

# The University of Queensland Law Journal

Volume 43(3) 2024

## ARTICLES

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## THE 24<sup>TH</sup> WA LEE EQUITY LECTURE

The Interaction of Aboriginal and Torres Strait Islander Customary Law with Some Aspects of the Law of Equity: Is the View any Different Through the Lens of the Human Rights Act?

2 November 2023, Banco Court, Supreme Court of Queensland

**The Hon Chief Justice Helen Bowskill**

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**Michael White and Nicholas Gaskell**

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# The University of Queensland Law Journal

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Volume 43

2024

Number 3

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The University of Queensland Law Journal is published by the TC Beirne School of Law. The Journal is controlled by an Editorial Board of academics drawn from within the School.

This issue may be cited as  
*(2024) 43(3) University of Queensland Law Journal*

ISSN 0083-4041

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# The University of Queensland Law Journal

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Volume 43

2024

Number 3

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# THE TRAUMA-INFORMED TRIAL: A CONCEPTUAL FRAMEWORK TO GUIDE PRACTICE

SARAH KENDALL\*

*The criminal trial (and broader legal system) replicates trauma dynamics. For court participants who have experienced traumatic events (such as victims, defendants and other witnesses), this creates a risk of re-traumatisation. The concept of trauma-informed practice aims to guide practices so that re-traumatisation is minimised and no further harm is done. While a number of conceptual frameworks for trauma-informed practice have been developed, these have limitations, including that a conceptual framework for application in the context of the criminal trial (and, indeed, the legal system more broadly) has not yet been settled. This article presents a conceptual framework for the 'trauma-informed trial'. Such a framework will be an invaluable tool for those seeking to assess the extent to which existing criminal trial practices are trauma-informed and to assist with development of trauma-informed reforms to the trial. In this way, application of the framework may contribute towards minimising the re-traumatisation of criminal trial participants. By applying the methodology utilised in this article, similar conceptual frameworks could be developed for application to other legal system contexts.*

## I INTRODUCTION

[Trauma] results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional or spiritual wellbeing.<sup>1</sup>

Research shows that many defendants — along with victims of (often interpersonal) crime — have suffered from traumatic experiences and, in fact, may be suffering from post-traumatic stress disorder when they engage with the

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<sup>1</sup> Substance Abuse and Mental Health Services Administration, US Department of Health and Human Services, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (Report, July 2014) 7 ('SAMHSA's Concept').

criminal justice system.<sup>2</sup> Yet, legal systems are said to replicate trauma dynamics, posing risks of re-traumatisation or secondary victimisation to those who become involved with the criminal justice system.<sup>3</sup>

Several features of the criminal trial may act as triggers for trauma survivors, leading to re-traumatisation. These include its adversarial nature (which, amongst other things, requires witnesses to be questioned in a way that challenges their honesty and credibility); the emphasis on orality in testimony (which requires witnesses to testify verbally in front of others); the formality of court (such as its strict rules and procedures, including rules around examination); the presence of an impartial and authoritarian decision-maker, and; depending on the nature of the case, the persistence of myths and misconceptions about the victim, defendant and/or crime.<sup>4</sup> Owing to these features of the criminal trial, it has been suggested that a trauma-informed approach to the trial is necessary to minimise the inherently re-traumatising effects of the system and do no further harm to those who become involved with the trial process.<sup>5</sup> Minimising further harm to these people might have other benefits too, such as eliciting better evidence from witnesses.<sup>6</sup> As Melanie Randall and Lori Haskell argue:

While it may not be the role of law to ‘heal’ those harmed by crime, law does represent itself as playing a crucial role in creating the parameters around acceptable human conduct, and creating the conditions for a just and law-abiding society in which people can expect to have their rights and freedoms respected. If law in general, and the criminal law in specific, is to play such a fundamental role in human life, clearly its

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<sup>2</sup> See, eg, Ronald C Kessler et al, ‘Trauma and PTSD in the WHO World Mental Health Surveys’ (2017) 8(5) *European Journal of Psychotraumatology* 1353383; C Benjet et al, ‘The Epidemiology of Traumatic Event Exposure Worldwide: Results from the World Mental Health Survey Consortium’ (2016) 46(2) *Psychological Medicine* 327; Emma Facer-Irwin et al, ‘PTSD and Complex PTSD in Sentenced Male Prisoners in the UK: Prevalence, Trauma Antecedents, and Psychiatric Comorbidities’ (2022) 52(13) *Psychological Medicine* 2794; Natasha Sindicich et al, ‘Offenders as Victims: Post-Traumatic Stress Disorder and Substance Use Disorder among Male Prisoners’ (2014) 25(1) *Journal of Forensic Psychiatry and Psychology* 44.

<sup>3</sup> See, eg, Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan, 2020) 55–60, ch 11; Negar Katirai, ‘Retraumatized in Court’ (2020) 62(1) *Arizona Law Review* 81; Deborah Epstein and Lisa A Goodman, ‘Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences’ (2019) 167(2) *University of Pennsylvania Law Review* 399; Judith Herman, *Trauma and Recovery: The Aftermath of Violence* (Basic Books, 1997).

<sup>4</sup> Cossins (n 3) 55–60, ch 11; Katirai (n 3) 85–6; Epstein and Goodman (n 3) 420–38; Herman (n 3) 160.

<sup>5</sup> See, eg, Cossins (n 3) 554–5, 569; Cathy Kezelman and Pam Stavropoulos, ‘Trauma and the Law: Applying Trauma-Informed Practice to Legal and Judicial Contexts’ (Background Paper, Blue Knot Foundation, 9 October 2016) 9–11 (‘Trauma and the Law’).

<sup>6</sup> Cossins (n 3) 555, 561, 569.

practices and processes should begin from an enhanced appreciation of human psychology, human capacities, and how traumatic events shape and disrupt these.<sup>7</sup>

The concept of trauma-informed practice was developed to guide the practices of those delivering human services so that they would ‘do no further harm’.<sup>8</sup> To achieve this, trauma-informed practice requires service providers to recognise that clients may have a trauma history, to understand trauma and its impacts, and to minimise (as much as possible) the re-traumatisation of clients when delivering services to them (by applying certain principles of trauma-informed practice).<sup>9</sup>

While trauma-informed practice originated in the field of human services, it has since been applied in the legal system context as well as in fields such as physical health care, child welfare, schooling, domestic violence support services, social work, the military and prisons.<sup>10</sup> Like the criminal trial, it is recognised that many institutions and systems in these fields are themselves trauma-inducing because they replicate trauma dynamics, making a trauma-informed approach all the more necessary.<sup>11</sup> Potentially trauma-inducing practices in these fields

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<sup>7</sup> Melanie Randall and Lori Haskell, ‘Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping’ (2013) 36(2) *Dalhousie Law Journal* 501, 533. See also Kezelman and Stavropoulos who argue that the law is pivotal in regulating human behaviour and adjudicating disputes: Kezelman and Stavropoulos, ‘Trauma and the Law’ (n 5) 3, 8.

<sup>8</sup> Joshua M Wilson, Jenny E Fauci and Lisa A Goodman, ‘Bringing Trauma-Informed Practice to Domestic Violence Programs: A Qualitative Analysis of Current Approaches’ (2015) 85(6) *American Journal of Orthopsychiatry* 586, 588; Maxine Harris and Roger D Fallot, ‘Envisioning a Trauma-Informed Service System: A Vital Paradigm Shift’ [2001] 89 *New Directions for Mental Health Services* 3, 3–4, 10 (‘Envisioning a Trauma-Informed Service’). See also Denise E Elliot et al, ‘Trauma-Informed or Trauma-Denied: Principles and Implementation of Trauma-Informed Services for Women’ (2005) 33(4) *Journal of Community Psychology* 461, 462–3. Trauma-informed practice has also been referred to as trauma-informed care, trauma-informed practice and care, a trauma-informed approach, trauma-informed theory, and trauma-informed interactions (amongst other variations). This article uses the term ‘trauma-informed practice’ to emphasise that application of the conceptual framework is intended to guide *practices* used in the context of the criminal trial.

<sup>9</sup> See generally Elliot et al (n 8); Jill Levenson, ‘Trauma-Informed Social Work Practice’ (2017) 62(2) *Social Work* 105; Sarah Katz and Deeya Haldar, ‘The Pedagogy of Trauma-Informed Lawyering’ (2016) 22(2) *Clinical Law Review* 359; SAMHSA’s *Concept* (n 1); Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8); Pam Stavropoulos, ‘The Principles of Trauma-Informed Care and the Need for Cultural and Organisational Change’ in Richard Benjamin, Joan Haliburton and Serena King (eds), *Humanising Mental Health Care in Australia: A Guide to Trauma-Informed Approaches* (Routledge, 2019) 307.

<sup>10</sup> See, eg, SAMHSA’s *Concept* (n 1) 3; Kezelman and Stavropoulos, ‘Trauma and the Law’ (n 5) 2; Nicole C McKenna and Kristy Holtfreter, ‘Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness’ (2021) 30(4) *Journal of Aggression, Maltreatment and Trauma* 450, 451–2; Randall and Haskell (n 7) 404–5; Victoria A Anyikwa, ‘Trauma-Informed Approach to Survivors of Intimate Partner Violence’ (2016) 13(5) *Journal of Evidence-Informed Social Work* 484, 485; Levenson (n 9) 107; Yvonne Jewkes et al, ‘Designing “Healthy” Prisons for Women: Incorporating Trauma-Informed Care and Practice (TICP) into Prison Planning and Design’ (2019) 16(20) *International Journal of Environmental Research and Public Health* 3818, 3819.

<sup>11</sup> SAMHSA’s *Concept* (n 1) 2–3; Herman (n 3) 72–3; Stavropoulos (n 9) 312; Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 9–10.

include, for example, harsh disciplinary practices in school systems or the abrupt removal of a child from its abusive family in the child welfare system.<sup>12</sup>

Several different trauma-informed practice frameworks have been developed over the last two decades. While many of these frameworks have evolved from earlier iterations, each has articulated different sets of principles that are intended to guide practice. Some of these frameworks are argued to be generalisable across fields (although may be implemented in different ways across — and even within — fields),<sup>13</sup> while others are said to be developed for application within a certain field (such as the legal system).<sup>14</sup> However, as this article will show, each of these frameworks has limitations. In addition, different frameworks have been applied to the legal system context, indicating that a trauma-informed practice framework for the legal system is not yet settled. Indeed, Queensland's Women's Safety and Justice Taskforce recognised that currently 'there is no clear and instructive trauma-informed framework for practice for lawyers in Queensland'.<sup>15</sup>

In the light of this, this article presents a conceptual framework — the 'trauma-informed trial' — that applies to one aspect of the legal system: the criminal trial. This framework also aims to address limitations of existing frameworks. The trauma-informed trial framework is intended to be used as a tool by law and policymakers, law reformers, academics, lawyers and others to assess the extent to which existing criminal trial practices are trauma-informed and to inform development of trauma-informed reforms to the trial. The article does not intend to put forth a set of trauma-informed trial *practices* because the nature of such practices will differ depending on the specific context in which the conceptual framework is being applied (for example, whether it is being applied by prosecutors to their interactions with victim-witnesses or by law reformers to the reform of sexual violence trials). It is intended that specific trauma-informed practices be developed by others, however, through the application of the conceptual framework presented in this article.

The article begins, in Part II, by examining the concept of trauma-informed practice. This Part discusses some of the different sets of principles of trauma-informed practice that have been articulated over the years, highlighting their strengths and limitations. These sets of principles include those articulated by Maxine Harris and Roger D Fallot (the 'Harris and Fallot framework'),<sup>16</sup> Denise E Elliot et al (the 'Elliot et al framework')<sup>17</sup> and the United States' Substance Abuse

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<sup>12</sup> SAMHSA's *Concept* (n 1) 2.

<sup>13</sup> See, eg, Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8); Elliot et al (n 8); SAMHSA's *Concept* (n 1).

<sup>14</sup> See, eg, Kezelman and Stavropoulos, 'Trauma and the Law' (n 5).

<sup>15</sup> Queensland, Women's Safety and Justice Taskforce, *Hear Her Voice: Report One* (Report, 2 December 2021) 610.

<sup>16</sup> Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8).

<sup>17</sup> Elliot et al (n 8).

and Mental Health Services Administration ('SAMHSA's framework').<sup>18</sup> These more general frameworks are considered in this article because they have previously been applied in the context of the legal system.<sup>19</sup> This analysis is followed by a brief discussion of the key critiques of trauma-informed practice. The article then considers how the principles of trauma-informed practice have been applied in the context of the legal system and briefly discusses a fourth framework that has been designed specifically for the legal practice context, that articulated by Cathy Kezelman and Pam Stavropoulos (the 'Kezelman and Stavropoulos framework').<sup>20</sup>

Part III presents the conceptual framework for the trauma-informed trial. The Part begins by making an argument for why the concept of trauma-informed practice could be compatible with the adversarial trial. It then justifies why SAMHSA's framework was chosen as the foundation for the trauma-informed trial conceptual framework and explains how its assumptions and principles have been operationalised to the criminal trial context. It also explains how some of the limitations of SAMHSA's framework (and the concept of trauma-informed practice more broadly) have been addressed. The Part concludes by suggesting that the methodology utilised in this article could be applied by others to develop similar conceptual frameworks for application to other contexts within the legal system.

## II TRAUMA-INFORMED PRACTICE

Trauma-informed practice is argued by scholars to be an emergent paradigm.<sup>21</sup> It originated in the field of human services, specifically mental health care and substance abuse treatment, in the early 2000s.<sup>22</sup> Its central tenet is that all aspects of service delivery should be designed to be responsive to the effects of trauma on clients and to 'do no further harm'.<sup>23</sup> The ultimate goal (in this context) is to 'provide services in a manner that is welcoming and appropriate to the special

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<sup>18</sup> SAMHSA's *Concept* (n 1). Sets of principles other than those discussed in this article have also been developed. For example, Wilson, Fauci and Goodman identified six core principles of trauma-informed practice in domestic and family violence services which were based on qualitative content analysis of literature describing trauma-informed approaches in domestic and family violence services. However, these principles are largely the same as those articulated by SAMHSA: Wilson, Fauci and Goodman (n 8) 589–93.

<sup>19</sup> See Part II below.

<sup>20</sup> Kezelman and Stavropoulos, 'Trauma and the Law' (n 5).

<sup>21</sup> Stavropoulos (n 9) 307; Antonia Quadara and Cathryn Hunter, *Principles of Trauma-Informed Approaches to Child Sexual Abuse: A Discussion Paper* (Discussion Paper, Royal Commission into Institutional Responses to Child Sexual Abuse, 3 November 2016) 35.

<sup>22</sup> See, eg, Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8) 4–5; Wilson, Fauci and Goodman (n 8) 587.

<sup>23</sup> Wilson, Fauci and Goodman (n 8) 587–8; Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8) 3–4. See also Elliot et al (n 8) 462–3.

needs of trauma survivors<sup>24</sup> so that services help to resolve trauma (rather than exacerbate it) and avoid re-traumatising clients.<sup>25</sup> This requires service providers and their practices and policies to understand trauma and its far-reaching impacts, and to recognise that clients may have a trauma history.<sup>26</sup>

Some scholars have argued that an underlying assumption of trauma-informed practice is the ‘universal precautions’ approach, which provides that it is best practice to treat all clients as trauma survivors because service providers are not trained (or may not have the time) to diagnose trauma and may not recognise trauma symptoms.<sup>27</sup> It has been argued by some scholars that treating all clients as if they have a history of trauma will ensure that no one is re-traumatised through their interactions with services and institutions.<sup>28</sup> Even where clients do not have a trauma history, it is claimed that trauma-informed practices will only benefit their experience of human service delivery.<sup>29</sup> However, the universal precautions approach has been criticised by some feminist scholars who argue that it has the potential to overlook individual experiences, identity and personal characteristics.<sup>30</sup>

Trauma-informed practice emphasises organisational and systems-level change.<sup>31</sup> It focuses on service providers themselves and how clients are treated in everyday interactions with service systems.<sup>32</sup> It differs from trauma-specific services (such as psychological counselling) which specifically aim to address trauma-related symptoms and help clients work towards recovery from traumatic experiences.<sup>33</sup> Trauma-specific services, however, may aim to use and build upon trauma-informed practices.<sup>34</sup>

Over the last two decades, stakeholders have articulated various sets of principles of trauma-informed practice that are intended to guide practice so that re-traumatisation is minimised.<sup>35</sup> Many of these frameworks have evolved from and built upon previous frameworks. As described in Part I, this article focuses on four frameworks: the Harris and Fallot framework, Elliot et al framework,

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<sup>24</sup> Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 5.

<sup>25</sup> Stavropoulos (n 9) 307–9; *SAMHSA’s Concept* (n 1) 2–3; Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 4–5.

<sup>26</sup> See generally Elliot et al (n 8); Levenson (n 9); Katz and Haldar (n 9); *SAMHSA’s Concept* (n 1); Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8); Stavropoulos (n 9).

<sup>27</sup> See, eg, Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 10; Elliot et al (n 8) 463, 474; *SAMHSA’s Concept* (n 1) 10; Wilson, Fauci and Goodman (n 8) 594.

<sup>28</sup> See, eg, Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 10; Elliot et al (n 8) 463, 474; *SAMHSA’s Concept* (n 1) 10.

<sup>29</sup> Kezelman and Stavropoulos, ‘Trauma and the Law’ (n 5) 7.

<sup>30</sup> This is discussed further in Part IIIB below.

<sup>31</sup> Quadara and Hunter (n 21) 15.

<sup>32</sup> Wilson, Fauci and Goodman (n 8) 587.

<sup>33</sup> Cossins (n 3) 540; Anyikwa (n 10) 487; Elliot et al (n 8) 472. Cossins notes that recovery from trauma is not a goal of the criminal trial but rather its goal is to adjudicate criminal charges: Cossins (n 3) 535.

<sup>34</sup> See, eg, Elliot et al (n 8) 472; Cossins (n 3) 548–50.

<sup>35</sup> See, eg, Quadara and Hunter (n 21) 51.

SAMHSA's framework and Kezelman and Stavropoulos framework. The next section explains the content of the first three of these frameworks (which are all general frameworks that are not specific to the legal context) and canvasses their strengths and limitations. The Kezelman and Stavropoulos framework is discussed in Part IIC (which considers how trauma-informed practice has been applied in the context of the legal system) as it has been developed specifically for the legal practice context. This analysis informs decisions around which framework should form the basis of the trauma-informed trial conceptual framework, discussed in Part III.

### ***A Principles of Trauma-Informed Practice***

Although the aim of trauma-informed practice is not to engage in recovery processes, the concept developed in response to and draws on trauma theory.<sup>36</sup> Psychiatrist Judith Herman set out a highly influential theory of trauma in her landmark book, *Trauma and Recovery*.<sup>37</sup> There she wrote that '[t]raumatic events are extraordinary, not because they occur rarely, but rather because they overwhelm the ordinary human adaptations to life. ... They confront human beings with the extremities of helplessness and terror, and evoke responses of catastrophe'.<sup>38</sup> These responses persist past the traumatic event itself in 'an altered and exaggerated state long after the actual danger is over', creating profound changes in physiological arousal, emotion, cognition and memory.<sup>39</sup> Herman theorised that the symptoms of trauma (and post-traumatic stress disorder) fall into three main categories: hyperarousal (persistent physiological arousal which reflects a continual expectation of danger), intrusion (reliving of the traumatic event as flashbacks or nightmares) and constriction (which reflects the numbing response of surrender).<sup>40</sup> These symptoms are reflected in the DSM-5 and ICD-11 diagnostic criteria for post-traumatic stress disorder.<sup>41</sup> Not only do traumatic events affect survivors' psychological structures, but they also have a significant impact on systems of attachment and relations with others, such that survivors become disconnected from those around them.<sup>42</sup>

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<sup>36</sup> See, eg, Herman (n 3).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid* 33.

