. The fact of the inclusion of such references signals that the concept of purpose is generally to be deployed at a relatively low level of abstraction, and is therefore a more significant constraint on radical applications of the interpretive provisions than has been the case under the *UKHRA*.

The structure of this article takes the jurisdictions in turn, first setting out the relevant general principles of statutory interpretation, before analysing the interpretive provisions in the relevant human rights legislation. The jurisdictions are considered in chronological order of the enactment of each piece of relevant

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16 Ibid 571 [30].

17 *R v Fearnside* (2009) 3 ACTLR 25, 47 [89] (Besanko J, Gray P agreeing at 28 [1], Penfold J agreeing at 31 [20]).

18 *Slaveski v Smith* (2012) 34 VR 206, 214 [20] (Warren CJ, Nettle and Redlich JJA), citing *Momcilovic* (HCA) (n 12) 36–7 [18], 50 [51] (French CJ), 210 [544], 217 [565], [566] (Crennan and Kiefel JJ), 92 [170] (Gummow J), 123 [280] (Hayne J), 250 [684] (Bell J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky*'). Cf *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1, 62 [189]–[190] (Tate JA) ('*Taha*').

19 *R v Hansen* [2007] 3 NZLR 1. See Benedict Coxon, 'The Prospective (Ir)Relevance of Section 3 of the Human Rights Act: A Comparative Perspective' (2020) 41 *Statute Law Review* (forthcoming).

20 See generally Jan van Zyl Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' (2007) 70 *Modern Law Review* 294. See also Anthony Mason, 'Human Rights and Legislative Supremacy', in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013) 199, 204. Some observers have drawn a link between the references to purpose in the Australian interpretive provisions and *Ghaidan*: Lord Walker of Gestingthorpe, 'A United Kingdom Perspective on Human Rights Judging' (2007) 8 *The Judicial Review* 295, 297; Luke Beck, 'The Interpretation Provisions of Statutory Bills of Rights: A Little Bit Humpty Dumpty?' (2011) 22 *Public Law Review* 97, 102; Gledhill (n 14) 108. Cf Ian Dennis, 'The *Human Rights Act* and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 333, 334–5.

human rights legislation. The first jurisdiction to be considered, therefore, is the ACT.

II Australian Capital Territory

In the ACT, s 139(1) of the *Legislation Act 2001* (ACT)[21] provides: 'In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.' Section 139(2) provides: 'This section applies whether or not the Act's purpose is expressly stated in the Act.' Section 7(3) provides: 'A reference to an *Act* includes a reference to a provision of an Act.'[22] Reference must also be made to s 138. It defines 'working out the meaning of an Act' as:

> (a) resolving an ambiguous or obscure provision of the Act; or
> (b) confirming or displacing the apparent meaning of the Act; or
> (c) finding the meaning of the Act when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
> (d) finding the meaning of the Act in any other case.

The following provisions in the Act deal with context, including setting out (non-exhaustively) material that may be considered in that regard. Section 140 provides that the provisions of an Act being interpreted 'must be read in the context of the Act as a whole'. Section 141(1) adds that 'material not forming part of the Act may be considered', and s 142 includes a table setting out material that may be considered. Relevantly for present purposes in relation to the *ACTHRA*, s 142 provides for consideration of the report of the consultation committee whose report preceded the draft Bill,[23] the draft Bill itself,[24] second reading speeches[25] and other proceedings in the Legislative Assembly,[26] explanatory statements,[27] and the Long Title.[28]

As originally enacted in 2004, s 30 of the *ACTHRA* provided as follows:

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21 Compare its predecessor, *Interpretation Act 1967* (ACT) s 11A. This is not dealt with here, as the *ACTHRA* (n 3) post-dates the *Legislation Act 2001* (ACT).

22 See *Islam* (n 14) 246 [33] (Penfold J).

23 *Legislation Act 2001* (ACT) s 142, Table 142, col 2, item 2.

24 Ibid item 4.

25 Ibid item 5.

26 Ibid item 6.

27 Ibid item 4.

28 Ibid item 1. It has been argued that the Long Title is actually part of the Act, although this proposition does not appear to be supported by an explicit judicial statement: Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths Australia, 8th ed, 2014) 193 [4.48].

> **30 Interpretation of laws and human rights**
>
> (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
> (2) Subsection (1) is subject to the Legislation Act, section 139.
> (3) In this section:
> ***working out the meaning of a Territory law*** means—
> (a) resolving an ambiguous or obscure provision of the law; or
> (b) confirming or displacing the apparent meaning of the law; or
> (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
> (d) finding the meaning of the law in any other case.

The original form of s 30 attracted criticism, including that it was 'poorly drafted and ambiguous',[29] and it was amended in 2008[30] to mirror the Victorian provision. The new *ACTHRA* s 30 provides as follows:

> **30 Interpretation of laws and human rights**
>
> So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

Section 32(2) provides: 'If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right'. The fourth paragraph of the Preamble[31] asserts: 'Setting out these human rights also makes it easier for them to be taken into consideration in the development and interpretation of legislation.' This does not shed any light on the nature of interpretation under s 30. The Long Title (probably strictly not part of the Act, but undoubtedly a permissible interpretive aid) puts the focus on human rights: 'An Act to respect, protect and promote human rights'.

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[29] Carolyn Evans, 'Responsibility for Rights: The ACT *Human Rights Act*' (2004) 32(2) *Federal Law Review* 291, 305 ('Responsibility for Rights'). See also *Fearnside* (n 17) 47 [88] (Besanko J, Gray P agreeing at 28 [1], Penfold J agreeing at 31 [20]); Hilary Charlesworth, 'Human Rights and Statutory Interpretation', in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 100, 117; Carolyn Evans, '*Human Rights Act* and Administrative Law' (Assessing the First Year of the ACT Human Rights Act Conference, 29 June 2005) 6 <http://acthra.anu.edu.au/documents/afyhra_conf_2005/EvansC_The_Human_Rights_Act_and_Administrative_Law.pdf>; Bailey (n 10) 198. On the original s 30 generally, see Hilary Charlesworth, 'Australia's First Bill of Rights: The Australian Capital Territory's *Human Rights Act*', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 289, 294–6; Hilary Charlesworth and Gabrielle McKinnon, 'Australia's First Bill of Rights: The Australian Capital Territory's *Human Rights Act*' (Law and Policy Paper No 28, Centre for International and Public Law, 2006) 7–9; Peter Faris and Mirko Bagaric, *Human Rights: Charters in Australia* (Sandstone Academic Press, 2008) 43.

[30] *Human Rights Amendment Act 2008* (ACT) s 5. See Bailey (n 10) 198; Byrnes, Charlesworth and McKinnon (n 10) 83–4.

[31] This forms part of the *ACTHRA* (n 3) by virtue of *Legislation Act 2001* (ACT) s 126(3).

However, this general description provides limited assistance in light of the qualifications on the interpretive power contained in s 30.

Turning to material not forming part of the Act that may be considered, we may first observe that the enactment of the *ACTHRA* followed the publication of a report by the ACT Bill of Rights Consultative Committee, recommending the adoption of a bill of rights.[32] The Committee recommended that an interpretive provision be enacted as follows: 'A court or tribunal must interpret a law of the Territory to be compatible with human rights and must ensure that the law is given effect to in a way that is compatible with human rights, as far as it is possible to do so.'[33] There is no reference to purpose in this suggested provision and, indeed, it is strikingly similar to s 3(1) of the *UKHRA*. However, the Committee should not be taken to have sanctioned an expansive approach such as that under s 3. The Committee's report was published prior to the House of Lords' decision in *Ghaidan*. It therefore had to set out what it saw as competing approaches in the earlier case of *R v A [No 2]*.[34] The Committee concluded that what it saw as the more conservative approach appeared to be 'the most influential in decisions under the *Human Rights Act*'.[35] Nothing can therefore be drawn from the Committee's omission of a reference to purpose in its recommended provision. As the Committee saw the state of UK jurisprudence as not representing as expansive an approach as *Ghaidan* stands for, there was no need to include such a reference.

In any event, the Committee's recommendation was not implemented in those terms.[36] Instead, when the Human Rights Bill 2003 (ACT) was presented in the Legislative Assembly,[37] the draft interpretive provision was as follows:

> **30 Interpretation of laws and human rights**
>
> (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is to be preferred to any other interpretation.
> (2) If applying subsection (1) and Legislation Act, section 139 to a Territory law would achieve a different result, only section 139 is to be applied.
> (3) In this section:
> ***working out the meaning of a Territory law*** means—
> (a) resolving an ambiguous or obscure provision of the law; or
> (b) confirming or displacing the apparent meaning of the law; or
> (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

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32 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (Report, May 2003) 5 ('*Towards an ACT Human Rights Act*').

33 Ibid app 4, 4.

34 [2002] 1 AC 45.

35 *Towards an ACT Human Rights Act* (n 32) 50, citing as examples *Matthews v Ministry of Defence* [2002] 1 WLR 2621; *R v Shayler* [2003] 1 AC 247.

36 See Evans, 'Responsibility for Rights' (n 29) 294.

37 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18 November 2003, 4244 (Jon Stanhope, Attorney-General).

(d) finding the meaning of the law in any other case.

The crucial subclause was (2). No similar provision had appeared in the Committee's draft Bill. The Government, which presented the Bill through the then Attorney-General, clearly decided that the purposive approach to statutory interpretation was to remain supreme.

The Explanatory Statement sought to describe the interaction between cl 30 and s 139(1) of the *Legislation Act 2001* (ACT) thus:

> Clause 30(1) is subject to the purposive rule of construction set out in subclause [sic] 139(1) of the *Legislation Act 2001*. Subclause [sic] 139(1) requires that Territory laws must be interpreted in a way that best achieves the purpose of the Act. Consequently, the interpretation most beneficial to human rights will best achieve the purpose of the Bill.[38]

One ACT judge has said of this: 'I am not convinced that the explanation ... given in ... the Explanatory Statement ... was either coherent or correct.'[39] Indeed, the Statement provides no assistance.

The Attorney-General referred to cl 30 of the Bill in his second reading speech, highlighting that legislative intention was to play a key role:

> [T]he bill requires that all ACT statutes and statutory instruments must be interpreted and applied so far as possible in a way that is consistent with the human rights protected in the act. Unless the law is *intended* to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail.[40]

During the detail stage of the debate, the Attorney-General proposed amendments to the clause, such that sub-ss (1) and (2) would be omitted and substituted by the following:

> (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
> (2) Subsection (1) is subject to the Legislation Act, section 139.

The Attorney-General stated:

> The purpose of these amendments is to make clause 30 easier to read and understand. It is to make it as clear as possible that, while we expect the judiciary to read rights into statutory provisions, they may not override the clear intention of the Assembly to legislate inconsistently with human rights. The amendment to clause 31 [sic] includes

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38 Explanatory Statement, Human Rights Bill 2003 (ACT) 5.

39 *Islam* (n 14) 258 [89] (Penfold J); see further at [92].

40 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18 November 2003, 4247 (Jon Stanhope, Attorney-General) (emphasis added). See also Meagher (n 8) 224–5.

> the words 'is as far as possible'. This picks up the language used in the United Kingdom *Human Rights Act* and provides some nuance to the existing clause.
>
> The amendment to clause 2 is a simplification of the language. As ordinary legislation, the *Human Rights Act* is subject to the *Legislation Act 2001* and the rules of interpretation in chapter 14 of that act. Section 139 of the *Legislation Act* requires that where there is a choice to be made, the interpretation at [sic] best achieves the purpose of the legislation of [sic] the one to be adopted. This means that, where a human rights consistent interpretation is in conflict with interpretation that achieves legislative purpose, the latter will prevail.[41]

The amendment was agreed to as proposed, and the clause was agreed to as amended.

From the Committee's report and the parliamentary materials, it is clear that s 30(2) was designed to preserve the purpose or intention behind legislation impugned under the *ACTHRA*, albeit that its language was tempered by the amendment, which ensured that the Act would have some effect. Of course, this is clear from the language used, but, as noted above, this language is no longer found in the Act.

The 2008 amendment brought the ACT provision into line with the Victorian provision. The amendment was made in response to a recommendation of the Government department with responsibility for the Act in a report that it published on the operation of the Act during its first 12 months in force. The Department of Justice and Community Safety recommended that the provision be amended 'to clarify that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation'.[42] The clause passed the Assembly without amendment.[43] The amendment has been described as 'strengthening' the Act,[44] and particularly 'the requirement for consistency with human rights'.[45]

The Explanatory Statement explained the effect of the amended s 30 as follows:

> It clarifies the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation is to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a

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41 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 March 2004, 571–2 (Jon Stanhope, Attorney-General).

42 Australian Capital Territory Department of Justice and Community Safety, Human Rights Act 2004*: Twelve-Month Review* (Report, June 2006) 33 (Recommendation 5).

43 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 4 March 2008, 394.

44 Gabrielle McKinnon, 'Strengthening Human Rights: Amendments to the Human Rights Act 2004 (ACT)' (2008) 19(3) *Public Law Review* 186. See also McQuigg (n 7) 87, 194.

45 *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority (ACT)* (2008) 2 ACTLR 44, 54 [39] (Refshauge J). Cf *Islam* (n 14) 260 [98] (Penfold J) (merely 'change').

> way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection [sic] 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*. It also draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 cited recently by the ACT Supreme Court in *Kingsley's Chicken Pty Limited v Queensland Investment Corporation and Canberra Centre Investments Pty Limited* [2006] ACTCA 9.[46]

The reference to *Kingsley's Chicken Pty Ltd v Queensland Investment Corporation*[47] does not assist in ascertaining the meaning and effect of s 30[48] because of the cursory nature of the citation in that case of *Ghaidan*. Indeed, one ACT judge referred to the phrase in the Explanatory Statement 'intended to operate in a way that is inconsistent with the right in question', and noted that '[t]his seems to be directly in conflict with the *Ghaidan* view that it may be possible to "depart from the intention of the Parliament which enacted the legislation" in order to achieve consistency with human rights.'[49]

In his second reading speech, the Attorney-General stated that the Bill would 'clarify the operation of the interpretive provision, to better promote a human rights consistent interpretation of our statute book'.[50]

Overall, it seems that the 2008 amendment was designed to allow s 30 of the *ACTHRA* to play a greater role in statutory interpretation, but the reference to purpose still constrains courts from applying the interpretive power in a way similar to that of UK courts under the *UKHRA*.

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46 Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 3 (unnumbered).

47 [2006] ACTCA 9.

48 *Fearnside* (n 17) 46–7 [86]–[87] (Besanko J, Gray P agreeing at 28 [1], Penfold J agreeing at 31 [20]). See also *Casey v Alcock* (2009) 3 ACTLR 1, 22 [108] (Besanko J, Refshauge J agreeing at 5 [11]–[12]); *Islam* (n 14) 264–5 [119] (Penfold J); Spigelman (n 14) 85. Cf *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* (2006) 206 FLR 328, 335 [22] (Gray J); *Devenport v Commissioner for Housing (ACT)* (2007) 210 FLR 325, 331 [20] (Higgins CJ, Gray and Connolly JJ); Priyanga Hettiarachi, '*Some Things Borrowed, Some Things New*: An Overview of Judical [sic] Review of Legislation under the Charter of Human Rights and Responsibilities' (2007) 7(1) *Oxford University Commonwealth Law Journal* 61, 83 n 96; Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb Have Been Any Different If Australia Had a Bill of Rights Like Victoria?' (2007) 18(2) *Public Law Review* 119, 129; Gledhill (n 14) 108–9.

49 *Islam* (n 14) 262 [110] (Penfold J). See also McQuigg (n 7) 144. Cf *Momcilovic* (HCA) (n 12) 180–1 [449] (Heydon J, in dissent); Evans and Evans (n 5) 86 [3.9]; Elise Parham, *Behind the Moral Curtain: The Politics of a Charter of Rights* (Centre for Independent Studies, 2010) 15; Suzanne Zhou, '*Momcilovic v The Queen*: Implications for a Federal Human Rights Charter' (2012) 11–12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128005>. See Beck (n 20) 110.

50 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4028 (Simon Corbell, Attorney-General). See also *Islam* (n 14) 265 [121] (Penfold J).

III Victoria

Victoria shares with the ACT a general approach to statutory interpretation involving a focus on purpose. Section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) provides:

> In the interpretation of a provision of an Act or subordinate instrument—
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object ...

While Victoria has no statutory provision equivalent to s 140 of the *Legislation Act 2001* (ACT), the meaning of a provision being interpreted nonetheless 'must be determined "by reference to the language of the instrument viewed as a whole"'.[51] In addition, s 35(b) sets out various materials to which consideration may be given. Relevantly for our purposes in relation to the *Charter*, these include the consultation committee report that preceded the enactment of the *Charter*,[52] the Explanatory Memorandum[53] and reports of proceedings in Parliament.[54]

Turning to the *Charter* itself, s 32 relevantly provides:

> **32 Interpretation**
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> ...
>
> (3) This section does not affect the validity of—
> (a) an Act or provision of an Act that is incompatible with a human right; or
> (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Section 36(2) is also pertinent, providing that 'if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section'. The purpose clause of the *Charter* likewise juxtaposes the interpretive and declaratory powers: s 1(2) describes that '[t]he

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51 *Project Blue Sky* (n 18) 381 [69] (McHugh, Gummow, Kirby and Hayne JJ), citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ); *South West Water Authority v Rumble's* [1985] AC 609, 617 (Lord Scarman, Lord Diplock, Lord Roskill, Lord Brandon and Lord Templeman agreeing at 622).

52 *Interpretation of Legislation Act 1984* (Vic) s 35(b)(iv).

53 Ibid s 35(b)(iii).

54 Ibid s 35(b)(ii).

main purpose of this *Charter* is to protect and promote human rights by' at once 'ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights'[55] and 'conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right'.[56] The summary of the interpretive power without the qualification of s 32(1)'s reference to purpose potentially indicates that possibility is the 'predominant limit' rather than consistency with purpose,[57] but this seems to accord too much weight to the purpose clause over the more specific provision in s 32. Moreover, summarising a provision without restating it in its entirety is a sensible approach to drafting a purpose clause (otherwise purpose clauses may simply contain duplicate provisions or be difficult to navigate due to their length), and the omission of some language for the sake of conciseness should not be mistaken for a considered assessment of the importance of the omitted words as compared with the importance of those included in the clause.[58]

Beyond the text of the *Charter*, we may turn to the documents to which s 35(b) of the *Interpretation of Legislation Act 1984* (Vic) permits consideration. In 2005, the Victorian Human Rights Consultation Committee published a report in which it recommended the enactment of a 'Charter of Human Rights and Responsibilities'.[59] The Committee referred to *Ghaidan* and this reference has sometimes been taken as authority for s 32 being a codification of the *Ghaidan* principles.[60] However, the passages quoted by the Committee did not speak of the

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55 *Charter* (n 3) s 1(2)(b).

56 Ibid s 1(2)(e).

57 Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340, 358. See also Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9, 52 ('Parliamentary Sovereignty and Dialogue'); Julie Debeljak, 'Who Is Sovereign Now? The Momcilovic Court Hands Back Power over Human Rights That Parliament Intended It to Have' (2011) 22(1) *Public Law Review* 15, 30–1 ('Who Is Sovereign Now?').

58 Perhaps one risk of this approach to drafting is the labelling of such purpose clauses as containing '"motherhood" statements': Russell Solomon, 'The Social Construction of Human Rights Legislation: Interpreting Victoria's Statutes through Their Limitations' (2017) 22(1) *Deakin Law Review* 27, 28.

59 Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Report, November 2005) vi.

60 Debeljak, 'Parliamentary Sovereignty and Dialogue' (n 57) 50–1; Hettiarachi (n 48) 82–3 n 96; Andy Gargett, Paula Gerber and Melissa Castan, 'A Right to Birth Registration in the Victorian *Charter*? Seek and You Shall *Not* Find!' (2010) 36(3) *Monash University Law Review* 1, 18; Gledhill (n 14) 108. See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 55 [215] (Bell J,

'unusual and far-reaching character' of the interpretive obligation under s 3 of the *UKHRA* or of s 3 requiring a court 'to depart from the unambiguous meaning the legislation would otherwise bear'.[61] Rather, the Committee quoted passages in which two of the Law Lords described limitations on the process of interpretation under s 3.

Lord Nicholls, quoting from Lord Rodger's speech (in the second sentence of the quotation), held that '[t]he meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must … "go with the grain of the legislation".'[62] Lord Rodger held that 'it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen'.[63] In the light of these passages themselves not lending support to an especially expansive approach to the interpretive power, the Committee's reference to *Ghaidan* provides no support for such an approach.[64]

As well as the Committee's reference to UK authority, some advocates of an expansive approach[65] have relied on its statement that the reference to purpose would provide the courts 'with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question'.[66] This is simply a rephrasing of s 32 that sheds no light on the meaning of the provision. Indeed, the Victorian Court of Appeal in *R v Momcilovic* ('*Momcilovic* (VCA)')[67] quoted a longer passage from the Committee's report, including the above statement, and came to the conclusion that s 32 should be given a narrow operation.[68]

President) ('*Kracke*'); *Lifestyle Communities Ltd [No 3] (Anti-Discrimination)* [2009] VCAT 1869, [91] (Bell J, President); *Momcilovic* (HCA) (n 12) 179–80 [447] (Heydon J, in dissent). Cf South (n 13) 148.

61 *Ghaidan* (n 15) 571 [30].

62 Ibid 572 [33].

63 Ibid 596 [110].

64 See Simon Evans and Julia Watson, 'Australian Bills of Rights and the "New Commonwealth Model of Constitutionalism"', in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013) 221, 225–6. Cf Alison Duxbury, 'Human Rights and Judicial Review: Two Sides of the Same Coin?', in Matthew Groves (ed), *Modern Administrative Law in Australia* (Cambridge University Press, 2014) 70, 87 n 115.

65 *Kracke* (n 60) 55 [215] (Bell J, President); Debeljak, 'Parliamentary Sovereignty and Dialogue' (n 57) 50.

66 *Rights, Responsibilities and Respect* (n 59) 82–3.

67 *R v Momcilovic* (2010) 25 VR 436 ('*Momcilovic* (VCA)').

68 Ibid 457 [73]–[74] (Maxwell P, Ashley and Neave JJA). See also *Director of Public Transport v XFJ* [2010] VSC 319, [62] n 59 (Ross J). Cf Debeljak, 'Who Is Sovereign Now?' (n 57) 26.

A similarly ambiguously bland statement appears in the Explanatory Memorandum: 'The object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to give effect to human rights.'[69] While it has been argued that this supports an expansive approach,[70] it is of no real assistance in ascertaining the meaning and effect of s 32. Indeed, it illustrates the point — not always true, but apt in this case — made by the Chief Justice of the ACT when he referred to an explanatory memorandum and described 'the apparent purpose of such documents of explaining as little as possible'.[71] The Explanatory Memorandum continues:

> The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.[72]

The Court of Appeal in *Momcilovic* (VCA) distinguished this from the position under *UKHRA* s 3(1).[73]

The most instructive part of the legislative history of s 32 is the parliamentary debates. The Attorney-General was the Minister promoting the Bill in the Legislative Assembly. In his second reading speech, he referred to s 32 and said that it 'recognises the *traditional role* for the courts in interpreting legislation passed by Parliament'.[74] The Court of Appeal in *Momcilovic* (VCA) made the point that '[h]ad it been the Government's intention that Victorian courts be given a role under the *Charter* which was "fundamentally different [from] their role under the standard principles of interpretation", the Minister would have been obliged to say so.'[75] While the Court should not be taken to be referring to a *legal* obligation on the Minister, there is a *political*, and perhaps *moral*, obligation. The fact is that one would expect the Minister to draw attention to a major shift in the courts' role if this were intended.

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69 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

70 Debeljak, 'Parliamentary Sovereignty and Dialogue' (n 57) 54.

71 *SI bhnf CC v KS bhnf IS* (2005) 195 FLR 151, 165 [82] (Higgins CJ). See generally Alex Hickman, 'Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?' (2014) 29(2) *Australasian Parliamentary Review* 116, 121–4.

72 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

73 *Momcilovic* (VCA) (n 67) 459 [85] (Maxwell P, Ashley and Neave JJA). Cf Debeljak, 'Who Is Sovereign Now?' (n 57) 34–6.

74 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General) (emphasis added). See also Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2556 (Justin Madden, Minister for Sport and Recreation). The Attorney-General has been said to have 'stressed the important limitations of the proposal': James Waghorne and Stuart Macintyre, *Liberty: A History of Civil Liberties in Australia* (UNSW Press, 2011) 192.

75 *Momcilovic* (VCA) (n 67) 459 [83] (Maxwell P, Ashley and Neave JJA), citing *Kracke* (n 60) 55 [218]; cf [99]–[100]. Cf Debeljak, 'Who Is Sovereign Now?' (n 57) 32–3.

Indeed, far from being 'Delphic',[76] the Minister's statement is particularly instructive when compared[77] with Lord Woolf CJ's observations on s 3 of the *UKHRA*:

> When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when section 3 applies, the courts have to *adjust their traditional role* in relation to interpretation so as to give effect to the direction contained in section 3.[78]

As the previous Chief Justice of Australia has said, '[t]he strong interpretive approach undertaken by the House of Lords in *Ghaidan* might be seen in the Australian context as altering the constitutional relationship between the court interpreting a statute and the parliament which enacted it.'[79]

This leads us to a matter of broad context that will bear relevance to any application of the Australian interpretive provisions: the strict separation of judicial power under the *Australian Constitution*.[80] Heydon J, in dissent, held in *Momcilovic v The Queen* ('*Momcilovic* (HCA)') that s 32(1) failed the *Kable*[81] test of invalidity, as it conferred a legislative function on the courts that altered their character.[82] This was on the basis of his assumption that s 32(1) was designed to have the same effect as s 3 of the *UKHRA*.[83] The other six Justices rejected this assumption, leading Heydon J to note that '[t]he adoption by a majority of this

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76 *Momcilovic* (HCA) (n 12) 178 [445] (Heydon J, in dissent).

77 See *Momcilovic* (VCA) (n 67) 459 [83] (Maxwell P, Ashley and Neave JJA).

78 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 72 [75] (emphasis added).

79 RS French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (Speech, Anglo-Australasian Lawyers Society, and Constitutional and Administrative Law Bar Association, 5 July 2012) 26 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf>. See also Groves (n 8) 11.

80 See James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths Australia, 2010).

81 See *Kable v DPP (NSW)* (1996) 189 CLR 51.

82 *Momcilovic* (HCA) (n 12) 183–4 [454]. See also JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 (July) *Law Quarterly Review* 392, 400, 401–2. Cf John Basten, 'Constitutional Dimensions of Statutory Interpretation' (Centre for Comparative Constitutional Studies Constitutional Law Conference 2015, 24 July 2015) 5–6 <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/Basten_20150724.pdf>.
In addition, Heydon J was joined by Gummow (Hayne J agreeing on this point) in finding that the declaration mechanism provided for in s 36 was also invalid on the application of this principle: *Momcilovic* (HCA) (n 12) 185 [457], 97 [188], respectively. See Bateman and Stellios (n 13) 17–29; HP Lee and Michael Adams, 'Defining Characteristics of "Judicial Power" and "Court": Global Lessons from Australia' (2013) 21(2) *Asia Pacific Law Review* 167, 190–5.

83 *Momcilovic* (HCA) (n 12) 179–81 [447]–[449]. See Gledhill (n 14) 109–10. See also Stephenson (n 6) 209 n 78.

Court of a narrow interpretation of s 32(1) ensures validity.'[84] Arguably the majority was simply applying the presumption that 'the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid',[85] a presumption given statutory force in Victoria by s 6(1) of the *Interpretation of Legislation Act 1984* (Vic) (as well as in the ACT by s 120(2) and (3) of the *Legislation Act 2001* (ACT), and in Queensland by s 9(2) and (3) of the *Acts Interpretation Act 1954* (Qld)).

While these constitutional considerations were not alone determinative, they no doubt played an important role in the background to the interpretive arguments ventilated in *Momcilovic* (HCA) (along with the prevailing political culture of rights protection in Australia[86]) and will continue to inform the

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84 *Momcilovic* (HCA) (n 12) 184 [455]. See Melissa Perry, 'The Efficacy of the Human Rights Acts in the ACT and Victoria: Challenges and Lessons Learnt' (Administrative Law and Human Rights in Australia Seminar, 16 September 2011) 9 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/MPerry_Paper.pdf>; Bateman and Stellios (n 13) 15; Joanna Davidson, 'The Victorian Charter of Human Rights and Responsibilities' (2014) 10(4) *Policy Quarterly* 46, 47; Jeffrey Goldsworthy, 'The Constitution and Its Common Law Background' (2014) 25(4) *Public Law Review* 265, 271; Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter*: Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69, 76; Chief Justice Helen Murrell, 'ACT Human Rights Act: A Judicial Perspective' (Ten Years of the ACT *Human Rights Act*: Continuing the Dialogue Conference, 1 July 2014) 8 <http://www.hrc.act.gov.au/res/ACT_Human_Rights_Act_1July2014-Chief_Justice_Murrell.pdf>; Adrienne Stone, 'Constitutional Orthodoxy in the United Kingdom and Australia: The Deepening Divide' (2014) 38(2) *Melbourne University Law Review* 836, 852–3; cf 855–7; Jack Maxwell, 'One Step Forward, One Step Back: The Victorian *Charter* in *Bare v Independent Broad-Based Anti-Corruption Commission*' (2016) 40(1) *Melbourne University Law Review* 371, 387; Dale Smith, 'Is the High Court Mistaken about the Aim of Statutory Interpretation?' (2016) 44(2) *Federal Law Review* 227, 247 n 71; Mark Weinberg, 'Human Rights, Bills of Rights, and the Criminal Law' (Bar Association of Queensland 2016 Annual Conference, 27 February 2016) 13 <http://assets.justice.vic.gov.au/supreme/resources/2f16da99-9fb5-4121-ba36-dfdf858f059f/human+rights+bills+of+rights+and+the+criminal+law++27+feb+2016.docx>. See also Dame Sian Elias, 'A Voyage around Statutory Protections of Human Rights' (2014) 2 *Judicial College of Victoria Online Journal* 4, 6. Cf Rachel Ball, 'Human Rights and Religion in Australia: False Battle Lines and Missed Opportunities' (2013) 19(2) *Australian Journal of Human Rights* 1, 15; Claudia Geiringer, 'What's the Story? The Instability of the Australasian Bills of Rights' (2016) 14(1) *International Journal of Constitutional Law* 156, 172; Sir Anthony Mason, 'The Interaction of Statute Law and Common Law' (2016) 90(5) *Australian Law Journal* 324, 324–5.

85 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (citations omitted).

86 Russell Solomon, 'Reviewing Victoria's Charter of Rights and the Limits to Our Democracy' (2017) 42(3) *Alternative Law Journal* 195, 199. See also Chintan Chandrachud and Aileen Kavanagh, 'Rights-Based Constitutional Review in the UK: From Form to Function', in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing, 2016) 63, 92; Julie Debeljak 'Legislating Statutory Interpretation under the Victorian *Charter*: An Unusual Tale of Judicial Disengagement with Rights-Compatible Interpretation', in Chris Hunt, Lorne Neudorf and Micah Rankin (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law World* (Carswell 2018) 183, 185.

approach of Australian courts to interpretive provisions in human rights legislation.[87]

IV Queensland

Queensland is closer to the ACT than to Victoria in the language of the relevant provisions mandating a purposive approach to statutory interpretation and permitting consideration of extrinsic materials. Section 14A of the *Acts Interpretation Act 1954* (Qld) provides, in part:

> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.
> (2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act.

The Act elsewhere stipulates that '*purpose*, for an Act, includes policy objective'.[88]

As in Victoria, Queensland has no statutory provision equivalent to s 140 of the *Legislation Act 2001* (ACT), but, again, the meaning of a provision being interpreted nonetheless must be determined by reference to the language of the instrument viewed as a whole. Section 14B(1) provides:

> Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation—
> (a) if the provision is ambiguous or obscure—to provide an interpretation of it; or
> (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result; or
> (c) in any other case—to confirm the interpretation conveyed by the ordinary meaning of the provision.

'Ordinary meaning' is defined in s 14B as 'the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act'.

Relevantly for the purposes of interpreting s 48 of the *QHRA*, s 14B defines extrinsic material to include the parliamentary committee report preceding the Bill,[89] the explanatory notes to the Bill,[90] the parliamentary committee report on the Bill itself,[91] the speech made to the Legislative Assembly by the Member bringing in the Bill when introducing it,[92] and material in an official record of proceedings in the Legislative Assembly.[93]

Turning to the *QHRA*, s 48 provides as follows:

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87 See Stephenson (n 6) 208.
88 *Acts Interpretation Act 1954* (Qld) s 36(1), sch 1.
89 *QHRA* (n 3) s 14B(3)(b).
90 Ibid s 14B(3)(e).
91 Ibid s 14B(3)(c).
92 Ibid s 14B(3)(f).
93 Ibid s 14B(3)(g).

> **48 Interpretation**
>
> (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
> (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

As in the ACT and Victoria, the element of the text most crucial to delimiting the interpretive power is the reference to consistency with purpose. This is reinforced by s 4(f) of the *QHRA*, which in setting out how 'the main objects [of the Act] are to be achieved' refers to 'requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights'. Section 53(2) of the Act provides: 'The Supreme Court may, in a proceeding, make a declaration … to the effect that the court is of the opinion that a statutory provision can not be interpreted in a way compatible with human rights.'[94] Beyond these indications in the *QHRA*, we must consider extrinsic materials to place s 48 in context.

Unlike in the ACT and Victoria, the body that carried out an inquiry as to the desirability of enacting human rights legislation in Queensland was a parliamentary committee.[95] A majority of the Committee (composed of Government Members) recommended that 'the Queensland Parliament move to legislate for a human rights act in Queensland'.[96] The non-Government Committee members issued separate comments, indicating that they did 'not support the introduction of a human rights act for Queensland'.[97] The resulting report described the approach of UK courts to s 3 of the *UKHRA*. In particular, it cited from *Ghaidan* the statement of Lord Nicholls that '[s] 3 may require the court to … depart from the intention of the Parliament which enacted the legislation'.[98] However, the Committee stopped short of recommending a specific form of interpretive provision.

The Explanatory Notes accompanying the Bill describe 'a number of important features to note about the interpretative provision'.[99] One of these is that 'the emphasis on giving effect to the legislative purpose means that the provision does not authorise a court to depart from Parliament's intention. However, a court may depart from the literal or grammatical meaning of the

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94 See also s 4(g).
95 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into a Possible Human Rights Act for Queensland* (Report No 30, 55th Parliament, June 2016).
96 Ibid xx.
97 Ibid xiii.
98 *Ghaidan* (n 15) 571 [30].
99 Explanatory Notes, Human Rights Bill 2018 (Qld) 30.

words used in exceptional circumstances.'[100] The reference to this qualification hints at the then cl 48 potentially being slightly more powerful than the common law principle of legality, although not of the same strength as s 3 of the *UKHRA*.[101]

The Legal Affairs and Community Safety Committee of the Parliament of Queensland held another inquiry, this time into the Bill.[102] The Committee made a single recommendation: 'that the Human Rights Bill 2018 be passed'.[103] Opposition Members made a 'Statement of Reservation', primarily objecting to the declaration of incompatibility mechanism.[104] The Committee's report did not make any specific recommendation in relation to cl 48. However, the report did quote extensively from a document prepared by the Government department responsible for the Bill (the Department of Justice and Attorney-General), responding to written submissions that had been submitted to the inquiry.[105] This provided further detail in addition to the Explanatory Notes, clarifying that a *Ghaidan*-style interpretive approach was not envisaged and that cl 48 would be similar to the principle of legality (although recognising, as had the Explanatory Notes, that cl 48 might do slightly more work than that principle):

> The interpretative provision in the Bill (clause 48) has been drafted in light of criticism and interpretations of the equivalent provision in the Victorian Charter, particularly the decision of the High Court in *Momcilovic v The Queen*. … The provision has been drafted with the policy intention of avoiding a remedial approach by the courts associated with human rights legislation in some international jurisdictions. The emphasis on giving effect to the legislative purpose means that the provision is not intended to authorise a court to depart from Parliament's intention.
>
> Therefore it is not intended that the provision empower courts to remedy deficient legislation, by changing the meaning of legislation so as to make it compatible with human rights. This is reflected in the emphasis on giving effect to the purpose of the statute. It is expected that the approach under clause 48 would be similar in nature to

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100 Ibid.

101 Cf *Taha* (n 18) 62 [190] (Tate JA), citing *Momcilovic* (HCA) (n 12) 92 [170]: 'compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, *might more stringently require* that words be read in a manner "that does not correspond with literal or grammatical meaning" than would be demanded, or countenanced, by the common law principle of legality' (emphasis added). See also Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the *Charter* — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43, 63 ('Statutory Interpretive Techniques under the Charter').

102 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No 26, 56th Parliament, February 2019).

103 Ibid 2.

104 Ibid 137.

105 Department of Justice and Attorney-General, *Response to Legal Affairs and Community Safety Committee: Issues Raised in Written Submissions* (3 December 2018).

