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Dr Rebecca Ananian-Welsh
rebecca.aw@law.uq.edu.au

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THE CONSTITUTIONAL CONSTRAINTS ON ALTERING PROPERTY RIGHTS AFTER RELATIONSHIP BREAKDOWN

PATRICK PARKINSON AM*

Section 79(2) of the Family Law Act 1975 *(Cth) provides that the court shall not make an order altering property rights unless it is just and equitable to do so. This article argues that s 79(2) is required by the constitutional foundations upon which the power to alter property rights rests. The discretion of trial judges may be wide, but it is constrained by the parameters of constitutionality and by the purposes for which Parliament may authorise the alteration of property rights. Because existing legal and equitable titles are the starting point for consideration in family property proceedings, courts must always ask whether there is a sufficient justification for stripping a party of their legal or equitable rights. The fact of relationship breakdown is insufficient. While the broad discretion given to courts to alter property rights was originally seen as a means of providing justice for women who took on the role of homemaker and parent, the practice of the family courts of giving little weight to legal title has often worked a profound injustice to women. An understanding of the constitutional constraints on judicial discretion is also very important to give effect to the assumptions that underpinned the marital relationship.*

I *STANFORD* AND SECTION 79(2) OF THE *FAMILY LAW ACT*

Section 79(2) of the *Family Law Act 1975* (Cth) ('*Family Law Act*') provides that judges must not alter property rights on marriage breakdown unless satisfied that it is just and equitable to do so. There is a similar provision in relation to de facto relationships.[1] The section is drafted as a constraint on judicial power, not as an objective for the exercise of judicial power. That is, the instruction from Parliament is not for the court to make whatever orders it considers to be just and equitable, as leading decisions of the Family Court once held,[2] but rather not to make an order altering property rights unless it is satisfied that it is just and equitable to do so.[3]

* Emeritus Professor of Law, TC Beirne School of Law, University of Queensland.

1 *Family Law Act 1975* (Cth) s 90SM(3) ('*FLA*').

2 *In the Marriage of Hickey, Re* (2003) 20 FamLR 355, [39] ('*Hickey*'); *Coghlan & Coghlan* (2005) 193 FLR 9, 22 [58].

3 Patrick Parkinson, 'Family Property Division and the Principle of Judicial Restraint' (2018) 41(2) *University of New South Wales Law Journal* 380 ('Judicial Restraint').

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In *Stanford v Stanford* ('*Stanford*'),[4] the plurality of the High Court (French CJ, Hayne, Kiefel and Bell JJ) gave new prominence to this section of the Act. It said that a court, exercising jurisdiction under the *Family Law Act*, had to consider, in every case, whether it was just and equitable to make any alteration of property rights without conflating that decision-making process with the evaluation of contributions, future needs and other considerations that Parliament has set out in ss 79(4) and 75(2) of the Act. It also made it clear, in three fundamental propositions, that the court should not assume it is just and equitable to alter property rights.[5] The plurality reaffirmed that Australian law does not recognise the idea of community property arising from marriage.

Notwithstanding the prominence given to s 79(2) by the decision in *Stanford*, and its significance also in the High Court's more recent decision in *Hsiao v Fazarri* ('*Hsiao*'),[6] the rationale for this provision has not been explored in any depth. It is argued in this article that s 79(2) is required by the constitutional limitations on the legislative power to alter property rights on marriage breakdown, and that careful consideration of the state of the legal and equitable title going into a trial may be, in many cases, a matter of gender equity. This contrasts with an assumption that has long underpinned family property law in various jurisdictions, that the broad discretion to alter property rights is necessary for women in order to avoid an undervaluing of the contribution that many women make to relationships as a homemaker and parent.

In fact, in many leading family law cases that have considered the homemaker and parent contribution over the last forty years, it has been through a failure to ask the question why women should be stripped of their legal entitlements, that injustices in outcomes have occurred.

II The Constitutional Basis for Property Division

The federal Parliament has limited powers to pass legislation altering property rights on relationship breakdown, and despite the width of the discretion conferred by s 79, it must be read down to be within the legislative powers of the Commonwealth. The stream of judicial discretion cannot rise above the constitutional source of power.[7]

The Parliament does not have an unlimited power to make laws that take away people's property rights. It has power to make laws dealing with bankruptcy and insolvency (s 51(xvii)). It also has a limited power to make laws to acquire property from people, but the acquisition must be on just terms and for a purpose in respect of which the Parliament has power to make laws (s 51(xxxi)). The

4 (2012) 247 CLR 108 ('*Stanford*').
5 Ibid 121–2 [38]–[43].
6 (2020) 270 CLR 588 ('*Hsiao*').
7 *Heiner v Scott* (1914) 19 CLR 381, 393 (Griffith CJ).

taxation power (s 51(ii)) is also a source of authority to require people to transfer funds that they own or to force the sale of assets to meet a taxation liability.

The placita in s 51 (xxi) and (xxii) that provide the main constitutional bases for the enactment of the *Family Law Act* do not specifically provide a power to alter property interests of parties to a marriage either during a marriage or following the breakdown of that relationship. However, that power has been found to exist either as an exercise of the implied incidental power consequent upon divorce, or of the marriage power.[8]

In relation to the property of de factos, the constitutional power is derived from the legislation referring powers from each state that has done so, and is constrained by the terms of those referrals.[9] While Parliament's powers in relation to de factos are not constrained by the constitutional powers concerning marriage and divorce, it would be strange if the discretion to alter property rights on the breakdown of de facto relationships were broader than for marriages. The courts are interpreting and applying the same statutory language under different statutory provisions.

The case law on s 51(xxi) and (xxii) indicates that, in relation to a marriage, the Parliament may enact a law permitting courts to alter property interests in circumstances arising out of the marital relationship or to deal with the consequences of the breakdown of a marriage. In relation to each head of power, the justification for altering property rights is that injustice might otherwise result if property rights were left unaltered. It follows from this that a necessary step in considering whether to alter property rights is to consider the current state of legal and equitable ownership, and then to ask the question whether an injustice would be done were the parties to be left to their rights at law.

A *The Marriage Power*

The High Court first considered the application of the marriage power to property in *Russell v Russell*.[10] In that case it was only necessary to consider the power to declare property interests, not to alter them. Nonetheless, Jacobs J said:

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8 See also Patrick Parkinson, 'Constitutional Law and the Limits of Discretion in Family Property Law' (2016) 44(1) *Federal Law Review* 49 ('Constitutional Law').

9 See, eg, the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 4 provides that the reference of powers is to make laws about 'financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships'. Section 1(2) confirms this in explaining the Act's purpose: 'The purpose of this Act is to refer certain financial matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of s 51(xxxvii) of the Constitution of the Commonwealth.' There has been no general reference of powers from Western Australia because the Family Court of Western Australia can rely upon the *Family Court Act 1997* (WA).

10 (1976) 134 CLR 495.

> The purpose and operation of s. 79 is clear. Even if in law or equity the title to property is in one party to a marriage, the circumstances of the marital relationship may make an alteration of property interests just and equitable.[11]

In *Fisher v Fisher* ('*Fisher*'),[12] which concerned the validity of s 79(8) of the *Family Law Act*, the Court gave further consideration to the scope of the marriage power to justify the alteration of property rights. Gibbs CJ, and Mason and Deane JJ, all made it clear that it is not sufficient for a valid law altering property rights that the parties happened to be married. The proceedings must arise out of the marital relationship. Those circumstances provided the justification for altering property rights.

To similar effect, Brennan J said this:

> A jurisdiction to entertain any proceeding between parties to a marriage with respect to their property whether or not the proceeding arises out of the marital relationship cannot be created in reliance on the marriage power: *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, at pp 510–511, 527–528, 542, 552–553. On the other hand, if the jurisdiction is limited so that its exercise is governed by considerations arising out of the marital relationship, the creation of the jurisdiction is supported by s 51(xxi), at least where the parties to the proceedings are the parties to the marriage.[13]

Thus, central to the interpretation of s 79(4) in its constitutional context, is that the Court is asked to consider what circumstances arising out of the marital relationship justify the alteration of property rights, looking at the various factors listed in that subsection.

Brennan J went on to indicate that the jurisdiction is meant to be exercised 'only in cases where the moral obligations arising out of the marriage remain unsatisfied.'[14] In *Stanford*, the plurality indicated that Brennan J's reference to moral claims should not be misunderstood. The rights of the parties, it made clear, must be determined according to law and not by reference to other, non-legal considerations.[15] The important point remains that the justification for a property order lies in obligations arising out of the marriage which remain unsatisfied on the current state of the legal and equitable titles.

Dawson J spoke in similar terms to Brennan J. He said that it was not necessary to consider in that case how the limitation to matters arising out of the marital relationship affects the operation of s 79, but he observed:

> It is enough in this case to say that the limitation means that while s 79(1) authorizes the alteration of existing rights and the creation of new ones, it does so only to satisfy the claims arising from marriage upon the property of either spouse.[16]

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11 Ibid 553.
12 (1986) 161 CLR 438 ('*Fisher*').
13 Ibid 456.
14 Ibid 458.
15 *Stanford* (n 4) 125.
16 *Fisher* (n 12) 451.

In *Dougherty v Dougherty*,[17] the Court gave further consideration to the issues. Mason CJ, Wilson and Dawson JJ said of s 79:

> It purports to confer a wide discretionary power to vary the legal interests in any property of the parties to a marriage or either of them, but with no reference at all to the criteria by which a permissible claim to the exercise of the power may be identified. The validity of s 79 did not fall to be determined by this court in *Russell v Russell*, but the reasoning in that case indicates that the section can only have a valid application with respect to a claim based on circumstances arising out of the marriage relationship.[18]

Later in their reasons, their Honours referred to the court's power to 'alter the respective property interests of the parties inter se for reasons associated with and finding their source in the marriage relationship'.[19] It is not only that the proceedings must arise out of the marital relationship; that is a jurisdictional question. The reasons for altering property rights must also arise from the circumstances of the marital relationship and, to this extent, s 79 needs to be read down.

B *The Divorce Power*

In *Lansell v Lansell* ('*Lansell*'),[20] the High Court had to consider a constitutional challenge to s 86 of the *Matrimonial Causes Act 1959* (Cth), which gave the court the power to order a settlement of property in association with proceedings for the dissolution of marriage or other principal relief. The High Court upheld the validity of the provision unanimously. Kitto, Menzies and Windeyer JJ thought that it was valid within the implied incidental power which attaches to s 51(xxii) of the Constitution.[21] Taylor and Owen JJ thought that the provision was encompassed by the term 'matrimonial cause'.[22]

Kitto J stated that, in a divorce, a 're-adjustment of the property rights of the spouses may be required if consequential injustice to one or both of the spouses and to the children is not to result.'[23] Consequently, s 86 of the *Matrimonial Causes Act 1959* (Cth), which provided for such property division, was within constitutional power. In *Sanders v Sanders* ('*Sanders*'),[24] Windeyer J quoted Kitto J's words with approval in a passage explaining the effect of s 86.[25]

Section 79 is thus constitutionally valid only to the extent that it deals with circumstances arising out of the marital relationship or fulfills a remedial role in dealing with the consequences of marriage breakdown. While, as the High Court

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17 (1987) 163 CLR 278 ('*Dougherty*').
18 Ibid 285–6 (citations omitted).
19 Ibid 286.
20 (1964) 110 CLR 353 ('*Lansell*').
21 Ibid, Kitto J at 361–2; Menzies J at 369; Windeyer J at 370.
22 Ibid, Taylor J at 366; Owen J at 370.
23 Ibid 361.
24 (1967) 116 CLR 366 ('*Sanders*').
25 Ibid 381.

held in *Stanford*, that power extends to the resolution of property disputes where the marriage has not broken down, the Court must nonetheless be satisfied that it is just and equitable to make an order. It follows that the purpose of the power given in s 79 to alter property interests is to prevent an injustice that would otherwise occur because of the circumstances of the marriage or its breakdown if no order were made. It is in this context that the term 'just and equitable' in s 79(2) needs to be understood.

This is reflected in the early jurisprudence of the Family Court. In *Rogers & Rogers*,[26] the Full Court cited with approval Strauss J's view in *Ferguson & Ferguson* ('*Ferguson*'):

> It seems to me, that the main purpose of sec 79(2) is to ensure that the Court will not alter the property rights of the parties, unless it is satisfied that cogent considerations of justice require it to do so, and that if the Court decides that it is requisite to make any order under the section, the Court must be satisfied that the alterations so ordered, will go no further than the justice of the matter demands.[27]

The language of 'cogent considerations of justice' reflects that of Barwick CJ in *Sanders*.[28]

Once this is understood, it becomes apparent that the much-vaunted width of discretion of trial judges, acknowledged by the High Court in *Stanford*,[29] is actually not so wide after all. It is wide, but it is constrained by the parameters of constitutionality and by the purposes for which Parliament may authorise the alteration of property rights.

In the same way, the terms 'just and equitable' in s 79(2) have a constitutional context that informs their meaning. They are not synonymous with whatever the judge happens to think is fair. The *Constitution* does not allow a Chapter III court to be invested with a discretion to exercise justice under palm trees.[30] Several points follow from this.

III Implications of the Constitutional Framework

A *The Importance of Existing Legal and Equitable Rights Under s 79(4)*

The first point is that the court must pay close attention to the legal and equitable rights of the parties going into the trial, because the fundamental question

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[26] (1980) FLC 90-874, 75, 539 ('*Rogers*').
[27] (1978) 34 FLR 342, 358.
[28] *Sanders* (n 24) 376.
[29] *Stanford* (n 4) 120.
[30] Parkinson, 'Constitutional Law' (n 8) 68–72. A Chapter III court is a federal court established under Chapter III of the Commonwealth Constitution which deals with judicial power.

required to be asked by s 79(2) is whether there is any justification in altering them, and if so, to what extent. In *Mallet v Mallet* ('*Mallet*'),[31] the High Court decisively rejected any notion that there is a starting point or presumption that the property will be shared equally between the parties. Such a presumption or starting point, it said, is nowhere to be found in the legislation. Although s 79(2) did not get much attention in *Mallet*, *Stanford* made it clear that this subsection is the real starting point for consideration of property rights on separation or divorce. That is, legal and equitable title should prevail unless and until the court is persuaded of the need to exercise its statutory powers, and even if it is so persuaded, the current state of legal and equitable title represents a vital starting point in determining the extent to which alteration of property rights can be justified because of considerations arising out of the marital relationship or its breakdown.

The importance of justifying an alteration of the legal and equitable interests was at the heart of the difference between the majority and minority of the High Court in *Hsiao*.[32] The case involved a marriage that lasted only 23 days. The couple had been together for some time before this, and had tried to have a child together, but had not lived in a de facto relationship. The husband had purchased a house for $2.2 million, which, with renovations, had become worth more than $3 million at the time of trial. When it was purchased, he gave her, as a gift, a 10 per cent share in it. Later, at a time when he was in hospital with a suspected heart attack, his wife pressured him (so the trial judge found) into signing a transfer of the property into a joint tenancy. While this might have made the transaction voidable due to undue influence or pressure, he subsequently entered into a deed that reflected that intent, at a time when he was not under such pressure. The deed provided for money to be paid to the wife's brother and sister should she predecease him, reflecting substantially the value of a half share in the property at the time.[33] This deed was not a binding financial agreement.

The trial judge did not consider it necessary to determine whether the transaction was voidable for undue influence, or subsequently ratified because of the deed. This was because he considered, in any event, that it was just and equitable to alter property rights. The house had been purchased and renovated in the expectation that the marriage would last and that this would be their marital home. The lack of fulfilment of this expectation justified the alteration of property rights.[34] He ordered the transfer of the home back into the husband's sole name and awarded the wife $100,000 plus the $80,000 previously transferred to her to pay her legal fees, in lieu of the half share in the property, which was worth about $1.5 million.

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31 (1984) 156 CLR 605 ('*Mallet*').
32 *Hsiao* (n 6).
33 Ibid 597–600 [15]–[21], 600–1 [24].
34 Ibid 601 [25].

The Full Court and the majority of the High Court upheld this as a reasonable exercise of the trial judge's discretion. Kiefel CJ, Bell and Keane JJ rejected criticisms of the trial judge for not determining whether the transfer of the property into joint names had been procured through undue influence or pressure, and whether, even if that were so, the deed had in effect ratified and confirmed the transfer. This was because the wife had chosen not to participate in the trial. As a consequence, she did not run the arguments at trial that she subsequently ran on appeal.[35]

There was a strong dissent from Nettle and Gordon JJ, who had granted the special leave. They considered that, as *Stanford* requires, the judge first had to determine the legal and equitable interests of the parties. They said that 'it is the statutory imperative to take into account the considerations stipulated by the legislature, including, critically, the existing interests of the parties, that characterises the power conferred by s 79 as judicial power. Consequently, proper consideration of existing interests is of fundamental importance.'[36] The trial judge had not credited the wife with a financial contribution of the additional 40 per cent of the equity in the home since it could not be seen as a gift to her as a result of the circumstances under which it arose. That is, he made an implicit finding in the analysis of the parties' respective financial contributions under s 79(4)(a) without a close analysis of the facts, in accordance with equitable principles, to determine whether the gift was voidable or whether the deed constituted a subsequent ratification.

Nettle and Gordon JJ were particularly critical of the Full Court for treating the resolution of the dispute about the transfer of the property into joint names as a 'distraction'.[37] The legal and equitable interests 'should have been front and centre — the very starting point — in the determination of what was "just and equitable" for the purposes of s 79', they said.[38] The significance, for them, of resolving the issues of legal and beneficial ownership, was that the next question had to be whether it was just and equitable to deprive the wife of her half share in the property, a share with a value in excess of $1.5 million. Was it just and equitable for her to receive only $100,000 plus the $80,000 received in advance to assist her with her legal costs? They asked 'what justice and equity could there be in stripping the appellant of the totality of her 50 per cent legal and beneficial interest in the property and conferring it on the respondent, who, on the evidence,

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35 Ibid 608 [50], 609–10 [53].

36 Ibid 615–16 [66]. Their reference to the requirements necessary for the power under s 79 to be an exercise of judicial power is in essence a reference to one of the constitutional limitations that constrains judicial discretion. A Chapter III court cannot exercise justice under palm trees: Parkinson, 'Constitutional Law' (n 8) 68–72.

37 Ibid 620–1 [77].

38 Ibid 621 [78].

was an extremely wealthy man'?[39] He had assets of more than $9 million at the time of trial.[40]

In the minority's view, therefore, the existing legal and equitable interests ought to have a persuasive influence upon the determination of whether, and to what extent, it is just and equitable to alter those property rights.

On the minority's approach, the significance of determining the legal and equitable interests of the parties is not merely because it forms step one of the four-step approach in *Hickey*[41] to identify what property rights might need to be altered in the final orders. Rather, determining the legal and equitable interests of the parties is is significant because it is the starting point from which the court must consider whether it is just and equitable to deprive a party of some of those rights, and if so, to what extent.

This contrasts with the position so often seen in the Family Court's jurisprudence that, as long as the judge has found reasons to make some kind of order altering property rights, thereby crossing the s 79 threshold, then consideration of what orders are just and equitable rests entirely on a consideration of s 79(4). No further reference is needed as to why it is justifiable to deprive a party of his or her legal or equitable rights. After *Stanford*, it has become the norm for judges to pay lip service to the requirement of s 79(2) by invoking just one paragraph of the High Court's judgment in that case, paragraph 42, to the effect that alteration of property rights is justified because the parties no longer share a common home.[42] On that approach, little more than the fact of relationship breakdown is sufficient reason to open up the court's wide discretion to alter property rights.

It is submitted that Nettle and Gordon JJ's approach to the issues is far more consistent with the constitutional basis for alteration of property rights than the approach typically adopted, applying the four steps in *Hickey*. It is also consistent with what Bryant CJ and Thackray J said in *Bevan & Bevan*,[43] quoting Strauss J in *Ferguson*, to the effect that s 79(2) 'is directed to both the questions whether an order should be made at all, and what the order should be, if one is made'. Strauss

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39 Ibid 621–2 [81].

40 *Fazarri & Hsiao (No 2)* [2018] FamCA 447, [69].

41 *Hickey* (n 2).

42 Paragraph 42 of *Stanford* (n 4) does not say that just because the marriage has come to an end it is just and equitable to alter property rights. What the plurality in that case observed, quite rightly, is that 'in many cases' it is just and equitable to alter property rights because the arrangements that were satisfactory to the parties during the marriage (involving co-residence, very often with children) can no longer operate now that the parties do not have the common use of property. It is frequently just and equitable to alter property rights in favour of the spouse who will have primary care of the children if for no other reason than to meet the children's housing needs. However, in *Bevan & Bevan* (2013) 279 FLR 1, 15 [70] ('*Bevan*'), Bryant CJ and Thackray J treated paragraph 42 as per se justifying the alteration of property rights in most cases, thus appearing to render the s 79(2) requirement as being of little more than token importance. See further, Parkinson, 'Judicial Restraint' (n 4).

43 *Bevan* (n 42) 18 [87].

J had said in that case that 'the Court must be satisfied that the alterations [to property rights] so ordered, will go no further than the justice of the matter demands.'[44]

B *The Benefits Already Received from the Other Spouse During the Relationship*

Second, it is submitted that the constitutional basis for property alteration requires at least some consideration of the benefits each of the parties has already received from the marriage before the court can answer the question about whether there is a need to alter property rights further. To adapt the questions asked by Kitto J in *Lansell*, what injustice would result if legal title were to remain unaltered, given the benefits that the applicant spouse has already received from the relationship? Or adapting the language of Brennan J in *Fisher*, what obligation, arising out of the marital relationship, remains unsatisfied?

Consider, for example, a situation where a man with high earning capacity goes through a marriage breakdown, makes a property settlement with his ex-wife, and thereafter sees his teenage children at weekends and in school holidays. A couple of years after the divorce from the first wife, he forms a de facto relationship with another woman who has no children of her own. That relationship breaks down after, say, seven years, and there are no children of that relationship. Both of them worked throughout the relationship, but his earnings were much higher than hers. They kept their finances separate but he paid for most of the outgoings in the household.

There could be some kind of claim based upon care of the de facto husband's children,[45] as well as future needs factors; but in considering whether it is just and equitable to alter property rights, consideration must at least be given to the benefits the de facto wife has already received. That might be, for example, that she has enjoyed a very high standard of living for the last seven years, which she could not have enjoyed otherwise; or that because he provided the home and paid the bills, she had no housing costs and could save her own money. These are not insubstantial benefits, and they must be weighed in the balance in determining whether, as a consequence of a seven-year childless de facto relationship, there is any injustice in leaving property rights as they stand at law.

There is authority that supports the contention that, when considering s 79(4)(c), the kinds of contributions made by the husband in providing a high standard of living for his wife should weigh in the balance as a contribution to the welfare of the family constituted by the couple. In *Ashton & Ashton*,[46] Strauss J,

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44 Cited with approval by the Full Court in *Rogers*, see above n 26 and accompanying text.

45 *In the Marriage of G and D J Robb* (1994) 18 FamLR 489.

46 *In the Marriage of T M and P L Ashton* (1986) 11 FamLR 457.

with whom the other judges on the Full Court agreed, observed that the husband made contributions to the welfare of the family by his financial provision:

> The husband and the wife contributed to the welfare of the family, he by providing generously for the support of the wife and children and fulfilling the expected role as a husband and parent in the home, and she by running the household and being the primary caretaker of the children.[47]

Nygh J made similar observations about the respective contributions to the welfare of the family in *Aldred & Aldred (No. 3)*.[48] Under the heading of 'welfare of the family' he observed:

> [T]he husband's financial contribution is overwhelming. To his great credit he pursued a policy of treating all the children, whether his or hers, equally. He financed their education at private schools and made provision for their futures … he provided the household with a very high standard of living.
>
> So far as the non-financial contributions to the welfare of the household are concerned, the wife with some assistance from domestic help paid by the husband, provided for the combined family of six boys during cohabitation and continued to render household services for the husband … If his financial contribution was outstanding, so was her care for the family.[49]

In *Ferraro & Ferraro* ('*Ferraro*'), Baker, Murray and Fogarty JJ observed that the husband's financial support of the family during the marriage was an important contribution by him under s79(4)(c).[50]

These dicta provide authority for the proposition that, when focusing on the question of whether any alteration of property rights is just and equitable, the court must consider what obligation, arising out of that relationship, remains unsatisfied, taking account of the contributions that one spouse has already made to the wellbeing of the other by means of financial provision during the course of the relationship.

C *Disparities in Wealth*

The third implication is that there is no constitutional power for the federal Parliament to authorise courts to redistribute property from the more well-off to the less well-off, without the justification arising from the circumstances of the marital relationship or its breakdown. In appropriate circumstances, this may be a reason for invoking s 79(2). As Wilson J explained in *Mallet* concerning s 79:[51]

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47 Ibid 463.
48 (1988) FLC 91-933.
49 Ibid [34]–[35].
50 (1992) 111 FLR 124, 151 ('*Ferraro*').
51 *Mallet* (n 31) 638.

> The objective of the section is not to equalize the financial strengths of the parties. It is to empower the court, following a dissolution of a marriage, to effect a redistribution of the property of the parties if it be just and equitable to do so …

The Full Court made it clear in *Clauson & Clauson* that a disparity in financial resources is not itself a reason for adjustment of property interests.[52] Section 79, it said, 'is not an exercise in social engineering'.[53] There are of course a great many situations where an imbalance in the earning capacity of each of the parties at the end of the relationship reflects the consequences of the role division within that relationship, as one spouse, usually the woman, prioritises family responsibilities for a time over involvement in the workforce. In *Waters & Jurek*,[54] Fogarty J explained why a disparity between parties' incomes may be relevant to the need to make a determination that is just and equitable:

> In most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests — as individuals and as a partnership … Post-separation, the party who had assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage. Yet that party often cannot simply turn to more financially rewarding activities. Often, opportunities to do so are no longer open, or, if they are, time is required before they can be accessed and acted upon.[55]

These are circumstances arising out of the marital relationship. However, in other circumstances, where a disparity in wealth does not arise from the circumstances of the relationship, an application of the discretion to award one spouse more of the assets 'simply based upon the situation … that one party is very rich while the other party is not',[56] fails to read the *Family Law Act* down to remain within constitutional power. It is not a justification for altering property rights.

D *Assets Acquired With no Connection to the Marital Relationship*

Fourth, it may be beyond constitutional power to alter property rights in circumstances where there is no justifiable claim to a share of the existing assets that arises from the circumstances of the marital relationship or its breakdown. This is of particular significance when assets are acquired long after the separation. An example, where the reasoning was based upon s 79(2), is *Zaruba & Zaruba*.[57] The application in that case was filed in 2008, heard by a trial judge, sent back for redetermination by the Full Court, and reheard in 2015. That decision was again overturned on appeal in 2017. The Full Court re-exercised the discretion.

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52 (1995) 18 FamLR 693.
53 Ibid 711. See also *Kavanagh & Metzger* [2010] FamCAFC 201.
54 (1995) 126 FLR 311.
55 Ibid 321–2.
56 *In the Marriage of Farmer and Bramley* (2000) 27 FamLR 316, 330.
57 [2017] FamCAFC 91 ('*Zaruba*').

By the time of the second appeal, the parties had maintained separate finances for 30 years and been divorced for over 20 years. They had lived together under the one roof until 2005, and during that time, twins who were born to the wife from a different father after the divorce, lived with the parties. To that extent, then, the husband made a parenting contribution that could be taken into account under s 75(2)(o) of the *Family Law Act*.[58] In addition to the former matrimonial home, a property, known as Mindarie, had been acquired by the wife some five years after they had separated their finances, with no contribution from the husband. The trial judge awarded the husband 10 per cent of this asset, as well as dealing with the former matrimonial home.

This was overturned by the Full Court. The primary reason was by application of s 79(2). The Full Court said this:

> In the vast majority of cases, it will be appropriate to address the s 79(2) question by ascertaining the legal and equitable interests in property without making distinctions between individual assets. That is because the "express and implicit assumptions that underpinned the existing property arrangements" can be seen to apply (to the extent and degree to which they do apply) to all of the property of the parties or either of them, including property in which the legal interests vary.
>
> However, the position is likely to be different in circumstances where, as here, the characteristics of the property and the circumstances of its acquisition, improvement and the like can be seen to differ significantly and where, as here, the parties' relationship had taken on quite different characteristics during the period to which the s 79 inquiry is directed.
>
> We are respectfully unable to see any evidentiary foundation by which it was open to his Honour to conclude that it was just and equitable to alter the wife's legal and equitable interest in Mindarie.[59]

The Court held in any event that the same result should have been reached by exercise of the judicial discretion, since there was no evidence that the husband had made any contribution.

Another example is *Skoflek & Baftirovsky*.[60] The parties had been married in Yugoslavia in 1947. They were divorced there in 1956. That divorce decree did not include any property settlement. The evidence indicated that they had little property of any significance at the time. After the divorce the parties moved to Australia. They lived together and acquired assets. In 1982 they separated. In 1985 the wife was granted leave to institute proceedings under s 79 pursuant to s 44(3). The husband appealed orders for property settlement, arguing that the Court lacked jurisdiction to entertain the wife's application under s 79 because of a lack of nexus to the marriage (at this stage, there was no federal jurisdiction to alter property rights on the breakdown of a de facto relationship).

The Full Court agreed with the husband's submission. It said:

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58 *Robb* (n 45).

59 *Zaruba* (n 57) [38]–[40].

60 (1988) 90 FLR 126.

> Since para (ca) relates to proceedings with respect to the property of the parties, it is those proceedings which must arise out of the marital relationship ... This is not to say that the court may not consider contributions made before the commencement or after the termination of a marital relationship or include in its orders assets acquired after separation or even dissolution. Once the court has jurisdiction there are many matters which it can consider pursuant to sec 79 and 75(2).
>
> However, the origin of the claim to adjustment of property rights must arise from the property relationship of the parties during marital cohabitation. Where all claims have been disposed of... or no claim could have arisen in the absence of any assets as in the present case, it is difficult to see how the proceedings under sec 79 can be said to have arisen out of the marital relationship.[61]

This view was overruled by another bench of the Full Court in *Kowalski & Kowalski*.[62] This was also a case involving post-divorce cohabitation for a lengthy period after a short marriage that had ended in divorce. The Full Court in that case said:

> [O]nce a marriage has been celebrated between the parties, the entire relationship between the parties whether arising out of contributions before, during or after the formal tie of marriage was entered into or dissolved, falls within the ambit of Part VIII of the *Family Law Act 1975*. This principle explains why contributions made between cohabitants who later marry are judged according to the criteria set out in the *Family Law Act 1975* and not according to those set out in the *Property Law Act 1958* (Vic.) or the *De Facto Relationships Act 1984* (NSW). It is also consistent with the proposition that post separation and post divorce contributions continue to be taken into account. These parties are before the Family Court because they were once married and hence the proceedings can be said to arise out of the marital relationship, even if the property, the subject of such proceedings, does not.[63]

However, the issue cannot be regarded as completely settled. In *Benenke & Benenke*, Fogarty and Finn JJ said:

> To the extent that *Kowalski's case* may suggest that, once the parties have or had been married, any financial dealings, no matter how far they pre-date or post-date the marriage, are encompassed by s 79, we have reservations about that as we feel that there must be some causal or at least temporal connection.[64]

The issue typically arises in cases where there is a post-separation inheritance. In many such cases, the inheritance has been taken into account as a factor under s 75(2), and this represents a sufficient connection to the marriage,[65] but potentially a constitutional argument is open as to whether it can be taken into account in terms of contributions if it is not referable to the efforts of the parties

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61 Ibid 130.
62 (1992) 109 FLR 193.
63 Ibid 201.
64 (1996) 20 FamLR 841, 847.
65 See e.g. *Wall & Wall* (2002) FLC ¶93-110; *Jarrott & Jarrott (No. 2)* [2012] FamCAFC 72; *Marcel & Garrigan* [2013] FamCAFC 94; *Bevis & Bevis* [2014] FamCAFC 147.

in the course of their marriage.[66] The constitutional limits of s 79 in relation to post-separation assets was raised, but not authoritatively dealt with, in *Calvin & McTier*.[67]

IV Gender Equity and Section 79(2)

As has been argued, there are constitutional constraints that ought to impact upon the interpretation and application of s 79 of the *Family Law Act* and how the wide discretion of the judge is exercised. One of the problems in the current and very inconsistent case law on the division of family property on relationship breakdown is that, once a reason is found to justify altering property rights (which may be for no greater reason than that the parties no longer share the same home), little attention is then paid to the question of whether it is just and equitable to strip a person of their legal or equitable rights and, if so, to what extent.

Put differently, once a justification is found for exercising the s 79 power, the legal and equitable interests of the parties cease to be seen as having any gravitational pull on how the discretion should be exercised. On this approach, it is not necessary to bear in mind the statutory principle of judicial restraint contained in s 79(2) once the threshold required by that subsection is crossed. Instead, the importance placed on legal and equitable rights in the s 79(2) inquiry is displaced by the statutory considerations, with the outcome usually based upon a percentage assessment of 'contributions' and other factors, mainly future needs. The assumption is that the proposed orders will be just and equitable for no other reason than that the judge has purported to apply the statutory considerations in s 79(4).

However, there is reason to think that, in 2024, this casual displacement of legal and equitable title in favour of a broad statutory discretion may not provide the benefit to women that was once the primary justification for that statutory discretion. The origins of the statutory regime lie in the perceived inadequacy of equitable doctrines to provide justice for women on relationship breakdown at a

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66 See, eg, *Singerson & Joans* [2014] FamCAFC 238. The issue has also arisen in the context of post-separation lottery wins, see *Eufrosin & Eufrosin* [2014] FamCAFC 191 in which the Full Court chose not to follow the reasoning concerning contributions to a post-separation lottery win in *Farmer & Bramley* (n 56), on which the appellant had relied.

67 [2017] FamCAFC 125. The wife commenced the proceedings in January 2015 and in March 2015 was given leave out of time, pursuant to s 44(3) of the Act to pursue the property claim against the husband. That meant that the case was filed around five years after separation, and a little under four years after the divorce. The inheritance represented 32% of the joint assets of the parties. The inheritance was not received until three years after the divorce, so if the wife had filed her application in a timely manner, the inheritance would not have been part of the property available for division. The trial judge's decision was challenged on appeal on the basis that there needed to be a connection between the asset sought to be divided and the marriage, citing the High Court in *Dougherty* (n 17). The Full Court rejected this argument, citing *Stanford* to the effect that the Court must take the parties' property as at the date of trial.

time when, so often, title to the family home was in the name of the man, and when it was common for women to be stay at home mothers.[68] As English family law scholar John Eekelaar wrote of the general law doctrines: 'A woman's place is often still in the home, but if she stays there, she will acquire no interest in it.'[69]

Gender equity has long been, quite rightly, an important consideration in family property cases. Perhaps it is ongoing concern about justice for women that has led the Family Court to be so resistant to the three fundamental principles articulated in *Stanford*.[70]

However, a notable feature of the Family Court jurisprudence is that in some of the leading cases on the homemaker and parent contribution over the years, the discretionary approach that gives little or no weight to legal and equitable title has actually worked to the disadvantage of women. That issue continues to this day. The wife in *Hsiao*,[71] for example, would undoubtedly have been better off if the trial judge had been required to provide 'cogent considerations of justice' as to why the wife should have been stripped of her joint ownership of the home. Perhaps on the facts, those cogent considerations of justice could have been articulated, but Nettle and Gordon JJ considered that the trial judge had not adequately justified the alteration of property rights.

Women's disadvantage arising from discounting legal title goes back to the leading case that articulated the importance of the homemaker and parent contribution: *Rolfe and Rolfe*.[72] The judgment of Evatt CJ in that case still constitutes the classic explanation, in the Australian jurisprudence, for giving the homemaker and parent contribution substantial weight. Her Honour said:

> The purpose of s 79(4)(b), in my opinion, is to ensure just and equitable treatment of a wife who has not earned income during the marriage, but who has contributed as a homemaker and parent to the property. A husband and father is free to earn income, purchase property and pay off the mortgage so long as his Wife assumes the responsibility for the home and the children. Because of that responsibility she may earn no income or have only small earnings, but provided she makes her contribution to the home and to the family the Act clearly intends that her contribution should be recognized not in a token way but in a substantial way.[73]

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68 Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31(1) *Federal Law Review* 1, 20–2.

69 John Eekelaar , 'A Woman's Place – a Conflict between Law and Social Values' (1987) *Conveyancer and Property Law*yer 93. The principle for why men should be required to share their property with women was well expressed by Sir Jocelyn Simon, the President of the Probate, Divorce and Admiralty Division of the High Court in England, who explained in a speech that the cock can feather its nest because it doesn't have to spend most of its time sitting on it: Sir Jocelyn Simon, 'With All My Worldly Goods' (Presidential Address, Holdsworth Club, 20 March 1964).

70 Patrick Parkinson, 'Why Are Decisions on Family Property So Inconsistent?' (2016) 90(7) *Australian Law Journal* 498, 520–2.

71 *Hsiao* (n 6).

72 (1977) 34 FLR 518.

73 Ibid 519.

Reading that explanation, one might think that title to the main assets was in the husband's name, but this was not so. The wife was a joint owner of the family home, and this was the only asset of substance, raising squarely, therefore, the application of s 79(2). The Full Court decision favoured the husband because he had provided the primary care of the children since separation for the last five years, and still needed to house his 15-year-old daughter. That is a conventional application of the contribution provisions and the s 75(2) factors. The net value of the home (the only asset) was $30,000 and the wife ended up receiving a quarter of this, that is, $7,500.

The wife would have been much better off leaving title as it stood, but it may be that the husband would also have been better off. Even in the mid-1970s, this was a very modest asset-pool case. The costs of litigation and appeal to the husband may well have dwarfed the benefits he received from the application of s 79 in his favour. The broad discretion of s 79 imposes heavy costs on low-income parties who cannot find a way to settle.

In other leading cases, failure to look carefully at the legal property rights of the parties going into the trial, and asking why those rights should be diminished, has been manifestly to women's disadvantage. One such case is the well-known one of *Ferraro*.[74] In that case, the Full Court overturned the trial judge on the basis that inadequate consideration had been given to the wife's contribution as a homemaker and parent.

The parties were married for 27 years and had three children. When they commenced married life, they were in their early twenties and had no assets. The husband initially worked as a carpenter and, early on, the wife helped with bookkeeping and other such duties. However, after the birth of their first child the wife devoted herself to the duties of homemaker and parent. They had three children. The husband built up a business that proved to be hugely successful. About $10.5 million had been acquired in the course of the marriage. During the course of that development, he worked long hours, leaving the parenting of the children almost entirely to the wife.

The trial judge awarded the woman 30 per cent of the total assets. The wife successfully appealed because, so the Full Court held, such a result undervalued her homemaker contribution. However, the Full Court still only credited her with 37.5 per cent on the basis of contributions.

Ferraro was the case in which the doctrine of special contributions was first articulated. It provided a justification for departing from the usual practice of the Court in quantifying the homemaker and parent contribution as being equal to the efforts of the other spouse in earning income during the course of a marriage, and when there is no imbalance of contributions due to premarital assets or inheritances. The basis of the concept of special contributions, as expressed in

74 *Ferraro* (n 50).

Ferraro, was that the entrepreneurial spouse had shown special skill in accumulating such a large amount of wealth.

The doctrine of special contributions was a controversial doctrine because it conflicted with norms of gender equality and appeared to undervalue women's contributions to the marital partnership.[75] The debate on this issue was part of a larger critique of the Family Court's approach to assets involving businesses. Numerous scholars argued that the homemaker contribution was undervalued in these cases.[76]

In fact, the bigger problem with *Ferraro* is that the Court did not take proper account of the way in which the partnership of husband and wife had been expressed through the legal structures. Baker, Murray and Fogarty JJ noted that, although there were some ventures into which the husband entered through companies controlled solely by him, substantially the business was conducted through jointly owned company structures.[77] The case proceeded on the basis that essentially everything was jointly owned. It was the husband, in that case, not the wife, who was asking the court to alter legal title in order to deprive the wife of shares that she owned.[78]

Had the Court focused on the s 79(2) question, in the light of the constitutional basis for altering property rights, it might well have reached a different conclusion. Surely the husband could not have complained if the judge had left their legal positions at law, for the partnership of husband and wife formed the financial substratum of their whole relationship. He should not have been permitted to hold her out as an equal partner in the business structures, and then to deny that equality when the marriage broke down.

Another example where the assessment of contributions disadvantaged the woman by diverting focus away from legal rights, was *JEL & DDF*.[79] This was a case of a long marriage involving a homemaker and parent contribution by the wife in bearing and raising their three children. A substantial fortune had been built up through the husband's efforts in developing a gold mine in Queensland. The husband and wife were the sole directors and equal shareholders in each of the trustee companies, and could vote to distribute any or all of the income

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75 See, eg, Lisa Young, 'Sissinghurst, Sackville-West and "Special Skill"' (1997) 11(3) *Australian Journal of Family Law* 1. See also the criticism of the doctrine by Nicholson CJ and Buckley J (obiter) in *Figgins & Figgins* (2002) 173 FLR 273.

76 See, eg, Hilary Charlesworth and Richard Ingleby, 'The Sexual Division of Labour and Family Property Law' (1988) 6(1) *Law in Context* 29; Hilary Charlesworth, 'Domestic Contributions to Matrimonial Property' (1989) 3(2) *Australian Journal of Family Law* 147; Regina Graycar, 'Gendered Assumptions in Family Law Decision-Making' (1994) 22(2) *Federal Law Review* 278; Regina Graycar, 'Matrimonial Property Law Reform and Equality for Women: Discourses in Discord' (1995) 25(1) *Victoria University of Wellington Law Review* 9; Rebecca Bailey-Harris, 'The Role of Maintenance and Property Orders in Redressing Inequality: Re-Opening the Debate' (1998) 12(1) *Australian Journal of Family Law* 3.

77 *Ferraro* (n 50) 149.

78 Ibid.

79 (2000) 163 FLR 157.

and/or capital of the trust to either the husband or the wife, in their absolute discretion. Powers of appointment of the trustees to the different trusts were variously distributed.[80]

On the basis of a s 79(4) assessment of contributions, the Full Court gave the wife only 27.5 per cent of the assets. Again, had the question been asked whether it was just and equitable to deprive the wife of assets that she had a prima facie equal entitlement to control through the relevant trust structures, the result might well have been different. The business and trust structures indicated an intention that they be equal partners, and this underpinned the financial arrangements made during the course of the marriage.

The same adverse consequences of not paying close attention to the state of the legal title going into the trial is evident in the landmark case of *Fields & Smith*, in which the doctrine of special contributions was finally repudiated. This was a case where the husband built up a highly successful business while the wife was engaged as a homemaker and parent to their three children in the course of a 29-year marriage. The trial judge assessed contributions as 60–40 per cent in favour of the husband.[81] His decision was overturned on the appeal, with the wife getting 50 per cent.[82]

The outcome gave the wife no more than she already had, going into the trial. The parties had an equal shareholding in the family business. They were joint owners of the family home. Apart from some jewellery that was owned by the wife, everything was jointly owned. The husband's application involved depriving the wife of some of her property. If the Court had considered s 79(2) properly, it could not have sensibly concluded that property rights should be altered. The Full Court result was correct, but for the wrong reasons.

V Legal title and the stated and unstated assumptions of the parties

The state of the legal title is very often an indication of the way in which the parties understood the financial substratum of their relationship during happier times. Gone are the days when it was common for the property to be held just in the husband's name in a marriage where the couple specialised in their roles, and the wife was primary carer of the children. Typically, married couples at least will

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80 Ibid 163 [44].

81 *Smith & Fields* [2012] FamCA 510.

82 *Fields & Smith* (2015) 53 FamLR 1.

have joint title to the family home, and at least one joint bank account.[83] Often, only the superannuation will not be held jointly.

The legal title to assets will usually reflect the parties' mutual intentions about property rights. While many couples purchase property and have bank accounts in joint names, others, adopting a more individualistic approach to the relationship, keep their finances separate, apart from maybe a joint account for household expenses. In *Stanford*, the plurality of the High Court drew attention to this issue of the couple's intentions by speaking of the stated and unstated assumptions of the parties as to their property rights. They said that there must be 'a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage'.[84]

Just as in some cases equal ownership of the assets, or an equal right to control the assets, will be evident in the legal title to real estate or the structure of companies or trusts, so, conversely, a lack of sharing in terms of property rights will be indicative of the stated and unstated assumptions of the parties. People may go through a succession of intimate partnerships in the course of their lives, none lasting for a particularly long time. Separation of finances is much more common in second or subsequent marriages or de facto relationships than in first relationships.[85]

Consideration of those stated and unstated assumptions ought to be particularly significant in cases where couples are childless, as in such cases the disadvantage usually experienced by females in withdrawing from the workforce or reducing participation in paid work in order to care for the children is not a factor.

Even in a childless relationship, the court must consider contributions to the welfare of the family constituted by the parties. It is not that the contribution to the welfare of the family is irrelevant in cases where the couple have no children or there is no role specialisation. Parliament has required judges to take contributions to the welfare of the family into account without limiting it in this way. The problem is rather that, in situations where there is no role specialisation as homemaker and parent, there is very often no reasonable basis for saying that

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83 According to one large Australian survey in 2006–7, 83% of married persons had joint accounts, either only joint or combined with separate accounts, with half having only a joint account. Conversely, 85% of persons in de facto relationships had separate accounts, with or without joint accounts: Supriya Singh and Clive Morley, 'Gender and Financial Accounts in Marriage' (2011) 47(1) *Journal of Sociology* 3, 4, 7.

84 *Stanford* (n 4) 121–2 [41].

85 Yangtao Huang, Francisco Perales and Mark Western, 'To Pool or Not to Pool? Trends and Predictors of Banking Arrangements within Australian Couples' (2019) 14(4) *PLoS ONE* 0214019: 1–29, which found differences between first relationships (married or de facto) and subsequent relationships (remarried or repartnered). In the subsequent relationships, couples were much more likely not to have a joint bank account.

one party has contributed more to the welfare of the family constituted by the couple than the other one has. In almost all marriages and de facto relationships, there is a process of mutual benefit conferral.[86] Each spouse confers benefits on the other — perhaps different kinds of benefits — but benefits nonetheless.

The significance of s 79(2) and s 90SM(3) in this context is illustrated by *Chancellor & McCoy*.[87] The parties were both teachers, and lived in a same-sex de facto relationship for 27 years. For the most part, they kept their financial affairs separate. They each contributed to household expenses, but there were otherwise few indications that their lives were financially intermingled. They lived in homes owned by the respondent. The applicant made contributions to assist with the housing costs.

Following separation, the applicant sought a share of the respondent's assets and superannuation. These were worth more than double those of the applicant, who had salary-sacrificed into her super. The trial judge concluded that it was not just and equitable to make any order for property alteration. The Full Court agreed.

VI Section 79(2) and Law Reform

The property division sections of the *Family Law Act* are once again under review. An Exposure Draft of the Family Law Amendment Bill (No 2) 2023 was released in September 2023. It proposes some minor changes to pt VIII of the Act, including the addition of several new factors for the court to take into account. Excluding the catch-all 'any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account',[88] but including the just and equitable requirement (s 79(2) and existing factors in s 79(4)(d),(f) and (g)), the Bill contains 30 factors that the court must consider in the proposed new legislation.[89]

Having 30 factors to consider is a recipe for increased incoherence, particularly when the legislation offers no objects to guide trial judges in what they are meant to achieve by the exercise of their discretion. The constitutional basis for property division, focusing upon the inequity that might result in the circumstances of the marriage if the property rights remain unaltered, or the obligations arising out of that relationship that remain unsatisfied, can offer a rational set of objectives for the alteration of property rights that will help judges read down the width of discretion in the statute to be within constitutional power,

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86 For further explanation of this concept see Patrick Parkinson, 'Beyond *Pettkus v Becker*: Quantifying Relief for Unjust Enrichment' (1993) 43(2) *University of Toronto Law Journal* 217.

87 [2016] FamCAFC 256.

88 *FLA* (n 1) s 75(2)(o).

89 The Bill actually contains 31 factors because there is an accidental duplicate: s 79(4)(g), which is not repealed, is duplicated by s 79(5)(r).

at least for marriages. While the law in relation to de facto relationships is not constitutionally constrained, in a time when people may go through a number of intimate partnerships in their lifetime, the questions that the *Constitution* requires judges to ask are all the more relevant to childless de facto relationships in which the parties may not have perceived themselves as in a socio-economic partnership involving an assumption of shared property ownership.