<sup>39</sup> *Ibid* 34.

<sup>40</sup> *Ibid* 35–50.

<sup>41</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5<sup>th</sup> ed, 2013) 271–2; World Health Organisation, '6B40 Post Traumatic Stress Disorder', *ICD-11 for Mortality and Morbidity Statistics* (Database, January 2024) <<https://icd.who.int/browse11/1-m/en#/http%3a%2f%2fid.who.int%2f%2fid%2f2070699808>>.

<sup>42</sup> Herman (n 3) 51–73.

As ‘the core experiences of psychological trauma are disempowerment and disconnection from others’, Herman theorised that recovery from trauma requires empowerment of the survivor (including by restoring choice and control) and the creation of new, trusting connections.<sup>43</sup> When a therapist is involved in recovery, the relationship must be collaborative and based on ‘persuasion rather than coercion, ideas rather than force, mutuality rather than authoritarian control’.<sup>44</sup> Herman suggested that the recovery process proceeds in three stages (although this is not always a linear process): first, the survivor establishes a sense of safety; second, she remembers the trauma and integrates it into her life story, and; third, she reconnects with ordinary life by developing a new self and new relationships.<sup>45</sup> Bessel van der Kolk, author of the influential book on recovery from trauma, *The Body Keeps the Score*, has also emphasised the importance of language and voice in the recovery of trauma survivors.<sup>46</sup>

Trauma-informed practice has drawn on characteristics of both the trauma response and recovery process to inform its principles. The concept recognises that interactions with trauma survivors may need to be adjusted because of the profound psychological and relational impacts of trauma, and it uses the various principles to guide how these interactions should be adjusted. Because the principles of trauma-informed practice have been taken from literature on trauma theory — and later sets of principles have generally evolved from earlier iterations — the different sets of principles have commonalities. For example, the principles tend to focus on safety, choice, voice, empowerment and collaboration. However, they also have important differences. Table 1, below, lists each of the principles articulated by Harris and Fallot, Elliot et al, SAMHSA and Kezelman and Stavropoulos. It also lists the assumptions of trauma-informed practice that form part of SAMHSA’s framework.

**Table 1: Principles of Trauma-Informed Practice Articulated by Different Authors.**

Harris and Fallot	Elliot et al	SAMHSA	Kezelman and Stavropoulos
<ol style="list-style-type: none"> <li>1. Safety</li> <li>2. Trustworthiness</li> <li>3. Choice</li> <li>4. Collaboration</li> <li>5. Empowerment</li> </ol>	<ol style="list-style-type: none"> <li>1. Recognise the impact of violence and victimisation on survivors’ development and coping strategies</li> </ol>	<p><b><u>Assumptions</u></b></p> <ol style="list-style-type: none"> <li>1. Have a realisation about trauma and understand how it can affect individuals, families, groups,</li> </ol>	<ol style="list-style-type: none"> <li>1. Basic knowledge of the impacts of stress on the brain and body</li> <li>2. Consistent emphasis on safety, trustworthiness, choice,</li> </ol>

<sup>43</sup> Ibid 133–6. See also Bessel van der Kolk, *The Body Keeps the Score* (Penguin Books, 2015) 169, 212–14.

<sup>44</sup> Herman (n 3) 136.

<sup>45</sup> Ibid chs 8–10.

<sup>46</sup> van der Kolk (n 43) ch 14.

<ol style="list-style-type: none"> <li>2. Identify recovery from trauma as a primary goal</li> <li>3. Employ an empowerment model</li> <li>4. Strive to maximise women’s choices and control over their recovery</li> <li>5. Engage in a therapeutic relationship that is collaborative, empowering and safe</li> <li>6. Create an atmosphere that provides safety, respect and acceptance (such as by providing clear information, being consistent and predictable, and giving clients as much control and choice as possible)</li> <li>7. Emphasise clients’ strengths</li> <li>8. Minimise re-traumatisation</li> <li>9. Strive to be culturally competent and to understand women in the context of their life experiences</li> <li>10. Solicit consumer input in designing and evaluating services</li> </ol>	<ol style="list-style-type: none"> <li>2. Recognise the signs of trauma</li> <li>3. Respond by applying principles of trauma-informed practice (taking a universal precautions approach where staff expect trauma in the lives of all people)</li> <li>4. Resist re-traumatisation</li> </ol> <p style="text-align: center;"><b><u>Principles</u></b></p> <ol style="list-style-type: none"> <li>1. Safety</li> <li>2. Trustworthiness and transparency</li> <li>3. Peer support</li> <li>4. Collaboration and mutuality</li> <li>5. Empowerment, voice and choice</li> <li>6. Cultural, historical and gender issues</li> </ol>	<p>organisations and communities</p>	<p>collaboration and empowerment (emphasis on ‘doing with’ rather than ‘for’ or ‘to’)</p> <ol style="list-style-type: none"> <li>3. Consistent emphasis on the way in which a service is provided (ie the ‘how’ as much as the ‘what’; the context in which the services are delivered, not just what the service is)</li> <li>4. Consistent emphasis on what may have happened to a client, rather than what is wrong with a client</li> <li>5. Recognition that difficult behaviour and/or symptoms may be the product of coping mechanisms and attempted self-protection in the light of prior adverse experiences</li> <li>6. A strengths-based approach which acknowledges people’s skills, notwithstanding the enormity and effects of overwhelming experiences with which they may be struggling</li> </ol>
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**1 Harris and Fallot’s Framework**

Harris and Fallot were the first to outline a set of principles and a philosophy of trauma-informed practice.<sup>47</sup> They developed these principles through their

<sup>47</sup> Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 21; Wilson, Fauci and Goodman (n 8) 587.

practice at Community Connections (a private mental health and substance abuse treatment agency in Washington DC), drawing on trauma research.<sup>48</sup> First, the agency began to think about trauma and its impact during the clinicians' assessments of every client.<sup>49</sup> Over time, the focus on trauma shifted to the centre of clinicians' interactions with clients, 'in part because consumers responded so positively to [clinicians'] appreciation of the role that violence and victimization had played and continued to play' in the lives of clients.<sup>50</sup> Once trauma had moved to the centre of the agency's understanding, Harris and Fallot then developed approaches that would avoid re-traumatizing and re-victimizing clients.<sup>51</sup> In their own words, '[w]ithout even consciously intending to do so, we evolved the philosophy and principles of a trauma-informed system'.<sup>52</sup>

Over subsequent years and following 'a large number of conversations discussing trauma-informed changes with program administrators, staff, and consumer-survivors',<sup>53</sup> the practitioners distilled five principles of trauma-informed practice that are intended to guide how services are delivered so that they can become responsive to the needs of trauma survivors.<sup>54</sup> These principles include:

- 1) Safety;
- 2) Trustworthiness;
- 3) Choice;
- 4) Collaboration; and
- 5) Empowerment.<sup>55</sup>

In and of themselves, these principles are relatively vague and do not provide much guidance on their scope or how they are to be applied (including how they could be applied in the context of the legal system or criminal trial). Therefore, Harris and Fallot further defined their five principles through a series of questions that service agencies should ask themselves:

To what extent do current service delivery policies, practices, and settings: (1) ensure the physical and emotional safety of consumers? Of staff members? (*Safety*); (2) provide clear information about what the consumer can expect? Ensure consistency in practice? Maintain boundaries, especially interpersonal boundaries, appropriate for the program? (*Trustworthiness*); (3) prioritize consumer experiences of choice and

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<sup>48</sup> See Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8) 21.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Roger D Fallot and Maxine Harris, 'Trauma-Informed Approaches to Systems of Care' (2008) 3(1) *Trauma Psychology Newsletter* 6, 6 ('Trauma-Informed Approaches').

<sup>54</sup> Ibid. These principles have been applied to, for example, social work practice: Levenson (n 9) 106–11.

<sup>55</sup> See generally Harris and Fallot, 'Envisioning a Trauma-Informed Service' (n 8); Fallot and Harris, 'Trauma-Informed Approaches' (n 53).

control? (*Choice*); (4) maximize collaboration and the sharing of power with consumers? (*Collaboration*); and (5) emphasize consumer empowerment? Recognize consumer strengths? Build skills? (*Empowerment*).<sup>56</sup>

While these questions provide some guidance on how the five principles are meant to be applied, ultimately they have been developed for service agencies and do not provide much clarity as to how they should be applied in the legal system (and trial) context.

## 2 *Elliot et al's Framework*

Building on the work of Harris and Fallot, Elliot et al created another set of trauma-informed principles applicable to human services.<sup>57</sup> Unlike Harris and Fallot's work, which involved 'unconsciously' developing trauma-informed principles through practice, Elliot et al's more detailed principles were developed through a collaboration of researchers, practitioners and trauma survivors in the United States over several years.<sup>58</sup> Furthermore, Elliot et al focused specifically on principles to be applied in the context of women survivors of domestic violence and childhood sexual abuse (although they stressed that their principles are intended to apply to both women and men seeking human services generally).<sup>59</sup>

Elliot et al developed ten principles of trauma-informed practice (see Table 1, above).<sup>60</sup> Joshua M Wilson, Jenny E Fauci and Lisa A Goodman suggest that Elliot et al's principles repeated the original contribution of Harris and Fallot but expanded on these original principles to also include provision of trauma-specific treatments (principle two), while placing increased emphasis on the importance of an empowering and collaborative approach.<sup>61</sup> This, however, is not an entirely accurate depiction of how the principles differ. While Elliot et al's principles do incorporate Harris and Fallot's principles, these have been combined and/or duplicated throughout the principle set. For example, Elliot et al include: employ an empowerment model,<sup>62</sup> emphasize clients' strengths<sup>63</sup> and engage in a therapeutic relationship that is empowering.<sup>64</sup> All of these principles encompass 'empowerment' (although, this repetition does support the notion that Elliot et al placed greater emphasis on empowering clients compared to Harris and Fallot).

Furthermore, collaboration can be found in the principles of 'engage in a therapeutic relationship that is collaborative'<sup>65</sup> and 'solicit consumer input in

<sup>56</sup> Fallot and Harris, 'Trauma-Informed Approaches' (n 53) 6 (emphasis in original).

<sup>57</sup> Elliot et al (n 8).

<sup>58</sup> *Ibid* 463–4.

<sup>59</sup> *Ibid* 463, 474.

<sup>60</sup> *Ibid* 464–9.

<sup>61</sup> Wilson, Fauci and Goodman (n 8) 587.

<sup>62</sup> Elliot et al (n 8) 465.

<sup>63</sup> *Ibid* 467.

<sup>64</sup> *Ibid* 466.

<sup>65</sup> *Ibid*.

designing and evaluating services'.<sup>66</sup> Safety can be found in both principles of 'engage in a therapeutic relationship that is safe'<sup>67</sup> and 'create an atmosphere that provides safety, respect and acceptance'.<sup>68</sup> Choice can be found in the principle of 'strive to maximize a woman's choices and control over her recovery'<sup>69</sup> and as an example of what it means to create a safe, respectful and accepting atmosphere ('give the woman as much control and choice over her experience as possible').<sup>70</sup> Additionally, safety appears to have been combined with trustworthiness (in principle six) and empowerment and collaboration (in principle five). This creates a somewhat confusing and repetitive set of principles, even though they provide slightly more detail than Harris and Falot's five principles.

As well as incorporating the Harris and Falot principles, Elliot et al included an additional four principles of trauma-informed practice. Improving on Harris and Falot's contribution, Elliot et al included a principle of 'recognize the impact of violence and victimization on development and coping strategies'.<sup>71</sup> This principle is necessary because recognition of the impact of trauma on individuals is the very foundation — and the justification — for trauma-informed practice. A further improvement on Harris and Falot's principles, Elliot et al also included a principle of cultural competence — something that is arguably necessary to adequately understand trauma and its impact.<sup>72</sup> They described cultural competence to include having 'the knowledge and skills to work within a client's culture, understanding how one's own cultural background and the program influence transactions with the client'.<sup>73</sup>

However, Elliot et al added two principles that are of questionable appropriateness — 'identify recovery from trauma as a primary goal'<sup>74</sup> and 'minimize the possibilities of re-traumatization'.<sup>75</sup> Minimising re-traumatisation is one of the central aims of trauma-informed practice and principles are developed so that this aim can be achieved. It is illogical for the very aim of the paradigm to itself be one of its principles. Furthermore, recovery from trauma is *not* a primary goal of trauma-informed practice — this is the domain of trauma-specific services. It is not always possible for human services (or other systems, such as law or schooling) to engage in recovery practices (although they can assist recovery by minimising further re-traumatisation). This makes 'identifying recovery from trauma as a primary goal'<sup>76</sup> an inappropriate principle of trauma-informed practice.

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<sup>66</sup> Ibid 469.

<sup>67</sup> Ibid 466.

<sup>68</sup> Ibid 467.

<sup>69</sup> Ibid 466.

<sup>70</sup> Ibid 467.

<sup>71</sup> Ibid 465.

<sup>72</sup> Ibid 468.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid 465.

<sup>75</sup> Ibid 467.

<sup>76</sup> Ibid 465.

Ultimately, while Elliot et al's principles provide more detail than Harris and Fallot's principles, they are repetitive, unnecessarily confusing and include principles that should not be included as principles. In addition, as with Harris and Fallot's framework, Elliot et al's framework does not reflect the legal system (or criminal trial) context, which makes it difficult to determine how the framework should be applied in that context.

### 3 SAMHSA's Framework

More recently, SAMHSA produced guidance on the trauma-informed approach to services and systems, building upon the work of Harris and Fallot, Elliot et al and other scholars.<sup>77</sup> Its aim was to develop a 'unified working concept' to advance the understanding of trauma and a trauma-informed approach for behavioural health service sectors,<sup>78</sup> but it stressed that its approach could be applied universally to other sectors too (although terminology and specific application of the principles might differ depending on the setting).<sup>79</sup>

Unlike Harris and Fallot and Elliot et al's frameworks, SAMHSA's guidance articulated both assumptions and principles of trauma-informed practice. These were based on more recent research into the effects of and recovery from trauma, clinical practice in the field of trauma interventions, and lessons articulated by survivors who had been involved in multiple service sectors.<sup>80</sup> SAMSHA argued that four key assumptions (the 'four R's') underlie trauma-informed practice. That is, for an organisation or system to be trauma-informed, it is assumed that all people in the organisation or system:

- 1) Have a realisation about trauma and understand how it can affect individuals, families, groups, organisations and communities;
- 2) Recognise the signs of trauma;
- 3) Respond by applying principles of trauma-informed practice (taking a universal precautions approach where staff expect trauma in the lives of all people); and
- 4) Resist re-traumatisation.<sup>81</sup>

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<sup>77</sup> SAMHSA's *Concept* (n 1).

<sup>78</sup> *Ibid* 17.

<sup>79</sup> *Ibid* 10.

<sup>80</sup> *Ibid* 5–6.

<sup>81</sup> *Ibid* 9–10. Reflecting these assumptions, Cossins explained that 'the goals of trauma-informed care include staff training about the impact of trauma on behaviour and memory, identification of trauma-based symptoms, minimisation of re-traumatisation and identification of the ways in which institutions re-enact the dynamics of trauma': Cossins (n 3) 541–2.

SAMHSA's six principles (listed in Table 1, above) largely reflect Harris and Fallot's principles.<sup>82</sup> However, SAMHSA has combined some principles (empowerment and choice) and expanded on other principles (trustworthiness as well as transparency; collaboration as well as mutuality; empowerment and choice as well as voice). It has also included a principle originally introduced by Elliot et al — cultural issues — and expanded upon that principle to include historical and gender issues. Wilson, Fauci and Goodman note that this principle attends to social oppression and identity,<sup>83</sup> which are both crucial to understanding trauma and its impact. Finally, SAMHSA added a new principle not previously included by Harris and Fallot or Elliot et al — peer support. Based on the work of Herman, peer support is arguably important to help survivors reconnect with others and overcome trauma.

Despite this, SAMHSA's principles replicate some of the limitations of Harris and Fallot and Elliot et al's principles. Most notably, SAMHSA's principles are relatively vague and ambiguous. In themselves, the principles do not provide much information about what they actually mean or how they should be applied (including in legal contexts). However, SAMHSA has provided some limited explanation of each principle. It explained that safety refers to the physical, psychological and interpersonal safety of clients and staff.<sup>84</sup> Trustworthiness and transparency requires operations and decisions to be conducted transparently, with the goal of building trust with clients.<sup>85</sup>

Peer support involves building supportive relationships with other trauma survivors to promote safety and hope, build trust, enhance collaboration, and promote recovery and healing.<sup>86</sup> Collaboration and mutuality focuses on partnering and leveling power differences between clients and staff by promoting collaborative relationships.<sup>87</sup> Empowerment, voice and choice refers to emphasising individuals' strengths, recognising and building upon their experiences, empowering them, giving them their voice and allowing them to make their own decisions.<sup>88</sup> The final principle — cultural, historical and gender issues — requires the organisation to move past cultural stereotypes and biases, offer access to gender responsive services, recognise and address historical

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<sup>82</sup> SAMHSA's *Concept* (n 1) 10–11. The approach taken by Bessel van der Kolk and colleagues to training school staff on trauma is very similar to SAMHSA's approach: 'We try to teach everyone in a school community — office staff, principals, bus drivers, teachers, and cafeteria workers — to recognize and understand the effects of trauma on children and to focus on the importance of fostering safety, predictability, and being known and seen': van der Kolk (n 43) 354.

<sup>83</sup> Wilson, Fauci and Goodman (n 8) 587.

<sup>84</sup> SAMHSA's *Concept* (n 1) 11.

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

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

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

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

trauma, and incorporate policies and processes that are responsive to the racial, ethnic, cultural and gender needs of clients.<sup>89</sup>

The inclusion of assumptions as well as principles is one of the strengths of SAMHSA's framework. This is because it explicitly articulates some of the assumptions of trauma-informed practice that would otherwise remain unspoken (ie the various things it is assumed an organisation or system does to be 'trauma-informed'). These assumptions differ from principles in that application of the principles might change from setting to setting, but all organisations or systems must satisfy the assumptions to be trauma-informed. Specifically, SAMHSA forthrightly states that it assumes that all trauma-informed systems respond to the growing knowledge of trauma by applying trauma-informed principles (assumption three), rather than a standard set of practices or procedures.<sup>90</sup> Principles provide greater flexibility, allowing trauma-informed practice to be applied in many different sectors — with application of the principles (ie the practice) tailored to the particular setting (or, indeed, individual).<sup>91</sup>

SAMHSA's assumptions one and four reflect principles articulated by Elliot et al — specifically, the assumption that people in organisations and systems have a 'realization about trauma' and understand how it can affect individuals (which is similar to Elliot et al's principle one), and that organisations and systems 'resist re-traumatization' (which is similar to Elliot et al's principle eight).<sup>92</sup> However, while resisting re-traumatisation could be characterised as an assumption (it is assumed that all trauma-informed systems are designed to resist re-traumatisation), as discussed above, it is better described as the overarching aim of trauma-informed practice.

Furthermore, as also discussed previously, understanding trauma and its impacts underpins the entire trauma-informed paradigm. As such, it is better characterised as an assumption (as in SAMHSA's framework) rather than a principle (as in Elliot et al's framework) — it is assumed that all trauma-informed systems and their personnel understand the nature of trauma and how it impacts individuals and communities. While this assumption appears to be very similar to SAMHSA's assumption two (trauma-informed systems and their personnel recognise the signs and symptoms of trauma), this latter assumption refers specifically to actual signs and symptoms of trauma in people who interact with the system, not more broadly to the prevalence of trauma and its general (or potential) impacts.

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<sup>89</sup> Ibid.

<sup>90</sup> Ibid 10.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 9.