> the common law principle of legality (that is, that absent words of clear intent that a statutory provision should be interpreted in a way that is compatible with fundamental rights). Nevertheless, it is still considered that the statutory requirement in the Bill would point to a stronger approach, and may for example involve a court departing from the literal or grammatical meaning of the words in a statute in exceptional circumstances. Clause 48 clarifies that if the court is unable to interpret a statutory provision compatibly with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is 'most compatible' with human rights. Unlike the Victorian provision, clause 48(2) makes it clear that the interpretative provision has work to do in directing the court to select the option which is most compatible with human rights, even though none of the options available are compatible with human rights.[106]

The modesty of the interpretive provision, and of the proposed *QHRA* as a whole, was a recurring theme in the parliamentary debates on the Bill. In her second reading speech, the Attorney-General specifically addressed the interpretive provision:

> The government has achieved the correct balance. The interpretative provision at clause 48 has been very carefully drafted in light of experience from other jurisdictions and is intended to avoid a strong remedial approach that would facilitate a legislative role by the courts. The emphasis on giving effect to the legislative purpose in interpretation means that the provision does not authorise a court to depart from parliament's intention.[107]

Also relevant to the interpretive power was the Attorney-General's reliance on the other Australian jurisdictions with similar human rights legislation:

> Further, experience from Victoria and the ACT, which both have similar legislative frameworks, does not indicate a misuse of the rights in the bill or an explosion of frivolous complaints. The High Court's decision in the case of *Momcilovic v the Queen* is authority for the proposition that the Victorian *Charter of Human Rights and Responsibilities Act 2006*, the model upon which this bill is based, is valid, rejecting suggestions that it gives courts some type of remedial legislative power or law-making function that is inconsistent with the judicial function of courts.[108]

The Opposition sought to amend the Bill to remove the declaration of incompatibility mechanism.[109] One feature of many of the contributions of Opposition Members to the debate on the Bill was a lack of clarity as to whether

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106 Ibid 49–50.

107 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 377 (Yvette D'Ath, Attorney-General and Minister for Justice).

108 Ibid 378 (Yvette D'Ath, Attorney-General and Minister for Justice).

109 See Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 377 (Yvette D'Ath, Attorney-General and Minister for Justice) 475–6; Explanatory Notes to David Janetzki's Amendments, Human Rights Bill 2018 (Qld).

they were objecting to the interpretive power to be conferred on (among others) courts, or whether their objections were mainly directed at the declaration mechanism, which they sought to remove. The Shadow Attorney-General, David Janetzki, seemed to criticise the interpretive power:

> The opposition's primary objection is that the bill infringes orthodox principles of statutory construction by requiring courts to interpret the bill's provisions in a way that is compatible or most compatible with another act, that is, the human rights listed in the bill. This will constitute a significant change in the relationship between the courts and the parliament and will increase the relative power of the courts.[110]

He later referred to the possibility that 'the express legislative intent of the parliament might be ignored by unelected judges'.[111] The concern of Opposition Members over the courts ignoring legislative intent was expressed on numerous occasions,[112] as was a concern that the courts would be empowered to 'rewrite' legislation.[113] Confusingly, some of the statements about 'rewriting' were followed by assertions that the proposed amendments to remove the declaration mechanism would address this concern.[114] It is therefore not clear whether the references to rewriting were directed at cl 48, or whether the 'rewriting' envisaged was the indirect effect of Parliament regarding itself as effectively bound to change its legislation to ensure consistency with the courts' interpretation of the relevant human rights law.[115]

More generally, Opposition Members expressed concern that the Bill would alter the relationship between the three branches of government in Queensland.[116] Government Members (including the Chair of the parliamentary committee that had inquired into the Bill) asserted the constitutional orthodoxy of the Bill, arguing that no such change would be effected.[117]

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110 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 380 (David Janetzki, Shadow Attorney-General and Shadow Minister for Justice).

111 Ibid 381 (David Janetzki, Shadow Attorney-General and Shadow Minister for Justice).

112 See Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 446 (Lachlan Millar), 452 (Anthony Perrett), 465 (Stephen Bennett).

113 See Queensland, *Parliamentary Debates*, Legislative Assembly, 26–7 February 2019, 384 (James Lister), 452 (Anthony Perrett), 465 (Stephen Bennett).

114 Ibid 384 (James Lister), 452 (Anthony Perrett).

115 See Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 455 (Christian Rowan): 'As the vast international and indeed domestic experience has shown, rulings of incompatibility have rarely, if ever, been made which have not resulted in the parliament of the day amending or repealing provisions. While in theory the dialogue model is attractive to many, in practice it would take, to paraphrase Sir Humphrey Appleby, a very courageous government and Attorney-General to reject any ruling of incompatibility. This is no way to hold a dialogue.'

116 Ibid 440–1 (Samuel O'Connor), 442 (Andrew Powell), 452 (Anthony Perrett), 471 (Daniel Purdie).

117 See Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 377 (Yvette D'Ath, Attorney-General and Minister for Justice), 383 (Peter Russo).

The most detailed consideration of cl 48 came from an Opposition Member. After quoting cl 48(2), he asserted:

> We are moving from judicial interpretation to judicial legislation. What happens is this: at the moment the courts interpret the law. This provision gives them the obligation to interpret the law, if it does not find a way to do so, in accordance with the bill and that is in a way that is 'most compatible with human rights'. It is enlarging their jurisdiction and moving well and truly beyond the capacity they have at the moment.[118]

The Member referred to Lord Bingham's speech in *Sheldrake v Director of Public Prosecutions*,[119] in which the senior Law Lord stated that 'the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament'.[120] The Member continued:

> Here we have the House of Lords raising the point exactly contained in clause 48(2) that at some point in time the court may need to divert from the intention of the parliament. That enlarges the jurisdiction of a court to a point that this body [the Parliament of Queensland] becomes a secondary body.[121]

The broad messages from the various background materials support the view that s 48 is similar to the principle of legality. Despite the concerns of some Opposition Members (many of which may in fact have related to the declaration power in s 53), the views expressed in the Explanatory Notes, the Department's response to the written submissions received by the parliamentary inquiry, and the statements of Government Members during the second reading debate on the Bill all emphasise that neither s 48 nor the *QHRA* as a whole was expected to effect a change to prevailing constitutional arrangements — including the interpretive function of the courts. The express references to the principle of legality should assist courts in interpreting s 48 when it falls for judicial consideration.

This is not to say that s 48 ought to be regarded as having no effect beyond what could already be achieved by the application of the principle of legality.[122] Rather, the emphasis on that principle demonstrates that the more radical aspects of the UK's *Ghaidan* approach are not to be imported via s 48. The position is somewhat complicated by the extent to which the principle of legality has developed in both Australia and the UK in the period since the enactment of the

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118 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 450 (Mark McArdle).

119 [2005] 1 AC 264.

120 Ibid 303 [28].

121 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, 450 (Mark McArdle).

122 Cf Tate, 'Statutory Interpretive Techniques under the Charter' (n 101). See also *Taha* (n 18) 62 [189]–[190] (Tate JA).

ACTHRA and the *Charter*.[123] The common law principle has gained in prominence and strength in both countries, although, at least for the time being, it cannot be said to encompass the full force of *Ghaidan*.[124]

V Conclusion

The interpretive provisions in Australian human rights legislation have been interpreted as conferring relatively modest powers on Australian courts (and other interpreters of legislation), similar to (if not entirely coextensive with) the common law principle of legality. As a matter of the application of the principles of statutory interpretation, this appears to be the correct approach. It is consistent with the text of the interpretive provisions, with their express references to the necessity of interpretations being consistent with legislative purpose, and with the respective contexts of their enactment.

In the ACT, the original form of s 30 subjugated the interpretive power to the purpose of the legislation being interpreted. In Victoria, a less restrictive approach was taken, but the background materials emphasised the modesty of s 32. The ACT having amended s 30 to mirror the Victorian legislation, Queensland has now followed this example as well. With the benefit of the experiences in the ACT and Victoria, Queensland's interpretive provision has most clearly been drafted to function in a similar way to the common law principle of legality, eschewing the approach of UK courts to s 3 of the *UKHRA*. Whatever view one takes of the merits of these interpretive provisions, one thing is obvious from their history: the pattern of Australian jurisdictions learning from the experiences of other Australian jurisdictions is as strong in the area of human rights legislation[125] as it is in others.[126]

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123 See generally Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017); Jason NE Varuhas, 'Conceptualising the Principle(s) of Legality' (2018) 29 *Public Law Review* 196.

124 On the possibility of further developments in this regard in the UK, see Coxon (n 19).

125 Williams and Reynolds (n 10) 142, 146.

126 See, eg, Douglas J Whalan, *The Torrens System in Australia* (Law Book, 1982) ch 1.

TESTING THE REGULATOR'S PRIORITIES: TO SANCTION WRONGDOERS OR COMPENSATE VICTIMS?

LACHLAN PEAKE*

As Australian corporate conduct came under intense and highly publicised scrutiny during the banking Royal Commission, so too did the conduct of the conduct regulator: the Australian Securities and Investments Commission ('ASIC'). Following the Royal Commission, the regulator has adopted what it describes as '"Why not litigate?" operational discipline' — a concept elaborated and recommended by Commissioner Hayne which is now the central tenet of ASIC's updated enforcement model. This article discusses the hierarchy of strategic priorities evident in that enforcement model and asks: should the regulator focus its resources on compensating those harmed by regulatory contraventions rather than sanctioning those who have broken the law?

I INTRODUCTION

In the Final Report of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* ('Final Report' and 'Royal Commission', respectively), Commissioner Kenneth Hayne said:

> The Australian community expects, and is entitled to expect, that if an entity breaks the law and causes damage to customers, it will compensate those affected customers. But the community also expects that financial services entities that break the law will be held to account. The community recognises, and the community expects its regulators to recognise, that these are two different steps: having a wrongdoer compensate those harmed is one thing; holding wrongdoers to account is another.[1]

In response to the Royal Commission, and specifically the 'Why not litigate?' mantra elaborated and recommended by Commissioner Hayne,[2] the Australian Securities and Investments Commission ('ASIC') has significantly reshaped its enforcement model.[3] It is quite clear that this model prioritises the sanctioning of

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1 Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2019) vol 1, 3–4 ('*Final Report*').

2 Ibid 427.

3 ASIC, 'Corporate Plan 2019–2023' (28 August 2019) 5–8 ('Corporate Plan 2019–23').

wrongdoers over the delivery of redress to victims. The aim of this article is to test the theoretical and practical justification for such a preference. The central question — should the regulator focus its resources on compensating those harmed by regulatory contraventions rather than sanctioning those who have broken the law? — arises because, while it will sometimes be possible to achieve both goals simultaneously, the prudent allocation of finite resources usually dictates that the enforcement strategy be tailored to the regulator's priority. As Commissioner Hayne put it, the 'regulator must approach [its] work … with a clear view of what kinds of outcome' it wants to achieve;[4] those desired outcomes — especially the *most* desired outcome — will guide the regulator's choice of enforcement tools.

Part II of this article demonstrates, as a preliminary factual matter, that ASIC's current enforcement model does not prioritise the delivery of redress to victims of misconduct. Part III examines whether, if such a priority were adopted, it would be theoretically justified, evaluating insights from regulatory scholarship, social psychology and sociology. The discussion commences with an analysis of the breadth of the regime that ASIC is required to enforce and the considerable discretion it is given to calibrate its enforcement style and determine its priorities when regulatory objectives conflict. The Part concludes that regulatory and interdisciplinary theory does not provide a secure foundation for either a punitive or a compensatory priority where those aims are in tension. As such, the article turns to resolve the question by reference to two key practical issues: whether regulatory mechanisms are more effective than others at achieving compensation, considered in Part IV; and whether, assuming a compensatory priority were adopted, this would unduly hinder the fulfilment of other regulatory objectives, considered in Part V.

Part IV commences with the recognition that the regulator ought properly to be mindful of both the availability and efficacy of alternative avenues for victims to obtain redress before determining its strategic priorities and resource allocation in response to a particular contravention or class of contravention. Interestingly, however, the analysis finds that regulatory mechanisms are among the most available and effective in delivering compensation when compared with private litigation, alternative dispute resolution ('ADR') and external dispute resolution ('EDR'). Despite this, Part V argues that a compensatory priority would unduly impede both the regulator's ability to achieve deterrence through enforcement and to improve compliance through its softer activities of persuasion, education and policy advice. The article therefore endorses ASIC's updated enforcement model to the extent that it conceives the agency's statutory role as best fulfilled where it prioritises the punishment or censure of regulated entities who contravene the law.

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4 *Final Report* (n 1) vol 1, 427.

II 'Why Not Litigate?'

Before a normative discussion of the optimal ranking of regulatory priorities can commence, it is necessary to briefly establish this article's factual premise: ASIC's current enforcement model does not prioritise the delivery of redress to victims. This is made clear, first, by ASIC's own regulatory guidance that reflects Commissioner Hayne's discouragement of a compensatory priority, and, secondly, because the 'Why not litigate?' model de-emphasises the use of enforcement tools that could achieve compensation for victims without recourse to litigation.

A *Lessons from the Royal Commission*

In the Interim Report,[5] Commissioner Hayne made clear that, while 'vitally important', remediation for consumers was not the 'only relevant consideration' for a regulator in taking enforcement action.[6] The Commissioner explained:

> [P]aying attention to how the entity will remedy those hurt by its conduct must never be allowed to detract from the fact of the contravention. What is to be done about the contravention? The regulator is not called on to choose between remediation and enforcement. Often, enforcement will induce an entity to set about remedying the consequences of its default, or committing to do so, before the penalty is fixed.[7]

The observation that the regulator need not choose between remediation and enforcement should not be read as a claim that the regulator ought to regard these outcomes as equally important. Rather, the Commissioner's view seems to be that the fact of a contravention requires the regulator to pursue appropriate sanctions regardless of whether compensation has been or is likely to be paid to victims.

This position is made more explicit in the Final Report, where the Commissioner offered the most detailed exposition of the question 'Why not Litigate?', which ASIC now endorses as its 'operational discipline'.[8] Specifically, the Commissioner said:

> Litigation takes time. It costs money and often great effort. There is always some uncertainty. What is to be made of time, cost and uncertainty? All three considerations

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5 Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 2018) vol 1 ('*Interim Report*').

6 Ibid 294.

7 Ibid 296.

8 ASIC, 'Corporate Plan 2019–23' (n 3) 2, 5, 7, 8, 26.

> will always be there. Why not avoid them? If a compromise can be reached without those risks, why not take it?
>
> The answer lies in recognising that litigation of the kind now under consideration is the exercise of public power for public purposes. It is litigation by a public authority to enforce the law … Breach of the law carries consequences. Parliament, not the regulators, sets the law and the consequences. There are cases where there is good public reason not to seek those consequences. Prosecution policies have always recognised that there may be good public reasons not to pursue a particular case. But the starting point for consideration is, and must always be, that the law is to be obeyed and enforced. The rule of law requires no less. And, adequate deterrence of misconduct depends upon visible public denunciation and punishment.[9]

In other words, where statute prescribes that sanctions should attach to particular misconduct, it is the regulator's obligation to see that those sanctions are applied, unless powerful public considerations militate against this. Whatever else the regulator may want to achieve through enforcement, including the delivery of adequate redress to victims of misconduct, it *must* prioritise the enforcement of the law against those who break it.

ASIC's own guidance adopts and gives effect to the Commissioner's position. In its updated 'Corporate Plan', ASIC announced the creation of a new Office of Enforcement to implement '"Why not litigate?" operational discipline', stating plainly: 'the aim of our enforcement work is to effectively bring wrongdoers to account through punishment and public denunciation'.[10] Delivering 'appropriate and timely consumer compensation' is last on a list of 'positive behaviours' that ASIC wants to inculcate in regulated entities;[11] ensuring that this occurs satisfactorily is not one of the agency's stated 'missions'.[12] Indeed, well before the Royal Commission, regulatory guidance as to ASIC's approach to enforcement, and its participation in private court proceedings, emphasised that its role is not primarily to advance the financial interests of injured parties.[13] In the post-Royal Commission regulatory landscape this stance has been reinvigorated within the context of a new operational structure and updated enforcement model.

B *Choice of Enforcement Tools*

A litigation-centric enforcement approach necessarily prefers the sanctioning of wrongdoers over the compensation of victims. Part IV of this article contains a

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9 *Final Report* (n 1) vol 1, 432–3.

10 ASIC, 'Corporate Plan 2019–23' (n 3) 2, 7.

11 Ibid 16.

12 Ibid 42–7.

13 See ASIC, 'ASIC's Approach to Involvement in Private Court Proceedings' (Information Sheet 180, June 2013) 1–3 ('Private Court Proceedings'); see generally ASIC, 'ASIC's Approach to Enforcement' (Information Sheet 151, September 2013) ('Approach to Enforcement').

detailed analysis of 'regulatory redress' — the collection of tools (litigious and non-litigious) by which a regulator can achieve the delivery of compensation — and its effectiveness when compared with other mechanisms. The purpose of this section is to briefly identify three reasons why the '"Why not litigate?" operational discipline' de-emphasises the use of enforcement tools that can return money to victims more reliably and cost-effectively than contested litigation.

The first reason concerns the newly maligned status of the Enforceable Undertaking ('EU'). Crucially, Commissioner Hayne explained the 'Why not litigate?' mantra precisely in opposition to the supposedly too-frequent reliance by the regulator on negotiated outcomes, including those that make provision for compensation.[14] In the past, ASIC has negotiated EUs that force regulated entities to return substantial sums to injured parties, as when Multiplex Ltd 'agreed to establish a $32 million fund to compensate investors' following an investigation for continuous disclosure breaches.[15] Commissioner Hayne's relatively dim view of EUs fuelled a public impression that the regulator was 'going soft', prompting ASIC Deputy Chairman Daniel Crennan QC to state that 'in the "post-royal commission world" enforceable undertakings are "fairly unlikely to be provided" by the regulator because they do not require an admission of liability'.[16] In the light of the fact that there will be many cases in which an entity would prefer to negotiate a sum total of payable redress in exchange for not admitting liability — continuous disclosure breaches being an obvious example — the regulator's new stance clearly demonstrates that the pursuit of appropriate sanctions is its priority.

In recognising that ASIC has decided to sideline the EU, it should not be thought that this reflects an eschewal of negotiated outcomes on the part of government generally. The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2020 (Cth), currently before the Senate, proposes to introduce Deferred Prosecution Agreements ('DPAs') as a tool available to the Commonwealth Director of Public Prosecutions ('CDPP') in some cases of

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14 See, eg, *Final Report* (n 1) vol 1, 424.

15 Vicki Waye and Vince Morabito, 'Collective Forms of Consumer Redress: Financial Ombudsman Service Case Study' (2012) 12(1) *Journal of Corporate Law Studies* 1, 8–9.

16 Quoted in Misa Han, James Eyers and Edmund Tadros, 'ASIC's "Why Not Litigate" Strategy Kills Enforceable Undertakings', *The Australian Financial Review* (online, 16 May 2019) <https://www.afr.com/companies/financial-services/asic-s-why-not-litigate-strategy-kills-enforceable-undertakings-20190516-p51014>.

suspected corporate criminality. Of course, the DPA and the EU differ in design,[17] rationale[18] and history — the Law Council of Australia has pointed out that the current Bill is a resurrection of one from 2017, meaning that the government's contemplation of a DPA scheme pre-dates Commissioner Hayne's criticism of ASIC's use of EUs.[19] Whatever may be the fate of the DPA proposal, the point for present purposes is that the negotiated tools available to ASIC can be expected to have a marginal role in its 'Why not litigate?' enforcement model.

The second reason reflects the history and likely future of the financial services compensation scheme directions power — which this article will for simplicity describe as ASIC's 'redress power'. In the United Kingdom, the Financial Conduct Authority ('FCA') has long been able to order firms to set up and administer compensation schemes where it takes the view that a regulatory contravention has caused loss to consumers.[20] ASIC flagged in its 2018–22 Corporate Plan that it envisaged receiving a comparable power, to direct regulated entities 'to take particular remedial actions, such as consumer compensation programs', as part of a suite of capability upgrades that will 'significantly transform [the agency's] regulatory work'.[21] This was recommended by the Enforcement Review Taskforce, which reported in December 2017.[22] Commissioner Hayne, in his Final Report, stated that such a power was likely to be included in the 'Tougher Penalties' legislation then before Parliament.[23] This did not transpire; no such power was included in the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). However, after the passage of that Act, a formal media release stated that ASIC still envisages that Parliament will legislate for this new directions capability:

> ASIC Commissioner Danielle Press 'welcomed the Government's commitment to give ASIC new directions powers that could speed up remediation programs in future … 'We

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17 For example, the DPA must be approved by a judge, ensuring independent oversight of the balancing exercise between the need to ensure that the law is enforced and the promotion of cooperation as a way to better secure that enforcement: see Commonwealth, *Parliamentary Debates*, Senate, 2 December 2019, 4715 (Jonathon Duniam, Assistant Minister for Forestry and Fisheries and Assistant Minister for Regional Tourism).

18 The DPA is not intended as a general discretionary tool for the CDPP but is confined to specified, particularly serious crimes: ibid.

19 Law Council of Australia, 'Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2020 <https://www.lawcouncil.asn.au/resources/submissions/crimes-legislation-amendment-combatting-corporate-crime-bill-2019>.

20 *Financial Services and Markets Act 2000* (UK) ss 384, 404, 404F.

21 ASIC, 'Corporate Plan 2018–22' (31 August 2018) 12.

22 Australian Government, The Treasury, *ASIC Enforcement Review Taskforce* (Final Report, December 2017) 102.

23 *Final Report* (n 1) vol 1, 441.

> are pleased that the Government has agreed to adopt recommendations from the 2017 *ASIC Enforcement Review Taskforce Report*, which includes a directions power. This would allow ASIC to direct AFS licensees to establish suitable customer review and compensation programs.'[24]

ASIC Chairman James Shipton has been careful to point out that 'Why not litigate?' is a different concept than 'litigate first' or 'investigate everything'.[25] Nevertheless, it seems obvious that with the power to order financial services entities to compensate consumers without the need to take court action, ASIC would be *less likely* to take court action if consumer redress were its strategic priority. Given ASIC's updated enforcement model, we can expect that if it receives a 'redress power' it will be used far more often in addition to than in lieu of litigation in pursuit of appropriate penalties.

The third and final reason is that there is an emerging emphasis on the need to take enforcement action against individuals rather than, or in addition to, corporations. Given, as Malcolm Sparrow puts it, that '[s]ocial norms act less upon complex organizations than upon individuals',[26] there is a view that in order to achieve more consequential and durable change in the future behaviour of regulated entities, ASIC should be much quicker to focus its enforcement on the individuals responsible for breaches rather than the corporations they work for or manage.[27] The Australian Law Reform Commission ('ALRC'), in the Discussion Paper released for its inquiry into corporate criminal responsibility, emphasised that individual liability 'reflects the reality that while corporations are distinct legal entities … they are also ultimately composed of individuals' and 'there is widespread agreement in the literature … [about] the importance of personal accountability in ensuring corporate compliance'.[28] Thus, in ASIC's most recent Corporate Plan, the agency states that 'a key objective … is to understand and strengthen director and officer oversight in large, listed companies',[29] and that it intends to make use of increased penalties to 'focus on both corporate

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24 ASIC, 'ASIC provides update on further reviews into fees-for-no-service failures' (Media Release, 19-051MR, 11 March 2019) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-051mr-asic-provides-update-on-further-reviews-into-fees-for-no-service-failures/>.

25 Quoted in Han, Eyers and Tadros (n 16).

26 Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000) 63, quoted in *Final Report* (n 1) vol 1, 424.

27 See, eg, Commissioner Hayne's discussion of the difficulties taking action against individual financial advisers and the compliance problem this generates: *Final Report* (n 1) vol 1, 215–16.

28 ALRC, 'Corporate Criminal Responsibility' (Discussion Paper DP 87, 2019) [7.3], [7.68] ('Corporate Criminal Responsibility').

29 ASIC, 'Corporate Plan 2019–23' (n 3) 7.

responsibility and individual responsibility' and 'scrutinise whether individuals at executive and board level are carrying out their legal responsibilities'.[30] It is trite to point out that individuals typically have less funds than corporate entities with which to satisfy the claims of injured parties;[31] as such, the expenditure by ASIC of its resources in enforcement action against individuals demonstrates a renewed strategic priority of ensuring appropriate punishment or censure of wrongdoers, irrespective of whatever capacity they may have to pay compensation. The following Part examines whether there is a satisfactory theoretical basis for such a priority.

III A Theoretical Principle?

The rules administered by regulators are designed to assist the proper functioning of the modern economy; breach of them, owing to the size and complexity of that economy, can cause significant harm to vast numbers of people.[32] Lurking behind this somewhat anodyne observation is a question of principle far more interesting and complicated: *Who* or *what* does the regulator serve by taking enforcement action: victims, the state, or the more nebulous 'society at large'? In this Part, I consider whether relevant theory supplies a satisfactory answer to this question. The first section examines the views of leading regulatory scholars on the goals or aims of regulation and argues that their formulations do not offer an adequate theoretical explanation for the regulator's prioritisation of either victim compensation or the sanctioning of wrongdoers where these aims might conflict. The second section picks up the amorphous notion of 'public expectations' to which reference is often made, including by Commissioner Hayne in the introductory quote to this article, without an explanation of *how* we can meaningfully claim to apprehend the public's expectations or precisely *why* they are a legitimate guide for the regulator. I problematise the notion of 'public expectations' by reference to social psychological research and then contrast it with the broader and arguably more legitimate concept of the 'public interest'. The outcome of the discussion is that a regulator compensatory priority lacks a secure basis in theory; thus, the question posed by this article must be resolved by reference to the practical and operational factors raised in Parts IV and V below.

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30 Ibid 8.

31 Jonathon Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 15.

32 Ibid 1; Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38(3) *Sydney Law Review* 311, 311.

A *Theoretical Justifications for Regulatory Objectives*

This section begins by interrogating the capacity of ASIC's legislative remit to function as a predetermined guide for structuring strategic priorities. It then comparatively evaluates the views of leading regulatory scholars on the question of whether the regulator ought to prioritise the censure of wrongdoers or the delivery of compensation to victims where these aims are in tension. The absence of a sufficiently comprehensive, principled answer to that question invites a broader inquiry into other disciplines — notably sociology and social psychology — which commences in Part III(B) below.

At the outset, it is worth noting that to some extent a regulator's goals or aims are pre-determined by the legislative 'blueprint' that defines the scope of its remit and confers the powers and functions necessary to discharge it.[33] ASIC as the corporate and financial services conduct regulator is usually described by, and understood through, the 'cop on the beat' metaphor — a corporate watchdog. It might be thought, then, that the question posed by this article is a simple one when applied to ASIC because, even where the agency takes an interest in assisting victims, it is ultimately acting as the corporate police officer motivated to ensure compliance with, and obedience to, the law. But I do not think this is sufficient, for four reasons. First, ASIC's legislative remit is exceedingly broad — too broad, indeed, for it to be determinative as a general 'blueprint' for structuring regulatory priorities.[34] In some areas of its responsibility, of which negligent or conflicted financial advice is an obvious example, the significant risk that misconduct will lead to substantial or widespread loss is likely to prompt the agency to consider the interests of victims before it makes a judgement about what sanctions it ought to pursue and in what manner it ought to pursue them.[35] With the ever-present problem of resource limitation, the regulator might be unable or unwilling to pursue both objectives to the maximum extent possible. It must choose. By contrast, in other areas of its responsibility, of which insider trading is a paradigmatic example, the lack of a defined class of victims is a key reason why ASIC almost always pursues criminal sanctions — its avowed purpose being to send a message that the conduct is 'wrong'.[36]

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33 Robert A Kagan, 'Editor's Introduction: Understanding Regulatory Enforcement' (1989) 11(2) *Law & Policy* 89, 94.

34 See the 'objects' provision of the *ASIC Act 2001* (Cth) s 1(2).

35 See generally Legg (n 32).

36 Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Companies & Securities Law Journal* 289, 303–7.

Secondly, ASIC is equipped with a diverse range of enforcement tools, some of which are clearly punitive in nature while others are directed to securing private compensation, a survey of which can be found in Part IV(A) of this article. The regulator has considerable latitude to choose among these tools, and formulate combinations of them, in order to achieve its specific objectives in relation to the particular contravention or class of contravention with which it is dealing. This breadth of capacity is reflected also in ASIC's governing legislation, which empowers it 'to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions'.[37] This is an important sense in which the role of 'corporate police officer' is somewhat more expansive than that of an actual police officer, whose powers and responsibilities are more narrowly tailored to the specific function of securing compliance with the law.[38] Thirdly, and relatedly, changes in the regulator's patterns of use of its enforcement tools are apt to occur as much through internal reform of its policies and procedures as through legislative change. Part II(B) of this article supplied a clear example — the drastic repositioning of the EU, a tool that may be used, and in the past was commonly used, to secure victim redress without the need to pursue sanctions in contested litigation. This is a significant change in approach brought about by the regulator's internal response to the Royal Commission and not through any change to its governing legislation or the regime it is required to enforce. This discretionary width reflects the limitations of viewing ASIC's statutory remit as a prescriptive 'blueprint' that is determinative of its priorities and objectives.

Finally, and perhaps most importantly for present purposes, recent decades have witnessed a shift among legislators, regulators and theorists alike away from the monochromatic question of 'whether regulations result in "compliance"' to the more technicolour issue of 'whether the regulations, as administered, produce socially desirable outcomes'.[39] Parliament has charged ASIC with striving to 'maintain, facilitate and improve the performance of … [and] promote the confident and informed participation of investors and consumers in, the financial system'.[40] Scholars have noted that in pursuit of such broad aims framed in the language of principles rather than rules, regulatory enforcement styles differ

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37 *ASIC Act 2001* (Cth) s 11(4).

38 See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the long title of which is: 'An Act to consolidate and restate the law relating to police and other law enforcement officers' powers and responsibilities; to set out the safeguards applicable in respect of persons being investigated for offences … and for other purposes.'

39 Kagan (n 33) 90.

40 *ASIC Act 2001* (Cth) s 1(2)(a)–(b).

widely both between and within agencies, as officers adapt their broad powers to their own more specific structure of strategic priorities.[41] Johnstone and Sarre have gone so far as to say that 'regulation in the 21st Century is *characterised* by flexibility', both as to aims and process.[42] The problem faced by the modern regulator is that it is *not* given the certainty of a single or overriding objective like 'compliance'; as Haines and Gurney put it, 'multiple goals exist, some of which conflict … In cases of conflict, exhortation to focus on outcomes, to engender a singular "compliance culture" or to follow an ordered enforcement strategy misunderstands the regulatory task and overemphasises its simplicity.'[43] In my view, two of the most important goals in corporate and financial services regulation are among those that are apt to conflict: the need to ensure that the law is enforced against those who break it; and the need to ensure that those who are injured by the breaking are made whole. When those goals do conflict, how should they be prioritised? This is a question on which regulatory theorists supply different answers; ultimately, I do not consider any of the leading formulations sufficiently comprehensive.

Christopher Hodges rejects what he describes as the 'classical' understanding — that the state's interest in enforcing the law takes priority to the interests of victims — and claims it is 'axiomatic that redress should be paid whenever due';[44] thus, he and Stefaan Voet advocate a model of regulatory objectives that ranks the delivery of compensation above the sanctioning of contraveners.[45] John Braithwaite extends this position even to criminal conduct in the regulatory sphere, arguing that the optimal strategy is a 'restorative justice' approach, which embraces financial and non-financial redress, rather than punishment of perpetrators.[46] In my view, these scholars base their formulations on a strong prima facie commitment to the *general principle* that

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41 See, eg, Bridget M Hutter, 'Variations in Regulatory Enforcement Styles' (1989) 11(2) *Law & Policy* 153; Kagan (n 33) 94, 99.

42 Richard Johnstone and Rick Sarre, 'Introduction', in Richard Johnstone and Rick Sarre (eds), *Regulation: Enforcement and Compliance* (Australian Institute of Criminology, Research and Public Policy Series No 57, 2004) 4, 5 (emphasis added).

43 Fiona Haines and David Gurney, 'Regulatory conflict and regulatory compliance: the problems and possibilities in generic models of regulation' in Johnstone and Sarre, *Regulation: Enforcement and Compliance* (n 42) 11.

44 Christopher Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23(5) *European Review of Private Law* 829, 837 ('Mass Collective Redress'); Christopher Hodges, 'Collective Redress: The Need for New Technologies' (2019) 42(1) *Journal of Consumer Policy* 59, 60 ('The Need for New Technologies').

45 Christopher Hodges and Stefaan Voet, *Delivering Collective Redress: New Technologies* (Hart, 2018) 9.

46 See generally John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2001).

those who suffer harm should be compensated or 'made whole'. This does not, I submit, adequately account for the unique position of the regulator, straddling public and private law, which is tasked also with conserving the systemic integrity of markets and industries. Ultimately, this article will argue that this unique position requires a regulator compensatory priority to be justified according to its relative effectiveness at delivering redress and its impact on other regulatory goals.

Others such as William Allen and Neil Gunningham take a broader view, identifying the goals of regulation to be securing 'complex human welfare',[47] fulfilling 'social objectives' and instilling 'community confidence'.[48] But what do these concepts mean? No doubt each *includes* the interests of injured parties, but how important is this compared with other considerations like the need to ensure that the law is enforced? Any theory must acknowledge that these considerations can be in tension; Michael Legg and Joanna Bird point out that regulatory contraventions frequently place the 'private' interests of injured consumers in conflict with 'public' or systemic goals.[49] The critical question for present purposes, unanswered by the extant body of regulatory scholarship, is whether there is a clear principled reason to resolve the tension one way or the other. One possible method of doing so, exemplified by Commissioner Hayne and ASIC, is by reference to the expectations of the community. The next section interrogates the merit of relying on 'public expectations' as a guide to structuring regulatory priorities.

B *'Public Expectations' and the 'Public Interest'*

This section raises two questions. First, how do we know what the community 'expects' its regulators to focus on or prioritise? Secondly, assuming we can reliably ascertain the public's expectations, is this the best guide to structuring a model of regulatory priorities?

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47 William T Allen, 'Commentary on the Limits of Compensation and Deterrence in Legal Remedies' (1997) 60(4) *Law and Contemporary Problems* 67, 75.

48 Neil Gunningham, 'Enforcement and Compliance Strategies', in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) ch 7, 120.

49 Joanna Bird, 'ASIC's Role as Intervener: When Should the Regulator Intervene in Private Litigation?' (2010) 28(7) *Company and Securities Law Journal* 460, 460–1; Michael Legg, 'Public and Private Enforcement: ASIC and the Shareholder Class Action', in Michael Legg (ed), *Regulation, Litigation and Enforcement* (Thomson Reuters, 2011) 151, 155, 164.

1 *Ascertaining Public Expectations*

Part I of this article commenced with an excerpt from the Royal Commission Final Report, in which Commissioner Hayne stated that the community *expects* its regulators to recognise that holding wrongdoers to account is a discrete and indispensable function of their enforcement activity. For its part, ASIC describes it as a 'community expectation' that 'unlawful conduct should be punished and publicly denounced through the courts'.[50]

It may be that the regulator and the Commissioner are deploying the concept of 'public expectations' in a manner akin to the concept of 'public confidence in the administration of justice'[51] or the 'reasonable person'. That is, the phrase is a juristic device, not an empirical claim about the desires or preferences of actual members of the community. Yet the question of prioritising the compensation of victims over the punishment of perpetrators is a real philosophical dilemma about which human intuitions are likely to differ. In theory, then, if it is possible to more precisely apprehend the *actual* expectations and preferences of the community, this would be a surer guide to structuring regulatory priorities. Indeed, in the criminal sentencing context, techniques such as surveys, focus groups and deliberative polls have been used to ascertain 'community attitudes' about the performance of sentencing judges, in recognition of the fact that 'public opinion … has a major impact on the state of public confidence in the criminal justice system'.[52]

However, scientific research, while a fruitful avenue of inquiry here, has yielded results ultimately too contingent to provide a satisfactory answer. Social psychological studies show that most people prefer authorities to compensate victims rather than punish perpetrators,[53] but this result is reversed where the perpetrator accrued unjust gains[54] and where the conduct was technically 'criminal'.[55] What is interesting about these results is the relationship between outcomes, behaviour and normative labels. Let us consider a hypothetical example. A financial adviser, in breach of their obligation to exercise proper care

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50 ASIC 'Corporate Plan 2019–23' (n 3) 7, 44.

51 See, eg, *R v Whyte* [2002] NSWCCA 343, [160].

52 New South Wales Parliament, 'Public Opinion on Sentencing: Recent Research in Australia' (e-brief 08/2014, June 2014) 1–2 <https://www.parliament.nsw.gov.au/researchpapers/Documents/public-opinion-on-sentencing-recent-research-in-/public%20opinion%20on%20sentencing.pdf>.

53 Yingjie Liu et al, 'Punish the Perpetrator or Compensate the Victim: Gain versus Loss Context Modulates Third Party Altruistic Behaviours' (2017) 8 [issue?] *Frontiers in Psychology* 2066; Sebastian Lotz et al, 'Punitive versus Compensatory Reactions to Injustice: Emotional Antecedents to Third-Party Interventions' (2011) 47(2) *Journal of Experimental Social Psychology* 477, 480.