The retention of s 79(2) is probably a constitutional necessity, so far as marriages are concerned. It is far from an anachronism. When the law gives judges a discretion across such a range of differently constituted relationships, some involving a traditional partnership in bearing and raising children together, others being intimate relationships involving financially autonomous and quite independent individuals, a starting point that examines carefully their intentions as expressed in the legal title, and their equitable interests that may be grafted onto that legal title, makes sense. The question then arises whether there are cogent reasons of justice to alter those rights. This approach may be very protective for women who have built successful careers or who have brought property into a second or subsequent relationship from a property division in a first failed marriage. Claims against their assets need to have a rational justification, and if the law is applied in a manner that is gender neutral, men too will be protected from unmeritorious claims arising out of having shared a bed and a home together for a few years.

Even a modest reform that places objects into pt VIII, derived from the constitutional basis for property division, could help give greater coherence to a law in which judges have a myriad of factors to consider, but no clear indication of the purposes for which those vast discretionary powers have been given.

Robodebt and Novel Data Technologies in the Public Sector: How Human Rights Laws Plug Data Protection Gaps

Serena Syme Hildenbrand*

The recent Royal Commission into Robodebt drew Australians' attention to the risks of data technologies in the public sector. Novel data technologies, including artificial intelligence, offer potential public benefits but create risks to individuals and society. I argue that existing Australian data protection laws offer inadequate protection against the dangers posed by the use of such technologies in the public sector. Pending more tailored legislative change, I consider the extent to which specific human rights laws such as those in Queensland, Victoria and the Australian Capital Territory, together with effective application of risk assessment methodologies within a human rights culture, could be layered over data protection laws to provide ongoing technologically-neutral protection against such harms.

I Introduction

In an effort to boost the efficiency of government services and law enforcement, Australian governments are trialling and implementing novel data technologies, such as automated decision-making, artificial intelligence ('AI') and biometric technologies. Such technologies carry the promise of immense efficiency gains, but their use of personal data may significantly limit human rights. This article argues that while data protection laws (often described as privacy laws in Australia) provide an important first layer of protection in relation to such novel data technologies, challenges in keeping them current with rapidly evolving technologies result in gaps in protection. In such a context, specific human rights laws, such as those in Queensland, Victoria and the Australian Capital Territory ('ACT'), offer the potential for a further layer of protection that is more durable and principles-based. If such human rights laws are bolstered by a human rights

* PhD candidate at Deakin University and Head of Data Sharing at the Department of Transport and Planning, Victoria, overseeing driver and vehicle data. The views expressed in this article are my own and not necessarily those of the Department. I wish to thank my supervisory team of Shiri Krebs, Matthew Groves and Bruce Chen for their ongoing support and valuable input and the Victorian Public Sector Commission for its assistance in providing data. I also appreciate the very helpful comments from my reviewers.

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culture within the public service, they could foster an appropriately robust, analytical, risk-based approach to the application of these technologies and the protection of human rights.

One notorious novel data technology was examined by the recent Royal Commission into Robodebt, investigating the federal government's use of a poorly-designed automated decision-making algorithm to identify and pursue potentially fraudulent welfare debts against hundreds-of-thousands of Australians from 2015–20.[1] Robodebt resulted in significant injustice and harm to members of the public and a financial settlement reaching into the billions of dollars.[2] Unsurprisingly, the Royal Commission concluded that Robodebt comprehensively 'failed the public interest'.[3]

Given resourcing constraints in the public sector,[4] together with the potential benefits of novel data technologies for government tasks,[5] such technologies are likely to become ubiquitous within the Australian public sector. I am not the first commentator to suggest that existing data protection laws at the state and federal levels in Australia are inadequate to address the risks posed by novel data technologies to individuals' rights.[6] In Europe, efforts have been made, including with the *General Data Protection Regulation* ('*GDPR*') and more recent laws,[7] to develop a more appropriate level of data protection to address such

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1 *Royal Commission into the Robodebt Scheme* (Final Report, July 2023) ('*Robodebt Report*') v.

2 Luke Henriques-Gomes, 'Robodebt: five years of lies, mistakes and failures that caused a $1.8bn scandal', *The Guardian* (online, 11 March 2023) <https://www.theguardian.com/australia-news/2023/mar/11/robodebt-five-years-of-lies-mistakes-and-failures-that-caused-a-18bn-scandal>.

3 *Robodebt Report* (n 1) iii.

4 See, eg, Josh Gordon, 'Thousands of public sector jobs face axe as state orders 10% budget cuts', *The Age* (online, 29 March 2023) <https://www.theage.com.au/national/victoria/thousands-of-public-sector-jobs-face-axe-as-state-orders-10-percent-budget-cuts-20230329-p5cwbe.html>.

5 See, eg, Fang Chen and Jianlong Zhou, 'AI in the public interest' in Cliff Bertram, Asher Gibson and Adriana Nugent (eds), *Closer to the Machine: Technological, Social and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019) 63, 65.

6 See, eg, Margaret Jackson, 'Regulating AI' in Cliff Bertram, Asher Gibson and Adriana Nugent (eds), *Closer to the Machine: Technological, Social and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019) 121; Kate Galloway, 'Big Data, Government, Privacy and Human Rights'in Paula Gerber and Melissa Castan (eds), *Critical perspectives on human rights law in Australia* (Thomson Reuters Australia, 2022) vol 2, 357; Moira Paterson and Maeve McDonagh, 'Data Protection in an Era of Big Data: The Challenges Posed by Big Personal Data' (2018) 44(1) *Monash University Law Review* 1.

7 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1 ('*GDPR*'). More recent European laws include *GDPR*-type legislation for the public sector and a *Data Governance Act*: *Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018*, [2018] OJ L 295/39; *Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European Data Governance and Amending Regulation (EU) 2018/1724*, [2022] OJ L 152/1 ('*Data Governance Act*'). The EU also passed an '*AI Act*', to add additional protections around the use of artificial intelligence: *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence*, [2021] OJ L 170/1 ('*AI Act*').

technologies. Without assessing whether European laws achieve this promise, I identify how Australian data protection laws fall short of an equivalent level of protection and are likely to leave citizens vulnerable in the context of public sector use of novel data technologies.

Pending the update and improvement of data protection laws, another legal framework may provide meaningful protection within relevant public sectors. Queensland, Victoria and the ACT are in the relatively unusual position in Australia of having both data protection laws[8] and specific human rights laws[9] covering their public sectors.[10] Those human rights laws offer a further valuable layer of protection over rights which may be engaged by novel data technologies, including the rights to privacy, equality, family life, property and freedoms of association, speech and movement. The laws contain conduct and decision-making obligations for public servants, requiring them to act compatibly with human rights and, in making decisions, to give proper consideration to relevant rights. Human rights laws also intentionally promote human rights culture in the public service, which is a significant element of the potential protection they offer.[11] I describe how laws such as the *Human Rights Act 2019* (Qld) ('*Qld HRA*'), *Charter of Human Rights & Responsibilities Act 2006* (Vic) ('*Victorian Charter*') and the *Human Rights Act 2004* (ACT) ('*ACT HRA*') could address the dangers posed to rights by novel data technologies. Further, any federal bill or charter of rights is likely to offer similar protection — the Commonwealth Parliamentary Joint Committee on Human Rights has recently recommended the establishment of a federal Human Rights Act following its *Inquiry into Australia's Human Rights Framework*.[12]

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8 *Information Privacy Act 2009* (Qld) ('*Qld IPA*'); *Privacy & Data Protection Act 2014* (Vic) ('*PDPA*'); *Information Privacy Act 2014* (ACT) ('*ACT IPA*'). Note that Queensland passed the *Information Privacy and Other Legislation Amendment Act 2023* (Qld) in November 2023, which is likely to commence on 1 July 2025. Where relevant, this article will reference this incoming legislation.

9 *Human Rights Act 2019* (Qld) ('*Qld HRA*'); *Charter of Human Rights & Responsibilities Act 2006* (Vic) ('*Victorian Charter*'); *Human Rights Act 2004* (ACT) ('*ACT HRA*').

10 The Commonwealth technically has human rights legislation in the form of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) which establishes the Parliamentary Joint Committee on Human Rights ('PJCHR') (s 4) and confers on the PJCHR a scrutiny and oversight function for legislation and the ability to conduct inquiries on referral (s 7). However, I am not including the Commonwealth in the jurisdictions covered by specific human rights laws because the PJCHR's legislative oversight role and narrow scope is not equivalent to human rights legislation of the type implemented in Queensland, Victoria and the ACT, which is intended to impact the daily activities and culture of public servants. There is a comprehensive summary of the PJCHR's role and effectiveness here: Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Report, December 2022), 297–303. See also the following article which raises questions about the PJCHR's impact: Laura Grenfell and Julie Debeljak, *Law Making & Human Rights* (Thomson Reuters, 2019) 42–63.

11 See, eg, Queensland, *Parliamentary Debates*, 31 October 2018, 3184 (Yvette D'Ath, Attorney-General).

12 Parliamentary Joint Committee on Human Rights, 'Inquiry into Australia's Human Rights Framework' (Report, 2024) xxi–xxii <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000210/toc_pdf/InquiryintoAustralia'sHumanRightsFramework.pdf >.

Part II briefly defines and describes the types of novel data technologies relevant to this article. Part III outlines data protection laws in Queensland, Victoria and the ACT and their origins and approach. These three jurisdictions have been selected as case studies because their specific human rights legislation offers potential for such additional protection of data subjects from the impacts of novel data technologies. Comparison of these jurisdictions' data protection laws with more modern European Union data protection laws highlights their weaknesses relative to novel data technologies. Part IV describes the additional protection offered by specific human rights legislation in the relevant jurisdictions, first, by reference to the protective effect of a human rights culture within government and, second, through express conduct and decision-making obligations. It also provides practical ways to discharge those obligations using risk management methodologies within a human rights culture. Part V illustrates the difference that this may have made had a Robodebt-style program been implemented in one of these jurisdictions rather than federally, and Part VI concludes by recommending the implementation of a risk-based rights assessment within a human rights culture to avoid a repeat of a Robodebt scenario.

II Novel Data Technologies

To understand the impact of novel data technologies on public sector decision-making and functions, we start by looking more closely at the technologies.

Figure 1: Representation of Novel Data Technologies

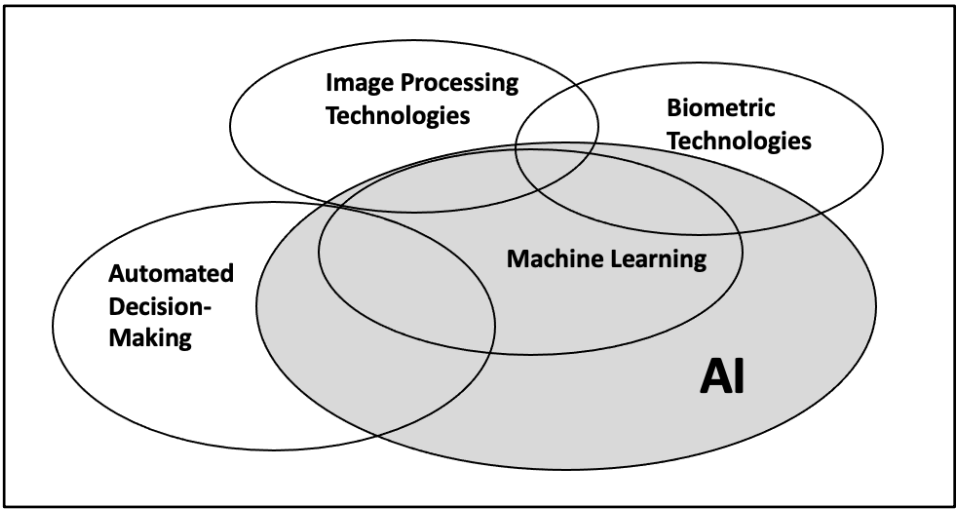

Figure 1 covers a range of data technologies, including non-novel technologies which can be combined with newer technologies such as AI to provide a wider field of operation. The most prominent category in Figure 1 is AI (shaded grey), which describes a collection of different technologies allowing computers to learn or solve problems, usually via a 'training' process involving the absorption and analysis of large quantities of data.[13] Machine learning ('ML') is a sub-set of AI, in which algorithms are trained on high volumes of data to make classifications or predictions and uncover key insights through a learning process.[14] Automated decision-making involves the application of computer-based algorithms to arrive at outcomes or recommendations — this can be powered by AI, but can also be a simpler algorithmic process (as seen in Robodebt). Biometric technologies refer to a mode of collecting biological markers (facial images, iris scans, speech patterns, gait characteristics, fingerprints) which may be digitised and analysed, by means of AI or otherwise. Image processing technologies include optical character recognition ('OCR') and processing of photos and closed-circuit television ('CCTV') images to extract information — they overlap with biometric technologies in areas such as facial recognition.

The use of all of these technologies within government offers efficiency advantages including by expanding the reach and application of limited government resources. For instance, in the context of a sharp increase in the Victorian road toll,[15] and evidence that driver distraction is a factor in at least 11 per cent of road fatalities, the Victorian government presented its AI-powered road camera enforcement solution as necessary to prevent an estimated 95 crashes resulting in death or injury each year.[16] In 2021, Queensland police conducted a trial of an algorithm using data from its Queensland Police Records Information Management Exchange ('QPRIME') police database and AI to identify likely perpetrators of domestic violence and enable police to conduct pre-emptive home visits to those individuals ('QPRIME algorithm').[17] Results of the

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13 Toby Walsh, 'Understanding AI' in Cliff Bertram, Asher Gibson and Adriana Nugent (eds), *Closer to the Machine: Technological, Social and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019) 7, 7–11.

14 Cliff Bertram, Asher Gibson and Adriana Nugent, 'Key Terms' in Cliff Bertram, Asher Gibson and Adriana Nugent (eds), *Closer to the Machine: Technological, Social and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019) 3.

15 ABC Radio Melbourne, 'Road Safety Expert Calls for Change in Individual Behaviour After 'Disheartening' Jump in National Road Toll' (online, 15 May 2023) <https://www.abc.net.au/melbourne/programs/mornings/national-road-toll-spike/102345990>.

16 Daniel Andrews, 'New Driver Distraction Road Rules To Save Lives' (Media Release, 14 February 2023) <https://www.premier.vic.gov.au/new-driver-distraction-road-rules-save-lives>.

17 Ben Smee, 'Queensland Police to Trial AI Tool Designed to Predict and Prevent Domestic Violence Incidents', *The Guardian* (online, 14 September 2021) <https://www.theguardian.com/australia-news/2021/sep/14/queensland-police-to-trial-ai-tool-designed-to-predict-and-prevent-domestic-violence-incidents>.

trial pointed to a significant reduction in incidents in a cohort of high-risk offenders.[18]

These developments are not without critique, with detractors identifying the possibility of significant limitations of the human rights of data subjects and other potential harms.[19] AI and algorithmic systems are notorious for ingesting bias from the data on which they train, resulting in outcomes which may be unfair and discriminatory.[20] This may have been the case with the Suspect Target Management Program ('STMP') operated by New South Wales police, which generated predictive profiles of likely crime suspects.[21] An investigation found that 44 per cent of the individuals targeted by the system were Indigenous, a highly disproportionate outcome considering the Indigenous population comprised less than 4 per cent of the state's residents.[22] Of course, it can be difficult to prove that an algorithm is unbiased — such an assessment will generally require a detailed technical knowledge of the algorithm and the training datasets used.[23]

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18 Teagan Westendorf, 'AI and Policing: What a Queensland Case Study Tells Us', *The Strategist* (online, 13 May 2022) <https://www.aspistrategist.org.au/ai-and-policing-what-a-queensland-case-study-tells-us/>.

19 See, eg, Paterson and McDonagh (n 6) 6–7; Galloway (n 6) 365–76. I use the term 'data subjects' to refer to individuals whose data is being shared and used, following the terminology used in the *GDPR*.

20 Katie Miller, 'Discrimination, Bias and Inequality in AI' in Cliff Bertram, Asher Gibson and Adriana Nugent (eds), *Closer to the Machine: Technological, Social and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019) 23; New South Wales Ombudsman, *The New Machinery of Government: Using Machine Technology in Administrative Decision-Making* (Report, 29 November 2021) 35–6. The New South Wales Ombudsman report notes that algorithmic bias can comprise human biases preserved in the data (such as racism and sexism) as well as technical biases due to incomplete or distorted data: 35.

21 Michael McGowan, 'NSW Police Accused of "Oppressive" Tactics Against Subjects on Secretive Blacklist', *The Guardian* (online, 4 July 2022) <https://www.theguardian.com/australia-news/2022/jul/04/nsw-police-accused-of-oppressive-tactics-against-subjects-on-secretive-blacklist>. See also, the description of this program in Galloway (n 6) 370–1.

22 Jake Goldenfein, 'Algorithmic Transparency and Decision-Making Accountability: Thoughts for Buying Machine Learning Algorithms' in Cliff Bertram, Asher Gibson and Adriana Nugent (eds), *Closer to the Machine: Technological, Social and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019) 41, 45. For figures related to the Indigenous population of New South Wales, see: 'Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians', *Australian Bureau of Statistics* (Web Page, 31 August 2022) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/2021>. Indigenous people are already over-represented in the Australian criminal justice system: Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, March 2018). So this outcome may be a perpetuation of that existing inequity preserved in the data, or it may represent new technical biases — in either case, it raises concern and warrants further investigation.

23 See, eg, *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037, 5078–80 [193]–[201]. In that case, it was apparent that the South Wales Police had no such detailed knowledge of the facial recognition system they were employing — so while there was no evidence that the algorithm was biased, bias also could not be ruled out: 5079–80 [199]–[201].

While not all aspects of the use of novel data technologies in the public sector are regulated, they do not operate in a legal vacuum. The following section explores existing regulation governing the use of such technologies.

III Data Protection Law

Data protection law seeks to protect individuals from harms caused by information processing and accordingly can be regarded as the first line of defence against the risks of novel data technologies.[24] Data protection shares some common ground with the broader concept of privacy.[25] However, it should be understood to extend beyond a limited association with privacy rights and seen to cover prevention of a wide range of harms that might result from the processing of personal data. Viewed in such a way, data protection laws are potentially of great relevance to burgeoning novel data technologies and their impact on human rights.

Data protection has a multi-decade history in Europe where it is an established field of law and policy, but is less central to Australian legal practice.[26] Bygrave describes how data protection theories arose from significant developments in the field of personal information processing, which triggered fears not adequately addressed by other laws.[27] In some countries, data protection emerged from legal foundations quite distinct from privacy, such as information self-determination (Germany),[28] protection of liberty (France),[29] and fair information practices (the United States),[30] and had little in common with privacy

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24 '[T]he term "data protection" is used ... to denote a set of measures (legal or non-legal) which are aimed at safeguarding persons from detriment resulting from the processing of information on them': Lee A Bygrave, 'An international data protection stocktake @2000 Part 1: regulatory trends' (2000) 6(8) *Privacy Law and Policy Reporter* 129, 129.

25 Lee A Bygrave, *Data Privacy Law: An International Perspective* (Oxford University Press, 2014) 3. While data protection can arguably protect rights in addition to privacy, privacy rights can be considered to extend further than the information privacy coverage offered by data protection laws because they include bodily, spatial, communicational, proprietary, intellectual, information, decisional, associational and behavioural privacies: see Bert-Jaap Koops et al, 'A Typology of Privacy' (2017) 38(2) *University of Pennsylvania Journal of International Law* 483.

26 David Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 29(1) *Melbourne University Law Review* 131, 133, 155–7.

27 Bygrave (n 25) 8.

28 The German term *informationelle selbstbestimmung* was first used in relation to a prominent German court decision on the 1983 census, where the court recognised informational self-determination as a constitutional right: see Gerrit Hornung and Christoph Schnabel, 'Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-Determination' (2009) 25(1) *Computer Law & Security Report* 84.

29 The first French data protection law in 1978, dubbed *Informatique et Libertés*, and the relevant French regulator (the *Commission Nationale de l'Informatique et des Libertés* with its mission statement: 'to protect personal data, support innovation, preserve individual liberties') highlight the focus on liberty.

30 Bygrave (n 25) 27, 33, 115–16.

law.[31] Data protection law is also concerned with elements of data quality — the 'validity, integrity, availability, relevance, and completeness of data', which are not directly derived from privacy concerns.[32]

Data protection laws are intended 'to protect individuals from the processing of data by means of individual rights and structural guarantees'.[33] In an 'early specifically European interpretation of data protection in relation to privacy',[34] De Hert and Gutwirth contrast the 'transparent', procedural role of data protection with the more 'opaque' protection offered by privacy laws (such as secrecy provisions or restrictions on surveillance), noting that data protection laws are based on an understanding that personal information can be legitimately processed and shared, provided that certain transparency requirements and protections are applied.[35] De Hert and Gutwirth consider that the purpose of such laws is not to *prohibit* but to *allow* access, with commensurate protection.[36] Kohl notes that 'data protection law is based on the assumption that there has been a disclosure of personal information and gives individuals a degree of control to oversee and manage that disclosure'.[37] Bygrave concurs, commenting: 'data privacy legislation tends to operate with largely procedural rules that avoid fundamentally challenging the bulk of established patterns of information use. In the language of road signs, it usually posts the warning "Proceed with Care!"; it rarely orders "Stop!"'.[38] Similarly, Hustinx views data protection as a series of checks and balances rather than a prohibition, stating that data protection law 'was not designed to prevent the processing of such information or to limit the use of information technology per se… it was designed to provide safeguards'.[39] Accordingly, data protection can be viewed as a type of bargain with the public: some data will inevitably be shared, so in return protections must be applied.

The first truly international instrument addressing data protection was the non-binding 1980 *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Data* ('*OECD Guidelines*'), drafted by an expert group led by

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31 Ibid 26–8.

32 Ibid 120.

33 Felix Bieker, *The Right to Data Protection: Individual and Structural Dimensions of Data Protection in EU Law* (Springer, 2022) 180.

34 Ibid 145.

35 Paul De Hert and Serge Gutwirth, 'Privacy, data protection and law enforcement. Opacity of the individual and transparency of power' in E Claes, A Duff and S Gutwirth (eds), *Privacy and the Criminal Law* (Intersentia, 2006) 61, 77. See also support for this approach in Serge Gutwirth, Ronald Leenes and Paul de Hert, *Reforming European Data Protection Law* (Springer, 2015) 16.

36 De Hert and Gutwirth (n 35) 77.

37 Uta Kohl, 'The Right to be Forgotten in Data Protection Law and Two Western Cultures of Privacy' (2023) 72 *International Comparative Law Quarterly* 737, 748.

38 Bygrave (n 25) 122. This parallels the 'red light/green light' metaphor for administrative law popularised by Harlow and Rawlings: see, eg, Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 4th ed, 2022) 7.

39 Peter Hustinx, 'EU Data Protection Law: The Review of Directive 95/46/EC and the General Data Protection Regulation' in Marise Cremona (ed), *New Technologies and EU Law* (Oxford University Press, 2017), 123.

Justice Michael Kirby.[40] Justice Kirby describes how even in the 1970s it was increasingly apparent that transnational technologies could not effectively be managed by national laws; it was 'the fear of new "barriers" that afforded the initial focus of the work of the expert group and of the interest of the OECD', that is, fear that national laws might impede the free flow of data and its consequent economic benefits.[41]

Data protection is most often a creature of statute or negotiated frameworks such as the *OECD Guidelines*.[42] It is defined and understood as compliance with certain 'data protection principles', which generally comprise an accepted set of minimum principles, plus newer principles introduced over time through international acceptance.[43] The key principles are that personal data must be processed fairly and lawfully, for specified purposes only.[44] The *OECD Guidelines* contained eight such principles which have been adopted throughout the world. Greenleaf regards the *OECD Guidelines* principles as offering 'the best guide to the *minimum* requirements of a data privacy law'.[45]

The *OECD Guidelines* were implemented in Australia by statute.[46] They were first reflected in the *Privacy Act 1988* (Cth) ('*Privacy Act*')[47] and then in corresponding legislation in most of the states.[48] Enforcement is primarily allocated to privacy or information commissioners in each jurisdiction, who tend to experience resourcing challenges in the face of a significant workload.[49] The Queensland and Victorian statutes contain Information Privacy Principles ('IPPs') based on the eight principles of the *OECD Guidelines*, while the ACT uses Territory Privacy Principles ('TPPs') instead (see Table 1).[50] Table 1 also includes the relevant Australian Privacy Principles ('APPs') under the *Privacy Act*; and there

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40 Organisation for Economic Co-operation and Development, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, 23 September 1980.

41 Michael Kirby, 'The History, Achievement and Future of the 1980 OECD Guidelines on Privacy' (2009) 20(2) *Journal of Law, Information and Science* 1, 4–5.

42 Bygrave (n 25) 3–4.

43 G W Greenleaf, *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (Oxford University Press, 2014) 5.

44 Bygrave (n 25) 147, 153.

45 Graham Greenleaf, 'Sheherezade and the 101 Data Privacy Laws: Origins, Significance and Global Trajectories' (2014) 23(1) *Journal of Law, Information and Science* 4, 11 (emphasis in original).

46 Graham Greenleaf, 'Privacy in Australia' in James Rule and Graham Greenleaf (eds), *Global Privacy Protection: The First Generation* (Edward Elgar Publishing, 2008) 141, 151–2.

47 *Privacy Act 1988* (Cth) ('*Privacy Act*').

48 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, May 2008) 161–88.

49 See, eg, the report into the effectiveness of the Queensland Office of the Information Commissioner, which broadly identified a good service limited by resourcing constraints: Department of Justice and Attorney-General, *Strategic Review of the Office of the Information Commissioner (Queensland)* (Report, 26 April 2017). Regarding resourcing challenges faced by the Office of the Australian Information Commissioner: see Anna Macdonald, 'Privacy commissioner role separated once more, needs "double funding" to do job well', *The Mandarin* (online, 23 May 2023) <https://www.themandarin.com.au/219131-information-privacy-commissioner-role-separated-once-more/>.

50 *Qld IPA* (n 8); *ACT IPA* (n 8).

is a close relationship between the APPs and TPPs, as reflected in Table 1 below.[51] It also includes the new Queensland Privacy Principles ('QPPs'), scheduled to replace the Queensland IPPs in 2025 and also modelled on the APPs.[52] Given the direct line from the *OECD Guidelines* to these Australian laws, it is reasonable to characterise them all as data protection laws, rather than privacy laws per se. All three jurisdictions have separate privacy principles covering personal information collected for health purposes,[53] but as these are similar to the more general privacy principles, and as health information is potentially less likely to be processed by novel data technologies due to its sensitivity, they will not be specifically considered.

Table 1: Implementation of OECD Guidelines in the Privacy Act and Jurisdictional Laws in Queensland, Victoria and ACT

OECD Guidelines Principle	Requirement	Qld IPP	Vic IPP	ACT TPP, Cth APP and QPP (not yet in force)
Collection Limitation	Applies limits to personal data collection, minimisation and lawful and fair collection; where appropriate with knowledge and consent.[54]	1	1	3–4
Data Quality	Data is to be relevant, complete, accurate and up to date.[55]	3, 7–9	3, 6	10
Purpose Specification	Requires notification of purposes of collection at the time and subsequent use limited to those purposes or other compatible purposes specified on each occasion where the purpose changes.[56]	2, 9–11	1–2	5–6

51 The Territory Privacy Principles ('TPPs') and Australian Privacy Principles ('APPs') are intentionally very similar but not identical. Some of the APPs have been omitted from the TPPs for irrelevance and are there are some minor drafting differences, but numbering consistency has been preserved: see Office of the Australian Information Commissioner, 'Territory Privacy Principles', (Web Page) <https://www.oaic.gov.au/privacy/privacy-legislation/state-and-territory-privacy-legislation/territory-privacy-principles>.

52 The new *Information Privacy and Other Legislation Amendment Act 2023* (Qld) replaces the Qld Information Privacy Principles ('IPPs') with Queensland Privacy Principles ('QPPs'), which align more closely with the APPs and are likely to come into effect on 1 July 2025.

53 *Qld IPA* (n 8) ss 30–1, sch 4; *Health Records Act 2001* (Vic) ss 19–21, sch 1; *Health Records (Privacy and Access) Act 1997* (ACT) ss 5–6, sch 1.

54 Organisation for Economic Co-operation and Development (n 40) [7].

55 Ibid [8].

56 Ibid [9].

Use Limitation[57]	Use is to be limited to the specified purpose, except with consent or where required by law.[58]	10–11	2	6
Security Safeguards	Requires data to be protected against loss, destruction or unauthorised use or disclosure by 'reasonable security safeguards'.[59]	4	4	11
Openness	Imposes openness around data practices including means to establish the existence of the data, purpose of use and identity of user.[60]	5	5	1
Individual Participation	Requires individuals to receive confirmation if data is held on them and for it to be provided to them and corrected on request, with appeal rights for refusals.[61]	5–7	6	12–13
Accountability[62]	Data controller is to be accountable for compliance with the principles.[63]	Through out	Through out	1.2

European law has now outstripped the approach set out in the *OECD Guidelines*, with the introduction of data protection laws including the *GDPR* and the *Data Governance Act*. Paterson and McDonagh undertake a useful exercise of contrasting the protection of the *Privacy Act* and the protection offered by the *GDPR* in relation to big data analytics, concluding that the *GDPR* offers additional protection in a number of areas including: clearer application of protection around online identifiers; higher bars for collection, use and disclosure; requirements for privacy by design and default; obligations to conduct data protection impact assessments; restrictions on profiling; and a right to erasure.[64] Table A1 in the Appendix compares the *GDPR* principles with the data protection principles in the relevant Australian jurisdictions, demonstrating how current

57 Note that each of the jurisdictional laws specifies allowed uses which extend beyond those permitted by the *OECD Guidelines*, namely (a) with the consent of the data subject, or (b) by the authority of law: ibid [10].

58 Ibid.

59 Ibid [11].

60 Ibid [12].

61 Ibid [13].

62 The Accountability Principle is that '[a] data controller should be accountable for complying with measures which give effect to the principles stated above': ibid [14]. This is not expressly stated in the IPPs or TPPs, but is arguably covered by the requirement that public sector agencies in those jurisdictions must comply with them, and by enforcement measures that can be taken by regulators.

63 Ibid.

64 Paterson and McDonagh (n 6) 15–25.

Australian protection omits several *GDPR* protections with specific relevance to novel data technologies. These omissions include: rights to restrict and object to data processing; protections around automated decision-making and de-identified information; and requirements for data protection by design and default and mandatory impact assessments. Several high-profile reports have identified further deficiencies in the *Privacy Act* in the context of twenty-first century data practices.[65]

A review of the *Privacy Act* commenced in 2019 and the resulting 2022 *Privacy Act Review Report* contains 116 proposals broadly weighted towards the European approach, with a number of them emulating the *GDPR*.[66] The federal government has formally agreed to implement 38 of the proposals, with 'in principle' support for a further 68 proposals, and draft legislation to be released in 2024.[67] Once reflected in legislation, those proposals may be replicated at the state level, but there is likely to be a significant delay.[68] For instance, Queensland has recently passed new privacy legislation with the key provisions expected to take effect in 2025, so is unlikely to adopt additional changes mirroring amendments to the federal *Privacy Act* in the near future.[69]

Commentary on the proposed changes suggests that, while they may not address every deficit of the *Privacy Act*, they would be landmark reforms likely to increase protection and enforcement in certain key areas.[70] The proposals helpfully introduce an overarching 'fair and reasonable' test which may promote better conduct by entities handling personal data.[71] In addition, the proposals are likely to provide a higher level of protection in relation to data processing

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65 See, eg, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, June 2014) 51–3 [3.50]; Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 121–3; Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 23–5.

66 Attorney-General's Department, *Privacy Act Review Report* (Report, 2022).

67 Attorney-General's Department, 'Fact Sheet: Government Response to the Privacy Act Review Report' (2023) 2. Note that 'in principle' agreement means that further consultation and an impact analysis will be undertaken before a final decision on implementation: 2.

68 Maria O'Sullivan, 'The Privacy Act Review Report 2022 — A Radical Review or Just a Re-imagining?' (2023) 51 *Australian Business Law Review* 52, 52.

69 *Information Privacy and Other Legislation Amendment Act 2023* (Qld). The Queensland review of privacy legislation arose from the 2017 statutory review of the relevant legislation, plus the 2020 findings of the Crime and Corruption Commission (Queensland) in Operation Impala, which investigated the misuse of confidential information in the Queensland Public Sector: Department of Justice and Attorney-General, 'Consultation Paper — Proposed changes to Queensland's Information Privacy and Right to Information Framework' (Report, June 2022) 3–4.

70 O'Sullivan (n 68) 55.

71 Attorney-General's Department, *Privacy Act Review Report* (n 66) 8–9. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (Report, 2023) 8.

activities,[72] automated decision-making activities,[73] high risk data activities,[74] and the use of de-identified data.[75]

The Appendix (Table A1) includes reference to these proposals, which are considered necessary to bring the *Privacy Act* up to an acceptable level of protection — and which, accordingly, highlight existing deficits. It illustrates that the recommendations do not cover all relevant *GDPR* protections, excluding as they do any right to restrict processing or any requirement to implement data protection by design and default. Further, even though the *GDPR* is broadly regarded as offering a high level of protection, it contains some recognised weaknesses (also reflected in the Australian laws) which are not addressed by the *Privacy Act Review Report* and continue to represent gaps in protection. For instance, the *GDPR* continues to rely on a notice and consent model, despite much evidence that the concept is heavily fraying and offers inadequate protection to individuals.[76] This weakness is somewhat offset by art 5 of the *GDPR,* which includes a fairness requirement and, as noted above, the *Privacy Act Review Report* recommends an objective 'fair and reasonable' test for handling personal data. Thus, both the *GDPR* and *Privacy Act Review Report* recommendations would reduce but not remove reliance on individual notice and consent.

The *GDPR* also restricts legal protection to personal data, defined as 'any information relating to an identified or identifiable natural person ("data subject") … who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data' or other factors.[77] Novel data technologies not only allow re-identification of anonymised data through data matching, but can apply 'individuation' to data which is technically non-identifiable (and therefore unprotected) and extract insights about individuals or groups without re-identifying the data.[78]

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72 Attorney-General's Department, *Privacy Act Review Report* (n 66) 11. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 30.

73 Attorney-General's Department, *Privacy Act Review Report* (n 66) 12. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 32.

74 Attorney-General's Department, *Privacy Act Review Report* (n 66) 9. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 28.

75 Attorney-General's Department, *Privacy Act Review Report* (n 66) 5. In its response, the government agreed in principle to amend and expand the definition of de-identified information, agreed to consult on introducing an offence for malicious re-identification, but only 'noted' the other recommendations: see Attorney-General's Department, *Government Response — Privacy Act Review Report* (n71) 21–2.

76 Peter Leonard, 'Data privacy in a data and algorithm enabled world' (2021) 93 *Computers & Law* 22. The 'notice and consent' model is the familiar process by which customers are given privacy notices and asked to provide their consent to use of their personal data. This model has been critiqued because it places the burden on individuals to manage their own privacy and the consent they provide is often not meaningful: see, eg, Daniel Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 126 (7) *Harvard Law Review* 180.

77 *GDPR* (n 7) art 4 cl 1.

78 Anna Johnston, 'Reforming privacy laws to protect against digital harms' (2021) 93 *Computers & Law* 38.

Further, the *GDPR* limits data use to a clearly defined purpose known in advance.[79] Some novel data technologies, especially AI technologies, do not operate in this way. Once the data is ingested into such an application, it may be impossible to restrict its use to a defined purpose.[80]

Accepting that current Australian data protection legislation contain gaps in effective protection, specific human rights legislation fulfils a valuable role. Data protection law targets the mechanics of information processing and accordingly is challenged by the pace of technological development. By focusing instead on the rights to be protected, human rights legislation can operate at a principles-level above current technologies, offering a truly technology-neutral approach.[81] Such protection is highly desirable given the speed of change in novel data technologies and the difficulties legislators face in keeping pace.[82] This supports the use of specific human rights legislation in Queensland, Victoria and the ACT to provide this layer of protection relative to novel data technologies and also the introduction of such legislation at the federal level and in other state jurisdictions to help future-proof protection in those jurisdictions.[83] Even if Australia's data protection laws are ultimately reformed to address existing deficits, separate technology-neutral human rights overlays will continue to be valuable, offering durable protection which spans technological developments. The next section outlines the potential contribution of human rights laws as demonstrated in Queensland, Victoria and the ACT in relation to novel data technologies in the public sector.

IV Human Rights Legislation

Queensland, Victoria and the ACT each have a specific human rights statute, setting out a range of human rights that the public sector is bound to protect and promote.[84] In this Part, I describe how the application of specific public sector obligations under those human rights laws, together with the fostering of a human rights culture in the public sector, could provide additional protection to data subjects relative to novel data technologies. There is a strong case for the introduction of a similar law at the federal level, as cogently argued in the Australian Human Rights Commission's 2022 position paper *Free & Equal: A*

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79 See, eg, *Privacy Act* (n 47); *GDPR* (n 7) art 5 cl 1(b).

80 Alessandro Mantelero, *Beyond Data: Human Rights, Ethical and Social Impact Assessment in AI* (Springer, 2022) 9–11.

81 Galloway (n 6) 378.

82 Australian Competition & Consumer Commission (n 65) 3: 'The ACCC is concerned that the existing regulatory frameworks for the collection and use of data have not held up well to the challenges of digitalisation. The pace of technological change needs to be matched by the pace of policy review'.

83 Galloway argues that the need for technology-neutral protections for big data technologies requires the implementation of a federal bill of rights: Galloway (n 6) 378.

84 *Qld HRA* (n 9); *Victorian Charter* (n 9); *ACT HRA* (n 9).

Human Rights Act for Australia,[85] and as recently recommended by the Parliamentary Joint Committee on Human Rights.[86] Should such a law be introduced, it is likely to extend the protections to the Commonwealth public sector also.

The *Qld HRA*, *Victorian Charter* and *ACT HRA* share similar origins, given their common inspiration from the *Human Rights Act 1998* (UK) and the *New Zealand Bill of Rights Act 1990* (NZ), both of which are dialogue-based parliamentary models of human rights protection.[87] Each of the Australian statutes contains conduct and decision-making obligations applicable to public servants and public sector agencies, requiring them to act compatibly with human rights and to give proper consideration to human rights.[88] Each also contains a range of rights which may be relevant to the impact of novel data technologies, including but not limited to privacy rights.[89] But in some ways their most important contribution is in seeking to build a human rights culture within the public sector of each jurisdiction, which is particularly pertinent to the complex challenges raised by the use of novel data technologies. In a fast-changing environment where legislation struggles to keep pace, a widespread awareness of human rights in the public sector and inclusion of human rights in decision-making will help ensure that the capabilities of technology do not outstrip the needs of citizens.

A *Importance of a Human Rights Culture*

On presentation of the Queensland Human Rights Bill to Parliament, Attorney-General Yvette D'Ath noted that '[t]he primary aim of the bill is to ensure that respect for human rights is embedded in the culture of the Queensland public sector'.[90] Victorian Attorney-General Rob Hulls made similar comments in introducing the *Victorian Charter* bill, adding that '[t]he experience in other jurisdictions that have used this model is that it is in the area of administrative compliance that the real success story of human rights lies'.[91] That is, such

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85 Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (n 10).

86 Parliamentary Joint Committee on Human Rights (n 12).

87 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General) 1290. See discussion of the 'dialogue model' in the context of the *Qld HRA*: Bruce Chen, 'The "Human Rights Act 2019 (Qld)": Some perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4, 4. Note that the UK legislation implements the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*') and accordingly operates in a different context than the New Zealand and Australian legislation, which is based on the *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

88 *Qld HRA* (n 9) s 58(1); *Victorian Charter* (n 9) s 38(1); *ACT HRA* (n 9) s 40B(1).

89 *Qld HRA* (n 9) s 25; *Victorian Charter* (n 9) s 13; *ACT HRA* (n 9) s 12.

90 Queensland, *Parliamentary Debates*, 31 October 2018, 3184 (Yvette D'Ath, Attorney-General).

91 Victoria, *Parliamentary Debates*, 4 May 2006, 1293, 1295 (Rob Hulls, Attorney-General).

legislation is arguably strongest in creating a culture of compliance so that human rights are not unjustifiably limited in the first place, rather than in boosting legal remedies following a breach. The development of a public sector human rights culture was also a key goal for the *Human Rights Act 1998* (UK),[92] and the *ACT HRA*.[93]

What is a human rights culture? A frequently used definition of organisational culture is formulated by Edgar Schein as 'a pattern of shared basic assumptions that was learned by a group as it solved its problems', that is then shared with new members.[94] Naylor et al note that it is more difficult to find consensus over the definition of human rights culture, but they propose the following adaptation of Schein's definition: 'shared assumptions and patterns of behaviour that are respectful of the human rights of people both within and outside the organisation, and that comply with the organisation's negative and positive obligations to promote human rights'.[95] Similarly, the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') defines a positive human rights culture as 'a pattern of shared attitudes, values and behaviours that influence the policy making, decisions and practices of government to uphold the human rights of all people'.[96]

How does such a culture evolve in practice? At the one year review of the *ACT HRA*, progress towards such a culture was found to be slow,[97] while the five year review identified 'a fledgling human rights culture in the ACT'.[98] After ten years of the *ACT HRA*, it was reported that cultural change had been patchy and measurement limited.[99] The outgoing ACT Human Rights Commissioner describes the ACT's 'increased human rights culture', which she considered to be strengthened by the *ACT HRA*, but she also raises the need for more resources for public service training.[100]

The mandated eight year review of the *Victorian Charter*, the 2015 *Victorian Charter Review* ('Eight Year Review'), included a strong focus on building a human rights culture in Victoria, noting that such a culture is not an end in itself but 'a

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92 United Kingdom, *Parliamentary Debates*, House of Commons, 21 October 1998, vol 981021, col 1320 (Mike O'Brien, Parliamentary Under-Secretary of State for the Home Department).

93 ACT, *Parliamentary Debates*, 23 October 2003, 4032 (Jon Stanhope, Chief Minister and Attorney-General).

94 Edgar H Schein, *Organizational Culture and Leadership* (Jossey-Bass, 4th ed, 2010) 17.

95 Bronwyn Naylor, Julie Debeljak and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41(1) *Monash University Law Review* 218, 261.

96 Victorian Equal Opportunity and Human Rights Commission, *2018 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, November 2019) 14.

97 ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review* (Report, June 2006), 34–6.

98 The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (Report, 2009) 7.

99 ACT Human Rights Commission, *Look Who's Talking: 10 years of the Human Rights Act* (Report, 2014) 15–16.

100 Helen Watchirs, 'Reflections on the ACT's Human Rights Bill 20 Years On — Lessons for the National Inquiry' (2023) 268 *Ethos: Law Society of the ACT Journal* 26, 28, 36.

means to better government decision making'.[101] The Eight Year Review identified some strong progress in cultural change,[102] but also a deprioritisation of the *Victorian Charter* in recent years, which had restrained progress.[103] This serves as a reminder that the process of building culture needs to be consistent and ongoing. It is noteworthy that the VEOHRC submission to that review identifed a positive cultural shift but also considerable fragility in that change.[104] A 2018 report prepared by VEOHRC included a survey of 35 public authorities, finding a strong commitment to a human rights culture but also key areas for improvement, noting that progress was demonstrably weaker in municipal councils and large government agencies than in government departments and small government agencies.[105]

The Victorian government measures the impact of the *Victorian Charter* on public sector culture by including human rights questions in its annual survey of public sector staff. One such question has been consistent across the period 2008–23, namely, 'I understand how the Charter of Human Rights and Responsibilities applies to my work'. In analysing responses to this survey to assess the growth of a human rights culture, VEOHRC commented in 2018 that 'the Commission expects to see a steady decline in the number of employees in the 'neither agree nor disagree' categories of the Victoria Public Sector Commission survey, and an increase in the number of affirmative responses'.[106] Figure 2 shows data and trend lines for the 'neither agree or disagree' category (formerly 'don't know') and total affirmative responses ('strongly agree' plus 'agree') across the 15 year period for the question stated above.[107]

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101 Michael Brett Young, Victorian Equal Oppurtunity & Human Rights Commission, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 2015) 20.

102 Ibid 32–3.

103 Ibid 23, 39.

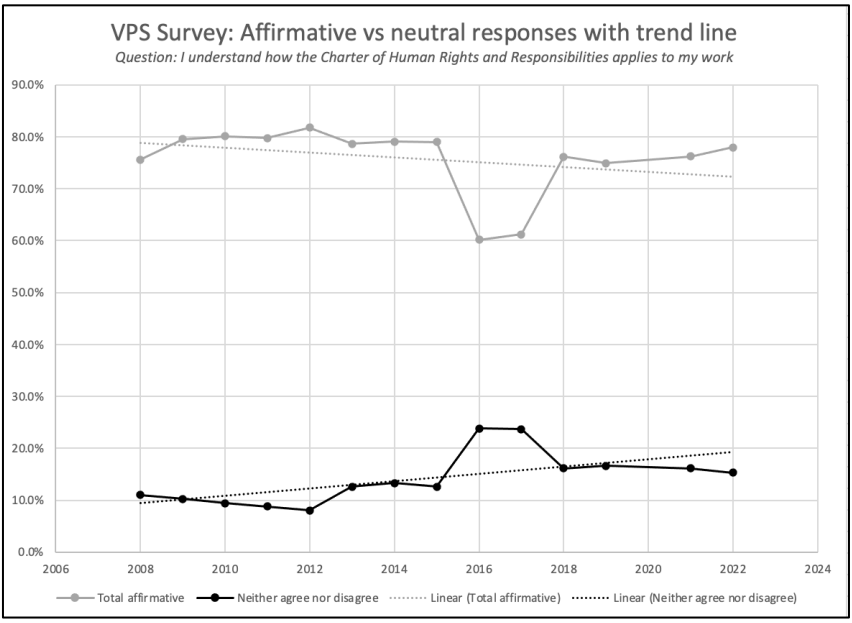
104 Victorian Equal Opportunity & Human Rights Commission, *Submission to the Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 2015). 'We have also seen, however, that when support for the Charter is waning, or where there was a possibility it might be repealed, that enthusiasm for meeting Charter obligations waned correspondingly': 13.

105 Victorian Equal Opportunity & Human Rights Commission, *2018 Report on the Operation of the Charter of Human Rights and Responsibilities* (n 96) 17. There was a particularly large divide in whether leadership was engaged in human rights, with high scores for engaged leadership in government departments (83 per cent) and small agencies (79 per cent), but much lower for municipal councils (48 per cent) and large agencies (37 per cent): 22.

106 Victorian Equal Opportunity and Human Rights Commission, *2017 report on the operation of the Charter of Human Rights and Responsibilities* (Report, August 2018) 49.

107 The questions are asked using a five-point Likert scale for responses. From 2008–15, the responses were 'Strongly agree — Agree — Don't know — Disagree — Strongly disagree'. From 2016 to present, the responses were 'Strongly agree — Agree — Neither agree nor disagree — Disagree — Strongly disagree'. While this change in naming the third point may have contributed to the 2016 effects seen in Figure 2, it is unlikely alone to have caused the sharp change in the 'Strongly agree — Agree' combined affirmative response.

Figure 2: Victorian Public Sector Survey Responses 2008–22[108]



First, it is worth noting the high proportion of respondents answering the question affirmatively.[109] These relatively high ratings are broadly in line with survey responses regarding other public sector values, such as integrity and accountability.[110] Second, there appears to be an abrupt change in the data in 2016, which is maintained in 2017 before correcting in 2018. It is notable that following the Eight Year Review, the Victorian government reaffirmed in 2017 its commitment to the *Victorian Charter* and provided new funding for a Charter Education Program to develop and provide targeted Charter education programs to public servants.[111] It is likely that this investment caused a meaningful

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108 The Victorian Public Sector Commission kindly supplied the author with all human rights questions and responses used in the surveys in the period 2008–22, and percentage responses to those questions ('VPSC Raw Data 2008–22'). See Table A2 in the Appendix for the relevant data. Note that no survey was conducted in 2020 due to the Covid-19 pandemic.

109 Victoria Public Sector Commission, 'Past Releases', *Victorian Public Sector Commission* (Web Page, 10 May 2021) <https://vpsc.vic.gov.au/data-and-research/past-releases/>. Additional and more complete data for the period 2008–23 was included in the VPSC Raw Data 2008–22.