## B Key Critiques of Trauma-Informed Practice

Each of the three frameworks discussed in Part IIA have drawn on the literature on trauma and recovery from trauma to inform their principles. For this reason, trauma-informed practice has been lauded for having the potential to reduce further harm and minimise re-traumatisation. Despite this, the concept (and its various principles) has also been critiqued. This section discusses some of those key critiques.

As alluded to above, trauma-informed practice is fraught with the use of inconsistent terminology (which is perhaps a result of its emergent nature).<sup>93</sup> Reflected in the discussion above, academics have developed various sets of principles and principles have been defined and explained differently (or not explained at all).<sup>94</sup> Where academics and practitioners agree on the applicable principles, at times they have disagreed as to their relative importance. For example, some scholars believe that safety should be prioritised,<sup>95</sup> yet confirmatory factor analysis performed by Travis Hales et al suggests that — in relation to Harris and Fallot's five principles — each principle is unique, equally important and interrelated, and shares a single underlying dimension.<sup>96</sup> That is, primacy need not be given to safety; implementation of any principle will enhance the others.<sup>97</sup>

Furthermore, the principles of trauma-informed practice can be vague and, as such, it can be difficult to determine how they could (or should) be implemented in practice.<sup>98</sup> It is argued that the principles of trauma-informed practice are amorphous, broad and ambiguous,<sup>99</sup> and are therefore difficult to concretely implement and assess. Antonia Quadara and Cathryn Hunter have argued that there is little guidance on how organisations can actually embed these broad principles into their practices.<sup>100</sup> While this may create the flexibility necessary for the principles to be applied in different settings, it also creates a risk that the principles may be applied inconsistently within the same setting or that principles will not be applied as intended.

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<sup>93</sup> Shira Birnbaum, 'Confronting the Social Determinants of Health: Has the Language of Trauma-Informed Care Become a Defense Mechanism?' (2019) 40(6) *Issues in Mental Health Nursing* 476, 477; Lucy Berliner and David J Kolko, 'Trauma-Informed Care: A Commentary and Critique' (2016) 21(2) *Child Maltreatment* 168, 169.

<sup>94</sup> Furthermore, scarcely any of these frameworks have been empirically tested for validity (except for Harris and Fallot's model): see Travis Hales, Nancy Kusmaul and Thomas Nochajski, 'Exploring the Dimensionality of Trauma-Informed Care: Implications for Theory and Practice' (2017) 41(3) *Human Service Organizations* 317, 318.

<sup>95</sup> See, eg, Stavropoulos (n 9) 310: '[t]he principle of safety is central and non-negotiable and underpins all trauma-informed values and priorities'. See also Hales, Kusmaul and Nochajski (n 94) 318.

<sup>96</sup> Hales, Kusmaul and Nochajski (n 94) 323.

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

<sup>98</sup> Berliner and Kolko (n 93) 169; Hales, Kusmaul and Nochajski (n 94) 318; Quadara and Hunter (n 21) 35.

<sup>99</sup> Birnbaum (n 93) 477–8.

<sup>100</sup> Quadara and Hunter (n 21) 36.

In addition, specific considerations arise in relation to the application of trauma-informed practice to the legal system, given it was originally developed for use in the field of human services (and many of the conceptual frameworks have been developed to reflect this). For example, SAMHSA has argued that its assumptions and principles could be applied universally and not just to behavioural health service sectors, although specific application of the principles might differ between settings.<sup>101</sup> However, there are uncertainties around how those principles should be applied in the context of the legal system. Furthermore, given the adversarial and authoritarian nature of the criminal trial (as opposed to the behavioural health service sector's focus on the wellbeing of individuals), there are real questions around the compatibility of the goals of trauma-informed practice with the criminal trial. I return to this issue in Part III.

Ultimately, the discussion in this Part demonstrates that the precise content of the principles of trauma-informed practice has not yet been settled and, indeed, the entire concept of trauma-informed practice is still developing (including as it applies to the criminal trial and legal system more broadly). This provides the impetus for the trauma-informed trial conceptual framework presented in this article.

### C Trauma-Informed Practice and the Legal System

Before I turn to the trauma-informed trial conceptual framework, this section briefly considers how trauma-informed practice has already been applied in the context of the legal system. Although not developed specifically for application in this context, most of the frameworks discussed above have already been applied to certain aspects of the legal system. For example, Elliot et al's framework has been applied by researchers to inform reforms to restorative justice practices<sup>102</sup> and the sexual assault trial,<sup>103</sup> while researchers have applied SAMHSA's framework to legal practice,<sup>104</sup> court processes<sup>105</sup> and sentencing.<sup>106</sup>

In contrast to the three frameworks discussed in Part IIA, the Kezelman and Stavropoulos framework was developed specifically to be applied in the context

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<sup>101</sup> SAMHSA's *Concept* (n 1) 10.

<sup>102</sup> Randall and Haskell (n 7).

<sup>103</sup> Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) 17(1) *International Journal of Evidence and Proof* 74.

<sup>104</sup> Katherine Swanson, 'Barristers Tips: Providing Trauma-Informed Legal Services' (2019) 42 *Los Angeles Lawyer* 15.

<sup>105</sup> McKenna and Holtfreter (n 10); Substance Abuse and Mental Health Services Administration, *Essential Components of Trauma-Informed Judicial Practice* (Report, 2013).

<sup>106</sup> Katherine J McLachlan, 'Trauma-Informed Sentencing in South Australian Courts' (2022) 55(4) *Journal of Criminology* 495; Katherine J McLachlan, 'Using a Trauma-Informed Practice Framework to Examine How South Australian Judges Respond to Trauma in the Lives of Aboriginal Defendants' (2022) 11(2) *Journal of Qualitative Criminal Justice and Criminology* 181.

of legal practice.<sup>107</sup> In their previous work regarding practice guidelines for trauma-informed care and service delivery, Kezelman and Stavropoulos relied on the Harris and Fallot framework.<sup>108</sup> This was expanded upon in their guide for applying trauma-informed practice to legal and judicial contexts (the Kezelman and Stavropoulos framework discussed in this article).<sup>109</sup> That framework's six trauma-informed practice principles are listed in Table 1, above. Although developed for legal practice, these principles do not adequately reflect this context — by, for example, referring to legal system personnel (such as lawyers and judges) or legal system participants (such as defendants, victims or other witnesses). Rather, the framework refers to 'services' and 'clients'.<sup>110</sup> This can make it challenging to determine exactly how the principles should be applied and assessed within the legal system.

To an extent, Kezelman and Stavropoulos' principles reflect many of the other principles of trauma-informed practice discussed in Part IIA. Principles one and five, for example, align with SAMSHA's first and second assumptions (realisation about trauma and recognition of the signs of trauma) while principles two and six encompass SAMSHA's principles of trauma-informed practice. Principle three seems to reflect SAMHSA's assumption three — that services should not just be concerned with the services they provide, but that they must consider *how* they provide those services (ie how they provide services should be trauma-informed). Despite this, Kezelman and Stavropoulos's third principle has not been included in any of the other frameworks discussed above and, additionally, no explanation was given as to why it was included.

Furthermore, while it is necessary that principles are adequately defined (which has not been done by, for example, Harris and Fallot and SAMHSA), such definitions must not come at the expense of clarity and ease of application. Kezelman and Stavropoulos have provided greater detail for their principles, but in doing so have created a framework that is confusing, repetitive and appears to have blurred assumptions with principles. In addition, like SAMHSA they did not explain the scope of safety, trustworthiness, choice, collaboration or empowerment (contained in principle two) which appear to be key principles that are intended to guide trauma-informed legal practice. As such, not only does Kezelman and Stavropoulos's framework not reflect legal practice, but it is less clear than the three frameworks discussed in Part IIA (including in relation to how its principles should be applied in practice). Despite this, the framework has been applied by Queensland's Women's Safety and Justice Taskforce in its work on

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<sup>107</sup> Kezelman and Stavropoulos, 'Trauma and the Law' (n 5) 5–6.

<sup>108</sup> Cathy Kezelman and Pam Stavropoulos, 'The Last Frontier': Practice Guidelines for Treatment of Complex Trauma and Trauma-Informed Care and Service Delivery (Report, 28 September 2012) 21 ('The Last Frontier').

<sup>109</sup> Kezelman and Stavropoulos, 'Trauma and the Law' (n 5).

<sup>110</sup> *Ibid* 4.

addressing coercive control and domestic violence, and women and girls' experiences across the criminal justice system.<sup>111</sup>

Other scholars, as well as government inquiries and law reform bodies, have argued that trauma-informed reforms to the law must occur, but have not linked their suggested reforms to a particular framework.<sup>112</sup> Similarly, legislative reforms have occurred in Australia in recent years that aim to (at least in part) reduce re-traumatisation experienced during the criminal trial process, including reforms for vulnerable, special and child witnesses.<sup>113</sup> However, there is little evidence to suggest that these reforms were introduced specifically as a result of application of a trauma-informed practice conceptual framework.

While Elliot et al, SAMHSA and Kezelman and Stavropoulos' frameworks have been applied in the context of the legal system, the fact that different frameworks have been applied — or that no explicit framework has been applied — demonstrates that a trauma-informed practice framework for the legal system has not yet been settled. Indeed, Australia's *Royal Commission into Institutional Responses to Child Sexual Abuse* recognised that '[c]urrently, the coordination and translation of knowledge about trauma-informed approaches into practice is ad hoc'.<sup>114</sup> More recently, Queensland's Women's Safety and Justice Taskforce emphasised that 'there is no clear and instructive trauma-informed framework for practice for lawyers in Queensland' and, on this basis, recommended creation and implementation of such a framework.<sup>115</sup> The trauma-informed trial conceptual framework presented in this article intends to take a step towards addressing this gap.

Scholars have put forth different reasons why trauma-informed practice should be applied to the legal system. As discussed in Part I, some have argued that legal systems replicate trauma dynamics and therefore risk re-traumatising those who become involved with the legal system.<sup>116</sup> Because of this, a trauma-informed approach is necessary to minimise re-traumatisation and ensure no further harm is done.<sup>117</sup> Other scholars have argued that a trauma-informed approach to the legal system is necessary to 'facilitate justice',<sup>118</sup> for legal

<sup>111</sup> Queensland, Women's Safety and Justice Taskforce (n 15).

<sup>112</sup> Katz and Haldar (n 9); *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) ('*Royal Commission into Institutional Responses to Child Sexual Abuse*'); Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021).

<sup>113</sup> See, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) chs 2, 4; *Crimes Act 1914* (Cth) pt IAD; *Criminal Procedure Act 1986* (NSW) ch 6, pts 4B–7; *Evidence Act 1939* (NT) pt 3; *Evidence Act 1977* (Qld) pt 2, divs 4–4A; *Evidence Act 1929* (SA) ss 12, 13–13A; *Evidence (Children and Special Witnesses) Act 2001* (Tas); *Criminal Procedure Act 2009* (Vic) pt 8.2, divs 4–6; *Evidence Act 1906* (WA) ss 106E–106F, 106H–106HA, 106I–106K, 106N, 106R–106RA.

<sup>114</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse* (n 112) 35.

<sup>115</sup> Queensland, Women's Safety and Justice Taskforce (n 15) 610.

<sup>116</sup> See, eg, Cossins (n 3) 555–60, ch 11; Katirai (n 3); Epstein and Goodman (n 3); Herman (n 3) 160.

<sup>117</sup> See, eg, Cossins (n 3) 555, 569; Kezelman and Stavropoulos, 'Trauma and the Law' (n 5) 9–10.

<sup>118</sup> Kezelman and Stavropoulos, 'Trauma and the Law' (n 5) 10.

responses to be ‘more effective, fair, intelligent, and just’<sup>119</sup> and to ‘achieve best evidence’ which the ‘interests of justice requires’.<sup>120</sup> Other scholars have focussed on the benefits to lawyers in their dealings with clients. For example, trauma-informed lawyering has been argued to help lawyers develop client management skills,<sup>121</sup> to understand the client’s interests better<sup>122</sup> and to ‘competently and zealously represent clients who have experienced trauma’ to make them better advocates.<sup>123</sup> These reasons for applying trauma-informed practice to the legal system inform considerations around what the overarching goal of the trauma-informed trial should be (discussed in Part III below).

As lawyers, judges and other legal system personnel are generally not trained to recognise trauma and its effects, scholars have argued that a universal precautions approach should be taken by these personnel (and the system as a whole) when it comes to interacting with every person who makes contact with the legal system.<sup>124</sup> This approach is said to benefit all people, including lawyers and legal system personnel.<sup>125</sup> Such an approach is argued, however, to require a ‘paradigm shift’ in how the legal system operates and sweeping cultural change within the system<sup>126</sup> because the very nature of the legal system is the antithesis to supporting the recovery (or at least minimising further traumatisation) of traumatised individuals. Indeed, Herman writes in relation to victims:

Victims need social acknowledgment and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience by directly confronting the perpetrator.<sup>127</sup>

Whether the trauma-informed trial should take a universal precautions approach, or an approach that focuses on the individual, is discussed further in Part III.

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<sup>119</sup> Randall and Haskell (n 7) 505.

<sup>120</sup> Cossins (n 3) 555, 561, 569.

<sup>121</sup> See Swanson (n 104).

<sup>122</sup> Katirai (n 3) 112.

<sup>123</sup> Katz and Haldar (n 9) 393.

<sup>124</sup> See, eg, Kezelman and Stavropoulos, ‘Trauma and the Law’ (n 5) 3–4, 7.

<sup>125</sup> *Ibid* 3–4.

<sup>126</sup> *Ibid* 3; Cossins (n 3) 562.

<sup>127</sup> Herman (n 3) 160.

### III THE TRAUMA-INFORMED TRIAL

Part II established that trauma-informed practice is still a developing concept and that a trauma-informed practice conceptual framework for application in the context of the legal system is yet to be settled. It also raised some key critiques and limitations of the concept and its principles. This Part presents a trauma-informed trial conceptual framework that (i) is operationalised to the criminal trial context (with the intention of making the framework easier to apply and assess in this context), and (ii) aims to address key criticisms and limitations of the concept and its principles that were raised in Part II.

As explained in Part I, the trauma-informed trial framework is intended to be used as a tool by lawmakers, policymakers, law reformers, academics, lawyers and others to evaluate the extent to which existing criminal trial practices are trauma-informed and to inform development of new trauma-informed practices and other measures (which may be used by, for example, lawyers, judges and other court personnel).<sup>128</sup> Indeed, this is something that has already been occurring, with trauma-informed practice used to inform recommendations made by law reform bodies and government inquiries.<sup>129</sup>

The trauma-informed trial framework presented in this Part uses SAMHSA's framework as its foundation. The Part begins by explaining why SAMHSA's framework has been chosen as the basis for the trauma-informed trial conceptual framework. It then details how SAMHSA's framework has been operationalised to the criminal trial context, and how it has been interpreted and applied to address key criticisms and limitations of SAMHSA's framework and trauma-informed practice more broadly (as discussed in Part II). The Part concludes by briefly explaining how the methodology utilised in this article could be applied to develop trauma-informed practice conceptual frameworks for application to other legal system contexts.

Before delving into these issues, however, it is necessary to consider whether the concept of trauma-informed practice is even compatible with the adversarial criminal trial. The adversarial criminal trial can be conceptualised as a contest between two opposing parties — the prosecution and the defendant (although

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<sup>128</sup> This is consistent with trauma-informed practice as a framework to effect organisational and systems-level change: Quadara and Hunter (n 21) 35. Additionally, Quadara and Hunter have argued that it may be challenging to translate principles into practice so concrete strategies and tools for people to use may be necessary: at 8. This could include, for example, system-wide measures in the criminal justice system.

<sup>129</sup> In Australia see, eg, *Royal Commission into Institutional Responses to Child Sexual Abuse* (n 112); Victorian Law Reform Commission (n 112); Queensland, Women's Safety and Justice Taskforce (n 15). Queensland Law Reform Commission, *Non-fatal Strangulation: Section 315A Review — Our Terms of Reference* (Background Paper 1, November 2024).

prosecutors are model litigants and, as such, should not try to win at all costs).<sup>130</sup> The trial centres on whether the prosecution can prove the case beyond reasonable doubt (and consequently on whether the defence can establish doubt) as well as whether the defendant's fair trial rights (which include, for example, the presumption of innocence and the right to examine/confront witnesses) are being upheld.<sup>131</sup> If victims play a role, they are mere witnesses for the prosecution to assist in proving the case against the defendant.<sup>132</sup> Victims, defendants and other witnesses who choose to give evidence are open to being challenged as to the truthfulness and reliability of their evidence. Their credibility might also be challenged.

As described in Part II, the central aim of applying trauma-informed practice as it was originally conceptualised is to do no further harm. Within the adversarial system, it may be difficult to achieve this goal, especially with respect to court participants (such as defendants, victims and other witnesses). For example, it may not be possible to do no further harm to victim-witnesses if they are required to recount — and be challenged on — what may have been a traumatic event in front of strangers as well as the alleged perpetrator.<sup>133</sup> Defendants, too, are at risk of suffering further harm by being subject to the authoritarian criminal justice process. The very nature of the criminal trial exposes court participants to potential re-traumatisation which means that it may not be realistic to strive for a trial that does no further harm whatsoever.<sup>134</sup>

However, this does not mean that things should remain as they are, especially if such practices put the wellbeing of court participants at risk. As the Victorian Victims of Crime Commissioner told the Victorian Law Reform Commission:

Trauma-informed responses are key to reducing the risk of secondary victimisation by the criminal justice system. ... While there are some aspects of the adversarial criminal justice system that, by their very nature, will not be victim-centred, even laws and processes that advance the interests of the state and the rights of the accused should be reviewed with a trauma-informed lens.<sup>135</sup>

While a trauma-informed trial that aims to completely prevent re-traumatisation of court participants may be out of reach (at least for the time being), there is scope for the trial to be more trauma-informed in criminal cases — that is, for the trial to strive to *minimise* re-traumatisation. Not only could an approach such as this

<sup>130</sup> Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 7, 35; Chief Justice Jeffrey Miles, 'The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused' (1995) 19(4) *Criminal Law Journal* 193, 195. See also 'Model Litigant Principles', *Department of Justice and Attorney-General* (Web Page, 21 August 2023) <<https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles>>.

<sup>131</sup> *Woolmington v Director of Public Prosecutions* [1935] AC 462, 482; *Dietrich v The Queen* (1992) 177 CLR 292, 298; Jeremy Gans et al, *Criminal Process and Human Rights* (The Federation Press, 2011) 376–7. Doak (n 130) 1–7; Chief Justice Miles (n 130) 195.

<sup>132</sup> Herman (n 3) 160; Cossins (n 3) 551–60.

<sup>133</sup> Herman (n 3) 160; Katirai (n 3) 84–6.

<sup>134</sup> Victorian Law Reform Commission (n 112) 396 [18.45].

improve the trial experience for court participants (and potentially facilitate justice by ensuring best evidence is collected),<sup>136</sup> but it could be compatible with the adversarial criminal trial. A trauma-informed trial would still focus on the prosecution proving the defendant's guilt beyond reasonable doubt while upholding the defendant's fair trial rights but, at the same time, consideration would be given to how court participants experience the trial process and what could be done to make their experience less traumatising. In the light of this, the primary goal of the trauma-informed trial is to minimise re-traumatisation.

### ***A The Foundation: SAMHSA's Framework***

Although there are similarities between the four trauma-informed practice frameworks discussed in Part II, and each framework has its own strengths and limitations, there are several reasons why SAMHSA's framework has been chosen as the foundation for the trauma-informed trial conceptual framework. First, Elliot et al and Kezelman and Stavropoulos' frameworks contain double barrelled principles, principles that repeat other principles in the set and principles that should not be principles (because they are better characterised as, for example, aims or assumptions). This creates frameworks that are confusing and repetitive. In contrast, SAMHSA's framework is far simpler and clearer, and does not contain repetition. It also encompasses many of the principles articulated in the other three frameworks (reflecting its evolution from previous frameworks and all four frameworks' reliance on the literature on trauma theory).