54 Liu et al (n 53).

55 Jan-Willem Van Prooijen, 'Retributive versus Compensatory Justice: Observers' Preference for Punishing in Response to Criminal Offences' (2010) 40(1) *European Journal of Social Psychology* 72.

and skill, negligently advises their client to make an inappropriate and high-risk financial decision that culminated in loss to the client. Presented only with this information about the case, social psychological research suggests that most people would prefer the relevant authorities to focus their efforts on *compensating* the injured client. However, if informed that the financial adviser obtained a sizeable commission from the transaction, it is more likely that most people would prefer the authorities to ensure that the adviser was *stripped of his or her gains*. If informed, further, that the adviser's conduct was dishonest or deceptive in relation to their obtaining of the commission, such as would amount to an offence under s 192E(1)(b) of the *Crimes Act 1900* (NSW), the fact that the conduct can be labelled 'criminal' makes it more likely that most people would prefer the authorities to focus on *punishment*.

In other words, even where research can shed light on the actual content of public expectations about the actions of public enforcers, there are complex variables that hinder the reliability of this as a general guide to structuring regulatory priorities.

2 *The Public Interest: Democracy, Sociology*

For now, let us assume that 'public expectations' *could* be precisely ascertained through research, or reliably approximated as a kind of juristic device. It is an entirely separate question whether this is the most legitimate guide to determining the resource allocation and strategic priorities of regulators. It is not difficult to see why one might presume so: the regulator is a government entity; Australia's constitutional system establishes a line of accountability from the government to the Parliament and, ultimately, to the people, whose democratic will is supposed to be respected and given effect. As Commissioner Hayne put it, the community has expectations of '*its*' regulators[56] — in some basic sense, public enforcers *belong to* and are answerable to the public. But in a representative system such as ours, the agencies of state should not act according to perceived public opinion from time to time but rather according to what seems *to them* to be in the public interest. Sometimes, an unpopular course of action, contrary to the expectations of the general public, is nonetheless the right one.

So, is this concept of the 'public interest' any more helpful? In *Deloitte Touche Tohmatsu v ASIC*, Lindgren J held that when deciding whether to exercise its power under s 50 of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'), a provision which allows the regulator to commence a civil suit on

[56] *Final Report* (n 1) vol 1, 3–4.

behalf of a private plaintiff, ASIC must not be guided solely by the interests of that plaintiff but rather the interests of the public.[57] Here, the 'public interest' is taken broadly to embrace the full gamut of other considerations of which the regulator may properly be mindful, for instance: whether the case gives rise to an important question of principle that has broader regulatory significance; the prospects of success in the matter and therefore ASIC's extent of financial exposure; or the need to promote public confidence in the financial system.

But what if the broader 'public interest' is actually best served where public authorities focus their resources on remedying private injury rather than imposing public censure? Sociological theories of law and punishment invite contemplation of this question. Contemporary economies are highly differentiated, with various organs such as consumers, manufacturers, marketers, advisers, financiers, insurers, brokers, and others operating in fields that are diverse but functionally interdependent. As the authors of the final report of the Ramsay Review point out, the contemporary financial system is a 'complex, adaptive network' in which the frequency of 'interactions' between participants 'inevitably increases the demand for dispute resolution'.[58] This reflects the Durkheimian sociological theory that modern, complex societies depend for their cohesive functioning mainly on 'restitutive' law aimed at repairing broken social relations rather than 'repressive' law aimed at sanctioning wrongdoers to reconfirm norms of conduct.[59] Braithwaite's advocacy of a restorative justice approach to corporate criminal conduct[60] clearly reflects this sociological perspective, which views the goal of regulatory enforcement as the prompt and satisfactory resolution of disputes so that the various 'organs' that comprise the economy can resume functional relations.

It can be taken as given that the modern financial system is a complex web of interactions which requires adequate remedial mechanisms. However, the classical sociological understanding of the primacy of 'restitutive' rather than 'repressive' law is riddled with difficulties[61] and, in my view, cannot ultimately be sustained. A number of scholars have pointed to the historical inaccuracies of

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57 *Deloitte Touche Tohmatsu v ASIC* [1996] FCA 1370, [39]–[40]; see ASIC, 'Private Court Proceedings' (n 13) 1–3; see generally ASIC, 'Approach to Enforcement' (n 13).

58 Commonwealth, *Review of the Financial System External Dispute Resolution and Complaints Framework* (Final Report, April 2017) 7, 19–20.

59 Emile Durkheim, *The Division of Labor in Society* (Macmillan, 1933) 174.

60 See generally John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2001).

61 Steven Lukes, *Emile Durkheim: His Life and Work — A Historical and Critical Study* (Peregrine, 1975) 160.

Durkheim's theory of the development of law and its supposed connection with the increasing complexity and differentiation of the social and economic system.[62] I consider there to be at least two other major reasons why the theory underestimates the importance of punitive law in the contemporary economy: first, because there has been a general expansion of criminal law, including into areas that could also be (and in many cases once were) dealt with by civil law; and, secondly, because even restitutive or remedial law, when brought about by the intervention of public enforcers, is, in the final analysis, punitive in nature.

Expansion of the criminal law into ever new domains is a widely noted phenomenon.[63] It is true that many new offences are of what might be described as a bureaucratic or administrative type,[64] yet crimes have emerged in areas where, on a Durkheimian interpretation, they never should have, such as offences associated with the mismanagement of private companies, punishable by imprisonment.[65] ALRC research furnishes stark evidence of this phenomenon: 2,898 criminal offences are potentially applicable to corporations, including among them 'the failure to place an ACN on certain company documents' and the 'failure to notify ASIC of a change in company office hours'.[66] In addition to this numerical expansion, and despite Durkheim's claim in his 'Two Laws of Penal Evolution',[67] research from Spitzer demonstrates that the *severity* of punishment has actually increased rather than decreased as societies and economies have become more differentiated and complex.[68] Indeed, in some areas of its regulatory responsibility, ASIC's preference has been for the more severe enforcement option where a less severe one is available, for example with insider trading, a form of market misconduct which *can* be dealt with civilly by ASIC but almost always is prosecuted criminally for the express purpose of 'sending a message' that the conduct is wrong.[69] Similarly, public sentiments in the

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62 See, eg, Leon Shaskolsky Sheleff, 'From Restitutive Law to Repressive Law: Durkheim's *The Division of Labor in Society* Revisited' (1975) 16(1) *European Journal of Sociology* 16; Steven Lukes and Andrew Scull (eds), *Durkheim and the Law* (Martin Robertson, 1983) 10.

63 Lukes and Scull (n 62) 14.

64 In 'Two Laws of Penal Evolution', Durkheim discussed the difference between usual criminal law and more mundane offences such as fishing or hunting in the closed season: Emile Durkheim, 'Two Laws of Penal Evolution' (1901) 4 *Année Sociologique* 65, 65–9, quoted in Roger Cotterell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh University Press, 1999) 69.

65 Eg, *Corporations Act 2001* (Cth) s 184.

66 ALRC, 'Corporate Criminal Responsibility' (n 28) [3.10]–[3.11].

67 Durkheim (n 64).

68 Steven Spitzer, 'Punishment and Social Organization: A Study of Durkheim's Theory of Penal Evolution' (1975) 9(4) *Law and Society Review* 613, 631; see also Lukes and Scull (n 62) 14–15.

69 Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Companies & Securities Law Journal* 289, 303–7.

contemporary economy are often marked by the *desire for punitive treatment* of conduct that could be dealt with in a compensatory and restitutive way, for instance the strong demand by some in the community to imprison bankers whose misconduct was exposed by the Royal Commission.[70] These trends are radically different from what Durkheim predicted and suggest a greater importance of the desire to punish in complex and differentiated economies.

Secondly, scholars have pointed out Durkheim's under-emphasis of the way repressive sanctions ultimately support the obligatory character of restitutive remedies.[71] Durkheim was critical of Spencer's apparent belief that the pursuit of individual self-interest in complex societies would coordinate automatically such that defective relations between people would self-correct, believing instead that for a 'stable social order' it was necessary that 'self-interested action' be united with 'dutiful action'.[72] Although Durkheim did point out that the two types of law — 'restitutive' and 'repressive' — could be blended, he maintained that when the state steps in to enforce a contract (for example) it is acting as the 'essential cog in the machine' for the restitutive process, not as a repressive agent.[73] That is, Durkheim would probably view such crimes as contempt of court or perjury as restitutive adjuncts: they are there to support the goal of repairing broken social relations, not to *punish* in order to reaffirm collective moral norms. Like Schluchter, I do not find this persuasive;[74] the obligation to obey the rulings of relevant authorities has a *moral* valence, albeit a different one to the obligation not to murder or not to steal. This is the sine qua non of judicial authority. Recognition of this fact can be seen to underpin Commissioner Hayne's view, quoted in Part II of this article, that the promotion of respect for and observance of the law, through its enforcement, is and ought to be a salient concern for a conduct regulator.[75]

C *Conclusion*

Nevertheless, it seems to me that an analysis of the sociological theory of law and its enforcement — as with an analysis of regulatory scholarship and the insights from social psychology — allows us only to conclude that *both* remedial and punitive outcomes are important regulatory goals; these theories do not on their

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70 See Rick Sarre, 'Yes, We Can Put Bank Bosses in Jail, but is that the Best Way to Hold Them to Account?' *The Conversation* (online, 13 February 2019) <http://theconversation.com/yes-we-can-put-bank-bosses-in-jail-but-is-that-the-best-way-to-hold-them-to-account-111507>.

71 See a review of the literature by Lukes and Scull (n 62) 13.

72 Wolfgang Schluchter, 'The Sociology of Law as an Empirical Theory of Validity' (2002) 2(3) *Journal of Classical Sociology* 257, 262.

73 Emile Durkheim, *The Division of Labor in Society* (New York, trans G Simpson, 1933) 127–9.

74 Schluchter (n 72) 262.

75 *Final Report* (n 1) vol 1, 432–3.

own supply a sufficient reason, in point of principle, for the regulator to focus its resources on one or the other where the aims conflict. One standard that is often touted as the basis for such a principle — the 'expectations' of the public — is, when analysed, ultimately unreliable. The notion of the 'public interest' seems more apposite; however, while this concept suggests a range of considerations including, but not limited to, the interests of injured parties, it does not provide a useful guide to a general structuring of the priorities of regulatory enforcement. In my view, then, the question posed by this article must be answered by reference to practical and operational considerations, namely, whether regulatory mechanisms are comparably effective at delivering compensation, and whether the adoption of a compensatory priority would have an adverse impact on the fulfilment of other regulatory goals. These issues are discussed in Parts IV and V below.

IV 'Regulatory Redress' and Its Relative Effectiveness

It is appropriate and desirable that the regulator consider the availability and efficacy of non-regulatory mechanisms for injured parties to obtain redress when determining its response to a particular contravention or class of contravention. Correspondingly, if the powers and functions of a regulator are less effective than those other mechanisms at delivering redress, this provides a strong reason against a regulator compensatory priority. This Part outlines 'regulatory redress' and then compares it with private litigation, ADR and EDR, against the criteria of access, cost, duration and quality of outcome, and finds that, in general, regulatory redress is among the most effective.

A *Regulatory Redress*

Regulatory redress has been defined generally as 'redress *ordered* or *brought about* by the intervention of public enforcers'.[76] ASIC has a number of mechanisms available to it that satisfy this definition. First, it can commence proceedings under s 50 of the *ASIC Act* to recover compensation 'in the name of, or on behalf of, another person', providing the proceedings arise out of a formal investigation or examination and ASIC considers them to be in the broader public interest.[77] ASIC is unlikely to commence a s 50 action if other redress mechanisms are

[76] Hodges and Voet (n 45) 2 (emphasis added).
[77] Bird (n 49) 462; ASIC, 'Private Court Proceedings' (n 13) 5.

available;[78] importantly, Joanna Bird notes that even the impecunious plaintiff may have recourse to legal aid, litigation funding, EDR or ADR.[79] Secondly, under s 1330 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') ASIC has a right to intervene in proceedings relating to a matter arising under that Act, which allows ASIC to bring its resources and the evidentiary fruits of its investigations to assist private plaintiffs. This power, too, is reserved for cases where the cost to ASIC is justified because of the matter's broader regulatory significance.[80] Thirdly, when taking civil penalty proceedings, ASIC can seek a compensation order under s 1317H of the *Corporations Act*. Waye and Morabito observe that, consistently with the escalatory logic of responsive regulation, these three mechanisms are reserved for 'more egregious' or 'widespread' cases of breach.[81] Fourthly, ASIC can seek that compensation arrangements are made a term of an enforceable undertaking, as in the case of Multiplex Ltd referred to in Part II(B) of this article.[82] Lastly, ASIC can take informal action, as it did by participating as a non-party in the mediation that led to $253 million of compensation for creditors of Opes Prime Group Ltd.[83] Not included in this list is ASIC's approval of EDR schemes for financial services licensees,[84] because it is such schemes themselves — of which the largest and most important is the Australian Financial Complaints Authority ('AFCA'), the successor to the Financial Ombudsman Service ('FOS')[85] — that determine and administer entitlements to compensation.

Notably, ASIC does not yet have the power to *order* that compensation be paid or a compensation scheme be established. In Part II(B), above, I outlined the history and current status of this 'redress power', which both the Enforcement Review Taskforce and the ALRC recommended that ASIC receive,[86] modelled on that available to the United Kingdom FCA. As discussed in Part II(B), ASIC has confirmed that this power remains on the legislative agenda as part of its broader

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78 ASIC, 'Private Court Proceedings' (n 13) 5–6.

79 Bird (n 49) 464.

80 ASIC, 'Private Court Proceedings' (n 13) 3.

81 Vicki Waye and Vince Morabito, 'Collective Forms of Consumer Redress: Financial Ombudsman Service Case Study' (2012) 12(1) *Journal of Corporate Law Studies* 1, 8–9.

82 Ibid.

83 Ibid.

84 See ASIC, 'Private Court Proceedings' (n 13) 1.

85 Waye and Morabito (n 81) 5–6; AFCA is also the successor to the Superannuation Complaints Tribunal and the Credit and Investments Ombudsman.

86 Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third Party Litigation Funders* (Report No 134, 2018) 235–55 [8.1]–[8.76] ('*Class Action Proceedings*'); James Eyers, 'ASIC Seeks New Power to Force Bank Compensation', *Australian Financial Review* (online), 17 April 2018 <https://www.afr.com/news/asic-seeks-new-power-to-force-bank-compensation-20180417-h0yvkc>.

capability upgrade; as such, the following analysis includes such a power in the phrase 'regulatory redress', along with ASIC's existing mechanisms.

B *A Note on Internal Dispute Resolution*

One mechanism that this Part does not deal with is Internal Dispute Resolution ('IDR'), the direct negotiation of a remedial outcome between an injured party and the entity responsible. There is one major reason for this exclusion: there is a marked lack of data on IDR processes, both generally and in relation to specific industries and specific regulated entities.[87] This is despite the fact that Australian Financial Services Licence ('AFSL') holders are obliged to maintain adequate IDR procedures.[88] ASIC has attempted to compensate for the lack of a statutorily mandated reporting requirement by issuing regulatory guidance that confirms its expectation that adequate records will be kept of internal dispute and complaints handling, and that these will remain available for ASIC's inspection if required.[89] Notwithstanding this guidance, it remains — as noted by the authors of the final report of the Ramsay Review — simply too difficult to assess IDR against other compensation mechanisms given the lack of transparency.[90] This is unfortunate because IDR is usually the first process available to an injured party and performs a crucial 'stepping stone' or gateway function to other dispute resolution mechanisms; if IDR is functioning properly, it can relieve pressure on EDR, ADR and court-based processes.[91] The only point to make for present purposes is that with the enactment of ASIC's contemplated 'redress power', it may be that the regulator's supervisory function with respect to IDR is enhanced, leading to better outcomes and also better transparency.

C *Criteria for Evaluation*

There are four criteria that this article will use to compare regulatory redress with the mechanisms of private litigation, ADR and EDR schemes: access, cost,

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87 Commonwealth, *Review of the Financial System External Dispute Resolution and Complaints Framework* (n 58) 186.

88 Ibid.

89 ASIC, 'Regulatory Guide 165: Licensing: Internal and External Dispute Resolution' (May 2018), 33 (RG165.128), 47 (Guiding Principle 4.9).

90 Commonwealth, *Review of the Financial System External Dispute Resolution and Complaints Framework* (n 58) 186.

91 Ibid 189.

duration and outcomes.[92] In general, regulatory redress can be considered the most effective mechanism, or at least equally effective to appropriately designed EDR and ADR schemes.

1 *Access*

Any compensatory mechanism must be accessible to be effective. Of particular relevance in the context of financial services and markets is the ability to facilitate the participation of individuals in mass claims. Hodges and Voet demonstrate that the 'outstanding feature' of the regulatory redress mechanism is 'the ability to achieve a generic solution for all those affected … on an opt-out basis'.[93] By contrast, EDR schemes such as the AFCA usually resolve claims individually, which must be initiated by the affected consumers themselves; however, I would contend that as they are typically low-cost, their opt-in nature is only a minor barrier to access.[94] Formerly, an issue with the accessibility of FOS was that the monetary limits prescribed by statute were outdated and too small — as the authors of the final report of the Ramsay Review pointed out, a $500,000 limit was inappropriate given the typical value of retail financial products such as home loans.[95] This difficulty has been somewhat ameliorated with the AFCA receiving jurisdiction for disputes up to $1 million.[96]

In response to Hodges and Voet's analysis that mass, opt-out participation is the outstanding feature of regulatory redress, it could be argued that class actions are, at least in Australia, usually conducted on an opt-out basis and resourced by litigation funders rather than the plaintiffs themselves. However, a significant limitation to accessibility is that only those matters that are commercially viable are likely to be funded. This problem is made particularly acute by emphasis in the Federal Court of Australia that settlements in class actions must genuinely be in the interests of group members and not simply commercially acceptable from the funders' point of view.[97] A recent decision by the High Court of Australia in *BMW Australia Ltd v Brewster*; *Westpac Banking Corporation v Lenthall* ('*Lenthall*') appeared to confine the number of matters that

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92 See, eg, ALRC, *Class Action Proceedings* (n 86) 246–7 [8.45]–[8.47]; Hodges and Voet (n 45) 5–6.

93 Hodges and Voet (n 45) 291.

94 See Waye and Morabito (n 81) 5–6.

95 Commonwealth, *Review of the Financial System External Dispute Resolution and Complaints Framework* (n 58) 151.

96 AFCA, 'AFCA at a Glance' (Factsheet, 24 October 2018) <file:///Users/amelialoughland/Downloads/Factsheet%20-%20AFCA%20at%20a%20glance.pdf>.

97 See, eg, Murphy J's rejection of a proposed settlement order in *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323, [78]–[109].

funders are likely to view as commercially viable by finding that the Federal Court lacked statutory power to make a 'common fund order'.[98] A common fund order is a mechanism designed to deal with the problem of group members who do not opt out of the proceedings but also do not sign a litigation-funding agreement — in effect, absent a common-fund order, such plaintiffs would be entitled to their share of the benefit of a successful outcome without bearing a corresponding responsibility for costs.[99] Not to be deterred, however, a decision of Lee J upon the remittal of *Lenthall* to the Federal Court has paved the way for a new and conceptually similar device of 'expense sharing orders' to meet this problem.[100] For now, it seems, funders remain able to distribute costs among unfunded plaintiffs, avoiding a contraction in the number of class actions and, therefore, a reduction in the accessibility of class actions as a compensatory mechanism in the financial services context.

There is another important caveat, or rather set of caveats, to Hodges and Voet's view of regulatory redress as the most accessible mechanism, although in ASIC's case these caveats do not disturb the strength of that view. These are the widely noted problems with state-regulator enforcement, most importantly: detection, industry capture, and deficient or perverse enforcement incentives.

(a) *Detection*

As is obvious, 'uncovering undesirable behaviour is a first step in regulatory enforcement';[101] however, the challenges regulators face in detection can be 'severe'.[102] The need for evidence to emerge and come to the regulator's attention 'impedes precautionary enforcement'.[103] In addition, the more complex the regulatory scheme or regulated activity, the more difficult it will be to discern 'levels and patterns of compliance'.[104] There is an information asymmetry between regulator and regulatee that can never fully be overcome. However, in the context of ASIC's remit the detection problem is mitigated by at least two safeguards, one legal and the other practical. First, there is the breach-reporting

98 [2019] HCA 45.

99 See Vicky Waye and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19(1) *Theoretical Inquiries in Law* 303, 305.

100 *Lenthall v Westpac Banking Corporation [No 2]* [2020] FCA 423.

101 Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59, 77.

102 Ibid.

103 Ibid 80.

104 Ibid.

regime for holders of an Australian Financial Services Licence ('AFSL').[105] The obligation on entities to detect and report their own breaches is onerous and taken very seriously by both the regulator and Parliament, which is currently considering a bill that would expand markedly the scope of the regime and the consequences of non-compliance with it.[106] Secondly, there is the fact that loss-causing contraventions are frequently sizeable, widespread and increasingly likely to be publicised following the spotlight of the Royal Commission. If there are parties aggrieved by corporate misconduct or contravention of the financial services laws, ASIC is likely to hear about it.

(b) *Capture*

Scholarly writing on this issue has evolved over time. Traditional 'capture theory' held that 'repeated contact with representatives of a single industry, intensely interested in regulatory policy and appointments, would gradually draw regulatory officials toward an "industry orientation", in which their view of the public interest coincided with that of the dominant firms in the regulated industry'.[107] This is unlikely now to be accepted as a universal proposition, although industry influence remains an important variable on regulatory approach;[108] indeed, research by Hutter into the causes of diversity in enforcement style within and between agencies concluded that the most important factor is the 'relationship between enforcement official and the regulated'.[109] Hutter suggests that in the regulatory sphere, Black's 'relational distance' hypothesis has much explanatory force: officials who are less 'acquainted with those they regulate' have less 'fear' of the 'negative consequences of legal action, and are likely to adopt a cynical and less charitable view of the regulated'.[110] ASIC's updated enforcement model reflects a heightened sensitivity to any perception that it is 'too cosy' with the entities it regulates, as this was a point examined by the Royal Commission that was eagerly seized upon

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105 Sourced principally in the obligation imposed by s 912D of the *Corporations Act 2001* (Cth).

106 See the Exposure Draft of the Financial Sector Reform (Hayne Royal Commission Response — Protecting Consumers (2020 Measures)) Bill 2020 <https://treasury.gov.au/sites/default/files/2020-01/c2020-48919b-exposure-draft.pdf>.

107 Kagan (n 33) 106–7, citing Marver Bernstein, *Regulating Business by Independent Commission* (Princeton University Press, 1955) and David Truman, *The Governmental Process* (Alfred Knopf, 1953).

108 Kagan (n 33) 107.

109 Hutter (n 41) 171.

110 Ibid 169.

by the media.[111] That perception is a non-trivial problem for the agency's reputation, which, if left unchecked, would have adverse consequences for its relationship with government and its broader efficacy as a regulatory enforcer. While I think the allied but lesser risk of inconsistent treatment[112] continues to be material in ASIC's case given the diversity in entity size and industries that it regulates, the general problem of industry capture is in my view a subsiding one.

(c) *Incentives*

Regulation has been described as an essentially 'political process'.[113] The phenomenon of 'retreatism'[114] — that is, a regulator's focus on easy targets to appear effective while avoiding more difficult challenges — is usually a result of deficient or perverse incentives: 'deficient' where government or the public fail to adequately measure the regulator's performance on the most consequential problems and entities within its remit; and 'perverse' where budgetary or political pressure positively tends against a regulator's focus on those problems or entities. This issue, too, is on the ebb in ASIC's case, for two main reasons. First, industry funding arrangements have been in place since 2017 under the *ASIC Supervisory Cost Recovery Levy Regulations 2017* (Cth). The purpose of this scheme is to allow ASIC to recover most of its enforcement costs from regulated entities directly, rather than being totally reliant on government decisions as to funding.[115] Two of the factors that govern the payable levy for an entity are its size and the quantum of regulatory costs spent by ASIC in the entity's particular industry.[116] This alleviates the financial disincentive that, under a solely government funding model, would discourage the regulator from taking on the most 'difficult targets' within its remit — that is, those entities with the most resources to resist and contest enforcement actions. Secondly, the political and public scrutiny brought to bear on the agency in recent years was particularly focused on its treatment of large financial institutions, the most systemically

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111 See, eg, Chris Pash, 'Australia's Corporate Cop Just Got Grilled on its "Cosy" Relationship with the Banks', *Business Insider* (online) 23 November 2018 <https://www.businessinsider.com.au/australias-corporate-regulator-just-got-grilled-on-its-cosy-relationship-with-the-banks-2018-11>; Patrick Durkin, 'Banking Royal Commission: ASIC's Role "Unacceptable"', *Australian Financial Review* (online. 28 September 2018) <https://www.afr.com/companies/financial-services/banking-royal-commission-interim-report-asics-role-unacceptable-20180928-h15zzl>; Killian Plastow, 'ASIC, the Mega-Regulator Failing to Keep Our Banks Honest', *The New Daily* (online, 2 October 2018) <https://thenewdaily.com.au/finance/finance-news/2018/10/02/asic-failing-to-regulate-banks/>.

112 Kagan (n 33) 91.

113 Ibid 105.

114 Ibid 93.

115 ASIC, 'Regulatory Costs and Levies' <https://asic.gov.au/about-asic/what-we-do/how-we-operate/asic-industry-funding/regulatory-costs-and-levies/>.

116 See generally sub-div 2.2 of the *ASIC Supervisory Cost Recovery Levy Regulations 2017* (Cth).

consequential entities that it regulates. ASIC's desire to remedy the negative perceptions of its performance in the community and among government is a powerful positive incentive against retreatism.

In any event, these problems of detection, capture and incentives apply equally to a regulator's pursuit of sanctions. They do not, on their own, tend to support either conclusion on the issue the subject of this article: how conflicting regulatory aims ought to be prioritised. Nonetheless, these problems should be taken into account when comparing regulatory redress with other mechanisms against the criterion of *access* because they affect the availability of regulatory mechanisms for injured private parties. For the reasons discussed above, however, they do not disturb my view that Hodges and Voet are basically right to identify regulatory redress — at least where this includes the power to make compensatory orders — as more reliably accessible than non-regulatory mechanisms.

2. *Cost and Duration*

As a general rule, the most resource-efficient mechanisms will be those that avoid litigation and for which the cost is borne by the wrongdoer or the regulated community rather than the state or injured parties. That is, both the quantum of costs and the entities responsible for bearing them are important. Private and regulator-initiated proceedings alike are highly resource-intensive. On the other hand, EDR schemes such as the AFCA and its predecessor, FOS, are usually funded by levies and case fees imposed on members.[117] The ALRC and scholars have identified the cost-efficient manner in which such schemes tend to deliver their services as a key advantage of them.[118] Michael Legg, in a detailed case study, has also drawn attention to ad-hoc ADR schemes such as that established by the Commonwealth Bank of Australia ('CBA') to meet claims by clients of Storm Financial Ltd and concluded that these offered a similarly cost-effective mechanism to FOS when compared with private suit and regulatory proceedings.[119] Of course, the quicker that claims are able to be resolved, the lower the costs, but speedy compensation is intrinsically worthy. In Legg's case study, the cheaper ADR and FOS mechanisms were also markedly quicker.[120]

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117 Financial Ombudsman Service Australia, 'What We Do' <https://www.fos.org.au/about-us/what-we-do/>.

118 ALRC, *Class Action Proceedings* (n 86) 238 [8.13]; Waye and Morabito (n 81) 5–6; see also Legg, 'Compensating Financial Consumers (n 32) 338.

119 Legg, 'Compensating Financial Consumer's (n 32) 338.

120 Ibid.

Hodges acknowledges the cost-efficiency of such schemes but argues that regulatory redress powers of the sort possessed by the FCA and contemplated for ASIC are equally cost-effective, and for the same reasons: avoidance of litigation and timeliness.[121] I hasten to point out, though, that the cost of exercising regulatory redress powers may not be recoverable, or not entirely recoverable, from wrongdoers or the regulated community; there is always the risk that some cost, including opportunity cost, is borne ultimately by the regulator and therefore the state. Nevertheless, it can be accepted that a well-structured suite of regulatory redress powers can be similarly cost-effective to EDR and ADR schemes, and certainly more cost-effective than court proceedings.

3 *Outcomes*

The quality of compensation, meaning the amount recovered as a percentage of the loss sustained, is vitally important. Private litigation may seem intuitively attractive because there is no ceiling on the damages payable;[122] however, there are significant burdens on plaintiff recovery. In the case of class actions, 'intermediaries' rents'[123] or 'agency costs'[124] — namely, lawyers' fees and funders' commissions — impose a sizeable tariff on the amount ultimately received by group members. Individual proceedings, too, involve significant costs that, even if mostly recovered from the defendant, can diminish the funds available for compensation.[125] The Storm Financial case study examined by Legg reflects these limitations; there, the class action commenced against the CBA achieved a recovery rate no better, and for some plaintiffs worse, than that achieved by participants in the CBA's ad-hoc ADR scheme.[126] On the other hand, Legg notes that a contested court battle may be systemically advantageous in establishing a precedent for determining liability or assessing quantum.[127] Though important, this consideration should in my view be secondary to recovery rate in measuring compensation outcomes.

Regulatory proceedings such as an ASIC s 50 action are more attractive from the injured parties' point of view because the costs are borne by the state and, if

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121 See generally Hodges, 'Mass Collective Redress' (n 44).
122 Legg (n 49) 162–3.
123 Hodges, 'The Need for New Technologies' (n 44) 60.
124 Amanda Rose, 'Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5' (2008) 108(6) *Columbia Law Review* 1301, 1317.
125 See Legg (n 32) 334.
126 Ibid 334–5.
127 Ibid 337.

the action is successful, ultimately by the wrongdoer.[128] But they remain costly and carry the risk of an adverse outcome. In contrast, non-litigious regulatory redress powers avoid these problems. In his cross-industry analysis of the use of such powers in Denmark and the United Kingdom, Christopher Hodges concludes that they offer superior, even 'full', recovery, 'often in small individual amounts', and are therefore the optimal mechanism.[129] It is not apparent to me from Hodges' analysis exactly *why* regulatory powers to order redress are superior to EDR and ADR schemes, which Legg's study of Storm Financial showed can be impressively effective where appropriately designed. It seems that, for Hodges, the ultimate benefit of regulatory redress lies in is its capacity to dovetail with other enforcement goals such as compliance and to affect future behaviour, rather than its pure potential to deliver compensation.[130] As such, I am prepared only to conclude that a suite of regulatory redress powers that includes orders for compensation delivers possibly better, but at least equally effective, compensation to other well-designed non-litigious dispute resolution mechanisms.

V Fulfillment of Other Regulatory Objectives

This Part argues that prioritising the delivery of compensation over sanctioning of wrongdoers would have an adverse impact on the fulfilment of other regulatory objectives. The primary aim in sanctioning contraveners is to achieve deterrence, but there are also other strategic and systemic goals — such as improving compliance through education, persuasion and policy guidance — which the pursuit of sanctions may aid in fulfilling. This Part first considers what is meant by deterrence and whether it is a realistic goal. Secondly, it predicts how ASIC's approach to enforcement would change if it adopted a compensatory priority, before moving to consider the effect of this on achieving deterrence and other regulatory objectives.

I discuss these issues within the context of 'responsive regulation', the framework developed by Ian Ayres and John Braithwaite.[131] This model is based on an escalatory logic: as the regulator confronts contraventions of increasing seriousness, it is able to deploy enforcement tools of correspondingly greater

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128 See Bird (n 49) 463.

129 Hodges, 'Mass Collective Redress' (n 44) 836, 860, 871.

130 See ibid.

131 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

severity. As Commissioner Hayne put it in the Interim Report, this framework 'reflects two very practical observations: not all contraventions of law are of equal significance; and regulators do not have unlimited time or resources'.[132] This Part takes the position that because ASIC's approach operationalises the concept of responsive regulation, the merits of any shift in its priorities must be evaluated within the same framework, by considering how the regulator's choice of enforcement tools, and pursuit of its broader strategic goals, would likely be affected.

A *Achieving Deterrence*

There is scholarly disagreement about whether deterrence is a realistic regulatory goal. Deterrence is premised on the assumed preference of regulated entities, acting rationally, to avoid incurring a sanction that is more costly than a contravention of the law would be rewarding.[133] Gunningham notes that although this is a central notion in the framework of responsive regulation as developed by Ayres and Braithwaite, the relationship between deterrence and the behaviour of regulated entities is not straightforward and likely varies across classes of contravention, types of enterprise, and other factors.[134] Some scholars go further. For example, Hodges and Voet contend that the concept itself is 'unreliable' and has been 'demolished' by behavioural psychology, which highlights the irrational, context-driven, subconscious and culturally bound influences on human decision-making.[135] Other scholars nevertheless remain proponents of the rational cost-calculation theory of deterrence. Popper describes the view that pure economic incentives do *not* reliably modify behaviour as tantamount to assuming 'some level of widespread masochism at the individual and corporate level — and that is nonsensical'.[136] Similarly, Minzner contends that regulatory enforcement is at its most effective and justifiable when sanctions are in pursuit

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132 *Interim Report* (n 5) vol 1, 433.

133 International Organization of Securities Commissions ('IOSCO'), 'Credible Deterrence in the Enforcement of Securities Regulation' (June 2015) 6–8.

134 Gunningham (n 48) 122–3.

135 Hodges and Voet (n 45) 276–8; see also Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart, 2015) 18–25.

136 Andrew F Popper, 'In Defense of Deterrence' (2012) 75(1) *Albany Law Review* 181, 188.

of deterrence.[137] Coffee, too, perceives a direct link between the size of a sanction and its impact on an entity's future behaviour.[138]

My own view is a *via media* between these two strands of thinking. In contrast to Hodges and Voet, it seems to me that accepting the lessons from behavioural economics is not incompatible with a view that rational cost-calculation shapes conduct.[139] Behavioural psychology simply reminds us to *also* consider the impact of institutional, cultural, social and other factors. In this respect, Parker and Nielsen's concept of 'extended deterrence', which draws attention to these broader phenomena, has much to commend it.[140] There are some similarities between 'extended deterrence' and Baldwin and Black's intriguing concept of '*really* responsive regulation', both in theoretical substance and intent.[141] Baldwin and Black augment Ayres and Braithwaite's framework by contending that in order to be 'really' responsive to the behaviour of regulated entities, the enforcer must consider: the firm's cognitive or 'attitudinal' setting; the broader institutional environment of the regulatory regime; the different logics that underpin particular regulatory tools and strategies; the performance and efficacy of the regulatory regime itself; and changes in each of those elements.[142] Enlightened by these more developed and inclusive theories, 'achieving deterrence' is a finely calibrated mission, not a blunt and universal assumption. Moreover, while I accept that deterrence, especially general deterrence, is difficult to measure, there is no need to suppose that it is 'theoretically perfect'[143] — it is reasonable to perceive that an enforcement action has helped deter wrongdoing even if one can't discern *precisely* how much. And if that is true, it remains a valid regulatory objective. I also do not see any reason in principle why delivering compensation is a *more* valid goal simply because it is easier to measure in an ex-post fashion by calculating an injured party's recovery percentage. If deterrence works, then it follows that sanctions can yield fewer regulatory contraventions and therefore less harm that needs compensating. As such, this

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137 Max Minzner, 'Why Agencies Punish' (2012) 53(3) *William & Mary Law Review* 853.

138 John C Coffee, '"No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386, 435.

139 See generally Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Yale University Press, 2008); see also Daniel Kahnemann, *Thinking Fast and Slow* (Farrar, Straus and Giroux, 2011).

140 Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does It Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*' (2008) 32(2) *Melbourne University Law Review* 554, 563.

141 Baldwin and Black (n 101) 61 (emphasis in original).

142 Ibid.

143 Hodges and Voet (n 45) 278.

Part takes the view that if a compensatory priority unduly impedes the regulator's capacity to deter wrongdoers, it should not be adopted.

B *ASIC's Approach to Enforcement*

Part II above demonstrated that ASIC's current approach to enforcement does not prioritise the recovery of compensation.[144] It is therefore worth considering how ASIC's choice of enforcement tools would be likely to change if this prioritisation were adopted. There are three points to make here.

First, ASIC's preference would be to deliver compensation without litigating. Once possessed of its new 'redress power', in turn allowing more practical involvement in both IDR and EDR processes, the need to pursue court-based remedies to ensure the return of compensation would diminish.[145] Moreover, ASIC would likely accept an enforceable undertaking that, as with the Multiplex case discussed in Part II, included a compensation scheme. Obviously, this enforcement approach would be inconsistent with the 'why not litigate?' mantra that ASIC 'now accepts must' be adopted.[146]

Secondly, where it did litigate, ASIC would prefer action against corporate entities rather than individuals, and would prefer civil proceedings to civil penalty or criminal proceedings. The first of these preferences is based on the simple fact that, as Clough and Mulhern point out, corporate offenders 'are often better placed than individuals to "make amends"'.[147] As for the type of proceedings, criminal prosecution involves greater substantive and procedural hurdles without any corresponding increase in the extent of redress for injured parties; equally, a civil penalty action invokes the *Briginshaw* gloss on the civil standard of proof, requiring the more demanding 'reasonable satisfaction' of the fact-finder.[148] In addition, a recent amendment to the *ASIC Act* requires a court, in assessing a civil penalty, to consider its impact on the entity's ability to pay compensation, providing a further reason for ASIC to avoid civil penalty proceedings if its primary goal was the delivery of redress.[149]

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144 See ASIC, 'Approach to Enforcement' (n 13); ASIC, 'Private Court Proceedings' (n 13); ASIC, 'Corporate Plan 2018–22' (n 21) 10.