110 Victoria Public Sector Commission, 'Public Sector Values', *Victorian Public Sector Commission* (Web Page, 24 April 2023) <https://vpsc.vic.gov.au/data-and-research/people-matter-survey-data/public-sector-values/>.

111 Victorian Equal Opportunity and Human Rights Commission, *2017 Report on the Operation of the Charter of Human Rights and Responsibilities* (n 106) 45. The education program was still operating

improvement in the development of a human rights culture in Victoria.[112] Third, the 15-year trend lines do not yet demonstrate the clear progress that VEOHRC was seeking, showing both a gradual decline in affirmative responses, and a gradual increase in neutral responses. The 2021–2 results look encouraging and a continued trajectory might demonstrate the overall growth VEOHRC is seeking, but these findings suggest that there is still work to be done to solidly embed a human rights culture in the Victorian public sector. This data appears to support the positive findings on human rights culture in the Eight Year Review and VEOHRC analysis, but also suggests that progress is fragile and requires ongoing commitment and support.

Queensland and ACT have no published metrics around their public sector human rights culture.[113] Surveys of the broader Queensland population following the implementation of the *Qld HRA* showed strong support for the importance and personal relevance of human rights, and such community support is likely to have a positive impact on public sector human rights culture.[114] Overall, the specific human rights laws appear to have had some success in developing stronger human rights cultures, but those cultures may need further encouragement to mature. The following section addresses the obligations under the specific human rights laws, which form a key component of the human rights culture.

B *Obligations under Human Rights Legislation*

The conduct and decision-making obligations require public sector agencies to take human rights into account in meaningful ways for each administrative action or decision, including a decision to implement novel data technologies. Table 2 sets out the relevant obligations under each human rights statute:

in 2022: Victorian Equal Opportunity and Human Rights Commission, *2022 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, August 2023) 37. See also the description of these interventions here: Grenfell and Debeljak (n 10) 225–6.

112 Grenfell and Debeljak draw a similar conclusion from the 2017 and 2018 data: Grenfell and Debeljak (n 10) 226.

113 'The [ACT] HR Act's impact on bureaucratic practices and culture remains difficult to assess, due in part to the absence of any ongoing or systematic initiative by the government to measure the HR Act's influence in this area': ibid 190.

114 Sarah Joseph, Chris Lane and Susan Harris Rimmer, 'What did Queenslanders Think of Human Rights in 2021? An Attitudinal Survey' (2022) 41(3) *The University of Queensland Law Journal* 363, 420.

***Table 2: Conduct and Decision-Making Obligations of the* Qld HRA, Victorian Charter *and* ACT HRA**

s 58(1) *Qld HRA*	s 38(1) *Victorian Charter*	s 40B(1) *ACT HRA*
It is unlawful for a public entity — (a) to act or make a decision in a way that is not compatible with human rights; or (b)in making a decision, to fail to give proper consideration to a human right relevant to the decision.	Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.	It is unlawful for a public authority — (a) to act in a way that is incompatible with a human right; or (b) in making a decision, to fail to give proper consideration to a relevant human right.[115]

The drafting similarities mean that Queensland courts tend to view cases considering s 38(1) of the *Victorian Charter* as relevant to their own conduct and decision-making obligations under s 58(1) of the *Qld HRA*.[116]

Generally, each provision is considered to consist of two obligations:[117]

- The substantive obligation: did the public authority act (and in Queensland, make a decision) compatibly with a human right, in terms of the substance or outcome?
- The procedural obligation: did the public authority give proper consideration to a relevant human right in making a decision?

Each obligation is 'an additional, or supplementary obligation, upon public authorities in the exercise of their statutory powers', such that a failure to discharge them renders the decision unlawful.[118]

For completeness, I will briefly discuss the interpretive obligations under each of the specific human rights laws, which require courts and agencies to

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115 Inserted by the *Human Rights Amendment Act 2008* (ACT), modelled on s 38(1) of the *Victorian Charter* and s 6 of the *Human Rights Act 1998* (UK): Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 5.

116 See, eg, *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, 298 [135]–[137] (Martin J) ('*Owen-D'Arcy*'). There is a more extensive body of Victorian precedent considering the relevant conduct and decision-making obligations than in Queensland or the ACT.

117 *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 48 VR 129, 205 [245] (Tate JA) ('*Bare*'). See also Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: A Guide for Public Entities* (Report, 2019) 12; ACT Human Rights Commission, *Human Rights Research Paper: Public Authorities* (Report, 2010) 3.

118 *Bare* (n 117) 234 [323] (Tate JA). It is worth noting that under s 40C of the *ACT HRA*, these obligations may be enforced by a direct right of action in the ACT Supreme Court. There is no equivalent under the *Qld HRA* or *Victorian Charter*, where such a claim of unlawfulness must be attached to another cause of action.

interpret (as far as possible) statutory provisions consistently with human rights.[119] In theory, the interpretive obligations could apply additional human rights protection, but that is unlikely to be the case for data privacy. Strictly, the obligations require data protection legislation (including the privacy principles) to be construed consistently with privacy rights and other applicable human rights.[120] This could support an argument that the two frameworks effectively collapse, replicating one another's effect. But courts have tended to read down these interpretive provisions, making them weaker in practice than the common law principle of legality.[121] In addition, data protection legislation is already considered to be (broadly) a form of human rights legislation,[122] intended to promote fair or responsible collection and handling of personal information.[123] So even if a court were prepared to apply the relevant interpretive obligation to the construction of data protection legislation, it may not have a major impact.[124]

The next sections outline how the conduct and decision-making obligations apply to public sector actions and decisions involving novel data technologies, which is the focus of this article.

C *Substantive Obligation*

The substantive obligation is generally applied in three steps: 'engagement, limitation, and justification'.[125] The first step assesses the relevance of the right, the second asks whether the applicant has demonstrated that the right is restricted or interfered with (construing the right broadly) and the third asks whether the defendant has established that the relevant restriction satisfies the proportionality test and is accordingly justified.[126] The proportionality test is set

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119 *Qld HRA* (n 9) s 48; *Victorian Charter* (n 9) s 32; *ACT HRA* (n 9) ss 30–1.

120 See, eg, *Jurecek v Director Transport Safety Victoria* [2016] VSC 285, [24], [65] ('*Jurecek*'). In that case, Bell J was unable to fully explore the interaction, because the applicant did not serve the requisite notices under s 35 of the *Victorian Charter* to allow such a question of law to be adjudicated: [65]. But note that when Bell J assessed Freedom of Information ('FOI') legislation against the *Victorian Charter* right to freedom of expression in an earlier case, his Honour found the two to be inherently consistent in promoting the rights of applicants: see, eg, *XYZ v Victoria Police (General)* [2010] VCAT 255, [573] ('*XYZ*'). A similar outcome could be expected with data protection legislation, given that both data protection and FOI legislation can be considered to be human rights legislation or at least rights-supporting: see *Jurecek* (n 120) [24]; *XYZ* at [554].

121 Bruce Chen, 'Revisiting Section 32(1) of the Victorian Charter: Strained Constructions and Legislative Intention' (2020) 46(1) *Monash University Law Review* 174.

122 *Jurecek* (n 120) [24] (Bell J).

123 See, eg, *Qld IPA* (n 8) s 3; *PDPA* (n 8) s 1; *ACT IPA* (n 8) s 7.

124 In a forthcoming article I argue that courts should apply the interpretive obligation to inform their interpretation of 'unlawfully' in the privacy right — should they choose to do so, it would have a significant protective impact: Serena Hildenbrand, 'Public Sector Data Sharing: Applying State-based Human Rights Laws to Minimise Privacy Harms' (2023-24) 47(2) *Melbourne University Law Review* (advance).

125 *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95, [306] (Freeburn J).

126 Ibid [306]–[307] (Freeburn J); *Baker (a pseudonynm) v DPP* (2017) 270 A Crim R 318, 331 [56] (Tate JA).

out in the general limitations clauses: s 13 of the *Qld HRA*, s 7(2) of the *Victorian Charter* and s 28 of the *ACT HRA*. Notably, it will not be possible for the implementation of a novel data technology to satisfy the general limitations clause if that implementation is unlawful.[127] European and New Zealand courts have construed this broadly, indicating that a measure (such as a new technology) will be considered unlawful if it does not have a clear and transparent legal basis for use, together with adequate procedural safeguards.[128] This question has been approached more narrowly in Australia, such that unlawfulness may simply mean not contravening an applicable law, such as data protection legislation.[129] I discuss this divergence further below, in exploring application of privacy rights.[130]

The substantive obligation unavoidably leads us to the question of which human rights are, or may be, engaged by a decision on the use of novel data technologies. Table 3 sets out potentially relevant rights, which are examined in more detail below, noting that in each case the relevant impacted rights may differ due to the nature of the technology. In almost all cases the text of the relevant right is essentially identical across the three jurisdictions.

Table 3: Human Rights Relevant to Novel Data Technologies in Queensland, Victoria and ACT

Right	Requirement (*Qld HRA* text)	*Qld HRA*	*Victorian Charter*	*ACT HRA*
Privacy and reputation	A person has the right — (a) not to have that person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) not to have that person's reputation unlawfully attacked.	S 25	S 13	S 12
Recognition and equality before the law	(1) Every person has the right to recognition as a person before the law. (2) Every person has the right to enjoy the person's human rights without discrimination.	S 15(1)–(4)	S 8	S 8

127 *Thompson v Minogue* (2021) 67 VR 301, 318–19 [58] (Kyrou, McLeigh and Niall JJA) ('*Thompson*').

128 *Varga v Slovakia* (European Court of Human Rights, Chamber, Application 58361/12, 29 June 2021) [151] ('*Zoltan Varga*'), affd *Hascak v Slovakia* (European Court of Human Rights, Chamber, Application 58359/12, 24 May 2022) [89]. See also *R v Hansen* [2007] 3 NZLR 1, 62 [180] (McGrath J); *S and Marper v United Kingdom* [2009] 48 Eur Court HR 1169, 1196 [99] ('*Marper*').

129 *Thompson* (n 127) 318–19 [58] (Kyrou, McLeigh and Niall JJA).

130 I have argued that for this test of unlawfulness to offer an adequate level of protection in the face of novel data technologies, Australian courts would ideally be guided by the European and New Zealand approach and require a clear legal basis and procedural safeguards: Hildenbrand (n 124).

Right	Requirement (*Qld HRA* text)	*Qld HRA*	*Victorian Charter*	*ACT HRA*
	(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination. (4) Every person has the right to equal and effective protection against discrimination.			
Freedom of movement	Every person lawfully within [the jurisdiction] has the right to move freely within [the jurisdiction] and to enter and leave it, and has the freedom to choose where to live.	S 19	S 12	S 13
Freedom of thought	(1) Every person has the right to freedom of thought, conscience, religion and belief, including — (a) the freedom to have or to adopt a religion or belief of the person's choice; and (b) the freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.	S 20(1)	S 14(1)	S 14(1)
Freedom of expression	(1) Every person has the right to hold an opinion without interference. (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds…	S 21	S 15	S 16
Peaceful assembly and freedom of association	(1) Every person has the right of peaceful assembly. (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.	S 22	S 16	S 15
Taking part in public life	Every person in [the jurisdiction] has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives.	S 23(1)	S 18(1)	S 17
Property	A person must not be arbitrarily deprived of the person's property.	S 24(2)	S 20	–
Protection of children	Every child has the right, without discrimination, to the protection that	S 26(2)	S 17(2)	S 11(2)

Right	Requirement (*Qld HRA* text)	*Qld HRA*	*Victorian Charter*	*ACT HRA*
	is needed by the child, and is in the child's best interests, because of being a child.			

Privacy rights are likely to be engaged in any decision to adopt a novel data technology which uses or processes personal data. There have not yet been data privacy cases decided under the privacy provisions of the *Qld HRA*, and few cases in Victoria which consider privacy rights in the context of data privacy.[131] As noted above, there are significant European cases considering the use of novel data technologies such as facial recognition in the context of article 8 privacy rights under the *European Convention on Human Rights*, which differs slightly in its drafting from the Australian formulations in specifically requiring that no interference with privacy rights be permitted unless it is both 'in accordance with the law' and 'necessary in a democratic society'.[132] The settled view is that for the use of such a technology to be lawful and necessary, there must be a clear legal basis for its use, and a number of transparent safeguards in place, including to avoid the arbitrary application of any discretions.[133]

Under Australian human rights laws, a public sector agency assessing a novel data technology which may engage privacy rights is required to consider whether the proposed data use might unlawfully or arbitrarily interfere with privacy.[134] If it is considered to pose an unlawful interference (such as by contravening one or more applicable privacy principles)[135] it must not proceed to an assessment of

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131 In the Victorian case *DPP v Kaba* (2014) 44 VR 526, the court found that the s 13 privacy right was engaged and limited by police officers' questioning of a suspect for his name and address data at a traffic stop, which is less of a data processing issue than a conventional privacy issue. Another Victorian case, relating to the retention of video footage from a protest, could be considered to involve data privacy but the Tribunal was not satisfied that the s 13 privacy right was engaged because there had been no attempt to identify the applicant from her image: *Caripis v Victoria Police* [2012] VCAT 1472.

132 *ECHR* (n 87) art 8(2).

133 See, eg, the summary of the settled position in *R (Bridges) v Chief Constable of the South Wales Police* [2020] 1 WLR 5037, [55]. In that case, the UK Court of Appeal found that the South Wales Police's safeguards around the use of facial recognition technology were inadequate: [94]. See also these European Court of Human Rights cases finding inadequate safeguards for the purposes of article 8 of the *ECHR* regarding a UK surveillance program and the use of facial recognition technology in Moscow, respectively: *Big Brother Watch v United Kingdom* (2022) 74 Eur Court HR 493; *Glukhin v Russia* (2024) 78 Eur Court HR 73.

134 The onus would not rest on the agency to demonstrate this in court; the onus would rest on a complainant to do so. But an agency discharging its conduct obligation would wish to be confident in its analysis that it could defend against such assertions.

135 If the proposal contravenes a legislated privacy principle, it is likely to be considered to be unlawful and accordingly in contravention of the privacy right: *Thompson* (n 127) 317 [49].

limitation and justification.[136] If it is assessed to arbitrarily interfere with privacy, it could potentially be justified by application of the relevant general limitations clause, discussed further below.[137] Applications of novel data technologies in the public sector that could engage and potentially limit the privacy right include AI/ML applications, image processing applications, biometric applications and automated decision-making applications, if they use or process personal data or de-identified personal data.

Rights to recognition and equality may be engaged by the use of any novel data technology application which results in differential outcomes for individuals based on attributes identified in or arising from the data. These rights are intended to include but might not be limited to protecting attributes already protected by anti-discrimination laws in the relevant jurisdictions.[138] A Robodebt-style algorithmic decision-making program might engage these rights if it is considered to systematically discriminate against vulnerable individuals or individuals in irregular employment, for example.[139] Other novel data technologies which might engage these rights include biometric technologies such as facial recognition algorithms (known to be less accurate in recognising people of colour)[140] and the use of AI or ML tools for predictive purposes, where the training data may reflect racial or socioeconomic bias.[141]

The right to freedom of movement could be impacted by any image-processing surveillance, such as CCTV analytics, given that it may have the effect of chilling movement. Similarly, the widespread use of Automated Number Plate Recognition cameras by law enforcement could engage this right. In Queensland,

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136 In *Thompson* the Victorian Court of Appeal indicates that if the conduct is unlawful '[i]t will be impossible for the public authority to meet the justification requirement', so there is no point continuing the analysis: ibid 318–19 [58].

137 The *Thompson* court notes that while it would be technically possible to justify conduct found to be arbitrary it would 'ordinarily, be very difficult' because the tests overlap: ibid 318–19 [58].

138 See, eg, *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95, [317]–[320]. In that case, Freeburn J notes that the *Qld HRA* and *ACT HRA* have an inclusive definition of 'discrimination' but considered the definition in the *Qld HRA* to be limited to attributes *analogous* to those protected by anti-discrimination laws: [317]–[318]. Compare the narrower definition under the *Victorian Charter*, which is restricted to attributes already protected by anti-discrimination laws.

139 Karen Yeung and Adam Harkins, 'How do "Technical" Design-Choices Made When Building Algorithmic Decision-Making Tools for Criminal Justice Authorities Create Constitutional Dangers? (Part II)' (2023) (Jul) *Public Law* 448; Miller (n 20); Natalie Sheard, 'Employment Discrimination by Algorithm: Can Anyone be Held Accountable?' (2022) 45(2) *University of New South Wales Law Journal* 617. Note that this consideration raises large questions in the context of a program like Robodebt, where a substantial proportion of affected individuals are likely to be vulnerable — but that is good grounds for exercising extra care.

140 Drew Harwell, 'Federal Study Confirms Racial Bias of Many Facial-Recognition Systems, Casts Doubt on Their Expanding Use', *The Washington Post* (online, 19 December 2019) <https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/>.

141 Julia Dressel and Hany Farid, 'The Accuracy, Fairness, and Limits of Predicting Recidivism' (2018) 4(1) *Science Advances* 5580.

such cameras are used to detect unregistered and uninsured vehicles and automatically issue infringement notices.[142]

The rights to freedom of thought and expression may be engaged by technologies processing opinions previously expressed or inferred, including religious opinions. For instance, AI- or ML-based risk assessments and recidivism predictions in the criminal justice system may incorporate previously expressed views or activism.[143]

The rights to peaceful assembly and freedom of association would be impacted by restrictions applied to the free assembly of citizens for protests, including by means of image-processing or biometric technologies. One controversial issue has been the use of CCTV to monitor peaceful gatherings — such activity resulted in a *Victorian Charter* case, *Caripis v Victoria Police*, in which the applicant unsuccessfully asserted an infringement of her rights to freedom of expression and peaceful assembly due to retention of protest footage by law enforcement.[144]

If a technology will collect or process data from citizens under 18 years-of-age, children's rights to protection may be engaged. Public sector agencies should be conscious of the need to consider the 'best interests of the child' and make special provision to protect children when dealing with datasets including children's personal data (such as birth certificate, passport or driver licence datasets), or collection mechanisms which may capture children's images.[145] Biometric technologies may be inappropriate for use with children, due to their inability to fully consent to the potential life-long implications of the collection.

A right not to be deprived of property is included in the *Qld HRA* and *Victorian Charter* but not the *ACT HRA*. Moreover, the *Qld HRA* includes a reference to arbitrariness lacking in s 20 of the *Victorian Charter*, which only precludes unlawful deprivation of property (see Table 4). This right may be engaged more rarely in relation to novel data technologies, but may be relevant where an automated decision-maker imposes an unjust penalty or fine (see the discussion of Robodebt below in Part V).

Finally, the right to take part in public life is relevant if a data technology, such as automated cleansing of voter rolls, impacts access to voting, or engagement with political parties.

To summarise, the substantive obligation requires that the public sector agency's actions and decisions be compatible with the rights listed above. While

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142 'Automated Number Plate Recognition Cameras', *Queensland Government* (Web Page, 15 June 2023) <https://www.qld.gov.au/transport/safety/fines/number-plate-recognition-cameras>.

143 Dressel and Farid (n 141).

144 *Caripis v Victoria Police* [2012] VCAT 1472, [76]. Since then, an applicant has been successful in a similar human rights case in the United Kingdom: *Catt v United Kingdom* (2019) 69 Eur Court HR 177.

145 The principle of protecting 'the best interests of the child' has a solid foundation in international human rights laws, deriving from the United Nations Convention on the Rights of the Child: *Convention on the Rights of the Child*, 1577 UNTS 3 (signed and entered into force 20 November 1989). See also Committee of the Rights of the Child, *General Comment No 25 on Children's Rights in Relation to the Digital Environment*, Doc No CRC/C/GC/25, 2 March 2021.

the substantive and procedural obligations are legally independent of one another,[146] effective application of the procedural obligation should assist the agency in complying with the substantive obligation, and vice versa.

D *Procedural Obligation*

Courts have tended to take a pragmatic approach to the procedural obligation, given that non-legally qualified public servants must be able to undertake this task as part of their regular work. There is a slightly more stringent approach in Queensland, where the Queensland Supreme Court case of *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* ('*Owen-D'Arcy*') confirmed that due to s 58(5) of the *Qld HRA* it is necessary in that State for the agency to correctly identify all applicable rights.[147] The general test arises from the judgment of Emerton J in an early *Victorian Charter* case, *Castles v Secretary of the Department of Justice* ('*Castles*')[148]. This test was summarised in *Bare v IBAC* ('*Bare*') and re-stated by the Court of Appeal in *HJ v IBAC* ('*HJ*') to the effect that a public sector decision-maker must: (1) understand which human rights may be relevant and how the decision might impact them; (2) seriously consider the impact of the decision on those rights; (3) identify countervailing interests; and (4) balance the competing interests as part of the task of justification.[149]

In *Castles*, Emerton J emphasised the normative role of the conduct obligation, stating that it is not expected to be a 'sophisticated legal exercise'.[150] How would a public servant discharge this obligation when required to make a decision on the use of a novel data technology? As a matter of policy, public sector agencies usually prepare a written assessment to assist with discharging the procedural obligation, to demonstrate that they have given proper consideration to human rights (and acted accordingly).[151] While this goes by different names in

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146 *Thompson* (n 127) 327 [101].

147 *Owen-D'Arcy* (n 116) 298 [136]–[137] (Martin J). This approach was affirmed and followed by the Queensland Supreme Court: *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95, [355]–[356] (Freeburn J). A subsequent Supreme Court case appeared to soften the approach but did not clearly depart from *Owen-D'Arcy*: *BZN v Chief Executive, Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266, [240] (Crowley J).

148 *Castles v Secretary of the Department of Justice and Others* (2010) 28 VR 141 ('*Castles*').

149 *HJ (pseudonym) v Independent Broad-based Anti-corruption Commission* (2021) 64 VR 270, 306 [155] (Beach, Kyrou and Kaye JJA), citing ibid 184 [185]–[186]; *Bare* (n 117) 198–9 [217]–[221], 218–23 [277]–[289], 297–8 [535]–[536].

150 *Castles* (n 148) 184 [185]–[186].

151 This is not required by the legislation but 'practically, such a record will be critical to meet any allegation that the public entity failed to give proper consideration to human rights as required by the "procedural limb"': Brenna Booth-Marxson and Kent Blore, 'Breathing life into the *Human Rights Act 2019* (Qld): The ethical duties of public servants and lawyers acting for government' (2022) 41(1) *University of Queensland Law Journal* 1, 26–7.

different jurisdictions,[152] I will refer to this document as a 'rights assessment'.

A rights assessment has no required format, but should identify the engagement of human rights plus any limitation of those rights, and assess whether the limitation is reasonable and justified by application of the relevant general limitations clause.[153] In the case of a novel data technology, the rights assessment should (at a minimum) outline the nature of the technology and any associated data flows, identify any human rights it might engage, and consider any limitation of those rights and possible mitigations to prevent such an impact. Should a limitation be identified, the rights assessment would need to step through the applicable general limitations clause in relation to that limitation. Unlike in Victoria and the ACT, s 58(5) of the *Qld HRA* requires that public servants consider 'whether the decision would be compatible with human rights' as part of the procedural requirement, which may make application of the general limitations clause mandatory as part of the rights assessment in Queensland.[154]

The level of consideration required will depend to a degree on the circumstances. In *Bare*, Tate JA described s 38(1) 'proper consideration' as requiring a higher standard of consideration than generally required at common law.[155] In *Certain Children (No 2) v Minister for Families & Children*, John Dixon J noted that the standard required in that case (impacting the interests of vulnerable child detainees) would be higher than for *Castles* (which concerned an adult prisoner seeking access to in vitro fertilisation services).[156] On the other hand, in *Owen-D'Arcy*, Martin J noted that '[d]ecision-makers … are not expected to achieve the level of consideration that might be hoped for in a decision given by a judge'.[157]

What should be the appropriate level of 'proper consideration' for a program involving novel data technologies? In the case of new technologies, the decision-maker arguably has a higher responsibility to understand the inherent privacy impacts of the project. The European Court of Human Rights considered in *S and*

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[152] In Queensland, it can be a Human Rights Impact Assessment or a File Note: see, eg, Queensland Government, 'Human rights resources' (Web Page, 2020) <https://www.forgov.qld.gov.au/service-delivery-and-community-support/design-and-deliver-public-services/comply-with-the-human-rights-act/human-rights-resources>. In Victoria, it is generally called a Charter assessment: see, eg, *Loielo v Giles* [2020] VSC 722, [75], [77]. In the ACT, it is simply a documented consideration: see, eg, ACT Human Rights Commission, Achieving the Rights Outcome (2015) 4, 21–3 <https://www.hrc.act.gov.au/___data/assets/pdf_file/0005/2305481/Achieving-the-Rights-Outcome.pdf>.

[153] See, eg, this Queensland guide to the rights assessment which includes a template for agencies to complete at Appendix A: Queensland Government, *Human Rights Guide: Reviewing Policies and Procedures for Compatibility with Human Rights* (Report, 1 June 2019) 4.

[154] See (n 147).

[155] *Bare* (n 117) 203 [235].

[156] *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 584 [491] ('*Certain Children (No 2)*'). Dixon J indicated that the standard expected of the Minister was higher due to having received high-quality legal advice and due to the vulnerability of the children impacted by the decision: [203], [491]–[492].

[157] *Owen-D'Arcy* (n 116) 298 [137].

Marper v United Kingdom ('*Marper*') that a particular duty applied to European jurisdictions in relation to novel technologies in the context of the equivalent European right to privacy:

> the protection afforded by [privacy rights] would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests.... [A]ny State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance in this regard.[158]

While this approach has not been expressly adopted in Australian jurisdictions, the relevant human rights statutes all provide that courts may consider foreign jurisprudence on similar provisions.[159] Even though European rights to privacy do not include an equivalent procedural obligation, *Marper* provides persuasive guidance for applying a high bar to the procedural consideration of novel data technologies, where the full range of potential consequences is not well known. In this context, the next section explores how the rights assessment process for novel data technologies could be bolstered by applying contemporary risk-based methodologies.

E *Risk Management as an Approach to Discharging the Obligations*

A challenging element of assessing novel data technologies is that their full impact is not always clear at the outset, and there is often uncertainty around their design, scope, outcomes and the extent to which they engage and limit human rights.[160] Where there is potential limitation of human rights and considerable uncertainty, risk-based methodologies can be a useful tool. Further, if a novel data technology poses potentially significant risks to human rights, there is a strong basis for the application of risk management based on the precautionary principle, 'to regulate the intervention before we are sure that it presents a serious threat, and before it is released and dispersed widely'.[161] In this context, it is worth noting that risk management based on the precautionary

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158 *Marper* (n 128) [112]. The Court made these comments in relation to the novel use of DNA technologies by United Kingdom law enforcement agencies. The Court held that the retention of DNA samples and fingerprints of suspects for an unlimited time 'constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society': [125].

159 *Qld HRA* (n 9) s 48(3); *Victorian Charter* (n 9) s 32(2); *ACT HRA* (n 9) s 31(1).

160 Yeung and Harkins helpfully explore the potential breakdown between technical goals and policy goals in the establishment of one type of novel data technology (automated decision-making algorithms) and indicate the range of uncertainty of outcomes that might accompany such a tool: Yeung and Harkins (n 139). This is emblematic of the issues across novel data technologies, where technical goals and outcomes may diverge widely from policy goals and outcomes, with neither side fully understanding the other.

161 Alan Randall, *Risk and Precaution* (Cambridge University Press, 2011) 7.

principle is not uncontroversial — opponents argue that it requires intrusive regulation, deals badly with the choice between more and less risky options, implicitly favours the 'do nothing' option, discourages innovation and encourages unfounded panic around risks which may not eventuate.[162] But where there is human rights legislation in place requiring public servants to work through the potential impact of a novel data technology on human rights, such a precautionary approach would be advantageous.

Is risk management an appropriate approach to the protection of human rights? The *GDPR* incorporates some risk management approaches in its approach to accountability obligations on data controllers,[163] which has led to critical inquiry around the relationship between risk management and fundamental rights. Gellert describes how a risk-based approach has been critiqued for being overly business-friendly and eroding rights.[164] But he considers rights-based and risk-based approaches to data protection to be fundamentally compatible, given that both are based on the proportionality principle, namely, the balancing of various rights and interests.[165] Yeung and Bygrave comment that attempts to apply risk assessment to rights can 'seem to fly in the very face of their jurisprudential structure and philosophical foundations',[166] but in attempting to reconcile this, they propose a distinction between clear violations of rights, which should not be risk-managed, and 'borderline' cases where a risk-based approach applying additional scrutiny and safeguards may produce an acceptable outcome.[167]

Italian legal scholar Alessandro Mantelero began working on the use of human rights impact assessments for AI technologies in 2018, developing the concept into a book in 2022.[168] His 'general theory on the risk-based approach' involves four documented steps, namely identifying risks posed by the technologies; analysing their impact; selecting and applying mitigation measures; and undertaking regular review of the measures' effectiveness.[169] The Australian government's recent discussion paper 'Safe and Responsible AI in Australia' identifies 'a developing international direction towards a risk-based

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162 Ibid 17–25.

163 *GDPR* (n 7). See, eg, art 36: '[t]he controller shall consult the supervisory authority prior to processing where a data protection impact assessment under Article 35 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk.'

164 Raphaël Gellert, *The Risk-Based Approach to Data Protection* (Oxford University Press, 1st ed, 2020) 2.

165 Ibid 10–11.

166 Karen Yeung and Lee A Bygrave, 'Demystifying the modernized European data protection regime: Cross-disciplinary insights from legal and regulatory governance scholarship' (2022) 16(1) *Regulation & Governance* 137, 146.

167 Ibid.

168 Alessandro Mantelero, 'AI and Big Data: A Blueprint for a Human Rights, Social and Ethical Impact Assessment' (2018) 34(4) *Computer Law & Security Review* 754; Mantelero, *Beyond Data: Human Rights, Ethical and Social Impact Assessment in AI* (n 80).

169 Mantelero, *Beyond Data: Human Rights, Ethical and Social Impact Assessment in AI* (n 80) 50.

approach for governance of AI',[170] including in the EU *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence* ('*AI Act*'),[171] and invites consideration of a risk-based approach to addressing the regulation of AI in Australia.[172] Similarly, the facial recognition model law proposed by a group from the University of Technology Sydney ('UTS Model Law') includes a human rights risk-assessment model.[173] Like Yeung and Bygrave, the UTS Model Law identifies that while some human rights are absolute and must not be limited, a risk-based model may be used with non-absolute human rights like the right to privacy.[174] All of the human rights identified in Table 3 are non-absolute under the *Qld HRA*, *Victorian Charter* and *ACT HRA* (although some aspects of the rights to recognition and to freedom of thought may be considered absolute at international law).[175]

A risk assessment may duplicate some of the elements of a proportionality analysis under human rights law,[176] but carries several practical benefits. First, the risk assessment process could be undertaken by any mid-level public servant (preferably by a member of the project team, with a close knowledge of project design), with the less familiar proportionality analysis undertaken afterwards by specialist staff: an internal legal team or a data privacy officer. Second, a risk assessment encourages more express 'quantification' of risk into categories such as high, medium and low — Mantelero outlines the importance of quantifying risk and setting a threshold for acceptability.[177] Third, a risk assessment is generally understood by project teams in a way that a legal advice may not be, and may be more likely to produce action to mitigate extreme and high risks.

Overall, a risk-based approach can appropriately add value to a rights assessment, provided it is recognised that in the face of a clear violation of rights or attempts to limit absolute rights, the use of risk management techniques will be inappropriate. Risk assessment generally involves a structured consideration of the potential consequences or severity of the action and the likelihood of each consequence occurring.[178] Qualitative risk assessments commonly use a two-

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170 Department of Industry Science and Resources, *Safe and Responsible AI in Australia* (Discussion Paper, June 2023)16.

171 Ibid 39, citing *AI Act* (n 7).

172 Department of Industry Science and Resources (n 170) 40–1.

173 Nicholas Davis, Lauren Perry and Edward Santow, The University of Technology Sydney, *Facial Recognition Technology: Towards a Model Law* (Report, September 2022) 45–56. The risk-based assessment model proposed by this group in respect of facial recognition assessments is not dissimilar to the model I propose in this article for novel data technologies more broadly.

174 Ibid 56.

175 The relevant human rights legislation specifies that these rights may be limited: *Qld HRA* (n 9) s 13; *Victorian Charter* (n 9) s 7(2); *ACT HRA* (n 9) s 28. For non-derogable international law rights, see *ICCPR* (n 87).

176 '[W]hen we do a legal proportionality test what we do is actually much closer to risk management than the current framing of the issue allows us to imagine and/or admit': Gellert (n 164) 10.

177 Mantelero (n 80) 52.

178 International Organization for Standardization, *ISO Guide 73: Risk Management* (2009) [1.1].

variable matrix, with 'severity' on one axis and 'likelihood' of occurrence on the other (see Figure 3).

Figure 3: A Classic 5 x 5 Risk Matrix

		Severity				
		Insignificant	Minor	Moderate	Major	Severe
Likelihood	Almost certain (76–100%)	Medium	High	High	Extreme	Extreme
	Likely (51–75%)	Medium	Medium	High	Extreme	Extreme
	Possible (31–50%)	Low	Medium	Medium	High	Extreme
	Unlikely (11–30%)	Low	Low	Medium	High	High
	Rare (0–10%)	Low	Low	Low	Medium	High

The categories of likelihood and severity should be clearly defined, to assist with consistent risk assessment.[179] Severity ratings (such as the distinction between minor and moderate) should be defined by reference to the types of projects or activities prevalent in that business area.

Despite scholarship such as Mantelero's, a structured risk assessment process is not currently a common element of rights assessments in Australia. Completed rights assessments are rarely published, so it can be difficult to draw conclusions about their use or effectiveness. Anecdotally, as illustrated by an exemplar rights assessment published by the Queensland government, rights assessments may step through the relevant rights and conclude that no rights are limited, or that any limitations to rights are justified — without recommending changes to program design or mitigations.[180] In such cases the assessment risks becoming a 'tick box' exercise. Another such example is the Victorian City of Yarra's 2022 assessment of proposed amendments to its governance rules ('City of Yarra Assessment'), which concludes in relation to each *Victorian Charter* right that the right is not engaged, or that the rules document 'imposes a reasonable

[179] See, eg, some sample severity ratings included below at n 208.

[180] Queensland Department of Education, 'Human Rights Impact Assessment: Decision Making' (Web Page, 2022) <https://ppr.qed.qld.gov.au/attachment/human-rights-impact-assessment-exemplar.docx>. As noted above, consideration of the general limitations clause may be mandatory in Queensland, so the failure of this exemplar to step through that clause is curious — particularly the failure to document possible alternative approaches in the exemplar.

limit on this human right', with no amendments proposed.[181] No specific format is prescribed for rights assessments, and neither the Queensland exemplar nor the City of Yarra Assessment describe the methodology or approach used to reach their conclusions, or propose alternative approaches.[182] The Queensland government has produced some helpful guidance for public servants around applying the substantive and procedural obligations in decision-making and asking relevant questions. However, it does not mention documenting the assessment in a structured way.[183] Such an opaque approach is not ideal in any case, but is particularly problematic when dealing with novel data technologies, where there are a range of complexities and possible outcomes and impacts that would ideally be assessed and documented. It would be unfortunate for public servants to deprive us of the benefits of novel data technologies due to misconceptions or a poor understanding of risk trade-offs, but equally undesirable for them to make overly optimistic assumptions about potential harms. Without a structured methodology, both outcomes are possible.

Introducing a more structured risk-based assessment into the rights assessment for novel data technologies may assist in building analytical skills in public servants around human rights protection, and thereby promote a stronger human rights culture. This approach aligns with UK Supreme Court justice Lord Sales' advocacy for structured *ex ante* reviews of AI technologies by public servants, including the need to develop the relevant skills within government.[184] My proposed approach, not dissimilar from Mantelero's,[185] is illustrated in Figure 4:

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181 City of Yarra, 'Charter of Human Rights and Responsibilities Assessment: Governance Rules' (Web Page, 2022) <https://www.yarracity.vic.gov.au/-/media/files/events/council-and-pdc-meetings/2022-meetings/council-23-august-2022/item-8_1-attachment-7-governance-rules-human-rights-assessment.pdf>.

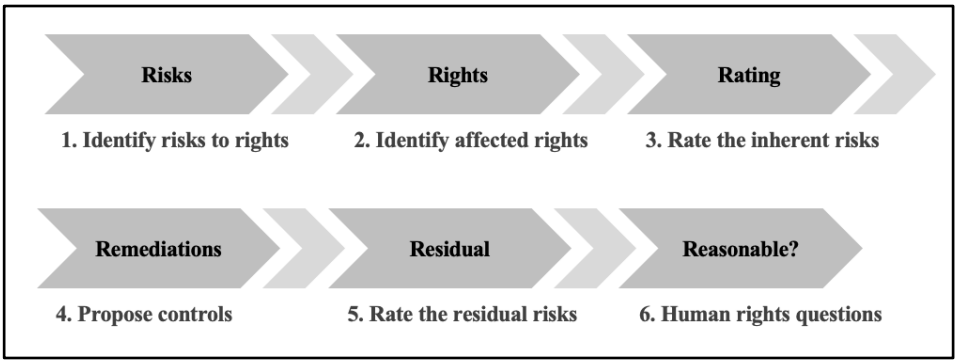
182 Ibid; Queensland Department of Education (n 180).

183 Queensland Government, 'Guide: Human Rights in Decision Making, A Guide for Queensland Government staff' (Web Page, 2020) <https://www.forgov.qld.gov.au/___data/assets/pdf_file/0024/184029/guide-human-rights-in-decision-making.pdf>.

184 Lord Sales, 'Algorithms, Artificial Intelligence and the Law' (2020) 25(1) *Judicial Review* 46, 53–4. Lord Sales was not convinced that such tasks could be resourced by existing government structures or personnel and proposed a new expert scrutiny agency to take on this role, including by allowing legal challenges to proceed prior to implementation: 54–7. See also Goldenfein's encouragement for public servants to rigorously assess new technologies: Goldenfein (n 22) 59.

185 Mantelero (n 80) 50. See also Mantelero's discussion of the likelihood and severity model and mitigation measures: 55–8.

Figure 4: The 6 'R's of Risk-Based Rights Assessment



The first two steps would generally be done together — identifying risks to rights (step one) and the corresponding rights (step two). The 'risk' is the potential undesirable outcome (eg personal information could be shared without adequate justification) and the 'affected right' is the relevant impacted human right (eg, privacy). This should involve scrutiny of the proposed technology and a degree of ethical imagination to work through potential consequences — this needs to be within the reach of mid-level public servants.[186] The importance of a human rights culture was outlined above, and that mindset and those associated skills within a public sector agency will be useful in this context. A table such as Table 4 would ideally be used to record the outputs, as part of the rights assessment.

Table 4: Risk Assessment Table, Showing Corresponding Step Number from Figure 4

1. Risk	2. Affected right	3a. Likeli-hood	3b. Severity	3c. Inherent risk	4. Control	5a. Likeli-hood	5b. Severity	5c. Residual risk

Once the relevant risks are identified and recorded, the Figure 3 matrix can be used to identify the likelihood and severity of the risk and therefore its inherent rating (step three) — where the inherent rating is the applicable risk level (low, medium, high or extreme) in the absence of any mitigation measures. Public agencies are likely to have a risk framework documenting acceptable risk levels. The acceptance of a risk rated higher than 'medium' is likely to depend on the benefits of the program and require senior-level approval. If the inherent rating is not acceptable with regard to the agency's risk appetite, it will be necessary to

186 Goldenfein (n 22) 59.

apply mitigation measures (step four) to produce a reduced *residual* risk. Appropriate mitigation measures for risks arising from the use of novel data technologies may include:

a) **Structural compliance mechanisms**: such as regular testing, auditing, or certification of the technology if available.[187]

b) **Privacy-by-design:** incorporating privacy protective measures in the design, such as by minimising the use of personal data.

c) **Security-by-design:** incorporating security controls in the design, such as encryption, security testing, and a security governance framework.

d) **Prototyping and pilots:** using a prototype or pilot approach (processing test data only), so that any impact on human rights can be explored and better understood.

e) **Human in the loop/oversight assessments:** despite well-founded concerns over reliance on 'human in the loop' to address AI risks,[188] it may be appropriate to embed an element of meaningful human review and oversight.[189]

Once the relevant mitigation measures are defined and inserted into the rights assessment, the next step is to determine a residual risk rating for each risk, based on the adjusted likelihood and severity ratings as a result of the treatment (step five). If any residual risks remain unacceptably high, additional mitigation measures can be added. While this approach should assist in reducing risks and producing a better project design to minimise impact on human rights, it may not eliminate such impacts. Because human rights are not absolute under Australian state or territory human rights legislation and can be limited in reasonable ways, the final step (step six) involves a proportionality analysis, essentially an evaluation of whether the limitations are reasonable by applying the relevant general limitations clause: s 13 of the *Qld HRA*, s 7(2) of the *Victorian Charter* or s 28 of the *ACT HRA*.[190]

While the wording of the general limitations clauses across the three jurisdictions varies slightly, they are similar and the variations are unlikely to result in substantial differences in effect. Blore asserts that the s 13 elements in

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187 Ibid 51.

188 Reuben Binns, 'Human Judgment in Algorithmic Loops: Individual Justice and Automated Decision-Making' (2022) 16(1) *Regulation & Governance* 197. 'Human in the loop' is the concept of including human oversight of algorithmic decision-making systems to ensure a just outcome; but reliance on this as a safeguard has been critiqued because humans may apply their discretion in unfair ways, and may influence or by influenced by the technology: 207–8.

189 The discussion paper 'Safe and Responsible AI in Australia' proposes this as a risk control: Department of Industry Science and Resources (n 170) 40.

190 Victorian Equal Opportunity and Human Rights Commission, *The Charter of Human Rights and Responsibilities: A guide for Victorian public sector workers* (Report, June 2019) 16.

the *Qld HRA* reflect the four elements contained in the 'structured proportionality analysis' used in human rights systems internationally, and that each is necessary and sufficient to that goal: '[e]ach step tests the reasonableness of the limit on human rights from a slightly different angle, such that skipping a step means failing to test the reasonableness of the measure from that angle'.[191] Blore describes those four sequential elements, reflected in each of the general limitations clauses, as follows:[192]

(i) the limit has a proper purpose;

(ii) there is a rational connection between the limit and that purpose;

(iii) the limit is necessary to achieve its purpose, in the sense that the purpose cannot be achieved without limiting the human right or by limiting it to a lesser extent; and

(iv) the limit strikes a fair balance between the need to achieve its proper purpose and the human right at stake.[193]

There is one additional element covered in each of the general limitation clauses, namely the requirement that the limitation be lawful.[194] Table 5 shows these five elements as questions tailored for the use of a novel data technology.

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191 Kent Blore, 'Proportionality under the *Human Rights Act 2019* (Qld): When Are the Factors in s 13(2) Necessary and Sufficient, and When Are They Not?' (2022) 45(2) *Melbourne University Law Review* 419, 421.

192 Ibid 435.

193 Blore also refers to the 'seminal' Canadian case *R v Oakes* [1986] 1 SCR 103, a noted authority on structured proportionality: Ibid 426. Speaking for the Supreme Court in *R v Oakes*, Dickson CJ summarises the elements as (1) the measures must be rationally connected to the objective; (2) the means should limit rights as little as possible; and (3) there must be 'a proportionality' between the impact of the measures and a sufficiently important objective: [70].

194 *Victorian Charter* (n 9) s 7(2); *Qld HRA* (n 9) s 13(1); *ACT HRA* (n 9) s 28.

Table 5: Human Rights Questions for Novel Data Technologies (Arising from General Limitations Clauses)

	If there is potential limitation of human rights by the technology:	***Qld HRA***	***Victorian Charter***	***ACT HRA***
1	Is there a clear legal basis for the use of the technology?	13(1):subject under law'	7(2): 'subject under law'	28(1): 'set by laws'
2	Does the use of the technology have a proper purpose?	13(2)(b): 'nature of the purpose' and 13(2)(e): 'the importance of the purpose of the limitation'.	7(2)(b): 'importance of the purpose'	28(2)(b): 'importance of the purpose'
3	Is there a rational connection between any potential limitation on human rights and that purpose?	13(2)(c): 'the relationship between the limitation and its purpose'	7(2)(d): 'the relationship between the limitation and its purpose'	28(2)(d): 'the relationship between the limitation and its purpose'
4	Is the limitation necessary to achieve the purpose (or is there an alternative approach which would be less restrictive?)	13(2)(d): 'any less restrictive and reasonably available ways to achieve the purpose'	7(2)(e): 'any less restrictive means reasonably available to achieve the purpose'	28(2)(e): 'any less restrictive means reasonably available to achieve the purpose'
5	Does the limitation strike a fair balance between the proper purpose and the human right?	13(2)(g): 'the balance between the matters' [the importance of the limitation and of preserving the right]	7(2): 'such reasonable limits as can be demonstrably justified in a free and democratic society'	28(2): 'whether a limit is reasonable'

This may appear repetitive, given that some elements of Table 5 will no doubt be considered during the first five steps in Figure 4. Those first steps should be viewed as preparing the best proposal possible, minimising human rights impacts. In most cases, this should be undertaken by staff with a close understanding of the project, preferably staff on the project team — who would ideally also prepare an overview of the proposed use of the technology as an introduction to the rights assessment.[195] Step six is more likely to be undertaken by a legal team or data privacy officer exercising oversight, providing a check on the work done by the project team to reduce human rights impacts. For smaller projects, it should be feasible to complete the first five steps and record the outputs in Table 4 in a relatively short timeframe — the rights assessment is not expected to be a polished piece of work, simply a documented record of reasonable considerations. Some might wonder why the program's legal basis is not fully considered until step six, given that legality is a threshold question (as already noted, an illegal program cannot be justified under human rights laws). The project team working on the first five steps is unlikely to feel comfortable assessing legal basis, which may be best handled by specialist staff (lawyers or data privacy professionals). But those specialist staff will benefit from having the detail of the proposal and technology fleshed out by the project team before they do an overall assessment of proportionality. Accordingly, the deferral of this consideration until step six is a practical matter, rather than a comment on its importance in the assessment.

The next section works through the steps using a hypothetical situation, to demonstrate how the application of this approach may layer meaningful safeguards over potentially inadequate legal frameworks regarding the use of novel data technologies.

V Application to a Robodebt-Type Program

The Australian government's Robodebt program did not use AI but employed automated processes to evaluate personal data,[196] so it can be viewed as the use of a novel data technology. Hypothetically, we will relocate that program to a state-based program in Queensland, and consider how the *Qld HRA* and the risk-based assessment process outlined above may have resulted in a different outcome.

For our purposes, it is useful to examine the Robodebt elements that were apparent during program design and pre-implementation, because this is the period when public servants would ideally have identified and controlled relevant

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195 Such an introduction is usually prepared for any privacy impact assessment and could be re-used for the rights assessment with minor modifications. A reliable overview of the project, data flows and technologies will assist the specialist staff to efficiently and accurately undertake step 6.

196 *Robodebt Report* (n 1) 472.

risks. According to the Royal Commission, the 'five significant differences' introduced by Robodebt compared to previous debt recovery programs were:

a) the use of unconfirmed wage data as the basis for earned income;

b) the provision of unconfirmed information as a debt, with the onus on the recipient to dispute it (a reversed onus of proof) or accept the estimated debt plus an automatic 10 per cent 'recovery fee';

c) income-averaging used as a default approach to calculate the debt for each fortnight;

d) an almost entirely automated online process with minimal human involvement or assistance; and

e) retrospective effect reaching back five years, instead of the previous process that only reached back 12 months.[197]

Early legal advice raised questions about the legal basis for income-averaging and recommended legislative change to support the program, but was ignored.[198] In addition to the lack of a legal basis for income-averaging, the Royal Commission noted the lack of a basis for the 10 per cent penalty, the onus placed on recipients and the purportedly compulsive demands to recipients to provide information.[199] Easily-anticipated fairness issues arose from the fact that welfare recipients had not been told to retain more than six months of employment data, so would struggle to access employment records reaching back five years. Such issues also arise from: the complexity of the online system and the lack of available assistance for a vulnerable population; the use of outdated recipient contact information preventing many from receiving notifications of their 'debt'; and a lack of adequate explanation of the process.[200] In terms of the calculation, '[t]here was no meaningful human intervention in the calculation and notification of debts'[201] and it later emerged that the calculation error rate was at least 27 per cent.[202]

From a privacy perspective, the program relied on data-matching under the *Data-matching Program (Assistance and Tax) Act 1990* (Cth).[203] The Office of the

197 Ibid xxiv–xxv.

198 Ibid 26–7. The Royal Commission notes that had this advice been followed and legislative change sought, the required changes 'would certainly have encountered parliamentary and public opposition': ibid xxv.