Secondly, while SAMHSA's principles were criticised in Part II for being vague and ambiguous, the vagueness of its principles (and breadth of its assumptions) means that its framework may be applicable in various fields, including fields that do not deliver trauma-specific services (such as the criminal trial). Specifically, it is possible for criminal trial personnel to have a realisation about trauma and understand how it can affect people, to recognise the signs and symptoms of trauma, and to respond by applying principles of trauma-informed practice. SAMHSA's principles of trauma-informed practice could all potentially be applied within the criminal trial. Despite this, there is a need to clarify how SAMHSA's relatively ambiguous assumptions and principles should be applied in the criminal trial context.

Thirdly, a significant strength of SAMHSA's framework is that it contains assumptions as well as principles. These assumptions explicitly acknowledge that there are certain things that it is assumed that an organisation or system does for it to be trauma-informed. While application of principles may change from setting to setting, all organisations or systems must satisfy the assumptions to be trauma-informed.

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<sup>136</sup> See Part IIC above.

Fourthly, SAMHSA specifically set out to develop a conceptual framework for trauma-informed practice that could be applied across various services,<sup>137</sup> as opposed to simply ‘evolving’ the concept over time as Harris and Fallot did.<sup>138</sup> To do this, SAMHSA drew on literature on trauma, practice-generated knowledge about trauma interventions, and survivors’ experiences; consulted a group of experts in the field; and obtained feedback from the public (in the form of over 20,000 comments) on a draft framework.<sup>139</sup> While Harris and Fallot and Elliot et al also consulted practitioners, researchers and trauma survivors to develop their principles,<sup>140</sup> SAMHSA’s framework was articulated much more recently than Harris and Fallot and Elliot et al’s frameworks (in 2014 as opposed to in 2001 and 2005, respectively) and, as such, is based on more recent literature and practice in the field of trauma and trauma-informed practice.

Lastly, although Kezelman and Stavropoulos developed a set of trauma-informed principles to apply to the legal system, their framework does not reflect the legal system context. Rather, it essentially encapsulates SAMHSA’s assumptions and principles.

## **B Operationalising SAMHSA’s Assumptions and Principles**

As described in Part II (and listed in Table 1, above), SAMHSA’s framework consists of a set of four assumptions and six principles.<sup>141</sup> While SAMHSA argued that its framework could be applied across different settings, it noted that terminology may need to be altered to reflect the specific setting in which the framework is being applied.<sup>142</sup> This section operationalises SAMHSA’s assumptions and principles to the criminal trial context in which the trauma-informed trial conceptual framework is intended to be applied. This process also aims to address the critiques and limitations raised in Part II.

### **1 Assumptions**

There are three key ways that SAMHSA’s assumptions must be refined to make them a more effective tool for application in the criminal trial: they must be operationalised to the criminal trial context, they must be clarified and simplified, and they must be modified to make them easier to apply and assess in practice.

First, the assumptions must be operationalised to the criminal trial itself. Specifically, instead of referring to ‘people in the organization or system’,<sup>143</sup> the

<sup>137</sup> SAMHSA’s *Concept* (n 1) 3.

<sup>138</sup> Harris and Fallot, ‘Envisioning a Trauma-Informed Service’ (n 8) 21.

<sup>139</sup> SAMHSA’s *Concept* (n 1) 3–4.

<sup>140</sup> Fallot and Harris, ‘Trauma-Informed Approaches’ (n 53) 6; Elliot et al (n 8) 463–4.

<sup>141</sup> SAMHSA’s *Concept* (n 1) 9–11.

<sup>142</sup> *Ibid* 10.

<sup>143</sup> *Ibid* 9.

assumptions should refer to ‘criminal trial personnel’. Such personnel could include lawyers, judges and other court personnel. Additionally, the assumptions should identify to whom the framework is being applied. Although court personnel can suffer from vicarious trauma (and therefore it has been argued that a trauma-informed approach to the whole legal system is necessary),<sup>144</sup> for the purposes of this article, the focus of the trauma-informed trial is on court participants (such as victims, defendants and witnesses). This is because these people are most at risk of being re-traumatised throughout the trial process (by being exposed to what is likely an unfamiliar environment with many potential triggers).<sup>145</sup> As discussed below, however, the methodology applied in this article could be utilised to develop conceptual frameworks for application to other contexts, including the minimisation of vicarious trauma suffered by court personnel.

Second, the assumptions must be clarified and simplified. Assumptions one and two are necessary because without basic knowledge of what trauma is and how to recognise its signs and symptoms, it is difficult for criminal trial personnel to be *informed* by trauma and, therefore, to apply trauma-informed practice principles (assumption three), including by utilising the trauma-informed practices and other measures available to them. Despite this, assumptions one and two could be simplified to make it clearer what is actually being assumed. In addition, as noted in Part II, assumption four — resist re-traumatisation — is best characterised as the ultimate aim of trauma-informed practice. As such, it should not be included as an assumption of the trauma-informed trial. The ultimate aim of the trauma-informed trial was described above as being to minimise re-traumatisation.

Operationalising and clarifying the assumptions in accordance with the above creates the following set:

- 1) It is assumed that criminal trial personnel understand trauma and how it might affect court participants;
- 2) It is assumed that criminal trial personnel recognise the signs of trauma in court participants; and
- 3) It is assumed that criminal trial personnel respond by applying principles of the trauma-informed trial.

While these assumptions are a considerable improvement, they may still be difficult to apply and assess in practice. For this reason, the assumptions should be turned into a set of questions that can be asked of a particular cohort of criminal trial personnel. These questions are:

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<sup>144</sup> Katz and Haldar (n 9) 359.

<sup>145</sup> See Part I above.

- Do criminal trial personnel understand trauma and how it might affect court participants?
- Can criminal trial personnel recognise the signs of trauma in court participants?
- Have criminal trial personnel applied principles of the trauma-informed trial?

By operationalising the assumptions in this way, they become easier to test and measure. Despite this, the third question — ‘application of principles of the trauma-informed trial’ — may still be challenging to apply and assess in the context of the criminal trial, given the vague and ambiguous nature of SAMHSA’s principles (especially as they apply to the criminal trial).

## **2 Principles**

As with the assumptions, there are three key ways that SAMHSA’s principles must be refined to make them a more effective tool for application in the criminal trial — they must be operationalised to the criminal trial context, they must be clarified, and they must be modified to make them easier to apply and assess in practice. By way of reminder, SAMHSA’s six principles are: safety; trustworthiness and transparency; peer support; collaboration and mutuality; empowerment, voice and choice; and cultural, historical and gender issues.<sup>146</sup>

SAMHSA explained that the principle of safety means physical, psychological and interpersonal safety.<sup>147</sup> This provides a clearer account of what safety means and, as such, should be used to interpret and apply the principle of safety within the trauma-informed trial framework. Taking this approach — and operationalising the principle to reflect the criminal trial context (as I did with the assumptions above) — the principle of safety should be reframed as ‘physical, psychological and interpersonal safety of court participants’. While less vague than SAMHSA’s original principle, principles in themselves can still be difficult to assess and apply. As such, the principle should be converted into a question that can be asked about any practice or other measure used in the criminal trial (for simplicity, ‘measure’ is used in the question to encompass any practice, procedure, policy or other thing used or done in the context of the criminal trial). Specifically, ‘Does the measure promote physical, psychological and/or interpersonal safety of court participants?’ A question such as this orients the person applying the framework to the issue they must consider and makes it far clearer what the principle aims to do in practice. Existing trial measures in Australia that might promote the safety of court participants include, for example, victim-witnesses being able to give evidence via audiovisual link from a

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<sup>146</sup> SAMHSA’s *Concept* (n 1) 10–11.

<sup>147</sup> *Ibid* 11.

location outside the courtroom or from behind a screen, partition or one-way glass (so they do not have to see the defendant when giving evidence).<sup>148</sup>

SAMHSA explained that the principle of trustworthiness and transparency refers to whether operations and decisions are conducted transparently, with the goal of building trust with clients.<sup>149</sup> In the context of the criminal trial, this principle should be operationalised in a way that interrogates whether trust is built between court participants and court personnel, and whether the trial process is transparent for court participants. Specifically, the principle should be reframed as ‘trustworthy court personnel and transparent trial processes’. Again, this principle could be made more effective to apply and assess by turning it into two questions: first, ‘does the measure build trust between court participants and court personnel?’ and, second, ‘does the measure make trial processes more transparent?’ Examples of measures that might build trust between court participants and court personnel, and make the trial process more transparent, include the provision of information to witnesses about the trial process and the building of rapport between prosecutors and victim-witnesses.

In the context of SAMHSA’s framework, the principle of peer support focuses on supportive relationships with other trauma survivors.<sup>150</sup> As the criminal trial is not specifically concerned with support from peers in this sense (ie other trauma survivors), the principle should be interpreted and applied to mean the presence of supportive relationships for court participants throughout the trial process (such as support services for victims, the presence of an emotional support person in court while a witness gives evidence<sup>151</sup> or support from family in court for defendants). Drawing on this explanation, the principle of peer support should be interpreted as ‘supportive relationships for court participants’. To make the principle easier to apply and assess, the principle should also be reframed as a question: ‘does the measure promote supportive relationships for court participants?’

The principle of collaboration and mutuality is defined by SAMHSA to include partnering and promoting collaborative relationships.<sup>152</sup> Without this explanation, however, it is not so clear what ‘mutuality’ refers to. While collaboration and mutuality have similar meanings, mutuality is directed more so at reciprocal relationships while collaborations refer to working together.<sup>153</sup> As such, the principle would be better enunciated as ‘collaborative, reciprocal relationships between court participants and court personnel’. This principle should be transformed into a question to assist with its application and assessment in practice: ‘does the measure promote collaborative, reciprocal

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<sup>148</sup> See above n 113.

<sup>149</sup> SAMHSA’s *Concept* (n 1) 11.

<sup>150</sup> *Ibid.*

<sup>151</sup> See above n 113.

<sup>152</sup> SAMHSA’s *Concept* (n 1) 11.

<sup>153</sup> *Cambridge Dictionary* (online at 14 June 2023) ‘mutuality’ (def 1); *Cambridge Dictionary* (online at 14 June 2023) ‘collaboration’ (def 1).

relationships between court participants and court personnel?’ While similar to the principle of ‘supportive relationships for court participants’, this principle focuses specifically on the relationship between court participants and court personnel. In contrast, the principle of supportive relationships extends beyond this to other relationships that court participants might have (such as with out-of-court victim support workers). Additionally, this latter principle is concerned specifically with supporting court participants rather than collaborations or reciprocity, which are different characteristics of relationships. An example of a measure that might promote collaborative, reciprocal relationships between court participants and court personnel includes a prosecutor and victim-witness working together to determine which alternative arrangements for giving evidence (if any) would suit the victim-witness best.<sup>154</sup>

SAMHSA explained that the principle of empowerment, voice and choice refers to the empowerment of individuals, whether they are given a voice, and whether they are given the opportunity to make their own decisions.<sup>155</sup> It has been argued that people are empowered by giving them a voice that is heard and the choice to decide.<sup>156</sup> Because of this, the principle is best operationalised as ‘empowerment of court participants, including through choice and a voice that is heard’. This principle acknowledges that a person might be empowered in ways other than just giving them voice and choice,<sup>157</sup> but highlights that choice and voice are key ways to empower a person, as reflected in the literature on recovery from trauma.<sup>158</sup> As with the other principles, this principle would more effectively be applied and assessed in practice if it was transformed into a question: ‘does the measure empower court participants, including by giving them choice and a voice that is heard?’ Measures that might empower court participants and give them choice and a voice include, for example, allowing witnesses to choose which alternative arrangements for giving evidence (if any) they ultimately want to use or modifying the rules of evidence to enable witnesses to give evidence in their own words, rather than answering a series of questions that are often intended to only elicit a yes or no answer.

According to SAMHSA, the final principle — ‘cultural, historical and gender responsiveness’ — requires the organisation to move past cultural stereotypes and biases, offer access to gender responsive services, recognise and address historical trauma, and incorporate policies and processes that are responsive to the racial, ethnic, cultural and gender needs of clients.<sup>159</sup> This explanation appears

<sup>154</sup> For legislative provisions on the alternative arrangements available in Australian jurisdictions, see above n 113.

<sup>155</sup> SAMHSA’s *Concept* (n 1) 11.

<sup>156</sup> See, eg, Kristin L Anderson, ‘Victims’ Voices and Victims’ Choices in Three IPV Courts’ (2015) 21(1) *Violence Against Women* 105.

<sup>157</sup> See, eg, SAMHSA’s explanation of the principle of empowerment, voice and choice: SAMHSA’s *Concept* (n 1) 11.

<sup>158</sup> See, eg, Herman (n 3) 133–6; van der Kolk (n 43) 169, 212–14, ch 14.

<sup>159</sup> SAMHSA’s *Concept* (n 1) 11.

to focus on two things: that organisations be responsive to individuals' needs and unequal starting points (whether that be because of cultural, racial, ethnic, historical or gender factors), and that they move past stereotypes and biases.

While the whole point of trauma-informed practice is to be responsive to individuals' needs, this principle focusses on the context — needs that arise because of factors outside trauma specifically (even though these factors may have contributed to the trauma). It also emphasises that, as part of being responsive to individual needs, people should eschew any reliance on stereotypes and biases. In the context of the criminal justice system, relevant to the issue of stereotypes and biases are myths and misconceptions — research shows that myths and misconceptions about the victim, defendant and/or crime persist in evidentiary rules, judicial directions and bench book guidance, and are held by many jurors.<sup>160</sup> Operationalisation of the principle to the criminal trial should therefore reflect these things.

As such, the principle should be restated as 'responsiveness to cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants, eschewing reliance on stereotypes, biases, myths and misconceptions'. To make the principle easier to apply and assess, it should be turned into two questions. Specifically, 'is the measure responsive to the cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants?' and 'does the measure eschew reliance on stereotypes, biases, myths and misconceptions?' Examples of measures that might reflect this principle include allowing Aboriginal and Torres Strait Islander defendants to attend a Murri Court in Queensland<sup>161</sup> or permitting expert evidence to be given about the behaviour of domestic, family and sexual violence complainants (including the impact of trauma on such complainants).<sup>162</sup>

The operationalised principles presented above specifically reflect the criminal trial context yet are still sufficiently flexible to allow them to be applied across and throughout the criminal trial process. They are also less ambiguous than SAMHSA's principles and it is clearer what they aim to achieve. In this way, the principles will be easier to apply and assess in practice. Whether or not a certain measure does (or will) in fact promote a particular principle can only be determined with research into that specific measure. There are many ways that such research could be undertaken, but this could involve, for example, asking court participants for their thoughts on particular measures or by comparing outcomes when a particular measure is used (as opposed to not used).

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<sup>160</sup> See, eg, Cossins (n 3) 487, 555–60, chs 6, 10–11; Katirai (n 3) 86; Epstein and Goodman (n 3) 425–32; Herman (n 3) 160.

<sup>161</sup> 'Murri Court', *Queensland Courts* (Web Page, 22 April 2022) <<https://www.courts.qld.gov.au/courts/murri-court>>.

<sup>162</sup> In Australia, see, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74A; *Evidence Act 1977* (Qld) pt 6A, div 1A; *Evidence Act 1929* (SA) pt 3, div 4; *Criminal Procedure Act 2009* (Vic) s 388; *Evidence Act 1906* (WA) ss 36BE, 39–39B.

### 3 Universal Precautions or a Focus on the Individual

Like other authors, SAMHSA argued that its principles of trauma-informed practice must be applied taking a universal precautions approach.<sup>163</sup> The universal precautions approach was discussed in Part II but, briefly, it assumes a history of trauma in all people and, as such, suggests that it is best practice to treat all clients as trauma-survivors.<sup>164</sup>

Some stakeholders have argued that a universal precautions approach should be taken in the legal system because legal system personnel are not trained to recognise trauma and its effects.<sup>165</sup> However, the universal precautions approach has been criticised by some feminist scholars who argue that it has the potential to ignore the diversity in women's experiences, identity and coping, and erase their unique agency — they argue that the focus should be on the uniqueness of the individual (ie an individually responsive approach should be taken).<sup>166</sup> Moreover, some feminist scholars have highlighted that not all people will have persisting trauma problems (and therefore not all will need trauma-informed practices).<sup>167</sup>

There are reasons why both approaches — universal precautions and individually responsive — may be appropriate in the context of a trauma-informed trial. For example, a universal precautions approach may save time and resources, and might be easier for court personnel to apply and for the trial to accommodate (given measures that are available would be the same across all trauma-informed trials). This is especially so if court personnel do not have adequate knowledge of how to recognise when court participants might be suffering from trauma (and therefore might need additional assistance navigating the trial process). On the other hand, an individually responsive approach may ensure the approach taken in the case as well as how court participants are treated are tailored specifically to participants' needs, which could improve their experience of the trial and benefit the prosecution/defence. It could also be more feasible in practice, given not all courts may have the resources to engage in trauma-informed practices in every case (such as spare court rooms, relevant technology, support people or extra time). Additionally, the individually responsive approach is more consistent with the principles of 'empowerment of court participants, including through choice' and 'responsiveness to the cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants', which focus on an individual's needs and desires.

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<sup>163</sup> SAMHSA's *Concept* (n 1) 10.

<sup>164</sup> *Ibid.*

<sup>165</sup> See, eg, Kezelman and Stavropoulos, 'Trauma and the Law' (n 5) 3–4, 7.

<sup>166</sup> Emma Tseris, 'Social Work and Women's Mental Health: Does Trauma Theory Provide a Useful Framework?' (2019) 49(3) *British Journal of Social Work* 686, 690 ('Social Work and Women's Mental Health'); Birnbaum (n 93) 478.

<sup>167</sup> Tseris, 'Social Work and Women's Mental Health' (n 166) 687; Emma Tseris, 'A Feminist Critique of Trauma Therapy' in Bruce MZ Cohen (ed), *Routledge International Handbook of Critical Mental Health* (Routledge, 2017) 255; Berliner and Kolko (n 93) 171.

Because both approaches have merit in the trial context, rather than mandating application of the universal precautions approach, the trauma-informed trial framework should begin with the universal approach but provide scope for taking an individually responsive approach. This could be achieved by refining the third assumption of the trauma-informed trial as follows: 'it is assumed that criminal trial personnel apply principles of the trauma-informed trial, *taking a universal precautions approach unless otherwise appropriate*'. Framing the assumption in this way highlights that trauma-informed practices should be applied universally within the trial (to victims, defendants, witnesses and other court participants, as relevant) but if this is not appropriate, then an individually responsive approach should be taken. This could operate as an 'opt-out' system for court participants, providing scope for them to decline trauma-informed practices, consistent with the principles of the trauma-informed trial.

In the context of the criminal trial, this approach might be more suitable given court personnel may not possess the knowledge necessary to be able to recognise when someone might be suffering from trauma or, indeed, to be able to disentangle the potentially many causes of disadvantage that court participants might have.<sup>168</sup> In this way, the default position would be for court personnel to universally apply the trauma-informed measures available (assuming there could be a diversity of issues at play, including trauma), unless other information indicates otherwise (such as a victim-witness informing the prosecutor of their wishes or medical evidence indicating an individually responsive trauma-informed practice should be used instead). A similar approach could be taken by lawmakers, policymakers, law reformers, academics and others when considering how potential reforms could operate.

### **C Trauma-Informed Practice Beyond the Trial**

While this article has presented a conceptual framework for the trauma-informed trial, the methodology utilised in this article could be applied to develop similar conceptual frameworks for application to other legal system contexts and, in this way, provide clarity as to how trauma-informed practice should be applied in those contexts. This is something that some staff members (including myself) did at the Australian Law Reform Commission ('ALRC') to inform development of staff practices for engaging with consultees and other members of the public as part of the *Justice Responses to Sexual Violence Inquiry*.