145 ASIC, 'Corporate Plan 2018–22' (n 21) 12–13.

146 *Final Report* (n 1) vol 1, 427.

147 Clough and Mulhern (n 31) 215.

148 *ASIC v Vines* [2005] NSWSC 738, [1104]–[1105] (Austin J).

149 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) sch 2, pt 1 (amendment to *ASIC Act* s 12GCA).

Lastly, it should not be assumed that ASIC's approach to enforcement would change in the same way across each area of its regulatory responsibility. For example, ASIC may retain its clear preference for criminally prosecuting individuals in cases of insider trading.[150] However, this would likely be because, as a former ASIC Chairman put it, private loss in such cases is 'less easily identifiable', and so ASIC is concerned instead with the 'public cost' of compromised market integrity.[151] By definition, the question the subject of this article only concerns contraventions that are apt to cause identifiable (and thus compensable) loss or damage.

C *Impact of Compensatory Priority on Achieving Deterrence*

This section compares the deterrent effect of compensatory orders and punitive sanctions and concludes that an enforcement strategy modified in the ways I have described would be sub-optimal from the point of view of impact-calibration and extended deterrence.

1 *Deterrent Effect of Compensation*

If a requirement to pay compensation has a credible deterrent effect, this would be a strong reason in favour of a regulator compensatory priority. The traditional mechanism for obtaining compensation has been private suit, the deterrent effect of which is doubted by some scholars[152] and advocated by others,[153] while some — such as Coffee,[154] Dorman[155] and Calkins[156] — go so far as to say that proper compensation is a necessary condition for deterrence. A survey conducted by Parker and Nielsen in the competition context found that regulated entities were most worried about enforcement that required compensatory awards.[157] However, it appears that these scholars attribute the deterrent effect to the fact

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150 Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Companies & Securities Law Journal* 289, 296.

151 Tony D'Aloisio, 'Insider Trading and Market Manipulation' (speech delivered to the Supreme Court of Victoria Law Conference, 13 August 2010) 3.

152 See, eg, Hodges and Voet (n 45) 267.

153 Popper (n 136) 188.

154 Coffee (n 138) 435 n 133.

155 Roderick G Dorman, 'The Case for Compensation: Why Compensatory Components are Required for Efficient Antitrust Enforcement' (1980) 68(5) *Georgetown Law Journal* 1113, 1117.

156 Stephen Calkins, 'Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties' (1997) 60(3) *Law and Contemporary Problems* 127, 149–54.

157 Parker and Nielsen (n 140) 573, 579–80.

that the quantum of compensatory remedies will often — in cases of mass injury — far exceed any pecuniary penalty that an entity would be liable to pay. A deterrent effect should not be assumed where this is not the case or where the compensation is insignificant given the size of the entity's balance sheet.

Moreover, the quantum of compensation can present a problem for regulators. At the heart of responsive regulation is *proportionality* — enforcement tools should be tailored to the contravention and escalated or de-escalated as appropriate; that way, both over- and under-deterrence are avoided and entity behaviour can be more effectively moulded.[158] In some areas, for example shareholder class actions for breach of continuous disclosure obligations, the settlement or damages award can be astronomical, even in cases where ASIC considers the conduct amounting to breach to have been 'less serious' and therefore deserving of a smaller penalty by way of infringement notice.[159] The problem with this is that the regulator's threat of escalation in the event of future non-compliance pales in comparison to the compensation payout already made; thus, the 'dialogic' regulatory engagement is undermined.[160] This effective, calibrated deterrence is difficult to achieve if the priority is to deliver compensation whatever its quantum.

2. *Deterrent Effect of Punitive Sanctions*

There are two key deterrent benefits from punitive sanctions that, in my view, would be hindered by a regulator focus on delivering compensation. The first is the exact counterpoint on the quantum issue: punitive sanctions are *calibrated*. When ASIC does not litigate, it can impose a fine by way of infringement notice. When it does litigate, the civil penalty is subject to judicial oversight and contested submissions.[161]

Secondly, sanctions offer better 'extended deterrence', which is concerned with the indirect social and economic impacts of a punitive measure. Deterrence is more effective the greater the 'notoriety of the misconduct',[162] because injury to reputation is highly consequential.[163] It is true that a large compensation

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158 See Legg (n 34) 161–2; Rose (n 124) 1303.

159 ASIC, 'RG 73: Continuous Disclosure Obligations: Infringement Notices' (Regulatory Guide 73, October 2017) 4.

160 Gunningham (n 48) 120.

161 See, eg, *ASIC v Hochtief AG* [2016] FCA 1489.

162 Popper (n 136) 188.

163 Michael Legg and Dimity Kingsford Smith, 'Banks Risk All by Neglecting Image', *The Australian* (Sydney [is this correct?], 7 September 2018) 26; Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983) 1.

payout can be damaging to an entity's reputation; hence, IOSCO and Fisse argue that compensation delivers 'accountability' that merely 'writing a cheque' to the state does not.[164] In my view, however, sanctions offer a distinct and irreplaceable kind of accountability — namely, that conduct that is *wrong* requires reprimand. Social-psychological research demonstrates the normative power of wrongness as it is contained in concepts like 'crime'.[165] These subtle, often subconscious factors play a role in shaping behaviour and are important for the perceived legitimacy of a system of law enforcement. Sanctions can also involve important non-financial measures such as the cancellation or variation of licences to operate, or the disqualification or imprisonment of company officers. As Hanlon reminds us, 'individual accountability and responsibility' is a core legal value that should be fulfilled even if action against corporations has been taken, or harm has been repaired or compensated.[166] Moreover, targeting *individual* wrongdoing can impact the behaviour of companies,[167] and may offer one tangible way to modify a corporate 'culture' that permits breaches to occur.[168]

A regulator compensatory priority would likely lead to the avoidance of enforcement tools that offer these benefits — in my view, an undesirable outcome from a responsive regulation perspective.

D *Impact on Other Regulatory Goals*

Enforcement is only one aspect of regulation. An agency such as ASIC must consider the broader 'strategic regulatory significance' of any action that it takes.[169] Other activities like education, persuasion and policy advice have an important function in securing compliance.[170] IOSCO suggests that it is a benefit of compensatory measures that they can be paired with education and compliance training.[171] This is true, but is also the case with punitive sanctions. I have greater concern about the broader strategic detriment of regulators being less interested in sanctioning wrongdoers. The clarification and development of legal principle,

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164 IOSCO (n 133) 37; Brent Fisse, 'Redress Facilitation Orders as a Sanction against Corporations' (2018) 37(1) *University of Queensland Law Journal* 85, 87.

165 Van Prooijen (n 55).

166 James Patrick Hanlon, 'Individual Criminal Liability Related to the Corporation', in James T O'Reilly et al (eds), *Punishing Corporate Crime: Legal Penalties for Criminal and Regulatory Violations* (Oxford University Press, 2009) 41.

167 See, eg, Clough and Mulhern (n 31) 4–10.

168 See generally the discussion regarding 'changing culture' in the *Final Report* (n 1) 388–93.

169 ASIC, 'Private Court Proceedings' (n 13) 3.

170 ASIC, 'Approach to Enforcement' (n 13) 1.

171 IOSCO (n 133) 37.

which is furthered by contested litigation, is an important adjunct to ASIC's education, policy advice and persuasion initiatives. But more fundamentally, there is a practical harmony between 'softer' regulatory engagement with industry and 'harder' enforcement action; in a 'dialogic regulatory culture', each reinforces the other.[172] It would be unfortunate if the regulator neglected one side of this equation — the upper levels of the enforcement pyramid — in an attempt to function mainly as a consumer compensation agency.

VI Conclusion

As Australian corporate conduct came under intense and highly publicised scrutiny during the Royal Commission, so too did the conduct of the conduct regulator. ASIC has fully embraced the recommendations made by Commissioner Hayne that deal with its own approach to enforcement. In updating its enforcement model, ASIC has been and will continue to be supported by legislative reform, both to its own powers and to the scheme of duties and penalties that apply to regulated entities. The central change to ASIC's enforcement approach is its adoption of the 'Why not litigate?' operational discipline. That mantra effects a renewed strategic prioritisation of the need to ensure appropriate punishment or censure of those who break the law, above and beyond other goals that the regulator may be interested in achieving, such as the delivery of adequate redress to victims of misconduct. The purpose of this article has been to interrogate that prioritisation and consider whether it would be preferable for the regulator to adopt the opposite position, and more readily focus its resources on the delivery of compensation to victims of misconduct.

The central argument advanced in this article — that a regulator compensatory priority would be an effective way to deliver redress to victims but would unduly impede other desirable regulatory objectives — used the assumptions and logic of responsive regulation as its yardstick. It was beyond the scope of the article to engage in a substantive critique of that theory or its symbolic manifestation in the enforcement pyramid. However, given the extensive adoption of responsible regulation, including by ASIC, it is logical to discuss the merits of a compensatory priority, or indeed any shift in regulator focus, from that perspective. The article began by considering the underlying theoretical question: *whom* or *what* does the regulator serve? This discussion was approached broadly, evaluating insights from diverse sources: conventional regulatory scholarship, social psychology, and sociology. The answer was the amorphous 'public interest', which leaves little secure theoretical footing for a compensatory priority. As such, the practical implications of such a shift were

[172] Gunningham (n 48) 120.

taken to be the most important considerations. There is sufficient evidence, in my view, for concluding that regulatory mechanisms are among the most effective at delivering compensation. However, a regulator's choices are complex and its resources must be deployed to ends other than compensation alone, particularly deterrence and compliance. My analysis suggests there is a credible risk that substantial violence would be done to the fulfilment of those goals if the interests of victims were to be preferred in a case of conflicting regulatory objectives. Such a priority should not be adopted.

THE EQUITABLE JURISDICTION TO ENFORCE FOREIGN JUDGMENTS

DR STEPHEN LEE*

There are a variety of instances when courts exercising equitable jurisdiction have recognised and enforced foreign judgments. But when those instances are acknowledged at all, they have tended to be consigned to discrete subject areas and not treated as examples of a wider genus. A new approach is required to keep apace with the needs of an increasingly borderless society. In this article, the author collects in one place the established instances of equitable intervention and argues that they are merely illustrations of a comprehensive equitable jurisdiction to recognise and enforce foreign judgments.

I INTRODUCTION

A lot of attention has been paid to the common-law and statutory aspects of the topic of enforcement of foreign judgments. But the jurisdiction in equity to enforce foreign judgments has not attracted anywhere near the same degree of interest. This trend has encouraged or suffered wrong assumptions to be made. That includes the notion that only foreign money judgments can be enforced, and that this is only by an action in the nature of *indebitatus assumpsit*. The lack of attention to equitable modes of enforcement creates an environment where alarmist concerns can flourish about the alleged dangers of recognition of foreign non-money orders. Such concerns are then quelled by taking easy refuge in comforting themes. The time has now come to revisit this topic to demonstrate that there is a comprehensive equitable jurisdiction to enforce foreign judgments.

In times gone by, the jurisdiction to enforce foreign judgments has been justified by reason of the 'deference which, for the sake of international comity, the law of England pays to the law of the civilized world generally'.[1] It has also been said:

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* Barrister-at-Law.

1 *Freke v Lord Carbery* (1873) LR 16 Eq 461, 466, cited by Barton J in *Australian Mutual Provident Society v Gregory* (1908) 5 CLR 615, 632 ('*Gregory*').

> The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce.[2]

But, whatever the rationale, no one suggests that money orders of foreign courts apply automatically of their own force and effect in the country where the judgment is sought to be enforced.[3] Such judgments are enforced because the law of the enforcing court chooses to regard them as giving rise to an obligation. There is no reason why it should necessarily be any different for foreign *in personam* orders to perform an act other than the payment of money.

In the time of Coke, there was a debate about whether Chancery orders were capable of having any effect if they were not obeyed. That controversy was stilled a long time ago, or no longer matters, for domestic equity decrees.[4] But it is as if that kind of thinking continues to dominate the law of foreign judgments. There was no necessity for common-law courts to intervene in the case of domestic Chancery decrees because the Court of Chancery had its own procedures of enforcement. But a necessity to intervene exists in the case of foreign decrees.[5] Thus, common-law courts were willing to enforce foreign money decrees of an equitable nature, provided they were for an ascertained sum.[6] That being so, there is no reason why foreign judicial orders compelling a defendant to perform an act other than the payment of money, should not also be treated by courts possessing equitable jurisdiction as having an effect if such orders are not obeyed.

Of course, the courts of the country where the judicial order is sought to be enforced are entitled to insist that the foreign proceedings comply with certain minimum standards of jurisdiction and natural justice, and are consistent with the other usual preconditions to recognition such as public policy and the like.

Further, regard must always be paid to the intervention of third-party rights, which can be readily achieved. Just because a foreign judicial order is recognised does not mean it has to be enforced. Enforcement against a third party involves more than just the recognition of the foreign judgment. It involves the adjustment of rights between competing claimants.

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2 *Schibsby v Westenholz* (1870) LR 6 QB 155, 159.

3 As much follows from the fact that such foreign judgments do not operate to merge the original cause of action.

4 See, eg, *Common Law Practice Act 1867*, 31 Vic No 17, s 19, and *Civil Proceedings Act 2011* (Qld) s 83.

5 WW Cook, 'The Powers of Courts of Equity (Pt III)' (1915) 15(3) *Columbia Law Review* 228 (pt 3), 234ff.

6 *Sadler v Evans* (1808) 1 Camp 253, 255; 170 ER 948, 948–9; *Henley v Soper* (1828) 8 B & C 16; 108 ER 949.

But those things, when they are satisfied or not applicable, do not stand in the way of recognising an equitable jurisdiction to enforce foreign *in personam* orders, including those in relation to property.

The 2019 *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* ('*Hague Judgments Convention*')[7] makes provision for the recognition and enforcement in one contracting state of certain kinds of non-money (as well as money) judgments issued by the courts of another contracting state. This even extends to decrees enforcing rights *in personam* in relation to immovables situate outside of the country of the original court.[8] However, Australia is not a party to the *Hague Judgments Convention*.

The *Foreign Judgments Act 1991* (Cth), which primarily deals with registration of foreign money-orders, also allows for regulations to be made extending the operation of the Act to non-money orders: s 5(6). But to date, no such regulations have been promulgated. Therefore, for non-money orders one must consider the matter more broadly. It should also be noted that the *Trans-Tasman Proceedings Act 2010* (Cth) makes provision for (amongst other things) registration of certain New Zealand non-money orders.[9] Also, inter-state non-money judgments are enforceable within Australia under s 105 of the *Service and Execution of Process Act 1992* (Cth). This article is concerned with international judgments.[10]

This article will initially seek to put into perspective the jurisdiction to enforce foreign money judgments. It will then survey well-established categories of cases where courts exercising equitable jurisdiction do enforce foreign judgments. Attention will then turn to the procedures available to enforce foreign decrees executing other equitable rights, including trusts and similar rights established by foreign courts in respect of property outside the country of the original court. The article will move on to deal briefly with registration of decrees concerning movables under statute. It will then deal with immovable property. Finally, the topic of third-party rights will be considered before concluding.

II Perspective

There were forms of action available prior to the *Judicature Acts 1873–75*, and there are now procedures to enforce foreign judgments other than an action in the

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7 *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, concluded 2 July 2019 ('*Hague Judgments Convention*').

8 Ibid arts 5 and 6.

9 *Trans-Tasman Proceedings Act 2010* (Cth) ss 68, 72(1)(c) and 4 ('judgment').

10 This article uses the terms 'judgment' interchangeably with 'judicial order'.

nature of *indebitatus assumpsit*. For example, there is jurisdiction in probate to recognise a foreign domiciliary grant of probate or letters of administration by issuing a fresh local grant. This is commonly referred to as 'following the grant'. That extends at least to cases where the estate comprises movables situated in the country of the recognising court.[11]

There is also the jurisdiction in admiralty to enforce foreign decrees when the ship was within the territorial waters of the original court at the time of the proceedings but has since come into the territorial waters of the enforcing court. At least where the foreign orders were made in an action *in rem*, there is such a jurisdiction to enforce not only foreign money decrees, but also maritime liens and orders for possession and sale.[12]

At common law, there is little doubt that a foreign judgment in replevin or detinue (insofar as it includes an order for recovery of the chattel) relating to chattels situated in the country of the original court, can be enforced elsewhere by a similar order, when the chattels are lately removed into the country of the enforcing court.[13] Also, a foreign judicial order giving authority to a person to get in another person's funds and stock, situated outside the country of the original court, can be recognised in an action of detinue at the *situs*.[14]

Furthermore, prior to the intervention of statute, there was a jurisdiction at common law to recognise foreign divorces, at least when granted by the courts of the husband's domicile — a rule that was relaxed over time.[15]

Therefore, it is artificial to focus on the jurisdiction to enforce foreign money judgments. The common-law jurisdiction to enforce foreign money judgments is but one facet of the topic of foreign judgments. It should therefore come as no surprise that equity should contribute to the subject of foreign judgments, too. As

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11 *Lewis v Balshaw* (1935) 54 CLR 188, 193–4, 197–8 ('*Lewis*'). See the comprehensive discussion of this topic in Queensland Law Reform Commission, *Uniform Succession Laws — Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (Discussion Paper WP No 55, 2001). See also, eg, *British Probates Act 1898* (Qld) s 4. In the case of some types of movables, the foreign grant is automatically recognised by force of statute: *Corporations Act 2001* (Cth) s 1091; *Life Insurance Act 1995* (Cth) s 211.

12 *SS Pacific Star v Bank of America* [1965] WAR 159; *The Despina GK* [1983] 1 QB 214.

13 Cf *Castrique v Imrie* (1870) LR 4 HL 414, 429. WW Cook, 'The Powers of Courts of Equity' (1915) 15(2) *Columbia Law Review* 106 (pt II), 124, 130–1, argues that such actions (detinue to the extent of the order for recovery of the chattel) are actions *in rem*.

14 *Didisheim v London and Westminster Bank* [1900] 2 Ch 15. One could also readily imagine a case where a common-law action is brought for conspiracy to defraud a foreign judgment creditor, in which case the foreign judgment is accepted as a datum and not re-litigated.

15 *Armitage v Attorney General* [1906] P 135; *Travers v Holley* [1953] P 246; *Indyka v Indyka* [1969] 1 AC 33. See also *Ainslie v Ainslie* (1927) 39 CLR 381 (judicial separation). See now *Family Law Act 1975* (Cth) s 104.

Part III will demonstrate, just because the foreign judgment is not a money judgment, and even when it is, that does not mean that equity has no jurisdiction to enforce it. Examples are taken from six areas recognised in the cases.

III Procedures in Equity Accepted in Case Law

A *Equitable Money Relief*

Just because the common law will recognise and enforce foreign money decrees for an ascertained sum, does not mean that equity does not have a concurrent jurisdiction where the foreign decree can be characterised as equitable in nature.[16] Litigants may not often avail themselves of equitable remedies to enforce foreign money decrees because the remedies at law are adequate. Courts of equity may adopt an attitude of discretionary restraint in such cases. But it would be wrong to assume that a concurrent jurisdiction does not exist. It would be an even greater error to assume that equity will not enforce foreign decrees when the common law is powerless to act.

These points were well made by Lord Denman CJ in *Henderson v Henderson*:

> The power of the Court of Chancery may exist without excluding that of other Courts capable of giving a remedy as complete and much more expeditious. The decrees of foreign Courts of Equity may indeed, in some instances, be enforceable nowhere but in Courts of Equity, because they may involve collateral and provisional matters to which a Court of Law can give no effect; but this is otherwise where the Chancery suit terminates in the simple result of ascertaining a clear balance, and an unconditional decree that an individual must pay it. The circumstances by which the Court arrives at that conclusion do not affect the right of suing in a Court of Law, which grows out of the legal duty to pay. [17]

In 1852, the point arose before Sir John Romilly MR. In *Paul v Roy*,[18] the plaintiff and the defendant had been the subject of a Scottish interpleader order, requiring them jointly and severally to pay monies into Court. The defendant decamped to England and the plaintiff was forced to pay the whole amount. The plaintiff obtained an assignment of the judgment and sued the defendant in England in the Court of Chancery for contribution in equity. His Lordship dismissed the bill on the ground that the foreign judgment was interlocutory, not final. But he observed: 'It has not been questioned, and I have no doubt, that this Court has jurisdiction to enforce a foreign judgment.'[19] His Lordship expressly reserved for

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16 See also *Morgan's Case* (1737) 1 Atk 408; 26 ER 259.
17 (1844) 6 QB 288, 297.
18 (1852) 15 Beav 433; 51 ER 605.
19 Ibid 439; 608; cf also at 443; 609.

future consideration whether the enforcement of foreign money orders should be left to the common law, as he did not need to decide it. But nothing he said indicated a view that equity lacked the power to enforce foreign judgments, whether money or non-money orders, even though it was a question whether, as a matter of discretion, equity should decline to grant relief in money cases where the remedy at law was adequate.

Five years later, in *Reimers v Druce*, a similar issue arose before his Lordship.[20] A bill was brought in the Rolls Court to enforce a money decree of a Hanoverian court. The plaintiffs were Hanoverian traders who had consigned wheat to a London merchant (Mr Hennings) for sale. The latter was unable to sell it readily and incurred warehouse charges, which he claimed more than offset the value of the goods. In proceedings in Hanover, judgment was pronounced in 1842 in favour of the plaintiffs in the sum of 16,200 Dutch guilders. Mr Hennings died in 1846 and his estate was fully administered in England, the legal personal representatives not having notice of the Hanoverian judgment. The plaintiffs filed a bill against the personal representatives of the deceased in England in 1855 to enforce the Hanoverian judgment. Sir John Romilly MR dismissed the bill on grounds of laches, but there was no suggestion that the judgment was only enforceable at law. His Lordship clearly regarded that the same principles for enforcing foreign judgments applied as they would have applied had the action to enforce the judgment been brought in a common-law court.

The plaintiffs then appealed to the Lord Justices. The appeal was compromised by the payment to the plaintiffs of £2000 and costs as between solicitor and client of all proceedings including in Hanover.[21] The Court must have formed the view that it had jurisdiction to enforce the Hanoverian decree, as it sanctioned the compromise.

B *Equitable Relief in Bankruptcy*

Since the eighteenth century, the Court of Chancery, acting pursuant to judge-made rules, would enforce foreign sequestration decrees. Thus, it was held that creditors of a person adjudicated bankrupt abroad, having recovered local debts owed to the bankrupt, could be held liable to account to the foreign assignee for the value of the debt so received.[22] In such cases, the title of the foreign assignee

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[20] (1857) 26 LJ Ch 196; 23 Beav 145; 53 ER 57.

[21] Ibid 201n; 158n; 62.

[22] *Solomons v Ross* (1764) 1 Hy Bl 131n; 126 ER 79 ('*Solomons*'); *Jollet v Deponthieu* (1769) 1 Hy Bl 132n; 126 ER 80 ('*Jollet*'); *Neale v Cottingham* (1764) 1 Hy Bl 132n; 126 ER 81.

was accepted without question. The same principle has been recognised in relation to receivers or liquidators appointed pursuant to foreign winding up orders.[23]

But the enforcement jurisdiction of the Court of Chancery was not confined to granting equitable money relief. In *Solomons v Ross*,[24] a Dutch firm (Deneufville) traded with various London merchants. The partners of Deneufville were declared bankrupt by a Dutch court, which appointed curators as assignees of the firm's assets. Mr Ross was a London creditor of the Dutch firm. By proceedings in the Mayor's Court of London, Mr Ross attached a debt in the sum of about £1200 owed to the Dutch firm by a Mr Michael Solomons, another London merchant. Mr Ross later obtained a default judgment. Mr Michael Solomons gave Mr Ross a promissory note payable in a month in satisfaction of the judgment. The garnishee order nisi occurred before, but the final judgment was granted after, the curators were appointed. The curators, by their attorney, a Mr Israel Solomons, filed a bill in the Court of Chancery against Mr Michael Solomons seeking that the latter account to the curators for the amount of the debt and that he be restrained from paying the amount of the note to Mr Ross. Mr Michael Solomons interpleaded and paid the moneys to a stakeholder. The Court of Chancery decreed that stock that had been bought with the moneys be transferred to Mr Israel Solomons for the benefit of the creditors of the bankrupts, and that Mr Ross deliver up the note for cancellation. Therefore, the Court of Chancery granted *in personam* relief other than an order for the payment of money by way of enforcement of a foreign non-money judgment.[25]

This jurisdiction probably also extended to the appointment of a receiver to immovables situated in the forum, with power of sale. This has been done in modern cases.[26] In those case, the Court's power was derived from statute.[27] But

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23 *Alivon v Furnival* (1834) 1 CM&R 277, 296; 149 ER 1084, 1092; *Macauley v Guaranty Trust Co of New York* (1927) 44 TLR 99.

24 *Solomons* (n 22). For a fuller account, see Wallis-Lyne's Irish Chancery Reports 59n (1839). To like effect, see *Jollet* (n 22), where an account and an injunction were granted. See also *Cockerel v Dickens* (1840) 3 Moo PC 98; 13 ER 45 (as to the movable property).

25 See the discussion of this case in *Galbraith v Grimshaw* [1910] AC 508, 511; *Re Doyle* (1993) 71 FCR 40; *Al Sabah v Grupo Torras* [2004] UKPC 1, [39]–[45]; and Kurt H Nadelmann, 'Solomons v Ross and International Bankruptcy Law' (1946) 9(2) *Modern Law Review* 154.

26 *Re Kooperman* (1928) WN 101; *Re Osborn* (1931–2) B & CR 189. See also *Re A Debtor* [1981] Ch 384; *Re Levy's Trusts* (1885) 30 Ch D 119, 124, 125.

27 *Bankruptcy Act 1914* (UK) s 122, based on *Bankruptcy Act 1883* (UK) s 118. The comparable provision in Australia is *Bankruptcy Act 1966* (Cth) s 29. See also *Corporations Act 2001* (Cth) s 581, and the *Cross-Border Insolvency Act 2008* (Cth). For an analysis of s 29 of the *Bankruptcy Act*, see *Re Ayers* (1981) 56 FLR 235; *Radich v Bank of New Zealand* (1993) 116 ALR 676; *Re Hanna* [2018] FCA 156, [51]. Section 29 even gives the Court a discretion to vest local immovable property in the foreign

in a 1921 Scottish decision, it was done apparently without the aid of statute. In *Araya v Coghill*, one William Coghill, a Chilean exchange broker, died in 1919.[28] His estate was adjudicated insolvent and a sequestration order was granted by a Chilean court, appointing Mr Araya as Official Receiver. Mr Coghill died possessed of insurance policies and immovable property situated in Scotland. Mr Araya, and his Scottish mandatory, applied in Scotland for orders confirming the sequestration order and to authorise Mr Araya and his local mandatory to make up a title to the Scottish property and sell the same. The Court granted that relief, even as to the immovables, but made directions to require the proceeds of sale to be paid into Court and reserving the right of the Scottish heir-at-law to have his rights to the proceeds of the immovable property adjudicated at a later date.

C *Estoppel Per Rem Judicatam*

The classic case is *Henderson v Henderson*.[29] Elizabeth Henderson, wife of Jordan Henderson who had died intestate, brought proceedings in Newfoundland for an account against her brother-in-law, Bethel Henderson. The brothers' father, also deceased, had admitted his sons into a partnership, and thereafter gave to them his share of the partnership. He also gave a sizeable sum of money to Bethel for the benefit of Bethel and Jordan. After Jordan's death, Bethel refused to account for the moneys so received or for what was due to Jordan in respect of the partnership. Elizabeth Henderson's bill in Newfoundland was successful, despite Bethel having decamped. It resulted in an order that Bethel pay her a certain sum of money. Elizabeth then brought an action at law in England on the Newfoundland judgment, and Bethel there filed a bill in Chancery for an account and to restrain Elizabeth from pursuing the common-law action. He alleged errors in the Newfoundland proceedings and that he wanted an opportunity to raise matters that he had not raised abroad.

Wigram VC dismissed Bethel's bill, holding that the subject matter of the suit was *res judicata*. In an oft-cited passage, he said that '[t]he plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the

assignee: *Levy v Reddy* [2009] FCA 63, [12]; *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [19].

28 [1921] 1 SLT 321 ('*Araya*').

29 (1843) 3 Hare 100; 67 ER 313.

parties, exercising reasonable diligence, might have brought forward at the time.'[30]

Although that was a case where Bethel had tried to re-open the same cause of action as that ruled on abroad, it is also now clear that the doctrine of issue estoppel is capable of applying with respect to discrete issues involved in foreign proceedings.[31]

Some commentators have suggested that when a plaintiff, successful abroad, sues elsewhere on the original cause of action, the plaintiff can rely on issue estoppel to prevent the defendant raising defences that were taken, or could have been taken, abroad.[32] But no case has been cited where this actually occurred.[33] In *Carl Zeiss Stiftung v Rayner & Keeler Ltd* itself,[34] the plaintiff failed abroad and brought a fresh action in England, and the defendant raised issue estoppel as a defence. The only comments in that case on the instant point were ambiguous or against the proposition.[35] Instead of agonising over that issue, it would be more direct to acknowledge that there is an equity to enforce foreign judgments.

D *Common Injunction*

In *Burroughs v Jamineaux*,[36] one Skinner, a London merchant, drew two bills of exchange on the plaintiffs who carried on business in Leghorn, in favour of Leghorn merchants (the defendants), which bills were indorsed ultimately in favour of Langlois & Co. The plaintiffs accepted the bills, not having notice of the fact that Skinner had since stopped payment. The plaintiffs brought proceedings in Leghorn (as they were obliged to do under Leghorn law) against Langlois & Co, paying the amount of the bills into court, challenging their liability on the bills. The Leghorn court held, applying the laws of Leghorn, that the plaintiffs were not bound by their acceptance of the bills, as they had no notice that the drawer had failed and had no assets of the drawer in their hands, and ordered that the monies be paid back to the plaintiffs.

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30 Ibid 115; 319.

31 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1965] AC 853 ('*Carl Zeiss*').

32 See, eg, Martin Davies, Andrew S Bell and Paul LG Brereton (eds), *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 8th ed, 2010) [40.45] ('*Nygh's*').

33 *Carl Zeiss* (n 31) was referred to by the editors of *Nygh's* (n 32), as was also *RDCW Diamonds Pty Ltd v DA Gloria* [2006] NSWSC 450, [28], where the comment was dicta and the only authority cited was *Carl Zeiss*. Another case repeating the assertion, by way of dicta, is *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267, [16], but none of the cases cited there were in point. *Delfino v Trevis [No 2]* [1963] NSWR 194 has also been cited, but it says nothing of the sort.

34 *Carl Zeiss* (n 31).

35 Ibid 917, 938, 946, 947.

36 (1726) Mos 1; 25 ER 235.

Soon after, the plaintiffs came to England, and the defendants brought an action against them in the Court of Common Pleas for judgment on the bills of exchange. The plaintiffs filed a bill in the Court of Chancery and obtained a perpetual injunction to restrain the defendants from pursuing the proceedings at law. In granting the relief, the Lord Chancellor held that the order of the Leghorn court was binding.

The injunction was not granted because of the principle of *res judicata*. The Lord Chancellor said that an injunction was necessary, as it was not clear whether the foreign decree would be a defence at law, on account of the defendant not having been a party to the foreign proceedings. A preferable explanation for the injunction is that it was vexatious or oppressive for the defendant to sue the plaintiff at law having regard to the foreign decree.

E *Mareva Orders, Discovery and Inspection*

In the Australian legal tradition, there is a clear equity to grant a mareva injunction ('mareva order') in aid of the execution of a final domestic judgment.[37] There is a similar equity in aid of the execution of foreign money orders.

This jurisdiction is illustrated by a 1979 English case, *Cook Industries v Galliher*.[38] A corporation obtained a money judgment in New York for some US$2.5 million against one Sarlie. The New York court had found that the CEO of that corporation had 'fleeced' the corporation to repay the CEO's personal indebtedness to Sarlie, who well knew where the money had come from. The New York judgment ordered Sarlie to repay the moneys with interest. It was now alleged in the English proceedings that Sarlie had invested the moneys in Picasso paintings and had left them in the possession of his friend, one Galliher, who stored them in a Paris flat leased in Galliher's name, in order to evade the judgment debt. Galliher claimed that the lease and the chattels belonged to him.

The assignees of the judgment debt brought proceedings in England against Galliher and Sarlie, seeking a declaration that Galliher held the lease of the Paris flat and the contents thereof on trust for Sarlie and that the plaintiffs were entitled to execute the New York judgment obtained against Sarlie, or that the dispositions to Galliher were made to evade Sarlie's creditors. Galliher lived in England for part of the year and the process was served on him personally in England.

The plaintiffs obtained an *ex parte* injunction enjoining Galliher from disposing of or removing any of the contents of the Paris flat. The matter came on by way of motion on notice for continuation of the injunction and for an Anton

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37 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 401 [43] ('*Cardile*').

38 [1979] Ch 439 ('*Cook Industries*').

Piller order, permitting the plaintiffs by an agent to inspect the Paris flat. His Lordship Justice Templeman dismissed various objections to jurisdiction, continued the injunction and granted the Anton Piller order, pending the trial of the action, saying that if he did not grant the relief sought, there was 'a very grave danger that the plaintiffs, if they are right, will be wholly frustrated'.[39]

Although his Lordship did not say so, the granting of the injunction was no doubt supported by the well-known statutory provision empowering the grant of interlocutory injunctions when it is 'just or convenient' to do so.[40] But, even so, the mareva order, like the Anton Piller order, still had the effect of enforcing the foreign judgment, preventing the judgment debtor from deliberately evading or frustrating it, which foreign judgment had not received any final judicial imprimatur in the English court. Moreover, there is little doubt from his Lordship's approach that he would have been disposed to grant an injunction in the same terms as part of the final relief in the action if the plaintiffs ultimately succeeded in showing that Galliher had no beneficial title to the lease and contents.[41] That happened in *White v Verkouille*,[42] discussed below.

More recently, Australian authority has confirmed that there is an inherent jurisdiction, quite apart from statute, to grant a mareva order to prevent the dissipation of local assets to defeat an actual or prospective foreign judgment,[43] and to grant other relief such as discovery.[44] Some rules of procedure also permit the granting of mareva orders pending the litigation of foreign proceedings, provided the judgment would be enforceable in the jurisdiction.[45]

The jurisdiction to grant injunctions restraining attempts to evade a foreign judicial order should not be limited to foreign money orders. There is also no reason why a procedure to restrain a defendant from leaving the jurisdiction

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39 Ibid 446.

40 *Judicature Act 1873* (UK) s 25(8).

41 In granting interlocutory relief, '[r]egard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights': *Cardile* (n 37) 395–6.

42 [1990] 2 Qd R 191 ('*White*').

43 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36. See also *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676 ('*Davis*'); *Celtic Resources Holdings plc v Arduina Holding BV* (2006) 32 WAR 276; *Severstal Export GmbH v Bhushan Steel* (2013) 84 NSWLR 141.

44 *Davis* (n 43) 686–7.

45 See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 260D. Note r 257, which makes it clear that the provision made by the Rules is not to be taken as intending to limit the Court's jurisdiction otherwise.

ought not to be similarly available, in the nature of the old Chancery writ of *ne exeat regno*.[46] Some procedural rules provide for orders of this kind.[47]

F Equitable Execution

When a foreign court has granted a money judgment, and has appointed a receiver by way of equitable execution, local courts having equitable jurisdiction have the power to enforce the order appointing the receiver, without the need to re-litigate the merits of the foreign judgment.[48]

In *White v Verkouille*,[49] a decision of the Queensland Supreme Court, a Nevada court gave judgment in the sum of US$467,438 plus interest against Mr Verkouille for deceit and breach of warranty. Days after those proceedings were commenced, Mr Verkouille deposited a sum of money in cash in two large suitcases at a Californian bank. Mr Verkouille then came to Australia with a Mr Gorson, together with the sum of $360,000 sourced from that Californian bank account. The sum was credited to an account with the ANZ Bank on the Gold Coast. The complainants in the Nevada proceedings obtained an order from the Nevada court appointing a Mr White as receiver with authority to attach all assets of Mr Verkouille, whether inside or outside Nevada, including the moneys held on deposit with the ANZ Bank, and to apply them towards the judgment debt.

Mr White (the receiver) commenced an action in Queensland against Mr Verkouille and Mr Gorson for a declaration that Mr White was entitled to the moneys held in the ANZ account, an order that the defendants pay those moneys to Mr White, and an injunction restraining the defendants from dealing with the moneys. Mr Gorson argued that the moneys or some portion thereof were owned beneficially by him. Both defendants entered appearances in the action and voluntarily appeared to contest the merits of the notice of motion. Mr White applied for summary judgment.

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46 Cf *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358, 364 (Wright J) ('*Companhia*'); *Arglasse v Muschamp* (1682) 1 Vern 75, 77, 135; 23 ER 322, 322, 369 ('*Arglasse*'). For an example of a modern procedure giving expression to this right, see *Uniform Civil Procedure Rules 1999* (Qld) r 256, which makes clear that the procedure is not to be taken as limiting the Court's jurisdiction otherwise.