199 Ibid xxv–xxvi.

200 Ibid xxvi–xxvii. In relation to the retention of work documentation, the target population could be expected to have a higher incidence of casual work and health challenges than the general population, so it was foreseeable that they would find these requirements particularly difficult and unfair.

201 Ibid 477.

202 Bill Shorten, 'Questions without notice on the Royal Commission into Robodebt' (Web Page, 7 February 2023) <https://ministers.dss.gov.au/transcripts/10181>.

203 'Centrelink Data Matching Activities' *Services Australia* (Web Page, 3 March 2022) <https://www.servicesaustralia.gov.au/centrelink-data-matching-activities>.

Australian Information Commissioner ('OAIC') prepared voluntary *Guidelines on data matching in Australian government administration* ('Guidelines') under the *Privacy Act* for application in such situations.[204] The Guidelines are voluntary but considered best practice and they contemplate the development of a Protocol for each data matching program; Centrelink had developed a Protocol in 2004 and lodged it with the OAIC.[205] According to the Royal Commission, the Robodebt program was inconsistent with the 2004 Protocol in a number of ways, including around data retention and the role of manual checking.[206] A new 2017 Protocol replaced the 2004 Protocol during the Robodebt program, but Robodebt did not comply with this new protocol's data retention requirements either.[207]

If we were to relocate a proposed Robodebt program to Queensland, a Queensland public agency would be required to complete a rights assessment before approving the program to proceed. Public servants assessing the program design in the light of the *Qld HRA* would be well-advised to step through the Figure 4 approach, recording the results in their rights assessment in a table like Table 6 below. In terms of methodology, Table 6 applies the Figure 3 risk matrix, using the likelihoods defined in Figure 3 and simple severity definitions.[208] (Most government departments and agencies would have their own organisational risk matrix with definitions appropriate to their portfolio, which they should apply.)

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204 Office of the Australian Information Commissioner, 'Guidelines on data matching in Australian Government administration' (Web Page, 18 June 2014) <https://www.oaic.gov.au/privacy/privacy-guidance-for-organisations-and-government-agencies/government-agencies/guidelines-on-data-matching-in-australian-government-administration>. This is the latest version of the Guidelines, but versions have been in place since 1992: *Robodebt Report* (n 1) 449.

205 *Robodebt Report* (n 1) 449.

206 Ibid 458.

207 Ibid 456, 458.

208 For the purposes of Table 6, I applied the following simple severity definitions, which are simply an attempt to divide potential consequences into five sequential levels:
Severe: loss of life, severe impact to more than 100 individuals, some impact to over 10,000 individuals, major litigation, major adverse media attention or reputational damage and/or severe impact on program delivery.
Major: personal injury, severe impact to 10–100 individuals, some impact to 1000–10,000 individuals, litigation, significant reputational impact, and/or major impact on program delivery.
Moderate: severe impact to fewer than 10 individuals, some impact to 100–1000 individuals, limited reputational impact and/or moderate impact on program delivery.
Minor: some impact to 10–100 individuals and/or minor impact on program delivery.
Insignificant: some impact to fewer than 10 individuals and no other disruptive impacts of any significance.

Table 6: Risk Assessment for Proposed Robodebt-Style Debt Recovery Program

1 Risk to human rights	Income-averaging may result in unequal and unjust outcomes for those with irregular income	Data matching does not comply with the relevant privacy-protecting Protocol	Personal information could be shared without adequate awareness of participants	Notifications from the program may not reach impacted individuals, resulting in penalties/ fines	Individuals impacted by the program may have inadequate avenues for complaint and appeal about impacts on their rights	The algorithm may not work as intended and produce arbitrary results	Payment obligations or fines may be incorrectly calculated	Vulnerable customers may not be resourced to engage with the program
2 Human Right	Equality, Property	Privacy	Privacy	Privacy, Property	Privacy, Equality, Fair Hearing[209]	Privacy, Equality, Property	Property	Equality
3a Likelihood	Almost certain	Likely	Likely	Likely	Likely	Likely	Possible	Possible
3b Severity	Severe	Moderate	Moderate	Moderate	Moderate	Severe	Severe	Major
3c Inherent Risk	Extreme	High	High	High	High	Extreme	Extreme	High
4. Control	Consider whether effective alternative approaches are available, or remove this feature.	Adjust processes for consistency with Protocol, especially regarding data retention and checking	Provide clear public explanation of use, notify participants and seek consent	Update contact details where possible, use multiple notification methods. Do not enforce where notification effectiveness unclear.	Create meaningful customer service, complaints and internal review channels	Undertake extensive prototyping and testing, including regular human testing/ auditing, offer manual reworking as part of internal review	Regular manual checking of a sample of all calculations to confirm process accuracy, offer manual reworking as part of internal review	Provide complex customer support for vulnerable customers, or exclude them from debt recovery.
5a Likelihood	?	Unlikely	Unlikely	Unlikely	Unlikely	Rare	Unlikely	Unlikely
5b Severity	?	Moderate	Moderate	Moderate	Moderate	Moderate	Moderate	Moderate
5c. Residual Risk	?	Medium	Medium	Medium	Medium	Medium	Medium	Medium

209 Fair hearing principles under the human rights legislation might be engaged if affected individuals were parties to a civil proceeding, but are unlikely to be so engaged in this case because the processes are internal to government, not court processes. However, administrative law principles will be relevant.

Due to the size and scope of the program it would be difficult to mitigate residual risks to lower than 'medium', but the approach outlined in Table 6 would still have offered very significant practical improvements and mitigation measures. First, it would have obliged the project team to consider alternatives to income-averaging. It would also have prompted clear public information provision, consistency with the privacy Protocol, multiple methods to notify customers, accessible customer service, complaints and internal review channels including support for vulnerable customers, extensive algorithmic checking and regular manual checking and auditing of calculations, as well as an ability and willingness to retract demands as required. The residual (remaining) risks would include the possibility of miscalculation, failed notification and error, but in each case customers would have a review pathway.

The residual risks of limitations on human rights would then be subjected to step six (the Table 5 questions), to be assessed by specialist staff:

1. **Is there a clear legal basis for the use of the technology?** A legal basis can be identified for the program as whole (data matching and welfare enforcement), but not for the income-averaging approach, financial penalties, retrospectivity, reversed onus of proof or compulsive information demands. These elements would therefore need to be removed from the program, or supporting legislation passed, to avoid breaching human rights. Also, an administrative recovery proceeding must comply with applicable administrative law principles — while detailed consideration of those principles is beyond the scope of this article, specialist staff reviewing the program should turn their minds to them, such as by ensuring adequate channels for customers to seek internal review.

2. **Does the use of the technology have a proper purpose?** The overall goal of enforcement of eligibility and reduction of fraud in a welfare system is a proper purpose, including efforts to preserve public funds. But the driving purpose for Robodebt may have been achieving substantial and specific reductions in welfare entitlements for budget repair regardless of eligibility, arguably not a proper purpose.[210] If a clear and consistent proper purpose is not identified, the project would not pass this element of the test.

3. **Is there a rational connection between any potential limitation on human rights and that purpose?** Assuming a legitimate purpose, the next consideration is whether the limitations on the rights to privacy and

[210] *Robodebt Report* (n 1) 28–31. According to the Report, public servants were pressured to find substantial cost savings calculated without reference to any estimate of fraud or wrongdoing in the program: 'the estimated $1.2 billion in savings was not a number "that had come out of a methodology, but that the number itself was a goal of the process"': 28.

equality for welfare recipients and property rights are rationally connected to a program to reduce misuse of welfare funds. But this depends on the program being accurate: limitations on human rights due to inaccurate calculations would not be rationally connected to a legitimate purpose. Any inaccuracies would need to be addressed to satisfy this test.

4. **Is the limitation necessary to achieve the purpose (or is there an alternative approach which would be less restrictive)?** The inherent risks identified in Table 6 above were clearly too restrictive to human rights. However, the mitigation measures proposed in Table 6 (which are alternative approaches) are likely to significantly reduce these risks. Provided the program has a proper purpose, an amended program including these additional mitigation measures might reasonably be considered necessary to achieve that purpose.

5. **Does the limitation strike a fair balance between the proper purpose and human rights?** On the initial design, no. With the re-design proposed in Table 6 including accurate calculations plus a proper legal basis, it is arguable that a fair balance is struck, with numerous mitigation measures and checks and balances to ensure fairness.

It is likely that if such a process were undertaken with genuine intent and within a human rights culture, the issues that emerged with Robodebt and caused considerable harm and damage would have been identified and corrected or controlled, or the project abandoned. [211] Such an approach would have resulted in a different program design and additional review avenues and supports for vulnerable customers. A rights assessment such as the above is clearly likely to satisfy the procedural obligation, and go a long way to satisfying the substantive obligation. [212]

With the increasing adoption of novel data technologies, public servants need to become skilled at interrogating such proposed uses and improving them. A greater depth of questioning and deliberation would be prompted by an approach such as the one outlined above, within a positive human rights culture.

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[211] See the comments of the President and Human Rights Commissioner of the ACT Human Rights Commission: 'I think that with a national Human Rights Act that Robodebt would have been prevented or at least remedied earlier': Watchirs (n 100) 28.

[212] Of course, such a result would require that legal and policy advice impacting human rights not be hidden from key decision-makers, as reported by the Robodebt Royal Commission: *Robodebt Report* (n 1) 106–7.

VI Conclusions

In this article I have considered Australian data protection legislation and concluded that it leaves a gap in protection in relation to novel data technologies. In Queensland, Victoria and the ACT, one way to plug that gap without law reform is to apply specific human rights legislation using a risk-based approach. This will be most effective where there is a human rights culture within the public service which is attuned to asking appropriate questions in the face of novel data technologies. The proposed approach may assist in mitigating weaknesses in the data protection legislation and further promoting and encouraging human rights cultures in the relevant public sectors, helping them mature. The rights assessment would ideally grow to encompass a genuine engagement with human rights risks, effective mitigation measures and structured proportionality, adding considerable value in an increasingly complex technological landscape.

The Commonwealth Robodebt program demonstrated a shocking lack of checks and balances. I illustrate above how a risk-based rights assessment of such a program could improve it and minimise its impact on human rights. As novel data technologies become more widespread, it becomes essential to increase the public service's sophistication in engaging with the impacts of such technologies. Within the relevant public sectors, applying risk-based approaches to novel data technologies under jurisdictional human rights laws may add a layer of technology-agnostic protection, pending (and even following) law reform to update data protection legislation.

APPENDIX

Table A1: Comparison of GDPR *Principles with Jurisdictional Laws and the Privacy Act Review Report (2022), with Areas of Concern Shaded Grey*

GDPR Principle[213]	*GDPR* Reference	Specific relevance to novel data technologies?[214]	Existing coverage under Qld, Vic, ACT data protection laws?	Coverage proposed under Privacy Act Review Report?[215]
Lawfulness, fairness and transparency	Art 5(1)(a)	-	Partial: covers collection only	Yes: recommends coverage of collection, use and disclosure.[216]
Purpose Limitation	Art 5(1)(b)	-	Yes	Yes: no change proposed
Data Minimisation	Art 5(1)(c)	-	Yes	Yes: no change proposed
Accuracy	Art 5(1)(d)	-	Yes	Yes: no change proposed
Storage Limitation	Art 5(1)(e)	-	Yes	Yes: no change proposed
Integrity and Confidentiality	Art 5(1)(f)	-	Yes	Yes: no change proposed
Accountability	Art 5(2)	-	Partial: accountability may be implied rather than directly addressed.	Yes: recommends increased accountability.[217]
Protection of children	Art 8	-	No	Yes: recommends additional

213 Note that there are a range of law enforcement exceptions to the *GDPR* principles: *GDPR* (n 7) art 23.

214 All the principles have relevance to novel data technologies, but this column attempts to identify those principles which have *specific relevance* in respect of these technologies, by offering protections targeted to the risks they pose.

215 Attorney-General's Department, *Privacy Act Review Report* (n 66). In each of the references to proposals from this report I indicate whether the proposal has been accepted by government in full ('agreed'), is subject to further consultation and an impact analysis ('agreed in principle') or merely 'noted': Attorney-General's Department, 'Fact Sheet: Government Response to the Privacy Act Review Report' (n 67) 2.

216 Attorney-General's Department, *Privacy Act Review Report* (n 66). Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 27.

217 Attorney-General's Department, *Privacy Act Review Report* (n 66) 10. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 29.

GDPR Principle[213]	*GDPR* Reference	Specific relevance to novel data technologies?[214]	Existing coverage under Qld, Vic, ACT data protection laws?	Coverage proposed under Privacy Act Review Report?[215]
				protections for children.[218]
Sensitive Data	Art 9	-	Yes	Yes: no change proposed
Provision of information	Art 13	-	Partial: lack of detail regarding contents of collection notices	Yes: recommends more detailed collection notice requirements.[219]
Right of access and rectification	Art 15, 16	-	Yes	Yes: no change proposed
Right of erasure	Art 17	-	No	Yes: recommends a right of erasure.[220]
Right to restrict processing	Art 18	Yes	No	No
Right to data portability	Art 20	-	No	No: notes consumer data rights (re banking and other industries) may assist.[221]
Right to object to processing	Art 21	Yes	No	Yes: recommends a right to object.[222]
Automated decision making / profiling	Art 22	Yes	No	Yes: recommends transparency re automated decisions.[223]

218 Attorney-General's Department, *Privacy Act Review Report* (n 66) 10. Combination of 'agreed' and 'agreed in principle': Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 29–30.

219 Attorney-General's Department, *Privacy Act Review Report* (n 66) 8. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 26.

220 Attorney-General's Department, *Privacy Act Review Report* (n 66) 11. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 31.

221 Attorney-General's Department, *Privacy Act Review Report* (n 66) 166.

222 Ibid 11. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 30.

223 Attorney-General's Department, *Privacy Act Review Report* (n 66) 12. Agreed: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 32.

GDPR Principle[213]	*GDPR* Reference	Specific relevance to novel data technologies?[214]	Existing coverage under Qld, Vic, ACT data protection laws?	Coverage proposed under Privacy Act Review Report?[215]
Data protection by design and default	Art 25	Yes	No	No: notes that this is implied. [224]
Obligations around de-identified information	Art 25	Yes	No	Yes: recommends extending protections to de-identified datasets.[225]
Mandatory impact assessments	Art 35	Yes	No: impact assessments are recommended but not mandatory	Yes: recommends mandatory impact assessments for any 'high privacy risk activity'.[226]

Victorian Public Sector Commission Raw Data 2008–22:

Table A2: Victorian Public Sector Survey, Whole Victorian Public Sector

Question: 'I understand how the Charter of Human Rights and Responsibilities applies to my work'

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
2008	19.94%	55.68%	11.02%	11.10%	2.26%
2009	22.81%	56.77%	10.25%	8.72%	1.45%
2010	21.75%	58.35%	9.44%	8.82%	1.64%
2011	20.56%	59.19%	8.81%	9.60%	1.84%
2012	22.51%	59.28%	8.07%	8.36%	1.60%

224 Attorney-General's Department, *Privacy Act Review Report* (n 66) 145.

225 Ibid 5. Government agreed to consult on a criminal offence for malicious re-identification (proposal 4.7) and agreed in principle to amend and extend the definition of 'de-identified' (proposal 4.5), with proposals 4.6 and 4.8 noted only: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 21–2.

226 Attorney-General's Department, *Privacy Act Review Report* (n 66) 9. Agreed in principle: Attorney-General's Department, *Government Response — Privacy Act Review Report* (n 71) 28.

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
2013	25.58%	53.08%	12.63%	7.30%	1.24%
2014	25.73%	53.32%	13.32%	6.51%	1.09%
2015	23.78%	55.21%	12.63%	7.10%	1.24%
2016	15.53%	44.62%	23.83%	12.06%	3.94%
2017	16.20%	44.98%	23.71%	11.64%	3.47%
2018	22.48%	53.70%	16.15%	5.71%	1.96%
2019	21.98%	52.93%	16.61%	6.53%	1.94%
2021	24.70%	51.52%	16.13%	5.79%	1.85%
2022	25.38%	52.58%	15.31%	5.19%	1.55%

The Territorial Scope of Australia's Unfair Contract Terms Provisions

Sirko Harder*

Section 23 of the Australian Consumer Law, which is sch 2 of the Competition and Consumer Act 2010 *(Cth), invalidates unfair terms in particular types of contract. Section 5(1) of the Act extends the application of the Australian Consumer Law to conduct outside Australia by (among others) corporations carrying on business within Australia. In* Carnival plc v Karpik *('*Ruby Princess*'), the High Court of Australia held that s 5(1) applies to the unfair contract terms provisions without any further territorial limitation. The Court applied the provisions to a contract made in North America between a Canadian resident and a foreign company which was carrying on business in Australia through other transactions. This article investigates the territorial scope of the unfair contract terms provisions.*

I Introduction

Part 2-3 of the Australian Consumer Law ('ACL'), which is sch 2 of the *Competition and Consumer Act 2010* (Cth) ('*CCA*'), contains provisions on unfair contract terms ('UCT provisions'). They invalidate a term in a particular type of contract if the term is unfair as defined in s 24. This article investigates the applicability of the UCT provisions in a cross-border case, ie a case in which not all elements are linked to Australia. This is present where the contract was made overseas, or at least one of the parties to the contract was based overseas when the contract was made,[1] or at least one of the obligations of the contract was or should be performed overseas.

The issue is not straightforward. The Australian common law has choice-of-law rules that specify the proper law of a contract, ie the legal system that an Australian court applies to determine the merits of a contractual dispute. It might be thought that an Australian court applies the UCT provisions to a contract if,

* Reader, School of Law, Politics and Sociology, University of Sussex. Email: s.harder@sussex.ac.uk. ORCID ID: https://orcid.org/0000-0002-7899-4397. I thank the anonymous reviewers for helpful comments on an earlier draft of this article. Any error is mine.

1 For the purposes of this article, a business is 'based' in the country in which it has its principal place of business or the place of business that has the closest connection to the contract, and an individual not acting in the course of a business is 'based' in the country in which the individual is ordinarily resident.

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and only if, the law of an Australian jurisdiction governs the contract under those choice-of-law rules. However, the *CCA* contains provisions that delineate the territorial scope of the ACL as a law of the Commonwealth. Since the ACL can also apply as a law of a state or territory, uniform provisions in state and territory legislation delineate the territorial scope of the ACL as a law of a state or territory. It might therefore be thought that the applicability of the UCT provisions in cross-border cases is determined solely by the provisions in the *CCA* and in state or territory legislation that delineate the territorial scope of the ACL ('ACL application provisions').

The High Court of Australia considered the issue in *Karpik v Carnival plc* ('*Ruby Princess*').[2] The case arose out of the voyage of the vessel *Ruby Princess* from Sydney to New Zealand and return in March 2020. During the voyage, an outbreak of Covid-19 occurred, as a result of which passengers contracted the disease and fell ill or died, while others suffered distress, disappointment or psychiatric injury. A class action was brought in the Federal Court of Australia, pursuant to Part IVA of the *Federal Court Act 1976* (Cth), against the time charterer and operator of the *Ruby Princess* (a company incorporated in the UK) and the owner of the *Ruby Princess* (a company registered in Bermuda that had its headquarters in Florida and its principal place of business in California). No distinction was drawn in the proceedings between the two companies, and they were collectively referred to as 'Princess'.[3]

The class was divided into three sub-groups, including the 'US sub-group' which was represented by Mr Patrick Ho, a Canadian resident who had booked tickets on the voyage through a Canadian travel agent. Before the High Court, it was no longer in dispute that Mr Ho's contract contained particular standard terms, including the following three clauses: a clause choosing the general maritime law of the US as the law governing the contract; a clause referring all claims involving personal injury or death to the US District Courts for the Central District of California to the exclusion of all other courts in the world; and a clause in which the passenger waived any entitlement to participate in any class action.

Princess sought a stay of proceedings by virtue of the exclusive jurisdiction clause and the class action waiver clause. The High Court of Australia rejected the stay. While the Court expressed the view that the class action waiver clause was not contrary to Part IVA of the *Federal Court Act*, it held that the clause was void for being an unfair term under the UCT provisions and that there were strong reasons not to enforce the exclusive jurisdiction clause in exercising the discretion whether to stay proceedings. Crucially, the Court held that the UCT provisions applied to Mr Ho's contract — a contract concluded in North America between a Canadian resident and a foreign company.

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2 (2023) 98 ALJR 45 ('*Ruby Princess* HCA').

3 Ibid [2].

The High Court's statements on the territorial scope of the UCT provisions settled several questions that had hitherto been controversial. But some important questions were not addressed and new questions arise. This article investigates the territorial scope of the UCT provisions in all aspects. It engages with the arguments made by the High Court and by judges in the Full Federal Court in *Karpik*, but it is not confined to the issues addressed in *Karpik*.

Part II provides a brief overview of the UCT provisions, insofar as necessary for present purposes. Part III considers the relationship between forum statutes and the common law choice-of-law rules, insofar as necessary for present purposes. Part IV determines the territorial scope of the UCT provisions according to the ACL application provisions in the *CCA* and in state and territory legislation. Part V examines whether that scope is compatible with the comity of nations or whether it needs to be limited. Part VI investigates whether the territorial scope of the UCT provisions could have been limited through statutory interpretation had the High Court in *Karpik* not rejected any such limitation. Part VII contains the conclusion.

II The Unfair Contract Terms Provisions

With effect from 1 July 2010, the ACL was enacted as a new sch 2 of what was then the *Trade Practices Act 1974* (Cth) ('*TPA*').[4] At that time, the ACL contained only provisions on unfair contract terms.[5] With effect from 1 January 2011, the *TPA* became the *CCA*, and a large number of provisions on various matters were inserted into the ACL.[6] The UCT provisions were renumbered (they are now in Part 2-3 of the ACL) but their content remained the same. Each state and territory enacted legislation making the ACL applicable as a law of that state or territory in certain circumstances.[7]

Section 23(1) of the ACL provides that a term of a 'consumer contract' is void if the term is 'unfair' and the contract is a 'standard form contract'.[8] The term 'standard form contract' is not defined. Section 27(2) lists factors that a court must take into account in determining whether a contract is a 'standard form contract' but provides no test against which those factors are to be assessed. It may broadly be said that a contract is a 'standard form contract' for the purposes of Part 2-3 of the ACL if the terms other than the core terms were imposed by one

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4 See *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth). This Act also inserted parallel provisions on unfair terms in financial products and services (ss 12BF–12BM) in the *Australian Securities and Investments Commission Act 2001* (Cth).

5 Identical provisions were enacted in New South Wales and Victoria with effect from 1 July 2010. See *Fair Trading Amendment (Unfair Contract Terms) Act 2010* (NSW); *Fair Trading Amendment (Unfair Contract Terms) Act 2010* (Vic).

6 See *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth).

7 See below n 53.

8 Part 2-3 of the ACL does not apply to certain types of term (s 26) and certain types of contract (s 28).

party and not individually negotiated.[9] Section 24 defines the meaning of 'unfair'. The details of this definition are not relevant for the purpose of this article.[10]

Section 23(3) states that a 'consumer contract' for the purpose of Part 2-3 of the ACL is a contract for the supply of goods or services or for the sale or grant of an interest in land where the supply, sale or grant is 'to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption'.[11] It is not required that the person who supplies the goods or services, or sells or grants the interest in land, is acting in the course of a business. A 'consumer contract' may be present where neither party is acting in the course of a business.[12] Such a contract will not usually be a 'standard form contract', but it may be.[13] Section 250(1) permits each party to a 'consumer contract' (as well as the regulator) to apply to a court to declare a term void. It is not only the person who acquires the goods, services or interest in land who is protected by pt 2-3 of the ACL. In the second reading speech, the minister introducing the relevant bill said that the UCT provisions (as originally enacted) aimed to protect consumers,[14] but also said that the person who is advantaged by an impugned term is 'usually a business',[15] meaning that it may not always be a business.

In 2015, the UCT provisions were amended with effect from 12 November 2016.[16] This measure aimed to protect small businesses from unfair contract terms.[17] Section 23(1) of the ACL was amended so as to apply not only to a 'consumer contract' but also to a 'small business contract' provided it is a 'standard form contract'.[18] The same test of unfairness applies. Like a 'consumer contract', a 'small business contract' is defined in s 23(4)(a) as a contract for the supply of goods or services or for the sale or grant of an interest in land. The version of s 23(4) and (5) that was enacted with effect from 12 November 2016 requires a contract to satisfy the following two conditions to qualify as a 'small business contract'. First, the upfront price payable under the contract must not

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9 See, eg, *Value Living for Seniors Pty Ltd v Kacar* [2023] VCAT 1270 [259]; *VA Holdings Pty Ltd v Global Capital Corp Pty Ltd* [2023] NSWSC 1522 [174]. For a discussion, see Sirko Harder, 'Problems in Interpreting the Unfair Contract Terms Provisions of the Australian Consumer Law' (2011) 34(3) *Australian Bar Review* 306, 311–13.

10 For a summary of the applicable principles, see *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3)* (2021) 153 ACSR 347 [65]–[73]. See also Jeannie Paterson, *Unfair Contract Terms in Australia* (Lawbook Co, 2011).

11 For a discussion, see Harder (n 9) 307–10.

12 The definition of 'consumer contract' in section 23(3) is thus unusual in international comparison. Cf *Consumer Rights Act 2015* (UK) s 61.

13 For example, the sale of residential property may be conducted on standard terms introduced by a real estate agent even though neither party to the contract of sale is acting in the course of a business.

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6983 (Craig Emerson).

15 Ibid 6984 (Craig Emerson).

16 *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).

17 See Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth) ch 2.

18 See *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).

exceed AUD300,000 or, where the contract has a duration of more than 12 months, AUD1m. Secondly, at the time the contract is entered into, at least one of the parties to the contract must be 'a business that employs fewer than 20 persons'.[19] Only such a party (as well as the regulator) may ask the court to declare a term in a 'small business' contract unfair.[20]

Another revision of the UCT provisions was enacted in 2022 with effect from 9 November 2023.[21] The two key aims were to strengthen the remedies and enforcement of the provisions and to expand the class of contracts covered by the provisions.[22] New subsections of s 23 of the ACL now provide that particular conduct constitutes a contravention of those subsections where the conduct relates to an unfair term in a contract that is a 'standard form contract' and is either a 'consumer contract' or a 'small business contract'. Section 23(2A) provides that a person contravenes this subsection if the person makes a contract containing an unfair term and the person 'proposed' that term.[23] Section 23(2B) provides that a person commits a separate contravention in respect of each term that is unfair and that the person proposed. Section 23(2C) provides that a person contravenes this subsection if the person applies or relies on, or purports to apply or rely on, an unfair term.[24] A new s 224(1)(a)(iia) permits the court to impose a penalty for a contravention of s 23(2A) or (2C).[25]

The concept of 'small business contract' is still confined to a contract for the supply of goods or services or the sale or grant of an interest in land. But there is no longer a limit as to the upfront price payable under the contract, and s 23(4)(b) of the ACL now requires that at least one of the parties satisfies either or both of the following conditions: (i) the party makes the contract in the course of a business and employs fewer than 100 persons; (ii) the party's turnover in the

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19 Casual employees are not counted unless they are employed on a regular and systematic basis. For the question of whether employees of a related company are to be counted, see Peter Sise, 'Can a Big Business Avail Itself of the Unfair Contract Terms Provisions in the Australian Consumer Law?' (2018) 26(4) *Australian Journal of Competition and Consumer Law* 276.

20 See the version of s 250(2) enacted with effect from 12 November 2016.

21 *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth).

22 Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth) 28 [2.16]–[2.17]. In addition, a new s 27(3) of the ACL sets out factors that do not prevent a contract from being a 'standard form contract', such as the opportunity to negotiate minor changes to the terms of the contract.

23 It is not sufficient that a person merely drafts new standard terms for later use: Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth) 32 [2.24]. For criticism of penalising the inclusion of an unfair term in a 'small business' contract, see Mark Lewis, 'Penalising the Inclusion of Unfair Terms in Standard Form Small Business Contracts — A Critical Analysis' (2019) 47(4) *Australian Business Law Review* 309.

24 The person must give effect to, or seek to enforce, an unfair term: Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth) 33 [2.26].

25 In addition, a new s 243A of the ACL provides that where a term has been declared unfair under s 250, the court may make against a party advantaged by that term any order to redress loss or damage that has been caused to any person by the term, or prevent or reduce loss or damage that is likely to be so caused.

income year preceding the contract is less than AUD10m.[26] According to s 250(2), only such a party (as well as the regulator) may ask the court to declare a term in a 'small business' contract unfair.

III The Interaction between Forum Statutes and the Common Law Choice-of-Law Rules

The common law has developed causes of action. It has also developed choice-of-law rules for those and comparable causes of action. Statute may create a cause of action. If a forum statute that does so does not contain a choice-of-law rule, the question arises how the statute's applicability in a cross-border setting ought to be determined. There are two schools of thought.

According to one school of thought, the process ought to start with the common law choice-of-law rules as they form the background for the statute's enactment.[27] If those rules identify the *lex fori* as the applicable law, the statute applies if it applies on its own terms. If the common law choice-of-law rules identify a foreign law as the applicable law, the statute applies only if it constitutes an internationally mandatory rule in the circumstances, ie it can be said that the statute demands its application to the particular facts irrespective of the choice-of-law rules otherwise applying. While the common law did not initially have a concept of internationally mandatory rules, it is now recognised in Australia that some statutory provisions are of such fundamental importance that a court in the enacting forum must apply them in certain circumstances irrespective of the law selected by the forum's choice-of-law rules.[28]

According to the other school of thought, the process ought to start with the statute because a statute takes priority over the common law.[29] It does not follow that the court applies a forum statute in every case that is covered by the statute's substantive provisions. A statute that is silent on its territorial scope may be

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26 In counting the number of employees, a casual employee is not to be counted unless employed on a regular and systematic basis, and a part-time employee is to be counted as an appropriate fraction of a full-time equivalent: s 23(5).

27 This approach is favoured, eg, by Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4(1) *Journal of Private International Law* 1; Christopher Bisping, 'Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974' (2012) 8(1) *Journal of Private International Law* 35; Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435.

28 See, eg, *Old UGC Inc v Industrial Relations Commission of NSW* (2006) 225 CLR 274, 282–3 [22]–[23], 291–2 [55] –[59] ('*Old UGC*'); *Huntingdale Village Pty Ltd v Westgarth* (2018) 128 ACSR 168, [127] (Martin CJ).

29 This approach is favoured, eg, by Michael Charles Pryles, 'The Applicability of Statutes to Multistate Transactions' (1972) 46(12) *Australian Law Journal* 629; Michael Douglas, 'Choice of Law in the Age of Statutes' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart, 2019) 201.

interpreted as applying in accordance with the common law choice-of-law rules.[30] However, the statute will not be interpreted in that way where the legislature intended to regulate certain conduct in certain circumstances. Thus, where a statute that regulates a particular type of contract was intended to apply to all contracts of that type that are concluded or performed in the enacting jurisdiction, the courts do not apply the common law choice-of-law rules for contract.[31]

Whatever the starting point of the choice-of-law process, it is sometimes clear that an Australian statute applies only in connection with the common law rules of the enacting jurisdiction. This is particularly the case where the statute changes some individual common law rules without replacing them with a comprehensive set of rules that could be applied independently of the common law. An example is the *Frustrated Contracts Act 1978* (NSW), which makes provision for the effects of the frustration of a contract on the obligations under that contract, these being different from the effects of frustration at common law. The Act presupposes that the contract has been frustrated, but makes no provision for the circumstances in which this is the case. Thus, the Act can only be applied to a contract that is subject to the common law doctrine of frustration. A court in New South Wales cannot therefore apply the Act to all contracts before it, as some of them may be governed by a civilian legal system that deals with supervening events in a different way.[32] The application of the Act must be subject to the common law choice-of-law rules, either because they are the starting point of the choice-of-law process or because the Act makes them applicable by implication, so that the Act applies only to a contract governed by the law of New South Wales.[33]

The UCT provisions do not fall into the same category. They require no more than the existence of a contract,[34] which is possible under any legal system. They do not conceptually require that the contract is otherwise governed by the Australian common law. Nor is their application conceptually impossible where the legal system that otherwise governs the contract has different rules on unfair contract terms. The UCT provisions could be given priority over those inconsistent rules. This would not be unusual from an international perspective. For example,

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30 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 600–1 (Dixon J); *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124, 142–3 ('*Kay's Leasing Corporation*'); *Old UGC* (n 28) 283 [23], 291–2 [56]; *Ruby Princess* HCA (n 2) 51 [19]. For a criticism, see Adrian Briggs, 'A Note on the Application of the Statute Law of Singapore within its Private International Law' [2005] (July) *Singapore Journal of Legal Studies* 189, 196.

31 *Kay's Leasing Corporation* (n 30); *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418, 425 (Menzies J); *Old UGC* (n 28) 282–3 [22]-[23], 291–2 [55]-[59].

32 For a review of how a supervening event may affect a contract in various legal systems, in the particular context of the Covid-19 pandemic, see Laura Maria Franciosi, 'The Effects of Covid-19 on International Contracts: A Comparative Overview' (2020) 51(3) *Victoria University of Wellington Law Review* 413.

33 The same applies *mutatis mutandis* to the *Frustrated Contracts Act 1988* (SA).

34 It is not necessary to discuss whether 'contract' here should have the meaning it has in the Australian domestic law (excluding gifts) or whether it should have the wider meaning that it has in some other legal systems, including gifts.

s 74 of the *Consumer Rights Act 2015* (UK) provides that pt 2 of the Act, which regulates unfair contract terms in business-to-consumer contracts, applies despite the parties' choice of the law of a country other than the UK or any part of the UK if the contract has a close connection with the UK.[35] Thus, where the parties have chosen the law of New South Wales as the governing law but the contract has a close connection with the UK, a UK court will apply the unfair terms provisions of the UK Act, but will otherwise apply the law of New South Wales.[36] It would be unexceptional if an Australian court applied the UCT provisions to a contract otherwise governed by English law.

The High Court in *Karpik* did not consider the common law choice-of-law rules but said that the applicability of the UCT provisions to Mr Ho's contract was 'a question of statutory construction'.[37] This approach had already prevailed for the *TPA*,[38] the *CCA*,[39] and forum statutes in general.[40] It is justified for the *CCA*, which contains provisions on many aspects of competition and consumer law, creates a number of causes of action, and pursues public policy objectives.[41] Crucially, the ACL application provisions contain express provisions on its territorial scope.

As explained in Part VI A below, an application of the common law choice-of-law rules would render the territorial scope of the UCT provisions too narrow. In particular, the parties could evade their application by choosing a foreign law as the proper law of the contract. If the process of determining the applicability of the UCT provisions to a particular contract started with the common law choice-of-law rules, the UCT provisions would, in appropriate circumstances, have to be regarded as being internationally mandatory in that they would at least override the parties' choice of a foreign law[42] and would potentially also override the closest

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35 Section 32 contains a similar choice-of-law rule for Chapter 2 of Part 1, which implies particular terms in business-to-consumer contracts for the sale of goods.

36 See *Eternity Sky Investments Ltd v Zhang* [2023] EWHC 1964 (Comm), [89]–[91].

37 *Ruby Princess* HCA (n 2) [18] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

38 See, eg, *Francis Travel Marketing Pty Ltd v Virgin Australia Airways Ltd* (1996) 39 NSWLR 160, 164; *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 14 [44] ('*Bray*'); *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388, 461–2 [349]–[350].

39 *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, 334 [11] ('*Moore*'); *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, 224–5 [103]–[110] ('*Valve* FCAFC').

40 See, eg, *Chubb Insurance Co of Australia Ltd v Moore* (2013) 302 ALR 101, 132 [144]; *Huntingdale Village Pty Ltd v Westgarth* (2018) 128 ACSR 168, [123]–[134], [162]–[173] and the cases cited in (n 30). The common law choice-of-law rules were used as the starting point in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 400 [25].

41 The *TPA* was described as 'a fundamental piece of remedial and protective legislation which gives effect to "matters of high public policy"': *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 [99] (Gummow J), citing *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, 256 (Lockhart J).

42 Examples of provisions that merely override the parties' choice of foreign law but not the closest connection test are: *Insurance Contracts Act 1984* (Cth) s 8 and *Contracts Review Act 1980* (NSW) s 17(3).

connection test.[43] In determining the circumstances in which the UCT provisions are internationally mandatory, the starting point would be the ACL application provisions in the *CCA* or in state or territory legislation. If those provisions made the UCT provisions applicable in too wide a range of circumstances, an implied territorial limitation would have to be considered. This convoluted process would ultimately boil down to an application of the UCT provisions in accordance with the ACL application provisions and a potential implied limitation. It is more straightforward to start with the ACL application provisions.

IV The Territorial Scope of the UCT Provisions under the ACL Application Provisions

A *The Application Provisions for the ACL*

The ACL can apply as a law of the Commonwealth or as a law of a state or territory.[44]

Pursuant to s 131(1) of the *CCA*, the ACL applies as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of ch 2, 3 or 4 of the ACL by corporations.[45] Pursuant to s 4(2) of the *CCA*, a reference in that Act to 'conduct' or 'engaging in conduct' includes the making of, or the giving effect to a provision of, a contract. The conduct or contravention must occur in Australia. This follows from a general presumption that an Australian statute applies only to conduct occurring within the enacting jurisdiction,[46] and from the fact that s 5(1) of the *CCA* makes express provision for the application of the ACL to conduct outside Australia.[47]

Section 5(1) of the *CCA* provides that, among other provisions, the ACL (other than pt 5-3)[48] applies 'to the engaging in conduct outside Australia' by 'bodies corporate incorporated or carrying on business within Australia', 'Australian citizens', and 'persons ordinarily resident within Australia'. This is a profound extension of the ACL's territorial scope. The ACL applies simply because a relevant

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43 An example of a provision that overrides both the parties' choice of a foreign law and the closest connection test is: *Carriage of Goods by Sea Act 1991* (Cth) s 11. The Act does not necessarily invalidate an agreement to arbitrate in a foreign country; see *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers Gmbh & Co KG* (2024) 98 ALJR 445.

44 See *Zervas v Burkitt (No 2)* [2019] NSWCA 236, [53]–[59].

45 Section 6 of the *Competition and Consumer Act 2010* (Cth) ('*CCA*') extends the operation of particular provisions of the ACL and other parts of the *CCA* to conduct of persons who are not corporations.

46 *Bray* (n 38) 15 [47] (Merkel J), citing *R v Jameson* [1896] 2 QB 425, 430 (Lord Russell CJ); *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* (2012) 266 FLR 243, [400] (Croft J), approvingly quoted in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237, [396].

47 See, for the *TPA*, *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299, 355; *Bray* (n 38) 16–17 [50]–[55]; *Worldplay Services Pty Ltd v Australian Competition and Consumer Commission* (2005) 143 FCR 345, 350 [18] ('*Worldplay Services*').

48 Part 5-3 of the ACL concerns country of origin representations and is not relevant to the UCT provisions.

party has a particular status (being a corporation incorporated or carrying on business within Australia, or a citizen or ordinary resident of Australia), even if there is no other connection with Australia.

In particular, the ACL applies to every conduct of a corporation that carries on business within Australia and elsewhere: section 5(1)(g). For this purpose, it is not required that the corporation has a place of business in Australia,[49] but the mere solicitation of customers in Australia (for example, through online advertisement) is not sufficient.[50] Crucially, s 5(1)(g) does not require that the impugned conduct was part of the corporation's business activities within Australia.[51] In *Karpik*, s 5(1)(g) rendered the ACL applicable to a contract made in North America between a Canadian resident and a foreign company because the latter had sold and marketed cruises, including the voyage that was the subject of the proceedings, in Australia.[52]

Legislation in each Australian state and territory sets out the circumstances in which the ACL applies as a law of that state or territory.[53] The provisions are uniform across all jurisdictions, thus removing the possibility of an intra-Australian conflict of laws. Subsection (1) of the uniform provisions stipulates that the ACL as a law of the respective jurisdiction applies to and in relation to persons carrying on business within the jurisdiction, bodies corporate incorporated or registered under the law of the jurisdiction, persons ordinarily resident in the jurisdiction, or persons otherwise connected with the jurisdiction. Subsection (2) of the uniform provisions stipulates that, subject to sub-s (1), the ACL as a law of the respective jurisdiction extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside the jurisdiction (whether within or outside Australia).

B *The Applicability of the UCT Provisions by Virtue of a Contravention of the ACL*

Section 131(1) of the *CCA* provides that the ACL applies as a law of the Commonwealth in relation to contraventions of ch 2, 3 or 4 of the ACL by

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49 *Bray* (n 38) 19 [63]; *Valve* FCAFC (n 39) 233 [145]; *Owners – Strata Plan No 87231 v 3A Composites GmbH* (2019) 369 ALR 315, 321 [31].

50 *Valve* FCAFC (n 39) 233–5 [146]-[149]. However, it has been said that '[s]upplying goods on a regular basis to an Australian company for the purpose of sale to Australian consumers is "carrying on business" in Australia': *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905, [3144] (Katzmann J).

51 *Worldplay Services* (n 47) 354 [42] (Tamberlin J); *Australian Competition and Consumer Commission v Facebook, Inc* [2021] FCA 244, [34]. See also *Norcast SARL v Bradken Ltd (No 2)* (2013) 219 FCR 14, 73–77 [243]–[256].

52 *Ruby Princess* HCA (n 2) 56 [42].

53 *Fair Trading (Australian Consumer Law) Act 1992* (ACT) s 11; *Fair Trading Act 1987* (NSW) s 32; *Consumer Affairs and Fair Trading Act 1990* (NT) s 31; *Fair Trading Act 1989* (Qld) s 20; *Fair Trading Act 1987* (SA) s 18; *Australian Consumer Law (Tasmania) Act 2010* (Tas) s 10; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 12; *Fair Trading Act 2010* (WA) s 24.

corporations. As a result of the 2022 amendments of the UCT provisions, certain conduct (namely to propose, apply or rely on an unfair term) now constitutes a contravention of s 23(2A) or (2C) of the ACL and thus of ch 2 of the ACL. It might be thought that this fact now renders the UCT provisions applicable as a law of the Commonwealth by virtue of s 131(1) of the *CCA*.

The contravention limb of s 131(1) of the *CCA* can render ss 23(2A)–(2C) and 224(1)(a)(iia) of the ACL applicable by virtue of contravening conduct where the UCT provisions already apply to the contract in question pursuant to another of the ACL application provisions. If the UCT provisions already apply to the contract, all of them apply and there is generally no need to make specific provision for the application of ss 23(2A)–(2C) and 224(1)(a)(iia) of the ACL. However, the contravention limb of s 131(1) of the *CCA* may be relevant in that it provides for an application of ss 23(2A)–(2C) and 224(1)(a)(iia) of the ACL *as a law of the Commonwealth*. Suppose that a contract has been made overseas between a foreign corporation and a resident of New South Wales; that the ACL as a law of New South Wales applies to that contract; and that a particular term in that contract is unfair pursuant to s 24 of the ACL. If the corporation applies or relies on the unfair term through conduct in Australia, the contravention limb of s 131(1) of the *CCA* will render ss 23(2C) and 224(1)(a)(iia) of the ACL applicable as a law of the Commonwealth.

The contravention limb of s 131(1) of the *CCA* should not be capable of making the UCT provision applicable to a contract to which they do not apply already. The mere fact that a corporation proposes, applies or relies on a particular term in Australia should not make this term subject to the UCT provisions. Otherwise, the UCT provisions could apply to a contract simply because litigation concerning the contract takes place in Australia by virtue of a jurisdiction clause in the contract, even though neither the contract nor the parties have any other connection with Australia.

In conclusion, the contravention limb of s 131(1) of the ACL cannot bring a contract within the scope of the UCT provisions.

C *The Applicability of the UCT Provisions by Virtue of Certain Conduct*

1 *The Applicability of the Concept of Conduct to the UCT Provisions*

As mentioned in Part IV A above, the ACL application provisions in the *CCA* and in state and territory legislation provide that conduct of certain persons outside Australia renders the ACL applicable. The High Court in *Karpik* held that s 5(1)(g) of the *CCA* can render the UCT provisions applicable.[54] Derrington J in the Full

[54] *Ruby Princess* HCA (n 2) 55–6 [41]–[42].

Federal Court had expressed the opposite view,[55] arguing that, since s 5(1)(g) refers to 'conduct', it can apply only to those ACL provisions that proscribe certain conduct, such as s 18, which proscribes misleading or deceptive conduct in trade or commerce.[56] The UCT provisions (apart from s 23(2A)–(2C) which were enacted after the Full Federal Court's decision) do not proscribe any conduct. They merely invalidate certain types of term in specific types of contract.[57] Derrington J expressed doubts as to the applicability of s 4(2) of the *CCA*, which defines 'conduct', to the UCT provisions,[58] but added that even if it did apply, it could not extend their operation as they are concerned only with the terms of the contract and not the entering into of a contract.[59]

If accepted, Derrington J's argument, which was made for s 5(1)(g) of the *CCA*, would equally apply to s 5(1)(h) (which refers to conduct outside Australia by Australian citizens), s 5(1)(i) (which refers to conduct outside Australia by persons ordinarily resident within Australia) and s 131(1) insofar as it refers to conduct by corporations. Consequently, the only provision that could render the UCT provisions applicable as a law of the Commonwealth would be the contravention limb of s 131(1). But it was argued in Part IV B above that the contravention limb is not capable of doing this.

Even if it is thought that the new sub-ss 23(2A) and (2C) of the ACL enable the contravention limb of s 131(1) of the *CCA* to bring a particular contract within the scope of the UCT provisions, there would still be the question of how the UCT provisions applied as a law of the Commonwealth prior to the 2022 amendments, when no conduct relating to an unfair term constituted a contravention of the ACL. Prior to the 2022 amendments, ss 232(3), 237(1)(a)(ii) and 238(1)(b) of the ACL provided that the (purported) application or reliance on a term that a court had declared under s 250 to be an unfair term was to be treated *as if* the conduct *were* a contravention of Chapter 2. This implies that it was not a contravention. Still less did the (purported) application or reliance on a term that a court *subsequently* declared unfair constitute a contravention of the ACL.[60]

Moreover, with effect from 1 July 2010, a reference to the ACL was inserted into s 5(1) of the *TPA* and a new s 130 was added to that Act.[61] Section 130 provided: 'The Australian Consumer Law applies as a law of the Commonwealth to the conduct of corporations'. At that time, the ACL contained only the UCT provisions

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55 *Carnival plc v Karpik* (2022) 294 FCR 524, 602–5 [281]–[288] ('*Ruby Princess* FCAFC').

56 Ibid 602 [282].

57 Ibid 602–3 [284].

58 Ibid 603 [286], observing that Northrop J in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 490–1 had expressed the view that s 4(2) only applied to Part IV (on restrictive trade practices) of what was then the *TPA* and is now the *CCA*.

59 *Ruby Princess* FCAFC (n 55) 603 [287].

60 See ACL s 15(a); Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) [2.118], [3.52]; Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) [2.62]; *Ruby Princess* HCA (n 2) [35].

61 *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth).

and nothing else. All the other provisions now in the ACL were added later when the Act was given its present name. Thus, as noted by the High Court in *Karpik*,[62] s 130 in its original version and the reference to the ACL in s 5(1) were enacted specifically for the UCT provisions.[63] If the concept of 'conduct' were incapable of applying to the UCT provisions, ss 5(1)(ea) (referring to the ACL) and 130 of the *TPA* had no effect. There is a strong presumption that the legislature does not enact ineffective provisions.[64]

Therefore, if the concept of conduct is considered inapplicable to the UCT provisions, no provision in the *CCA* renders them applicable as a law of the Commonwealth (or at least no provision did so prior to the 2022 amendments). In *Karpik*, Derrington J in the Full Federal Court expressed the view that the territorial scope of the UCT provisions should be determined solely under the common law choice-of-law rules for contract.[65] But it is often necessary to determine whether the UCT provisions apply as a law of the Commonwealth or as a law of a state or territory, not least because the Federal Court has jurisdiction only in the former category.[66] The common law choice-of-law rules are incapable of specifying whether the ACL applies as a law of the Commonwealth or as a law of a state or territory.