The Terms of Reference for that Inquiry asked the ALRC to take a 'trauma-informed ... approach'.<sup>169</sup> To inform development of inquiry-specific trauma-

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<sup>168</sup> See, eg, Megan C Kurlychek and Brian D Johnson, 'Cumulative Disadvantage in the American Criminal Justice System' (2019) 2(1) *Annual Review of Criminology* 291.

<sup>169</sup> 'Terms of Reference', *Australian Law Reform Commission* (Web Page, 23 January 2024) <<https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference/>>.

informed practices, we utilised the approach taken in this article to operationalise SAMHSA's trauma-informed practice framework to the law reform inquiry process. These operationalised principles were then converted into questions that we asked of various practices. These questions were:

- 1) Does the measure promote the physical, psychological and relational safety of consultees and other engaged members of the public?
- 2) Does the measure foster trust between consultees/other engaged members of the public and ALRC staff? Does the measure make the ALRC inquiry process more transparent?
- 3) Does the measure create room for peer support for consultees and other engaged members of the public?
- 4) Does the measure promote collaborative, reciprocal relationships between consultees/other engaged members of the public and ALRC staff?
- 5) Does the measure empower consultees and other engaged members of the public, give them a voice that is heard, and give them choice?
- 6) Is the measure responsive to the individual needs and inequalities of consultees and other engaged members of the public? Does the measure eschew reliance on stereotypes, biases, myths and misconceptions?

We took a similar approach to inform development of trauma-informed practices to minimise the risk of vicarious trauma suffered by ALRC staff during the course of the inquiry.

The staff who were involved in this process, including myself, found the methodology utilised to be useful for providing clarity as to how trauma-informed practice should be applied in the law reform inquiry process. Some of my colleagues commented that the questions in particular were immensely helpful, as they oriented us to the particular issue that needed to be considered and provided guidance as to how the relevant principle should be applied and assessed in practice.

#### IV CONCLUSION

This article presented a conceptual framework for the trauma-informed trial. It is intended (and hoped) that others will use this framework to develop trauma-informed practices that can be applied in specific trial contexts, or to address particular problems that arise in criminal trials (such as the experience of domestic, family and sexual violence victim-witnesses). The aim of the trauma-informed trial is to *minimise* re-traumatisation, an aim that this article argued is compatible with the adversarial trial and defendant's fair trial rights.

By way of summary, the trauma-informed trial conceptual framework consists of three assumptions — specifically, that criminal trial personnel:

- 1) Understand trauma and how it might affect court participants;
- 2) Recognise the signs of trauma in court participants; and
- 3) Apply principles of the trauma-informed trial, taking a universal precautions approach unless otherwise appropriate.

To make the assumptions easier to apply and assess in practice, the assumptions were converted into a set of questions to be asked of a particular cohort of criminal trial personnel, as follows:

- Do criminal trial personnel understand trauma and how it might affect court participants?
- Can criminal trial personnel recognise the signs of trauma in court participants?
- Have criminal trial personnel applied principles of the trauma-informed trial, taking a universal precautions approach unless otherwise appropriate?

When applied to a trial setting, the six trauma-informed practice principles result in the following principles and associated questions:

1. *Physical, psychological and interpersonal safety of court participants*
  - Does the measure promote physical, psychological and interpersonal safety of court participants?
2. *Trustworthy court personnel and transparent trial processes*
  - Does the measure build trust between court participants and court personnel?
  - Does the measure make trial processes more transparent?
3. *Supportive relationships for court participants*
  - Does the measure promote supportive relationships for court participants?
4. *Collaborative, reciprocal relationships between court participants and court personnel*
  - Does the measure promote collaborative, reciprocal relationships between court participants and court personnel?
5. *Empowerment of court participants, including through choice and a voice that is heard*

- Does the measure empower court participants, including by giving them choice and a voice that is heard?
6. *Responsiveness to cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants, eschewing reliance on stereotypes, biases, myths and misconceptions*
- Is the measure responsive to the cultural, historical, racial, ethnic, gender and other needs and inequalities of court participants?
  - Does the measure eschew reliance on stereotypes, biases, myths and misconceptions?

It is intended that the set of questions above be asked about a particular trial measure as a means of assessing the extent to which that measure promotes trauma-informed practice principles (and, in this way, whether the measure might minimise re-traumatisation).

The trauma-informed trial framework summarised above is designed to address some of the limitations and critiques of existing trauma-informed practice frameworks, including that a framework for application in the context of the criminal trial is yet to be settled. Trauma-informed practice is increasingly being applied by law reform and government bodies examining issues in the context of criminal law, so creating a conceptual framework specific to the criminal trial will be of immense practical benefit. Given the research shows that many defendants and victims of crime have suffered traumatic experiences, this conceptual framework will be an invaluable tool for those seeking to minimise the re-traumatising nature of the criminal trial.

# LEAVING CAN BE SO HARD: THE LIABILITY OF A FIDUCIARY EMPLOYEE FOR BREACH OF CONFIDENCE ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

PETER DEVONSHIRE\*

*An employee owes common law and equitable duties to his or her employer. Both import duties of fidelity and loyalty. The most significant difference lies in the nature and scope of remedies for breach of those obligations. In this setting, the demarcation between law and equity can be elusive, particularly if an employee occupies a fiduciary position. The implications are explored with respect to a breach of confidence by an employee who appropriates an employer's confidential information to assist in setting up a competing business. Starting from first principles, an employment relationship is founded in contract and if fiduciary duties arise, they are circumscribed by the terms of that agreement. The relevant legal regime will determine whether the employer is confined to damages for breach of contract or whether equitable relief in the form of equitable compensation and an account of profits can be granted. This is explored by reference to the fundamental concepts which underlie the employment relationship and their engagement with law and equity.*

## I INTRODUCTION

This article will assess the nature and extent of a duty of confidence in respect of employment relationships where a fiduciary takes preparatory steps to set up in competition with their employer. It is trite that while the employment relationship subsists, a fiduciary owes common law, statutory and equitable duties of loyalty and good faith to his employer. A fiduciary may advance his or

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\* Professor of Law, University of Auckland. A version of this article was presented at the Private and Commercial Law Annual Conference, University of Western Australia, December 2023. I would like to thank the participants for their comments. I also acknowledge, with thanks, helpful suggestions from Ben Chen. I am grateful to Jamie Glister and Rohan Havelock for their insightful comments on an earlier draft. Finally, I would like to convey my thanks to the anonymous referees for their helpful suggestions.

her personal interests while serving as an employee, provided these duties are observed.<sup>1</sup> In practice, it is a fine line between fidelity and betrayal.

This discussion exposes the unsettled state of the law of confidence and its diverse legal foundations, variously attributed to contract, property law and equity. A duty of confidence may be an incident of a fiduciary relationship, attracting obligations within that setting. Although this may co-exist with other legal constructs, the respective obligations may differ. Compounding this, a duty of confidence may be an express or implied term of a contract.

Attention then turns to the remedy for breach of confidence. Two particular issues will be considered. First, the demarcation of compensatory and gain-based relief, with particular reference to the taxonomy of the wrong and contrasting positions on causation and limiting principles. Second, conceptual difficulties that arise from the jurisdictional basis of the proceedings. For example, whether an account of profits can be granted in equity's auxiliary jurisdiction for breach of contract or whether the plaintiff is confined to damages at law. This is particularly problematic in cases where equitable relief is neither expressly contemplated nor expressly excluded. This is developed further by exploring whether these approaches can be reconciled on the basis that an account of profits serves to enforce a performance interest. The article will conclude by drawing together some common themes that unify the nature of a duty of confidence and the normative expectations that underpin it.

## II THE DOCTRINAL BASIS OF A DUTY OF CONFIDENCE IN AN EMPLOYMENT RELATIONSHIP

A duty of confidence has a lineage which derives from different private law sources.<sup>2</sup> Equity has long recognised a duty of confidence, both as a general

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<sup>1</sup> It is moot whether an employee's failure to disclose to his employer that he is taking preparatory steps to set up in competition is a breach of the employment relationship. This will depend on factors such as 'the position and duties of the employee, the nature of the acts of preparation, the effect of non-disclosure upon the employer's business interests, and the motives of the employee': *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 807 (McLelland J).

<sup>2</sup> This is framed against an interpretation of the Judicature Acts (commonly described as the fusion-fallacy debate). Jurisdictions, such as New Zealand, which openly recognise the merger of law and equity, are more receptive to applying remedies and principles irrespective of their historical origins. See, eg, *Day v Mead* [1987] 2 NZLR 443, 451 (Cooke P). In contrast, Australia has largely adopted the fusion fallacy approach. See, eg, *Maguire v Makaronis* (1997) 188 CLR 449, 489 (Kirby J); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 226 [156] (Kirby J) ('*Pilmer*'); *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 306 [18] (Spigelman CJ), 326 [139]–[145] (Mason P), 391–2 [353] (Heydon JA) ('*Harris*'). See also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2015) ch 2.

obligation and as an incident of a fiduciary relationship.<sup>3</sup> With respect to the former, the doctrine has a broad function in preventing unconscionable conduct.<sup>4</sup> In this setting, an expansive range of equitable remedies is available, including injunctive relief, delivery up, an account of profits<sup>5</sup> and compensation in the court's equitable jurisdiction.<sup>6</sup> A duty of confidence may also arise as the term of a contract, express or implied. This is a common law obligation and the traditional remedy is damages. The duty occurs in many settings, including employment relationships, personal and professional relationships, business negotiations, surreptitious journalism, joint venture agreements and information gathered by the government and public bodies. The obligation can arise incidentally and is not confined to the original parties to the confidence or dependent upon a direct relationship between them.<sup>7</sup>

This article focuses on the nature of a duty of confidence owed by a fiduciary employee. During the currency of the employment relationship, an employee is subject to a stringent duty of confidence. The standard is exacting, whether expressed as an equitable or common law duty. Some employees are classed as fiduciaries<sup>8</sup> and subject to obligations on that basis. This has implications for both liability and remedy. The latter is particularly significant when an employer seeks gain-based relief against a delinquent employee.

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<sup>3</sup> The jurisdiction of the medieval Chancellors is depicted in the couplet: 'These three give place in court of conscience, Fraud, accident, and breach of confidence.' See FW Maitland, *Equity: A Course of Lectures*, ed AH Chaytor, WJ Whittaker and John Brunyate (Cambridge University Press, 2<sup>nd</sup> rev ed, 1936) 7 n 1. See also *Saltman Engineering Co Ltd v Campbell Engineering Co* (1948) 65 RPC 203, 215 (Lord Greene MR); *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50–1 (Mason J) ('Fairfax'); *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281, 290 [39] (Finn, Sundberg and Jacobson JJ).

<sup>4</sup> *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J) ('Moorgate'); *Stephens v Avery* [1988] 1 Ch 449, 456 (Browne-Wilkinson V-C); *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73, 95 (Gummow J); *Douglas v Hello! Ltd* [2001] QB 967, 985 (Brooke LJ).

<sup>5</sup> *Seager v Copydex Ltd* [1967] 1 WLR 923, 931 (Lord Denning MR); *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 46 (Megarry J); *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515, 520–1 (Woodhouse J for the Court); *Fairfax* (n 3) 50–1 (Mason J); *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, 157–63 (Binnie J).

<sup>6</sup> *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301 (Cooke P); *Catt v Marac Australia Ltd* (1986) 9 NSWLR 639, 659 (Rogers J).

<sup>7</sup> In a colourful and oft quoted example: 'where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by'. See *A-G v Observer Ltd* [1990] 1 AC 109, 281 (Lord Goff).

<sup>8</sup> The New South Wales Court of Appeal has recently stated that *all* employees are fiduciaries, although their scope may be limited: *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151, 191–2 [150]–[154] (Gleeson, Leeming and White JJA) ('Anderson'). See below n 28 and accompanying text for discussion.

## A An Employee's Status

It is axiomatic that an employment relationship imports common law duties of fidelity and good faith to an employer.<sup>9</sup> This has been expressed as embodying duties of loyalty, honesty, confidentiality and mutual trust.<sup>10</sup> A duty of fidelity is a strong corrective where an employee fails to faithfully serve his or her employer. Fidelity carries the expectation that the employee 'shall not use except for the purposes of service, the opportunities which that service gives him of gaining information'.<sup>11</sup> These stringent standards broadly correspond with fiduciary obligations, but it does not follow that every employment relationship is fiduciary. The finding that a relationship is fiduciary assumes a transcendent standard that exceeds a duty of fidelity.<sup>12</sup> However, the distinction is elusive:

The problem of identifying the scope of any fiduciary duties arising out of the relationship is particularly acute in the case of employees. This is because of the use of potentially ambiguous terminology in describing an employee's obligations, which use may prove a trap for the unwary. There are many cases which have recognised the existence of the employee's duty of good faith, or loyalty, or the mutual duty of trust and confidence — concepts which tend to shade into one another. ... Accordingly, in analysing the employment cases in this field, care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations.<sup>13</sup>

The nature and extent of an employee's duty of loyalty is a convenient criterion for distinguishing a fiduciary and non-fiduciary employee. Although loyalty does not, in the abstract, define a fiduciary employee, its distinguishing feature is the exclusivity of this undertaking:

An employee owes an obligation of loyalty to his employer but he will not necessarily owe that exclusive obligation of loyalty, to act in his employer's interest and not in his own, which is the hallmark of any fiduciary duty owed by an employee to his employer. The distinguishing mark of the obligation of a fiduciary, in the context of employment, is not merely that the employee owes a duty of loyalty but of single-minded or exclusive loyalty.<sup>14</sup>

<sup>9</sup> *Robb v Green* [1895] 2 QB 315, 317 (Lord Esher MR), 320 (Kay LJ) ('*Robb*'); *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 135–6 (Neill LJ) ('*Faccenda Chicken*').

<sup>10</sup> *Concut Pty Ltd v Worrell* (2000) 176 ALR 693, 705–7 [51] (Kirby J).

<sup>11</sup> *Merryweather v Moore* [1892] 2 Ch 518, 524 (Kekewich J).

<sup>12</sup> See, eg, *Bayley & Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341, [232] (Foster J); *Nexgen Sydney Pty Ltd v Barakat* [2022] NSWSC 312, [380] (Ward CJ in Eq) ('*Nexgen*').

<sup>13</sup> *Nottingham University v Fishel* [2000] ICR 1462, 1492–3 (Elias J) ('*Nottingham*'). This may not represent the view in New South Wales, following the decision of *Anderson* (n 8): see below n 28 and accompanying text. Also, the reference to a 'mutual duty of trust and confidence' does not represent the view of the High Court of Australia. In *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, the High Court rejected the notion that there is an implied *mutual* duty of trust and confidence in an employment contract: at 178 [1] (French CJ, Bell and Keane JJ).

<sup>14</sup> *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 16, 448 [36] (Moses LJ). See also *Woolworths Ltd v Olson* (2004) 184 FLR 121, 185 [212] (Einstein J).

Employees who owe a duty of undivided loyalty are subject to the unique principles developed by equity in respect of unauthorised gains and conflict of interest:

The fiduciary duty that an employee has to an employer within the scope of the relationship of employment, no less than the fiduciary duty that any other person in a fiduciary position has to any other person to whom the fiduciary duty is owed ... in respect of which the person in the fiduciary position has undertaken or assumed responsibility to act in the exclusive interests of that other person, is a duty of 'absolute and disinterested loyalty'. That duty of loyalty is imposed in equity by means of two overlapping 'proscriptive obligations'. ... 'The first', often referred to as the 'conflict rule' ... 'The second', often referred to as the 'profit rule'...<sup>15</sup>

It follows that care must be taken not to immediately equate obligations of good faith and loyalty with fiduciary duty.<sup>16</sup> A chauffeur employed by one person may work on his own account as a taxi driver during off-duty hours without necessarily acting inconsistently with his employer's interests.<sup>17</sup> In contrast, a sales manager who markets similar products to potential customers of his employer during his off-duty hours may be in breach of a duty of loyalty.<sup>18</sup> Loyal performance must be exclusive in the case of the sales manager, but not the chauffeur. The determinative factor is not simply what an employee is engaged to do but how that duty is discharged in the context of the employment relationship. In the example of the sales manager and the chauffeur, the duty of loyalty differs and in turn defines the status of the former as a fiduciary and the latter as a non-fiduciary employee.

In practical terms, an errant employee is as likely to be snared by a duty of fidelity as a breach of fiduciary duty. However, as will be discussed below, the classification of the wrong may have significant implications to the outcome and, importantly, the remedy. This draws to the fore the distinction between status-based and fact-based fiduciary relationships. The former, such as trustee and beneficiary, solicitor and client, partners, company directors, agent and principal, are deemed to be inherently fiduciary. With the exception of relationships falling within these categories,<sup>19</sup> an employee is not — at least in a general sense — a fiduciary.<sup>20</sup> While relationships falling outside the status-based categories are not presumptively fiduciary, it may be established on the particular

<sup>15</sup> *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 29–30 [67]–[69] (Gageler J) (citations omitted) ('*Lifeplan*').

<sup>16</sup> *Nottingham* (n 13) 1493 (Elias J).

<sup>17</sup> Arguably, loyalty is not a significant feature of this form of employment, but the example brings home the point that the employee's off-duty activities are not inconsistent or harmful to his employer and to that extent a duty of loyalty is not engaged.

<sup>18</sup> See *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, 172, 174–8 (Lord Greene MR), 179–83 (Morton LJ).

<sup>19</sup> It is apparent from the specificity of these roles that employment relationships per se do not necessarily fall within the status-based category.

<sup>20</sup> As noted below, particular obligations of an employee may create fiduciary duties.

facts that a relationship meets the required standard.<sup>21</sup> In this setting, a fiduciary obligation may arise out of the employment relationship although it is not inherent in the nature of the relationship itself.<sup>22</sup>

An inference as to an employee's status may be drawn from the employee's seniority,<sup>23</sup> but a more comprehensive approach is usually required.<sup>24</sup> This is achieved by identifying the employee's duties, the manner in which they are carried out and their significance to the employer.<sup>25</sup> This supplies a context in which it can be asked whether the employee has a special opportunity to exercise power or discretion to the detriment of their employer and whether, as a result, the employer is vulnerable to abuse. As Ward CJ in *Equity* commented:

[T]he test requires one to take into account the features of the particular employment relationship in question (including matters such as ascendancy, influence, vulnerability, trust, confidence or dependence) as to whether there is a reasonable expectation that a party will act in another's interest to the exclusion of his or her own or a third party's interest.<sup>26</sup>

Fundamentally, the focus is the duty, not the relationship. The obligations which are the constituents of that duty define the nature of the relationship. In Paul Finn's celebrated pronouncement: '[A] person is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to fiduciary obligations that he is a fiduciary.'<sup>27</sup>

However, the status of an employment relationship is not without controversy. In *Anderson v Canaccord Genuity Financial Ltd* ('*Anderson*'), the New South Wales Court of Appeal stated that, as a general proposition, employees owe fiduciary obligations to their employers.<sup>28</sup> Appellate authorities establish that two elements must be separately assessed: the existence of a fiduciary relationship and the scope of the fiduciary obligations that arise.<sup>29</sup> In *Anderson*, the conduct of two senior company employees was in issue. The initial premise was that the defendants were fiduciaries. It was then necessary to determine the scope of their fiduciary obligations and to assess liability by reference to equity's traditional strictures. On the facts it was found that the defendants were not permitted to act self-interestedly by removing an existing trustee and appointing entities in which they had a personal interest.

<sup>21</sup> For example, in *A Company v Secretariat Consulting Pte Ltd* [2021] 4 WLR 20 it was questioned whether an expert witness owes a fiduciary duty of loyalty to his or her client.