47 See, eg, *Civil Proceedings Act 2011* (Qld) s 100.

48 See also *Robb Evans v European Bank Ltd* (2004) 61 NSWLR 75. See also *Civil Proceedings Act 2011* (Qld) s 12; and *Cook Industries* (n 38) 443, referring to a charging order presumably under ord 50 of the then *Rules of the Supreme Court* (UK) (1965 revision).

49 *White* (n 42).

It was argued for Mr Gorson that Mr White could not be recognised as receiver without a money judgment first having been granted by a Queensland court for the sum adjudicated by the Nevada court. McPherson J rejected that argument, holding that equity acts *in personam* against the conscience of the defendant, and following *Houlditch v Marquess of Donegall*.[50] There the House of Lords held that the order of an English Court of Chancery for an account and the appointment of a receiver of the rents and profits of a life tenancy of landed estates in Ireland was one that should be recognised and enforced by the Irish courts, even though no judgment at law had been entered in Ireland.

Justice McPherson went on to grant summary judgment, appointing Mr White as receiver of the funds and granting a final injunction in the terms sought. However, as his Honour considered that Mr Gorson's allegations ought to be tried, in Nevada, he required the receiver to give undertakings that would bring those matters before the Nevada court for its determination.

It is not necessary here to resolve the question of whether the principle in that case should apply even when the foreign court in a money judgment case has not made a receivership appointment, as that uncertainty can be readily overcome by seeking an appropriate order in the foreign court.[51]

IV Other Equitable Rights

Let it be assumed that a foreign court declares that the defendant holds property situated outside the territory of that court on trust for the plaintiff, and grants an *in personam* order compelling the defendant to transfer that property (or an interest therein) to the plaintiff. Or the foreign court grants a similar order by way of enforcement of a right of a kind that otherwise arises out of a personal obligation between the parties.[52] In the writer's opinion, there is or should be an equitable jurisdiction to recognise and enforce such a foreign judgment, and a procedure adapted to such a case.[53]

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50 (1834) 2 Cl & F 470; 6 ER 1232.

51 McPherson J appeared to doubt that such a prior order is a necessary pre-requisite: *White* (n 42) 195–6.

52 Cf *Deschamps v Miller* [1908] 1 Ch 856, 863–4. Many such other rights arising out of a personal obligation arguably involve a trust, including a constructive trust, such as a contract to sell property, at least where the purchase price has been paid, or rescission. But a trust should not be a prerequisite. This principle should also extend to rights of the kind recognised in *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143.

53 See American Law Institute, *Restatement (Second) of Conflict of Laws* (1969) §102.

Of course, it must be shown that the foreign court had jurisdiction in the 'international' sense, and that the other usual defences are not applicable, such as forum public policy. But those defences aside, if courts exercising equitable jurisdiction enforce foreign judgments in the ways set out in Part III above, they should also be capable of enforcing foreign judicial orders to compel the performance of an act other than the payment of money by an order in the nature of a mandatory injunction. That is at least where the foreign court's order is of kind that can be characterised as establishing a personal right *inter partes* to an *in personam* order regarding property. This is not to imply that there is no enforcement jurisdiction where equity acts in its auxiliary jurisdiction to restrain breach of a simple contract or tort. But that aspect of the topic deserves its own treatment.[54]

As a matter of practicality, it may be that cases of enforcement of foreign judgments involving property are only likely to arise when they involve immovables situated outside the country of the original court. That is because plaintiffs may not often consider it worth their while to bring a proceeding in one country, relating to movables located in another. The dearth of reported cases of that kind might be thought to bear that out. But that does not mean that jurisdiction does not exist. It may be that practitioners are unaware of it, having been encouraged in that view by scholars for so long. It may not always be convenient for plaintiffs to bring proceedings in the country where the movables are situated, for example where the movables are situated in a number of countries — a scenario more likely to happen nowadays than a century ago. It may also be that, when the plaintiff commences the action, the movables are situated in that place, but the defendant afterwards removes them to another jurisdiction.

Moreover, if the foreign judgment involves movables, at least when situated in the foreign country at the time of the foreign proceedings, or when they are instituted, equity's enforcement jurisdiction should extend further, to foreign judgments determining priorities claims.[55] It is not necessary to stay to consider whether foreign proceedings determining law of priorities claims are actions *in rem*, with the result that the foreign judgment would be denied recognition here if the movables were situated at all material times outside of the country of the original court.

To invoke equity's enforcement jurisdiction, the right does not have to be necessarily identical to equitable concepts known to the law of the forum, but it must be of such a kind as to be capable of being enforced by the procedural remedies of the forum.

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54 Cf *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612.

55 Cf *Gregory* (n 1) 623, 628, 633–4; *Lewis* (n 11) 193–4, 197–8; *Solomons* (n 22). The situation is unlikely to arise that a foreign judgment determining a priorities claim to land situated in that foreign country is sought to be enforced elsewhere.

If the foreign order meets those requirements, there is no reason why there should not be available an action at the *situs* for an *in personam* order compelling the defendant to, say, transfer title to the property or an interest in the property or to perform some other act, such as to deliver up movable property, in the course of which the merits of the foreign judicial order would not be re-litigated but recognised. This would occur in much the same way as occurs with actions to enforce foreign money orders, and subject to similar defences. If those defences are thought to be insufficient having regard to the nature of the order, that issue should be debated, rather than assuming that the jurisdiction does not exist at all.

If the enforcing court grants such an order, and the defendant refuses to obey it, she or he can be dealt with for contempt. There will then usually be other procedural avenues available under the law of the forum in the event of default. Many modern jurisdictions permit an officer of the court or someone else to sign documents on behalf of the defaulting defendant.[56] These may require that the local (enforcing) court has first made an order requiring the defendant to perform the act in question. A receiver could be appointed in equity with power of sale.[57] But a receivership with power of sale, like the appointment of statutory trustees for sale, would only be satisfactory (apart from recovering income from the property) if the plaintiff were satisfied with money in lieu of an interest *in specie*. Equity should not be so confined. One need not here get into the territory of whether a vesting order or similar order can be made based purely on the foreign decree, without a prior facultative order *in personam* by the enforcing court.[58] It is enough to conclude that a vesting order should be available to enforce an *in personam* decree of the local court enforcing the foreign decree.

The enforcing court ought to be able to grant an order in the nature of the Chancery decree of delivery of possession.[59] It may not be enough by itself, though it could usefully supplement other relief, such as the appointment of a receiver with power of sale. This equitable remedy may sometimes not be necessary in the case of land, because once the plaintiff gets in the legal title she or he can get an

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56 See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 899. Provisions of this kind are descended from the *Contempt of Court Act* (1830) 1 Wm IV, c 36, s 15.

57 See, eg, *Civil Proceedings Act 2011* (Qld) s 12. The fact that the foreign court granted an *in personam* order compelling the execution of a transfer ought to be regarded as sufficient as warranting the local court appointing a receiver with power of sale, if the plaintiff elects to take a sum of money in lieu of the land itself.

58 Such as *Land Title Act 1994* (Qld) s 114. For vesting orders, see, eg, *Trusts Act 1973* (Qld) s 82.

59 See *Penn v Baltimore* (1750) 1 Ves Sen 444, 454; 27 ER 1132, 1139 ('*Penn*'); *Solomons* (n 22). Cf *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478; *Metropolitan Permanent Building Society v McClymont* [1983] Qd R 160, 162ff; and *Civil Proceedings Act 2011* (Qld) s 90(2)(d).

order in the nature of ejectment, at least on the making of a vesting order or the registration of a transfer executed by a court officer of the enforcing court.[60] But, in the case of tangible movables, it may be necessary for the local court to grant an order for delivery of possession, by way of enforcing a foreign *in personam* order for delivery up of goods. Once the enforcing court's *in personam* order for delivery up has been breached, one could then pursue execution under rules of court for seizure of the goods, to avoid difficulties of gaining access to the place where the movables are held.[61]

When the foreign decree executes or enforces a right of the requisite kind, there is no reason why the foreign decree should not be picked up as a foundation for rights. The above holds true at least as regards property situated in the territory of the enforcing court at the time of the enforcement proceedings. It may be that one can go further, for example if the defendant can be found in the territory of the enforcing court, but the property is situated in a third country, then it may be propitious to grant an *in personam* order against him or her and take advantage of procedures available under the law of the enforcing court to prevent that person from leaving the jurisdiction,[62] with imprisonment as an inducement for the defendant to execute the appropriate transfer.

V Movables under Statute

The *Foreign Judgments Act 1991* (Cth) ('the Act') allows for the registration of foreign money judgments. The Act authorises registration of non-money orders if regulations to that effect are made under s 5(6); but that power has not yet been exercised. If it were, in the writer's view, the Act should provide an avenue for enforcement of at least foreign *in personam* decrees enforcing rights *in personam* relating to movables wherever situated, on the ground that the foreign proceedings are 'actions *in personam*' within s 7(3)(a).[63] Some such decrees, because they are made in subject specific proceedings taken out of the definition of 'action *in personam*' by s 3(1), could fall within s 7(3)(c), which accommodates cases which are neither 'actions *in personam*' nor 'actions *in rem*'. In such cases,

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60 See also provisions for registered mortgagees to recover possession by court order, such as *Land Title Act 1994* (Qld) s 78.

61 See, eg, *Uniform Civil Procedure Rules 1999* (Qld) rr 916–17.

62 Based on the old Chancery writ of *ne exeat regno*; cf *Companhia* (n 46) 364 (Wright J); *Arglasse* (n 46) 77, 135; 322, 369. See, eg, *Civil Proceedings Act 2011* (Qld) s 100.

63 See *Foreign Judgments Act 1991* (Cth) s 7(3)(a). This view is supported by the fact that 'judgment' is defined to mean 'a final or interlocutory judgment or order': s 3(1). There is no need to artificially read down the phrase 'action *in personam*' in s 7(3)(a) in this context. There is no comparable provision in s 7 deeming the foreign court not to have had jurisdiction in actions the subject matter of which was movable property situated outside the country of the original court, akin to s 7(4)(a), which excludes jurisdiction when the foreign judgment was in an action the subject matter of which was immovable property situated outside the country of the original court.

the foreign court's jurisdiction is deemed to be established 'if the jurisdiction of the original court is recognised by the law in force in the State or Territory in which the judgment is registered'.

There is also a question of how to characterise a foreign judgment deciding a law of priorities claim, at least relating to movables situated in the territory of the original court at the time the proceedings were commenced. Section 7(3)(b) provides that the foreign court is deemed to have had jurisdiction if the judgment was given 'in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was movable property, if the property in question was, at the time of the proceedings in the original court, situated in the country of that court'. There is also s 7(3)(c) mentioned above.

It is not necessary or possible to deal definitively with such questions here. Whether or not (if the power in s 5(6) were exercised) the Act would be capable of extending to such judgments, the plaintiff is still at liberty to enforce judgments of that character under the general law. Section 10 of the Act prevents modes of enforcement of registrable judgments other than by way of registration, but it only applies to foreign money judgments. An application to the Court could be brought relying on both avenues, in the alternative. The Act also does not prevent the need to consider the general law where the foreign court was not a qualifying court of a participating country, or where the foreign judgment was in an action the subject matter of which was immovable property situated outside the country of the original court.

There is a further question of whether the conclusive effect provision in s 12(1) of the Act can be set up as a sword by a plaintiff who won overseas and, if so, in what cases. If, for example, a plaintiff obtained a foreign order *in personam* enforcing a right *in personam* concerning movables situated outside the country of the original court, could that plaintiff rely positively on that judgment as having conclusive effect under s 12(1)? Or does s 12(1) only allow foreign judgments to be set up as a shield? As attractive as the former possibility is, there is reason to be cautious before jumping to that conclusion.[64] But once again, it is not necessary to express a concluded view on that question. Even if s 12(1) can be set up as a sword, it would only apply where the original court is a qualifying court

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64 It is unclear whether the word 'and' in s 12(1) is to be read conjunctively or disjunctively. Section 12, like the equivalent provision in the earlier reciprocal enforcement of judgments legislation enacted around the British Commonwealth, is based on s 8 of the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK). That Act was based on the *Foreign Judgments (Reciprocal Enforcement) Committee Report* (December 1932), chaired by Lord Justice Greer. That Report (at 6, 15, 17) said it was not intended to make any substantial change to the pre-existing law. Not even the *Carl Zeiss* case (n 31) had been decided in 1932.

from a participating country. For other courts, as well as for judgments the subject matter of which are immovables situated outside the country of the original court, it is still necessary to look to the general law, which is preserved by s 12(3).

The *Trans-Tasman Proceedings Act 2010* (Cth) provides for the registration here of certain New Zealand non-money orders (and money orders). Under that Act, judgments that are registrable can only be enforced through registration.[65] There is an exclusion where the judgment was given in a proceeding the subject matter of which was immovable property, or was given in a proceeding *in rem* the subject matter of which was movable property, situated outside of New Zealand.[66] In the writer's view, the scheme should permit registration of at least a New Zealand *in personam* decree establishing a right *in personam* relating to movables wherever situated.[67] It should also apply to a New Zealand judgment determining a law of priorities claim relating to movables, at least when situated in New Zealand.

VI Immovables

One of the main reasons why there has been a reluctance to recognise a general equitable jurisdiction to enforce foreign judgments is the vexed question of immovables. Under the general law, the received wisdom is that even foreign *in personam* decrees relating to land outside the country of the original court will not be recognised and enforced elsewhere, because the foreign court has no jurisdiction to directly affect title to such land. The decree of a foreign court, it is said, cannot alter, *ex proprio vigore*, title to land situate in another sovereign state. This objection only applies to immovables, not movables, for *mobilia sequuntur personam*.[68]

There is no decision of the High Court of Australia that holds that such foreign *in personam* decrees relating to land outside the country of the original court cannot be recognised and enforced here. There are some decisions that are not concerned with the enforcement of a foreign judgment.[69] There is also *Lewis v Balshaw*, but that was a probate case and the comments were confined to that

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65 See *Trans-Tasman Proceedings Act 2010* (Cth) s 65.

66 See ibid ss 72(1)(c) and 68.

67 See definition of 'judgment ibid s 4. Except where, for example, it is an 'excluded matter' or an 'order relating to … the administration of the estate of a deceased person': *Trans-Tasman Proceedings Act 2010* (Cth) s 66(2)(a), (e).

68 Movables follow the person: *Gregory* (n 1) 623, 628, 633–4.

69 *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 500–1; *Commonwealth v Woodhill* (1917) 23 CLR 482.

context.[70] And there is *Australian Mutual Provincial Society v Gregory*, which was a case involving a foreign sequestration order.[71] Although the subject matter of the proceedings in that case was an equitable interest in property that was characterised as an immovable, it was a dispute between competing claimants to that equitable interest. It was not a case of a foreign *in personam* decree enforcing a trust or another personal obligation *inter partes*.[72]

A *Duke v Andler*

The leading authority for the orthodox view, as regards foreign land decrees, is the oft-cited Canadian case of *Duke v Andler* ('*Duke*').[73] Mr Duke fraudulently procured a conveyance of real property located in British Columbia from Mrs Andler without furnishing the agreed consideration. He then conveyed the land to his wife to defeat Mrs Andler's rights. Mrs Andler brought proceedings against Mr and Mrs Duke in California, where all parties resided. The Californian court rescinded the contract of sale and ordered Mr and Mrs Duke to execute and deliver a re-conveyance to Mrs Andler and, in the event of default, directed a commissioner of the court to execute a conveyance on their behalf, which ultimately occurred. When the Registrar of Titles for British Columbia refused to register the deed executed by the commissioner, Mrs Andler brought proceedings in the British Columbia courts against the Dukes. She sought a declaration that Mrs Andler was the owner of the land by virtue of the Californian decree, alternatively by virtue of the commissioner's deed, alternatively by virtue of the decree and the deed, or alternatively a vesting order.

The Supreme Court of Canada, overturning the British Columbia Court of Appeal and the trial judge, held that Mrs Andler's claim should be rejected. It reasoned that 'the courts of a foreign country have no jurisdiction to adjudicate the title or the right to possession of any immovable not situate in such country'.[74] There were repeated references to the rule that judgments of courts do not, *ex proprio vigore*, alter title to land in another country.[75]

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70 (1935) 54 CLR 188.

71 *Gregory* (n 1).

72 It was not even a case where the Tasmanian Supreme Court, where the land was situated, was acting under statute in aid of the Natal bankruptcy, such as by appointing a receiver. The Tasmanian court had no statutory duty under the prevailing *Bankruptcy Act 1870* (Tas) to provide assistance to a foreign bankruptcy.

73 [1932] SCR 734 ('*Duke*').

74 Ibid 744.

75 Ibid 738–40, 743, 744. *Ex proprio vigore* means 'of its own force and effect'.

The comments must be seen in context. Mrs Andler conducted her case in reliance on the commissioner's deed.[76] It does not seem that the court was asked to regard the *in personam* decree alone as warranting the existence of an equity of enforcement under the *lex situs*.

The Supreme Court of Canada followed an American decision, *Fall v Eastin* ('*Fall*').[77] There, in Washington matrimonial proceedings, Mr EW Fall had been ordered to execute a conveyance of a moiety of Nebraskan land to his wife. On his default, a Washington Commissioner executed the transfer on his behalf. Undeterred, Mr Fall transferred the land to his sister, Elizabeth Eastin, who took as a volunteer with constructive notice. Mrs Fall brought proceedings in Nebraska against Mr Fall and Ms Eastin, unsuccessfully. A majority of the United States Supreme Court also found for Ms Eastin, for reasons similar to those later expressed in *Duke*.[78] But once again the plaintiff/wife based her argument on the Commissioner's deed.[79] Mr Fall was also not before the Nebraskan court, as he had been served constructively by way of publication, which lent itself to the view that to enforce the Washington decree would have given it an operation *in rem*.[80] Moreover, the foreign decree enforced a statutory right to a matrimonial property settlement. It may be said that this was not a right that was based on an obligation *inter partes* that could be characterised as equivalent to equitable doctrines of trust, fraud or unconscionable conduct. That point would, however, be an entirely unsatisfactory basis of distinction.[81]

Interestingly, though, Holmes J disagreed with the majority. He concurred but only because he considered that he was powerless to intervene.[82] He thought that the Nebraskan Supreme Court should have held that Elizabeth Eastin took

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76 Ibid 737. See also [1931] 3 DLR 561, 566–7; [1932] 2 DLR 19, 24–7, 36–43.

77 215 US 1 (1909) ('*Fall*'), cited in *Duke* (n 73) 43. The Supreme Court of Canada also cited (at 743) *Carpenter v Strange*, 141 US 87 (1891), but that was a case where the foreign decree was not a decree requiring the defendant to perform some act such as execute a conveyance. The theory relied on by the plaintiff was one that invoked a pure question of competing titles to real estate.

78 *Fall* (n 77) 11. Harlan and Brewer JJ dissented.

79 The first sentence of the majority opinion (delivered by McKenna J) was (ibid 2): 'The question in this case is whether a deed to land situate in Nebraska, made by a commissioner under the decree of a court of the State of Washington in an action for divorce, must be recognized in Nebraska under the due faith and credit clause of the Constitution of the United States.'

80 *Fall v Fall*, 113 NW 175, 176 (Neb 1907). This point was made a ground of distinction by Holmes J, in his concurring judgment: *Fall* (n 77), 15.

81 At any number of levels, the case highlights the urgent need for legislative intervention. There was also a suggestion in the case that there were public policy concerns. But these did not seem to arise out of differences in substantive matrimonial law, but rather in procedure: *Fall v Fall* (n 80) 176, 181. That can hardly seem a valid basis to invoke public policy, given that the differences were to the form of the orders, not to their effect.

82 *Fall* (n 77) 14–15.

subject to the Washington decree, because she was not a bona fide purchaser for value without notice. However, if the Supreme Court of Nebraska took the view that the Washington decree would not avail as against any transferee subsequent to the decree, whether they were an innocent purchaser or a volunteer with notice, then Holmes J could not say that the Full Faith and Credit clause of the Constitution was infringed.

B *No Alteration of Ownership Ex Proprio Vigore*

The main objection[83] raised in these cases to recognition of the foreign decree was that it would infringe the principle that no court has jurisdiction to directly affect title to immovables situated outside its territorial borders.

As a matter of logic, this objection proves too much. Just because the foreign court has made an order does not mean that it applies *ex proprio vigore* in the country of the *situs*. It may, however, apply as part of the law of the *situs* if the *situs* court chooses to recognise and enforce that decree or if the defendant voluntarily obeys the foreign decree.[84] It is well accepted that courts of equity can grant orders that, because they operate on the conscience of the defendant and not on the property directly, compel the defendant to perform an act in connection with property situated outside the territorial borders of the issuing court, on pain on contempt if that order is disobeyed.[85] This undoubted jurisdiction is not regarded as infringing any rule of international law concerning immovable property.

Thus, as Lord Herschell LC said in *British South Africa Co v Companhia de Mozambique*:

> No nation can execute its judgments, whether against persons or movables or real property, in the country of another. On the other hand, if the Courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to

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[83] The other objections commonly raised include the one about forms of action that has been mentioned above. This was raised, and rejected, at first instance in *Duke v Andler* [1931] 3 DLR 561, 565. It was not mentioned by the Supreme Court. Reliance was also placed by the Supreme Court of Canada (*Duke* (n 73) 739) on the notion that a court should not pronounce a decree that it cannot enforce, citing Dicey. But little need be said about this. Later editions of Dicey have abandoned the principle of effectiveness as a rationale of jurisdiction. That complaint really begs the question of whether the courts of the *situs* will recognise the decree. Another objection sometimes raised is that the *situs* is the most convenient venue, as views of the land are sometimes necessary. But this is likely to be more of an issue for cases seeking to enforce rights *in rem*, than rights *in personam*.

[84] This point was clearly understood in *Gregory* (n 1) 623–4 and 627 (Griffith CJ), and 644 (Isaacs J), and by Cook (n 13) 128.

[85] See *Penn* (n 59) 447, 454; 1134–5, 1139; *Cranstown v Johnston* (1796) 3 Ves Jun 170, 182–3; 30 ER 952, 958–9; *Ex Parte Pollard* (1840) Mont & Ch 239, 250–1.

> land in a foreign country, and to enforce its adjudication in personam, it is by no means certain that any rule of international law would be violated.[86]

If that is so, then other courts should not be constrained by international law, if they choose, from picking up such a foreign decree as a datum and treating it as a foundation for rights recognised under the law of the *situs* (or forum), just as can happen by force of statute in the fields of insolvency,[87] probate[88] and mental illness.[89]

In *Fall*, Holmes J well understood this when he observed:

> The real question concerns the effect of the Washington decree. As between the parties to it, that decree established in Washington a personal obligation of the husband to convey to his former wife. A personal obligation goes with the person. If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in Nebraska. … So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska.[90]

Moreover, the *Hague Judgments Convention* provides for the enforcement of non-money orders enforcing rights *in personam* in relation to immovables situate outside the country of the original court.[91] Therefore, a respected international instrument proceeds on the principle that there is no objection in international law to a *situs* court choosing to recognise a foreign decree enforcing a right *in personam* in relation to immovable property.

Furthermore, there are two clear instances where such foreign decrees do have an effect at the *situs*. First, if the defendant executes a conveyance in the form required by the law of the *situs*, and delivers it up to the plaintiff, in obedience to the foreign decree, under pain of contempt, there can be no doubt that such a transfer would be treated as valid according to the law of the *situs*, assuming the plaintiff registers it or takes whatever steps are required under the *lex situs* to formalise it. This evidently does not infringe international law. As has been pointed out, such a transfer would be voidable for duress if the foreign decree

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86 [1893] AC 602, 624. The later comments, at 626–7, citing Story, do not express a firm conclusion.

87 See above n 27.

88 If the estate comprises or includes immovables, the better view is that resealing operates to vest in the executor or administrator under the foreign grant the real as well as personal property of the deceased situate in the resealing jurisdiction, although that assumes that the discretion to reseal is exercised: Queensland Law Reform Commission (n 11) 121. See *British Probates Act 1898* (Qld) s 4; *Land Title Act 1994* (Qld) s 111(2)(a). See also special legislation in some jurisdictions: *Probate Rules 2015* (SA), r 42; *Non-Contentious Probate Rules 1987* (UK) r 30.

89 See, eg, *Public Trustee Act 1978* (Qld) s 79.

90 Fall (n 77) 14–15, citing *Ex parte Pollard*, 4 Deacon, Bankr 27, 40; *Polson v Stewart*, 167 Mass 211.

91 *Hague Judgments Convention* (n 7) arts 5 and 6.

were not treated as having some effect under the law of the *situs*.[92] Second, no one doubts that such non-*situs* decrees, including in regard to land outside the territory of the original court, give rise to an issue estoppel, at least if the defendant brings proceedings at the courts of the *situs* inconsistent with the foreign decree.[93] That being so, it follows that, for that purpose, the foreign decree is regarded as having some effect at the *situs*, and is not regarded as infringing any rule of international law.

These consequences would not follow if the foreign decree had no effect under the law of the *situs*. It has that effect not because it operates *ex proprio vigore* at the *situs*, but rather because the law of the *situs* chooses to pick it up as a datum.

If there is an objection to this process occurring automatically without the need of a court order by the enforcing court, it would be possible for the foreign land decree to be regarded as something approximating a 'mere equity'. But only in this sense: while the foreign decree would not mature into an equitable interest until the enforcing court recognises it, it would conclusively establish an obligation *inter partes* that the enforcing court would be *required* to recognise subject to well-recognised exceptions such as public policy and the defendant's lack of sufficient connection with the foreign country.[94] This would allay concerns that the foreign decree is operating of its own force and effect as regards immovables situated outside that original country. This classification is not the writer's preferred position, including because it involves treating the foreign decree as giving rise to a mere equity when the underlying facts might themselves without regard to the decree give rise to an equitable interest in the land, in some circumstances at least. It would not put the plaintiff in any different position as against the defendant.[95] But, if third-party rights have intervened, the plaintiff's position would be somewhat more fragile, though only in some circumstances. This is discussed in Part VII below.

C *The Sanctity of the Lex Situs*

The other main reason advocated in *Duke*[96] in favour of the traditional view as regards foreign land decrees is that the right to immovables can only be determined according to the *lex situs*. On a point of clarification, in a sense the *lex situs* must always be complied with, in that the forms for transferring legal title to

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92 A point first made by Sedgwick CJ, dissenting, in *Fall v Fall* (n 80) 186.

93 *In the Marriage of Caddy and Miller* (1986) 84 FLR 169; *O'Hara v Public Trustee of Manitoba* (1987) 46 DLR (4th) 504; *Burnley v Stevenson*, 24 Ohio St 474 (1873).

94 And such other limited defences if any as can be demonstrated to be necessary. Sed quaere, eg, *Reimers v Druce* (n 20).

95 See, eg, *Land Title Act 1994* (Qld) ss 184(3) and 185(1)(a).

96 *Duke* (n 73) 738–42.

property under the *lex situs* need to be adhered to. For example, for legal title to land or to an interest therein to pass, a transfer must be lodged for registration in the proper form. But that is not what is at issue here. A defendant can be compelled to execute such a form, or other relief granted that operates *in personam* such that there is brought about a change in property rights in accordance with the forms of the *lex situs*. The issue under discussion is what rules are to govern the question whether the defendant should be so compelled or, on default, whether a transfer should be executed on his behalf.

Five points can be made about the *lex situs* objection.

First, this objection should not affect recognition of foreign decrees that apply the *lex situs* of the immovable. If they do, it cannot be a reason to refuse to recognise the decree that the foreign court allegedly made a mistake of fact, or indeed even a mistake of law, as otherwise a refusal to do so would be inconsistent with a fundamental principle of the law of foreign judgments.[97]

Second, the failure to apply the *lex situs* cannot matter if the *lex situs* would have arrived at the same result. The Supreme Court of Canada acknowledged the difficulty this presented to its conclusion.[98]

Third, the sanctity of the *lex situs* is apparently not so strong a policy as to prevent the acceptance of transfers signed by the defendant, or to prevent an issue estoppel arising. There are also statutory inroads into the view that the *lex situs* must always be given primacy in some fields such as insolvency, probate and mental illness.[99] The *Hague Judgments Convention* also rejects the primacy of the *lex situs* for foreign judgments enforcing rights *in personam*.

Fourth, when there is no question of intervening third-party rights, it is difficult to see why a foreign *in personam* land decree should never be recognised and enforced merely because it did not apply the *lex situs*. Our own courts are willing to apply forum law in granting *in personam* decrees over foreign land. They do so because the right to relief arises from dealings *inter partes* that bind the conscience of the defendant, and because and when forum law is the appropriate law. It is inconsistent with comity if our courts refuse to recognise a jurisdiction that *mutatis mutandis* they claim for themselves.[100] In the event that a foreign judgment leads to a consequence considered obnoxious to the enforcing court, there is always the public policy escape valve. But where there is no public policy issue, by recognising the foreign decree the courts of the forum (where that is also the *situs*) *are* applying the *lex situs*, being a different branch of the *lex situs*.

Fifth, as will be seen below, there is no basis for any apprehension of prejudice to third-party rights.

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97 *Godard v Gray* (1870) LR 6 QB 139.

98 *Duke* (n 73) 742.

99 See above nn 87–9.

100 *Indyka v Indyka* [1969] 1 AC 33, 75, 84 and 109.

VII Third-Party Rights

The concern about prejudicing the rights of third parties, particularly *situs* residents, lies at the heart of the orthodox view as regards foreign land decrees. Residents should be able to carry on their business without being affected unwittingly by some lurking foreign decree. This concern is unfounded for three reasons.

First, the question of priorities between competing claimants to land *is* governed by the *lex situs*. The recognition of the foreign decree itself does not alter that fact. The *recognition* of the foreign decree certainly obviates the need of the plaintiff to re-establish the creation or validity of his or her rights. To that extent, and to that extent alone, the third party is bound by the judgment (if that is necessary[101]), as the third-party claims through or under the defendant.[102] But that is as far as the judgment goes: it does not by itself establish that the plaintiff's interest must *prevail over* that of the third party. The question of who prevails as between the plaintiff and the third party falls to be decided separately.[103] If the plaintiff prevails, only then will the foreign judgment be *enforced*, because orders will be made inconsistent with the rights of the intervening third party. If the third party prevails, then the foreign judgment will have been recognised, but not enforced.

Second, even if there were occasions where the choice of law rules of the forum do not point to the *lex situs* as governing the priorities question, then that is the choice of the forum court. If the applicable foreign law or the result to which it leads is obnoxious, then the forum can always refuse to apply the foreign *lex causae* on public policy grounds.[104]

Third, Australian law, when it applies as the *lex situs* or on some other basis, provides adequate protection for third parties. Even if it did not, the issue of priorities should be addressed openly and debated; it should not just be left to be resolved by the blunt instrument of 'no jurisdiction'. The rights of forum resident third parties should not prevail in all cases, as that would unfairly discriminate

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101 If the third party does not have a beneficial interest, but holds on trust for the defendant, or if the assignment is set aside as in defraud of the plaintiff, then it may not matter if the third party is or is not bound by the foreign decree.

102 Cf *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28 [17], [28]–[33].

103 This distinction was well understood by the High Court in *Gregory* (n 1), where the Court considered the case on the alternative footing that the interest at stake was movable property as opposed to immovable property. It was also well understood in *White* (n 42) and *Araya* (n 28).

104 Cf *Gregory* (n 1) 633–4, 643–4, 646. Cf also Nadelmann (n 25) 161–2.

against foreign residents. That invites the question: is the true goal — the hidden rationale — of the rule of 'no jurisdiction' to prefer forum residents?

Thus, in the case of immovables situated in Australia, third parties who perfect their interests by registration under the Torrens system of land titles have nothing to fear from rights, however characterised, declared by a foreign decree in foreign proceedings. This assumes, as would usually be the case, that the plaintiff's equity was not protected by registration prior in time.[105] Where the third party is first registered, that interest will prevail over the plaintiff's right, however described, even if the third party took with notice, or even if the third party gave no consideration (at least in the latter case provided they took with no actual notice).[106] However, if the defendant disposed of the property or an interest therein to the third party in fraud of the plaintiff, and the third party knew of that fact and gave no consideration, then it is hard to imagine that the third party would prevail over the plaintiff even though the third party registered their interest.[107] And the third party could not fairly be heard to complain in those circumstances.

If neither the plaintiff nor the third party had registered their right, the general law would apply. Even if the plaintiff's right were regarded as an equitable interest, the rules adequately protect third parties. The starting point would be that, where the equities are equal, the first in time prevails. If the plaintiff was first in time, but had not caveated, and the third party (being a purchaser) checked the register before paying the consideration, then the third party would surely prevail. If the third party's interest arose first in time, the third party would also prevail, unless the equities were not equal. If the third party was a volunteer, if it had an equitable interest at all, it is hard to imagine how its equity could be superior. If the third party loses under such rules, it is difficult to see that the third party would have just cause for complaint.

But if the plaintiff's right were regarded as a mere equity prior to local recognition, then the third party would be in a stronger position. The rule would then be that the third party, being second in time, would prevail if she or he were a bona fide purchaser for value without notice. The third party could not fairly complain if they lost under that rule.

In fact, the concern here is more the adequate protection of the plaintiff's rights. It is unclear whether a mere equity is a caveatable interest. Even if it is, it is doubtful that the foreign proceedings would themselves satisfy the requirement that exists in many jurisdictions that caveators bring proceedings to

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105 If somehow the plaintiff were able to register, and do so first in time, the third party could hardly be heard to complain.

106 See, eg, *Land Title Act 1994* (Qld) ss 180, 184(1) and (2)(a).

107 See, eg, ibid ss 184(3) and 185(1)(a). If the third party took with actual notice of the fraud and was a volunteer, surely that would amount to 'fraud' within s 184(3)(a) of that Act: cf *Property Law Act 1974* (Qld) s 228.

establish their interest. The plaintiff could seek an interlocutory mareva order (even *ex parte*) once the foreign decree is granted, having started proceedings at the *situs* to enforce the foreign decree. But by then it may be too late. As noted above, it is possible to seek such a mareva order pending the foreign litigation, provided the court considers that the foreign judgment, if granted, would be enforceable at the *situs*. The *situs* court would need to take the view advanced herein that foreign *in personam* decrees are enforceable. On the back of a mareva order, the plaintiff could then lodge a caveat.[108] The plaintiff might seek a mareva order in the foreign proceedings themselves. But if the defendant ignores the substantive part of the decree in those proceedings, then the grant of a mareva there is unlikely to be of much comfort. There may be other avenues, but also not without risk.[109] There is need for reform of real property legislation to better protect plaintiffs to foreign proceedings of the kind here under consideration.[110]

It is not necessary here to survey the applicable priorities rules if the competition is between a foreign *in personam* decree relating to movables situated in Australia, and a third party who acquired an interest in those movables subsequently to the foreign decree. That is because there is no blanket rule that a foreign court lacks jurisdiction to determine title to movables situated outside of the country of the original court. In that situation, the separate priorities question will ordinarily be governed by the *lex situs*. If the movables are here, one suspects that the priority rules that would be applied would also adequately protect third parties, whether it be under the general law or under legislation such as the *Personal Property Securities Act 2009* (Cth). If the foreign decree itself adjudicated the priorities question against the 'third party', then, assuming the movables were situated in the country of the original court at the material time and that such court applied the *lex situs*, then that would be consistent with principle. But if any foreign judgment, no matter what law it applied, leads to a result considered obnoxious, there is always the public policy escape value.[111]

It is sufficient to conclude that any concern that the enforcement of foreign non-money land decrees would unfairly prejudice third-party rights is misplaced and unjustified. Courts are astute to ensure that third-party rights are fairly protected.[112] If it is still complained that forum residents are not adequately protected, the point is that there should be a debate about the priorities rules or

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108 See, eg, *Land Title Act 1994* (Qld) s 122(1)(e).

109 Where the plaintiff can, they may be able to lodge a caveat based on the underlying cause of action. But that may give rise later to the need to lodge a second caveat, as to which leave is needed: see, eg, *Land Title Act 1994* (Qld) s 129. This demonstrates the need for reform.

110 For example, sections such as s 122(1)(d) of the *Land Title Act 1994* (Qld) should also be enlarged to include foreign in personam decrees. But this is not enough for, as noted, protection is needed during the pendency of the foreign proceedings.

111 See, eg, *Gregory* (n 1); *Araya* (n 28). Cf also *Simpson v Fogo* (1863) 1 H & M 195; 71 ER 85, although the opposite conclusion was reached in *Liverpool Marine Credit Co v Hunter* (1868) LR 3 Ch App 479.

112 See *White* (n 42); *Araya* (n 28).

the defences to recognition and enforcement, not just an overbroad rejection of all foreign non-money decrees based on wrong assumptions and a refusal to have that debate.

VIII Conclusion

Ultimately the aim of any legal system, especially one administering rules of equity, should be to promote equal justice at the least cost and without regard to legal technicalities. The view that there is no comprehensive equitable jurisdiction to enforce foreign judgments fails to meet that standard. It does not give sufficient credit to established authority. The justifications offered for that view do not provide a firm foundation for it and do not accommodate the needs of a modern, globalised world. It is time to adopt a rule that meets those needs. If there are other concerns, then they should be robustly debated. But ultimately, the onus is on to commentators to do that, in the course of dealing comprehensively with equity's contribution to the subject of foreign judgments. Much also depends on practitioners bringing appropriate cases before the courts to pursue justice for their clients, thereby allowing the courts an opportunity to create new precedents. And the legislature needs to intervene as a matter of urgency. A good place to start would be for Australia to become a party to the *Hague Judgments Convention*.