The High Court's decision in *Karpik* that s 5(1)(g) of the *CCA* can render the UCT provisions applicable is therefore convincing. This must apply to all provisions in the *CCA* and in state and territory legislation that render the ACL applicable by virtue of particular conduct.

2 *The Relevant Conduct*

It is not immediately obvious what conduct renders the UCT provisions applicable. It could be the proposal of the standard terms, the formation of the contract, or the purported application or reliance on the standard terms.

The High Court in *Karpik* observed that Mr Ho's contract was made outside Australia and that the giving effect to that contract, by Princess seeking to rely on the exclusive jurisdiction clause and the class action waiver clause, occurred in Australia.[67] The Court went on to say that it was sufficient for the applicability of

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62 *Ruby Princess* HCA (n 2) [41].

63 Incidentally, when a reference to the ACL (only containing the UCT provisions at the time) was inserted into section 5(1), the heading of section 5 was changed from '[e]xtended application of Parts IV, IVA, V, VC etc' to '[e]xtended application of this Act to conduct outside Australia'. Thus, the enactment of the UCT provisions was the occasion for the insertion of the word 'conduct' into the heading of s 5.

64 An application of s 5(1) to the UCT provisions was envisaged in the Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) [3.53].

65 *Ruby Princess* FCAFC (n 55) 602 [281]–[292].

66 See *CCA* s 86(1AA), (1). The states have no power to confer jurisdiction on a federal court: *Re Wakim, ex parte McNally* (1999) 198 CLR 511.

67 *Ruby Princess* HCA (n 2) [42].

the UCT provisions to point to the making of Mr Ho's contract; even though it involved conduct outside Australia, s 5(1)(g) of the *CCA* rendered the UCT provisions applicable since Princess had been carrying on business in Australia.[68] Thus, the Court expressed no view on whether the reliance on a contractual term can render the UCT provisions applicable.

The purported application or reliance on a term should not constitute qualifying conduct. Otherwise, the unilateral action of one party could render the UCT provisions applicable, creating uncertainty. The applicability of the UCT provisions to a contract ought to be settled when the contract is made.

The choice is between the proposal of the standard terms during the contractual negotiations, in which case only the conduct of the proposer is qualifying conduct, and the formation of the contract in general (ie giving consent to the terms of the contract), in which case either party's conduct is qualifying conduct. The High Court in *Karpik* explained that the UCT provisions applied to Mr Ho's contract by virtue of s 5(1)(c) and (g) of the *CCA* because Princess, a corporation carrying on business in Australia, engaged in conduct outside Australia by making the contract with Mr Ho.[69] Nothing can be made of the fact that the Court referred to the conduct of Princess rather than that of Mr Ho. Since Mr Ho was not an Australian citizen or resident, his conduct outside Australia was not capable of rendering the ACL applicable.

Since Princess was the only party having a connection with Australia, the High Court was not required to distinguish between the making of Mr Ho's contract by Princess in general and the proposal of the standard terms by Princess in particular. Some remarks of the Court might imply that only conduct of the proposer of the standard terms can be qualifying conduct. The Court observed that the UCT provisions prescribe a norm of conduct,[70] which s 5(1)(c) and (g) of the *CCA* extend to the engaging in conduct outside Australia by a corporation carrying on business within Australia.[71] In this context, the Court referred to 'standard form contracts with consumers made outside Australia by those identified in s 5(1)(g) to (i)'.[72]

There are two arguments in favour of regarding the proposal of the standard terms as the qualifying conduct. The first is that, pursuant to s 23(2A) of the ACL, the proposal of an unfair contract term is now a contravention of the ACL. However, the issue currently under discussion is the applicability of the UCT provisions by virtue of conduct, not by virtue of a contravention of the ACL. A stronger argument is that, if either party's consent to the terms of the contract were qualifying conduct, the UCT provisions would apply to every qualifying contract made anywhere in the world by a corporation that does business in

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68 Ibid.
69 Ibid.
70 Ibid 53 [26].
71 Ibid 56 [42].
72 Ibid 56 [43] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

Australia, an Australian citizen or an Australian resident, regardless of whether the contract partners are aware that they are dealing with such a person. The UCT provisions would apply to numerous contracts that have no other connection with Australia. It is doubtful that the legislatures intended the UCT provisions to have such an enormous extra-territorial reach.

However, it would not sit well with the object of the *CCA* 'to enhance the welfare of Australians' (s 2 of the *CCA*) if the UCT provisions applied only when a corporation that does business in Australia, an Australian citizen or and Australian resident proposes standard terms and not when such a person is subjected to standard terms by the other party. Australian consumers and small businesses who order goods or services from a supplier based overseas deserve the protection of the UCT provisions against the supplier's standard terms where the supplier knows that the contract partner is based in Australia (because of the address or IP address to which the goods or services are supplied). An overseas supplier who chooses to supply goods or services into Australia should expect the application of protective Australian law.

If only the conduct of the proposer of the standard terms were qualifying conduct, the UCT provisions would not apply in those circumstances unless the overseas supplier falls into any of the categories in s 5(1)(g)-(h) of the *CCA*. Section 5(1)(g) may capture an overseas corporation that regularly supplies goods or services into Australia.[73] But the UCT provisions would not apply where the supplier only sporadically deals with Australian customers or is a natural person (who does not happen to be an Australian citizen), such as a self-employed professional.

It is not necessary for the purposes of this article to express a conclusive view on what conduct should qualify. It suffices to note that even the narrow interpretation, under which only the conduct of the proposer of the standard terms is qualifying conduct, provides the UCT provisions with a large extra-territorial effect, as demonstrated by *Karpik*.

V The Need for a Limitation of the Territorial Scope of the UCT Provisions

A *Conflict with Comity*

An unqualified application of the ACL application provisions to the UCT provisions renders the latter's territorial scope very wide. A contract made overseas between two parties based overseas would be subject to the UCT provisions simply because one of the parties happens to be an Australian citizen or is a company that

[73] *Australian Competition and Consumer Commission v Facebook, Inc* [2021] FCA 244, [33].

happens to do business within Australia through other transactions. In *Karpik*, the High Court applied the UCT provisions to a contract made in North America between a Canadian resident and a foreign company. This might be considered justified on the ground that the voyage that was the subject of the contract started and ended in Australia. But this fact was not relevant. The UCT provisions would have applied even if no part of the voyage had been in Australian waters. As Derrington J in the Full Federal Court observed, a European car manufacturer that sells cars in Australia would be subject to the UCT provisions even in relation to its sales of cars in other countries.[74] His Honour expressed the view that an application of the UCT provisions in such circumstances would not promote comity between Australia and other countries,[75] and the legislature cannot have intended such an application.[76] As Tattersall explains, '[c]omity requires the judicial systems of states to grant one another equal respect, meaning that the courts of one state will not seize jurisdiction over claims concerning domestic issues pertaining to another state'.[77]

The High Court in *Karpik* made no express reference to comity. But it is clear that the Court saw no conflict between an unqualified application of the ACL application provisions to the UCT provisions and comity because it rejected the argument that the territorial scope of the UCT provisions needs to be limited through statutory interpretation to prevent absurd and capricious results.[78] The Court said that, if 'a corporation carries on business in Australia, then a price of doing so is that the corporation is subject to and complies with statutes intended to provide protection for consumers'.[79] The Court added that 'Parliament is prescribing that a corporation that does business in Australia should be required, if it uses standard terms in a consumer or small business contract, to meet Australian norms of fairness, irrespective of whether the standard terms are in a contract made in Australia or one made overseas.'[80] It is one thing to require a corporation that does business in Australia to comply with Australian law in contracts that are parts of its Australian business activities. It is quite another thing to require a corporation that does business in Australia to comply with Australian law in every single contract it makes anywhere in the world. It would be a very bold step for a country's legislature to enact such a requirement, and it must be doubted that the legislatures enacting the ACL intended to take that step.

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74 *Ruby Princess* FCAFC (n 55) 607 [300].

75 Ibid.

76 Ibid 607 [301].

77 Luke Tattersall, 'Derailing State Immunity: A Broad-Brush Approach to Jurisdiction under Claims for the Expropriation of Cultural Property' (2019) 26(2) *International Journal of Cultural Property* 181, 190. See also James Edelman and Madeleine Salinger, 'Comity in Private International Law and Fundamental Principles of Justice' in Andrew Dickinson and Edwin Peel (eds), *A Conflict of Laws Companion* (Oxford University Press, 2021) 327.

78 *Ruby Princess* HCA (n 2) 58 [50].

79 Ibid 55 [38] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

80 Ibid 55 [40] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

Moreover, since the High Court in *Karpik* took the view that the territorial scope of the UCT provisions is determined exclusively in accordance with s 5(1) of the *CCA* without any qualification, it is not only s 5(1)(g) that applies without qualification. The same logically applies to s 5(1)(h) (Australian citizens) and s 5(1)(i) (persons ordinarily resident in Australia). If the view is taken that the person listed in s 5(1)(g), (h) or (i) does not need to be the party imposing the standard terms,[81] the UCT provisions will apply to every contract made by an Australian citizen or resident anywhere in the world. It is not required that the contract partners of such a person are aware that they are dealing with an Australian citizen or resident. It cannot therefore be said that they have to accept the application of Australian law as the price of contracting with an Australian citizen or resident. The High Court in *Karpik* did not address those scenarios.

The High Court did comment on the argument made by Derrington J in the Full Federal Court that a European car manufacturer that sells cars in Australia should not be subject to the UCT provisions in relation to its sales of cars in other countries. The High Court said:

> [T]he possibility that a consumer who purchased a car in Europe *could* take action against a European car manufacturer under s 23 of the ACL in the Federal Court of Australia is a very different question to whether a consumer would take such action and whether such an action would progress to judgment … [I]n the absence of a connection beyond the extraterritorial operation of s 23 of the ACL, it would be open to a respondent to seek a stay of such a proceeding on the basis that the Court is an 'inappropriate forum' for the proceeding.[82]

In this passage, the High Court gave two reasons for its view that the impact of its interpretation of the *CCA* in practice would be minor, and thus a conflict with comity avoided. First, consumers based outside Australia are unlikely to litigate in Australia. It is true that litigation in Australia is expensive, which will deter consumers in other countries from commencing individual proceedings in Australia for the sole purpose of rendering the UCT provisions applicable, considering also that the vague test of unfairness makes it difficult to predict whether a court will regard a particular term as unfair. However, foreign consumers will not be deterred from joining a class action in Australia, as demonstrated by the facts of *Karpik*. Moreover, it is not only consumers that may invoke the UCT provisions. As mentioned in Part II above, the UCT provisions may also be invoked by corporations, both in a 'consumer contract' and in a 'small business contract'. Corporations have deeper pockets and will not as easily be deterred by high litigation costs from commencing individual proceedings in Australia.

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81 See Part IV C 2 above.

82 *Ruby Princess* HCA (n 2) 58 [50] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ) (emphasis in original). The Court cited rule 10.43A(2)(a) of the *Federal Court Rules 2011* (Cth) as the source of the phrase 'inappropriate forum'.

Secondly, the High Court observed that, where the contract has no connection with Australia other than that it is subject to the UCT provisions, the respondent may seek a stay of proceedings on the ground that Australia is an inappropriate forum for the dispute. The Court was implying that an application for a stay of proceedings in those circumstances will be successful, at least as a general rule. This is an important observation that warrants close scrutiny.

B *Using the Jurisdiction Rules as a Filter*

The determination of whether an Australian court will exercise jurisdiction in a case involving a foreign element involves two questions. The first is whether originating process can be served on the defendant (*prima facie* jurisdiction). Where this is the case, an Australian court may still refuse to exercise jurisdiction on the ground that it is an inappropriate forum for the resolution of the dispute (*forum non conveniens*). It must be scrutinised whether the rules relevant to those questions are capable of preventing an Australian court from applying the UCT provisions to a contract that has only a tenuous connection with Australia, as suggested by the High Court in *Karpik*.[83]

1 *Prima Facie Jurisdiction*

Originating process may always be served on a defendant present in Australia[84] or New Zealand.[85] It may be served on a defendant present in another foreign country in particular circumstances, as specified by the rules for the issuing court. A discussion of all those jurisdictional gateways is not necessary for present purposes. What should be examined is whether the mere fact that the plaintiff is invoking the UCT provisions permits service of originating process overseas. Four jurisdictional gateways might be thought to do this.

One gateway is the fact that the contract to which the proceedings relate is governed by the law of the jurisdiction in which the process is issued,[86] or the law of any Australian jurisdiction.[87] This gateway is not satisfied merely because the UCT provisions apply to the contract, as this does not by itself make the law of an Australian jurisdiction the governing law of the contract.

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83 Ibid 58 [50].

84 *Federal Court of Australia Act 1976* (Cth) s 18; *Service and Execution of Process Act 1992* (Cth) s 15.

85 *Trans-Tasman Proceedings Act 2010* (Cth) s 9. The provision is constitutionally valid: *Zurich Insurance Co Ltd v Koper* (2023) 411 ALR 480.

86 *Court Procedures Rules 2006* (ACT) r 6502(b)(iv); *Supreme Court Rules 1987* (NT) reg 7.01(f)(iii); *Rules of the Supreme Court 1971* (WA) ord 10 r 1(1)(e)(iii).

87 *Federal Court Rules 2011* (Cth) r 10.42(b)(iv); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (b)(iv); *Uniform Civil Procedure Rules 1999* (Qld) r 125(b)(iv); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(b)(iv); *Supreme Court Rules 2000* (Tas) r 147A(b)(iv); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(b)(iv).

Another gateway (in some jurisdictions) is the fact that the proceeding 'arises' under an Australian enactment, which 'applies expressly or by implication to an act or omission that was done or occurred outside Australia in the circumstances alleged'.[88] The latter phrase would capture the application of the ACL in general to conduct outside Australia pursuant to s 5(1) of the *CCA*[89] or the ACL application provisions of a state or territory.[90] However, the gateway should require that the Australian law provides for the claim.[91] While the UCT provisions may invalidate the purported exclusion of a claim, they do not themselves provide for a claim. For the same reason, reliance on the UCT provisions should not satisfy the gateway (in most jurisdictions) that the proceedings relate to the construction, effect or enforcement of an Australian enactment.[92]

Finally, in most jurisdictions, where none of the specific jurisdictional gateways applies, originating process may still be served overseas with the leave of the court if the proceedings have a real and substantial connection with Australia, Australia is an appropriate forum for the proceedings and the court should exercise jurisdiction.[93] These conditions should not be regarded as being satisfied by the mere fact that the UCT provisions apply to a contract involved in the proceedings.

If, as argued here, the applicability of the UCT provisions to a contract does not by itself permit service of originating process overseas, the plaintiff needs to find some other jurisdictional gateway, such as that the contract to which the

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88 *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (j)(iii); *Uniform Civil Procedure Rules 1999* (Qld) r 125(j)(iii); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(j)(iii); *Supreme Court Rules 2000* (Tas) r 147A(j)(iii); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(j)(iii).

89 Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 5th ed, 2023) [2.60].

90 Martin Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) [3.80].

91 See, for a similar gateway in a previous version of the Victorian rules, *Brighton Automotive Holdings Pty Ltd v Honda Australia Pty Ltd* (2021) 65 VR 146 [40].

92 *Federal Court Rules 2011* (Cth) r 10.42(p); *Court Procedures Rules 2006* (ACT) r 6502(p) (requiring an ACT law or Commonwealth law affecting property in the ACT); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (p); *Uniform Civil Procedure Rules 1999* (Qld) r 126; *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(p); *Supreme Court Rules 2000* (Tas) r 147A(p); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(p).

93 *Federal Court Rules 2011* (Cth) r 10.43; *Court Procedures Rules 2006* (ACT) r 6503 (requiring a connection with the ACT); *Uniform Civil Procedure Rules 2005* (NSW) r 11.5; *Uniform Civil Procedure Rules 1999* (Qld) r 126; *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 3; *Supreme Court Rules 2000* (Tas) r 147B; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.03. For a discussion, see Andrew Dickinson, 'In Absentia: The Evolution and Reform of Australian Rules of Adjudicatory Jurisdiction' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart, 2019) 38–41; Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160.

proceedings relate was made within the jurisdiction,[94] or was breached within the jurisdiction.[95] Since the UCT provisions may be invoked to invalidate the purported exclusion or limitation of liability in tort, it is worth noting that, with the exception of Western Australia, originating process for a claim in tort may be served overseas where damage resulting from the tort was sustained wholly or partly in the jurisdiction in which process is issued,[96] or anywhere in Australia.[97] Damage for this purpose is any compensable loss caused by the tort,[98] such as medical expenses caused by an injury sustained overseas.[99]

2 Forum Non Conveniens

Where originating process may in principle be served on the defendant, an Australian court will not necessarily exercise jurisdiction. The exercise of jurisdiction is ultimately a discretionary decision.[100] Where the dispute could be litigated in a foreign country, the exercise of jurisdiction by Australian courts depends upon on the connection of the dispute with Australia, considering all factors including the location of the parties, the location of witnesses, the location of the subject matter of the contract, the existence of related proceedings and the applicable law.[101] Where the alternative forum is New Zealand, an Australian court must stay the proceeding if New Zealand is the more appropriate place to litigate the dispute.[102] Where the alternative forum is another foreign country, the rules of court permit an Australian court to stay the proceeding if the court is an

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94 *Federal Court Rules 2011* (Cth) r 10.42(b)(i); *Court Procedures Rules 2006* (ACT) r 6502(b)(i); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (b)(i); *Supreme Court Rules 1987* (NT) r 7.01(f)(i); *Uniform Civil Procedure Rules 1999* (Qld) r 125(b)(i); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(b)(i); *Supreme Court Rules 2000* (Tas) r 147A(b)(i); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(b)(i); *Rules of the Supreme Court 1971* (WA) ord 10 r 1(1)(e)(1).

95 *Federal Court Rules 2011* (Cth) r 10.42(c); *Court Procedures Rules 2006* (ACT) r 6502(c); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (c); *Supreme Court Rules 1987* (NT) r 7.01(g); *Uniform Civil Procedure Rules 1999* (Qld) r 125(c); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(c); *Supreme Court Rules 2000* (Tas) r 147A(c); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(c); *Rules of the Supreme Court 1971* (WA) ord 10 r 1(1)(f).

96 *Court Procedures Rules 2006* (ACT) r 6502(a)(ii); *Supreme Court Rules 1987* (NT) r 7.01(j).

97 *Federal Court Rules 2011* (Cth) r 10.42(a)(ii); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (a)(ii); *Uniform Civil Procedure Rules 1999* (Qld) r 125(a)(ii); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(a)(ii); *Supreme Court Rules 2000* (Tas) r 147A(a)(ii); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(a)(ii).

98 See, eg, *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (The 'Katowice II')* (1990) 25 NSWLR 568, 577; *Roads and Traffic Authority (NSW) v Barrie Toepfer Earthmoving and Land Management Pty Ltd (No 7)* [2014] NSWSC 1188 [229].

99 See, eg, *Flaherty v Girgis* (1985) 4 NSWLR 248, 266; *Tweedale v Carnival PLC* [2021] FCA 1633 [64].

100 See *Agar v Hyde* (2000) 201 CLR 552, 570 [41]–[42], 601–2 [129]–[130].

101 For a detailed outline of the relevant principles, see Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) ch 8.

102 *Trans-Tasman Proceedings Act 2010* (Cth) ss 17, 19.

'inappropriate forum' for the trial of the proceeding.[103] The High Court has held that it is not sufficient that the foreign country is a more appropriate forum to litigate the dispute; the proceeding can be stayed only if the Australian court is a clearly inappropriate forum.[104] This is a high threshold, and Australian courts rarely stay proceedings on the ground of *forum non conveniens*.

Such a stay removes the entire dispute from the Australian courts, based on the factors connecting the dispute with Australia at the time of the court's decision on the stay application. The High Court in *Karpik* suggested that a stay should be granted in order to prevent the application of a particular set of rules (the UCT provisions) to a contract, based on the factors connecting the contract to Australia at the time of its formation. There are three discrepancies between the two exercises.

First, the stay of a proceeding on the ground of *forum non conveniens* removes the entire dispute from the Australian courts. The court cannot refuse to apply the UCT provisions while otherwise deciding on the merits of the dispute. Thus, where Australia is generally an appropriate forum for the dispute, the Australian court needs to decide whether to send the whole dispute to another country only because one party is invoking the UCT provisions and it would be inappropriate to apply them to the contract before the court. Strictly, the court needs to decide whether the impugned term is in fact void under the UCT provisions because a dispute that could otherwise be litigated in Australia should not be sent to a foreign court simply because one party makes an argument that will ultimately be unsuccessful. If the impugned term is void under the UCT provisions, the court should, strictly, determine whether the foreign court would enforce the term. If the foreign court would not enforce the impugned term, the applicability of the UCT provisions should not be a relevant factor in the *forum non conveniens* inquiry.[105] In the example of the European car manufacturer discussed in *Karpik*,[106] it would be unnecessary to stay Australian proceedings on the sole ground that the UCT provisions should not apply to the contract if the alternative foreign court would equally refuse to enforce the impugned term. The problem is that issues

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103 *Federal Court Rules 2011* (Cth) r 10.43A(2)(b); *Court Procedures Rules 2006* (ACT) r 6504(2)(b); *Uniform Civil Procedure Rules 2005* (NSW) r 11.6(2)(b); *Uniform Civil Procedure Rules 1999* (Qld) r 127(2)(b); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 4(2)(b); *Supreme Court Rules 2000* (Tas) r 147C(2)(b); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.05(2)(b).

104 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564; *Puttick v Tenon Ltd* (2008) 238 CLR 265, 282 [29], 287 [38].

105 See *PCH Offshore Pty Ltd v Dunn (No 2)* (2010) 273 ALR 167 [158]–[160]: the plaintiff's reliance on the *Corporations Act 2001* (Cth) did not prevent a stay of proceedings as Azerbaijani law provided comparable relief. See also *Akai Pty Ltd v People's Insurance Co Ltd* (1997) 188 CLR 418, 447; Richard Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23(1) *Melbourne University Law Review* 30, 47–8.

106 See Part V A above.

relating to the substance of the dispute in general,[107] and complex choice-of-law issues in particular,[108] should not be determined during the jurisdiction stage but only after trial.

Secondly, the propriety of applying the UCT provisions to a particular contract depends upon *its* connections to Australia. By contrast, the decision on whether Australia is an inappropriate forum depends upon the connection of the entire dispute to Australia. This includes the location of witnesses, the applicable law, the presence of an exclusive choice-of-court agreement, the availability of another forum, and the connection with other proceedings in Australia. Originating process may be served on an overseas defendant who is a necessary or proper party to proceedings properly brought against another defendant.[109] Where it is in the interest of justice to decide on the claims against both defendants together, the proceedings will not be stayed for only one defendant even if the contract between the plaintiff and that defendant has only a tenuous connection with Australia. *Karpik* is an example. The High Court refused to stay the proceedings brought by the US sub-group, and one reason for that decision was that it was more efficient to decide on the claims of all sub-groups in one class action.[110]

The applicable law is not generally a strong factor.[111] However, Australian courts usually refuse to stay the proceedings when the claim is based on protective Australian legislation and the alternative foreign court would not apply that legislation or equivalent foreign legislation.[112] In those circumstances, the Australian courts usually even refuse to give effect to an exclusive jurisdiction agreement in favour of a foreign court.[113] The key legislation to which these rules

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107 *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337, 375 [82] (Lord Neuberger PSC): '[i]t is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost'.

108 *Murakami v Wiryadi* (2010) 109 NSWLR 39, 55 [66]. See also *Puttick v Tenon Ltd* (2008) 238 CLR 265 [21], [24], [32].

109 *Federal Court Rules 2011* (Cth) r 10.42(h)(i); *Court Procedures Rules 2006* (ACT) r 6502(h)(i); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (h)(i); *Supreme Court Rules 1987* (NT) reg 7.01(l); *Uniform Civil Procedure Rules 1999* (Qld) r 125(h)(i); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(h)(i); *Supreme Court Rules 2000* (Tas) r 147A(h)(i); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(h)(i); *Rules of the Supreme Court 1971* (WA) ord 10 r 1(1)(h).

110 *Ruby Princess* HCA (n 2) 61 [69].

111 See, for foreign law, *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 521 [81]; *Puttick v Tenon Ltd* (2008) 238 CLR 265, 282–3 [31]–[32].

112 For the *TPA*, see *Eurogold Ltd v Oxus Holdings (Malta) Ltd* [2007] FCA 811, [60]; *Mineral Commodities Ltd v Promet Engineers Africa (Pty) Ltd* [2008] FCA 30, [22]; *Centrebet Pty Ltd v Baasland* [2013] NTSC 59, [162]. The Australian court may also grant an anti-suit injunction to restrain proceedings in a foreign court that would not apply the Australian legislation; see *Bolin Technology Co Ltd v BirdDog Technology Ltd* [2024] FCA 129.

113 *Akai Pty Ltd v People's Insurance Co Ltd* (1997) 188 CLR 418; *Proactive Building Solutions v Keck* [2013] NSWSC 1500. For criticism, see Richard Garnett, 'Determining the Appropriate Forum by the Applicable Law' (2022) 71(3) *International and Comparative Law Quarterly* 589, 617–23.

have been applied is the former *TPA*,[114] and now the *CCA*[115] and the ACL.[116] None of these cases involved the UCT provisions, but they too are protective legislation and may warrant the same approach being taken.

However, if the mere fact that the UCT provisions apply to a contract before an Australian court and that the alternative foreign court would not apply those or equivalent provisions prevented a stay of the Australian proceedings, there could never be such a stay to prevent a territorial overreach of the UCT provisions, and the approach envisaged by the High Court in *Karpik* would be thwarted. In order to give effect to the High Court's suggestion, the approach generally taken in relation to protective Australian legislation must not be applied to the UCT provisions, which should simply constitute one (not dominant) factor in the *forum non conveniens* exercise. This may be justifiable on the ground that the UCT provisions are not the basis of the claim as they do not provide a cause of action. Nevertheless, there is something awkward about declaring Australia to be a clearly inappropriate forum for the sole purpose of preventing the application of protective Australian legislation.

Thirdly, the applicability of the UCT provisions to a particular contract depends upon the factors present at the time of its formation. Subsequent events cannot change this. Subsequent events can, however, inform the decision on whether to stay an Australian proceeding on the ground of *forum non conveniens* because the court considers all the factors present at the time of that decision. Australia may not be an inappropriate forum where one of the parties has relocated, or the subject matter of the contract has been moved, to Australia since the contract was made. This is particularly relevant if it is considered sufficient that either party to the contract (and not just the party who proposed the standard terms) falls into one of the categories in s 5(1)(g)–(i) of the *CCA*.[117] An Australian citizen or resident who has been injured in a medical or other professional procedure overseas and incurred medical expenses in Australia may bring a tort action against the overseas professional in Australia (except Western Australia), based on the fact that damage was sustained in the jurisdiction.[118] The Australian court may decide to exercise jurisdiction in those circumstances.[119] If it does, the

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114 *Green v Australian Industrial Investment Ltd* (1989) 25 FCR 532, 545; *Commonwealth Bank of Australia v White* [1999] 2 VR 681, [89]–[91]; *Clough Engineering Ltd v Oil & Natural Gas Corp Ltd* (2007) ATPR 42–166, [41].

115 *Epic Games, Inc v Apple Inc* (2021) 286 FCR 105; *Epic Games, Inc v Google LLC (Stay Application)* (2022) 399 ALR 119.

116 *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320; *Lew Footwear Holdings Pty Ltd v Madden International Ltd* (2014) 50 VR 1, [233]–[236]; *Home Ice Cream Pty Ltd v McNabb Technologies LLC (No 2)* [2018] FCA 1093, [19]; *Urban Moto Imports Pty Ltd v KTM AG* [2021] VSC 616; *Epic Games, Inc v Google LLC (Stay Application)* (2022) 399 ALR 119; *Ayers Rock SkyShip Pty Ltd v Lindstrand Technologies Ltd* [2022] FCA 1208. The exclusive jurisdiction clause was enforced in *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133.

117 See Part IV C 2 above.

118 See Part V B 1 above.

119 See *O'Reilly v Western Sussex Hospitals NHS Trust* [2010] NSWSC 909.

plaintiff can invoke the UCT provisions if the defendant relies on an exclusion or limitation of tortious liability in a qualifying contract between the parties.[120]

There is one other problem. Australian proceedings will not be stayed on the ground of *forum non conveniens* unless the defendant applies for such stay. The possibility of stay is therefore unable to prevent a territorial overreach of the UCT provisions where the defendant is the party who is invoking them. This might be considered justified on the ground that the plaintiff has chosen to litigate in Australia and must therefore accept an application of mandatory Australian law. Where the plaintiff is forced to litigate in Australia because the contract contains an exclusive choice-of-court clause in favour of Australia, it can equally be argued that the consent to the clause is a consent to the application of mandatory Australian law. However, there is no choice where the plaintiff cannot litigate in the only alternative forum because, for example, that country experiences civil war or military conflict or the plaintiff would face persecution there.

In conclusion, while it may be possible to stay Australian proceedings in some cases in which the UCT provisions apply to a contract that has a tenuous connection with Australia, it is not possible in all such cases. The *forum non conveniens* exercise is concerned with the propriety of deciding the merits of a dispute in Australia, not with the territorial scope of legislation.[121] It would be much better to limit the territorial scope of the UCT provisions through statutory interpretation. The possibility of doing so will be discussed next.

VI Limiting the Territorial Scope of the UCT Provisions Through Statutory Interpretation

Since an unqualified application of s 5(1) of the *CCA* to the UCT provisions renders their scope extremely wide, a limitation of the scope through statutory interpretation must be considered. According to Ryan and Kiefel JJ, it 'is to be understood and implied that the Australian Parliament does not intend to deal with persons or matters over which, according to the comity of nations, jurisdiction belongs to some other sovereign or state'.[122] In the area of private law,

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120 If the view is taken that the person proposing the standard terms must fall into one of the categories in section 5(1)(g)–(i), the UCT provisions will still apply here if the defendant is a corporation doing business in Australia, an Australian citizen or an Australian resident.

121 See generally Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4(1) *Journal of Private International Law* 1, 28–31.

122 *Worldplay Services* (n 47) [17]. See also *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 363; *Barcelo v Electrolytic Zinc Company of Australia Ltd* (1932) 48 CLR 391, 424 (Dixon J); *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 31 (Taylor J); *Re Maritime Union of Australia; Ex parte CSL Pacific* (2003) 214 CLR 397, [45]. For a discussion, see Thomas Schultz and Jason Mitchenson, 'Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts' (2016) 12(2) *Journal of Private International Law* 344, 351–3.

as mentioned in Part III, a statute may be interpreted as applying in accordance with the common law choice-of-law rules.

The High Court in *Karpik* rejected the application to the UCT provisions of any interpretative principle relating to the territorial scope of a forum statute: since s 5(1) of the *CCA* identifies the requisite connection between the UCT provisions and Australia, 'there is no basis for seeking to identify a further territorial connection, whether by implication or statutory presumption'.[123] This argument would be unassailable if s 5(1) of the *CCA* had been enacted at the same time as the UCT provisions. But it was not. Section 5(1) had been in the *TPA* since its enactment and was simply extended to the UCT provisions when they were enacted. There is no indication that the legislature appreciated the drastic effect of extending s 5(1) to the UCT provisions. Thus, the language of the *CCA* may not reflect the legislature's intention.

The High Court in *Karpik* was concerned with the ACL as a law of the Commonwealth. The Court made no reference to the ACL as a law of a state or territory. Since state and territory legislation contains express provisions on the territorial scope of the ACL, the High Court's reason for rejecting a limitation of the territorial scope of the ACL as a law of the Commonwealth extends also to the ACL as law of a state or territory. Thus, the High Court's decision in *Karpik* obliges courts to apply the UCT provisions completely in accordance with the ACL application provisions.

Nevertheless, it is worth exploring whether in the absence of this authority it would be possible to remove the conflict with comity through statutory interpretation. Some possible criteria were considered in *Karpik* by the High Court and by Derrington J in the Full Federal Court. These and other criteria will be scrutinised to determine whether the High Court could have come to a different outcome if it had not regarded the existence of provisions on the territorial scope as an outright bar to a limiting interpretation.

As the High Court in *Karpik* observed, statutory provisions cannot be read down where this would frustrate the object of the legislation.[124] Pursuant to s 2 of the *CCA*, the *CCA*'s object is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. This is the guide for the following discussion.

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123 *Ruby Princess* HCA (n 2) 56–7 [44] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ), citing *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, 965 [38], 970–1 [59]–[62]; *Kay's Leasing Corporation* (n 30) 142–3.

124 *Ruby Princess* HCA (n 2) 56–7 [44], citing *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459, 481 [77]. See *Acts Interpretation Act 1901* (Cth) s 15AA.

A *The Law of An Australian Jurisdiction Governs the Contract*

The first limiting criterion to be considered is that the law of an Australian state or territory is the proper law of the contract under the common law choice-of-law rules. The proper law may generally be chosen by the parties (expressly or by implication) and is otherwise the law of the jurisdiction with which the contract as a whole has its closest and most real connection.[125] A reference of these rules to a foreign legal system is a reference to its internal rules rather than its choice-of-law rules.[126]

This criterion must be rejected. Since the parties may choose the proper law of the contract, the UCT provisions could not apply where the parties chose a foreign law as the proper law of the contract. Where the bargaining power is unequal, the stronger party could impose such a choice of law on the weaker party. As the High Court in *Karpik* noted,[127] the simple step of adding a choice-of-law clause in the standard terms would be sufficient. The purpose of the UCT provisions of protecting parties, in particular parties in a weaker bargaining position, from unfair contract terms would be completely thwarted if the provisions could be evaded that easily.

The parties' choice of a foreign law may be ignored where it was made in bad faith,[128] or violates public policy.[129] However, these grounds are rarely invoked,[130] and they invalidate the parties' choice of a foreign law completely. But there is no reason why the choice should be disregarded for issues other than the fairness of the terms. It is far better not to limit the territorial scope of the UCT provisions to contracts governed by the law of an Australian jurisdiction in the first place.

In *Karpik*, Princess suggested that the UCT provisions, where they apply to a contract pursuant to the ACL application provisions, could be applied to a choice-of-law clause in the contract and would invalidate it where it is unfair.[131] However, where a substantive term in the contract is unfair under the UCT provisions, the purported exclusion of their application by the choice of a foreign law as the proper law of the contract must logically be unfair too. In effect, Princess suggested limiting the territorial scope of the UCT provisions to contracts that

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125 *Bonython v Commonwealth* (1950) 81 CLR 486, 498; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 217, 224, 259–60; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 441–2; *Ship 'Sam Hawk' v Reiter Petroleum Inc* (2016) 246 FCR 337, [256], [258].

126 In other words, there is no *renvoi*: *Proactive Building Solutions v Keck* [2013] NSWSC 1500, [27]–[29].

127 *Ruby Princess* HCA (n 2) 57 [47].

128 See *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 290; *Garsec Pty Ltd v His Majesty Sultan of Brunei* (2008) 250 ALR 682, 709 [128] (Campbell JA). The parties' choice of the proper law was held invalid on grounds of bad faith in *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378.

129 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 290; *Garsec Pty Ltd v His Majesty Sultan of Brunei* (2008) 250 ALR 682, 709 [128] (Campbell JA); *Re Bulong Nickel Pty Ltd* (2002) 42 ACSR 52, [39].

130 See *Huntingdale Village Pty Ltd (CAN 085 048 531) (Recs and Mgrs Apptd) v Westgarth* (2018) 128 ACSR 168, [182].

131 See *Ruby Princess* HCA (n 2) 57 [47].

objectively have their closest connection with an Australian jurisdiction. This will be considered next.

B *The Contract Has Its Closest Connection with An Australian Jurisdiction*

The question arises whether it would be appropriate to limit the territorial scope of the UCT provisions to contracts that have their closest and most real connection with an Australian state or territory, employing the test used at common law to determine the proper law of the contract in the absence of a choice by the parties.[132]

It is necessary to consider the effect of the closest connection test for the two types of contract to which the UCT provisions apply: a contract for the supply of goods or services; and a contract for the sale or grant of an interest in land. Since the court considers all of the factors of the individual case,[133] the outcome will not be the same for every contract of the same type. Nevertheless, some general tendencies can be observed.

In determining the proper law of a contract for the sale of land, the location of the land (the *situs*) is an important factor, which may be decisive even where the contract was made, and both parties reside, in a jurisdiction other than the *situs*.[134] Thus, where the land is situated in Australia, an Australian court is likely to find that the contract has its closest connection with the *situs*, and the UCT provisions apply. Where the land is situated overseas, an Australian court is also likely to find that the contract has its closest connection with the *situs*, in particular where at least one of the parties resides in the same country. The UCT provisions cannot be invoked, even if one of the parties is based in Australia. However, an Australian party (whether a business or consumer) who contemplates entering into a contract relating to land situated overseas can be expected to be sufficiently shrewd to anticipate foreign law to be relevant and to obtain legal advice before entering into the contract.

In *Karpik*, Derrington J in the Full Federal Court stated that contracts for the supply of goods or services in Australia are likely to have their closest connection with Australia.[135] However, his Honour cited no authority in support of this contention, and the authorities in fact suggest the opposite, at least for services. The courts tend to find the closest connection of a contract for services with the

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132 See n 125. For the historical development of this test, see *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 661–2 [65]–[67] ('*Valve (No 3)* FCA').

133 Including the parties' places of business or residence, the place of contracting, the places of performance, and the nature and subject matter of the contract: *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 437.

134 *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565. See also *McClelland v Trustees Executors and Agency Co Ltd* (1936) 55 CLR 483.

135 *Ruby Princess* FCAFC (n 55) [321].

place of the service provider, at least where the other party is a consumer. This is unremarkable where both parties are based in the same jurisdiction. In cases in which a contract for the provision of a tour through Europe was made in Australia between a corporation based in New South Wales and residents of New South Wales, it was common ground that the law of New South Wales was the proper law of the contract for the provision of the tour.[136]

Importantly, a closest connection with the service provider's place of business has also been found where the parties were based in different countries. Where residents of New South Wales retained lawyers in New York to conduct litigation on their behalf in Pennsylvania, the proper law of the contract was said to be the law of New York.[137] In cases in which an overseas corporation provided online services to an Australian consumer, the contract was said to have its closest connection with the country in which the corporation had its principal place of business.[138] One argument for that conclusion was that the corporation used the same standard form contract for its dealings with consumers in multiple countries and a single proper law for all those contracts was desirable.[139]

These examples demonstrate that an application of the closest connection test renders the territorial scope of the UCT provisions too narrow. An Australian court is more likely to find that a contract between a business and a consumer has its closest connection with the country in which the business is based. This is understandable as a business usually involves a number of resources (in particular employees) in its operations. But it means that where a corporation based overseas supplies goods or services to an Australian resident, it is not necessarily or indeed usually the case that the contract has its closest connection with that jurisdiction.

The territorial scope of the UCT provisions should not be limited to contracts that have their closest connection with an Australian jurisdiction as specified by the common law choice-of-law rules in the absence of a choice of the governing law by the parties.

C *The Contract was Made in Australia*

In *Karpik*, Derrington J in the Full Federal Court observed that 'there is nothing in the *CCA* or the ACL which suggests that the circumstances which render an unfair clause void arises from the fact that it was entered into in a part of Australia'.[140]

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136 *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, [11]; *Moore* (n 39) [16].

137 *Fleming v Marshall* (2011) 279 ALR 737, 754–5 [81]–[86]. It was a provisional view expressed in a decision on whether to stay the Australian proceedings.

138 *Valve (No 3)* FCA (n 132) 663–5 [75]–[84]; *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133, [128].

139 *Valve (No 3)* FCA (n 132) 665 [83]; *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133, [128]. This argument is not convincing, as the non-Australian consumers may be able to litigate in their home countries where different choice-of-law rules may be applied.

140 *Ruby Princess* FCAFC (n 55) [294].

Nor could such a condition be implied, for two reasons. First, it is not always straightforward to determine where a contract was made, in particular for a contract made by electronic means. Secondly, the place of the contract may be fortuitous and does not provide a sufficient justification for the applicability or non-applicability of the UCT provisions. Suppose that the resident of a foreign country, while being on a short visit to Australia, enters (electronically) into a contract with a business in the foreign country for the supply of goods or services there. The business may not even be aware that its customer is present in Australia when making the order. Conversely, suppose that the agent of a small Australian business, while being overseas, enters into a contract with a large foreign business for the construction of a building in Australia. Even though the contract was not made in Australia, the Australian business deserves the protection of the UCT provisions.

D *An Obligation Under the Contract Was or Should Have Been Performed in Australia*

With regard to a 'consumer contract' for services, the High Court in *Karpik* rejected a limitation of the UCT provisions to services performed wholly or predominantly in Australia, as this would exclude contracts between an Australian consumer and an Australian-based company for services wholly or predominantly performed overseas.[141] This concern could be addressed by regarding it as sufficient that any, even minor obligation under the contract was or should have been performed in Australia. Such a criterion is still underinclusive as it renders the UCT provisions inapplicable where, for example, a foreign company advertises a European river cruise online and an Australian resident books the cruise in Australia through the company's website.[142] Even though no performance takes place in Australia,[143] there is a strong argument that the Australian resident should be protected against unfair terms used by the foreign company.

The last criterion is also overinclusive. In *Karpik*, Derrington J in the Full Federal Court convincingly argued that a passage contract for a round-the-world cruise concluded in the United States between entities domiciled there should not be subject to the UCT provisions only because part of the voyage is in Australia.[144] This would not leave the traveller without any protection of Australian law for injuries suffered in Australia. In particular, the traveller can invoke s 60 of the

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141 *Ruby Princess* HCA (n 2) 57–8 [49].

142 This is a variation of the facts of *Moore* (n 39). The travel agent in that case was an Australian company.

143 It is assumed that the place of payment is the creditor's place of business; see *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd* (2004) 61 NSWLR 451, [177]; *Eagle v Delta Haze Corp* [2000] VSC 513, [19].

144 *Ruby Princess* FCAFC (n 55) [314].

ACL, which provides: 'If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.' The traveller can bring a claim under s 60 against the Australian entity that provided the relevant part of the tour,[145] as the consumer guarantees do not require a contract between the consumer and the supplier of the goods or services.[146] The terms of the contract between the traveller and the overseas corporation do not affect the claim under s 60 as parties cannot generally contract out of the consumer guarantees.[147] It is not necessary to subject those terms to the UCT provisions.

E *At Least One Party is a Consumer or Small Business Based or Present in Australia*

With regard to a 'consumer contract' for the supply of goods or services, the High Court in *Karpik* rejected a limitation of the UCT provisions to contracts that affect or are capable of affecting the acquisition of goods or services by a consumer in Australia, as this would ignore the language of s 5(1) of the *CCA* and s 23(3) of the ACL.[148] It is unclear whether the High Court was considering a consumer who, at the time of the contract, is ordinarily resident in Australia or physically present in Australia. Both such limitations should be rejected as inappropriate. As Derrington J in the Full Federal Court observed, a limitation to Australian residents is still overinclusive as it would render the UCT provisions applicable where an Australian resident, while travelling overseas, enters into a contract with a foreign company.[149] Nor should the UCT provisions apply merely because at least one of the parties is a consumer or small business who was physically present in Australia when the contract was made. The presence within or outside Australia at that time may be fortuitous and, as Derrington J observed, there is no justification for treating two parties differently solely because they were in different locations when entering into contracts with the same third party for the same service on the same terms.[150]

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145 Consider the facts of *Wieck v Wayoutback Desert Safaris Pty Ltd* [2023] NSWSC 134: a resident of Germany booked an Australian tour with a German company and, after being injured in a tour bus in Australia, brought a claim under section 60 against the Australian companies that had provided that part of the tour. The court made a procedural decision and did not resolve the applicability of section 60.

146 *Valve* FCAFC (n 39) [106].

147 Section 64 invalidates a term that seeks to modify the consumer guarantee provisions, with a very limited exception in s 64A. Section 67 invalidates a term that seeks to apply a foreign law instead of the consumer guarantee provisions.

148 *Ruby Princess* HCA (n 2) 57 [48].

149 *Ruby Princess* FCAFC (n 55) [315].

150 Ibid 612–13 [320].

F *Both Parties are Based in Australia*

The territorial scope of the UCT provisions should not be confined to contracts between two parties based in Australia. Such a limitation would render the provisions inapplicable where a foreign corporation advertises goods or services in Australia and supplies them to Australian residents. In those circumstances, the Australian residents ought to enjoy the protection of the UCT provisions, and the foreign corporation can reasonably expect their application by an Australian court.

Similar considerations apply where a small business based in Australia contracts with a large overseas business that has targeted customers in Australia. It might be argued that the definition of a 'small business contract' (after the 2022 amendments) implies that both parties are based in Australia. As mentioned before, one of the two alternative criteria for determining whether a business is large or small for this purpose is the annual turnover. In that context, s 23(4)(b)(ii) of the ACL refers to 'the party's last income year (within the meaning of the *Income Tax Assessment Act 1997*)'. This might be said to imply that the party must be liable to pay income tax in Australia, as the financial year runs from 1 July to 30 June of the following year in Australia[151] but runs between different dates in other countries.[152] However, s 4.10(2) of the *Income Tax Assessment Act 1997* (Cth) provides that the 'income year' is the financial year (ie 1 July to 30 June) or the company's accounting period if it is different from the financial year. The 'income year' of a company based in a country in which the financial year does not run from 1 July to 30 June is that company's accounting period. Thus, the definition of a 'small business contract' in the ACL can accommodate foreign companies. Similarly, the fact that s 23(4)(b)(ii) of the ACL expresses the turnover threshold in Australian Dollars and that s 23(6) and (7) refer to Australian GST legislation[153] in defining 'turnover' is not a clear indication that only a party that pays its tax in Australia can be a party to a 'small business contract' for the purposes of the ACL.

G *The Contract was Made in 'Trade or Commerce'*

It should finally be considered whether the territorial scope of the UCT provisions could be limited to contracts made in 'trade or commerce' as defined identically in s 4(1) of the *CCA* and s 2(1) of the ACL. According to that definition, 'trade or commerce' means trade or commerce within Australia or between Australia and places outside Australia. It is necessary to consider when trade or commerce is between Australia and a place outside Australia for this purpose. This includes the case where a person or a tangible or intangible thing crosses a territorial border

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151 *Income Tax Assessment Act 1997* (Cth) s 995.1(1).

152 In the UK, for example, the financial year runs from 6 April to 5 April of the following year.

153 *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

(in particular the supply of foreign made goods to Australia),[154] in which case the contractual arrangements to effect such movement are included.[155] It also includes contracts concluded through the website of a foreign corporation that offers goods or services to persons in Australia.[156] By contrast, it is not sufficient that one party to a transaction is an Australian citizen or a corporation incorporated in Australia.[157]

The criterion of 'trade or commerce' as defined would work where at least one party to the contract is a business or government agency and thus acts in trade or commerce. It would render the UCT provisions applicable where both parties are based in Australia and also where a foreign party supplies goods or services to Australia. The criterion would render the UCT provisions inapplicable where an Australian citizen, while being overseas, and a foreign party enter into a contract to be performed overseas. It would also render the provisions inapplicable to a contract that was concluded in Australia (for example at a trade fair) between two foreign corporations and which is to be performed overseas. All of this is appropriate.

Nevertheless, basic principles of statutory interpretation prevent the adoption of this criterion, for two reasons. First, as observed by Derrington J in *Karpik*,[158] the legislature made careful choices as to which ACL provisions do and which do not employ this criterion. For example, the consumer guarantees in ss 51–53 do not require the supply to occur in trade commerce whereas the consumer guarantees in ss 54–62 do require this. It must be assumed that the legislature made a conscious choice not to confine the scope of the UCT provisions to contracts made in trade or commerce.

Secondly, the criterion would render the UCT provisions inapplicable where neither party acts in trade or commerce. While it may be rare for two consumers to contract on standard terms, this is not impossible to occur even in a cross-border context. For example, a luxury item such as a vintage car may be sold from one consumer to another, and one party may insist on the inclusion in the contract of particular standard terms found online. The possibility of making such a transaction by way of a smart contract may increase the possibility of standard terms being used.[159] At least an Australian party ought to be protected by the UCT provisions in those circumstances. Therefore, while the criterion might work in practice because the excluded type of contract is rare to occur, a type of contract

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154 See, eg, *Philipsen v American Medical LLC* [2018] FCA 246, [24]; *Gill v Ethicon Sarl (No 5)* [2019] FCA 1905, [3130].