<sup>22</sup> *Nottingham* (n 13) 1491 (Elias J).

<sup>23</sup> *Colour Control Centre Pty Ltd v Ty* (Supreme Court of New South Wales, Santow J, 24 October 1995) [48].

<sup>24</sup> *Victoria University of Technology v Wilson* (2004) 60 IPR 392, 438 [145] (Nettle J).

<sup>25</sup> *Crowson Fabrics Ltd v Rider* [2008] FSR 17, 445–6 [77]–[83] (Peter Smith J).

<sup>26</sup> *Nexgen* (n 12) [379] (Ward CJ in Eq).

<sup>27</sup> PD Finn, *Fiduciary Obligations* (Law Book, 1977) 2.

<sup>28</sup> *Anderson* (n 8) 185 [126] (Gleeson, Leeming and White JJA).

<sup>29</sup> *Ibid.*

A concern with the Court of Appeal's approach in *Anderson* is that an enquiry regarding the scope of the obligations assumes a substantive determination of the status of the relationship and the duties which inform it. Their Honours elaborate:

[I]t is not sufficient to hold that a fiduciary obligation *exists*. The next step is to determine the *scope* of that obligation. Ordinarily, unless the employee is very senior, or has a large degree of authority, there is unlikely to be conduct which falls within the *scope* of that obligation.<sup>30</sup>

On this model, an employment relationship is classified as a status-based fiduciary relationship. But unless it falls within certain exceptions (seniority and degree of authority), in the normal course there is no content to the putative fiduciary relationship. This has the semblance of putting the cart before the horse when the cart is empty.

In surveying the authorities, the New South Wales Court of Appeal placed particular reliance on Mason J's statement in *Hospital Products Ltd v United States Surgical Corporation* ('*Hospital Products*')

The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations ... viz, trustee and beneficiary, agent and principal, solicitor and client, *employee and employer*, director and company and partners.<sup>31</sup>

This passage describes status-based fiduciary relationships. However, it is unsafe to categorise employment relationships as inherently fiduciary. It cannot be said that every employee owes an exclusive duty of loyalty and undertakes to act for or on behalf of his or her principal in the exercise of a power or discretion which will affect the interests of the principal. Nor is it necessarily the case that an employer reposes trust and confidence in the employee and is vulnerable to abuse by that person.<sup>32</sup> The obligations that flow from a fiduciary relationship are onerous and, understandably, equity is parsimonious in recognising relationships as inherently fiduciary. Taking the relationship of trustee and beneficiary, the elements of fiduciary duty are unquestionably present. Other nominate relationships have the common feature that one party enjoys a dominant position of control, with the ability to exploit their role for personal gain. While this may be true of some employment relationships, it is unrealistic to suggest that it applies to employment relationships generally. Similarly, it does not follow that an employer is necessarily vulnerable to the conduct of an employee. The relationship is founded in contract and the employer typically has the ability to set the terms.

It would therefore be more accurate to say that *some* employment relationships are fiduciary. A relationship falling outside the usual status-based

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<sup>30</sup> *Ibid* (emphasis in original).

<sup>31</sup> (1984) 156 CLR 41, 97 (emphasis added) ('*Hospital Products*').

<sup>32</sup> *Ibid* 96–7 (Mason J). In any event, an employer may be adequately protected by analogous common law duties of fidelity and faithful performance.

categories can, of course, on enquiry, be deemed fiduciary. Given the diversity of employment relationships, this cannot be placed any higher. In *Anderson*, the New South Wales Court of Appeal discussed whether an errand boy could be a fiduciary in relation to his master.<sup>33</sup> To adopt, with variation, the example given by the Court, suppose an errand boy is given a folded note to take to his master. The errand boy reads it. It is a tip to invest in a particular company. As instructed, the errand boy delivers the note to his master. His master duly invests in the company and makes a significant profit. The errand boy does the same. The classification of the relationship and the taxonomy of the wrong is an essential precursor to the remedy. On these facts the errand boy is not a fiduciary,<sup>34</sup> because he does not act in a capacity of trust and confidence.<sup>35</sup> These expectations simply do not fit the facts. It is true that in this, as in most relationships, each party has the capacity to cause harm to the other, but such concerns are not the exclusive preserve of equity. The errand boy may be liable in tort or contract,<sup>36</sup> although the likely award would be nominal damages.<sup>37</sup>

## B Contract as the Foundation of an Employment Relationship

An employment relationship is founded in contract. This is usually signified by a formal agreement, although a purely oral contract suffices.<sup>38</sup> In either case,

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<sup>33</sup> *Anderson* (n 8) 194 [162]–[165] (Gleeson, Leeming and White JJA). The Court of Appeal cited *Re Coomber* [1911] 1 Ch 723, 728, where Fletcher–Moulton LJ observed: '[f]iduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change'.

<sup>34</sup> Much could be said about the errand boy. Even if his position is not deemed fiduciary, it is arguable that he is a fiduciary when conveying confidential information. That is, a person 'may be in a fiduciary position *quoad* a part of his activities and not *quoad* other parts': *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, 1130 (Lord Wilberforce for the Board) (Privy Council) (emphasis added) ('*New Zealand Netherlands Society*'). However, the delivery of written communications would appear to be central to the job, so it is a case of all or nothing. On this basis it is submitted that the role of an errand boy is most appropriately cast as non-fiduciary. Cf *Anderson* (n 8) 194 [164] (Gleeson, Leeming and White JJA).

<sup>35</sup> However, this is not beyond doubt. Breach of confidence may arise if the note was in a sealed envelope and the contents were inherently confidential.

<sup>36</sup> In contrast, if the errand boy is a fiduciary, the gains would offend the profit rule. Equity's usual response is to require the wrongdoer to disgorge the gains.

<sup>37</sup> The outcome will probably be the same irrespective of whether the master invests in the shares. The errand boy's exploitation of the contents of the letter has no causal bearing on the master's use of this information. For a more contemporary perspective, in *Nexgen* (n 12), the defendant took from her former employer a spreadsheet containing confidential information about prospective sales leads. However, her former employer was unable to establish that any loss was sustained and nominal damages were awarded for breach of the defendant's employment contract: at [365]–[366] (Ward CJ in Eq).

<sup>38</sup> See, eg, *Plus One International Pty Ltd v Ching (No 3)* [2020] NSWSC 1598, [436]–[443] (Hallen J) ('*Plus One*'). But compare with the position in New Zealand: *Employment Relations Act 2000* (NZ) ss 54, 65.

certain terms are generally implied.<sup>39</sup> The contractual nature of the relationship does not preclude fiduciary duties, but the terms of an agreement have primacy. Essentially, the parties may prescribe or exclude the elements of their relationship:

This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms ...<sup>40</sup>

Insofar as the terms of an employment contract are inconsistent with fiduciary obligations, contract prevails,<sup>41</sup> as Mason J's classic statement in *Hospital Products* makes clear:

That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract which regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them.<sup>42</sup>

Thus, the terms of an employment contract and those which are necessarily implied, will define the nature of the relationship. Liability flows from consensus to the extent that contract describes the parties' expectations. However, there are limits to contractual primacy. Contract doctrine is less persuasive with respect to remedy. While equity usually follows the law, intervention is often triggered not because there is no legal sanction, but because on the facts the remedy is inadequate. This brings equity's auxiliary jurisdiction into play and exposes the limits to which contract holds sway in confining relief to damages. It may be

<sup>39</sup> Implied terms include a duty of confidence: *Robb* (n 9) 317 (Lord Esher MR); *Faccenda Chicken* (n 9) 135–6 (Neill LJ).

<sup>40</sup> *Nottingham* (n 13) 1491 (Elias J).

<sup>41</sup> Contractual terms may entirely exclude equitable doctrine. See *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, 175 [118] (Campbell JA) ('*Del Casale*'): 'If there was a contractual obligation that covered the topic, there would, of course, be no occasion for equity to intervene to impose its own obligation.' This view has been generally approved by Australian courts. See, eg, *Coles Supermarkets Australia Pty Ltd v FKP Ltd* [2008] FCA 1915, [63] (Gordon J) ('*Coles Supermarkets*'); *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 85 NSWLR 196, 223–4 [150] (Barrett JA); *Gold and Copper Resources Pty Ltd v Newcrest Operations Ltd* [2013] NSWSC 281, [97] (Stevenson J).

<sup>42</sup> *Hospital Products* (n 31) 97. His Honour's analysis has been widely accepted. See, eg, *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 36 [91] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *Kelly v Cooper* [1993] AC 205, 215 (Lord Browne-Wilkinson for the Board) (Privy Council); *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, 575 [30] (Lord Walker) ('*Hilton*').

objected that the doctrine of efficient breach is undermined by pecuniary awards that exceed a compensatory measure.<sup>43</sup> However, this does not preclude relief in equity where there is a special interest in performance<sup>44</sup> and damages cannot satisfy the demands of justice.<sup>45</sup> The implications with respect to an account of profits are explored in the next section.

### III THE IMPLICATIONS OF A BREACH OF CONFIDENCE BY A FIDUCIARY EMPLOYEE

The implications of a breach of confidence can be tested against the common scenario of an employee who surreptitiously appropriates customer lists, marketing information or commercial data from a current employer to assist in setting up a competing business.<sup>46</sup> Put colloquially, the employee's intention is to 'hit the ground running'.<sup>47</sup> In addressing the wrong, an account of profits may, on the particular facts, be a superior remedy to damages or compensation. This is cogently demonstrated in *Warman International Ltd v Dwyer* ('*Warman*').<sup>48</sup>

In *Warman*, the plaintiff was a manufacturer and distributor of slurry pumps. It also had an agency agreement for the distribution of gearboxes manufactured in Italy by Bonfiglioli. Warman was based in New South Wales, but it had a Queensland branch that was run by its general manager, Dwyer. The Queensland branch sold more Bonfiglioli products than any other outlet in Australia and accordingly it controlled the running of the agency. Dwyer became dissatisfied with his employer's operational decisions. In particular, Warman began to reduce its presence in Queensland. Stock was decreased and staff were laid off. Warman also abandoned its agencies for Bonfiglioli products in Australia except for Queensland.

<sup>43</sup> *Coles Supermarkets* (n 41) [64] (Gordon J).

<sup>44</sup> *A-G v Blake* [2001] 1 AC 268, 282 (Lord Nicholls) ('*Blake*'). However, this judgment has not been widely accepted. See below n 55 for further discussion.

<sup>45</sup> *Wilson v Northampton and Banbury Junction Railway Co* (1874) LR 9 Ch App 279, 284 (Lord Selborne LC); *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 503 (Windeyer J).

<sup>46</sup> See, eg, *Lifeplan* (n 15). The plaintiff sold to the public retail investment contracts to meet the costs of pre-arranged funerals. Two employees (the defendants) secretly approached a competitor, F, with a view to diverting the plaintiff's existing business to that party. To this end they presented a 5-year business concept plan using confidential and commercially sensitive information purloined from their employer. At trial it was held that the defendants were in breach of their fiduciary duty of loyalty to the plaintiff as well as the fundamental obligations of confidence owed by an employee to an employer. The primary judge ordered an account of profits against the defendants (which was not challenged on appeal). See also Peter Devonshire, 'Recent Cases: Breach of Fiduciary Duty' (2019) 93(1) *Australian Law Journal* 20.

<sup>47</sup> Not uncommonly, this includes diverting business opportunities from a current employer.

<sup>48</sup> (1995) 182 CLR 544 ('*Warman*'). This case was primarily concerned with breach of fiduciary duty, although it was necessary for the defendant to appropriate confidential and commercially sensitive information to achieve his ends.

Bonfiglioli approached Warman with a view to entering into a joint arrangement for the assembly of its products in Australia. Warman's senior management rejected the proposal. Dwyer resolved to set up his own business and in furtherance of this he entered into secret negotiations with Bonfiglioli. Dwyer also incorporated two companies and encouraged existing Warman staff to join him. Clearly Dwyer's actions were calculated to undermine his employer's interests.<sup>49</sup> Ultimately Bonfiglioli executed a joint venture agreement with Dwyer's companies and terminated its agency agreement with Warman. The same month, Dwyer resigned from Warman to pursue his new business. Dwyer prospered and, in the 4 years preceding the trial, the business made net pre-tax profits of \$1.6 million.

On discovering these events, Warman commenced proceedings against Dwyer and his companies. At first instance,<sup>50</sup> it was held that Dwyer was in breach of his duties to Warman. By advancing his own interests to the detriment of his employer it was found that Bonfiglioli had prematurely terminated its agency with Warman. Warman was entitled to recover equitable damages for the associated loss or, alternatively, an account of profits for the first four years of the defendant's business.<sup>51</sup> The Queensland Court of Appeal upheld the finding that Dwyer had breached his fiduciary duty, but the remedy was confined to compensation for losses flowing from the breach.<sup>52</sup> Warman appealed successfully to the High Court of Australia, which reinstated the order for an account of profits, albeit for a reduced period.<sup>53</sup> This was more advantageous to Warman because the fortunes of its operations in Queensland and Dwyer's new business were driving in opposite economic directions. Warman was running its operations down, whereas Dwyer had developed a vibrant and expanding business. Thus, the measure of Warman's loss was considerably less than Dwyer's gains.

On facts such as these, the wronged employer will usually seek an account of profits in respect of the delinquent employee's unauthorised gains.<sup>54</sup> Two factors discussed above are particularly relevant. First, an employment relationship is usually founded in contract. It is trite that the orthodox remedy for a breach of contract is damages. An important consequence is that on payment of damages the contract-breaker can retain gains derived from the breach and is at liberty to

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<sup>49</sup> Compounding this, Dwyer was asked to review Warman's agency arrangements with Bonfiglioli to assist Warman's senior management to decide on its future relationship with that party. Given Dwyer's personal dealings with Bonfiglioli, there was an obvious conflict of interest.

<sup>50</sup> (1992) 46 IR 250.

<sup>51</sup> Ibid 259–60 (Derrington J).

<sup>52</sup> [1994] QCA 12, 34 (Macrossan CJ and Pincus JA).

<sup>53</sup> *Warman* (n 48) 570 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

<sup>54</sup> The plaintiff usually has an election between equitable compensation and an account of profits. See below Part IV(B) ('*The Boundaries of Disgorgement*') and IV(C) ('*Account of Profits as a Performance Interest*'), where the implications of an order for account are discussed further.

pursue more valuable economic opportunities.<sup>55</sup> The comments of Lord Walker in *OBG Ltd v Allan* typify this binary approach:

In order to investigate that problem it is necessary to enquire more closely into what is happening, in legal terms, when a court makes an order for the protection of confidential information. If the person disclosing the information is in contractual relations with the claimant, the most natural claim will be for breach of an express or implied term in the contract. That was the basis for the decision in *Pollard v Photographic Co* (1888) 40 Ch D 345 ... Where there is no contractual tie the cause of action is the equitable jurisdiction to restrain (or if it cannot be restrained, to award compensation or an account of profits for) breach of confidence.<sup>56</sup>

This introduces the rudimentary argument that if damages are available at law for breach of contract there is ‘no occasion for equity to intervene to impose its own obligation’.<sup>57</sup>

Second, employees can broadly be classified as fiduciary and non-fiduciary. This has implications as to whether a breach of confidence should be treated as an equitable or common law wrong. These factors give rise to a complex lattice of jurisdictional considerations,<sup>58</sup> which will be addressed in the next Part.

#### IV WHERE SHOULD THE LINE BE DRAWN BETWEEN COMPENSATION AND GAIN-BASED RELIEF?

Attention now turns to the remedial options with respect to a breach of confidence by fiduciary and non-fiduciary employees. This brings into play the boundary between compensatory and gain-based relief and the wider implications of classifying a breach as an equitable or legal wrong.

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<sup>55</sup> Exceptionally, wider policy considerations are engaged, where it is not in the public interest for a contract to be broken. Here, the remedial focus is adjusted to deprive the defendant of the fruits of the wrong. *Blake* (n 44) provided impetus for this approach, but it has not been widely accepted. Moreover, the case was unique. The defendant was in breach of an undertaking of permanent confidentiality with regard to his employment in the Secret Intelligence Service. The Crown was seeking to obtain the royalties of a book written by the defendant about his time as an intelligence officer. It would be unrealistic to suggest that the outcome in this case has general application to employment relationships. If gain-based relief is to be propounded, it must rest on a more principled basis.

<sup>56</sup> [2008] 1 AC 1, 77 [276].

<sup>57</sup> *Del Casale* (n 41) 175 [118] (Campbell JA).

<sup>58</sup> It has aptly been said that ‘[t]here is a substantial overlap between the content of an employee’s contractual duties, the equitable duty of confidence, any fiduciary duties and ... statutory duty’: *Plus One* (n 38) [547] (Hallen J).

## A The Boundaries of Compensation

It must be clarified what is meant by compensation for loss. The court can grant damages at law and compensation in its equitable jurisdiction. The terms are sometimes elided,<sup>59</sup> but this masks some significant differences. Damages for tort or breach of contract are subject to limiting principles such as remoteness, foreseeability and intervening cause. In contrast, equity's normative objectives are fostered by reducing the threshold of causation and the scope of limiting principles.<sup>60</sup> This is particularly pronounced in the case of formal trusts and less so in respect of relationships removed from the trust paradigm where there are diminished policy concerns for protecting the principal. The status of a fiduciary is much closer to the former. Equity's stringent policy of ensuring that fiduciaries should not profit from their wrongs suggests a much weaker causal enquiry and test of remoteness in respect of gains from a breach of fiduciary duty.<sup>61</sup>

This is subject to the qualification that not every wrong by a fiduciary is a breach of fiduciary duty.<sup>62</sup> If the impugned conduct is merely careless or negligent, liability may be governed by tort or contract. Alternatively, and with similar effect, equity may address such conduct, applying common law principles by analogy.<sup>63</sup> It has aptly been said that the 'fact that a fiduciary acts negligently, whether contractually or tortiously, does not in itself place the fiduciary in breach of any of its duties qua fiduciary'.<sup>64</sup>

In such cases, equitable duty is either subsumed, or fashioned by, the common law. In short, the nature of the substantive duty, rather than the category of relationship, determines the appropriate remedial regime.<sup>65</sup>

However, this is not without controversy. Much depends on where, philosophically, the line should be drawn in defining — or perhaps more precisely, preserving — the fiduciary principle. In *Youyang Pty Ltd v Minter Ellison Morris Fletcher*, the High Court of Australia observed:

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<sup>59</sup> For example, equitable compensation is sometimes described as equitable damages.

<sup>60</sup> On an extreme thesis, where a trustee is under a duty to restore trust assets, causation, foreseeability and remoteness are usually not material: *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSW 211, 214–16 (Street J).

<sup>61</sup> Graham Virgo, 'Restitutionary Remedies for Wrongs: Causation and Remoteness' in Charles E. F. Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, 2008) 301, 327.

<sup>62</sup> *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 647 [147], 670 [185] (La Forest J); *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237 (Ipp J).

<sup>63</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1, 16–18 (Millett LJ).

<sup>64</sup> *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218, 237 (Blanchard J). See also *New Zealand Netherlands Society* (n 34) 1130 (Lord Wilberforce for the Board); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 688 (Tipping J) ('*Bank of New Zealand*'); *Hilton* (n 42) 575 [29] (Lord Walker).

<sup>65</sup> If a fiduciary or non-fiduciary employee is in breach of a duty of care, liability is determined by the tort of negligence and the remedy is damages. This is of limited relevance in the context of a duty of confidence, because the unauthorised removal of confidential information is usually an intentional wrong.