GENOMIC RESEARCH AND DATA-SHARING: TIME TO REVISIT AUSTRALIAN LAWS?

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This article analyses the ethical and legal aspects of data-sharing and genomic research. It begins in Part II with an overview of the nature of genomic information, and whether it is exceptional when compared to other forms of health information. Part III considers the role of data-sharing in genomic research, with the importance of public trust in supporting genomic research considered in Part IV. The Australian regulatory framework for data-sharing in genomic research is considered in Parts V and VI, with reform options discussed in Part VII. The article concludes that advances in genomic research and the complexity of the current regulatory framework make it timely to review Australian laws to ensure that they maintain their relevance for this rapidly developing field of research.

I INTRODUCTION

In the early 2000s the Australian Law Reform Commission ('ALRC') and the Australian Health Ethics Committee ('AHEC') of the National Health and Medical Research Council ('NHMRC') embarked on a two-year inquiry on the protection of genetic information. The report of this inquiry, *Essentially Yours: The Protection of Human Genetic Information in Australia* ('*Essentially Yours*'), was published in March 2003.[1] Drawing on scientific expertise and wide public consultation, *Essentially Yours* identified the characteristics of genetic information that posed particular legal and ethical challenges and considered whether those challenges

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1 Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No 96, May 2003) ('*Essentially Yours*').

justified treating genetic information as a special kind of personal information requiring more stringent regulation than other forms of personal information.[2]

Published shortly after the mapping of the human genome,[3] *Essentially Yours* appeared on the threshold of the genetic age. In the 17 years since the publication of the report, genetic research has been transformed. Perhaps one of the most significant changes during this period has been the development of genomics. Genomics is defined as 'the application of specific technologies to analyse information about the entire genome of an organism'.[4] While genetics examines isolated genes, 'genomics addresses all genes and their inter-relationships'.[5] This might involve the entire genome (whole genome sequencing) or all protein-coding genes (whole exome sequencing).[6]

Genomic research promises exciting new possibilities for understandings of the human body and for the prevention, diagnosis and treatment of disease.[7] While data-sharing is regarded as important to the development of genomic research,[8] the expected benefits of data-sharing are accompanied by potential risks to privacy. Understanding the risks of data-sharing, and the options for minimising the potential for harm, requires a discussion of the qualities of genomic information.[9]

Focusing on the issue of data-sharing, this article considers the complex privacy issues raised by contemporary genomic research and argues that a review of Australian regulatory frameworks relating to genomics is timely. Such a review will also help to ensure public trust and confidence in research related to emerging genomic technologies. In Part II we consider the nature of genomic information. We consider whether genomic information can be considered 'exceptional' or different from other forms of health information. While much of

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2 Ibid ch 3.

3 International Human Genome Sequencing Consortium, 'Initial Sequencing and Analysis of the Human Genome' (2001) 409 *Nature* 860; J. Craig Venter et al, 'The Sequence of the Human Genome' (2001) 291(5507) *Science* 1304.

4 National Health and Medical Research Foundation, *Principles for the Translation of 'Omics'-Based Tests from Discovery to Health Care* (2015) 22 <https://www.nhmrc.gov.au/aboutus/publications/principles-translation-omics-based-tests>.

5 Ibid.

6 National Institutes of Health, 'What Are Whole Exome Sequencing and Whole Genome Sequencing?' <https://ghr.nlm.nih.gov/primer/testing/sequencing>.

7 Australian Health Ministers' Advisory Council, 'National Health Genomics Policy Framework' (2017) 2 <https://www.coaghealthcouncil.gov.au/Portals/0/Genomics%20Framework%20WEB_1.PDF> ('National Health Genomics Policy Framework').

8 Yann Joly et al, 'Data Sharing in the Post-Genomic World: The Experience of the International Cancer Genome Consortium (ICGC) Data Access Compliance Office (DACO)' (2012) 8(7) *PLoS Computational Biology* e1002549.

9 Donald RC Chalmers, Dianne Nicol and Margaret F Otlowski, 'To Share or Not to Share Is the Question' (2014) 3(4) *Applied and Translational Genomics* 126, 127.

the debate about the nature of genomic information has arisen in the context of genomic medicine, the potentially exceptional nature of genomic information is also relevant to the privacy-related issues that arise in the context of research. Part III explains the role of data-sharing in genomic research and the scientific benefits from data-sharing.[10] In Part IV we analyse the role of public trust in supporting genomic research, highlighting the importance of trust in research participation. Part V discusses the regulatory framework for data-sharing in genomic research in Australia at a national level, through guidelines issued by the NHMRC, and the provisions of the *Privacy Act 1988* (Cth) ('*Privacy Act*'). Our aim here is to analyse the role of these regulatory frameworks in the specific context of genomic data-sharing. Australian information privacy law is a mixture of federal and state legislation. In Part VI we use the case study of Queensland as an example of state-based legislation, and to illustrate the complexities of the regulatory landscape in this area. In Part VII we argue that a review of Australian laws relating to genomic technologies is needed given advances in genomics and to address the current regulatory complexity, and we examine options for reform in this area. Finally, in Part VIII we conclude by arguing that the scale of the changes in genomic research make it timely to consider whether Australian law is able to meet the challenges posed by the genomic era.

II The Nature of Genomic Information

Essentially Yours considered the emerging uses of genetic information and the policy implications of what genetic analysis can reveal about a person. The report identified three characteristics of genetic information that distinguish genetic information from other health information: that 'it is ubiquitous, familial and often predictive'.[11] It is ubiquitous in the sense that any form of tissue from a person, including tissue collected in the past, can reveal genetic information.[12] The information, unlike some other forms of personal health data, is not anchored in time — 'genetic information lasts for life'.[13] It is also familial because, although about the individual, genetic sequences are shared with blood relatives,

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10 Although they may be considered types of data-sharing, the original consent of research participants to allow their data to be used, and the disclosure of research data to non-researchers such as might occur in the return of results, are outside the scope of this article.

11 *Essentially Yours* (n 1) [3.16]. For discussion, see Margaret Otlowski and Lisa Eckstein, 'Genetic Privacy', in Ian Freckelton and Kerry Petersen (eds), *Tensions and Traumas in Health Law* (Federation Press, 2017) 283, 285–6.

12 *Essentially Yours* (n 1) [3.17]–[3.21].

13 Ibid [3.18].

'including those in preceding and succeeding generations'.[14] This relational characteristic may even extend beyond families to others with common ancestral lineage, such as 'indigenous, ethnic or ethno-religious communities'.[15] Consequently, a person's genetic information may be inferred from information known about other members of their family or group.[16] Genetic data is often predictive, as it may reveal latent information about the likelihood of developing a disorder in the future, or passing it on to genetic descendants.[17]

Awareness of their genetic information may prove beneficial or detrimental to an individual. For example, while it may enable a person to make informed health decisions, it may also have negative implications for employment, education and benefits or services, such as life insurance, as well as being potentially distressing.[18] Further, such predictive information raises particular ethical and social concerns, such as how such information should be treated where no treatment is available, where the relevance of the information may be unclear, and where the potential impacts on privacy and discrimination require consideration.[19]

Genomics builds on genetic technology, capturing distinctive information not just about selected genes, but also about the individual's full genetic make-up. It is now accepted that genomic information has a high potential to be linked to a specific person despite attempts to remove markers of identity.[20] This may make it difficult to assure privacy for participants in genomic research or their genetic relatives.[21] Genomic data has been described by some as a 'hyper-barcode', reflecting a belief that it is always able to be linked to a specific donor.[22]

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14 Ibid [3.22].

15 Ibid.

16 See, eg, Yaniv Erlich et al, 'Identity Inference of Genomic Data Using Long-Range Familial Searches' (2018) 362(6415) *Science* 690; Melissa Gymrek et al, 'Identifying Personal Genomes by Surname Inference' (2013) 339(6117) *Science* 321.

17 *Essentially Yours* (n 1) [3.14].

18 National Health and Medical Research Council, *National Statement on Ethical Conduct in Human Research* (2018) 47 <https://www.nhmrc.gov.au/about-us/publications/national-statement-ethical-conduct-human-research-2007-updated-2018#block-views-block-file-attachments-content-block-1> ('*National Statement*').

19 *Essentially Yours* (n 1) [3.15].

20 Leslie E Wolf et al, 'The Web of Legal Protections for Participants in Genomic Research' (2019) 29(1) *Health Matrix* 1, 7; Erika Check Hayden, 'The Genome Hacker' (2013) 497(7448) *Nature* 172. The potential re-identifiability of genomic data has implications for the regulation of genomic research in Australia: see Jane Kaye et al, 'Trends and Challenges in Biobanking', in Freckelton and Petersen (n 11) 415, 422.

21 Kaye et al (n 20) 426.

22 William W Lowrance, *Privacy, Confidentiality and Health Research* (Cambridge University Press, 2012) 118.

However, there is disagreement about the magnitude and relevance of this risk. These matters are both legally and ethically complex.

The question of whether genetic information is 'exceptional', or whether it is similar to other forms of health information, has been the subject of much debate.[23] More recently, some have proposed 'genomic contextualism' as a preferred approach to characterising genetic information.[24] The exceptionalist position was reflected in moves to introduce specific genetic privacy and discrimination legislation in both the United States and Australia in the late 1990s.[25] In the United States, it resulted in the *Genetic Information Nondiscrimination Act* of 2008.[26] In Australia, the Genetic Privacy and Non-Discrimination Bill 1998 (Cth) also reflected an exceptionalist approach. The Australian Bill was referred to a Senate Committee, which took the view that legislation on genetic privacy was premature given the uncertain development of technology and continued debate in the area.[27] The Committee recommended continued review of emerging issues, and that any required legislative regulation be made through changes to existing statutes.[28]

Although the *Essentially Yours* report did not adopt an exceptionalist approach, it did 'accept that there are some special features and issues attaching to genetic information'.[29] The Inquiry recommended amendments to the *Privacy*

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23 See, eg, *Essentially Yours* (n 1) 137–42; LO Gostin and JG Hodge, 'Genetic Privacy and the Law: An End to Genetics Exceptionalism' (1999) 40(1) *Jurimetrics* 21; Ellen Wright Clayton et al, 'The Law of Genetic Privacy: Applications, Implications, and Limitations' (2019) 6(1) *Journal of Law and the Biosciences* 1, 7–9; James G Hodge, 'Ethical Issues Concerning Genetic Testing and Screening in Public Health' (2004) 125C(1) *American Journal of Medical Genetics Part C: Seminars in Medical Genetics* 66; Ilhan Ilkilic, 'Coming to Grips with Genetic Exceptionalism: Roots and Reach of an Explanatory Model' (2009) 1(2) *Medicine Studies* 131; Thomas H Murray, 'Genetic Exceptionalism and "Future Diaries": Is Genetic Information Different from Other Medical Information?', in Mark A Rothstein (ed), *Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era* (Yale University Press, 1997) 60; Daniel P Sulmasy, 'Naked Bodies, Naked Genomes: The Special (But Not Exceptional) Nature of Genomic Information' (2015) 17(5) *Genetics in Medicine* 331.

24 See, eg, Nanibaa' A Garrison et al, 'Genomic Contextualism: Shifting the Rhetoric of Genetic Exceptionalism' (2019) 19(1) *American Journal of Bioethics* 51; Thomas H Murray, 'Is Genetic Exceptionalism Past Its Sell-By Date? On Genomic Diaries, Context, and Content' (2019) 19(1) *American Journal of Bioethics* 13.

25 George J Annas, Leonard H Glantz and Patricia A Roche, 'Drafting the Genetic Privacy Act: Science, Policy, and Practical Considerations' (1995) 23(4) *Journal of Law, Medicine and Ethics* 360; Australian Senate Legal and Constitutional Committee, *Report on the Genetic Privacy and Non-Discrimination Bill* 1998 (Report, March 1999) <http://webarchive.nla.gov.au/gov/20000416141615/http://www.aph.gov.au/senate/committee/legcon_ctte/genetic/index.htm>.

26 Clayton et al (n 23) 13–14.

27 Australian Senate Legal and Constitutional Committee (n 25) [5.10]-[5.13].

28 Ibid Recommendations 1 and 2.

29 *Essentially Yours* (n 1) 141 [3.58]. For discussion, see Otlowski and Eckstein (n 11) 285; Don Chalmers et al, 'Personalised Medicine in the Genome Era' (2013) 20(3) *Journal of Law and Medicine* 577, 588.

Act to include genetic information within the definitions of 'health information' and 'sensitive information' in the Act.[30] Amendments were made to the *Privacy Act* and to privacy legislation in some states and territories.[31] As Otlowski and Eckstein have noted, '[t]he explicit recognition of "genetic information" as a category of "sensitive information" within federal, State and Territory privacy legislation indicates some level of acceptance that genetic information is in some respects "special".'[32] This recognition of genomic information as being somewhat special is also relevant to genomic research, given the role of privacy laws in governing research-related use of personal information. In view of the developments in genomics and personalised medicine, there is a need for 'ongoing assessment of the adequacy of existing regulation'.[33] Furthermore, as we will argue below, the current Australian regulatory frameworks that are relevant to genomic data-sharing are complex and there is a need for national harmonisation.

III Genomic Research and Data-Sharing

Genomic research uses data derived from tissue samples, which may be collected from persons who agree to participate in research, or who are tested in a clinical context. Those tissue samples are often stored in biobanks, which are 'generally large collections of human biological materials (biospecimens) linked to relevant personal and health information (which may include health records, family history, lifestyle and genetic information) and held specifically for use in health and medical research'.[34]

Sharing of genomic data is widely regarded as a prerequisite for advances in our understanding and classification of genetic diseases and variants, providing the best available data for both research and clinical decision-making, as well as benefits in the form of standardised approaches and the avoidance of duplicate

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30 *Essentially Yours* (n 1) 255. For discussion see Chalmers et al (n 29) 588.

31 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, 2008) vol 3, 2059 [62.7]–[62.9] ('*For Your Information*'); Otlowski and Eckstein (n 11) 285, citing *Personal Information Protection Act 2004* (Tas) s 3; *Health Records Act 2001* (Vic) s 3; *Information Privacy Act 2014* (ACT) s 14; *Information Act 2002* (NT) s 4. In New South Wales, personal information includes 'genetic characteristics' rather than 'genetic information': *Privacy and Personal Information Act 1998* (NSW) s 4; *Health Records and Information Privacy Act 2002* (NSW) s 5: Otlowski and Eckstein (n 11) 285.

32 Otlowski and Eckstein (n 11) 285.

33 Chalmers et al (n 29) 588.

34 National Health and Medical Research Council, *Biobanks Information Paper* (2010) 6 <https://www.nhmrc.gov.au/about-us/publications/biobanks-information-paper> ('*Biobanks Information Paper*').

research effort.[35] Data-sharing may mean providing other researchers with access to preliminary genomic data derived from tissue samples, or the storage of such data in central repositories that may be accessed by multiple researchers, sometimes internationally (often referred to as 'biobanks').[36] In a survey of human genetics researchers, from the United Kingdom and other countries, over 80 per cent of respondents agreed that '[a]ccess to more data means more statistical power for validation', '[a]ccess to more data means better representation of genetic variation', and '[s]haring data reduces duplication of effort'.[37]

Internationally, linking and sharing data is a common practice and considered a scientific value.[38] The culture of data-sharing in genomic research can be traced back to the Human Genome Project and the relevant data release policy, the 'Bermuda Principles'.[39] The Human Genome Project was an international collaborative effort to sequence the entirety of the human genome for the first time.[40] The Bermuda Principles, agreed to by leaders in the scientific community, required that all DNA sequence data be uploaded within 24 hours to the public domain in order to maximise benefit to society.[41] Currently, data-sharing is a condition of funding provided by major research bodies and may even be required for publication in academic journals.[42] In this context, sharing of data

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35 ACMG Board of Directors, 'Laboratory and Clinical Genomic Data Sharing Is Crucial to Improving Genetic Health Care: A Position Statement of the American College of Medical Genetics and Genomics' (2017) 19(7) *Genetics in Medicine* 721, 721–722.

36 Chalmers, Nicol and Otlowski (n 9) 126; Christine Critchley and Dianne Nicol, 'Commercialisation of Genomic Research: The Issue of Public Trust', in Freckelton and Petersen (n 11) 350, 352.

37 Tempest A van Schaik et al, 'The Need to Redefine Genomic Data Sharing: A Focus on Data Accessibility' (2014) 3(4) *Applied and Translational Genomics* 100, 103.

38 Jane Kaye, 'From Single Biobanks to International Networks: Developing e-Governance' (2011) 130(3) *Human Genetics* 377, 377–8; Juli M Bollinger et al, 'BRCA1/2 Variant Data-Sharing Practices' (2019) 47 *Journal of Law, Medicine and Ethics* 88; Edward S Dove, 'Biobanks, Data Sharing, and the Drive for a Global Privacy Governance Framework' (2015) 43(4) *Journal of Law, Medicine and Ethics* 675; Angela G Villanueva et al, 'Genomic Data-Sharing Practices' (2019) 47(1) *Journal of Law, Medicine and Ethics* 31.

39 BM Knoppers and Yann Joly, 'Introduction: The Why and Whither of Genomic Data Sharing' (2018) 137(8) *Human Genetics* 569; Robert Cook-Deegan and Amy L McGuire, 'Moving Beyond Bermuda: Sharing Data to Build a Medical Information Commons' (2017) 27(6) *Genome Research* 897, 897–8.

40 National Human Genome Research Institute, *An Overview of the Human Genome Project* <https://www.genome.gov/12011238/an-overview-of-the-human-genome-project/>; International Human Genome Sequencing Consortium, 'Finishing the Euchromatic Sequence of the Human Genome' (2004) 431(7011) *Nature* 931.

41 Eliot Marshall, 'Bermuda Rules: Community Spirit, With Teeth' (2001) 291(5507) *Science* 1192.

42 Villanueva et al (n 38) 31.

is seen as occurring within a 'medical information commons'[43] or, more specifically in the context of genomic research, within a 'genomic commons'.[44]

Surveys of biobank participants and the general public reveal that people appreciate the benefit of data-sharing for the progress of genomic science. Prospective participants in a United States biobank viewed the sharing of genomic data to benefit the public through enhanced efficiency, providing value for future generations and hastening outcomes that would benefit public health.[45] Those participants viewed data-sharing in genomic research to be an additional reason to participate, as their contribution is not limited to the one study; 'roses keep on growing'.[46] An Australian study found agreement about the importance of privacy and ethics but that more research was needed on public expectations about data sharing.[47]

Using data for multiple research projects also introduces economies of scale. The scale of genomic data sets and the resources required to sequence and store data also require consideration. For example, sequencing a single whole genome produces more than 100 gigabytes of data.[48] It can be more cost-effective to use existing genomic datasets rather than undertaking new data collection or genomic sequencing.[49] Although computing costs may be decreasing, other costs such as sample-acquisition costs are relatively stable and significant in the context of large sample sizes.[50]

The benefits of data-sharing may be in tension with privacy rights.[51] In the case of medical research, an individual's right to limit the use of their own information may work against broader public interests in scientific progress. This has led to arguments that individuals have a *duty* to allow their information to be used for the purposes of research, in order that the burdens of medical research

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43 Robert Cook-Deegan, Mary A Majumder and Amy L McGuire, 'Introduction: Sharing Data in a Medical Information Commons' (2019) 47(1) *Journal of Law, Medicine and Ethics* 7; Cook-Deegan and McGuire (n 39); Angela G Villanueva et al, 'Characterizing the Biomedical Data-Sharing Landscape' (2019) 47(1) *Journal of Law, Medicine and Ethics* 21.

44 Knoppers and Joly (n 39).

45 Susan Brown Trinidad et al, 'Genomic Research and Wide Data Sharing: Views of Prospective Participants' (2010) 12(8) *Genetics in Medicine* 486, 489.

46 Ibid.

47 Christine Critchley, Dianne Nicol and Rebekah McWhirter, 'Identifying Public Expectations of Genetic Biobanks' (2017) 26(6) *Public Understanding of Science* 671, 682.

48 Karen Y He, Dongliang Ge and Max M He, 'Big Data Analytics for Genomic Medicine' (2017) 18(2) *International Journal of Molecular Science* 412, 413.

49 Isaac S Kohane, 'Using Electronic Health Records to Drive Discovery in Disease Genomics' (2011) 12(6) *Nature Reviews Genetics* 417, 417.

50 Ibid.

51 For discussion, see, eg, Otlowski and Eckstein (n 11) 285–9; Kaye et al (n 20) 431; Lowrance (n 22) 1.

are equitably shared.[52] It has also been argued that there is a 'right to science' and a right to benefit from science.[53] There are also established arguments for recognising *group* rights to information, such that community consent is required for participation in research, or obligations exist to ensure that benefits are returned to communities for new knowledge developed from their genetic tissue.[54] Nevertheless, neither of these positions is reflected in Australian information privacy law, which remains focused on the protection of the individual.[55]

The importance of data-sharing to the development of genomic research highlights the need for clear regulatory frameworks that can support genomic research. Noting that '[t]he collection and analysis of genomic data is essential to driving improvements in health outcomes for all Australians and providing a pathway to truly personalised health care',[56] Australia's National Health Genomics Policy Framework lists '[r]esponsible collection, storage, use and management of genomic data' as one its five key priorities.[57]

IV Trust in Genomic Research

Genomic research relies on the willingness of participants to donate their genomic material, to share their genomic information, or both.[58] Public trust is

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52 See, eg, Ruth Chadwick and Kåre Berg, 'Solidarity and Equity: New Ethical Frameworks for Genetic Databases' (2001) 2(4) *Nature Reviews Genetics* 318; John Harris, 'Scientific Research Is a Moral Duty' (2005) 31(4) *Journal of Medical Ethics* 242; G Owen Schaefer et al, 'The Obligation to Participate in Biomedical Research' (2009) 302(1) *Journal of the American Medical Association* 67.

53 Bartha Maria Knoppers and Adrian Mark Thorogood, 'Ethics and Big Data in Health' (2017) 4 *Current Opinion in Systems Biology* 53.

54 For discussion of the need to obtain group consent for particular ethnic or cultural groups, see Jason Grant Allen, 'Group Consent and the Nature of Group Belonging: Genomics, Race and Indigenous Rights' (2009) 20(2) *Journal of Law, Information and Science* 28; Emily FM Fitzpatrick et al, 'Seeking Consent for Research with Indigenous Communities: A Systematic Review' (2016) 17(1) *BMC Medical Ethics* 65. On benefit-sharing, see HUGO Ethics Committee, *Statement on Benefit-Sharing* (9 April 2000) <http://www.hugo-international.org/Resources/Documents/CELS_Statement-BenefitSharing_2000.pdf>; HUGO Ethics Committee, *Statement on Human Genomic Databases* (December 2002) <http://www.hugo-international.org/Resources/Documents/CELS_Statement-HumanGenomicDatabase_2002.pdf>.

55 Under the *Privacy Act 1988* (Cth) s 2A, the objects of the Act include promoting 'the protection of the privacy of individuals', and providing 'a means for individuals to complain about an alleged interference with their privacy'. Queensland's legislation, the *Information Privacy Act 2009* (Qld), provides that personal information is 'information or an opinion … about an individual': s 12.

56 National Health Genomics Policy Framework (n 7) 7.

57 Ibid 3, 7.

58 Lisa Eckstein et al, 'Australia: Regulating Genomic Data Sharing to Promote Public Trust' (2018) 137(8) *Human Genetics* 583; Critchley and Nicol (n 36) 351.

thus a key element of genomic research. The importance of public trust is recognised in the National Health Genomics Policy Framework. Among the priority areas for action for the Framework's data priority is: 'Strengthen public trust of data systems and mechanisms so that people are empowered to engage with genomic interventions in the health system.'[59] In addition, among the outcomes listed for the data priority area are: 'The public is confident that genomic data and other clinical information is protected and culturally safe'; and 'The public understands the societal value of agreeing to share genomic data to support genomic research, including those funded through private industry.'[60] Clear regulatory frameworks for the management of genomic data-sharing will therefore potentially play an important role in supporting public trust in genomic research. However, it is also important to recognise that these issues are not unique to genomic research and that trust plays an important role in data-related regulatory reform generally. The Productivity Commission noted in its recent report on data that a '[l]ack of trust by both data custodians and users in existing data access processes and protections and numerous hurdles to sharing and releasing data are choking the use and value of Australia's data'.[61] In the Commission's view, 'improving trust community-wide is a key objective' of reforms to Australian data regulation.[62]

Australian and international surveys indicate that willingness to participate in biobank research is strongly associated with trust in researchers, as well as belief in the healthcare benefits of research.[63] The use of personal information for research without consent and breaches of privacy are likely to undermine public trust.[64] Maintaining public trust and confidence is key to the sustainability of research that relies on data-sharing, including biobanking.[65]

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59 National Health Genomics Policy Framework (n 7) 13 (Priority areas for action 5.1.2).

60 National Health Genomics Policy Framework (n 7) 13.

61 Productivity Commission, *Data Availability and Use* (Report, 2017) 2 <https://www.pc.gov.au/inquiries/completed/data-access/report>.

62 Ibid.

63 Christine R Critchley et al, 'Predicting Intention to Biobank: A National Survey' (2012) 22(1) *European Journal of Public Health* 139. For surveys in Europe, the United States and Canada, see Åsa Kettis-Lindblad et al, 'Genetic Research and Donation of Tissue Samples to Biobanks: What Do Potential Sample Donors in the Swedish General Public Think?' (2006) 16(4) *European Journal of Public Health* 433; Grainne Cousins et al, 'Public Perceptions of Biomedical Research: A Survey of the General Population in Ireland' (2005) <https://epubs.rcsi.ie/psycholrep/8>; Geraldine M McQuillan et al, 'Consent for Genetic Research in a General Population: The NHANES Experience' (2003) 5(1) *Genetics in Medicine* 35.

64 '[U]sing data or information [for secondary research purposes] without consent may undermine public trust in the confidentiality of their information': *National Statement* (n 18) 36.

65 Critchley and Nicol (n 36); Critchley, Nicol and McWhirter (n 47); Kaye (n 20); *Biobanks Information Paper* (n 34); Richard Tutton, Jane Kaye and Klaus Hoeyer, 'Governing UK Biobank: The Importance of Ensuring Public Trust' (2004) 22(6) *Trends in Biotechnology* 284; Lowrance (n 22) 3–4.

In Australia, there is a relatively high level of public trust in scientific and medical institutions.[66] However, this must be protected to ensure ongoing public participation in genomic research. Public trust entails expectations that researchers conduct themselves competently and ethically, and respect the rights of participants.[67] Transparency about the potential uses to which tissue may be put, including how data will be shared, is important.[68]

In the United Kingdom, public trust in research is conceptualised as a social contract between researchers and society.[69] This relationship entails both benefits and obligations. This, in part, requires designing the system such that people are 'satisfied that genomic medicine operates in their common interests, whilst protecting their individual privacy, and does not exploit some to benefit others'.[70] Such a social contract, which engenders trust and confidence, is posited to possibly 'encourage the growth of "genomic citizenship"' leading to greater participation in research.[71]

Without measures to maintain public trust, the benefits of genomic research cannot be realised. Gaps and uncertainty in Australia's system of regulating genomic data-sharing are potentially a threat to public trust in genomic research.[72] There are some groups from whom trust in researchers may be more difficult to secure. For example, Aboriginal and Torres Strait Islander peoples may be hesitant to participate in genomics research due to previous negative encounters with researchers.[73] Yet it is essential to include diverse genetic

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66 Gordana Bruce and Christine Critchley, *Swinbourne National Technology and Science Monitor* (Report, 2017) 10 <https://researchbank.swinburne.edu.au/items/4d553f11-b48c-4032-9505-cd0da8eeef9d/1/>.

67 Critchley and Nicol (n 36) 355.

68 AA Lemke et al, 'Public and Biobank Participant Attitudes toward Genetic Research Participation and Data Sharing' (2010) 13(6) *Public Health Genomics* 368; Critchley, Nicol and McWhirter (n 47) 679-681. Transparency is framed as a core element of responsible data-sharing in genomics in the International Code of Conduct for Genomic and Health-Related Data Sharing: Sumio Sugano and Regulatory and Ethics Working Group, Global Alliance for Genomics and Health, 'International Code of Conduct for Genomic and Health-Related Data Sharing' (2014) 8(1) *HUGO Journal* 1, 2.

69 Anneke Lucassen, Jonathan Montgomery and Michael Parker, 'Ethics and the Social Contract for Genomics in the NHS', in Sally C Davies, *Annual Report of the Chief Medical Officer 2016: Generation Genome* (2017) ch 16.

70 Ibid 4.

71 Ibid.

72 Eckstein et al (n 58) 583–4. As Eckstein et al note (at 583): 'The patchwork of Australia's regulatory environment generates implications for public trust. Regulatory gaps create uncertain expectations as to how Australian institutions will protect the interests of research participants.'

73 Emma Kowal, Lobna Rouhani and Ian Anderson, *Genetic Research in Aboriginal and Torres Strait Islander Communities: Beginning the Conversation* (Lowitja Institute, 2011) 31; Emma E Kowal, 'Genetic Research in Indigenous Health: Significant Progress, Substantial Challenges' (2012) 197(1) *Medical Journal of Australia* 19, 19.

groups in genomics research to ensure that the benefits of knowledge are shared equitably, and it is known that Aboriginal and Torres Strait Islander peoples are often underrepresented in genetic research.[74] The potential for harm must be taken into account when considering trust in genomic research.[75] Specific NHMRC guidelines exist on the requirements for ethical research with Aboriginal and Torres Strait Islander communities.[76]

Research participants may also be sensitive to the types of entities and persons allowed access to their samples and data.[77] In a study of Californians, a major finding was that willingness to participate in precision medicine research was contingent on the patients' perception of whether the individuals and institutions involved were trustworthy.[78] Another study in the United States showed that participants feel comfortable when data can be accessed by close collaborators of investigators as well as non-profit public-interest research institutions.[79] Those types of organisations were viewed by participants to be 'more legitimate' and involved in 'pure science' for public benefit rather than financial return.[80]

Commercialisation of research may also impact on the attitudes of the public.[81] In the United Kingdom, a study on the factors that influence public attitudes towards commercial organisations accessing genetic data, as well as the governance, safeguarding and communications actions that could improve trustworthiness and enable development of public trust in commercial access to data[82] found that '[e]ducational attainment, awareness of data usage and social grade all appear to be linked to acceptance of commercial access'.[83] Broadly,

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74 Gareth S Baynam, 'The Need for Genetic Studies of Indigenous Australians' (2012) 196(5) *Medical Journal of Australia* 313; Rebekah McWhirter, Dianne Nicol and Julian Savulescu, 'Genomics in Research and Health Care with Aboriginal and Torres Strait Islander Peoples' (2015) 33(2–3) *Monash Bioethics Review* 203.

75 Eckstein et al (n 58) 586.

76 National Health and Medical Research Council, *Ethical Conduct in Research with Aboriginal and Torres Strait Islander Peoples and Communities: Guidelines for Researchers and Stakeholders* (2018) <https://www.nhmrc.gov.au/_files_nhmrc/file/publications/indigenous-ethical-guidelines.pdf>.

77 See Kaye et al (n 20) 430–1; Critchley and Nicol (n 36).

78 Stephanie A Kraft et al, 'Beyond Consent: Building Trusting Relationships with Diverse Populations in Precision Medicine Research' (2018) 18(4) *American Journal of Bioethics* 3.

79 Trinidad et al (n 45) 491.

80 Ibid.

81 Critchley and Nicol (n 36); Gillian Haddow et al, 'Tackling Community Concerns about Commercialisation and Genetic Research: A Modest Interdisciplinary Proposal' (2007) 64(2) *Social Science & Medicine* 272; Dianne Nicol et al, 'Understanding Public Reactions to Commercialization of Biobanks and Use of Biobank Resources' (2016) 162 *Social Science and Medicine* 79.

82 Ipsos MORI, *The One-Way Mirror: Public Attitudes to Commercial Access to Health Data* (Report Prepared for the Wellcome Trust, March 2016) 1.

83 Ibid 4.

greater knowledge and exposure to the ideas tended to be associated with acceptance.[84] However, an Australian study found that those who had a university education reported a greater reduction in trust in a public biobank that allows access to other entities compared to when it is restricted.[85] Given the role of trust in public support for research and data-sharing,[86] clarity of the role of data-sharing in genomic research and protection of privacy are of particular importance.

V Regulatory Framework for Data-Sharing in Genomic Research

The National Health Genomics Policy Framework lists, as one of its priority areas for action in relation to data: 'Develop nationally agreed standards for data collection, safe storage, data sharing, custodianship, analysis, reporting and privacy requirements.'[87] It notes 'variable legislation' among the issues 'that currently limit data sharing'.[88] At a state level, New South Wales Health released its *Genomics Strategy* in June 2017, which also recognised the need to address ethical, legal and social issues in the foundation stage.[89] Other bodies in Australia are also considering the regulatory issues related to genomic data-sharing.[90] In this Part, and in Part VI below, we consider Australia's regulatory frameworks for information privacy, arguing that they are overly complex and lack national consistency, presenting challenges to the development of national approaches to this area.

Currently, the regulation of data in Australia is undergoing significant discussion,[91] with the Productivity Commission noting in the findings of their Data Availability and Use Inquiry that 'frameworks and protections for data

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84 Ibid.

85 Christine Critchley, Dianne Nicol and Margaret Otlowski, 'The Impact of Commercialisation and Genetic Data Sharing Arrangements on Public Trust and the Intention to Participate in Biobank Research' (2015) 18(3) *Public Health Genomics* 160, 169.

86 Ibid.

87 National Health Genomics Policy Framework (n 7) 13.

88 Ibid 3.

89 New South Wales Health, *Genomics Strategy* (2017) 30 <http://www.health.nsw.gov.au/services/Publications/nsw-health-genomics-strategy.pdf>.

90 Andrea Belcher et al, *Genomic Data and Privacy Law: A Summary of Health Legal's Report for Australian Genomics* (Australian Genomics Health Alliance, 2018).

91 See, eg, Carolyn Adams and Judy Allen, 'Government Databases and Public Health Research: Facilitating Access in the Public Interest' (2014) 21(4) *Journal of Law and Medicine* 957; Moira Paterson and Normann Witzleb, 'The Privacy-Related Challenges Facing Medical Research in an Era of Big Data Analytics: A Critical Analysis of Australian Legal and Regulatory Frameworks' (2018) 26(1) *Journal of Law and Medicine* 188.

collection and access, developed prior to sweeping digitisation, require serious re-examination'.[92] In particular, they noted that 'privacy law is neither the only lens, nor even the best, through which to view the use of an asset such as data'.[93]

In response to the Productivity Commission's call for reform, the Australian government has committed to reform the Australian data system.[94] It is intended that the reforms will be underpinned by three key features, including: (1) '[a] new Consumer Data Right [that] will give citizens greater transparency and control over their own data'; (2) '[a] National Data Commissioner, [who] will implement and oversee a simpler, more efficient data sharing and release framework'; and (3) '[n]ew legislative and governance arrangements [that] will enable better use of data across the economy while ensuring that appropriate safeguards are in place to protect sensitive information'.[95] Legislation has been passed on the Consumer Data Right,[96] and an Office of the National Data Commissioner has been established.[97] With regard to new legislation, a discussion paper has been published on proposed new legislation to govern data-sharing and release.[98]

In terms of existing regulation, data-sharing by genomic researchers is governed by a 'patchwork' of ethical guidelines, legislation and case law addressing areas such as medical research, donation and use of human tissue, and privacy of personal information.[99] For example, all health and medical research on humans is subject to the *National Statement on Ethical Conduct in Human Research* ('*National Statement*').[100] The removal and use of human tissue is governed by legislation in each state and territory.[101] Where the genetic or genomic information amounts to 'personal information', privacy legislation governs the circumstances under which it may be shared.

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92 Productivity Commission (n 61) 53.

93 Ibid.

94 Department of the Prime Minister and Cabinet, 'The Australian Government's Response to the Productivity Commission Data Availability and Use Inquiry'; Australian Government, *Budget Measures: Budget Paper No 2 2018–2019* (2018) 166, 186 <https://budget.gov.au/2018-19/content/bp2/download/bp2_combined.pdf>.

95 Department of the Prime Minister and Cabinet (n 94). See also Department of the Prime Minister and Cabinet, *Data Sharing and Release: Legislative Reforms Discussion Paper* (2019).

96 *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth).

97 Office of the National Data Commissioner <https://www.datacommissioner.gov.au/>.

98 Department of Prime Minister and Cabinet (n 95).

99 Eckstein et al (n 58) 583.

100 *National Statement* (n 18).

101 *Transplantation and Anatomy Act 1978* (ACT); *Human Tissue Act 1983* (NSW); *Transplantation and Anatomy Act* (NT); *Transplantation and Anatomy Act 1979* (Qld); *Transplantation and Anatomy Act 1983* (SA); *Human Tissue Act 1985* (Tas); *Human Tissue Act 1982* (Vic); *Human Tissue and Transplant Act 1982* (WA). See Eckstein et al (n 58) 585. For a discussion of this legislation in the context of research involving paediatric tissue, see Shih-Ning Then and Stephanie Jowett, 'Removal and Use of Paediatric Tissue for Research Purposes: Legal and Ethical Issues in Australia' (2020) 56(3) *Journal of Paediatrics and Child Health* 359.