155 *Wells v John R Lewis (International) Pty Ltd* (1975) 25 FLR 194, 204–6; *Swan v Downes* (1978) 34 FLR 36, 40–6.

156 *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309, [32].

157 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* (2012) 266 FLR 243, [407].

158 *Ruby Princess* FCAFC (n 55) [307].

159 See generally Son T Nguyen, 'Consumer Protection Against Unfair Contract Terms in the Age of Smart Contracts' (2023) 51(4) *Federal Law Review* 487, 498–500.

that the UCT provisions expressly include in their scope cannot be removed from their scope through statutory interpretation.

In conclusion, even if, contrary to the High Court's decision in *Karpik*, a limitation of the territorial scope of the UCT provisions were not considered excluded by the clear language of the ACL application provisions, there is no limiting criterion that is compatible with both the language of the UCT provisions and the object of the *CCA*.

VII Conclusion

It is legitimate for the UCT provisions to have some extraterritorial effect. In particular, where a foreign corporation targets customers in Australia, it is justified and indeed important that a consumer or small business based in Australia is able to invoke the UCT provisions to impugn a term in the foreign corporation's standard terms. The problem is that the extraterritorial effect of the UCT provisions is much wider than that. If the territorial scope of the UCT provisions is determined solely in accordance with the ACL application provisions in the *CCA* and in state and territory legislation, the UCT provisions apply to every contract made anywhere in the world by a corporation that does business in Australia through other transactions, by an Australian citizen or an Australian resident, at least where that person is the party who proposed the standard terms. This is a remarkably wide scope, which can hardly be considered compliant with comity.

Nevertheless, the High Court in *Karpik* refused to entertain interpretative devices aimed at narrowing the territorial scope of the UCT provisions, arguing that this is precluded by the clear wording of s 5(1) of the *CCA*. The Court expressed confidence that the Australian courts will not exercise jurisdiction in respect of a contract that has no connection with Australia other than that it is subject to the UCT provisions. This observation may be seen to conflict with the Court's decision in the case before it. Residents of North America were permitted to join a class action in Australia even though their contracts with the defendants had only a tenuous connection with Australia and contained a class action waiver clause and an exclusive jurisdiction clause in favour of a US court. More generally, the jurisdiction rules are not able to prevent a conflict with comity.

The jurisdiction rules of the Australian courts permit service of the originating process in a wide range of circumstances. The courts do have a discretion not to exercise jurisdiction, but they can do so only where Australia is a clearly inappropriate forum for the dispute (unless the alternative forum is New Zealand where it is sufficient that New Zealand is a more appropriate forum). This is a high hurdle, and a stay of proceedings will be rare, even if the applicability of the UCT provisions as protective legislation is not regarded as a factor that, by itself, prevents a stay. Crucially, the *forum non conveniens* inquiry considers all the

factors of the dispute at the time of the court's decision on the stay application, and not only the factors relating specifically to the contract at the time of its formation. Even where there are no factors connecting the contract itself with Australia, the Australian court may not be a clearly inappropriate forum because of other factors at the time of the proceedings, such as the presence of a related action in Australia. It would be awkward to stay Australian proceedings for the sole purpose of preventing the application of Australian protective legislation.

The jurisdiction rules do not constitute a sufficient bar to the application of the UCT provisions to a contract that has a tenuous connection with Australia. Only a limitation on the provisions' territorial scope itself can achieve this properly. The High Court's decision in *Karpik* prevents courts from implying any limitation. But even if the courts were free to do so, a suitable criterion cannot be found for the current legislation.

Legislative reform is needed. Rules delineating the territorial scope of the UCT provisions ought to be inserted in the ACL. There could be different rules for a 'consumer contract' and a 'small business contract', or a set of alternative criteria for both types of contract. For example, the UCT provisions could be made applicable where the contract is made in 'trade or commerce' as defined in s 4(1) of the *CCA* and s 2(1) of the ACL, or where the law of an Australian jurisdiction is the proper law of the contract, a foreign choice-of-law clause being ignored for that purpose.

Legislative reform is in fact needed beyond the UCT provisions. In *Valve Corporation and Australian Competition and Consumer Commission*,[160] the Full Federal Court held that the consumer guarantee provisions in the ACL apply whenever a corporation based anywhere in the world supplies goods or services to a consumer (as defined in s 3 of the ACL) based in Australia (because such a supply constitutes conduct in Australia) regardless of the proper law of the contract. Comparing the UCT provisions with the consumer guarantee provisions, the High Court in *Karpik* said that the latter provisions apply only where the law of an Australian jurisdiction is the proper law of the contract, noting that s 67 of the ACL invalidates a choice-of-law clause to the contrary.[161] Even though the High Court made no reference to the conflicting decision in *Valve*, lower courts may follow the High Court's comments and may now refuse to apply the consumer guarantee provisions where a consumer based in Australia acquires goods or services from an overseas supplier, on the ground that the contract has its closest connection with the supplier's country. The ACL ought to be amended so as to ensure the applicability of the consumer guarantee provisions whenever the supply of goods or services is part of business activities of the supplier directed at consumers based in Australia.

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160 *Valve* FCAFC (n 39) [106]–[116]. For a discussion, see Sirko Harder, 'The Territorial Scope of Australia's Consumer Guarantee Provisions' (2021) 17(2) *Journal of Private International Law* 255.

161 *Ruby Princess* HCA (n 2) 57 [46].

Regulating Decisions that Lead to Loss of Life in Workplaces

Chris Dent*

Workplace deaths occur as a result of decisions made by a range of parties — employers, employees and the victim. These decisions can be seen to form the basis of regulatory efforts. This research proposes a categorisation of the decisions in terms of their timeframes — long-term, short-term and emergency — as well as non-decisions. The decisions will be explored through the use of decision-making theory, an engagement with the 'agency-systems' dichotomy, the conflict between the underlying policies of safety, efficiency and devolved decision-making, as well the concept of 'resilience engineering'. By way of contrast, there will be reference to the regulation of iatrogenic deaths to further probe the value of the approach. The outcome is a call for a focus on the regulation of decisions, and a step away from the traditional focus on fatalities as outcomes.

I Introduction

The law is concerned with the minimisation of death in society — most obviously, but not most effectively, in the criminal sanctions around murder. This is, of course, not law's exclusive purpose. In several areas, the law allows for a balancing of purposes against risks to life. An obvious example is road rules, which balance efficient transit against fatalities.[1] It is not clear, however, that the settings for such assessments are explicit and/or optimal. One avenue for interrogating this is to adopt a framework that can be applied in a range of areas of law. The framework proposed here focuses on the role of specific decisions, and non-decisions, that contribute to a loss of life.[2] The categories of decisions include long-term (or strategic), short-term and extreme short-term (or

* School of Law and Criminology, Murdoch University. I would like to thank John Howe for helpful, and supportive, comments on this research..

1 As I have explained elsewhere, it 'would be possible, for example, for a speed limit of 5 kilometres per hour to be enforced and for all vehicles to be preceded by a person carrying a red flag. Such requirements would make road travel safer; however, such restrictions would not facilitate the effective transportation of significant numbers of people every day': Chris Dent, 'Relationships between Laws, Norms, Practices: The Case of Road Behaviour' (2012) 21(3) *Griffith Law Review* 708, 712 n 16.

2 This idea, therefore, can be seen as building on the assessment that 'law ... [is] a social institution that coordinates the behaviour of organisational and human actors. Human behaviour is complex ... it is individually psychologically derived and driven': Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) *University of New South Wales Law Journal* 392, 393.

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emergency) decisions;[3] and these categories will be considered in the light of current theories in psychology and other disciplines. This schema will, first, be expanded on in the context of occupational health and safety ('OH&S') regulation. The decisions made in this system include those of planners, employers and those made at the time of the incident that results in death (both those relating to the immediate cause of the incident and those of the person who lost their life). A consideration of decisions is implicit in the regulatory systems — for example, an inquest into a workplace death found that the 'controls' on the relevant machine were 'confusing and liable to produce an error'[4] — this analysis simply brings decisions to the fore.

In terms of statistics, there were 169 fatalities where the individual was at work in 2021.[5] From one perspective, given that there were over 12 million people in the Australian workforce in 2021,[6] the rate of fatalities is low, suggesting that it is a successful form of regulation.[7] From another perspective, 169 fatalities is close to the number of murder victims (193 in 2021, 65 of whom were victims of family and domestic violence[8]) with that level of crime not being seen as acceptable. Further, according to the Australian Institute of Criminology, there were 16 deaths in police custody in the financial year 2020–21,[9] which did not result from an intent to kill, as in the instances of murder. This was also deemed to be an unacceptable number. The framework presented here provides a more nuanced perspective on the context of decisions that may allow a better targeted approach to reduce the high number of fatalities in the workplace.

These ideas will be explored in another area of regulation — one that could be viewed from an OH&S perspective but is not. The area covers assessments of

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3 Long-term decisions in the area of road safety include driver education and car design; short-term decisions include those around the maintenance of vehicles and those made at the start of a journey (for example, choosing to drive when tired); and emergency decisions include those made when a tyre blows out when driving at speed.

4 *Inquest into the Death of Gareth Leo Dodunski* (Coroner's Court of Queensland, 31 August 2023) [226]. There was, for example, 'no emergency stop button' on the human-machine interface 'screen at the time': at [69]. The only explicit references to 'decisions' in that judgement were to the decisions of courts.

5 Safe Work Australia, *Key Work Health and Safety Statistics Australia 2022* (Web Page, 17 January 2023) <https://www.safeworkaustralia.gov.au/doc/key-work-health-and-safety-statistics-australia-2022>. In 2020, there were 194 fatalities: Safe Work Australia, *Work-related Traumatic Injury Fatalities, Australia* (Report, 2020) 6.

6 The Australian Bureau of Statistics reports that 12,049,900 were referred to as employed in the 2021 Census: Australian Bureau of Statistics, *Employment in the 2021 Census* (Web Page, 30 November 2022) <https://www.abs.gov.au/articles/employment-2021-census>.

7 That is not to say that the current regulatory settings are sufficient or as effective as they could be. That this is not the case is due, in part, to the fact that the risks of death and injury are not spread evenly across the workforce.

8 Australian Bureau of Statistics, *Recorded Crime — Victims* (Web Page, 29 June 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>.

9 Laura Doherty, Australian Institute of Criminology, *Deaths in Custody in Australia 2020–21* (Report, 2021) 12. The figure does not include deaths in prison custody.

blame around 'iatrogenic deaths' in hospitals that result from the mistakes of practitioners.[10] These deaths can also be seen to occur within systems of regulation, and each are impacted by long-term, short-term and emergency decisions. These deaths also occur in a workplace, and the patients could be seen as known visitors to that workplace. Their current regulation, however, is not the same as OH&S regulation. Instead, iatrogenic deaths are the subject of professional regulation and some coronial investigations. This difference suggests that not all deaths are treated equally. It has been said, in the health sector, that there are two approaches to considering harm: the 'person approach and the systems approach'.[11] This understanding has relevance to OH&S more broadly. A focus on the decisions made by parties adds great context, and problematises, the distinction between 'individual agency' and 'systemic liability'. The argument here is that neither the OH&S, nor the health, systems pay sufficient attention to decisions. Using the relatively new concept of 'resilience engineering',[12] the conclusion is that the real harm in either is the making of a bad decision, regardless of whether the bad decision leads to personal injury or death.

II Systemic Decision-making within OH&S Regulation

Occupational health and safety regulation is a significant area of research in its own right.[13] The discussion in this Part focuses on how the categorisation of decisions can be understood with respect to the range of parties involved in that

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10 'Iatrogenic harm is harm to the person, including death, which arises in the course of medical or health care treatment caused by the application of treatment itself, rather than the underlying disease or injury': David J Carter, Deborah J Street and Stephen Bush, 'Building Public Confidence in Medical Registration Revalidation: Reform of Medical Registration Law in Australia, a New Risk-based Approach' (2018) 25(4) *Journal of Law and Medicine* 1009, 1009 (n 1).

11 Femi Oyebode, 'Clinical Errors and Medical Negligence' (2013) 22(4) *Medical Principles and Practice* 323, 325. This may be seen as related to, yet distinct from, the agency-structure analysis of Giddens. See, eg, Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1984).

12 With respect to the workplace regulation, it has been said that current trends in 'safety science' focus on 'resilience engineering [which] is about identifying and then enhancing the positive capabilities of people and organisations that allow them to adapt effectively and safely under varying circumstances': Johan Bergrström and Sidney Dekker, 'The 2010s and Onward: Resilience Engineering' in Sidney Dekker (ed), *Foundations of Safety Science: A Century of Understanding Accidents and* Disasters (Routledge, 2019) 391. This text was referred to, with approval, in *Dodunski, Gareth Leo* (2013/2231) [2023] QldCorC 30, 'Executive Summary'.

13 A leading text is Richard Johnstone and Michael Tooma, *Work Health and Safety Regulation in Australia* (Federation Press, 2022).

regulation.[14] The range of parties relevant to regulation includes the employers,[15] regulators and victims. This analysis proceeds on the basis that one of the underlying purposes of the regulatory systems is the devolution of decision-making to individuals.[16] One issue is the interaction between decisions made by different individuals. As such, the analysis first expands on the different timeframes of decisions and then highlights the role of both individual agency and systemic pressures in the area.[17]

In order to introduce some of the ideas that support the analysis, a brief overview of decision-making theory is warranted. Significant work has been carried out over the past few decades into how people make decisions.[18] Kim refers to three 'major types of decision-making models' being 'descriptive', 'normative' and 'prescriptive'.[19] A distinction that has entered the public consciousness is between System 1 (intuitive) and System 2 (rational analysis) thinking.[20] Research in this area is valuable because 'judgment and decision-making are pervasive, important intellectual activities engaged in by all of us in

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14 While some understandings of regulation focus on regulation as 'deliberate attempts … to influence socially valuable behaviour' (Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press, 2007) 3), other work has focused on the regulation of decisions themselves. See, eg, Chris Dent, 'The Role of Law in the Treatment Decisions of Doctors' (2022) 48(1) *Monash University Law Review* 94.

15 More properly, the law governs 'persons conducting a business or undertaking' (for example, *Work Health and Safety Act 2011* (NSW) s 19); however, in order to emphasise the inherent power of those making certain decisions, the article will refer to 'employers' rather than 'persons conducting a business of undertaking'.

16 The same research that highlighted the role of efficiency also highlighted the role of autonomous decision-making: see Dent (n 1).

17 It may be noted that Sheehy and Feaver argue for a 'systemic approach' to regulation: Donald Feaver and Benedict Sheehy, 'Designing Effective Regulation: A Positive Theory' (2015) 38(3) *University of New South Wales Law Journal* 961, 963–4.

18 A significant early model is the behavioural decision theory of Ward Edwards: see, eg, Ward Edwards, 'The Theory of Decision Making' (1954) 51(4) *Psychological Bulletin* 380. Under this model, decision-makers consider their subjective expected utility from the decision and reach the optimal solution for them.

19 Nancy S Kim, *Judgment and Decision-Making: In the Lab and the World* (Palgrave Macmillan, 2017) 9–10. More specific models are' 'rational choice', 'incrementalism', 'bounded rationality', 'naturalistic decision-making' and 'game' theories. These are by no means the only approaches in the literature. For example, a 'mixed scanning' model was proposed to address perceived shortcomings of the rational choice and incrementalist theories: Amitai Etzioni, 'Mixed-Scanning: A "Third" Approach to Decision-Making' (1967) 27(5) *Public Administration Review* 385. The mixed scanning understanding incorporates a perception that a decision-maker needs to assess the 'big picture' aspect of a decision. For an example of the 'mixed-scanning' approach applied to judicial decision-making, see Neil E Snortland and John E Stanga, 'Neutral Principles and Decision-making Theory: An Alternative to Incrementalism' (1973) 41 *George Washington Law Review* 1006.

20 See, generally, Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus & Giroux Inc, 2011). In a later text, this time co-written by Kahneman, there is a discussion of: 'decision hygiene principles' that are aimed at improving decision-making: Daniel Kahneman, Oliver Sibony and Cass R Sunstein, *Noise: A Flaw in Human Judgment* (William Collins, , 2021) 374.

academic, professional and social pursuits throughout every day'.[21] That is, specific decisions are behind many of an individual's actions in the world. Some of those decisions are rushed, some are based on reflection and others are never actually 'made'.[22] The framework proposed here engages with the range of decisions, and their circumstances, that are evident in the workplace.

A *Characterisation of Process in Terms of Decisions*

The analysis in this article is based on the assertion that decisions may be characterised as long-term, short-term or emergency decisions. For present purposes, mistakes are characterised as bad short-term/emergency decisions or the absence of decisions. Included in the analysis, then, are 'nondecisions' — that is to say, decisions that should have been made, but where the regulated individual did not realise that a decision had to be made.[23] Discussing decision-making in terms of time periods allows a greater engagement with the roles of different parties at different stages of regulation, and it allows for both intuition and rationality at all stages of decision-making.

1 *Emergency Decisions*

The first decisions to be discussed are emergency decisions — that is to say, those made at the time of the incident that led to a fatality. All other decisions need to be understood as contributing to the decision made in an emergency situation. In terms of the personnel involved, the victim may be a key decision-maker. This is not an exercise in victim-blaming. Instead, it is an acknowledgement that the victim may have made decisions in constrained circumstances, often under significant pressure, which may have played a role, however small, in their death. Other decisions are made by those in the victim's immediate vicinity. As an example, a significant number of workplace deaths happen on the road. In the period 2016–20, 39 per cent of all workplace fatalities involved a vehicle collision, with 70 per cent of those being on a public road.[24] Many of the collisions would have involved other road users, and so their decisions may have contributed to the fatality. In such cases, the employer can have no direct impact on the decisions made as the incident played out.

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21 Terry Connolly, Hal R Arkes and Kenneth R Hammond (eds), *Judgment and Decision Making: An Interdisciplinary Reader* (Cambridge University Press, 2nd ed, 2000) 2.

22 Kahneman discusses the interplay, in professional settings, between expertise, intuition, emotion and memory — demonstrating the complexity of decision-making in life: see Kahneman (n 20) ch 22.

23 A nondecision, therefore, is distinct from a decision to not take action.

24 Bureau of Infrastructure and Transport Research Economics, *Road Trauma Australia 2021 Statistical Summary* (Report, 2022) 27. This data is not provided on a year-by-year basis.

In emergency situations, decisions may also be made under high mental-load circumstances. Specifically, the timeframe for the decision is significantly compressed. There is very little time to weigh up the options and carefully decide the best path after the benefits and costs of each avenue are considered. These factors impact on the quality of any decision made. There is also the possibility that the decision-making will be impaired as result of the circumstances in which the worker finds themselves. As an example, in one incident a trainee welder was sent in to clean the inside of a tanker.[25] A release of argon gas from a welder reduced the level of oxygen in the tank, and so hypoxia may have impacted his decision-making in the tank.[26] Further, there is the possibility that the stress that comes with an emergency situation may also produce hormones that impact on the decisions made.[27] For example, in a review of past studies, it was concluded that 'stress favours … "habit" over … "cognitive" memory systems'.[28] This finding may have a particular impact on the role of training relative to personal experience in emergency situations. In other words, if training is minimal, its impact may be overwhelmed by the circumstances.

The understanding of these decisions may be enhanced through a consideration of decision-making theory. According to that theory, the circumstances of extreme short-term decisions may produce what is known as 'attention-driven choice'.[29] That is, when under high mental load,[30] the circumstances that capture the focus of the decision-maker disproportionately affect the resulting decision.[31] It is harder, then, for workers in emergency situations to recall instructions. Instead, they may rely on their own (professional) experience.[32] The workers in some industries are trained to deal

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25 *DPP v Marshall Lethlean Industries Pty Ltd* [2022] VCC 945.

26 'Hypoxia … is known to cause decrements in normal neural functioning': Phillip Lieberman et al, 'Cognitive Defects at Altitude' (1994) 372 *Nature* 325, 325. See also Stefania Pighin et al, 'Decision Making under Hypoxia: Oxygen Depletion Increases Risk Seeking for Losses but not for Gains' (2012) 7(4) *Judgment and Decision Making* 472.

27 See below Part III(B).

28 Lars Schwabe and Oliver T Wolf, 'Stress and Multiple Memory Systems: from "Thinking" to "Doing"' (2013) 17(2) *Trends in Cognitive Sciences* 60, 66.

29 Bryan D Jones and Frank R Baumgartner, 'A Model of Choice for Public Policy' (2005) 15(3) *Journal of Public Administration Research and Theory* 325, 334.

30 In a decision relating to a commercial helicopter pilot's capacity to fly, reference was made to the risks associated with a medical condition and decisions that he would have to make under circumstances of 'high cognitive load': *McSherry and Civil Air Safety Authority* [2014] AATA 119, [43].

31 The attention-driven nature of the decision means that 'some aspects of the world are unmonitored, unattended to; other aspects are incorporated into the decision process beyond their intrinsic merit': Jones and Baumgartner (n 29) 334.

32 See, eg, Rebecca Pliske and Gary Klein, 'The Naturalistic Decision-Making Perspective' in Sandra L Schneider and James Shanteau (eds), *Emerging Perspectives in Judgment and Decision Research* (Cambridge University Press, 2003) 559.

with time-limited circumstances, such as paramedics.[33] However, most workers are not.[34] Emergency decisions also may be unexpected, one-off decisions that were not raised in their training.[35] In short, when assessing the relative contributions of various decision-makers to a fatal incident, the decisions made in extremely short timeframes should not be judged in the same way as those made with the luxury of more time, in part because there are fewer opportunities for interventions to prevent bad emergency decisions.

2 *Short-Term Decisions*

Short-term decisions are the decisions made close to the time of the incident that had, or could have had, a material effect on the incident. An example, taken from the workplace, is the decision to place a barrier around a gap in the flooring that could cause a lethal fall.[36] These decisions are not necessarily made by the people, or person, involved in the incident.[37] As a more concrete example taken from the case above, the decision to leave a welder overnight inside a tank to be cleaned was a short-term decision.[38] It was not a decision of the victim and it was not a decision of the employer; it was the decision of a different employee (this is not to impute any blame at all on that employee).[39]

These decisions may be 'fast and frugal'.[40] This means that people use heuristics, or mental shortcuts, when making decisions. The 'fast and frugal' way

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33 See, for example, Stuart Donn, 'Expertise and Decision-Making in Emergency Medical Services', in Joseph R Keebler, Elizabeth H Lazzara and Paul Misasi (eds), *Human Factors and Ergonomics of Prehospital Emergency Care* (CRC Press, 2017) 71. Donn uses a workplace example — an engineer who had failed to return after completing an operational check of a mine pumping station. The paramedics needed specific decision-making skills in order to understand, and resolve, the life-threatening situation: at 76.

34 Where such training is involved, the 'naturalistic decision-making' model may be useful. Naturalistic decision-making 'researchers have been interested in domains that require high-stakes, time-pressured decision-making under conditions of uncertainty and competing goals': Jennifer K Phillips, Gary Klein and Winston R Sieck, 'Expertise in Judgment and Decision-Making: A Case for Training Intuitive Decision Skills', in Derek J Koehler and Nigel Harvey (eds), *Blackwell Handbook of Judgment and Decision Making* (Blackwell, 2004) 297.

35 These can be seen as 'singular decisions'. See, eg, Kahneman, Sibony and Sunstein (n 20) 34–8.

36 A recent report has stated that 63.5 per cent of 'serious crashes' involving trucks had 'human factors' (such as excess speed, distraction and fatigue) as 'dominant proximate contributing factors': National Transport Insurance and National Truck Accident Research Centre, *Major Crash Investigation 2022 Report* (Report) 7. A significant number of truck drivers are, of course, workers for the purposes of OH&S regulation.

37 An example of where a short-term decision was made by a party to the incident prior to the death was that of the unlicensed driver of a forklift to ask to use the forklift. Their use of the forklift contributed to the death that was the subject of *Baiada Poultry v The Queen* (2012) 246 CLR 92.

38 *DPP v Marshall Lethlean Industries* [2022] VCC 945, [23].

39 Johnstone points out that 'defence counsel' in workplace-related prosecutions 'regularly attempted to 'shift' blame onto the injured or deceased worker': Richard Johnstone, 'Work Health and Safety and the Criminal Law in Australia' (2013) 11(2) *Policy and Practice in Health and Safety* 25, 28.

40 Gerd Gigerenzer, 'Fast and Frugal Heuristics: The Tools of Bounded Rationality' in Koehler and Harvey (n 34) 63.

is to rely on 'limited knowledge' and necessarily limited 'empirical evidence'.[41] One assessment of fast and frugal decisions is that they lead to 'satisficing' behaviour — an understanding under the 'bounded rationality' model of decision-making.[42] Bounded rationality recognises that decisions 'cannot wait until everything is known … [the decision-maker] makes a decision which he or she hopes will be satisfactory and will suffice to meet the … needs at the moment'.[43] When a delivery driver chooses to enter a roadway in their vehicle, they do not have the time to know, precisely, how fast the oncoming traffic is going, or how much time they have before it is unsafe to proceed. Instead, they base their decision on their sense of the relative speeds, and their past experience in similar situations.[44] In the vast majority of cases, such decisions are 'good enough' and no crash happens.

To be clear, short-term decisions to be regulated will include 'non-decisions' — instances where an individual should have made a decision but did not. A delivery driver whose attention lapses before striking a pedestrian did not choose to make contact or choose to let their mind wander.[45] The driver would have realised, had their mind not wandered, that a decision to avoid the pedestrian needed to be made. A non-decision with respect to the use of warning signs, after a workplace spill, may have been the result of an initial focus on aiding an injured worker, with the need for signs slipping from a supervisor's mind after the injury had been attended to. The acknowledgement of the role of non-decisions does not mean that they cannot be assessed with respect to any liability, just that it is not a *decision* that can be sanctioned.[46]

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41 See generally, Gerd Gigerenzer and Daniel G Goldstein, 'Reasoning the Fast and Frugal Way: Models of Bounded Rationality' (1996) 103(4) *Psychological Review* 650.

42 Bryan D Jones, *Politics and the Architecture of Choice: Bounded Rationality and Governance* (University of Chicago Press, 2001) 61.

43 David Corbett, *Australian Public Sector Management*, 2nd ed (Allen and Unwin, 2nd ed 1996) 62. Expressed differently, the 'bounded' in bounded rationality 'can refer to constraints in the environment, such as information costs, and to constraints in the mind, such as limited memory': Gigerenzer (n 40) 65.

44 Research has, for example, shown links between 'cognitive economy' and the 'performance efficiency of habits': Wendy Wood, Jeffrey M Quinn and Deborah A Kashy, 'Habits in Everyday Life: Thought, Emotion and Action' (2002) 83(6) *Journal of Personality and Social Psychology* 1281, 1295.

45 An extreme example of this is where an individual who was found to be driving his car, despite the fact that there was uncontroverted medical evidence that he did so 'without any degree of consciousness': *Donovan v State of WA* (2017) 53 WAR 1, 13 [41] (Mazza and Beech JJA and Hall J).

46 This analysis is not intended to excuse nondecisions. Rather, it is intended to highlight their existence and the potential for the law to acknowledge their existence.

3 *Long-Term Decisions*

The third category of decisions is long-term decisions. These are typically decisions made significantly before the fatal incident.[47] They might concern the institution and content of training for workers, and they might concern the resourcing of workers and training equipment.[48] As such, the most obvious party making these decisions in the workplace is the firm itself. In the welder case, for example, it was the company that failed to engage a 'qualified welding inspector to routinely inspect and maintain its welding equipment'.[49] This, of course, may be an example of a non-decision. It is not clear from the decision whether the company that employed the welder considered the possibility of engaging an inspector and chose not to do so, or whether it did not occur to them that an inspector could be engaged.

Other parties, however, also have a role in long-term decisions that contribute to deaths. Whether or not an incident on the road occurs may, in part, be the result of the distractedness of the driver and the scheduling of the firm.[50] It may also be, in part, the result of the design and maintenance of the road itself.[51] These decisions, in turn, may be informed by professional expertise.[52] Such expertise, however, may be misapplied or misconceived. More relevantly for law, the decisions of workplace regulators may have an impact on the decisions of employers that potentially give rise to the deaths of workers.[53] Such regulators make a range of decisions. WorkSafe may release material that is aimed at informing employers and employees.[54] Systems may be changed that impact on

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47 They may also be made after the incident. Prosecutors, for example, can make 'strategic choices' when proceeding with enforcement actions: Toni Schofield, Belinda Reeve and Ron McCallum, 'Australian Workplace Health and Safety Regulatory Approaches to Prosecution: Hegemonising Compliance' (2014) 56(5) *Journal of Industrial Relations* 709, 724.

48 They also can be around the design and construction of equipment and structures in the workplace — for example, as considered in *Slivak v Lurgi* (2001) 205 CLR 304. These decisions can also be around cost-cutting to improve profitability — and these could be either short-term or long-term decisions.

49 *DPP v Marshall Lethlean Industries* [2022] VCC 945, [23] (Trapnell J).

50 The repeated use of delivery drivers as the basis for an example is, in part, because it is an example that connects with the experience of most readers.

51 The role of road design as a key part of the regulatory system was raised in Chris Dent, 'Taking the Human Out of the Regulation of Road Behaviour' (2018) 40(1) *Sydney Law Review* 39.

52 'Expertise' in decision-making is also part of the, above-mentioned, 'naturalistic decision-making' analysis: Taryn Elliott, *Expert Decision-Making in Naturalistic Environments: A Summary of Research* (Research Paper, Land Operations Division, Department of Defence, May 2005) 8.

53 Of note is the fact that that the only reference to 'decision-making' in Gunningham and Johnstone's discussion of principled reforms to the OH&S system is to the decision-making of 'inspectors and prosecutors' (Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, 1999) 329) and not to the decision-making of employers or victims.

54 WorkSafe Victoria, for example, makes available posters that can be put up in the workplace: see Work Safe Victoria, *Posters for your workplace* (Web Page) <https://www.worksafe.vic.gov.au/posters>.

employers.[55] Most obviously, the issuing of an improvement notice represents a specific instance of the employer being informed of better practice.[56] Even the prosecution of an employer, particularly where there are media reports of the prosecution, may have an educative role for other employers.[57] Behind all of these outputs is a range of long-term decisions aimed at reducing the incidence of death and injury in the workplace.

There is often a policy-based tension in long-term decisions. The target outcome for these decision-makers may, for example, not be the absolute least number of deaths, but the optimal number of positive outcomes, given the policies. For example, mandating one-on-one supervision of new staff by experienced workers (such as a constant shadowing of the new worker) may dramatically reduce workplace deaths, but it would make many businesses unprofitable. A key provision in the regulations is that people in the workplace be 'given the highest level of protection against risks to their health and safety that is *reasonably practicable* in the circumstances'.[58] Reasonably practicable does not require that the risks be 'eliminate[d]'; rather, the 'employer is obliged to *reduce* that risk so far as reasonably practicable'.[59] That reduction does not have to be sufficient to prevent all possible injuries. The obligation reflects a tension in that a director of a company in an industry with known OH&S risks may have a desire to reduce the chance of death and injury, while also wanting to maintain profitability to ensure that their workers remain employed.[60]

The policies in OH&S law are evident in the 'objects' clauses of the legislation.[61] It is in these clauses that the 'reasonably practicable' standard sits.[62] Other relevant statements include that the law is aimed at 'protecting workers and other persons against harm … through the elimination or minimisation of risks';[63] 'promoting the provision of advice, information, education and

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55 As of late 2022, for example, employers in Victoria have specific obligations with respect to any workers who may be in contact with crystalline silica dust: *Occupational Health and Safety Regulations 2017* (Vic) r 319R.

56 Eg, *Work Health and Safety Act 2011* (NSW) s 191.

57 Linked with this is the notion of deterrence. Empirical research has shown that '[d]eterrence … was a taken-for-granted, though unexamined, effect of reserving prosecution for criminal culpability or workplace injuries and deaths that raised public concern or outrage': Schofield, Reeve and McCallum (n 47) 725. The authors, however, did not discuss the role of the media in generating 'public concern or outrage'. Further, Gunningham and Johnstone refer to 'moral and political pressures' and 'maximum publicity' of any 'successful prosecution', but they do not discuss the role of the media: Gunningham and Johnstone (n 53) 328, 335.

58 *Occupational Health and Safety Act 2004* (Vic) s 4(1) (emphasis added). The regulation of OH&S is substantially uniform across the country, and the test of 'reasonably practicable' is common.

59 *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281, 305–6 [71] (Gageler J) (emphasis added).

60 They also may have a more selfish desire to personally profit from an efficiently run company (and therefore may be less focused on negative OH&S outcomes than they could be).

61 The statutes are substantially uniform across most of the country. For a discussion of the development, and enactment, of the Model Law see Johnstone and Tooma (n 13) ch 1.

62 See, eg, *Work Health and Safety Act 2011* (NSW) s 3(2).

63 See, eg, *Work Health and Safety Act 2020* (WA) s 3(1)(a).

training';[64] and 'securing compliance with this Act through effective and appropriate compliance and enforcement measures'.[65] Again, not all risks need to be eliminated. Further, there is an implicit intention in the legislation to impact on the decision-making of parties through the provision of knowledge. There is also the implication, in the last-listed object of the Act, that the regulators will, themselves, make decisions around the prioritisation of enforcement because only 'appropriate', and not all, measures will be undertaken. The legislation in the only state that has not enacted the Model Law, Victoria, states that one of its objects is 'to eliminate ... risks'.[66] However, the 'principles' section of that Act refers to the 'reasonably practicable' requirement three times,[67] and includes the phrase 'to eliminate or reduce ... risks'.[68] Decisions of regulated parties, then, can be seen as central to the system and these decisions are made by individuals.

B *Agency vs System Approach*

This section will explore how a decision-based understanding of OH&S enhances the understanding of its regulation. Two aspects will be highlighted here. First, the fact that all regulatory decisions are made in relationships; and second, the OH&S regulatory system may usefully be understood as the sum of all relationship-embedded decisions.

1 *Decisions Made in Relationships*

No decision in the workplace is made in isolation — save, in some cases, for emergency decisions in circumstances where the decision-maker is by themselves[69] — so most decisions are made in the context of known relationships. Decision-makers, then, can, or should, have others in mind when considering an action or an inaction. At the highest level, the purpose of regulators, such as WorkSafe, is to consider risks to employers, workers and others. Other regulators, including employees with a supervisory role, should also bear in mind workers and others; and all should consider the risks that their decisions may pose to

64 See, eg, *Work Health and Safety Act 2011* (NSW) s 3(1)(d).

65 See, eg, *Work Health and Safety Act 2020* (WA) s 3(1)(e). There is an object in the WA Act that does not exist in all the others — 'providing for the formulation of policies ... relating to work health and safety': s 3(1)(i). This makes explicit the incorporation of policy goals into the operation of the OH&S system.

66 *Occupational Health and Safety Act 2004* (Vic) s 2(1)(b). It also refers to the 'formulation and implementation of standards': s 2(1)(d).

67 Ibid s 4(1)–(3).

68 Ibid s 4(4).

69 For example, a truck driver reacting to a kangaroo on a country road, at dusk, when no other road user is in the vicinity. Even in that scenario, however, the truck driver's short-term decisions may have been impacted by decisions and actions of others.

others.[70] Most obviously, each firm should make its decisions around OH&S with its workers, and others, in mind. This is made clear with the reference to 'protecting workers and other persons' in the objects clause. In order to 'protect', the employer needs to be aware of the existence of the workers and of the potential for others, who are not workers, to be present in the workplace. More specifically, the law imposes 'onerous proactive duties on officers of companies to exercise due diligence to ensure compliance by their companies'.[71] While the law considers that officers do make decisions,[72] it does not classify these decisions in terms of their timeframe. Further, at a base level, the concept of 'duty' reflects the law's concern with known relationships — some personal, some commercial — where one party should have the interests of the other in mind.[73] Unsurprisingly, then, the OH&S obligations of a firm are sited with the relationships within the workplace (though not limited to the physical confines of a particular place of work).

There are, of course, limits to the consideration that the employer must pay to others. As noted above, the High Court has said that, with respect to the 'reasonably practicable' requirement, the 'duty does not require an employer to take every *possible* step that could be taken'.[74] This means that employers can, to an extent, privilege the obligation to turn a profit over putting in place every safety mechanism available to them. For companies that are not sole traders, the decisions that the officers make are also made in the context of their relationships with the owners (whether or not the company is listed on the stock exchange). Officers cannot, then, divert *all* the firm's available resources to protect workers and visitors, even if they wanted to. The long-term decisions of officers, with respect to training and provision of safety equipment, are constrained by the needs and expectations of others to whom they must have regard.[75]

Just because the employer has a higher level of responsibility does not mean that workers do not need to think of others when in the workplace. The law also imposes duties on workers. For example, in the NSW Act, there is the requirement that '[w]hile at work, a worker must … take reasonable care that his or her acts or

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70 Mirroring the basics of negligence — people 'ought reasonably to have [their neighbours] in contemplation … when … directing [their] mind to the acts or omissions which are called in question': *Donoghue v Stevenson* [1932] AC 562, 613 (Lord Atkin).

71 Johnstone and Tooma (n 13) 137.

72 'An officer of a corporation (other than a CCIV) is: (a) a director or secretary of the corporation; or (b) a person: (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation': *Corporations Act 2001* (Cth) s 9AD.

73 See generally, Chris Dent, 'The Introduction of Duty into English Law and the Development of the Legal Subject' (2020) 40(1) *Oxford Journal of Legal Studies* 158.

74 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92, 101 [15] (French CJ, Gummow, Hayne and Crennan JJ) (emphasis in original).

75 The decisions of officers may, in some workplaces, be impacted by input from unions. Some unions, such as the CFMEU have dedicated OH&S officers who engage with employers over safety matters. Any legal liability for the decisions, however, rests with the employer.

omissions do not adversely affect the health and safety of other persons'.[76] This reads like the duty of care in negligence law generally and so reinforces the idea that, when workers are making decisions around safety, they are doing it in the context of known relationships. The precise scope of the provision has not been 'authoritatively determined';[77] however, it has been said that it is a 'duty not to expose those persons to a risk of injury as a result of the immediate conduct of the worker'.[78] While Scott DCJ does not discuss 'conduct' in terms of decision-making, the reference to 'immediate' conduct does accord with the analysis that workers may make short-term decisions that can impact on the risks faced by others in the workplace.

A key aspect of the relationships in question is, in most cases, an implicit power imbalance, most obviously (but not exclusively) between worker and employer (where the latter is making decisions that will impact on the former). Notably, the worker is reliant on the employer for an income. They might also lack the knowledge and experience of their employer. So, a worker may be constrained, given their weaker position, when engaging with the long-term decisions of their employer. This means that the weaker party often does not have full agency in their actions. A worker may also be in a weaker position relative to others around them when making an emergency decision. As a specific example, the driver of a B-double truck (a worker) may, in fact, feel disempowered in their interactions with car-drivers, given the inertia of their vehicle,[79] should a car-driver take an unexpected action. If a car-driver changes lane in front of the truck, without ensuring there is a safe distance between the two, and then brakes to turn a corner, the truck-driver has few options. Their emergency decision is prompted by the decision of the car-driver — a known relationship — and could lead to the death of the latter, at no fault of the truck-driver.

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76 *Work Health and Safety Act 2011* (NSW) s 28(b). This is in addition to the obligations to '(a) take reasonable care for his or her own health and safety … (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act, and (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers': s 28.

77 Johnstone and Tooma (n 13) 158, citing *SafeWork NSW v Scharfe* (2021) 37 DCLR(NSW) 75.

78 *SafeWork NSW v Scharfe* (2021) 37 DCLR(NSW) 75, 92 [96] (Scott DCJ).

79 A B-double truck may be up to 26m long and have a mass of up to 50 tonnes: National Heavy Vehicle Regulator, *National Class 2 B-double Operator's Guide* (2022) 2–3. These limits are set under the Heavy Vehicle (Mass, Dimension and Loading) National Regulations of each participating jurisdiction. The website for the Regulator includes a range of material to guide the decisions of those in the industry: National Heavy Vehicle Regulator (Web Page) <https://www.nhvr.gov.au/>. There is also substantially uniform law that regulates heavy vehicle use: eg, *Heavy Vehicle National Law 2013* (NSW).

2 *System as Sum of Individual Decisions*

The car-driver in the preceding example may have had, in their mind, good reasons for deciding to change lanes and brake hard.[80] The truck-driver being at that point of the road and driving at the speed they were was also the result of different factors and the decisions of other third parties. There may have been a schedule set by their employer.[81] There may have been a delay at their last meal-break (due to understaffing, or as a result of the location of the stop). There might have been a tyre blowout that required a tyre change (with the blowout occurring as a result of the road condition). They may have slept in (or risen unusually early). They may have pulled over to let traffic past that had built up behind them (because there had been no designated overtaking lane for a significant distance). Most of these decisions are not legally regulated;[82] however, they all contributed to the fatal crash happening. To focus, then, on just the decisions of the two drivers, at the time of the incident, does not acknowledge the range of factors, and preceding decisions, that contributed to it.

Nevertheless, the focus of the current system is on the long-term decisions of one category of party — the employers.[83] The regulators attend workplaces to ensure compliance. Regulatory websites target employers. For example, the first statement on WorkSafe WA's page on 'How do I get started' is: 'As an employer, you have a responsibility to provide a high standard of safety and health at your workplace'.[84] That the agency promulgates guidelines, and even the website itself, implies that it is aimed at enabling the establishment of a safe workplace — a long-term strategy. The creation of training materials is aimed at facilitating effective short-term and emergency decisions of workers. The idea of the training is to ensure that workers know what to do when faced with an unsafe situation. The approach is valuable; however, it is also incomplete.

That is not to say that there are no short-term decisions embedded in the regulatory system. The entry of union representatives, for example, may reflect such decisions.[85] Under the legislation, a union has a right of entry, if they are a WHS entry permit holder, for the 'purpose of inquiring into a suspected

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80 They may have been uncertain of where they were going, they may have had an unexpected fault in their car, or a bee may have flown in the window (and they are allergic to stings).

81 There are legislative requirements around limiting, and monitoring, the fatigue of drivers; for example, *Heavy Vehicle National Law 2013* (NSW) pt 6.3. There is also a specific obligation on drivers to avoid driving while fatigued: s 228.

82 There are requirements around sufficient rest and having a roadworthy vehicle (not driving with a burst tyre).

83 That said, the incorporation of workers and unions into the legislation allows their perspective to be included in the long-term decisions of employers.

84 See Department of Energy, Mines, Industry Regulation and Safety, *How to Get Started* (Web Page) <https://www.commerce.wa.gov.au/worksafe/how-get-started>.

85 There are also the decisions of health and safety representatives to 'investigate complaints' and make enquiries into potential risks; see, eg, *Work Health and Safety Act 2011* (NSW) s 68(1).

contravention of this Act that relates to, or affects, a relevant worker'.[86] The law also gives workers the right to 'cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard'.[87] These decisions are not about setting up training; instead, they are a process of accountability with respect to the obligations of employers to run safe workplaces. That is, they are decisions of non-employers to facilitate the better decision-making of employers.

Of course, the decisions of all parties are also not made in a vacuum. As noted above, workers do not have full agency with respect to responding to actions of their employers.[88] Unions have limited power, but their own agenda, with respect to the decisions of employers.[89] Even the decisions of employers are constrained. There is a need for them to turn a profit.[90] The broader capitalist functions of a modern economy, then, act as a driver of decisions of employers. The broader consumerist aspects of society also act as a driver for employees; people may be able to survive on welfare, but life is more comfortable when a higher than subsistence-level income is earned. In addition, specific industries may have other relevant regulatory obligations — such as animal welfare obligations for farmers[91] — that may impact on the decision-making of employers and workers.

All decisions, then, are systemic. Each individual is making their choice (whether conscious or unconscious) in the light of their obligations, the decisions of others and even general societal discourses. None should be seen as having radical agency. Perhaps the only group that has unregulated, rather than radical, agency is 'outsiders' — the visitors to the workplace, the other drivers on the road

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86 See, eg, *Work Health and Safety Act 2011* (NSW) s 117(1).

87 See, eg, ibid s 84.

88 It has been noted, citing union submissions to Senate Committees investigating the application of the *Fair Work Act 2009* (Cth), that '[a]ccording to the AMWU, employees who exercise their workplace rights are regularly intimidated by employers. Similarly, the CEPU state that union activists or safety representatives are often labelled troublemakers and struggle to gain future employment': Jason Raftos, 'Don't Come Around Here No More: Union Right of Entry Under the *Fair Work Act 2009* (Cth). The First Ten Years' (LLM Thesis, Murdoch University, 2023) 98 (footnotes omitted).

89 For example, an 'inference open to the Court is that … the [Construction, Forestry, Mining and Energy Union] and the [Builders' Labourers' Federation] have employed a strategy of using alleged workplace health and safety problems at the site as a pretext for interfering with the construction schedule of the M&A Project': *Laing O'Rourke Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FCA 133, [38] (Collier J). It should be noted, though, that this dispute was under the *Fair Work Act 2009* (Cth), rather than any of the State OH&S legislation.

90 As an example, directors and other officers of corporations 'must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose': *Corporations Act 2001* (Cth) s 181(1). 'It may be readily accepted that directors and other officers of a company must act in the interests of the company as a whole and that this will usually require those persons to have close regard to how their actions will affect shareholders': *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165, 178–9 [18] (McHugh, Gummow, Hayne and Callinan JJ).

91 See, eg, *Animal Welfare Act 2002* (WA).

— who may have minimal exposure to the regulatory efforts of the employer. This is not to excuse the actions (or inactions) of all. An employer will always have more capacity to institute a range of long-term strategies than an employee (or a visitor) will have options in their short-term or emergency decisions. The acknowledgement is to allow, instead, for an engagement with the systemic concerns at play. More importantly for this analysis, it maintains a focus on *decisions*. That they are dependent on a particular individual's role is not surprising; however, there are benefits to be gained from considering how decisions are impacted by the specific circumstances evident at the time that it was made.

III Contexts of Systemic Decisions

The circumstances that impact on systemic decisions include those that relate to (1) what the decision-maker knew (or should have known); (2) the individual *qua* an individual; and (3) their appetite for risk. Each of these will be discussed in this Part. To round it out, there will be an engagement with public policy — specifically that multiple policies constrain regulation and they are in tension.

A *Role of Knowledges (Practical and Expert) and Risk in Decisions*

It is self-evident that specific knowledges inform decisions. Whether the decision-maker is an employer making long-term decisions, a worker making a short-term decision or a visitor making an emergency decision, knowledge is involved. The knowledge applied may be expert, it may be practical, and it may be wrong. Some knowledge is conscious, while some is so well-known that its impact on decisions is unconscious. And, of course, knowledge is known to be incomplete — with the effect that many decisions are made in the context of some risk.

Decisions within systems may be made based on expert knowledge. A safety data sheet for a chemical may form the basis of safe work practices in a workplace[92] — that is, expert knowledge from a manufacturer may delimit the long-term decisions of management around that chemical's use.[93] Such expert knowledge may be the result of a tertiary qualification and may even include legal

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92 More prosaically, '[u]nder various legislative regimes in Australia, a manufacturer, importer or supplier of hazardous substances and dangerous goods must provide a material safety data sheet (an MSDS) which sets out prescribed categories of information about the product in question. Employers and the occupiers of certain premises using, or having on site, products of these kinds must have ready access to a copy of the relevant MSDS for each such product': *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173, 175 [1] (Jacobson, Nicholas and Yates JJ). It may be noted that this decision is a copyright case about the 'authorship' of automatically-generated data sheets.

93 The 'Safe Work Method Statement' and the relevant 'Material Safety Data Sheets' are highlighted in *Harris v Lend Lease (WorkCover)* [2016] VMC 16, [5].

advice sought by a party before making a decision. Practical knowledge may not be linked with formal education. It could, for example, be the 'tweaks' that get the best out of a piece of machinery or vehicle.[94] Practical knowledge, then, may not be reduced to writing (or other form of data storage). Practical knowledge may also either be conscious or ingrained to the extent that it is unconscious. Such knowledge may be based on task-related training — with that training including the use of safety manuals. There may, of course, also be a degree of tension between expert and practical knowledge, both at the level of the workplace and at the individual level.