[T]here must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.<sup>66</sup>

This reflects a reluctance to compromise fiduciary doctrine, which is a consistent theme of Australian jurisprudence.<sup>67</sup> In this jurisdiction at least, equity retains a tenacious grip on fiduciary wrongs and the remedial regime that supports it. This is reinforced from another perspective. The obligations of trustees and fiduciaries arise in equity's exclusive jurisdiction. In regard to compensation, at least, equitable relief is not impeded by a concurrent cause of action at law.<sup>68</sup> There is no reason in principle to exclude orders such as an account of profits, which belong to the same suite of remedies. In the context of an employment relationship, these expansive remedies are accessible in respect of fiduciary employees.<sup>69</sup> Having considered equitable compensation, attention now turns to the parameters of an account of profits.

## **B The Boundaries of Disgorgement**

A shared feature of equitable compensation and an account of profits is that the strictness of fiduciary doctrine has a significant influence on the causal enquiry.<sup>70</sup> Where special obligations of trust have been assumed, the focus of equity is to support rather than undermine expectations of fidelity.<sup>71</sup> Sanctions reflect the nature of the interest that requires protection,<sup>72</sup> and an account of profits must therefore be understood in the context of the duty it enforces.<sup>73</sup>

While it is necessary to establish a causal nexus between the breach and the gain, the precise formulation of this principle is open to debate. This is particularly evident from recent pronouncements of the English Court of Appeal,<sup>74</sup> which affirm that, while a defaulting fiduciary is strictly accountable for illicit gains, there must be a nexus between the breach of duty and the profits for which a fiduciary must account. However, the necessary link did not have to be of a causal

<sup>66</sup> (2003) 212 CLR 484, 500 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

<sup>67</sup> See, eg, *Pilmer* (n 2) 196 [71] (McHugh, Gummow, Hayne and Callinan JJ).

<sup>68</sup> *Nocton v Lord Ashburton* [1914] AC 932, 957 (Viscount Haldane LC). See also Heydon, Leeming and Turner (n 2) 862 [23-565].

<sup>69</sup> See above Part II(A).

<sup>70</sup> *Gunasegaram v Blue Visions Management Pty Ltd* (2018) 282 IR 15, 67 [268] (Gleeson JA).

<sup>71</sup> *Marathon Asset Management LLP v Seddon* [2017] ICR 791, 852 [230] (Leggatt J).

<sup>72</sup> This is particularly germane to fiduciary obligations, which are underpinned by the deterrent principle.

<sup>73</sup> *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), [343] (Sales J). See also *Gray v Global Energy Horizons Corporation* [2020] EWCA Civ 1668, [128] (David Richards, Henderson and Rose LJ) ('Gray').

<sup>74</sup> *Gray* (n 73) [128] (David Richards, Henderson and Rose LJ); *Recovery Partners GP Ltd v Rukhadze* [2023] Bus LR 646, 666 [76] (Poplewell, Phillips and Falk LJ) ('Recovery Partners').

character.<sup>75</sup> It sufficed if there was a ‘reasonable relationship’ between breach and gain.<sup>76</sup> This introduces considerable uncertainty, not least because of the difficulty of imputing liability without the obvious reference point of causation.

Australia has adopted ‘but for’ causation<sup>77</sup> to define the relationship between the breach and the gain.<sup>78</sup> This was affirmed by the High Court of Australia in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd*, where the plurality stated that it is sufficient to show that the profit would not have been made but for dishonest wrongdoing.<sup>79</sup> The ‘but for’ test provides a ‘narrow escape route from liability’,<sup>80</sup> but this does not significantly diminish the role of an account of profits in vindicating the standards of fiduciary duty.<sup>81</sup> The outcome, if not the methodology, is not inconsistent with the position in England and New Zealand,<sup>82</sup> despite their rejection of ‘but for’ reasoning for an account of profits,<sup>83</sup> and disavowal of causation as a formal test.<sup>84</sup>

The boundaries of disgorgement can also be defined from an economic perspective. To this point it has been assumed that gain-based relief is superior to compensation for loss.<sup>85</sup> However, this cannot be pressed further. The most desirable remedial outcome will depend on the facts of each case. If the plaintiff’s losses exceed the defendant’s gains, the preliminary indication, at least, would be

<sup>75</sup> Gray (n 73) [128] (David Richards, Henderson and Rose LJ); *Recovery Partners* (n 74) 666 [76] (Poplewell, Phillips and Falk LJ). See also *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, 484 [47] (Morritt LJ) (‘*United Pan-Europe*’); *Akita Holdings Ltd v Attorney General of the Turks and Caicos Islands* [2017] AC 590, 598 [17] (Lord Carnwath JSC) (‘*Akita Holdings*’); *Murad v Al-Saraj* [2005] EWCA Civ 959, [57] (Arden LJ) (‘*Murad*’).

<sup>76</sup> Gray (n 73) [128] (David Richards, Henderson and Rose LJ); *Recovery Partners* (n 74) 666 [76] (Poplewell, Phillips and Falk LJ).

<sup>77</sup> A similar approach was taken by the Court of Appeal of Singapore in *UVJ v UVH* [2020] SGCA 49.

<sup>78</sup> This contrasts with the position in England and New Zealand where ‘but for’ reasoning has not been adopted for an account of profits. See, eg, *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, 453 (Roskill J) (‘*Industrial Development Consultants*’); *Gwembe Valley Development Co Ltd v Koshy* (No 3) [2003] EWCA Civ 1048, [145] (Mummery LJ for the Court) (‘*Gwembe Valley*’); *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384, 400–1 [32] (Elias CJ) (‘*Premium Real Estate*’); *McLaughlin v McLaughlin* [2021] NZHC 3015, [412] (Gendall J) (‘*McLaughlin*’).

<sup>79</sup> *Lifeplan* (n 15) 12–13 [9] (Kiefel CJ, Keane and Edelman JJ). In separate reasons, Gageler J contemplated the assimilation of the ‘but for’ test for compensatory and gain-based relief: at 37 [88]. See also *Devonshire* (n 46).

<sup>80</sup> *Bank of New Zealand* (n 64) 687 (Tipping J).

<sup>81</sup> See, eg, Gageler J’s qualifications to the ‘but for’ test: *Lifeplan* (n 15) 37 [88].

<sup>82</sup> See generally Peter Devonshire, ‘Account of Profits and the Causation Paradigm’ [2024] *Lloyd’s Maritime and Commercial Law Quarterly* 188.

<sup>83</sup> *Industrial Development Consultants* (n 78) 453 (Roskill J); *Gwembe Valley* (n 78) [145] (Mummery LJ for the Court); *Premium Real Estate* (n 78) 400–1 [32] (Elias CJ); *McLaughlin* (n 78) [412] (Gendall J).

<sup>84</sup> *United Pan-Europe* (n 75) 484 [47] (Morritt LJ); *Akita Holdings* (n 75) 598 [17] (Lord Carnwath JSC); *Murad* (n 75) [57] (Arden LJ); *Gray* (n 73) [128] (David Richards, Henderson and Rose LJ); *Recovery Partners* (n 74) 666 [76] (Poplewell, Phillips and Falk LJ).

<sup>85</sup> This was certainly the basis of the plaintiff’s appeal to the High Court of Australia in *Warman* (n 48). However, the final orders were suspended for 7 days to give the plaintiff an opportunity to assess whether judgment should be entered for an account of profits instead of equitable compensation: at 570 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

to claim compensation. But it is one thing to allege loss and another to establish this as a measure of relief. Much will depend on the evidence and the conclusions to be drawn in the context of adversarial proceedings.<sup>86</sup> The gains of a former employee who appropriates confidential information for a startup business may be easily quantified, whereas the plaintiff may struggle to impute revenue losses to the defendant's breach. On this scenario, an account of profits may be the preferable option. However, certain factors potentially diminish its scope. Notably, on the taking of accounts a court may, in its discretion, permit the delinquent fiduciary to set off certain claims against gross receipts.<sup>87</sup> This includes expenses incurred in obtaining profits, together with allowances for the defendant's industry, enterprise and skill<sup>88</sup> in making the gains.<sup>89</sup>

This much is fairly settled. There is a further consideration which has received less attention, namely the concept of risk in defining the defendant's claim for allowances. This can be assessed from the perspective of both the wronged employer and the delinquent employee. Several principles are engaged. If the defendant makes unauthorised use of the plaintiff's property to advance his personal interests, the plaintiff bears the risk of loss. Equity is intolerant to such wrongs, not least because '[s]uch conduct puts the trust fund at risk without hope of gain. Equity's response is to insist that any profit is for the beneficiaries and any loss for the trustee.'<sup>90</sup>

Not unexpectedly, this has implications for the defendant's claim for remuneration. In discussing the distinction between gains deriving from misuse of the plaintiff's property and revenues attributable to a fiduciary's independent enterprise, the High Court of Australia accepted that:

[I]t may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances. That may well be the case when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, *the capital which he has introduced and the risks he has taken, so long as they are not risks to which the principal's property has been exposed.*<sup>91</sup>

<sup>86</sup> If an employer promptly obtains an interlocutory injunction restraining misuse of confidential information, it may be difficult to establish loss or the relevant losses may be minimal. See, eg, *Express Cargo Services Pty Ltd v Mysko* [2023] SASC 11, [528]–[531] (Stein J).

<sup>87</sup> In calculating gross receipts, a fiduciary is not required to account for more than the amount actually received (*Vyse v Foster* (1872) LR 8 Ch App 309, 333 (James LJ)) or such sum as should have been received but for the fiduciary's wilful default (*Armitage v Nurse* [1998] Ch 241, 252 (Millett LJ); *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194, 222 [54] (Lord Clarke JSC) (Privy Council)).

<sup>88</sup> Allowances by way of an apportionment of profits between defaulting fiduciary and principal are rarely granted outside the realm of intellectual property infringement.

<sup>89</sup> Awards in the latter category recognise the entrepreneurial elements of planning and implementing the wrong: Peter Watts, 'Restitution and Conflicted Agents' (2009) 125 (July) *Law Quarterly Review* 369, 374.

<sup>90</sup> *Tang Ying Ip v Tang Ying Loi* [2017] 2 HKC 502, 510 [27] (Lord Millett NPJ). His Lordship was addressing unauthorised use of trust funds, but the statement has general application.

<sup>91</sup> *Warman* (n 48) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) (emphasis added).

As these passages indicate, there are compelling policy reasons for denying allowances where the plaintiff's property is exposed to risk.<sup>92</sup> The fiduciary has gambled with another's property and violated his core obligations to the principal.<sup>93</sup> In contrast, where gains are obtained without recourse to the plaintiff's property, the case for allowances is more compelling because risk is entirely to the defendant's account. Here, remuneration may bear some relationship to the defendant's risk-taking and energy and skill in making the profit.<sup>94</sup> Nevertheless, the imperatives of fiduciary doctrine tend to influence the scale of remuneration and awards are generally modest and less than the defendant would otherwise have received in the absence of a breach of duty.<sup>95</sup> This does not entirely rule out allowances on a liberal scale, but such sums will typically fall short of full profit participation.<sup>96</sup>

The term 'allowances' can be misleading in failing to distinguish between expenses and awards for industry, enterprise and skill. For example, in *Halliday & Nicholas Insurance Brokers Pty Ltd v Corsiatto*,<sup>97</sup> the defendant was employed as an account executive for an insurance broker (the plaintiff). The defendant decided to leave their employment. Before doing so, in breach of fiduciary duty, the defendant compiled a list of the plaintiff's customers, whom he intended to contact as soon as he had left. The defendant terminated his employment on short notice and was immediately engaged as a sub-broker for a competitor ('DHB'). Timing was crucial. Possession of the customer list enabled the defendant to contact former customers before the plaintiff had an opportunity to do so. As a result, the defendant persuaded many of the plaintiff's customers to nominate DHB as their broker. Consequently, substantial brokerage fees flowed to DHB and

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<sup>92</sup> An issue left open is whether confidential information can be classified as property. This has important implications because there is a clear imperative for denying allowances if the plaintiff's property has been exposed to risk. Historically at least, opinion was divided. For example, in *Boardman v Phipps* [1967] 2 AC 46 ('Boardman'), two of their Lordships considered that confidential information could be regarded as property (Lord Hodson at 107, Lord Guest at 115), whereas Lord Upjohn's powerful dissent expressed a contrary view (at 127–9). Uncertainty has not entirely been dispelled: see *Janala Pty Ltd v Hardaker (No 3)* [2023] NSWSC 446, [51] (Richmond J). However, Heydon, Leeming and Turner (n 2) 1175 [42.135] points persuasively to a growing consensus in the High Court of Australia that in respect of a breach of confidence, equity acts on the conscience of the defendant, and not in aid of any proprietary right: see *Moorgate* (n 4) 438 (Deane J); *Breen v Williams* (1996) 186 CLR 71, 81 (Brennan CJ), 90 (Dawson and Toohey JJ), 111–12 (Gaudron and McHugh JJ), 128–9 (Gummow J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 143–4 [118] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). It is submitted that this is an appropriate focus unless settled principles are to be disturbed. Most relevantly, if there is a proprietary interest in confidential information, it is difficult to see how allowances can be granted when those rights are abused.

<sup>93</sup> Moreover, to allow such claims would undermine the objectives of deterrence.

<sup>94</sup> See, eg, *Boardman* (n 92), where a fiduciary who demonstrated exceptional skill and risk-taking was granted allowances on a liberal scale.

<sup>95</sup> *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309, [251] (Tobias JA).

<sup>96</sup> *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 468–9 (Fox LJ).

<sup>97</sup> [2001] NSWCA 188 ('*Halliday & Nicholas*').

the defendant. On these facts, it was held that the defendant derived a commercial advantage from his misuse of confidential information and he had acted in breach of his fiduciary duty.<sup>98</sup>

The defendant was required to account for his profits, subject to allowances for his time, trouble and expertise. The New South Wales Court of Appeal noted that the plaintiff would otherwise be unjustly enriched to the extent that the plaintiff would be better off than if the defendant had undertaken this work in their service. The sum due to the defendant was fixed by reference to his basic remuneration whilst employed by the plaintiff.<sup>99</sup> This methodology illuminates a tendency to conflate the reimbursement of expenses with awards for industry, enterprise and skill.

Wages and salary should be treated as an expense to the plaintiff. If the defendant's conduct had been authorised by his employer,<sup>100</sup> the latter would have paid overheads and general expenses, including employee's remuneration. Salary and wages are a cost of doing business and in that regard no different from paying a power bill. From this perspective, allowances for industry, enterprise and skill are akin to a bonus for particularly meritorious service.<sup>101</sup> The awards should be distinguished because each is granted on a different basis. The defendant is invariably reimbursed for expenses because profit in this context denotes the margin of receipts over costs. Expenses are therefore deducted from gross receipts to produce the net profits in respect of which allowances are claimed.<sup>102</sup> Conversely, allowances for industry, enterprise and skill are discretionary and dependant on a finding that the defendant made a substantive contribution to producing the gains.<sup>103</sup>

The distinction between expenses and awards for the defendant's entrepreneurial skill is aptly captured by the Full Court of the Federal Court of Australia in *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd*:

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<sup>98</sup> The trial judge dismissed the claim against DHB, but this was reversed on appeal. The Court of Appeal held that the defendant had acted as DHB's agent. The defendant's misuse of confidential information was therefore imputed to his principal: see *ibid* [36], [38], [45]–[46] (Handley JA, Spigelman CJ agreeing at [1], Heydon JA agreeing at [47]).

<sup>99</sup> *Ibid* [29], [30] (Handley JA, Spigelman CJ agreeing at [1], Heydon JA agreeing at [47]).

<sup>100</sup> See below n 124 and accompanying text for discussion, where it is argued that the plaintiff effectively affirms the unauthorised conduct in order to claim the benefits it produced.

<sup>101</sup> As a preliminary matter, the court will assess whether 'the work done by the fiduciary would otherwise have had to be done by another and/or ... the work done has benefitted the property which forms the basis of the account': *Recovery Partners GP Ltd v Rukhadze* [2022] EWHC 690 (Comm), [372] (Cockerill J). This is not directed to the nature or moral quality of the misconduct. It is confined to the causal relationship between the defendant's services and the benefit conferred on the principal.

<sup>102</sup> *De Bussche v Alt* (1878) 8 Ch D 286, 307 (Hall V-C); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 154 (Lord Macmillan).

<sup>103</sup> An informative discussion of allowances and the obligation to account is found in Matthew Conaglen, 'Identifying the Profits for which a Fiduciary Must Account' (2020) 79(1) *Cambridge Law Journal* 38.

To the extent that it was established that the profits of V-Flow and the increase in value of its business were generated by skills and efforts of the individual appellants, some allowance might be appropriate. However, such an allowance is quite different from reasonable remuneration for the work actually performed by the individuals in the business, being work that was necessary such that, whoever performed the work, it would have been a reasonable expense of the business. ...

[I]n calculating the profit made by V-Flow, there is no reason why an appropriate amount for reasonable remuneration should not be treated as an expense. It appears that, in fact, no salary was paid to either Mr Aloe or Mr Matkovic. However, if they had not worked in the business, it would have been necessary to pay someone else to do the work that they did.<sup>104</sup>

The practical outcome of awarding both remuneration and merit-based allowances is that the defendant may be placed in the same, or similar financial position as if he had not betrayed his principal's interest. Having regard to the objectives of deterrence it would be preferable to award either remuneration below market or contract rates,<sup>105</sup> or to monetise the value of the defendant's unique skills and exertions, discounted to reflect the fact that the defendant is being rewarded for committing a breach of fiduciary duty.

To return to the working example of an employee who surreptitiously appropriates confidential data from his employer for use in a competing business, it has been noted that the available remedies are either damages or compensation,<sup>106</sup> or an account of profits.<sup>107</sup> This revives the taxonomical question whether a particular breach of confidence is to be treated as an equitable wrong.<sup>108</sup> If so, the usual principle is that illicit gains must be disgorged, subject to expenses and allowances. In the present context, this is problematic. To strip all net gains presumes a clean causal enquiry where profits can be readily imputed to the wrong. This is an oversimplification which seldom fits the facts where an employee exploits confidential information from his employer.

It is submitted that accountable profits should be assessed by analogy to the infringement of intellectual property rights. In quantifying gains for intellectual property infringement, a narrower focus is taken. The remedial objective is to strip the defendant of gains attributable to infringing the plaintiff's interests.<sup>109</sup> Causation is interrogated with greater vigour than for a breach of fiduciary duty.

<sup>104</sup> (2013) 296 ALR 418, 432–3 [70]–[71] (Emmett, Edmonds and Rares JJ).

<sup>105</sup> Arguably, this raises the spectre of an illegal penalty. See *Harris* (n 2), where the majority of the New South Wales Court of Appeal held that punitive remedies are not available in contract or equity: at 312 [61] (Spigelman CJ), 384 [338], 422 [470] (Heydon JA).

<sup>106</sup> The former contemplates common law liability, the latter, liability in equity.

<sup>107</sup> The betrayed employer may also seek a prohibitory injunction to restrain use of commercially sensitive and confidential material, with the caveat that care must be taken in defining the extent of the prohibition: *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840, 853–7 (Nicholls V-C) ('*Universal Thermosensors*').

<sup>108</sup> As noted, the enquiry is complicated further if the employee is a fiduciary.

<sup>109</sup> *Spring Form Inc v Toy Brokers Ltd* [2002] FSR 17, 280 [7] (Pumfrey J); *My Kinda Town Ltd v Soll* [1983] RPC 15, 49 (Slade J); *Potton Ltd v Yorkclose Ltd* [1990] FSR 11, 15 (Millett J).