A *The NHMRC Framework*

The *National Statement* provides ethical guidance for Australian researchers who undertake research involving human subjects.[102] It is issued jointly by the NHMRC, the Australian Research Council and Universities Australia. There is no legal requirement that researchers follow the *National Statement*; however, it has strong normative power and research funders may impose compliance as a condition of funding.[103]

Chapter 3.3 of the *National Statement* addresses genomic research.[104] This chapter acknowledges that genomic research is an evolving field and that the principles described in the chapter will need to be applied to new technologies as they emerge.[105] Among other things, it requires researchers to take account of the 'potentially predictive and sensitive nature of genomic information' by, for example, minimising the risk of re-identification.[106] Sharing of genomic information should only be undertaken in accordance with the consent given by research participants or where a waiver of this requirement has been approved by a Human Research Ethics Committee ('HREC').[107]

The NHMRC provides guidance for HRECs in two further publications authorised under the respective sections of the *Privacy Act*.[108] The *Guidelines under Section 95 of the Privacy Act 1988* (Cth) ('*Section 95 Guidelines*') apply to Commonwealth government agencies who wish to use or disclose personal information for the purposes of medical research but where it is impractical to seek consent.[109] The *Guidelines approved under Section 95A of the Privacy Act 1988* (Cth) ('*Section 95A Guidelines*') apply to private sector organisations who wish to use or disclose health information for the purposes of research or the compilation or analysis of statistics relevant to public health or safety.[110] These guidelines are discussed in more detail in Part V(B) below.

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102 *National Statement* (n 18).

103 Ian Kerridge, Michael Lowe and Cameron Stewart, *Ethics and Law for the Health Profession* (Federation Press, 4th ed, 2013) 793.

104 *National Statement* (n 18) ch 3.3. For general consent requirements, see ch 2.2.

105 Ibid 47, 48.

106 Ibid 50.

107 Ibid. For discussion see Eckstein et al (n 58) 584–6.

108 *Privacy Act 1988* (Cth) ss 95, 95A.

109 National Health and Medical Research Council, *Guidelines Under Section 95 of the Privacy Act 1988* (November 2014) 2 <https://www.nhmrc.gov.au/about-us/publications/guidelines-under-section-95-privacy-act-1988> ('*Section 95 Guidelines*').

110 National Health and Medical Research Council, *Guidelines Approved Under Section 95A of the Privacy Act 1988* (March 2014) 3 <https://www.nhmrc.gov.au/about-us/publications/guidelines-approved-under-section-95a-privacy-act-1988> ('*Section 95A Guidelines*'). For discussion see Eckstein et al (n 58) 586–7.

The *National Statement* recognises that research participation raises particular issues for Aboriginal and Torres Strait Islander peoples and communities.[111] Accordingly, there are additional NHMRC guidelines that relate to all research involving Aboriginal and Torres Strait Islander peoples and communities.[112] In relation to genomics, for these communities research poses not just individual risks but also the possibility of 'group harms'.[113]

B *Federal Privacy Legislation*

The *Privacy Act* applies to Commonwealth government agencies and most private-sector organisations.[114] It requires those entities to comply with the Australian Privacy Principles ('APPs') when handling particular types of information.[115] Private organisations are governed by the *Privacy Act* unless they fall under a particular exception.[116] Private organisations include individuals,[117] body corporates, partnerships, other unincorporated associations and trusts.[118] Small businesses, with annual turnovers of less than $3 million are ordinarily exempt;[119] however, they are not exempt in certain circumstances, including if they provide a health service to an individual and hold any health information except where it is within an employee record.[120]

Generally, the *Privacy Act* provides protections for *personal* information. This means 'information or an opinion about an identified individual, or an individual who is reasonably identifiable: whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not'.[121] Whether genomic information fits these criteria is not immediately clear.[122] For information to be considered personal information, it must be both about an individual and the individual must be identified or reasonably identifiable.

Information about an individual can be distinguished from other data that is not directly about an individual but from which an individual's identity could be

111 *National Statement* (n 18) ch 4.7.
112 National Health and Medical Research Council (n 76). See Eckstein et al (n 58) 586.
113 Eckstein et al (n 58) 586. See also, McWhirter et al (n 74) 205
114 *Privacy Act 1988* (Cth) s 6 (definitions of 'APP entity', 'agency' and 'organisation').
115 *Privacy Act 1988* (Cth), s 15, sch 1.
116 Ibid s 6 (definitions of 'APP entity' and 'organisation'), 6C.
117 Information that individuals collect, hold, use or disclose for the purposes of personal, family or household matters are excluded from the scope of the Act: ibid s 16.
118 Ibid s 6C.
119 Ibid s 6D(1).
120 Ibid s 6D(4).
121 Ibid s 6 (definition of 'personal information').
122 Eckstein et al (n 58) 587.

reasonably ascertained.[123] It is not settled whether genomic information, where it has been uncoupled from identifiers such as name for use in research, should be treated as 'reasonably identifiable'.[124] The mere technical possibility of identification is not sufficient for information to be regarded as reasonably identifiable, and therefore as personal information.[125] The Office of the Australian Information Commissioner recommends that where there is uncertainty, it is preferable to apply the APPs.[126]

Under the *Privacy Act*, genomic information would likely be considered 'health information', as that definition includes 'genetic information about an individual in a form that is, or could be, predictive of the health of the individual or a genetic relative of the individual'.[127] Regardless of whether an argument could be made that it is not predictive of health of the individual or a genetic relative, it will nevertheless always be considered 'sensitive information', as it includes 'genetic information about an individual that is not otherwise health information'.[128]

The likely implication of this is that Commonwealth government agencies and most private organisations in possession of genomic information would be governed by the *Privacy Act* and therefore required to comply with the APPs.[129] Under APP 6.1, an 'APP entity' must not use or disclose personal information that was collected for a particular purpose (the primary purpose) for another purpose (the secondary purpose) unless an exception applies.[130] One such exception is where the individual has consented to the use or disclosure.[131] Such consent may be either express or implied.[132] Other exceptions are set out in APP 6.2 and APP 6.3. Under APP 6.2, an APP entity may use or disclose personal information held by an APP entity in certain circumstances, including if a permitted general situation exists,[133] or if 'the APP entity is an organisation and a permitted health situation

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123 This issue was raised in *Privacy Commissioner v Telstra Corporation Ltd* [2017] FCAFC 4. For discussion see: Tim Brookes et al, 'Is It Really All About You? *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4' (2017) 36(1) *Communications Law Bulletin* 1. For further discussion, see also Paterson and Witzleb (n 91) 191–2.

124 Eckstein et al (n 58) 587.

125 Office of the Australian Information Commissioner, *What Is Personal Information?* <https://www.oaic.gov.au/privacy/guidance-and-advice/what-is-personal-information/>.

126 Ibid.

127 *Privacy Act 1988* (Cth) s 6FA(d).

128 Ibid s 6 (definition of 'sensitive information').

129 APP entities are required to comply with the Australian Privacy Principles ('APPs'): *Privacy Act 1988* (Cth) s 15.

130 Ibid sch 1 APP 6.1(a). For discussion see Eckstein et al (n 58) 586.

131 *Privacy Act 1988* (Cth) sch 1 APP 6.1(a).

132 Ibid s 6 (definition of 'consent').

133 Ibid sch 1 APP 6.2(c).

exists in relation to the use or disclosure of the information by the entity'.[134] The permitted general situations are set out in s 16A of the Act,[135] and the permitted health situations are set out in s 16B.[136]

The collection of health information for research purposes is specifically provided for under the provisions of s 16B. Section 16B(2) provides:

> (2) A ***permitted health situation*** exists in relation to the collection by an organisation of health information about an individual if:
>
> (a) the collection is necessary for any of the following purposes:
>
> (i) research relevant to public health or public safety;
>
> (ii) the compilation or analysis of statistics relevant to public health or public safety;
>
> (iii) the management, funding or monitoring of a health service; and
>
> (b) that purpose cannot be served by the collection of information about the individual that is de-identified information; and
>
> (c) it is impracticable for the organisation to obtain the individual's consent to the collection; and
>
> (d) any of the following apply:
>
> (i) the collection is required by or under an Australian law (other than this Act);
>
> (ii) the information is collected in accordance with rules established by competent health or medical bodies that deal with obligations of professional confidentiality which bind the organisation;
>
> (iii) the information is collected in accordance with guidelines approved under section 95A for the purposes of this subparagraph.

Section 16B(3) contains similar provisions in relation to the use or disclosure of health information for research purposes, with the proviso:

> (d) in the case of disclosure — the organisation reasonably believes that the recipient of the information will not disclose the information, or personal information derived from that information.[137]

Importantly, the *Privacy Act* also expressly provides a permitted health situation exception to allow an organisation that is a provider of a health service to an individual to disclose genetic information about the individual to a genetic relative of the individual where 'the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of another individual who is a genetic relative of the first individual' and

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134 Ibid sch 1 APP 6.2(d).

135 Ibid s 16A.

136 Ibid s 16B. For discussion, see Eckstein et al (n 58) 586.

137 Ibid s 16B(3)(d). For discussion, see Eckstein et al (n 58) 586.

the use or disclosure is in accordance with guidelines issued under s 95AA of the *Privacy Act*.[138]

Agencies and organisations covered by the *Privacy Act* are permitted to disclose data for research purposes in some circumstances. Guidelines have been issued under ss 95[139] and 95A[140] of the *Privacy Act*. These guidelines enable the use of personal information for research purposes in situations where it is not practicable to obtain the consent of the individual to whom the information relates. The collection, use or disclosure of personal information for research purposes will not be a breach of the *Privacy Act* provided the research has been approved by a properly constituted HREC in accordance with the guidelines.[141]

The *Section 95 Guidelines* apply to research using personal information collected or held by Commonwealth government agencies.[142] The *Section 95A Guidelines* address the requirements in the APPs and ss 16B(2) and 16B(3) of the *Privacy Act* and apply to private sector organisations.[143] Both the *Section 95 Guidelines* and the *Section 95A Guidelines* set out the requirements for proposals to an HREC for approval of the collection, use of disclosure of personal information without consent, and provide guidelines for HRECs in the consideration of such proposals. Before approving an application under either s 95 or s 95A, an HREC must have determined that the public interest in the proposed research substantially outweighs the public interest in the protection of privacy.[144] Research that would otherwise breach the *Privacy Act* and the APPs may be allowable where it is conducted in accordance with the *Guidelines.*[145]

While the s 95 and s 95A guidelines both have the same approach of weighing the public interest in the research with the public interest in protecting privacy, the guidelines do differ in their scope. As indicated above, the *Section 95 Guidelines* apply to Commonwealth agencies.[146] In addition, the *Section 95 Guidelines* apply only to medical research, which specifically includes epidemiological research,[147]

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138 Ibid s 16B(4); National Health and Medical Research Council, *Use and Disclosure of Genetic Information to a Patient's Genetic Relatives under Section 95AA of the Privacy Act 1988 (Cth)* (March 2014) <https://www.nhmrc.gov.au/about-us/publications/guidelines-approved-under-section-95aa-privacy-act-1988-cth>; Otlowski and Eckstein (n 11) 287–8; Eckstein et al (n 58) 587.

139 *Section 95 Guidelines* (n 109). For discussion, see Paterson and Witzleb (n 91) 195–6.

140 *Section 95A Guidelines* (n 110). For discussion, see Paterson and Witzleb (n 91) 195–6; Eckstein et al (n 58) 586.

141 *Section 95 Guidelines* (n 109) 2; *Section 95A Guidelines* (n 117) 3.

142 *Section 95 Guidelines* (n 109) app 1 (definition of 'agency').

143 *Section 95A Guidelines* (n 110) 2-3, 8; *Privacy Act 1988* (Cth) s 6C (definition of 'organisation').

144 *Section 95 Guidelines* (n 109) 3.2(b); *Section 95A Guidelines* (n 110) D.4

145 *Privacy Act 1988* (Cth) ss 16B(3), 95; *Section 95 Guidelines* (n 109) 2; *Section 95A Guidelines* (n 110) 3. See also Eckstein et al (n 58) 586–7.

146 See above n 109 and accompanying text.

147 *Privacy Act 1988* (Cth) s 6 (definition of 'medical research').

involving the use of personal information held by agencies, where it is impractical to seek consent.[148] Notably, the *Section 95 Guidelines* require that any genetic research be conducted in accordance with the section in the *National Statement* that concerns genetic research.[149] The *Section 95A Guidelines* apply to the private sector,[150] and provide requirements for the conduct of research relevant to public health or public safety, the compilation or analysis of associated statistics, and the management, funding or monitoring of a health service. With a public health and public safety focus, these guidelines may be viewed as wider in scope than the *Section 95 Guidelines*, which are confined to medical research.[151]

In terms of international data-sharing, the APPs also include requirements where an APP entity discloses personal information about an individual to an overseas recipient.[152] The provisions of the *Privacy Act* may therefore be relevant not only to use and disclosure of health information within Australia, but also to international data-sharing.

VI State-Based Legislation: A Case Study of Queensland

In addition to federal privacy legislation discussed above, state- and territory-based health and privacy legislation is also relevant to the sharing of genomic data in Australia. In this Part we illustrate the regulatory complexity in Australia by examining the regulatory framework in one state, Queensland.

As discussed above, genetic information is included within the scope of the definition of 'sensitive information' in the *Privacy Act.*[153] Privacy legislation in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Victoria has also been amended,[154] so that genetic information was clearly brought within the scope of privacy laws in those jurisdictions. However, not all states made similar changes to their privacy laws. Queensland has not amended its privacy legislation, retaining separate Information Privacy Principles ('IPPs') and National Privacy Principles ('NPPs') as existed in the federal *Privacy Act* prior

148 National Health and Medical Research Council, *Flowchart Determining Whether the s 95 Guidelines Apply* <https://www.nhmrc.gov.au/about-us/publications/guidelines-under-section-95-privacy-act-1988>.

149 *Section 95 Guidelines* (n 109) 4. Note that the *Section 95 Guidelines* specifically refer to ch 3.5 of the *National Statement*, which did cover genetic research. However, the revised *National Statement* covers genomic research in ch 3.3.

150 *Section 95A Guidelines* (n 110) 3.

151 Ibid.

152 *Privacy Act 1988* (Cth) sch 1, APP 8. For discussion, see Eckstein et al (n 58) 588.

153 Ibid s 6 (definition of 'sensitive information').

154 See above n 31.

to the 2012 amendments,[155] and current Queensland privacy laws do not include provisions specific to genetic or genomic information. Queensland thus provides a useful case study of the current regulatory complexity that may arise within Australia's federal legal system.

As outlined in Part V, the *Privacy Act* governs the disclosure of information by Commonwealth government agencies and some private organisations. In Queensland, state legislation — the *Information Privacy Act 2009* (Qld), the *Hospital and Health Boards Act 2011* (Qld) and the *Public Health Act 2005* (Qld) — is also relevant to disclosure of personal information.

The *Information Privacy Act 2009* (Qld) contains both NPPs,[156] which apply to state-based health agencies, and IPPs,[157] which apply to non-health state government agencies. The various entities and the applicable law are set out in Table 1.

Table 1 — Legislative Principles Governing Disclosure of Information by Researchers in Queensland According to Entity Holding the Information

Entity	Queensland Health Agencies	Queensland (Non-Health) Agencies	Commonwealth Government Agencies	Private Organisations[158]
Law	• National Privacy Principles (NPPs) (*Information Privacy Act 2009* (Qld) sch 3) • *Hospital and Health Boards Act 2011* (Qld) • *Public Health Act 2005* (Qld)	• Information Privacy Principles (IPPs) (*Information Privacy Act 2009* (Qld) sch 4)	• Australian Privacy Principles (APPs) (*Privacy Act 1988* (Cth) sch 1)	• Australian Privacy Principles (APPs) (*Privacy Act 1988* (Cth) sch 1)

155 The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) replaced the previous Commonwealth IPPs and NPPs with a single set of APPs, which came into effect on 12 March 2014: s 2, sch 1.

156 *Information Privacy Act 2009* (Qld) sch 5 (definition of 'health agency'), s 31. The NPPs are set out in sch 4.

157 Ibid ss 18, 27. The IPPs are set out in sch 3.

158 'Private organisations' here refers to those organisations that are not covered by the small business exception established by s 6D of the *Privacy Act 1988* (Cth), as they either have an annual turnover of over $3 million, provide a health service and hold health information (other than

Under the *Information Privacy Act 2009* (Qld), 'personal information' is defined as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.[159] The Act also includes a definition of 'sensitive information', for the purposes of the NPPs that includes 'information that is health information about the individual for the NPPs'.[160]

Under the IPPs, Queensland government agencies must not do or fail to do acts, or engage or fail to engage in practices, in such a way that contravenes or is otherwise inconsistent with a requirement of an IPP.[161] This covers acts and practices 'relating to the agency's collection, storage, handling, accessing, amendment, management, transfer, use or disclosure of personal information'.[162] Health agencies are required to comply with the NPPs.[163] Under the NPPs, a health agency must not disclose personal information for a purpose (the secondary purpose) other than the primary purpose of collection unless an exception applies.[164] In relation to research, disclosure of personal information is permitted if the information is health information and the use or disclosure is necessary for research, or the compilation or analysis of statistics, relevant to public health or public safety, and provided other requirements of the NPPs are met.[165] However, the *Information Privacy Act* is subject to provisions of other Acts.[166] This would include the *Hospital and Health Boards Act 2011* (Qld), which prohibits disclosure of confidential information,[167] defined as 'information, acquired by a person in the person's capacity as a designated person, from which a person who is receiving or has received a public sector health service could be identified'.[168]

There are also general requirements on disclosure under the *Information Privacy Act 2009* (Qld). For non-health agencies governed under the IPPs, there is an obligation on the agency to 'take all reasonable steps to ensure that the relevant entity will not use or disclose the information for a purpose other than

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employee records), or disclose personal information about another individual to anyone else for a benefit, service or advantage.

159 *Information Privacy Act 2009* (Qld) s 12.

160 Ibid sch 5 (definitions of 'sensitive information', 'health information').

161 Ibid s 27(2).

162 Ibid s 27(3).

163 Ibid s 31.

164 Ibid sch 4 NPP 2.

165 Ibid sch 4 NPP 2(1)(c).

166 Ibid s 7.

167 *Hospital and Health Boards Act 2011* (Qld) s 142. The circumstances in which disclosure is permitted are specified in ss 143-161.

168 Ibid s 139.

the purpose for which the information was disclosed by the agency'.[169] For Queensland health agencies, if health information is collected for research, health agencies must take reasonable steps before disclosure 'to ensure that the individual the subject of the personal information can no longer, and can not in the future, be identified from the personal information'.[170] As with the APPs in the federal *Privacy Act*, Queensland legislation also includes provisions that are relevant to cross-jurisdictional transfer of personal information. Queensland agencies, health and non-health, are subject to requirements in the *Information Privacy Act 2009* (Qld) concerning the transfer of personal information outside of Australia.[171]

The *Public Health Act 2005* (Qld) also contains provisions that could be relevant to disclosure of genomic data for research purposes.[172] Under the *Public Health Act 2005* (Qld), 'health information held by a health agency' includes 'information held by the agency about a person's health or the provision of a health service to a person'.[173] The chief executive may give information for research under the *Public Health Act 2005 (*Qld) despite any other provision of the *Public Health Act 2005* (Qld) 'or any provision of another law that deals with confidentiality', including the *Hospital and Health Boards Act 2011* (Qld).[174] Under the *Public Health Act 2005* (Qld), health information held by a health agency may be released to a researcher by the chief executive.[175]

Research under the *Public Health Act 2005* (Qld) is defined to be a 'systematic investigation for the purpose of adding to knowledge about human health and well-being and includes the following: (a) a biomedical study; (b) a clinical and applied study; (c) an epidemiological study; (d) an evaluation and planning study; (e) a monitoring and surveillance study'.[176] A person may apply to be given health information for research purposes by providing the chief executive with an application that includes: 'the purpose of the research; and the methodology of the research; the type of information required; the reasons the information is required; how the privacy of any individual identified will be protected; if the information will be needed at intervals during the research, details of the intervals; the name of the person or entity proposing to conduct the research; the names of all persons who will be given the information for the research; the

169 *Information Privacy Act 2009* (Qld) sch 3 IPP 11(3).
170 Ibid sch 4 NPP 9(4).
171 Ibid s 33.
172 *Public Health Act 2005* (Qld) ch 6 pt 4.
173 Ibid sch 2.
174 Ibid s 281(3).
175 Ibid ss 281, 282.
176 Ibid s 280.

duration of the research; and the views of a human research ethics committee about the research, including contact details for the committee'.[177]

In deciding whether to grant access to health information for research, the chief executive must be satisfied of a number of things, including that the giving of the information is in the public interest, having regard to 'the opportunities the research will provide for increased knowledge and improved health outcomes', as well as 'the privacy of individuals to whom the health information relates', and that 'the identification of any person by the information is necessary for the relevant research'.[178] The chief executive may grant access to the information subject to conditions, including 'that information given for research must be handled in a confidential and secure way'.[179] Importantly, the chief executive is not required to consult with the individual to whom the health information relates before granting access for researchers.[180] However, individuals given information released through this mechanism are prohibited from using the information for a purpose inconsistent with the research for which it was provided, or otherwise disclosing it.[181]

As the above discussion demonstrates, the interplay of various regulatory instruments in this space results in a complex set of exceptions to privacy protections that allow for disclosure. At a federal level, the legislation draws a strong line between public and private entities. At a state level, in Queensland for example, the distinction is between health and non-health government entities. These exceptions require compliance with different legislation and guidelines depending on the entity in possession of the genomic data. This is likely to be similar in other Australian jurisdictions; however, a complete examination of the legislative environment of all Australian jurisdictions is outside the scope of this article.

VII Reforming Australian Laws

Facilitating data-sharing in genomics research in Australia is necessary and desirable to advance Australian genomic science. However, there are a number of ethical, practical and legal issues that will need to be addressed. Given the rapid developments in genetics and genomics since the *Essentially Yours* report in 2003, we argue that Australian laws and regulatory frameworks relating to genomics should be reviewed to ensure that they are able to meet contemporary challenges. We also recognise that data-sharing is just one of a number of complex legal and

177 Ibid s 282.
178 Ibid s 284(2).
179 Ibid s 284(4).
180 Ibid s 284(7).
181 Ibid s 290–1.

regulatory issues raised by developments in genomics, making a broad review of the relevant laws and regulatory frameworks related to genomics likely to be of greater value than a narrow, issue-specific approach.

Writing in relation to precision medicine, Nicol et al argue that the regulatory challenges posed by precision medicine

> need not — and probably should not — result in new, highly targeted laws, which are liable to be outpaced by scientific change. Instead, and to the greatest extent possible, precision medicine should be regulated by the large body of existing laws and other regulatory instruments that apply to other aspects of clinical care and medical research.[182]

A key issue, then, is how to address the regulatory complexity that we have outlined above. In particular, an approach that enhances public trust in genomic research is essential to ensure that Australians remain willing to participate in genomic research and data-sharing.[183]

Although the National Health Genomics Policy Framework envisages a national approach to data-sharing for genomic medicine, Australia's federal legal system does present some challenges to the development of a national approach, with medical research and information privacy laws comprising a patchwork of legislation and guidelines at both federal and state/territory level.[184] Information privacy law is the realm in which data-sharing is currently enabled or prohibited, as it governs the circumstances under which genomic information, as a subset of personal information, can be released. Furthermore, as we have shown above in Part IV, public trust has been recognised as an important aspect of data-related regulatory reform.

As our analysis has shown, the national and Queensland regulatory frameworks for information privacy are complex. Reform of Australian information privacy laws to develop a nationally consistent approach would help to address many of the complexities in the current regulatory environment identified in Parts V and VI above. An argument could be made for harmonising state and territory privacy legislation with the federal *Privacy Act*. In its 2008 report on privacy, the ALRC noted:

> Inconsistency and fragmentation in privacy regulation causes a number of problems, including unjustified compliance burden and cost, impediments to information sharing and national initiatives, and confusion about who to approach to make a

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182 Dianne Nicol et al, 'Precision Medicine: Drowning in a Regulatory Soup?' (2016) 3(2) *Journal of Law and the Biosciences* 281, 292.

183 Eckstein et al (n 58) 584; Critchley and Nicol (n 58) 352–3.

184 Eckstein et al (n 58) 583.

> privacy complaint. National consistency, therefore, should be one of the goals of privacy regulation.[185]

However, proposals to harmonise Australia's privacy laws are not new and have been advanced before, including by the ALRC and AHEC in *Essentially Yours*,[186] suggesting that reform in this area is unlikely to provide a solution in the short term to the regulatory complexities related to genomic data-sharing. Furthermore, additional legislation, such as health legislation in Queensland, is also relevant to this regulatory space and, as such, simplification of the legal situation through reforming privacy law would be limited. In addition, if the proposed Commonwealth data-sharing legislation that covers the release of data from federal agencies is enacted, complexity will still exist in the interplay of that legislation with state/territory privacy law.

The development of genomic-specific national guidelines or standards could provide an alternative approach for a nationally harmonised approach to genomic data-sharing. As noted above,[187] the National Health Genomics Policy Framework has identified the development of national standards, including for data-sharing, as a priority area for action. The benefit of introducing guidelines is that they would not require any changes to the law and could be implemented quickly. The downside of such an approach is that the guidelines would need to be flexible enough to account for the differing and convoluted state of current privacy legislation and guidelines. The ability to achieve national consistency in approach may be limited by what is achievable within the current legislative environment.

Whether a nationally consistent approach that removes regulatory complexity is achieved through reform of relevant legislation such as information privacy laws, or through the development of genomic-specific national guidelines or standards, any review of Australian regulatory frameworks for genomic data-sharing should also include consideration of relevant international developments and the degree to which Australian laws and regulatory frameworks — or any proposed changes to them — should align with existing international approaches. Among the priority areas for action listed in the National Health Genomics Policy Framework is '[s]upport sector engagement with international genomic alliances to promote shared access to data for research and global harmonisation of data where appropriate'.[188] Internationally, the Global Alliance for Genomics and Health has issued a 'Framework for

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185 Australian Law Reform Commission, '*For Your Information*' (n 31) 193.

186 *Essentially Yours* (n 1) 54, Recommendation 7–1.

187 See Part V.

188 National Health Genomics Policy Framework (n 7) 13.

Responsible Sharing of Genomic and Health Related Data'.[189] The argument for data-sharing internationally is that 'global sharing enables the best science and ultimately the greatest contributions to human well-being'.[190] Without global data-sharing, 'researchers cannot gain a complete picture of how genes influence disease unless those data are linked to clinical information and different institutions share data with each other'.[191] In particular, accumulating enough data on rare disorders may only occur if all possible cases from around the world are compiled.[192] Interestingly, one study conducted in Australia found that sharing genetic data outside Australia did not impact upon public trust or intention to participate in biobanking.[193]

Although consideration of international legal developments relevant to genomics does not necessarily mean that Australia should adopt international legal approaches, consideration of relevant international developments is important, particularly given the potential for international data-sharing. Recognition of the need for consideration of international developments is not new. Among 'seven attributes of the reform process'[194] listed in *Essentially Yours* was the need to '[c]onsider the cross-border implications of the issues, whether they be federal or international in character.'[195] Nicol et al make a similar point, listing 'consistency/equivalency across geographical, technological, and institutional borders' as one of 'five recurring elements that must be taken into account in the development of any regulatory framework for precision medicine'.[196]

There is value in a comparative approach in the development of Australian laws. As was noted by the ALRC and AHEC in *Essentially Yours*: 'An examination of relevant developments in other jurisdictions enables informed choices to be made for Australia based on international best practice in the field.'[197] In Europe, for

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189 Global Alliance for Genomics and Health, *Framework for Responsible Sharing of Genomic and Health Related Data* (9 December 2014) <https://www.ga4gh.org/genomic-data-toolkit/regulatory-ethics-toolkit/framework-for-responsible-sharing-of-genomic-and-health-related-data/>; see also Bartha Maria Knoppers, 'Framework for Responsible Sharing of Genomic and Health-Related Data' (2014) 8(1) *HUGO Journal* 3; Knoppers and Joly (n 39).

190 Mary A Majumder, Robert Cook-Deegan and Amy L McGuire, 'Beyond Our Borders? Public Resistance to Global Genomic Data Sharing' (2016) 14(11) *PLOS Biology* e2000206, 2.

191 Erika Check Hayden, 'Geneticists Push for Global Data-Sharing' (2013) 498(7452) *Nature News* 16.

192 Majumder, Cook-Deegan and McGuire (n 190).

193 Critchley, Nicol and Otlowski (n 85) 165.

194 *Essentially Yours* (n 1) [4.22].

195 Ibid [4.23].

196 Nicol et al (n 182) 303. Eckstein et al also argue that '[t]he extensive and typically cross-border sharing arrangements that characterise modern genomic research also warrant an assessment of the interactions between multiple, often overlapping, legal regimes': Eckstein et al (n 58) 590.

197 *Essentially Yours* (n 1) [4.44].

example, the General Data Protection Regulation ('GDPR') has led to discussion about the scope of privacy laws, including the ways that the GDPR may also potentially be relevant for genomics research.[198] A comparison between the legal and regulatory frameworks for genomics in Australia and those in the European Union and the United Kingdom and other jurisdictions may provide valuable insights into different regulatory approaches.[199] More broadly, it may also be important for Australian genomic data-sharing standards to align with those developed at an international level.[200]

Finally, community engagement must be an essential part of any law-reform process relating to genomic data-sharing. At a general level, community engagement has been recognised as an important element of law-reform processes.[201] More specifically in relation to genomic research, there is an inherent tension between tightening the law on data-sharing to account for the sensitive nature of genomic information and clarifying the law to enable greater sharing. In *Essentially Yours* the promotion of 'widespread community participation in the formulation of relevant rules and principles'[202] was included in the list of 'attributes for the reform process'.[203] It was further noted in the report that '[w]idespread community participation in the process of reform or review is thus seen by the Inquiry as essential to maintaining public trust.'[204] Nicol et al also include 'genuine engagement with all relevant stakeholders'[205] in their list of elements needed in the development of regulation for precision medicine. Given the importance of public trust in genomic research, reform in this area may require greater engagement with the public to ensure that the law strikes the right balance between the promotion of scientific research and individual privacy protections so that it is reflective of community values. Community engagement may also help to build public trust in genomic research.[206]

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198 For discussion, see Paul Quinn and Liam Quinn, 'Big Genetic Data and its Big Data Protection Challenges' (2018) 34 *Computer Law & Security Review* 1000; Kaye et al (n 20). For discussion of Australian law and compliance with the GDPR, see Eckstein et al (n 58) 588.

199 Kaye et al (n 20).

200 For discussion of international approaches, see Knoppers and Joly (n 39).

201 See, eg, Natalina Nheu and Hugh McDonald, *By the People, for the People? Community Participation in Law Reform* (Law and Justice Foundation of New South Wales, 2010) 4; Brian Opeskin, 'Engaging the Public — Community Participation in the Genetic Information Inquiry' (2002) 80 (Autumn) *Reform* 53, 54; David Weisbrot, 'From Public Engagement to Public Policy: Competing Stakeholders and the Path to Law Reform', in Kieran O'Doherty and Edna Einsiedel (eds), *Public Engagement and Emerging Technologies* (UBC Press, 2012) 167.

202 *Essentially Yours* (n 1) [4.23].

203 Ibid [4.22].

204 Ibid [4.28].

205 Nicol et al (n 182) 303.

206 Critchley and Nicol (n 58) 366.

VIII Conclusion

Genomic research promises advances in medicine to improve human health. Sharing of genomic research data can play an important role in supporting genomic research. However, as this article has argued, data-sharing brings with it complex legal and ethical issues, particularly in the context of privacy for research participants, and the complexity of the regulatory landscape. Given the advances in genomics, and the regulatory complexities outlined in this article, it is timely to review Australia's regulatory frameworks to ensure that they are able to meet the challenges posed by advances in genomics, including those relating to data and data-sharing. The review could consider how best to reduce the regulatory complexities identified in this article, for example through harmonisation of information privacy law or through the development of national standards. As outlined above, an international comparative approach and community engagement will be important aspects of this process. Such an approach could simultaneously build the trust of the Australian public while ushering Australia into the era of genomic medicine.

RULE OF LAW: BUILDING BLOCKS, HUMAN RIGHTS AND GLOBAL SECURITY

THE HON MICHAEL KIRBY AC CMG*

This article, first delivered at The University of Queensland as the Naida Haxton AM Oration 2019, explores some of the components of the rule of law. It starts with building blocks in the common law system, including law reporting for the derivation of precedents. It describes the notable career of Naida Haxton and her approach to law reporting. It then extends to municipal and international law, including that relevant to universal human rights. In that connection, it describes the author's work as chair of the United Nations Commission of Inquiry on North Korea. It explains its successes and disappointments. Finally, it concludes with the importance of building effective protections for peace and security and justice, including addressing existential challenges such as pandemics, global climate change, and the control of nuclear weapons. The author argues that these components of the rule of law are ultimately integrated and essential to the safety and protection of human beings and the biosphere everywhere.

I RULE OF LAW AND LAW REPORTING

The *Legal Profession Act* of Queensland was amended in 1905 to make it clear that women could be admitted as barristers, solicitors and conveyancers of the Supreme Court of Queensland. This step was the local response to the substantial resistance within the legal profession, in Australia and elsewhere, over the practice of law by women. Anyone in doubt should read the article by Justice Virginia Bell, 'By the Skin of our Teeth'.[1] It shows once again that the rule of law must involve more than the law of rules.[2] This requires that the rules themselves must have a moral quality, at least to some degree. Equality, justice and universal human rights are today part of the necessary moral quality. In her own special way, Naida Haxton, *alumna* of The University of Queensland, contributed significantly to the rule of law in Australia. By this I mean the maintenance of a society that lives according to generally rational, just and ascertainable rules. When they are seen as irrational, unjust or unavailable, we need to move to change

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* Justice of the High Court of Australia (1996–2009); President of the New South Wales Court of Appeal (1984–96); Chair of the United Nations Human Rights Council's Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea (2013–14).

1 The Hon Virginia Bell, 'By the Skin of our Teeth — The Passing of the *Women's Legal Status Act* 1918' (2018) 92(12) *Australian Law Journal* 935.

2 MD Kirby, 'The Rule of Law Beyond the Law of Rules' (2010) 33 *Australian Bar Review* 195.

that state of affairs. The rule of law extends from its local building blocks, including in common law jurisdictions, law reporting. It extends to the body of municipal law and embraces the universal law of human rights. It also includes the global law governing peace and security, justice and safety for all.

Although the public address giving rise to this article was the third oration to honour Naida Haxton AM and her special place in the legal profession of Queensland and New South Wales, it is as well to recall the steps that led to her career. She was born in 1941. She graduated from The University of Queensland in 1965 with Bachelors Degrees in Arts and Law. She undertook her articles of clerkship at Flower & Hart, solicitors in Brisbane. During her law course she participated in mooting and debating. In August 1966 she was admitted to the Queensland Bar at a sitting of the Full Court of the Supreme Court of Queensland. It was presided over by Justice Gibbs, later a Justice of the High Court, and later still Chief Justice of Australia. Commenting on Naida Haxton's presence, he declared that she would be the first of many women who would be so admitted, with a view to private practice at the Bar. She was permitted to give one interview to the press on that day; but no photographs were to be taken in breach of the stern rules of that time against professional advertising and self-promotion.

Naida Haxton's practice was busy and successful. In 1971 she married and soon after moved with her new husband to Sydney. Bereft of the contacts she had acquired in Brisbane, she undertook lecturing in real property and commercial law to keep the wolf from the door. However, in 1974 she made a move that was to mark her professional life thereafter as distinctive. She became the legal reporter for the *Papua New Guinea Law Reports*. In 1981 she became Assistant Editor of the *New South Wales Law Reports*, under the supervision of Dyson Heydon. He was later to be a Judge of Appeal of the Supreme Court of New South Wales and, after 2003, a Justice of the High Court of Australia.