Practical knowledge may, in part, be gained from personal experience. Experience is, necessarily, limited (and gives rise to biases to be discussed below). The subjective nature of personal experience also means that there may be gaps in knowledge. Gaps also exist with respect to expert knowledge. There is material that was never known. There is knowledge that was once known but, at the point it was needed, was forgotten (or knowledge that should have been known, if all their training had been learned). There is misremembered knowledge (which may include inaccurate assessments of data taken out of context). And, finally, there is incorrect knowledge — material that the individual thinks may be correct but is not. Some of these gaps may be the responsibility of the individual, and some may be the responsibility of the firm that trained or employs them, or both. All, potentially, impact on the decisions that can lead to death.

A specific aspect of knowledge with respect to decision-making is the awareness and quantification of risk.[95] Risk, here, is about a 'mode of treatment of certain events capable of happening'.[96] From this perspective, there is no necessary value judgment of those 'certain events'. For a firm, there is a risk both of an end-of-year profit, as well as a risk of an end-of-year loss. As such, in every area of human activity, there are risks as 'certain events' may occur as a result of any decision or non-decisions. Some possible events are known, some are not known, but are knowable, and there are some that are not knowable.[97] When it comes to regulation, there is a focus on those risks (both known and knowable)

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94 It can therefore be seen to have links with the concept of 'know-how'. The latter term has been defined as including the 'special skills, experience and knowledge of individuals, in the performance of teams and in organisational architecture and routines specific to particular workplaces or enterprises': Laurie Hunter, 'Intellectual Capital: Accumulation and Appropriation' (Working Paper No 22/02, Melbourne Institute of Applied Economic and Social Research, 2002) 13.

95 See generally George Wu, Jiao Zhang and Richard Gonzalez, 'Decision under Risk' in Koehler and Harvey (n 34).

96 François Ewald, 'Insurance and Risk' in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect — Studies in Governmentality* (Harvester Wheatsheaf, 1991) 197, 199.

97 There are links, then, with the well-known statement of former US Secretary of Defence Donald Rumsfeld about 'known knowns, known unknowns and unknown unknowns'. This is discussed, from a more theoretical perspective, in David Dunning, 'The Dunning-Kruger Effect: On Being Ignorant of One's Own Ignorance' (2011) 44 *Advances in Experimental Social Psychology* 247.

that may cause injury or death to someone.[98] Of course, the likelihood of any particular event may be known, unknown or being incorrectly known. Decision-making around any risk also has a personal aspect — to be discussed next.

B *Personal*

The personal aspects of decisions impact on all parties — employers, workers and outsiders. This has, to an extent, been noted by others:

> [N]ot every person is motivated by rational objectives or calculative decision-making. Rather, individuals often have imperfect knowledge of the law and its consequences. In addition, they may have bounded willpower and cognitive biases, which can lead to the perception that the offending will lead to higher short-term benefits, not future penalties.[99]

People have their own interests and preferences, they are subject to specific decision-making practices (many of which are unconscious), and there are physiological aspects to their decisions. Any consideration of how the law engages with the different categories of decisions should, at least, acknowledge these factors.

Research in law has considered how a range of other motivators can impact on the decisions of an individual.[100] These are conscious and/or unconscious *reasons* that a person has for a given action (or inaction). Motivators may be internal, external or reputational. The first category includes those bases of decisions that relate to how an individual sees themselves. For example, if they see themselves as risk-averse, they will tend to avoid risk; if they see themselves as driven to help others, their decisions will tend to be pro-social. The external motivators focus on punishment and reward. Here, the possibility of prosecution, and a fine, would be seen as a negative external motivator. Finally, there are the reputational motivators — those who desire to be seen as different from others and to look better in the eyes of others.[101] A young worker, for example, may engage in risky behaviours in the workplace because they want to show off. Again, this is not an excuse, but it is added context. Motivators, then, can either be an immediate, or an underlying, prompt for a problematic decision — with any legal obligations potentially having only a limited impact.

Next, biases and heuristics feed into the deployment of knowledge. Incomplete and inaccurate knowledge may lead to overconfidence (which, in

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98 For an example discussion of what risks should be considered and the role of the decision of the victim, see *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281.

99 Tess Hardy, John Howe and Melissa Kennedy, 'Criminal Liability for Wage Theft: A Regulatory Panacea?' (2021) 47(1) *Monash University Law Review* 174, 188.

100 See, eg, Uri Gneezy, Stephan Meier and Pedro Rey-Biel, 'When and Why Incentives (Don't) Work to Modify Behaviour' (2011) 25(4) *Journal of Economic Perspectives* 191.

101 For a more complete discussion of these, and links with the literate from behavioural economics, see Chris Dent, 'A Regulatory Perspective on the Interests and Motivators of Creative Individuals' (2013) 23(2) *Asia Pacific Media Educator* 265.

turn, can be seen as inaccurate risk assessment).[102] Confirmation bias is based on the idea that certain situations will be interpreted in terms of an individual's learned ideas of the world[103] — meaning that an individual's own experiences may have an involuntary impact on the decision. Mental shortcuts facilitate the avoidance of knowledge that is highly contextualised.[104] Biases, generally, are at odds with rational decision-making. Expressed differently, after assessing biases and heuristics, West, Toplak and Stanovich conclude that, if critical thinking is to be pursued, 'heuristic response must be inhibited and replaced with a more normatively appropriate response'.[105] The argument in this article is that expecting critical, or overtly rational, analysis and decision-making is too high a standard for many of the situations that lead to unintended deaths. There is not the time, there is too heavy a mental load, and/or there are too many adverse circumstances for that to happen.

Further, risk assessment is, in part, outside an individual's control. Studies have indicated that gonadal hormones — of particular relevance to teenagers — impact on risk-taking in both males and females.[106] Further, 'neurobiological models of adolescent brain development highlight the impact of pubertal hormones on reward-related regions, resulting in strong reward-approach behaviour … [including] increased risk-taking and impulsivity'.[107] More specifically for females (and not limited by age), 'estradiol played a positive role in effort expenditure and cognitive control during action selection … [and] augmented the hedonic qualities of the reward'.[108] With respect to males, research using the Iowa Gambling Task has shown that 'financial decision-making is

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102 For a discussion of overconfidence in managerial decision-making (particularly relevant for workplace deaths and the role of hospital systems in iatrogenic deaths), see Max Bazerman and Don A Moore, *Judgment in Managerial Decision-Making* (John Wiley & Sons, 8th ed, 2017) ch 2.

103 Expressed differently, the bias relates to the 'testing or evaluating a hypothesis such that inappropriately high confidence in the hypothesis is the systematic result': Craig R M McKenzie, 'Hypothesis Testing and Evaluation' in Koehler and Harvey (n 34) 200, 204.

104 More generally, past knowledge itself (which may or may not be accurate) is a heuristic — see Michael R P Dougherty, Scott D Gronlund and Charles F Gettys, 'Memory as a Fundamental Heuristic for Decision-Making' in Schneider and Shanteau (n 32) 125.

105 Richard F West, Maggie E Toplak and Keith E Stanovich, 'Heuristics and Biases as Measures of Critical Thinking: Associations with Cognitive Ability and Thinking Dispositions' (2008) 100(4) *Journal of Educational Psychology* 930, 937.

106 For example, '[r]emoval of ovarian hormones increased risky choice in females … while removal of testicular hormones decreased risky behaviour in males': Caitlin A Orsini et al, 'Regulation of Risky Decision Making by Gonadal Hormones in Males and Females' (2021) 46 *Neuropsychopharmacology* 603, 611.

107 Corinna Laube and Wouter van den Bos, 'Hormones and Affect in Adolescent Decision-Making' in Sung-il Kim, Johnmarshall Reeve and Mimi Bong (eds), *Recent Developments in Neuroscience Research on Human Motivation* (Emerald Group, 2016) 259, 274.

108 Aiste Ambrase et al 'Influence of ovarian hormones on value-based decision-making systems: Contributions to sexual dimorphisms in mental disorders' (2021) 60 *Frontiers in Neuroendocrinology* 1, 12.

related to circulating levels' of testosterone.[109] The same study also suggested that because 'androgen receptors are present in relevant regions, by which testosterone binds to exert its physiological effects, it seems plausible that testosterone in adulthood, or during foetal development, or both, might affect brain areas and neurotransmitter systems'.[110] As such, the hormones may have an impact on the structure of the brain itself. If that is the case, then decision-making more broadly may be affected.[111]

Hormones, notably stress hormones, also impact on value judgements — that is to say, how individuals assess possible outcomes.[112] One study has shown that the 'effects of stress expressed by cortisol levels are associated with both utilitarian and deontological decisions, depending on the focal goal of achieving certainty'.[113] Another showed that 'acute stress can exert both positive and negative effects on prosocial behaviour … [including the] activ[ation of] self-serving motivations'.[114] A different area of research looks at the impact of the hormones on cognition and memory. Research has shown, for example, that 'exogenously administered cortisol impairs cognitive reflection and potentiates a shift from deliberative to intuitive information processing'.[115] Another study has shown that 'acute stress … disrupted working memory performance at a behavioural level … [and that] it also had a detrimental effect in working memory at a cognitive neural level'.[116] This, then, indicates that decisions made in emergency situations are physiologically different from those made when the individual is not stressed. As a result, long-term decisions in the workplace could, and should, account for this difference.

In short, any decisions by parties in the system will be impacted by a range of factors, most of which are outside the control of policy makers. Best practice training could be put in place, but it may not sufficiently guide emergency

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109 Kelly L Evans and Elizabeth Hampson, 'Does Risk-Taking Mediate the Relationship Between Testosterone and Decision-Making on the Iowa Gambling Task?' (2014) 61–62 *Personality and Individual Differences* 57, 60.

110 Ibid 61.

111 The highest fatality rate among road users was 7.4 per 100,000 for the 17–25 age group: BITRE (n 24) 32. Further, in all categories of road users, other than as passengers, males significantly outnumbered females: ibid 8–9. This could suggest that hormones play a role in the decisions of drivers, or it could reflect their relative lack of experience, or both.

112 For a review of the literature, from a few years ago, see D Lupien, F Maheu, M Tu, A Fiocco and T Schramek, 'The Effects of Stress and Stress Hormones on Human Cognition: Implications for the Field of Brain and Cognition (2007) 65 *Brain Cognition* 209.

113 Malgorzata Kossowska et al, 'Cortisol and Moral Decisions Among Young Men: The Moderating Role of Motivation Toward Closure' (2016) 101 *Personality and Individual Differences* 249, 251.

114 Silja Sollberger, Thomas Bernauer and Ulrike Ehlert, 'Stress Influences Environmental Donation Behaviour in Men' (2016) 63 *Psychoneuroendocrinology* 311, 318.

115 Zsofia Margittai et al, 'Exogenous Cortisol Causes a Shift from Deliberative to Intuitive Thinking' (2016) 64 *Psychoneuroendocrinology* 131, 134. Of note is the fact that the authors place their work within the literature of decision-making theory — specifically, that of Kahneman: at 131.

116 Caihong Jiang and Pei-Luen Patrick Rau, 'Working Memory Performance Impaired after Exposure to Acute Social Stress: The Evidence Comes from the ERPs' (2017) 658 *Neuroscience Letters* 137, 140–1.

decisions made in circumstances of high mental load. Short-term decisions may also be delimited by the 'satisficing' behaviour discussed above — with confirmation biases unconsciously reducing the risks of a negative outcome in the decision-maker's mind.[117] Attitudes to risk are, in part, personal, as are attitudes to, and retention of, knowledge by individuals. This understanding of decision-making does not, itself, offer solutions; however, effective regulation should take it into account.

C *Public Policy*

The final context of decisions made within systems is the policy setting applied by the Executive arm of government. Some of these are explicitly stated, whereas others are implicit. Key public policies include safety, efficiency and autonomous decision-making.[118] The first is a stated purpose of OH&S regulation, and has been discussed above. The latter two are implicit. As such, they need further explanation, although the underlying assertion is that the regulatory system could not work as it does without an emphasis on efficiency and devolution of responsibility. The process by which all three policies come together may be understood in terms of risk *management*.

Efficiency is key, in part, because limited resources — either time or finances — drive key players. Available funding is a key factor in the availability of resources (or the perception of availability) for the quality, and frequency, of training in workplaces, the quality of monitoring systems and the quality and maintenance of safety equipment. Public road funding also impacts on the quality of the road infrastructure (including road surface, design, capacity and signage) and individual finances impact on the quality, and maintenance, of vehicles. This is relevant for the workplace deaths that occur on the roads. With respect to workplace safety, it is more efficient to have individual firms make long-term decisions about procedures and so forth, than to have a government agency step in and make the decision for them. In a finite world, unlimited funds are not available; those charged with decision-making around safety have to bear cost in mind when making their decisions. Finances are not an excuse, and the 'reasonably practicable' test allows for an objective assessment; however, the same test acknowledges that funds for safety may be limited.

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117 This may be despite publicity around fatalities and prosecutions. For example, media reports of the workplace death described above at n 38 include: Pat McGrath, Jeremy Story and Sarah Curnow, 'Family Distraught after Apprentice Dies in Worksite Employer AI Group knew was unsafe' *ABC News* (online, 14 November 2018) <https://www.abc.net.au/news/2018-11-14/ai-group-apprentice-dillon-wu-dies-in-unsafe-worksite/10429356>; Danny Tran, 'Transport Company Fined $600k over Suffocation Death of Apprentice Dillon Wu' *ABC News* (online, 24 June 2022) <https://www.abc.net.au/news/2022-06-24/company-sentenced-over-apprentice-death/101179706>.

118 These have been discussed as the three core regulatory purposes of the road rules: Chris Dent, 'Laws, Norms, Practices' (n 1). The efficiency in that system relates to the efficiency of transit.

With respect to the second implicit policy — autonomous decision-making — individuals are trained, or disciplined, to make decisions for themselves, in the light of the obligations and requirements of their respective institutions. That is, a significant purpose of the regulation that they are subject to is to make them self-regulating. It has been said that '[i]ndividuals should do more for themselves, paying greater attention, for example, to their diets and driving habits'.[119] The road transport system would not operate if individual drivers were not responsible for the control of, and for making decisions about, their vehicle.[120] And, of course, the obligations on workplaces are generalised. First, the above-mentioned object of 'education and training' indicates an assumption that workers should think for themselves. As a further example, the Victorian OH&S 'Duties of employers' include that

> An employer must, so far as is reasonably practicable — (a) monitor the health of employees of the employer; and (b) monitor conditions at any workplace under the employer 's management and control; and (c) provide information to employees of the employer (in such other languages as appropriate) concerning health and safety at the workplace.[121]

In other words, the OH&S legislation cannot set out, in detail, all of the possible requirements of employers across all possible workplaces in the State. This is an obvious point, but one that emphasises the importance of taking account of the decision-making of individuals who are subject to regulation.

Risk management is also systemic and is tied to finances.[122] While there are many risks associated with each of the interactions considered here, the key one is, of course, the risk of death. Decision-makers, however, are balancing that risk against the other risks. As has been noted, '[p]eople change their preferences in favour or against risk seeking (vs risk aversion) depending on whether a situation

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119 Richard J Zeckhauser and W Kip Viscusi, 'Risk Within Reason' in Connolly, Arkes and Hammond (n 21) 476.

120 That, however, does not mean that they have sole responsibility. A death that occurs when the worker is commuting either to, or from, work may still be considered a workplace death — with the decisions around shift-length and rest periods being considered when assessing the circumstances of the death. In one case (though one that resulted in a permanent brain injury rather than death), a worker lived 430 km from the mine site, and commuted from home for each 12-hour shift. Unsurprisingly, fatigue, and work procedures around the availability of an on-site room for workers, were issues explored: see *Kerle v BM Alliance Coal* [2016] QSC 304.

121 *Occupational Health and Safety Act 2004* (Vic) s 22(1).

122 As has been noted, '[i]n everyday parlance, the term "risk" is used as "a synonym for danger or peril, for some unhappy event which may happen to someone"': Gabe Mythen, *Ulrich Beck: A Critical Introduction to the Risk Society* (Pluto Press, 2004) 13. Risk is also used in a wider, yet more specific, sense in academic circles. Beck coined the term 'risk society' to privilege the understanding that the production of risk accompanies the production of wealth in society: Ulrich Beck, *Risk Society: Towards a New Modernity*, tr Mark Ritter (Sage Publishing, 1992) 19. The use of the term risk in this article reflects the former, more everyday, use of the term.

is presented in terms of gains or losses'.[123] This framing means that people can be seen to weigh up, at the point of decision, the positive and negative outcomes (linked, necessarily, with their personal motivations around the decision). This, of course, only applies to conscious decisions. Actions that result from habit (or ingrained training), or bias, do not engage with risk, and nor do non-decisions.

To be clear, managing risks means engaging with them, rather than avoiding them altogether. At one level, autonomous decision-making is a regulatory goal because it is the individual that has the clearest knowledge with respect to risk assessment and management. At another, the goal is an 'optimal' level of death, rather than zero deaths. The need for risk management, rather than risk elimination is because there are other purposes that attach to each area of regulation. The regulation of the workplace, for example, includes an acknowledgement of the need for the profitable existence of the workplace. Again, the above-mentioned objects include the 'minimisation' and not elimination of risks.[124] That there are sound reasons for not banning all behaviours that may lead to deaths (driving at a speed that can cause death, having machinery in workplaces that can cause death, police officers carrying guns) means that the risks of deaths cannot be fully expunged.

However, merely noting that the law accommodates risk management, and the knowledges embedded within risk assessment, does not provide a complete answer for the assessment of decision-making. That is, acknowledging that the different risks should be considered does not set out what standard of decision-making is sufficient, let alone what standard of risk assessment is sufficient. Take, again, the practical example of a driver wanting to enter a busy roadway. They have to decide when it is safe enough to do so — when the risk of a collision is low enough to proceed. Their assessment of what is safe is based on their perceptions and their past experiences. It also may be linked with their self-image. If drivers see themselves as safe they are more likely to recall similar incidences when they have acted safely, rather than unsafely.[125] A driver entering a road is balancing safety and transit; and a firm, when implementing work practices, is balancing worker safety and profitability. These are not excuses for the deaths that occur. Instead, they are a reminder that human society is complex and inter-related — individual safety competes with money, the safety of others, uncertain knowledge and the need for interactions that enable our communities.

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123 Eric R Igou, 'The When and Why of Risky Choice Framing Effects: A Constructive Processing Perspective' in Gideon Keren (ed), *Perspectives on Framing* (Routledge, London, 2011) 231, 233.

124 Of course, the public sector may also pose risks to the lives of workers. For an overview of the issues, see Victorian Law Reform Commission, *Criminal Liability for Workplace Death and Serious Injury in the Public Sector* (Report, 2002).

125 See the discussion of the intersection of 'motivational theories' and self-image in Kim (n 19) 73.

IV Systemic-Decisions Approach for Regulating Medical Decisions

The raw number of workplace deaths cannot indicate whether OH&S regulation is effective. Nor can it show whether the classification of regulatory decisions offered here facilitates a better understanding of the system. There is value, then, in applying the framework to a different regulatory system that can be seen to limit the number of decisions that can cause loss of life. That system covers iatrogenic deaths. It is not common to consider the deaths of patients from an OH&S perspective.[126] Patients are, nonetheless, visitors to a workplace who are 'at risk from work carried out as part of the business or undertaking'.[127] Instead of focusing on driving down the number of iatrogenic deaths, the regulatory system places its emphasis on the factors that contributed to those deaths that are investigated.

The analysis here centres on those deaths that occur in hospitals, as those institutions are most clearly examples of regulated workplaces. Broadly, it has been claimed that 'more than 18,000 people die in Australia from "avoidable medical adverse events"'.[128] A more recent estimate suggests that 'up to 27,000 people die from iatrogenic harm per annum in Australian hospitals'.[129] A more 'conservative' estimate, from 29 years ago, is that 'around 4,500 preventable deaths … occur in hospitals each year as a result of mistakes and inappropriate procedures'.[130] Further, it is estimated that 0.3 per cent of hospital patients die as

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126 Johnstone and Tooma, for example, do not mention patients — as either controversial or uncontroversial inclusions — in their discussion of the 'Primary Duty to "Others"' owed under the OH&S legislation: see (n 13) 68–71. In one Health Law textbook, the only reference to state OH&S legislation is as examples of 'public health law', rather than as a mechanism for regulating conduct in the health system: Sonia Allan and Meredith Blake, *The Patient and the Practitioner: Health Law and Ethics in Australia* (LexisNexis Butterworths, 2014) 694. Further, there are no references to hospitals in the *Review of the Model Work Health and Safety Laws* undertaken for Safe Work Australia and the only reference to medical practitioners was with respect to the definition of 'psychological injury': at 160.

127 Johnstone and Tooma (n 13) 71.

128 Ian Dobinson, 'Medical Manslaughter' (2009) 28(1) *University of Queensland Law Journal* 101, 101. A 2013 USA study found that a significantly higher number of up to 400,000 patients were dying each year from preventable harm: John T James, 'A New, Evidence-based Estimate of Patient Harms Associated with Hospital Care' (2013) 9(3) *Journal of Patient Safety* 122. This would equate to up to 30,000 deaths in Australia — though the differences in treatment practices across the two countries may vary this figure to an extent.

129 Carter, Street and Bush (n 10) 1025. The authors discuss the derivation of the figure at 1025 (n 113).

130 Productivity Commissioner, Australian Government, *Annual Report 2003–04* (Report, 2004) 16–17, citing Jeff Richardson, 'Priorities of Health Policy: Cost Shifting or Population Health' (Conference Paper, Australian Health Care Summit, 17 August 2003). Further, the Report of the Queensland Public Hospitals Commission of Inquiry cited Ranson's calculation of 'up to 14,000 patients a year died as a result of hospital treatment errors': Queensland Government, *Queensland*

a result of an 'adverse event',[131] although, given the lack of centralised statistics, it is difficult to be certain. Regardless of the precise figure, the numbers of iatrogenic deaths are at least one order of magnitude greater than road deaths[132] and two orders greater than workplace deaths. Even if the number of iatrogenic deaths were closer to road deaths, the effectiveness of the current regulatory system could still be called into question.

A *Medical Decisions as Systemic*

Prior to analysing the possibility of patient death in terms of the framework above,[133] it is necessary to provide an overview of the current regulatory system that applies to doctors in Australia.[134] The National Law,[135] the key regulatory system, emphasises the role of their training.[136] Under that Law, there are the National Boards that set out their necessary qualifications, continuing education needs and the promulgation of a Code of Conduct.[137] With respect to sanctions, the

Public Hospitals Commission of Inquiry (Report, 30 November 2005) 393 n 164, citing David Ranson, 'How Effective? How Efficient?' (1998) 23 *Alternative Law Journal* 284, 285. On the other hand, the Royal Australasian College of Surgeons is reported to have said that 'deaths' of '100 patients are avoidable surgical deaths': Amanda Gearing, 'Patients Dying Daily Due to Poor "Soft Skills" Among Australian Surgeons, Experts Warn', *Guardian Australia* (online, 22 Oct 2022). The College may, however, have an interest in downplaying the number of deaths.

131 Judith Healy and Paul Dugdale, 'Regulatory Strategies for Safer Patient Health Care' in Paul Dugdale and Judith Healy, *Patient Safety First: Responsive Regulation in Health Care* (Routledge, 2010) 1, 4.

132 There were 1,123 crash deaths on the road in 2021: BITRE (n 24) 2. This works out at a rate of 4.4 per 100,000 population: at 30. A different indicator of the relative safety of road transport is the fatality rate per billion vehicle kilometres travelled, which for 2020 was only 2.9 across Australia (for four-wheeled vehicles): at 35.

133 For an application of the above-mentioned Systems 1 and 2 thinking in the medical context: see Louise Bate et al, 'How Clinical Decisions are Made' (2012) 74(4) *British Journal of Clinical Pharmacology* 614.

134 Decisions that give rise to patient deaths may be made by other practitioners; for the sake of simplicity, the focus will be on the decisions of doctors.

135 More fully, health practitioners are regulated under the *Australian Health Practitioners Regulatory Agency Act* of the State or Territory in which they work: see *Health Practitioner Regulation National Law 2009* (Cth); *Health Practitioner Regulation National Law Act 2009* (Qld); *Health Practitioner Regulation National Law* (NSW); *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic); *Health Practitioner Regulation National Law (ACT) Act 2010* (ACT); *Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT); *Health Practitioner Regulation National Law (Tasmania) Act 2010* (Tas); *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA); *Health Practitioner Regulation National Law (WA) Act 2010* (WA).

136 The National Law covers a range of practitioner professions including, in a hospital setting, doctors, nurses, midwives, radiologists and paramedics.

137 These requirements are set out in the National Law itself: see, eg, *Health Practitioner Regulation National Law* (Queensland) ss 35, 53, 128. The National Law may be included as a schedule to a state law — for example, in the *Health Practitioner Regulation National Law Act 2009* (Qld).

primary penalty is financial,[138] in the form of a suspension of registration of a practitioner (which would limit their capacity to earn an income).[139]

In terms of the regulation of medical decisions that have led to the death of patients, there have been rare instances of doctors being prosecuted under the criminal law for causing the deaths of patients, with such cases focusing on actions with immediate effect.[140] Carter notes the role of systemic issues in his analysis of medical manslaughter cases.[141] Other research has also discussed the impact of 'organisational systems', 'workload', 'time pressure', 'teamwork', 'individual human factors', and 'case complexity' on medical errors.[142] Few would argue that the decisions of doctors in hospitals are not embedded within a broader system.[143]

With respect to the regulation of decisions that may lead to the loss of life of a patient, decisions are made within relationships — primarily between the doctor and patient and between the doctor and the hospital. The decisions themselves fit within the long-term, short-term, emergency and non-decisions categories. With respect to the first category, there are the long-term decisions of the National Boards (in terms of the required, and continuing, education), the hospital (with respect to their policies and the allocation of funds within the institution[144]), the doctors themselves (with respect to their attention to training materials and policies) and, to an extent, the patients (where their admission is the result of their lifestyle). The short-term decisions of practitioners include the tests that are run, the treatments that are prescribed and the triaging of patients

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138 Of course, there is also the possibility of an insurance-funded negligence payout. For example, in the recent decision of *Wilson v Gold Coast Hospital and Health Service* [2023] QSC 135, compensation was ordered as a result of the actions of a nurse. Of relevance to this analysis is the fact that there was no criticism of the decision not to call a 'Code Black', even though this led to the harm suffered.

139 That is not to say that a suspension is the only, or most common, penalty. Other sanctions include a condition being placed on the practitioner's registration or a reprimand: see, eg, *Health Practitioner Regulation National Law Act 2009* (Qld) s 191. In rare cases, such as for professional misconduct, a practitioner may be referred to a 'responsible tribunal'. That tribunal has the power to cancel a practitioner's registration: at s 196.

140 A very small number of practitioners have been convicted, in Australia, for errors. One case is that of Dr Arthur Gow, who prescribed morphine tartrate instead of morphine sulphate. This led to the patient overdosing. Gow was convicted of manslaughter and was also subject to sanctions under the *Medical Practice Act 1992* (NSW): see *Health Care Complaints Commission v Gow* [2008] NSWMT 2.

141 David J Carter, 'Correcting the Record: Australian Prosecutions for Manslaughter in the Medical Context' (2015) 22(3) *Journal of Law and Medicine* 588, 601–3.

142 Alicia M Zavala et al, 'Decision-Making Under Pressure: Medical Errors in Uncertain and Dynamic Environments' (2018) 42(4) *Australian Health Review* 395.

143 More broadly, research has shown that 'professional hierarchies, organisational positioning, ethical issues writ large and gatekeeping in its various forms, especially how issues of proximity versus distance and subordination versus autonomy shape healthcare workers' access to information and ability to act on it': Elizabeth Chiarello. 'How Organisational Context Affects Bioethical Decision-Making: Pharmacists' Management of Gatekeeping Processes in Retail and Hospital Settings' (2013) 98 *Social Sciences & Medicine* 319, 327.

144 And, of course, there are also the government decisions with respect to health funding for public hospitals and the per-patient funding of private hospitals that comes from the government and health insurers.

in the emergency department.[145] The decision of the patient to seek medical help, and its timing, can also be a short-term decision.[146] Emergency decisions may be limited to 'true' emergencies — a code blue (for example, where a patient is in cardiac arrest) and life-threatening presentations in the emergency department. Finally, non-decisions, most obviously, cover situations where tests could have been run but were not, and treatment regimes that could have been started but were not considered.[147]

Knowledge, therefore, plays a significant role in these decisions. There is the general medical expertise common to all doctors, and the more focussed expertise of specialists.[148] And, in theory, there is knowledge behind the decisions that set out the necessary education for qualification as a doctor.[149] There is also the policy knowledge, with respect to the allocation of resources, within the hospital administration.[150] Further, the health system could not function if doctors did not make treatment decisions based on their own knowledge and experience. Their job is to use their expertise to diagnose, and treat, their patients.[151] One example of knowledge that may be conscious, or ingrained to the extent to which it is unconscious, is task-related training (such as the continuing education that doctors need to undertake).

Given the nature of healthcare, risk, and risk assessment decisions, are central to the processes. Hospitals with retrospective data on past incidences will be aware of known risks, such as dosage errors (potentially caused by overwork) or the transmission of antibiotic resistance bacteria, although they may not know how specific remedial strategies targeted at those risks will impact on the fatality rate. More generally, effective risk assessment requires specific knowledge of the

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145 Long-term decisions, unsurprisingly, have an impact on short-term ones. For example, there are forms that assess the urgency of patents for triage purposes — referred to, for example, in *Investigation into the Death of Chavittupara, Aishwarya Aswath* [2023] WACOR 10, [50].

146 As an example of an interplay of these decisions, a coronial investigation into a suicide highlighted a patient's willingness (despite a fear of possible treatment options) to attend hospital and the 'failure to adhere to a number of policies and accepted standards of practice' (short-term decisions), as well as the possibility of a different outcomes if the '[h]ospital had been more respons[ive] to [the patient] as an Aboriginal man' (failure of long-term decisions): *Inquest into the Passing of Mathew James Luttrell* (Coroners Court of Victoria, 16 May 2023) 68–72.

147 Here the focus is on the failure to institute any treatment regime. A decision to institute a sub-optimal regime is, for this analysis, an example of a (bad) short-term decision.

148 See generally Gretchen Chapman, 'The Psychology of Medical Decision Making' in Koehler and Harvey (n 34) 585.

149 To link it with law, there is a requirement that all law graduates have passed courses in the so-called 'Priestley' subjects. It is not clear that the minimum standards of the content of the Priestley units have been set based on sound educational theory or a thorough assessment of the relevance of the content for all graduates undertaking a career in legal practice.

150 For an analysis of decision-making with respect to resources, see Kim (n 19) pt III.

151 They do, however, have access to technology to assist the process. For an analysis of the effectiveness of a specific diagnostic tool in US Emergency Departments: see Eui Jin Hwang et al, 'Deep Learning for Chest Radiograph Diagnosis in the Emergency Department' (2019) 293 *Radiology* 573.

risks. This is formalised for decisions made by patients in the health system as they must give consent to treatment.[152] It is not clear that all patients admitted to hospital admissions are provided with information, by the referring practitioner, that includes an explicit reference to the risk of iatrogenic death. Regardless, doctors, even if only because they seek consent, are aware of the role of risk in their decision-making.[153]

Turning to the personal aspects of health decisions, it is not controversial to assert that doctors as a group tend to be pro-social in orientation — that is to say, they typically get into medicine because they want to help others. This, however, could lead to a desire to see as many patients as possible in a day — potentially impacting on the depth of engagement, the practitioner's finances (the external motivator), as well as their levels of exhaustion. More broadly, 'stress, fatigue, personal problems and other factors would all … result in disturbances of affect and, in turn, decision-making'.[154] Reputational motivators have been raised in discussions of medical decisions;[155] however, they do not appear to impact on the individual treatment decisions of doctors. Further, there are heuristics and biases that are, to an extent, personal. Kim observes that there is an 'availability heuristic' with respect to 'likelihood' judgments in medical diagnoses,[156] with the heuristic based on the number of similar instances that a decision-maker can recall. Additionally, a review of the literature has shown that 'paramedics apply sub-conscious (intuitive) and conscious (analytical) thought processes … drawing on information from multiple sources culminating from both professional and personal experiences'.[157] This complexity could, and perhaps should, warrant greater regulatory investigation.

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[152] This is stipulated in both the Code of Conduct and case law. With respect to the former, 'consent is a person's voluntary decision about medical care'; and that '[g]ood medical practice involves … [p]roviding information to patients in a way they can understand': Medical Board of Australia, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (2020) cls 4.5, 4.5.1. With respect to the case law, '[c]onsent ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, contact': *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 233 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

[153] Key cases around consent in Australian law are *Rogers v Whitaker* (1992) 175 CLR 479 and *Rosenberg v Percival* (2001) 205 CLR 434. The latter case confirms that the 'subjective' interests of the patient are also relevant for information they need to make the decision about treatment.

[154] Louise Bate et al, 'How Clinical Decisions are Made' (2012) 74(4) *British Journal of Clinical Pharmacology* 614, 617–18.

[155] Chris Dent, 'Treatment Decisions of Doctors' (n 14) 122.

[156] Kim (n 19) 27. She also raises 'framing' processes (at 193) and 'anchoring' (at 55).

[157] Meriem Perona, Muhammad Aziz Rahman and Peter O'Meara, 'Paramedic Judgment, Decision-making and Cognitive Processing: A Review of the Literature' (2019) 16 *Australian Journal of Paramedicine* 1, 9.

Finally, there are broad policy considerations that might bear upon medical decisions. Safety, or at least freedom from harm, is seen as central to healthcare.[158] As noted above, the system also relies on individual practitioners making their own decisions about patients. All diagnoses and treatments *could* be made by a committee, but that would not be efficient. Given that the health system in Australia is substantially public funded,[159] governments have an interest in optimising the returns from their spending. The corollary of this is that an efficient system may have to accept some patient deaths.[160] The need to optimise returns places limits both on the tests that can be run for every patient and on the drugs that can be subsidised through the Pharmaceutical Benefits Scheme.[161] Unsurprisingly, then, the decisions of doctors in hospitals are just as systemic (with respect to the agency–systems dichotomy) as individuals in other workplaces. It is not clear, however, that the decisions of doctors are so different, conceptually, that they should not be regulated in the same way as other OH&S decisions are, or that OH&S decisions could not be regulated as those in the health system are.

B *Distinguishing Medical Decisions from Other OH&S Decisions*

This section will draw together the preceding material with two purposes in mind. The first is to determine whether, with respect to the categorisation of decisions offered here, doctors should be regulated differently. The second purpose is to investigate whether the highlighting of decisions in the hospital setting calls into question any aspects of the framework. A key difference is the implicit understanding of the relationships embedded in the two systems. Most obviously, patients (the victims) are seen as generally passive — other than the need for

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158 The Hippocratic Oath, for example, holds, in part, that 'I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone': see Sonia Allan and Meredith Blake, *The Patient and the Practitioner: Health Law and Ethics in Australia* (LexisNexis Butterworths, 2014) 28.

159 Individuals support their own care in hospitals through their insurance premiums and may pay, at point of service delivery, in private institutions.

160 In the same way that the 'reasonably practicable' standard in OH&S generally also can be seen to accept some deaths.

161 'For the purpose of deciding whether to recommend to the Minister that a drug or medicinal preparation, or a class of drugs and medicinal preparations, be made available as pharmaceutical benefits under this Part, the [Pharmaceutical Benefits Advisory Committee] shall give consideration to the effectiveness and cost of therapy involving the use of the drug, preparation or class, including by comparing the effectiveness and cost of that therapy with that of alternative therapies, whether or not involving the use of other drugs or preparation': *National Health Act 1953* (Cth) s 101(3A).

them to give their consent to treatment.[162] Workers are seen to be more active, with a capacity to engage with the safety policies and procedures of the workplace. There may also be a different relationship between doctors and the hospital than there is between most workers at risk of a workplace fatality and their employer.[163] Leaving aside the potential for some doctors to be independent contractors, rather than employees, hospitals rely on the years of training of doctors in a way that many other institutions cannot. That is, an engineering firm cannot expect that employees at the beginning of their careers will already have expert knowledge and significant risk assessment capacities.

As a result, neither the current workplace nor the medical approach to regulation engages with short-term decisions. The OH&S system focuses on the long-term decisions of employers (because there is more variation in the knowledge and experience of workers) and the approach to liability in the medical sphere emphasises the systemic impacts on the short-term decisions of doctors. With respect to the latter, there may be some biases in the decisions of those tasked with investigating deaths. In a recent inquest, for example, the coroner had the 'impression' that the doctor was 'caring and professional … [but that he] simply did not write 'SR' [slow release] against the doses of veramapil'.[164] This non-decision caused the death. The coroner also noted that the doctor 'could not say if he was busy, distracted or rushed … He made an error which he frankly admitted and which he did not … seek to rationalise, minimize or explain away'.[165] In contrast, it is not clear that a truck driver, if they were unable to say whether they were 'busy, distracted or rushed', would be free from liability if they killed a co-worker.[166] With respect to patient deaths, more weight is placed on systemic issues such as the lack of 'outposted pharmacies in the wards' and its impact on the safeguard for doctors' errors.[167]

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162 It is not clear, however, that doctors ensure that consent has been given. See, eg, Vanessa Raymont et al, 'Prevalence of Mental Incapacity in Mental Inpatients and Associated Risk Factors: Cross-Sectional Study' (2004) 364 *Lancet* 1421; R Murphy et al, 'Who Can Decide? Prevalence of Mental Incapacity for Treatment Decisions in Medical and Surgical Hospital Inpatients in Ireland' (2018) 111(12) *QJM: An International Journal of Medicine* 881.

163 There is also a different role for the unions. On a building site, a union is there to further the interests of those who are most likely to be the victim in a workplace death; in a hospital, while the unions have an interest in patient safety, their primary obligation is, again, to the workers and not to the likely victim of an iatrogenic death.

164 *Inquest into the Death of Patricia (Jill) Croxon* [2023] ACTCD 3, [35]. 'Veramipil was known to be a problem drug because of choices that had to be made as to the form (slow release or immediate release) in which it should be administered': at [36]. Despite the knowledge around the drug, the doctor's failure to indicate which form was minimised by the coroner.

165 Ibid [35]. The frankness of the admissions could be the result of an assumption that doctors are not often singled out as being personally liable for an iatrogenic death.

166 Just as there are biases in the decisions of workers, employers and doctors, there are also likely to be biases in coroners — though there is no evidence that bias is behind the decision to which this comment is appended.

167 *Inquest into the Death of Patricia (Jill) Croxon* [2023] ACTCD 3, [37](e).

A further key difference is, of course, the decisions that are regulated. The emphasis in OH&S is on the actions of the employer, whereas the emphasis in the health system is on the decisions of doctors. That said, the current regulatory processes in the health system acknowledge the systemic nature of practitioner decisions, which might unduly favour medical staff. As an example, another recent coronial investigation resulted in a finding that the patient's 'treatment … was sub-optimal … [but] I make no criticism of individual clinicians'.[168] The coroner identified 'systemic failings', listing, inter alia, 'inadequate or *poorly applied* sepsis treatment protocols' and a 'hesitancy in escalating a patient care issue and the lack of culture that encouraged staff to raise care concerns'.[169] From the perspective adopted here, the inadequacy of the protocols may be the result of bad long-term decisions in the hospital, but the poor *application* of the protocols that had been developed is a short-term decision of the clinician. Further, the coroner's reference to the culture that is "lacking" may be best seen in terms of a series of short-term decisions by all relevant staff (as any expression of any culture is based on individual decisions). In a hospital setting, however, the specific decision to not escalate the care was a short-term decision made by a specific individual. Going against poor culture does not attract formal sanctions. A decision to go along with the culture may be understandable, but that does not make it defensible.

With respect to external processes, there is no equivalent in the health sector to the WorkSafe organisations that carry out inspections under the OH&S system.[170] There are Health Complaints Commissions. However, they do not have all the functions and powers of a WorkSafe organisation. Health care complaints are aimed at investigating the practitioners,[171] and if a complaint is upheld, the practitioner may be referred to regulatory processes under the National Law.[172] There is no educative, institutional or data-gathering role.[173] The lack of outcry around iatrogenic deaths could be the result of a lack of knowledge about the

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168 *Inquest into the Death of Maarouf El-Cheikh* [2023] ACTCD 1, [59]–[60].

169 Ibid [63] (emphasis added).

170 It may be pointed out that this research has not focused on these organisations as they do not directly impact the decisions of parties, given that they are either supportive of, or reactive to, the actions of the parties, principally, employers. The regulator's functions, for example, include: advising the relevant Minister; monitoring compliance; investigating OH&S matters; providing advice to parties; collecting statistics; fostering cooperation; promoting education and training; and conducting proceedings under the Act: *Work Health and Safety Act 2020* (WA) s 152.

171 For example, the 'primary object of this Act is to establish the Health Care Complaints Commission as an independent body for the purposes of (a) receiving and assessing complaints under this Act relating to health services and health service providers in New South Wales; and (b) investigating and assessing whether any such complaint is serious and if so, whether it should be prosecuted, and (c) prosecuting serious complaints, and (d) resolving or overseeing the resolution of complaints': *Health Care Complaints Act 1993* (NSW) s 3(1).

172 See, eg, *Health Care Complaints Act 1993* (NSW) s 39.

173 This would not prevent any of the relevant unions — such as the Health Services Union and the Australian Nurses and Midwifery Federation — from raising safety concerns, either privately with the hospital or more publicly through the media.

statistics or an unquestioning acceptance of the profession's claims to systemic, rather than individual, failings.[174] WorkSafe organisations, therefore, generate a specialised, regulatory knowledge that is absent the health complaints process. Again, despite the deaths happening in a workplace, and despite most workplaces operating within their own systems of specialised knowledge, doctors and their employers are treated differently.

Overall, both systems adopt an approach that does not include the victim in the regulatory process. This is particularly problematic when the victim's own decision materially contributed to their death. This may be a result, in OH&S law, of the assumptions inherent in the law of vicarious liability (the employer has control over the activity and the resources to remedy any damage that it causes), and in medicine, a view of patients that potentially limits their agency. The repeated example here emphasises the point. A truck driver may cause a death on the road, but their decisions are treated differently in law to a worker who dies in a factory (as a victim) or to a doctor (as material cause of death). One view of this is that, as they are on the road, they have a greater degree of autonomy than others, but this only reflects a narrow understanding of the constraints of all decision-makers. The assertion here is that the relative autonomy of all decisions made that lead to deaths can, and should, be revisited.

V Potential Application of Decision-Focused Understanding of Regulation

A simple acknowledgement of the range of, and constraints on, decisions made around workplace safety (including in hospitals) is not enough. There is value in what the acknowledgement can mean for regulation in that space. To this end, the following Part begins by examining the distinction between the 'regulation' and 'criminalisation' of behaviour. It then argues that the regulatory system need not focus exclusively on decisions that lead to negative outcomes in the workplace.

A *Limits of Law: Regulation vs Criminalisation*

At one level, the division between 'regulation' and 'criminalisation' is relatively loose.[175] While it may be clear that offences under the criminal law are 'criminalised', most of the decisions considered here are not prosecuted under

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174 It appears that the driving public accepts that a certain number of road deaths will happen (though they may not accurately assess the risk of them, as individuals, becoming such a statistic).

175 That is, most understandings of regulation only relate to actions by State regulatory bodies, such as WorkSafe. They do not, necessarily, apply to the regulation of professionals (such as doctors or lawyers) or of individuals.

those provisions — although, in some cases, they could be.[176] Similarly, Sheehy and Feaver, in their recent analyses of regulation, do not discuss the criminal form of regulation[177] — despite the fact that the criminal law falls within their definition of the 'purpose of regulation', which is 'to alter social practices to achieve a different social effect'.[178] Their definition, however, still has value here. The key point in the present research is to consider the extent to which the decisions of individuals can be seen as relevant for achieving a specific social effect, namely, a reduction in workplace deaths. The purpose in this section is to engage, at a higher level, with how society engages with these issues. As such, there is value in considering the two dominant terms of regulation and criminalisation, as well as the implicit expectations of the public around each.

A key difference between the two classifications is how they are perceived. Criminalised behaviour is seen as 'worse' (morally and socially) than a regulatory breach.[179] It has been said that the 'ultimate principle … of criminal law … is the requirement of doing justice to individuals … [with there being] an intrinsic connection between criminal punishment and individual justice'.[180] Regulation, on the other hand, is, in the vein of Sheehy and Feaver, more 'facilitative … as an instrument for shaping social behaviour'.[181] As such, the former may seem to operate more as a deterrent, whereas the latter is aimed at establishing norms of expected behaviour. That said, the extent to which the criminal law can act as a deterrent in the high-mental-load circumstances of an emergency (such as may surround a police shooting) is not entirely clear, despite such decisions having the highest profile. The perceptions and expectations of the public are also relevant to how the regulated decision-makers are sanctioned.

Regulation can be understood as focussing on long-term decisions; for example, 'regulation seems to change an undesirable social effect by mandating,

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176 That said, prosecution under OH&S legislation may still use the 'beyond reasonable doubt' standard of proof: see, eg, *Baiada Poultry v The Queen* (2012) 246 CLR 92, 95–6 [1].

177 See Sheehy and Feaver, 'Normative Theory' (n 2); Sheehy and Feaver, 'Positive Theory' (n 17). The former article, however, does use murder as an example of the distinction between regulating a 'social practice' and regulating a 'social effect': at 395–6. The example, however, is not returned to in either of the articles.

178 Sheahy and Feaver, 'Normative Theory' (n 2) 396.

179 Significant publicity can attach to prosecutions of police officers. Albeit to a lesser degree, at least some media attention may be paid to traffic prosecutions for fatal crashes. While there may be reports about workplace deaths, there are fewer around any prosecution — though there is limited analysis of this. For a discussion of the over-reporting of incidents, relative to adjudications, in Canada, see Bob Barnetson and Jason Foster, 'Dead Quiet in the Hinterlands: the Construction of Workplace Injuries in Western Canadian Newspapers, 2009–2014' (2016) 26(2) *Labour and Industry* 75. One of the few examples of a practitioner's liability being assessed in the public eye is the case of Jayent Patel. For an overview of the basic facts, see *Patel v The Queen* (2012) 247 CLR 531. Perhaps surprisingly, there is a dearth of academic analysis on the media commentary around his trial.

180 Alan W Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014) 13.

181 Morgan and Yeung (n 14) 6.

prohibiting, modifying, guiding or disciplining social practices'.[182] These are all processes that are deployed anterior to potential instances of the 'undesirable social effect'. OH&S laws, as noted above, emphasise the provision of training and risk-management strategies aimed at limiting the chance of fatal incidents occurring. In health, the regulation is focused on the system of factors that may have, in the long term, contributed to the death. Criminal prosecutions, on the other hand, can focus on short-term decisions (and are rarely deployed in the health setting).[183] Given the contemporaneity of decision and death, an alternative way of understanding this is to say that criminalised acts focus on the physical impact (or outputs) of a bad decision. With respect to sanctions, a primary penalty in regulation is financial — such as in the form of a fine for an OH&S infraction. There is the capacity for workplace deaths to be prosecuted under the relatively recent 'industrial manslaughter' provisions.[184] Here, the penalty may be financial for the firm; however, there is the capacity for an 'officer' of the entity to be jailed if successfully prosecuted. Of course, penalties for criminal offences can include incarceration.

The advantage of the classificatory framework proposed here is that it includes the decisions of all those who are sought to be regulated by the system. That is, generally speaking, regulation does not explicitly engage with those who are making the short-term decisions that lead to the 'undesirable social effect' and the criminal law may not look at the long-term decisions that facilitated the criminal act. Sheehy and Feaver, for example, limit their analyses to the State, regulators, regulatees and 'third party inspectors and auditors'.[185] The role and/or decisions of the victims are not included in either form — except to the extent that it was the victim, themselves, who breached the road rules or workplace regulations.[186] A consequence of this is that, as both forms of control assess decisions, a lack of consideration of victims means that the standards of behaviour against which they may be judged are ignored. While the specifics may be mentioned in court — for example, whether the victim threatened a police officer or were not compliant with the road rules — this is not the same as assessing their decisions. There is the potential for the victims to have their

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182 Sheeny and Feaver, 'Positive Theory' (n 17) 965.

183 For an engagement with OH&S from a criminal law perspective see Johnstone (n 39). He notes that 'obstacles' to criminal prosecutions include officers of an employer do not owe a 'duty' to the workers and that 'an omission or failure to act is not 'act'' for the purposes of the prosecution: at 34. Focusing on the decisions of officers avoids these issues; however, the suggestion here is not to criminalise all bad decisions.