Naida Haxton later took over the editorship of the *New South Wales Law Reports*. It was during this period that I came to know her when, in 1984, I was appointed President of the Court of Appeal of New South Wales. She remained editor of that series after my departure to the High Court in 1996. She gave invaluable advice on the development of other series in specialised areas, including workers' compensation and local government law. She also gave advice on law reporting in overseas jurisdictions, including Vanuatu and Singapore. She was by this stage, with James Merralls AM QC, editor of the *Commonwealth Law Reports*, the senior law reporter of the nation.[3]

On her retirement from active work in law reporting, a tribute was paid to her by Justice Dyson Heydon. He acknowledged her prudence and sense of economy. She only reported decisions of New South Wales courts and tribunals if she judged

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[3] Further details on her career appear in 'Naida Jean Haxton — Barrister and Law Reporter', *Bar News* (NSW) (Winter 2006) 67.

them to contain new or specially useful statements of legal principle or of legal practice. She kept the size of the series under strict control, an attitude congenial to her temperament. Justice Heydon recounted at her farewell event how, when judges wrote words to the effect, 'I now turn, for the guidance of the legal profession, to vital statements of principle demonstrated in this case', such immortal words were frequently deleted from reporting with words appearing in square brackets: '[His Honour then proceeded to passages in his reasons that do not call for report]'.[4]

She courteously, but firmly, advised judges on matters of grammar and punctuation. She had a healthy respect for her leadership role in law reporting. As Justice Heydon explained, that role is 'lonely, ascetic, professional and dedicated'.[5] To explain its significance, Justice Heydon reached for an explanation that I had given of that importance. Somehow, it had survived her editorial square brackets:

> [Law reporting] requires very considerable skill. The [editing] of judicial reasons is extremely important in the common law legal system in a way non-lawyers may not always understand. The system is built on judicial precedents contained in published reasons. The preparation of reports, with accurate and brief headnotes, is an indispensable source of legal principle, used in daily practice and legal education. That is why law reporters deserve special acknowledgment. They are the unsung, and often unknown, heroes of the law. Without them the Australian legal system could not really continue to operate as it does.[6]

An added reason for the importance of the law reporter is that he or she is trained to know the precise way in which the legal principle for which the law, expressed by judges, is to be derived. Because this was something taught in every law course in Australia in our student days, it was known to those of our generation. It is not commonly known to younger lawyers, possibly because most of the law today is expressed in legislation. It was for this reason that in *Garcia v National Australia Bank Ltd*[7] I took pains to explain how the *ratio decidendi* of judicial reasons was to be found. The rules that I stated were known and applied by Naida Haxton in her precise and accurate work of law reporting.

For her contributions, especially to law reporting in Australia and thereby to the rule of law as we practise it, I express thanks to Naida Haxton. Her dedication to this aspect of the rule of law was worthwhile and enduring. In reporting the many decisions of the Court of Appeal of New South Wales during my time as President (1984–96), including a few of my own, I express thanks to her. This foundation of acknowledging a special and almost unique lifelong dedication to

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4 JD Heydon, 'Address Delivered on Retirement of Naida Haxton as Editor of the New South Wales Law Reports' (unpublished, 29 June 2006).

5 Ibid 6.

6 MD Kirby, cited in Heydon (n 4) 6.

7 (1998) 194 CLR 395, 417–18 [56]–[57].

the rule of law in Australia is an appropriate foundation for what follows, dedicated to Naida Haxton. For now, I must turn to a study of a particular jurisdiction, the Democratic People's Republic of Korea ('DPRK'), or North Korea, and to the international law on nuclear weapons to show how important it is to build the rule of law in a national jurisdiction and in the international community. And how perilous and dangerous it is when the rule of law is missing from the legal equation at any level.

II Rule of Law and Human Rights: Cambodia and North Korea

Before 2013, I had no more knowledge of the 'hermit kingdom' of North Korea than a person informed about international peace and security who read *The Economist* to keep updated on the recalcitrant states that neglect lawfulness and repeatedly depart from observance of universal human rights as envisaged by the *Charter of the United Nations* of 1945.[8]

Earlier, between 1993 and 1996 I served as the Special Representative of the Secretary-General of the United Nations (at the time Boutros Boutros Ghali) for Human Rights in Cambodia. This was at a time when that country had only recently been freed from the oppressive, anarchistic and generally lawless rule of the Khmer Rouge regime. In consequence of the *Paris Peace Agreement* of 1991 on Cambodia ('*Paris Agreement*'), steps were taken to conduct a national election in that country that was judged generally free and fair. One clause of the *Paris Agreement* required the establishment of a guardian or monitor to report to the then Human Rights Commission of the United Nations on the compliance of the state with universal human rights law. I was appointed as the first mandate-holder to fill that office. This gave me an acquaintance with what happens to a nation when it descends into lawlessness and gross abuse of human rights. In the case of Cambodia, that condition gave rise to grave instances of abuse of human rights and other international crimes.

Throughout my service as Special Representative in Cambodia, I received support from King Norodom Sihanouk. During the Khmer Rouge period, as was well known, the King spent significant amounts of time in the DPRK. In part this was to receive medical treatment. However, in part, it was also to escape the murderous regime in power in Phenom Penh. That was not the only coincidence between my call to duty by the United Nations Human Rights regime, first in Cambodia and then in the DPRK. There were, and are, many similarities between

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[8] *Charter of the United Nations*, signed 26 June 1945 (entered into force 24 October 1945) Preamble. The first item of the objectives is 'to save succeeding generations from the scourge of war'. The second is 'to reaffirm faith in fundamental human rights'. The third is 'to establish conditions under which justice [and] international law can be maintained'. The fourth objective is 'to promote social progress and better standards of life in larger freedom'.

the tyranny in Cambodia under the Khmer Rouge and the grave human rights abuses in the DPRK revealed in the report on my work there.

Prior to 2013, many reports had been received by the United Nations Human Rights officials in Geneva concerning shocking abuses of human rights that required investigation. By that stage, the United Nations Human Rights Commission had been replaced by the Human Rights Council. So egregious were the abuses of human rights in North Korea coming to the attention of the Council that in March 2013 it was resolved by the then United Nations High Commissioner for Human Rights (Navi Pillay of South Africa) to strengthen the response of the Human Rights Council in a significant way.

Prior to 2013, the Human Rights Council had established the mandate of a special rapporteur to investigate and report the conditions in the DPRK. The first mandate-holder was Professor Vitit Muntarbhorn (Thailand). His every endeavour to enter into and engage with the DPRK, and to investigate the conditions of human rights there, was frustrated. He was denied entry or cooperation. When eventually he resigned his responsibilities, he was replaced by Mr Marzuki Darusman, former Attorney-General of Indonesia. However, Mr Darusman also was denied admission or any cooperation by the DPRK. These were the circumstances in which High Commissioner Pillay commended to the United Nations Human Rights Council the establishment of a commission of inquiry ('COI') to investigate human rights violations in the DPRK. This was a significant upgrade in the seriousness with which the Council was treating the situation in the DPRK.

Normally, because the creation of a COI is viewed as a potential intrusion into the 'sovereignty' of member states of the United Nations, it is opposed by countries, many of them with serious human rights derogations of their own. However, when the proposal to create the COI on the DPRK was introduced by the Polish President of the Human Rights Council in February 2013, it was uniquely adopted without the call for a vote. No COI of the Human Rights Council, before or since, has been established without any expressed opposition and a vote to resolve the disagreements.

It was at this stage that I was invited to become the Chair of the COI on the DPRK. I accepted. I was joined by Ms Sonja Biserko (a human rights expert from Serbia) and Mr Darusman (who remained the Special Rapporteur on the DPRK from Indonesia and had been denied admission to North Korea).

The members of the COI first met in July 2013. We resolved to conduct the COI in a unique way. Whereas generally such investigations had been conducted according to the legal tradition of civil law nations, the very secretiveness of the DPRK made it important, in the view of the members of the COI, to proceed in a more open, transparent and publicised manner. Only in this way did we feel that it would be possible to gather testimony that could be shown to be trustworthy and truthful.

In the result the COI proceeded by way of public hearings convened in Seoul, Tokyo, London and Washington DC, and by closed investigation in Bangkok, Thailand. The testimony received was publicly recorded where it was considered safe to do so. The recording was uploaded online. To this day it is still available for the entire world to see and hear the shocking accounts of human rights abuses that emerged during the investigation of the COI.

The methodology embraced by the COI was widely appreciated in United Nations human rights circles.[9] When the COI was criticised by the DPRK, for relying on testimony substantially of persons who had fled the regime in North Korea, the COI and United Nations machinery could point to the refusal of cooperation and to the apparent veracity and consistency of the witnesses whose testimony was recorded on, and retrievable from, the internet. As well, that testimony, in so far as it related to the existence of a large network of detention camps in nominated places in the DPRK, appeared to be corroborated by satellite imagery available to (and recorded in) the COI Report.

The DPRK has laws and institutions that pretend to comply with domestic law. However, the measure of lawlessness that exists in the DPRK under the revolutionary and despotic regime led since 1946 by the Kim family, represents the antithesis of a rule-of-law society. Enemies or suspected enemies of the ruling elite are imprisoned, together with their families. The murder of the uncle by marriage to the present Supreme Leader (Jang Song-thaek) took place soon after the establishment of the COI.[10] Obviously, he was regarded by some as an alternative potential leader of the State and therefore dangerous to the third member of the Kim dynasty and present Supreme Leader, Kim Jong-Un. The murder of Jang was recorded in the COI Report. After that Report was presented to the Human Rights Council, the half-brother of the current Supreme Leader (Kim Jong-Nam) was notoriously murdered at Kula Lumpur International Airport. Pages of the COI Report are full of instances of lawlessness, cruelty and despotism. They address the nine heads of reference given to the COI by the United Nations Human Rights Council. The COI Report was delivered to the Council on 7

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9 See Christian Henderson (ed), *Commissions of Inquiry — Problems and Prospects* (Bloomsbury, Oxford and Portland, 2017); see the author's Foreword at v–xii. See also MD Kirby, 'UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea: Ten Lessons' (2014) 15(2) *Melbourne Journal of International Law* 291; Choi Sun-Young et al, 'The UN Universal Periodic Review and the DPRK, Monitoring of North Korea's Implementation of Its Recommendations' (Database Center for North Korean Human Rights, Seoul, Republic of Korea, 2017); cf MD Kirby and Rebecca La Forgia, 'Fact-finding and Report Writing by UN Human Rights Mandate Holders' (2017) 38(1) *Adelaide Law Review* 463.

10 United Nations, Human Rights Council, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea* (A/HRC/25/CRP.1, 7 February 2014) 43 [157] ('COI Report').

February 2014.[11] It was formally presented by me to a meeting of the Council in March 2014. The essence of the findings of the COI were summarised in the summary of the Report, set out at the opening of the text:

> Systematic, widespread and gross human rights violations have been, and are being, committed by the Democratic People's Republic of Korea, its institutions and officials. In many instances, the violations of human rights found by the Commission constitute crimes against humanity. These are not mere excesses of the state. They are essential components of a political system that has moved far from the ideals on which it claims to be founded. The gravity, scale and nature of these violations reveal a state that does not have any parallel in the contemporary world. Political scientists of the 20th century characterized this type of political organization as a totalitarian state: A state that does not content itself with ensuring the authoritarian rule of a small group of people, but seeks to dominate every aspect of its citizens' lives and terrorizes them from within.[12]

This Report, having been released internationally and laid before the United Nations Human Rights Council, effectively discharged the functions of the COI, while leaving the functions of the Special Rapporteur to be continued. The COI had recommended that the Report be transmitted to the General Assembly of the United Nations. This step was strongly resisted by the DPRK and its allies in the United Nations, including China, Cuba, Laos, Pakistan, the Russian Federation, Venezuela and Vietnam.

Notwithstanding the resistance by the DPRK, the United Nations General Assembly, by an overwhelming vote, received the COI Report. Moreover, it took a step that had only once before been taken in relation to a human rights issue (in the case of Myanmar/Burma) of referring the COI Report on the DPRK to the Security Council of the United Nations. This is the highest political organ of the United Nations.[13] Moreover, under the *Rome Treaty* of 1957, which establishes the International Criminal Court ('ICC'), the Security Council has the residual jurisdiction to refer alleged international crimes to the International Criminal Court, a step that has previously been taken in the cases of Darfur and Libya. The COI on the DPRK urged that, on the basis of its findings and conclusions, the case

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11 MD Kirby, 'The United Nations Makes Human Rights Inquiry on North Korea: Background, Reaction and Prospects' (2015) 45(2) *Hong Kong Law Journal* 425, 427–8.

12 COI Report (n 10) 6 [24]. The findings of the COI concern: violations of the freedoms of thought, expression and religion; discrimination on the basis of state-assigned social class, gender and disability; violations of the freedom of movements and residence; violations to the right of food and related aspects to the right to life; arbitrary detention, torture, executions and enforced disappearance and political prison camp; and enforced disappearance of persons from other countries, including though abduction. The COI Report addresses alleged crimes against humanity at 270ff and deals with the allegation of political genocide at 350ff.

13 *Charter of the United Nations* (n 8). The provisions relating to the Security Council appear in ch V (arts 23–32).

of North Korea should likewise be referred by the Security Council to a prosecutor for examination and evaluation of whether the DPRK should be indicted before the ICC.[14]

The steps that led to the presentation of the COI Report to the Security Council and the consideration of the human rights situation in the DPRK under that Council's scrutiny were themselves exceptional.[15] They arose out of particular provisions of the *Charter of the United Nations*.[16] These provisions effectively exclude the operation of the 'veto' provision (applicable to substantive resolutions of the Security Council) in the case of procedural resolutions. This was a legacy from the former Council of the League of Nations.[17] In fact, the acceptance of the issue of the DPRK on the agenda of the Security Council, in consequence of the COI Report, was critical to the events that followed. Those events included the steps that were taken by the DPRK, prior to and contemporaneous with, the COI investigation, to create a sizable armoury of nuclear weapons and, even more worrying, the concurrent creation of missile technology for the delivery of such weapons. The invention and development of intercontinental ballistic missiles could threaten nations close at hand: China, the Russian Federation, Japan and the Republic of Korea (South Korea). But also distant nations, including the United States of America and Australia. A realisation that the DPRK was asserting a nuclear weapons status necessarily attracted the attention and concern of the Security Council. It presented a grave potential threat to global peace and security.

At the time the DPRK became a member of the United Nations in 1991, it was a party to the United Nations *Treaty for the Non-Proliferation of Nuclear Weapons* ('NPT').[18] However, the DPRK later withdrew from that treaty, as it began to build its own nuclear stockpile. Concern about these moves extended not only to the western countries that shared anxiety about the conditions of human rights revealed in the COI Report. It also extended to China and the Russian Federation, each of which has a border contiguous with the DPRK. In consequence of that concern, steps were taken by the Security Council to increase, and later substantially to increase, the sanctions imposed on the DPRK by the Security Council. Such sanctions were imposed, including with the affirmative votes of China and the Russian Federation, necessary to their validity. Those votes were cast despite the general stance of those two countries to oppose responses

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14 The recommendation for reference to the situation in the DPRK to the International Criminal Court appears in COI Report (n 10) 370 [1225(a)].

15 The history of the procedural provisions of the United Nations *Charter* are explained in MD Kirby, 'The United Nations Report on North Korea and the Security Council: Interface of Security and Human Rights' (2015) 89 *Australian Law Journal* 714.

16 *Charter of the United Nations* (n 8) art 27.2. See the discussion in Kirby (n 15) 716.

17 *Covenant of the League of Nations*, art V, discussed in F Pollock, *The League of Nations* (Stevens, London, 1920).

18 *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

addressed to human rights violations as recommended by the COI. Early reports have indicated the general compliance of China and the Russian Federation with the sanctions regime imposed by the Security Council. That regime has, according to satellite and other reports, but also intense complaints by the DPRK itself, imposed serious hardships on the government and people of North Korea. The purpose of the sanctions was to endeavour to persuade and pressure the DPRK to desist from its nuclear weapons strategy, to return to compliance with the NPT, and to resume negotiations with a view to a peaceful resolution of the issues that remain outstanding, including the state of human rights in the DPRK, as disclosed in the COI Report.

Negotiations towards the ultimate conclusion of a formal peace treaty to replace the armistice that terminated the Korean War (1950–53) took place in Six Party Talks.[19] However, these were suspended by the United States of America and its allies once the DPRK began developing its nuclear arsenal and later missile systems. United States Presidents Clinton, GW Bush and Obama established a tripartite requirement for the resumption of the Six Party Talks. These were that the DPRK would agree to denuclearisation of the Korean Peninsula that would involve *complete* removal of nuclear weapons, *verifiable* means of assuring ongoing denuclearisation, and establishment that denuclearisation was *irreversible*, confirmed by reports of trustworthy United Nations inspections. Because the Kim leadership saw the existence of nuclear weapons as their insurance against hostile activity towards the regime in power in the DPRK, they rejected the tripartite requirement of the United States and its allies.

Upon the election of President Donald Trump as United States President in 2016, the policy of the United States began to change. President Trump, after initial aggressive gestures, conceived the possibility of opportunities for economic advancement in the DPRK that could tempt that country to turn away from the present dangerous weapons accumulation and stand-off. Accordingly, in June 2018 and again in March 2019, President Trump agreed to bilateral meetings with Supreme Leader of the DPRK, despite the failure of the DPRK to accept the tripartite preconditions to such dialogue.[20] At the June 2018 bilateral meeting held in Singapore, the DPRK agreed to '*move towards* denuclearisation'. This was a very soft undertaking, falling far short of the tripartite preconditions of previous United States policy. When that soft undertaking was not substantially

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19 Involving China, the DPRK, Japan, the Republic of Korea, the Russian Federation and the United States of America.

20 Cf COI Report (n 10) 363 [1204]–[1210]. See, eg, MR Gordon et al, 'Even Before Trump and Kim Met, Nuclear Talks Had Run Aground', *Wall Street Journal*, reproduced in *The Nation* (Thailand, 4 March 2019); K Needham, 'The Art of No Deal: Who Is to Blame', *Sydney Morning Herald* (Sydney, 2–3 March 2019).

delivered by the second meeting held in Hanoi, Vietnam, President Trump abruptly terminated the meeting. That is where things rest at this present time.[21] This move was followed by a brief meeting between the two leaders in the Demilitarized Zone on the border between the two Korean states, but no significant developments occurred involving dismantlement of the nuclear or missile facilities by the DPRK.

Although direct dialogue between the United States and the DPRK was, in my view, to be welcomed, because the threat of nuclear warfare is itself a grave human rights peril of enormous potential danger, a particular feature of the negotiation by the Trump Administration has been its failure to advert to the human rights crisis in North Korea reported by the COI. South Korea and even Japan have also lapsed into a high degree of silence about the precondition of attainment of human rights in the DPRK, in marked contrast with earlier postures adopted by those countries.

In the COI Report, a number of human rights abuses were identified that went far beyond the kinds of human rights violations for which many or most countries (including Australia) can be criticised. Several of the abuses rose to the level of crimes against humanity. Such crimes, accepted in international law in 1948, demand the action of the United Nations and of the organised international community. The definition of 'crimes against humanity' is defined as a crime of violence of such a kind that it 'shocks the conscience of mankind';[22] it demands that action on behalf of humanity should be taken through the United Nations system. After the egregious wrongs of the Nazi tyranny in Europe, the international community resolved to, and did, call those responsible for such crimes against humanity to account at the trials of the accused perpetrators in Nuremberg and Tokyo. Subsequently, the United Nations General Assembly in 2015 agreed that, if the state concerned did not address such crimes, it would be the entitlement and obligation of the international community to do so, in order that such crimes did not go unanswered and unpunished.[23]

Although the danger to peace and security by the development of nuclear warheads and missile systems by the DPRK is great indeed, a sober reflection on the COI Report on the DPRK will convince any reasonable reader, I believe, that there is no prospect of lasting peace and security on the Korean Peninsula whilst a state such as is described in that Report remains unchanged. It is, and will continue to be, a place of mortal danger to its own people and to humanity. Because it provides no effective and accountable internal avenues of redress, it demands change in order to become safe and civilised. Such change should

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21 G Korporaal, 'Xi Bid to Revive Nuclear Talks', *Weekend Australian* (Sydney, 2–3 March 2019) 11.

22 COI Report (n 10) 320 [1025]. See also 363 [1204].

23 GJ Evans, *The Responsibility to Protect — Ending Mass Atrocity Crimes Once and For All* (Brookings Institution, 2008) 38ff.

preferably happen by peaceful negotiation. But if not, it must accompany negotiated changes to the security situation that threatens the region and the world.

International law on dealing with crimes against humanity is clear. So far, the follow-up to the COI Report on the DPRK has been insubstantial and ineffective. Building the rule of law includes the necessity of creating effective machinery to enforce the rule of law. This includes enforcement of international peace and security. However, as made plain in the *Charter of the United Nations* itself in 1945, it also includes protecting, respecting and upholding universal human rights that constitute the foundation and stable foothold of a world of safety and of political and legal accountability.

III Rule of Law and Nuclear Weapons

The foregoing accounts reveal a broadening of my concerns beyond those of nation states (whether they be in a country like Australia or a country like North Korea) to wider issues affecting the global community. These raise issues of the rule of law in relation to nuclear weapons that constitute both an impediment to progress pursuant to the COI Report on the DPRK and the reason why such progress is so urgent.

Because a central purpose of the United Nations Organisation was to attain global peace and security, and because the highest organ entrusted with this objective was the *Security* Council, it is not unreasonable to infer that the United Nations, created in 1945, had special obligations to achieve, maintain and protect the security of all nations and peoples in the world.[24]

The First and Second World Wars, which had given rise successively to the League of Nations and the United Nations Organisation, witnessed the invention and deployment of new weapons of mass destruction, previously unimaginable and increasingly prone to undermine the earlier efforts to develop an effective international law of War. In particular, aerial warfare and bombs of increasing power and destructiveness affected ever-increasing numbers of the civilian population. The consequences of warfare were no longer confined to naval and military combatants who were to varying degrees volunteers or treated as such. Increasingly, the available weapons had devastating effects on non-combatants, the civilian populations and minorities disrespected by the combatants. The plans for the creation of the United Nations Organisation preceded the detonation of the

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[24] *Charter of the United Nations* (n 8) Preamble and art 1. In art 1.3 the purposes of the United Nations are defined as included 'to achieve international cooperation in solving international problems ... and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. See also *Universal Declaration of Human Rights*, adopted 10 December 1948 by General Assembly resolution 217A (III), UNDOC A/810 (1948).

first nuclear weapons, initially in tests conducted on the territory of the United States of America, but in August 1945 over two major cities of Japan: Hiroshima and Nagasaki. Although the precise results of those explosions were unknown when the *Charter of the United Nations* was being finalised, the United Nations was created to respond to the post-War world. When the nuclear age began in Japan, it immediately presented a new and major challenge to international law.

In the aftermath of the Hiroshima and Nagasaki explosions, the new weapons not only led, virtually immediately, to the termination of hostilities with Japan following that country's unconditional surrender to the Allies. It also led to the release of the Korea Peninsula from Japanese colonial rule. It also revealed the devastating impact of the explosions on human life, human health (with shocking nuclear radiation burns and other human and ecological consequences), and physical devastation of infrastructure and property in Japan, previously unimaginable.

Unfortunately, the advent of the Cold War, which immediately followed the nuclear explosions over Japan, produced deep ideological divisions in the world that made it difficult to secure, by consensus, effective international rules and institutions to protect the world and its peoples from the use of such devastating weapons. Instead, the possession of nuclear weapons, which some had hoped would be placed under the immediate control of the United Nations, spread from the United States to other nations, initially all of the five permanent members of the Security Council (United States, Soviet Union (later Russian Federation), United Kingdom, France and [People's Republic of] China).

Notwithstanding such proliferation, the position reached by the 1950s at least had a certain symmetry with the structure of the *Charter of the United Nations*. It envisaged generally the limitation of nuclear weapons to the 'great powers', identified in the *Charter*.[25] Whilst leaders of other nations claiming 'great power status', including India, refused in principle to accept this 'apartheid' in the possession of nuclear capability, the ideological division of the planet between contesting powers and non-aligned nations effectively secured a degree of stability in the balance of power for several decades. However, two nations with significant enemies (Republic of South Africa and the State of Israel) were soon rumoured to have developed nuclear weapons. Later, two very populous nations in conditions of semi-permanent conflict (India and Pakistan) developed and tested nuclear weapons so as thereby to demonstrate their possession of them. Whilst South Africa surrendered its nuclear capability following the end of apartheid after 1994, and whilst all of the former Soviet Republics repatriated their nuclear weapons to the Russian Federation after the dissolution of the Soviet Union, the consequent international situation remained inherently unstable.

[25] *Charter of the United Nations* (n 8) art 23.1.

A number of steps were then taken by the United Nations in an attempt to reduce the huge stockpiles of nuclear weapons, considered unnecessary to any legitimate purpose of a lawful war. Steps were taken to render illegal under international law the testing of nuclear weapons in the global atmosphere in outer space and under water,[26] to institute monitoring of all underwater nuclear explosions,[27] and to regulate other aspects of the deployment of nuclear weapons by or with the consent of the nuclear weapons state.[28] However, even this semi-stable intermediate position soon broke down.

By the 1990s, concerns were expressed that a member of potentially dangerous states, Libya, Iraq and Iran, were developing nuclear weapons, which the United States regarded as intolerable to its own security and that of its allies. The agreements of Libya and Iraq to desist from nuclear weapons development led quickly to the overthrow respectively of the regimes of Muammar al-Gadhafi and Saddam Hussein. A Joint Comprehensive Plan of Action concerning the Iranian Nuclear Program, of contested utility, was then negotiated with Iran to put its nuclear program on hold in exchange for relief from severe United Nations sanctions.[29] This last treaty was bitterly opposed by Israel. Eventually the United States, after the election of President Donald Trump, withdrew from it; but without any immediate substitute for non-proliferation including by Iran.[30]

The consequence of all these developments has been to focus sharp international attention upon the DPRK's development of a nuclear weapons arsenal of its own. That attention was increased by the demonstration of important advances, more quickly than had been expected, in the DPRK's missile capability. The DPRK has a total population of approximately 25 million people, roughly equivalent to that of Australia. It has an economy plagued by inefficiency and a population regularly afflicted by famine, civilian starvation and the many human rights violations as revealed in the COI Report. For such a state to develop deliverable nuclear weapons was naturally a matter of great concern to the international community. Moreover, if the DPRK could 'get away with'

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26 *Treaty Banning Nuclear Weapons Tests in the Atmosphere, In Outer Space and Under Water*, opened for signature 5 August 1963, 480 *UNTS* 43 (entered into force 10 October 1963) (*Partial Test Ban Treaty*) ('PTBT').

27 Ibid; and see the *Seabed Arms Control Treaty* (*Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof*, opened for signature 11 February 1971, 955 UNTS 115 (entered into force 18 May 1972)).

28 *Intermediate-Range Nuclear Forces Treaty* of 1988 (between the Soviet Union and the United States of America). The United Stated formally suspended the treaty on 1 February 2019. The Russian Federation did likewise on the following day.

29 The Iran Nuclear Program Deal of 14 July 2015 between the Permanent Five Powers and Germany and Iran and European Union. This was later endorsed by the United Nations Security Council.

30 On 3 May 2018, President Trump announced that the United States had withdrawn from the Iran Deal (*Joint Comprehensive Plan of Action): r*eported *New York Times* (New York, 8 May 2018). In its place the United States imposed severe sanctions of its own.

withdrawal from the NPT and the development of deliverable nuclear weapons, what could other states do, to the great peril of humanity?

For decades following Hiroshima and Nagasaki questions were debated in the international community concerning the legality of the possession, use and threat of use of nuclear weapons under international law. Ultimately, proceedings were commenced to submit that question to an advisory opinion of the International Court of Justice ('ICJ'). The process was brought in the belief by many that the Court would advise in favour of illegality. After all, the carefully developed principles of the international law of War, during the century prior to 1945, had raised a number of issues concerning how weapons target, or necessarily affect, civilian populations of great numbers; how they impose death and destruction of a previously unimagined kind, scope and duration; and how they are disproportionate in their impact when compared with their military utility — all of which afforded a foundation for a strong argument in favour of the illegality of nuclear weapons.

In the result, the ICJ accepted the process. It agreed to provide an advisory opinion. It delivered its opinion in 1996.[31] A majority of the judges held back from finding that, in its present state, international law afforded a sufficient foundation for a declaration of illegality involving such weapons. Nevertheless, the Court expressly stated that the states presently possessed of nuclear weapons were obliged by international law to 'pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control'.[32]

Despite this opinion of the ICJ, the nuclear weapons states have completely failed to enter into such negotiations, in good faith or otherwise. To the contrary, they have severally continued to assemble and hold in readiness, nuclear weapons with a capacity greatly exceeding that of the weapons used in 1945. Some have even set in train steps to dismantle particular treaties or agreements useful for limitation purposes.[33] And they have resisted efforts on the part of non-nuclear states to initiate new international treaty negotiations aimed at bringing nuclear weapons under the operation of effective treaty law, even if nuclear weapons states possessing such weapons refused to do so. Whilst any such treaty development would not necessarily achieve, on its own, the abandonment of stockpiled nuclear weapons currently held by the nuclear weapons states, the objective of such a development is to assert a principle of international law and to uphold the right of non-weapons states and others to protect their own populations and the health and safety of the global biosphere. Such a treaty could

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31 International Court of Justice, Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ 2.

32 Ibid [105], s 2f.

33 This is a reference to the renunciation by the United States of the Iran Nuclear Deal and the *Intermediate-Range Nuclear Forces Treaty* in 2018–19.

also shame or persuade nuclear weapons states to refrain from using nuclear weapons and from continuing to stockpile them. Still more it would stand as a principle and warning from international law not to enhance a nuclear armoury once it has become contrary to international treaty law. In this sense the proposed Nuclear Ban Treaty would be a step in the efforts of mankind to bring the catastrophic potential of nuclear weapons under the control of international law.

This is the context in which participants in civil society established in Melbourne, Australia, initiated the idea of a Nuclear Weapons Ban Treaty and propounded the potential content of such a treaty. The organisation involved, International Campaign to Abolish Nuclear Weapons (ICAN), thereby began a global process that ultimately produced a draft treaty, the *Treaty on the Prohibition of Nuclear Weapons* ('*Nuclear Weapons Ban Treaty*').[34] When this draft instrument was tabled before the General Assembly of the United Nations, it attracted the participation of a majority of member states of the United Nations and an affirmative vote in favour of proceeding with this treaty of 122-1. All of the nuclear weapons states, including worryingly the DPRK, absented themselves. Thus, the initiative was effectively boycotted by the states possessed of nuclear weapons. Moreover, other responsible states, that take international law seriously, including Australia, did not attend the United Nations discussions. Despite the initiation of this development within Australia, the government of our country has constantly opposed the draft treaty and the efforts of ICAN. Those efforts have also been strongly opposed by the United States of America with the lobbying of its representatives. It has also been opposed by all other nuclear weapons states. Those who hold these weapons of mass destruction, stockpiled in huge numbers, constituting an existential danger to the survival of humanity, often speak of the importance of the international rule of law. However, where it matters most, they seek to continue their speciality and exceptionalism.

Notwithstanding the foregoing indications of strenuous opposition, on 7 July 2017 the United Nations General Assembly voted to commence the formal process towards the adoption of the *Nuclear Weapons Ban Treaty*.[35] For that treaty to come into effect in international law, it requires ratification by 50 member states of the United Nations. Already 40 states have ratified. Those ratifying have included many small and Pacific states in Australia's region. But the supporters have also included significant international players, notably Austria, the Republic of South Africa and New Zealand.

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34 *Treaty on the Prohibition of Nuclear Weapons*, open for signature 20 September 2017 (not yet in force).

35 Ibid.

In May 2018, New Zealand signed and ratified the *Nuclear Weapons Ban Treaty*. In December 2018, by vote at the biennial conference of the Australian Labor Party ('ALP'), it was agreed that ratification should be adopted as an objective of an incoming Federal Labor Government in Australia. The ALP conference resolution was subject to the maintenance of Australia' defence relationship with the United States, forged in the Second World War and expressed in the Australia, New Zealand, United States Security Treaty[36] ('ANZUS Treaty') and later agreements. Whilst some opponents have suggested that Australia's ratification of the *Nuclear Weapons Ban Treaty* would be contrary to the *ANZUS Treaty* between Australia, New Zealand and the United States, no mention is made in the latter document concerning the so called 'nuclear umbrella' afforded by the United States. Nor does the United States guarantee and promise in that treaty to defend Australia with or against the use of nuclear weapons specifically so declared. Opinions have been expressed that there would be no legal impediment to Australia's ratifying the *Nuclear Weapons Ban Treaty* while renouncing any use, possession or threat of use of nuclear weapons for itself or in its own defence by the United States.[37] Many would conclude that the introduction of the use of such weapons, including the introduction of new, smaller so-called strategic nuclear weapons suitable for use in a field of battle, would necessarily introduce catastrophic real risks that outweigh any potential advantages, and that such risks need to be clearly subtracted from any equation involved in the defence of Australia and its people.

In 2017, ICAN was named winner of the Nobel Prize for Peace. It was acknowledged that the group of citizens in Melbourne had initiated the steps that have led to a response by increasing numbers of states, despairing that the nuclear weapons nations will ever take 'bona fide' or any other steps to reduce the perils of nuclear war and stockpiles of such weapons unless somehow obliged to do so. Although Australians were present in Oslo to receive the Nobel Prize for Peace, and although this is, for Australia, a unique and praiseworthy achievement, it attracted no commendation whatever from the Australian Government. Yet the ratifications are being assembled. The test for Australia's own participation in resolving this issue of international law lies ahead.

There are, it is true, arguable weaknesses in the *Nuclear Weapons Ban Treaty*. Most importantly, it does not introduce a strong, effective and independent inspection system, as such, to ensure that states parties and non-parties are

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36 *Australia, New Zealand, United States Security Treaty, signed 1 September 1951*, [1952] ATS 2 (entered into force 29 April 1952).

37 International Human Rights Clinic, 'Australia and the Treaty on the Prohibition on Nuclear Weapons' (Harvard Law School, December 2018); International Committee of the Red Cross, 'The Prohibition to Assist, Encourage or Induce Prohibited Activities under the Treaty on the Prohibition of Nuclear Weapons' (ICRC Briefing Note, Geneva, 2019).

doing what they respectively claim they will. This is a weakness.[38] On the other hand, doing nothing appears to be an even greater weakness.[39] Failing to address the challenges of nuclear weapons for humanity, the safety of the planet and the biosphere is an indictment of the failure of the global community to respond appropriately and effectively to the existential peril of nuclear weapons. This is why many thoughtful observers consider that the time is right for an initiative that cannot await the conscience of the nuclear weapons states. They have all been dragging the nuclear chain for too long.

The world has survived since August 1945 without suffering a nuclear weapons holocaust. Nevertheless, there have been serious changes in that interval. These are not limited to the dangers of deliberate use of nuclear weapons, although such dangers exist and are serious enough. They include the risks of accidents, mistakes and individual rage or desperation. That the world has survived 75 years since Hiroshima and Nagasaki is no guarantee that it will continue to do so in an environment of proliferating nuclear weapons of such existential potential. At the very least, the *Nuclear Weapons Ban Treaty* draws to the high attention of the United Nations, and all member states, the urgency of the global situation we now face. We live not in a nuclear-free world, but in a world free of law and effective international legal controls to defend our planet, its human populations and all living creatures in it, as well as civilisation and the values of human rationality, beauty, culture and consciousness.

IV Champions For the Rule of Law at All Levels

The rule of law requires champions. At the local and national level, it requires serious and faithful lawmakers and those who record and apply the law, like Naida Haxton and the judges and lawyers whose work she presented, digested and served. At the national level it requires legislators and governments of wisdom and insight, concerned beyond the pedestrian issues that typically engage local politics. At the international level it requires the development of international law, including effective means to implement the law that guards international peace and security, universal human rights, justice and equity for all.

The role of lawyers in local and national law is clear enough. But lawyers also have a role in the development, expression and enforcement of international

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38 But see International Committee of the Red Cross, 'Safeguards and the Treaty on the Prohibition of Nuclear Weapons' (ICRC Briefing Note, Geneva, 2018).

39 JA Camilleri, Michael Hamel-Green SC and Fumihiko Yoshida (eds), *The 2017 Nuclear Ban Treaty* (Routledge, 2019) 254. See also R Thakur, 'The Nuclear Ban Treaty: Recasting a Normative Framework for Disarmament' (2018) (Winter) *The Washington Quarterly* 71, 90–1.

law.[40] If we focus our skills as lawyers only on small, manageable and local concerns, but ignore challenges to, and dangers faced by, our species and planet, we will have lost our sense of priorities.[41] This is why the issues that arise in our national legal systems, and those that exist globally and regionally, are also of legitimate concern to all lawyers. The rule of law is important for our states and nations. But it is also important for the international community and for human beings everywhere who depend on an international rule of law for our survival.

Nowhere is this more so than in the challenge presented to that global community by the human rights record of the DPRK and other countries like it, and the perils for peace and security presented by the nuclear weapons arsenals and the risks that they present for human survival. There are, of course, other global perils that we must confront and resolve: dangerous pandemics like COVID-19; global climate change and warming of the biosphere; endemic poverty and overpopulation; and lack of access to adequate water and food. But no such peril is as great as that presented by nuclear weapons. Even in this area the rule of law, to which Naida Haxton dedicated her life as a lawyer, has its role to play. It is the duty of citizens and lawyers to bring this necessity to the attention of each other and of lawmakers and leaders everywhere.

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40 See the *Bangalore Principles on the Domestic Application of International Human Rights Norms* (1998), explained and elaborated in MD Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 531–2; Gregory Davies, 'The rise of judicial diplomacy in the UK: aims and challenges (2020) 40 *Legal Studies* 77.

41 Differences of approach to the issue of the relevance of international law, especially the international law on universal human rights, has given rise to differences in the High Court of Australia. See *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [62]ff (McHugh J), 617ff [152]ff (Kirby J); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224 [181] (Heydon J). Cf MD Kirby, 'Municipal Courts and the International Interpretive Principle: *AL-Kateb v Godwin*' (2020) 43(3) *University of New South Wales Law Journal* (forthcoming).

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