184 For example, under the name 'workplace manslaughter': see *Occupational Health and Safety Act* (Vic) s 39G.

185 Sheeny and Feaver, 'Positive Theory' (n 17) 967. The definitions they use are: the 'state … the ultimate source of power'; the 'regulator, which is granted authority to exercise power on behalf of the state' and the 'regulatee, being the actor subject to the exercise of that power': at 967. In the OH&S context, unsurprisingly, the regulator is WorkSafe and the regulatees are the firms.

186 Though, of course, given the power imbalance, the decisions of patients in hospitals should not be part of the regulatory analysis — save for the possibility of further supporting the need for them to make informed decisions about their treatment.

decisions measured against the standard of reasonableness,[187] or against a minimum (or maximum) standard of awareness and/or cognition. The point here is the legislation is silent about such an assessment; this is despite the potential that the victims materially contributed to their own deaths.

B *Stepping Back from the Focus on Outcome*

Expressed differently, both regulation and criminalisation have a focus on outcomes — or, as Gunningham and Johnstone put it, the 'traditional approach' of 'prosecution[s] has generally been reactive'.[188] This is not surprising, as the origins of the criminal law itself was on the outcome of an action, rather than on the thinking (or lack of it) behind the action. More fully, the assessment of 'criminal responsibility', even in the eighteenth century, 'did not lie in findings about the defendant's cognitive or volitional capacities … Rather it lay in an evaluation of the defendant's conduct' that gave rise to the demonstrated harm.[189] As such, the history of workplace deaths did not involve criminal offences in cases where there was no direct (or intentional) act by the employer that led to the death.[190] Further, without an intentional act, even if the act does not meet the formal standards of criminality, it is difficult to assess the act from a moral perspective.[191]

The focus on decisions central to the present analysis offers a different possibility. Instead of the application of regulatory, including criminal, responses being substantially contingent on a bad outcome, their application could be based on bad *decisions*, regardless of outcome. It has been noted that, when it comes to understanding safety, the 'number of things that go wrong is tiny'.[192] So, even where an incorrect decision was made, no overt harm occurs. For example, a worker may regularly drive a taxi on little sleep; and in a majority of cases, the journey is completed without a crash.[193] If the regulation of driving is based on

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187 An example of this would be where a driver who caused the death was sued in negligence, and they, in response, argued that, at the very least, the victim had been contributorily negligent.

188 Gunningham and Johnstone (n 53) 325.

189 Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford University Press, 2016) 38.

190 Contrary to the view expressed by some commentators, then, OH&S law has not been *de*criminalised because it was never criminalised to begin with: see, eg, Johnstone (n 39) 26.

191 Hardy, Howe and Kennedy discuss the moral aspects of wage theft in terms of intentional acts: Hardy, Howe and Kennedy (n 99) 184–7. As such, non-decisions do not easily fall within this analysis.

192 Bergrström and Dekker (n 12) 392.

193 This is not surprising. Driving after being awake for over 17 hours has had an 'effect on neurobiological performance' that is equivalent to 'moderate alcohol consumption': Nicole Lamond and Drew Dawson, 'Quantifying the Performance Impairment Associated with Fatigue' (1999) 8(4) *Journal of Sleep Research* 255, 261. The increased chance of having a crash, as a result of

deaths alone, then the majority of bad decisions would not be engaged with. Further, because most instances of driving fatigued do not have a negative outcome, this informs the confirmation bias of the tired driver. More broadly, given the annual number of workplace deaths, any fatality is an outlier, and so cannot be the focus of regulation. A move away from outcome also means a move away from a focus on liability. Regulatory strategies aimed at improving decisions, regardless of outcome, may offer a more useful way forward.[194]

Focusing on the assessment of bad decisions alone, however, does not guarantee improved outcomes. With respect to iatrogenic deaths, those in the health system (with expert medical knowledge) judge others in the same system.[195] Health professionals judging health professionals means that there is less opportunity for external viewpoints to be considered. More broadly, long-term decisions, such as the development of training programs, can be seen as a process of establishing workplace norms. Norms, themselves, do not always account for the short-term decisions of others; they may, of course, reduce deaths, but they may not allow for the abnormal circumstances that lead to a fatality or serious injury. A more complete understanding of the role of norms in short-term decisions, and the role of other factors in the decision-making of workers (and those around the workers) will enhance the effectiveness of the training.

This work, then, can be seen as aligning understandings in law with the concept of 'resilience engineering'.[196] This concept has been described as being 'concerned with assessing organisational risk, that is the risk that holes in organisational decision-making will produce unrecognised drift toward failure boundaries'.[197] Resilience engineering, then, focuses on decisions and the extent to which unseen issues impact on both decisions and safety. Bergrström and Dekker refer to seven specific strategies:[198]

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alcohol consumption, is 25 per cent per 10 g increase in consumption: B Taylor et al, 'The More You Drink the Harder You Fall: A Systematic Review and Meta-Analysis of How Acute Alcohol Consumption and Injury or Collision Risk Increase Together' (2010) 110(1) *Drug and Alcohol Dependence* 108, 113. The figures provided above indicate that there is, for four-wheeled vehicles, one fatality per 340 million kilometres driven: BITRE (n 24). This suggests that being awake for over 17 hours means that there may be one fatality per 270 million kilometres driven — still a very low chance.

194 Of course, inspections of workplaces do not occur only after a death or serious injury. It has been argued, however, that 'monitoring and compliance … do not predict safety outcomes': Bergrström and Dekker (n 12) 407.

195 An example of this assessment may be apparent in a quotation from a leading surgeon, after a colleague had been suspended after a review of the colleague's actions linked to four patient deaths: 'This is the worst day of my professional career, We've lost one of our own': see N Robinson, 'The Heart of a Problem', *The Australian* (16 November 2019).

196 Bergrström and Dekker (n 12) ch 11.

197 Ibid 398, quoting David Woods. Woods was an advisor to the NASA investigation into the 2003 destruction of the *Columbia* and the deaths of the seven crew members.

198 Ibid 408–9.

- 'Diversity of opinion and the possibility to voice dissent';
- 'Keeping a discussion on risk alive and not taking past success as a guarantee for safety';
- 'Deference to expertise' — this can include practical expertise, 'signals of potential danger, after all, and of a gradual drift into failure can be missed by those who are not familiar with the messy details of practice';
- 'Ability to say stop .... a "key difference between incidents that ended badly and those that did not was the extent to which individuals voiced their concerns about the early warning signs"';[199]
- 'Broken down barriers between hierarchies and departments';
- 'Do not wait for audits or inspections to improve ... you cannot inspect safety or quality into a process'; and
- 'Pride of workmanship ... is linked to the willingness and ability to improve without being prodded by audits or inspections'.

Each of these strategies relate to decisions to be made by a range of actors in the workplace — some long-term and some short-term — with an acknowledgement of the interaction between decisions made by different people. Interactions are key, as no decision is made in perfect circumstances (or with perfect knowledge). Virtually all decision-makers are time-poor (as a result of a quest for profit or insufficient funding in the public sector) and they exist within structured positions in an organisation with restricted capacities to learn from those in other positions.

Linking this with the material in Parts II and III above, the obvious connection is that decisions are made in relationships — the need for dissent requires multiple voices, breaking down barriers supports co-operative decision-making and the capacity to say 'stop' requires empowerment of those close to the potential incident (as does the suggestion not to defer to inspections). Adding a layer of decision-making theory allows the assessment that one person's 'fast and frugal' decision may not satisfice all parties in the system. There is also the acknowledgement of knowledge, including practical knowledge of risks, rather than academic or business-focused knowledge. There is the reference to bias — the mere existence of 'past success', or lack of previous incidents, does not mean that past decisions were optimal. And, finally, there is an engagement with 'motivators': 'pride of workmanship' accords with the internal 'proper conduct' motivator. Workplace safety, from the perspective of resilience engineering, requires decision-making that accounts for, and incorporates, the complexities of workplaces, along with the siting of the

[199] See Michelle A Barton and Kathleen M Sutcliffe, 'Overcoming Dysfunctional Momentum: Organisational Safety as a Social Achievement' (2009) 62(9) *Human Relations* 1327, 1339.

workplace within the broader society (such as is the case with visitors to sites or the sharing of roads by workers and others).

There is, of course, less room in this analysis for law, although there is no suggestion that regulatory inspections should be stopped. The law, instead, should be more flexible. The way that the law is thought about can also be more flexible. The well-known 'regulatory pyramid' implies rigidity with its hierarchy of regulatory responses.[200] In any workplace, a number of regulatory strategies may be deployed to target the range of individuals whose decisions need to be constrained. Workers, managers and officers may be 'persuaded' (by the law, or by their training); the same groups may be subject to 'warnings' (from without or within the workplace) and to the threat of penalties ('civil penalties' for officers, workplace sanctions for workers and managers); and more punitive state-based sanctions may be applied to the firms.[201] A regulatory 'rope', on the other hand, allows for different strands to intertwine — with different processes for different parties — with the regulation all the stronger for its structure. Some strands bind short-term decisions and others reflect long-term decisions; together, they may support better emergency decisions and reduce non-decisions. Individual fibres allow for different knowledges to be learned, expressed and deployed by the various actors in the workplace, with the potential for specific acknowledgement of deliberate active processes for the gathering of knowledge by all actors (highlighting the mental, rather than physical, aspects of decisions). The metaphor of fibres also allows for individual parties to be seen as self-regulating (so that they can 'take pride' in their own practices) and for them to be seen as operating within relationships (in which all parties should have an understanding of those with whom they are embedded). It is a more complex view of regulation, but one that fits with the increasingly complex technologies, workplaces and economies.

VI Conclusion

Overall, the approach suggested in this article is less about the number of deaths, and more about the clearer regulation of decisions (and non-decisions) that may lead deaths. The proposed categorisation, based on long-term, short-term and emergency decisions, offers a broader perspective than a more traditional focus on the regulators and the firms. This shift in regulatory emphasis away from outcomes to decisions may allow for a greater level of accountability for all in the system — without a recourse to victim-blaming, shifting the focus away from unthinking employers or overcriminalisation — on the basis that all decisions can

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200 For an early iteration, see John Braithwaite, 'Convergence in Models of Regulatory Strategy' (1990) 2(1) *Current Issues in Criminal Justice* 59. See also Morgan and Yeung (n 14) 196–9.

201 For a detailed breakdown of the pyramid, see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) ch 2.

be seen as constrained. Constraints, themselves, do not obviate responsibility, but they may encourage a more effective sharing of obligation and liability.[202] The approach taken here is not meant to suggest that the current regulatory systems be removed. There remains a role for fines and inspections; however, the number of fatalities that still occur suggests a broader approach is necessary. The focus can, now, shift from outcomes to the mental processes (including those that ignore a need for positive actions on the part of the individual) — because society has moved on from need for the spectacle of punishment for bad actions to improve behaviour.

[202] Given the statutory compensation schemes in places, the injured parties, or their families, can receive financial assistance, even where liability is not established — reducing the need for apportioning blame. That does not mean that the compensation schemes are effective or cannot be improved. See also Joanna Howe, 'Possibilities and Pitfalls Involved in Expanding Australia's National Workers' Compensation Scheme' (2015) 39(2) *Melbourne University Law Review* 472.

The 2024 Macrossan Lecture

Is the Civil Trial System Past its Use-By Date?

7 March 2024, Banco Court, Supreme Court of Queensland

The Hon Geoffrey Davies AO*

I Introduction

In delivering the Gerard Brennan lecture in 2011, The Hon John Doyle AC, Chief Justice of South Australia, a person not given to exaggeration, said this: 'I believe that, during the time of the next generation of legal practitioners, those now being admitted to practice, civil litigation as we know it in the higher courts will come to an end'.[1] And he subtitled his lecture 'the demise of civil litigation'.

There is no doubt that the cost of a trial of an action in the Supreme Court, even for a successful party, is, in most cases, beyond the means of the average citizen, or even of a small company. For a losing party of average means that is almost certainly the case. And there is nearly always a risk, for either party, of doing worse by judgment than that party expects. This has been the position now for a considerable time. That is why over 95 per cent of actions commenced in the Supreme Court are resolved before judgment.[2]

I do not mean to imply by this that the cost of going to trial and judgment is the only reason for agreement before then. Of course there are other good reasons. An agreement can be moulded to achieve an outcome which both parties will accept rather than being bound by rules to a fixed result which, certainly the losing party and, in many cases, both parties may not want. It is more conducive to an amicable resumption of a former relationship between the parties, whether business or personal. Parties are more likely to feel in control of achievement of a result which they have chosen than one which is imposed on them. And some parties value the privacy of an agreed solution.

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* A former judge of the Queensland Court of Appeal.

1 Hon John Doyle AC, 'Imagining the Past, Remembering the Future: the Demise of Civil Litigation" (2013) 86 *Australian Law Journal* 240.

2 It is also, no doubt, the main cause of the rise of class actions.

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But there is no doubt that the cost of going to trial and judgment is, for many parties, the effective deterrent to proceeding. In an action in which the amount or value in dispute is less than, say, AUD1 million, costs may be a substantial proportion of that amount or value. So the system of civil litigation by trial and judgment is not working for most potential litigants. That is, no doubt, why Chief Justice Doyle said what he did.

There are two aspects of cost which are of concern. The first is that, of those cases which are resolved before judgment, a massive proportion are resolved only at or close to trial, after all pre-trial costs have been incurred. And that is, unfortunately, at a cost which most litigants cannot afford and, as it turns out, a cost which was, in large part, unnecessarily incurred.

And the second is that, of those cases which are resolved before judgment, it is likely that a substantial portion are resolved only, or principally, because the litigants, or one of them, cannot afford to proceed. There are, I think, many cases resolved by agreement in which one or both parties to the dispute would reasonably have preferred to have their dispute resolved by an independent arbiter at a reasonable cost than by agreement.

Provisions for mediation, early neutral evaluation and settlement offers already exist. But merely providing these has been insufficient to persuade parties and their lawyers to use them as early as they should to avoid unnecessary costs; and it has been insufficient to persuade judges to impose them early enough, notwithstanding their power to do so and in circumstances justifying that course. First, I propose to say why I think that is so — why I think that our system, and the way those within it operate, impede early resolution of a dispute.

Secondly, I will explain what I think should be done to change this. There are two aspects of this. The first is to show how I think that those cases which are resolved by agreement may be resolved before the majority of pre-trial costs have been incurred. And the second is to explain why I think that there are some cases which are incapable of resolution by agreement, at least initially, but amenable to early neutral evaluation, and how that may be achieved.

Thirdly, I want say why I think that the present system with respect to experts is misconceived and how radical change to that system will ensure earlier, cheaper and fairer resolution of questions requiring expertise — and consequently in many cases, earlier resolution of an action.

And finally, I want to say something about whether, and if so how, an alternative cheaper system of deciding disputes can be devised. For if it can't, our system of trial and judgment will remain effectively accessible only to persons or entities to whom the cost is not an effective deterrent. And if it remains the case that there will still be many for whom the cost of litigating to trial and judgment is an effective deterrent, it is indeed past its use-by date.

I do not propose to say anything about litigation before specialist courts such as administrative tribunals or family courts. Nor do I intend to say anything, except by analogy, about motor vehicle or industrial accident claims or other

personal injury claims, all of which are dealt with under statutory schemes, which, whatever faults they may have, seem to work reasonably well. Nor do I intend to say anything about testamentary claims. My remarks are limited to civil actions involving common law causes of action and statutory claims which constitute the bulk of litigation in the Supreme Court. And by the civil trial system referred to in the title to my lecture I mean that system set out in the *Uniform Civil Procedure Rules 1999* (Qld) ('*UCPR*').

It is plain that some of what I say cannot apply to self-represented parties.

II Why the Adversarial System, and the Way Those Within it Operate, Impedes Early Resolution of a Dispute

An analysis of actions commenced in the Supreme Court over the past decade yields two relevant percentages. The first is that, of actions commenced, more than 95 per cent are resolved without a judgment. And the second is that, while approximately one half of defended actions are listed for trial, of those which are so listed, less than 10 per cent go on to trial and judgment. That is, more than 90 per cent of those are resolved by settlement or abandonment only after most or possibly even all pre-trial costs have been incurred. And that percentage appears to be increasing over the last few years.[3]

There are three impediments to early resolution of disputes which I think can be eliminated or at least mitigated.

The first is the way in which the system requires all actions to proceed under the existing rules of court as if they are to go to trial and judgment, notwithstanding the reality that the vast majority end before then. Under the *UCPR*, alternative/additional dispute resolution ('ADR') is relatively new. It came into the *UCPR* only in 1999. And in those Rules, it appears to arise only after virtually all of the trial preparation has taken place. In other words, the system itself still assumes a likely trial and judgment with ADR operating only as a last-minute exception.

The second and third impediments are of greater concern.

The second is the tendency of lawyers, notwithstanding that they could seek ADR early in proceedings, to take every step in those proceedings, almost up to trial, before attempting to do so. An explanation for that tendency, by some lawyers, is that unless they at least proceed up to disclosure before seeking resolution by agreement, they may not uncover all of their opponent's relevant documents. And that if they proceed to settle an action before then, they leave their client unprotected, and themselves open to action by their client, if a later contention or discovered document might have changed the client's decision to settle.

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[3] I have inferred these percentages from statistics supplied to me by the Courts Performance and Reporting Unit.

The reality is that our system is one of party autonomy or, more accurately, the autonomy of the parties' lawyers, and that lawyers tend to do too much before attempting settlement. Party autonomy is a leftover from the time when the judges of fact were juries. Under such a system it never occurred to lawyers or to judges that control of the litigation process up to the time of trial, its substantive issues, its form and its speed should be other than entirely in the hands of the parties' lawyers.[4] But that mindset persists, notwithstanding the change to judge only trials, due to (1) the reluctance of lawyers to forego control of the pace and, especially, the shape of litigation, and (2) the reluctance of judges to seize that control.

As Chief Justice Doyle pointed out:

> The judge does not determine the issues that will be contested between the parties. The judge does not determine how the parties will present their respective case or defence. The judge has no significant control over the quantity or quality of evidence presented on either side, nor over the relationship between the significance of the matter at issue and the effort or resources deployed by the parties. They can commit more or less resources than the issue warrants. Often it is more.[5]

There are incentives to a litigation lawyer under our existing system to do too much, rather than too little. In theory, the more work that is done in preparation of a case, the better are the client's prospects of success; the better is the lawyer protected against later being sued by the client; and the more will the lawyer earn. And there are no disincentives. Moreover, in most cases it is difficult to judge how much is 'too much'.

While party autonomy remains the essence of our civil justice system, it will remain one in which lawyers do too much and, consequently, costs are too high. Moreover, party autonomy ensures that litigation generally proceeds at the pace of the party least inclined to bring it to trial. And it may introduce unfairness into litigation between parties of unequal bargaining power. The richer litigant may use that to its advantage, obliging the other to commit more resources than it can afford.

Although there have been some modifying changes, at least in this State,[6] it remains fundamentally correct that the parties or, more accurately their lawyers, remain substantially in control of the pace and shape of litigation. And if we are to have a system which works for the majority, that must change. In each of these respects, there must be greater judicial control, or rule control, especially in the pre-trial process, than is presently the case.

And the third impediment to early resolution of a dispute is the likely failure of lawyers, before litigation commences, and thereafter if circumstances change,

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4 J A Jolowicz, *On Civil Procedure* (Cambridge University Press, 2000) ch 18.

5 Doyle (n 1) 241.

6 I am speaking principally of the introduction of case management practices.

or the situation becomes clearer, to advise their clients realistically both of the likely result of litigation and of its likely cost.

What parties to a dispute want or, more accurately, what they need when they first approach a litigation lawyer, and continuously thereafter, may be expressed in three questions:

1. What is the likely result if the dispute goes to judgment?
2. What will it cost me to get to that result?
3. Can I get to that result, or a result approximating it, more cheaply?

Without answers to each of these questions a party has no real prospect of weighing the relative advantages and disadvantages of, on the one hand, reaching an agreed early solution and, on the other, proceeding to judgment; or, indeed, of not proceeding at all.

At present, it seems to me, they are unlikely, in most cases, to get reliable answers to any of those questions, either when they first consult their lawyer or at any subsequent time before trial or its imminence.

As to the first of these, advice about the likely result, lawyers owe a common law duty to provide this.[7] The content of that duty may depend on the level of sophistication of the client and the relevant knowledge and means of knowledge of relevant facts by the lawyer.[8] Unfortunately, there is no statutory statement of that duty, notwithstanding the existence of a statute stating lawyers' other duties. There should be such a provision. It should state that the lawyer could be deprived of her costs for giving and failing to correct unrealistic advice.

Absent such a disincentive, any such advice is quite likely to be unreliable and optimistic, at least until a trial is imminent.

In the first place, at the time when she first consults her lawyer, the client may feel that she has been wronged by her opponent.[9] The lawyer may attempt to dampen down expectations a little but, even if she does, her advice will frequently be given an optimistic interpretation by the client.[10]

Secondly, the lawyer will ordinarily hear only one side of the story and her advice will be based on that. And though she may say that there might well be a contradictory version, that might not be seen by the client as a serious qualification.

Thirdly, the client often makes it clear that she believes that her prospects of success are good, and no one likes to disappoint a patron especially where a pessimistic opinion might well lose that patron and consequently the prospect of remunerative work. I do not mean to imply here that the majority of lawyers are likely to deliberately overestimate their clients' prospects of success in order to

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7 *Levicom International Holdings BV v Linklaters (A Firm)* [2009] EWHC (Comm) 812.

8 *Phelps v Stewarts (A Firm)* [2007] EWHC 1561 (Ch).

9 I have, arbitrarily, used she and her throughout.

10 I attribute the descriptions in this and the following three paragraphs to a source which I first adopted many years ago, but which I cannot now find or recall. In my opinion they remain accurate today.

obtain or retain work. I mean rather that the pressure on the lawyer to satisfy the client is an underlying factor.

Having failed, in the first place, to give the client a realistic estimate of the prospects of success, or having failed to correct the client's overoptimistic interpretation of her opinion, the lawyer, unsurprisingly, then finds it difficult later to moderate that estimate or moderate the client's misinterpretation of it. This can and often does lead to disappointed expectations when the client is first confronted with a realistic estimate, which, in many cases, may be only at trial.

As to the second and third questions, requiring a realistic estimate of the cost of proceeding to trial and judgment, there is already an obligation upon a lawyer, on receiving instructions in any matter, to give her client an estimate of the total legal costs, if reasonably practicable and, if not reasonably practicable, a range of estimates. She is also obliged, in a litigation matter, to give an estimate of the likely party and party costs.[11] But at this early stage these are unlikely to be realistic estimates.

It is true that a lawyer must disclose any substantial change to these estimates as soon as practicable after she becomes aware of it.[12] And there is a provision that a lawyer may be deprived of her costs if she fails to disclose anything required to be disclosed.[13] Whether that means that she could be deprived of costs if she grossly underestimates the likely cost of going to trial and judgment is not clear. But I have been unable to discover any case in which a lawyer has been deprived of costs because she grossly underestimated those costs to her client.

These provisions, in my opinion, are an unsatisfactory statement of: (1) the continuing duty of a litigation lawyer to advise her client of the likely costs of an action proceeding to trial and judgment; and (2) the consequences of failure to perform that duty.

III How Resolution by Agreement May be Achieved Earlier

Ideally, of course, a dispute should be resolved before and without litigation. In the Federal Court, before they can commence or defend proceedings, the parties to a dispute must file a statement that they have taken genuine steps to resolve it.[14] While there is no evidence of whether this has any beneficial effect, it costs little to implement and may have some. I therefore think that it is worth including in our system.

On the other hand, following the *Woolf Report* in England, pre-action protocols were introduced by a practice direction under the *Civil Procedure Rules*,

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11 *Legal Profession Act 2007* (Qld) s 308.

12 Ibid s 315.

13 Ibid s 316.

14 *Civil Dispute Resolution Act 2011* (Cth).

the aim being to encourage parties to settle their dispute without the need to issue proceedings. These require the parties to exchange correspondence and information sufficient to understand each other's positions.

Whilst this is a laudable aim, it has tended to front-load costs because, it has been noted, the requirements generate time consuming and costly exchanges. Compliance has often resulted, in effect, in an early exchange of pleadings and disclosure of too much rather than too little.[15] These requirements, or, more accurately, the way that they have been implemented by lawyers, involve too much cost to be incurred too soon in a system in which, statistically, the vast majority of cases will be resolved before judgment. I would not recommend their adoption here.

This unfortunate consequence is the result of provisions intended to have limited operation being interpreted more widely by lawyers because they were stated in general terms. However there is, in my view, merit in provisions having the aim of these but stating obligations in more specific, limiting terms. In this respect, the provisions relating to personal injuries litigation are useful examples. I cannot overemphasize the importance of limiting the tendency of lawyers to do too much work; more than is warranted by the evident intent of the provisions. This tendency can be restrained only by a combination of a clear and limiting description of what is required and, where necessary, costs orders against lawyers.

In addition, I think that court-appointed mediation should be available to parties before litigation commences. A party to a dispute which may result in litigation should be able to apply to a court to appoint a mediator of that dispute. And on such an application the court should have power to impose mediation on the other parties as a condition of those parties pursuing or defending an action.

Also a question of law or a question involving expertise can and in some cases should be decided before litigation has commenced. I shall discuss those a little later.

I acknowledge that there may be some cases which are not amenable to resolution by agreement, which is not the same thing as parties or lawyers who are not so amenable or not so initially. Because there are some such cases, there should be provision for application for exception from the obligations to which I have referred and which I am about to refer.

The plaintiff's lawyer should be obliged, shortly after the filing and service of the originating process, to provide to her client costs estimates and an opinion of the likely result if the action goes to trial and judgment. And at the same time, the lawyers of any persons so served who propose to defend, should be obliged to provide the same to their clients.

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[15] Damien Byrne Hill and Maura McIntosh, 'The Civil Procedure Rules Twenty Years On; The Practitioners' Perspective' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (Oxford University Press, 2020) 3; Hazel Genn, *Solving Civil Justice Problems: What might be best?* (Scottish Consumer Council Seminar on Civil Justice, 19 January 2005).

Accordingly, I suggest that, within a short time, say 14 days, after filing and service of the originating process, each party's lawyer should be obliged to provide her client with a costs statement containing:

1. details of legal costs payable by the party to the party's lawyer up to that date; and
2. an estimate of the party's likely legal costs if the claim proceeds to trial and is determined by a judge.

I also suggest that a copy of that statement should be provided to the court.[16]

At the same time, each party's lawyer should be obliged to provide her client with a statement estimating the likely result of the action if it proceeds to trial and judgment; and provide the court with a statement that she has done that. And the lawyer should be obliged to file a sealed copy of that advice to be opened only on a question of costs.

Of course, any such estimate could state a range of possible results, explaining why that is necessary, as might be the case, for example, in damages claims. And it may be conditional if, for example, it depends on who will be believed. But again, the lawyer should explain why that is necessary.

These obligations should be enforceable and enforced against lawyers. The lawyer should have her costs, otherwise recoverable from her client, reduced if she fails to comply with these provisions. An unrealistic estimate of costs or of the likely result of the action should, in the absence of compelling reason to the contrary, be sufficient evidence of that failure. There should be provisions in the rules which provide for that enforcement.

In addition to what I have said about an application to be excepted from these obligations, there may be litigants who do not need these, or some of these. Many large corporations, for example, may have entered into satisfactory costs agreements with their lawyers and had satisfactory advice on their prospects of success. So application for exception should also apply to these cases.

At the same time, each party should be obliged to provide the other with a list (of no more than 10) of the principal documents which that party will rely on at the trial to prove her case or rebut that of her opponent; and to provide copies of any such documents if requested.[17] This should ensure that neither party is later taken by surprise by the disclosure of a significant document.

Once these obligations have been complied with, or the time for performing them has expired, mediation should automatically occur. By that I mean that mediation should occur without the necessity of a court order. There would, of course, need to be provisions for how the mediator is selected and how the mediation should proceed.

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16 Cf *Motor Accident Insurance Act 1994* (Qld) s 51B(6)(e), (7); *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth) s 37N.

17 *Personal Injuries Proceedings Act 2002* (Qld) s 22.

Under the present regime, I am told, some parties, or, perhaps more accurately, their lawyers, tend to treat early mediation not so much as an attempt to resolve the action by agreement, but more as a means of testing the strengths and weaknesses of the opponent's case. But if the parties are, by this stage, armed with more realistic answers to the questions posed earlier and knowledge of the opponent's principal contentions and documents, there should be greater interest in the possibility of resolution by agreement. That may be especially so in cases in which, it can now be seen, costs are likely to assume a substantial part of the amount or value in issue.

III What Should Happen Next?

If the action has not been resolved by these procedures, I think the court should intervene to see if more should be done to resolve the action before all pre-trial costs have been incurred. Such intervention could be by some informal meeting but in consequence the judge should have power to and should consider making orders for:

- further mediation;
- neutral evaluation;
- appointment of an expert to decide any question involving expertise;
- deciding separately and in advance of trial any question of fact or law in the action;
- that each party make an offer of settlement to the other; and/or
- how the action is to be tried.

I appreciate that some of these may be dealt with under existing practice directions.[18] However, I want to say a little more about some of these, which may result in earlier resolution.

A *Resolution by Early Neutral Evaluation*

There are some cases which will not initially be capable of resolution by agreement but which would be amenable to early neutral evaluation. One example is where a party, or that party's lawyer, has an unrealistic view of the likely result upon

[18] See, eg, Supreme Court of Queensland, *Practice Direction No 11 of 2012: Supervised Case List*, 18 May 2012; Supreme Court of Queensland, *Practice Direction No 18 of 2018: Efficient Conduct of Civil Litigation*, 17 August 2018; Supreme Court of Queensland, *Practice Direction No 1 of 2023: Commercial List*, 16 January 2023; Supreme Court of Queensland, *Practice Direction No 2 of 2024: Building, Engineering and Construction List*, 22 January 2024.

judgment. Another is where, because of a substantial financial imbalance between the parties, the negotiating power of the poorer party may be impaired by her realisation that litigation against her richer opponent may lead to her own financial ruin; and where that imbalance is impeding a fair resolution by agreement.

I do not mean to imply that case appraisal should be limited to those cases. It is useful in many cases in which there appears to be a reluctance to agree. That is why early neutral evaluation should be an important part of the procedures used to resolve actions.

Case appraisal has been rarely used. I am told that the principal reason for this is that lawyers have tended to prepare for a case appraisal as if it were a trial and so, in effect, incurred the costs of a trial. That, of course, was never its intention. It was intended to be a summary procedure in which costs were limited. It is another example of lawyers tending to do too much, more than is warranted by the evident intent of the provisions, and therefore to cost more than the procedure intended.

If early neutral evaluation is to be used, as I think it should, an order for it must be accompanied by an order limiting the costs of both parties in the case appraisal. This should limit the amount of costs that a lawyer can recover from an opposing party and also from her own client.

B *Resolving Questions Involving Expertise More Rationally, Fairly and Cheaply*

Sometimes the resolution of a question involving expertise will lead to resolution of the case or a shortening of a trial. It is therefore beneficial in all cases to resolve that question promptly. But under our present system doing so requires a trial of that question. That is because our system, in my opinion, misunderstands the true role of an expert in court proceedings.[19]

If I were to start afresh to design a means of deciding a question involving expertise, I would, having no expertise myself, ask an expert to decide it. Or if it appeared that there might reasonably be different views among experts about the question,[20] I would appoint a panel of those experts holding different views and attempt to have them resolve those differences. And to the extent that they did not, I would accept the majority opinion. But again, having no expertise, I would not attempt to decide the question myself.

That is the way in which such questions are decided every day in business, in industry and in the professions.

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[19] The following discussion assumes that the expert is qualified as such, whether under s 79 of the *Evidence Act 1995* (Cth) or common law equivalent. See also *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 604 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[20] I have no doubt that there are many more differences of opinion expressed within and because of the adversarial context than occur in the real world.

If someone were to suggest to me that such a question could best be resolved by my hearing two or more experts, appointed by opposing parties, have each of them cross-examined by a person who had no expertise, and by then attempting to decide this question myself, I would think that suggestion irrational. And so would those who seek to have such questions decided every day in business, in industry and in the professions.

Yet that is the system which, with some minor modifications, we have now.

Judges should not attempt to decide questions involving expertise. Such questions are, by definition and in reality, beyond the competence of judges to decide.

To be fair to our distant forebears, there may well have been a time when questions involving expertise which came before a court were few and simple; and, consequently, questions which, with a little help, a judge, or more likely a jury, could decide. And it may be that jury trials could not have been conducted efficiently in any other way.

But if that were so, it has long ceased to be the case. Certainly, ever since I have been involved in the law, there have been many actions in which a question involving expertise arises which is beyond the understanding of a judge, let alone within her competence to decide.

Nor should a question involving expertise be turned into an adversarial contest. Especially one in which arguments on each side are made or controlled by non experts. To want to do this requires an adversarial mindset.

The irrationality of the present system is highlighted by the rules relating to referees. Under those rules, a judge may appoint a referee to decide any question of fact or law — questions which the judge herself is eminently qualified to decide. But a judge may not appoint an expert to decide a question involving expertise, a question which is, by definition, beyond the competence of a judge to decide. It must be decided by a judge (or jury) after an adversarial contest. Of course, a judge may appoint an expert under the present system, but that is as a witness only in that adversarial contest.

The system therefore misunderstands the real role of an expert. She should not be a witness in proceedings in the way in which witnesses of fact are. She is, in reality, a decision maker in the way in which a judge is, or, perhaps a better analogy, as a referee is. The expert's role is to decide a question which is, by definition, beyond the expertise of the judge to decide.

That is the fallacy of the existing rules.

Some may say that that is what, in effect, occurs now — that the expert, or panel, in effect, decides the question. But if that is so then we should face reality. We should not pretend that this is an adversarial contest which is decided by a judge.

An expert (or panel) should, in most if not all cases, be appointed by the judge to decide a question involving expertise and, once appointed, she (or they) should proceed to decide that question. No doubt the expert should be able to confer with the judge to ensure clarification of the question which she has to decide and the

facts on which to decide it. But she should have no more contact with the parties or their lawyers then does a judge or a referee.[21]

Nor should the resolution of a question involving expertise be turned into an adversarial contest. The expert should not be cross-examined by the parties. If there is any doubt as to the factual basis upon which the question is to be decided, or the question itself, the judge should have the power to seek the parties' submissions on this.

This may, in some cases, create an element of difficulty if the question arises for decision, as ideally it should, before the judge has resolved disputed questions of fact, such as, for example, where opposing factual contentions may result in different questions for expert decision. But that can often be dealt with, to enable resolution of the question involving expertise at an early stage, by asking the expert to decide the question on, say, two different factual bases. And that may well be sufficient to result in an early resolution of the dispute.

So it seems to me that the *UCPR* with respect to experts should be radically changed. Chapter 11 pt 5, which treats experts as witnesses, should remain to be used in exceptional cases only. In other than exceptional cases there should be rules which treat experts as decision makers. However, unlike the rules with respect to referees, such experts should not conduct hearings or seek submissions from the parties. They should decide the question posed by the judge on the factual basis stated by the judge.

Such an expert could and should be appointed as early as possible in the litigation process and could be appointed before litigation is commenced. One party to a dispute which may result in litigation and which contains a question involving expertise should be able to apply to a court for appointment of an expert, or a panel of experts, to decide that question. And such a question may, in effect, be decided before litigation commences.

The parties could agree upon such an expert or panel and, generally, the court would appoint that person or panel. Or one party could submit a panel to the other from which the other would choose an expert or panel. It would only be if both of those methods of choice failed that the judge herself would be obliged to find the expert or panel. And there should be rules which provide for that eventuality.

Such a system would have a number of advantages over the existing system. In the first place, it would recognise the reality that an expert (or a panel of experts) is, in effect, the decision maker on the question involving expertise.

Secondly, by ensuring that the judge is appointing a decision maker, it would remove the risk, which presently exists, that the opinion of an adversarially appointed expert, which may be accepted because she is more articulate or more

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[21] I do not think that this would involve the delegation of judicial power; the judge would decide the case. It might be otherwise if, under the referee rules, a judge were to delegate all questions of fact and law to a referee and merely rubber stamp the decision. As to delegation of judicial power at the State level: see generally Bede Harris, 'Separation of Powers at State Level— Going the Whole Hog Instead of Making the Dog Bark Many Times' (2017) 15(1) *Canberra Law Review* 1.

persuasive than the opposing expert, will be biased in favour of the party who appoints her. 'Whose bread I eat, his song I sing.'[22] It is mere wishful thinking that statements in court rules, purporting to impose duties on expert witnesses, will change that.

Thirdly, it enables an effective decision on that question early in the litigation process or even before litigation has commenced. Often the resolution of that question will accelerate resolution of the dispute.

And fourthly, it eliminates the costs incurred in having opposing experts proofed by their own party's non-expert lawyer and cross-examined by their opposing party's non expert lawyer.

Unfortunately, these rules are unlikely to be used by lawyers unless compelled to do so. They will be unwilling to surrender their own appointed experts. So these provisions should state that they will apply, to the exclusion of ch 11 pt 5, other than in exceptional circumstances; and that the fact that a party has appointed an expert is not an exceptional circumstance.

C *Deciding a Question of Fact or Law in Advance of Trial*

In some cases, the parties may agree that the decision of a question of fact or law arising in the action will resolve the dispute or, at least, substantially shorten the trial. Or the court may form that view. In either case, the court should consider whether to order a trial of that question or a case appraisal of it, in advance of trial.

The provisions with respect to deciding questions separately seem to have been rarely used. Lawyers seem reluctant to use them and judges seem reluctant to apply them.

In deciding whether to apply them, cost must be an important consideration and the tendency of lawyers to do too much must be taken into account. So, if these provisions are to be used, and I think they should be wherever possible, the earlier that they are used the cheaper that resolution will be. And it may be necessary to fix the costs of those proceedings in some cases to counter the tendency of lawyers to do too much.

Where the question is one of law and the parties can agree on the facts relevant to that question, there is no reason why that should not be decided in a summary way early in the litigation process, or even before litigation commences. And similarly, if a judge can resolve those facts quickly and cheaply. In making a decision on this question, the court should no doubt take into account the views of the parties, but it should not be bound by them.

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[22] This is a translation of the German idiom: *Wes brot ich ess, des lied ich sing*. The more that the expert is dependent on this income the more likely the idiom is to prove true. There may, of course, be other biases which are not dealt with here.

D *Ordering the Parties to Exchange Offers of Settlement*

Making an order that the parties exchange offers of settlement may seem, on its face, to be an extreme example of a court interfering with the rights of parties to determine for themselves how to conduct their litigation. Nor do I suggest that it should be routinely made. But it seems to me that there must be cases in which the issue in dispute is relatively straightforward and the amount or value in dispute is sufficiently small that costs may assume a substantial proportion of it — and in which, in consequence, the court should have such a power. Both the *Motor Accident Insurance Act 1994* (Qld) and the *Personal Injuries Proceedings Act 2002* (Qld) *contain* provisions permitting this.[23] These offers should have the same consequences as offers under ch 9 pt 5 of the Rules.

The following remarks apply, not just to offers ordered to be made, but to all offers made under the existing rules.

Offers made before litigation has commenced should also attract the cost consequences under the rules. There is no logical or commonsense reason, in my opinion, why such a rule should be limited only to offers made during the course of litigation. On the contrary, there is an even stronger argument, in my opinion, that a person who makes a reasonable offer before litigation should be entitled to be protected against the costs of that litigation than there is that one who makes such an offer during the course of litigation should be entitled to be so protected. The *Civil Procedure Rules 1998* (UK) seem to provide for this situation, although perhaps not with sufficient specificity.[24] And an offer should be taken into account in assessing costs if it is close to, but less beneficial to, the offeree than the judgment. Particularly in actions for damages, which, whilst capable of estimation, are not capable of precise calculation, a disputant who makes an offer to settle which is close to but a little less beneficial to the offeree than the judgment sum, deserves to be protected in costs where the amount of that offer is within the range of a reasonable judgment. This is especially so where the offer is made early in the proceedings or before action.[25] A specific rule to this effect would provide greater certainty than an interpretation of the present rules which would permit such a result.[26]

E *Deciding on the Manner of Trial*

If the purpose or one of the principal purposes of our civil justice system is to provide resolution of disputes by adjudication by a judge, then it does not fulfil that purpose if it provides access to such adjudication only to a small proportion

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23 *Motor Accident Insurance Act 1994* (Qld) s 51C; *Personal Injuries Proceedings Act 2002* (Qld) ss 20, 39, 40.

24 See r 36.20.

25 Cf *District Court Rules 2014* (NZ) r 14.11(4).

26 As occurred in *Carver v BAA plc* [2009] 1 WLR 113.

of those who would want to use it — the very rich or the funded or those few other potential plaintiffs whose likelihood of success is all but guaranteed. And I think that that is the case. As I have already said, a person of average means, or even a small company, cannot afford to litigate in the Supreme Court.

There are, it seems to me, two related reasons for this.

The first is that, over many decades, the classes of litigants have increased substantially. Before, say, the 1950s, most litigants were either men of property (no women), or corporations. Then in the decades following *Donoghue v Stevenson*,[27] the law of negligence expanded exponentially. Added to that, social changes and legislative initiatives, especially in social welfare and economic regulation, which commenced in the 1950s and are still continuing, have made all of us potential litigants.

And the second reason, partly for the above reasons, is that relations between us, especially business relations, and consequently litigation, has become more complex and therefore more expensive.

The massively high proportion of cases commenced which are resolved, mostly by agreement, before judgment may therefore be seen in two lights. On the one hand it is to be applauded that so many litigants have chosen to resolve their disputes by agreement. On the other, if it is the case, as I think it is, it is to be regretted that so many litigants have been deprived of having their disputes resolved by a judge solely or principally because they cannot afford to go to trial.

If it is true as, at present, I think it is, that many litigants settle their actions solely or principally because they cannot afford to go to trial, there needs to be a more summary system of adjudication which is within the means of ordinary litigants and small companies.

I do not mean to imply that every potential litigant who cannot afford to litigate under the present system should be entitled to a trial by a judge. There will always be some litigants whose claims or defences are unreasonable or who have acted unreasonably in rejecting an offer of settlement. The harm done to the other party by that unreasonableness may not be capable of being remedied merely by a costs order. In those cases, the court should be empowered to deprive the unreasonable litigant of their presumptive right to trial and to oblige them to accept a reasonable offer of settlement.

The present situation, by which I mean the inability of some parties to litigate to judgment because the cost of doing so is prohibitive, may well change with the evolution of artificial intelligence in our system. There is little doubt that artificial intelligence could and should reduce the work done by lawyers in basic routine tasks like disclosure. It should also enable more accurate prediction of costs and, in consequence, increase earlier resolution by agreement. It may enable more accurate prediction of the likely outcome of cases with the same result. And it may enable accurate prediction of those cases, or those kinds of cases, which

[27] [1932] AC 562.

are more likely to be resolved by agreement.[28] And, perhaps most importantly of all, it should assist in designing a cheaper and fairer system of deciding disputed questions of fact and law.[29]

So the application of artificial intelligence to the litigation process is likely, ultimately, to substantially reduce its labour intensiveness and so its cost. But whether, how, when and to what extent artificial intelligence will reduce the present costs of litigation, and change the present trial system, are, at present, unpredictable. I do not think that the introduction of the reforms which I have proposed should be postponed in order to see the outcome of this application.

I shall not attempt to design the kind of trial system which I have in mind but, in the absence of artificial intelligence, it would be one along the lines of the present rules with respect to case appraisal but with a binding judgment.[30] However, I think that artificial intelligence could be used to design a cheaper and more efficient way of deciding disputed questions of fact and possibly also of law. And if that can be achieved it should be used in most cases, leaving the present trial system to be used in exceptional cases only.

IV Conclusion

The cost to parties of dispute resolution probably remains the most serious challenge for our system. It is therefore ironic that some reforms which have been introduced, having as one of their aims reducing costs, may in fact, by the way in which they have been interpreted and implemented, increase them. This is often because a reform or its implementation has lost sight of some self-evident propositions or facts. I have mentioned three of these because it is so easy to lose sight of them.

The first is that the main reason for the high cost of litigation is the labour intensiveness of the process. The more labour intensive the process is, the higher will be its cost. Consequently, it is important to ensure that a reform does not simply replace one labour-intensive process with another process that is equally, if not more, labour intensive in its operation.

The second follows from the first: for many years, the vast majority of actions have for been resolved, one way or another, before judgment. Consequently, there is little point, at an early stage in a dispute resolution

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28 See generally Don Ferrands, 'Artificial Intelligence and Litigation — Future Possibilities' (2020) 9(1) *Journal of Civil Litigation and Practice* 7; Felicity Bell et al, 'AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators' (Research Project, The Australasian Institute of Judicial Administration and UNSW Faculty of Law and Justice, 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4162985>.

29 There is now, in many cases, a substantial amount of contemporaneous objective evidence, which may amenable to more exhaustive analysis than is presently the case.

30 This is sometimes dealt with by case management directions. See, eg, *Rules of the Supreme Court 1971* (WA), order 4A. But I am speaking of a rule to be applied generally, not in discretionary cases.

process, in the parties' lawyers undertaking work aimed at trial and judgment, unless it is also likely to result in a substantially earlier settlement of cases which are likely to settle in any event, or possibly also in enabling settlement of cases which should result in agreement but which would not otherwise settle.

And the third is that the adversarial mindset of lawyers may be so strong that mere encouragement, or even the possibility of an adverse finding on costs against their clients, may not be sufficient to change their focus on trial and judgment. In order to change this mindset, it may be necessary to compel conduct which will cause the change, and to confront lawyers with the risk of a cost penalty, not only against their clients, but also against themselves, if they fail to focus also on early resolution.

I have said in this lecture, more than once, that our present system of trial and judgment is beyond the financial capacity of an ordinary litigant or small company; that only large corporations, government entities, funded parties and those whose success at trial is all but guaranteed can afford to litigate to judgment in the Supreme Court. And although in many, perhaps even most, cases, the best way of resolving a dispute is by agreement, of that massive percentage of litigants who resolve their disputes by agreement before trial, there must be many who do so solely or principally because they realise, many at a point which is too late, that they cannot afford to go to trial and judgment.

If that is so, then our trial system is working for only a small percentage of potential litigants.

In this lecture, I have suggested two possible solutions. The first is one which, within the existing trial system, will better ensure that all of those disputes which can reasonably be resolved by agreement are resolved earlier and more cheaply than they now are.

The second is more radical because it involves an alternative, cheaper trial system for litigants who should be able to have their disputes resolved by an independent arbiter but cannot afford to litigate under the present system. And these may well be the majority of litigants in defended cases.

Do I think that my proposals are likely to be adopted in the foreseeable future? No, I do not.

Hardly anyone likes changing the way they do things, especially if they have been doing them that way for a long time. And even less so if, as in this case, the way they have been doing it follows practices and traditions of highly respected predecessors. The law is a conservative profession, as indeed, in many ways, it should be.

This makes it difficult for us to accept that a system, which was once the subject of pride and admiration, has, by a substantial increase in the classes of litigants it serves, and a substantial increase in the complexity of our relations with one another, ceased to operate successfully; that a system which may have operated effectively in, say, the 1950s, has become, in its operation, too labour intensive, and so too expensive, for most of the classes of litigants it now serves.

But consider this.

Under a system substantially controlled by the parties' lawyers, though 50 per cent of defended actions go to trial, only 10 per cent of those go on to hearing and judgment. That is, 90 per cent of actions listed for trial are either settled or abandoned.

I have suggested some reasons for this: the failure of lawyers to inform their clients, early in the litigation process, of the likely result of the action and of the likely cost of achieving that; and their failure to sufficiently encourage and effect settlement at an early stage in that process.

However, irrespective of the causes of this, does not an overall dropout rate of 95 per cent of actions commenced and a late dropout rate of 90 per cent of actions listed for trial show that the trial system is not working? How many of those dropouts would have been better satisfied, and reasonably so, by a cheaper trial system?

So it seems to me that radical change to our system is not just desirable but essential. And if that includes a radically different system of deciding disputed questions of fact and law it may fulfil the prediction — some may have said gloomy prediction — by Chief Justice Doyle.

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For further details, please contact:

T: +61 7 3365 2206

E: law@uq.edu.au

W: law.uq.edu.au

A: Level 3, Forgan Smith Building (1)
The University of Queensland
St Lucia QLD 4072, Australia

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