It is settled law that the plaintiff can only claim that portion of the infringer's profits which are causally attributable to appropriation of the plaintiff's intellectual property.<sup>110</sup> Thus, where the wrong consists of selling goods infringing a registered trade mark, the defendant is not liable for the sale price of the article itself, but the gain derived from its sale under the trade mark.<sup>111</sup>

Semantically, at least, this seems coherent, but the process of identifying causally relevant gains is not without difficulty. In the case of an employee's breach of confidence, revenues from his business may largely be attributable to legitimate post-employment activities. If evidential difficulties can be overcome, it may be possible to impute to the defendant gains that are causally related to the plaintiff's interests and to apportion profits on that basis. Admittedly, equity abhors the betrayal of trust and confidence, and its sanctions are calculated to remove any economic incentive for breaching those duties. From this perspective it may seem anomalous to apportion gains between the wrongdoer and the party whose confidence he has betrayed. However, a division of profits from a single venture to which infringing and non-infringing elements have contributed, is not, strictly, a sharing of profits, but rather an identification of the parties' distinct interests and the attribution of economic outputs to each.<sup>112</sup>

If it is not feasible to distinguish the parties' interests with precision,<sup>113</sup> it may be necessary to adopt a more impressionistic approach. Suppose the defendant has appropriated the plaintiff's customer lists and marketing strategies. In extreme cases the benefit gained by the defendant may be profound,<sup>114</sup> but more commonly, the misuse of a former employer's confidential information merely provides a springboard advantage.<sup>115</sup> An award<sup>116</sup> can take different forms but, in broad terms, the sum is usually quantified by reference to the value to the defendant of entering the market with the benefit of knowledge that could otherwise have been acquired over time from legitimate sources.<sup>117</sup>

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<sup>110</sup> *Monsanto Canada Inc v Schmeiser* [2004] 1 SCR 902, 938 [101] (McLachlin CJ and Fish J for McLachlin CJ and Major, Binnie, Deschamps and Fish JJ).

<sup>111</sup> *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 37 (Windeyer J). This is not a universal principle and depends on the nature of the intellectual property right. If the infringer sells an article made wholly from a patent, he or she may be accountable for the entire profits from the sale.

<sup>112</sup> See also Peter Devonshire, *Account of Profits* (Thomson Reuters, 2013) ch 5.

<sup>113</sup> See, eg, *Aquaculture Corp v New Zealand Green Mussel Co Ltd (No 3)* (1986) 1 NZIPR 678, 690 (Prichard J).

<sup>114</sup> See, eg, *Lifepan* (n 15).

<sup>115</sup> In its modern form, this is usually attributed to the judgment of Roxborough J in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375, 391. An employer's confidential information may confer a head start even if that information is in the public domain or capable of being independently ascertained. The advantage gained by the former employee is a saving in time and resources in locating that information: *North West Pilots Pty Ltd v Daniel* [2023] WASC 73, [82] (Hill J), quoting *Zomojo Pty Ltd v Hurd (No 2)* (2012) 299 ALR 621, 679 [201]–[202] (Gordon J).

<sup>116</sup> An account of profits can be granted for a springboard claim: *Bayer Cropscience KK v Charles River Laboratories Preclinical Services Edinburgh Ltd* [2011] SLT 145, 147 [8]–[9] (Lord Malcolm).

<sup>117</sup> See, eg, *Universal Thermosensors* (n 107) 850 (Nicholls V-C).

There is considerable latitude in assessing the advantage obtained by the defendant:

The equitable remedy of account is a personal order. The order operates to require that a defendant pay to a plaintiff the monetary value of a benefit or gain to the defendant. Although commonly referred to as an ‘account of profits’, there is no reason why a benefit or gain to be made the subject of an account must answer the description of a ‘profit’ in conventional accounting terms. Nor is there any reason why that benefit or gain must answer the description of ‘property’ or must have sufficient certainty as to be capable of forming the subject matter of a trust.<sup>118</sup>

### C Account of Profits as a Performance Interest

It has been observed that an employment relationship is defined by contract.<sup>119</sup> It follows that damages are awarded in respect of losses flowing from a breach. However, the argument can be made that gain-based relief is not inconsistent with this scheme. The core question is whether an account of profits can be invoked to enforce a performance interest notwithstanding that the (employment) relationship is founded in contract. If so, this would overreach some traditional impediments to granting an account of profits in a contractual setting.<sup>120</sup> Some observations by the High Court of Australia in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (‘*Tabcorp*’) conveniently set the scene.<sup>121</sup> The case concerned the measure of damages for losses sustained from a tenant’s breach of covenant in effecting unauthorised changes to the demised premises. *Tabcorp* is instructive in rejecting traditional restrictions on the scope of damages when a more expansive approach is required. In this regard, the Court gave short shrift to the doctrine of efficient breach and awarded damages reflecting the tenant’s failure to perform its contractual obligations. A unanimous bench emphasised:

Underlying the Tenant’s submission that the appropriate measure of damages was the diminution in value of the reversion was an assumption that anyone who enters into a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid. ... It has been dignified as ‘the doctrine of efficient breach’. ... The assumption underlying the Tenant’s submission takes no account of the existence of equitable remedies, like decrees of specific performance and injunction,

<sup>118</sup> *Lifepan* (n 15) 32–3 [75] (Gageler J).

<sup>119</sup> See above Part II(B).

<sup>120</sup> In particular, the distinction between a fiduciary and non-fiduciary employee, and the argument that the contractual nature of an employment relationship precludes gain-based relief. With respect to the latter, the Australian position is that an account of profits is unavailable as a remedy for a breach of contract. Such awards would potentially place a plaintiff in a superior position than if the contract been performed. This is inconsistent with the basic tenets of *Robinson v Harman* (1848) 1 Ex 850. See also *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 82 (Mason CJ and Dawson J); *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196 [158]–[159] (Hill and Finkelstein JJ); *Anderson* (n 8) 194–5 [166] (Gleeson, Leeming and White JJA).

<sup>121</sup> (2009) 236 CLR 272.

which ensure or encourage the performance of contracts rather than the payment of damages for breach. It is an assumption which underrates the extent to which those remedies are available.<sup>122</sup>

Can this reasoning be extended to an account of profits? This remedy of course contrasts with specific performance and an injunction. Both, in different forms, enforce performance contemplated by the parties. The function of specific performance is self-evident. Injunctive relief achieves a similar purpose. A mandatory injunction can enforce contractual undertakings and a prohibitory injunction ensures compliance by preventing a breach.

An account of profits operates quite differently in the context of an employee's breach of confidence. Unlike an injunction and specific performance, it does not enforce a course of conduct reflecting the parties' intentions. On the contrary, an account of profits is directed to actions which were not within the parties' contemplation.<sup>123</sup> The question is whether this remedy can be reconciled with an injunction and specific performance on the basis that it enforces a performance interest.

It is here that a fiction comes into play. In electing to strip the defendant's profits, the plaintiff is effectively treating the unauthorised conduct as having been undertaken for the plaintiff's benefit. It has been suggested that this is tantamount to condoning or approbating those activities,<sup>124</sup> and on one view it can be said that the plaintiff has notionally adopted the wrongdoer's conduct as his or her agent.<sup>125</sup> In these circumstances, the court will avoid unjust enrichment to the plaintiff, who as an applicant for equitable relief, must not unfairly deny value provided by the defendant. This is consistent with the practice of setting off allowances against gross receipts<sup>126</sup> and inconsistent with a claim for damages to the extent that the latter disaffirms the defendant's conduct.

It has been noted that a delinquent fiduciary may be reimbursed for expenses incurred in obtaining profits and awarded allowances for industry, enterprise and skill in generating revenues. Thus, in economic terms at least, the plaintiff is affirming the defendant's breach by treating the defendant's misconduct as if it was an approved arrangement.<sup>127</sup> From this perspective, an account of profits is effectively enforcing a performance interest.

In addition, it should not be overlooked that a contract may expressly contemplate enforcement of a performance interest by stipulating that

<sup>122</sup> Ibid 285–6 [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). Their Honours upheld an award of reinstatement damages to reflect loss sustained from the tenant's failure to perform its contractual obligation to preserve the premises.

<sup>123</sup> Or at least, not within the contemplation of the injured party.

<sup>124</sup> As pithily expressed, 'if you take an account of profits you condone the infringement': *Neilson v Betts* (1871) LR 5 HL 1, 22 (Lord Westbury). See also *Celanese International Corp v BP Chemicals Ltd* [1999] RPC 203, 219 (Laddie J); *Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd* [1939] AC 178, 198 (Lord Porter).

<sup>125</sup> See Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009) 16.1230.

<sup>126</sup> See, eg, *Halliday & Nicholas* (n 97) [30] (Handley JA).

<sup>127</sup> *Warman* (n 48) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

unauthorised gains should be surrendered to the counterparty. This is exemplified in *Attorney-General for England and Wales v R* ('A-G v R').<sup>128</sup> The defendant, a member of the Special Air Service, wrote a book about his experiences in the Gulf War. Publication of such material was contrary to a confidentiality agreement executed by the defendant as a term of his employment with the Crown.

The New Zealand Court of Appeal stated that if the defendant chose to publish, he would be in breach of his contractual obligations for which the Crown could recover damages and an account of profits.<sup>129</sup> Here, an account of profits was enforcing an express contractual expectation. McGrath J observed:

In the present case a term of the confidentiality contract provides an indication that the remedy of an accounting for profits will be an appropriate remedy for breaches of contract by the employee. The contract envisages that the Ministry, rather than the respondent, would enjoy any financial benefits arising from a publication covered by the contract ...<sup>130</sup>

The parties had comprehensively addressed the consequences of a breach and an alternative rationale for disgorgement of gains can be propounded which circumvents the jurisdictional issues under discussion. Where contemplated by the terms of an agreement, the surrender of gains from one contracting party to the other may be explained on the simple basis of an assignment. In this regard, in *A-G v R*, Tipping J was mindful that the disgorgement of profits was within the compass of the contract and that any order in favour of the Crown had the effect of enforcing a contractual entitlement, which his Honour described as 'the contractually provided remedy of accounting for, strictly assignment of, profits'.<sup>131</sup>

## V CONCLUSION

The law of confidence has an uncertain relationship to law and equity. Perhaps more accurately, it is the relationship between law and equity that is problematic. This is exacerbated when the confidential relationship is between employer and employee. An employment relationship imports strict standards of fidelity which resemble those applicable to a fiduciary. The task of distinguishing the two hinges on narrow — at times, improbable — distinctions such as the degree to which a duty of loyalty is owed to the employer. Again, employment relationships are founded in contract. While the contractual nature of the relationship does not

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<sup>128</sup> [2002] 2 NZLR 91 ('A-G v R'), affd *R v Her Majesty's Attorney-General for England and Wales* [2004] 2 NZLR 577 (Privy Council).

<sup>129</sup> *A-G v R* (n 128) 96 [2] (Keith J), 125 [112] (Tipping J, McGrath J agreeing at 126 [117]). The normal rule is that the plaintiff must exercise an election between these remedies. In the present case the Crown's rights flowed from a contract that contemplated both a right to sue for breach of contract and an account of profits, expressed as an assignment of all rights accruing from any unauthorised publication.

<sup>130</sup> *Ibid* 133 [147].

<sup>131</sup> *Ibid* 125 [113].

preclude fiduciary duties, the terms of the agreement have primacy. The scope of the fiduciary principle is therefore a matter of construction.

However, fiduciary doctrine seldom cowers, and a more vigorous role can be countenanced on the basis that fiduciary obligations are enforced substantively and remedially in equity's exclusive jurisdiction notwithstanding a concurrent cause of action at law. Again, adopting the fiction of the plaintiff's approbation of a wrongful course of conduct, it can be argued that an account of profits should be applied expansively to enforce a performance interest.

Underlying these considerations, causation and limiting principles have a different focus at law and in equity. This is particularly pronounced in defining the relationship between breach and compensable loss or recoverable gain. A remedy applied against this backdrop is unpredictable. If the uncertainties that attend this area of law are to be dispelled, the first step is to make some taxonomical decisions. A few points can be taken forward.

First, fiduciary obligations are not universal. Its strictures simply do not fit every employment relationship. To assert otherwise is to mischaracterise fundamental doctrine.

Secondly, it has been noted that a contract of employment regulates the basic rights and liabilities of the parties.<sup>132</sup> Equitable principles inherent in a particular relationship can be ousted by the terms of an agreement. However, this is not a fixed position. The status of a duty of confidence is ambivalent. As a breach of the employment contract, it is a common law wrong. In addition, this has long been recognised as an equitable wrong. The remedy for the former is damages, while the latter provides both compensatory and gain-based relief. The allocation of remedy for a breach of duty is usually guided by the jurisdictional provenance of the wrong. Clearly, this is problematic with respect to a breach of confidence.

Thirdly, while law and equity are conceptually distinct, the cases demonstrate that there is no bright line between the two. There is at least an argument for equitable hegemony with regard to fiduciary employees. Yet, circuitously, this must ultimately be reconciled with the dictates of contractual terms. The counterargument is that both fiduciary duty and a duty of confidence are recognised in equity's exclusive jurisdiction. In this realm at least, equity's governance of its own processes is paramount. Again, and more controversially, the equitable remedy of an account of profits is not inimical to the law of contract to the extent that it enforces a performance interest.

Finally, equitable relief must be understood in the wider context of its auxiliary jurisdiction to supplement common law remedies. Perhaps a compromise lies here. Where the threshold for intervention is met, equity exercises an overriding jurisdiction. Subject to this, employer and employee should be free to enter into a bargain in their own terms.

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<sup>132</sup> To borrow the language of Mason J in *Hospital Products* (n 31), 97.

# ALL THAT GLITTERS IS NOT GREEN: GREENWASHING INTERVENTIONS AS THE ENFORCEMENT ARM OF SUSTAINABLE FINANCE REGULATION

REBEKKAH MARKEY-TOWLER\*

*'Greenwashing' has become a buzzword in efforts to address global sustainability challenges and particularly the impacts of climate change. Despite the term being commonly invoked, it has lacked a clear legal definition. This article fills this gap. It frames 'greenwashing' intervention as the enforcement arm of sustainable finance regulation and places redress for actual or potential harm by corporate and financial sector entities to the market system and market participants at its heart. Significantly, this means that greenwashing must be seen as only one tool that complements a broader legal and regulatory architecture for sustainable finance.*

## I INTRODUCTION

Companies across a range of sectors including energy, vehicles, household products and appliances, food and drink packaging, as well as financial sector entities like superannuation fund trustees, banks and asset managers, are making environmental and sustainability claims that may not necessarily be true. This kind of behaviour has been referred to as 'greenwashing', namely, the range of representations, acts or omissions that companies and financial sector participants might engage in that are false, misleading or lack reasonable basis in terms of their environmental impact.

With the threat of climate change looming and growing, greenwashing has become a source of significant concern to many. This includes not only regulators and policy-makers but also civil society groups, consumers, companies and investors. The Australian Competition and Consumer Commission ('ACCC'), for example, has said that greenwashing limits consumer choice, leads to consumers paying more, unfairly disadvantages businesses doing the right thing and

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undermines consumer trust.<sup>1</sup> In relation to financial products and services, the Australian Securities and Investments Commission ('ASIC') has said that

[g]reenwashing distorts relevant information that a current or prospective investor might require in order to make informed investment decisions ... erode[s] investor confidence in the market for sustainability-related products and poses a threat to a fair and efficient financial system.<sup>2</sup>

Law and regulation are tools to address greenwashing. However, at present, the exact nature of this role has not been clearly articulated. Instead, greenwashing is sometimes used as a 'catch-all' term to refer to problematic behaviours adopted by firms in responding to global sustainability challenges like climate change. In particular, there is a lack of clarity about the rationale driving greenwashing regulation, the legal definition of greenwashing itself and how law and regulation might be used to respond to greenwashing. This gap exists not only in academia but also in practice.<sup>3</sup> This article therefore responds to this gap by addressing the following question: how can law and regulation be used as a tool to address greenwashing?

I argue that greenwashing regulation can be most appropriately conceptualised as part of enforcement activities in sustainable finance regulation. Its core function in this regard is to address the harm caused, or likely to be caused, by corporate and financial entities to the market system and market participants. This is relatively narrow understanding of greenwashing. As such, I argue that greenwashing regulation must complement a suite of other legal and regulatory interventions to ensure that corporations and financial sector participants help to achieve sustainable finance goals, whilst managing their own risks and opportunities. This would form part of an integrated legal and regulatory architecture for sustainable finance. While I concentrate on the legal and regulatory context in Australia, lessons from this jurisdiction offer policy insights for other countries.

This article proceeds as follows. In Part II, I review definitions of greenwashing offered in the literature and identify a particular gap in relation to a legal definition of greenwashing. Next, in Part III, to identify a legal definition, I first go back to identifying the rationale for greenwashing regulation. I argue that these rationales relate back to the need to protect against the harm, or potential harm, caused by greenwashing. Part IV then provides a legal definition of greenwashing, based on an analysis of greenwashing cases in the Australian

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<sup>1</sup> Australian Competition and Consumer Commission, *Environmental and Sustainability Claims: Draft Guidance for Business* (Report, July 2023) 7 ('*Environmental and Sustainability Claims*').

<sup>2</sup> 'How to Avoid Greenwashing When Offering or Promoting Sustainability-Related Products', *Australian Securities and Investments Commission* (Web Page, June 2022) <<https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>> ('How to Avoid Greenwashing').

<sup>3</sup> See, eg, International Organization of Securities Commissions, *Supervisory Practices to Address Greenwashing* (Final Report, December 2023) 12–14.

and Pacific Climate Litigation Database. Building on this foundation, in Part V, I look at how law might be used as a tool to respond to greenwashing and propose a range of measures possible up-and-down a regulatory enforcement pyramid. Part VI then argues that measures to address greenwashing, whilst important, are only one tool in the toolkit and must be complemented by other measures to produce an integrated regulatory architecture.

## II AN ELUSIVE DEFINITION OF GREENWASHING

Many articles looking the issue of greenwashing start with a review of the various ways to define the concept. In this regard, a definitive definition of greenwashing has, intentionally or unintentionally, been elusive in the literature and practice. RepRisk, an environment, social and governance ('ESG') research provider, for example, does not define greenwashing but instead focuses on its consequences. As per their 2022 report, greenwashing 'misleads consumers and stakeholders to view a company's environmental footprint in a more positive light'.<sup>4</sup> Similarly, the United Nations Secretary General's High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities, established to prevent greenwashing in non-state entity's net zero pledges, did not define greenwashing in its Integrity Matters report.<sup>5</sup> Instead, an attached press release said that '[b]y misleading the public to believe that a company or other entity is doing more to protect the environment than it is, greenwashing promotes false solutions to the climate crisis that distract from and delay concrete and credible action'.<sup>6</sup>

Academic articles across a range of disciplines have adopted different approaches to defining greenwashing. For example, Netto et al focus on the 'how' of greenwashing. In this regard, they argue that greenwashing can occur through 'selective disclosure' (where entities do or do not provide information), 'decoupling' (where entities commit to 'symbolic environmental protection behaviours' but do not actually follow through on these) and 'signalling and corporate legitimacy theory' (where entities make claims to enhance their legitimacy).<sup>7</sup> They also suggest that greenwashing claims can also be made about products or services or entities themselves.<sup>8</sup> Lyon and Montgomery, by contrast, provide a more concrete definition of greenwashing. They define greenwashing

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<sup>4</sup> 'Spotting Greenwashing with ESG Data', *RepRisk* (Web Page, July 2022) <<https://www.reprisk.com/news-research/reports/spotting-greenwashing-with-esg-data>>.

<sup>5</sup> United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (Report, 2022).

<sup>6</sup> 'Greenwashing: The Deceptive Tactics Behind Environmental Claims', *United Nations* (Web Page) <<https://www.un.org/en/climatechange/science/climate-issues/greenwashing>>.

<sup>7</sup> Sebastião Vieira de Freitas Netto et al, 'Concepts and Forms of Greenwashing: A Systematic Review' (2020) 32(19) *Environmental Sciences Europe* 1, 6.

<sup>8</sup> *Ibid* 7–11.

as ‘any communication that misleads people into adopting overly positive beliefs about an organisation’s environmental performance, practices, or products’.<sup>9</sup>

However, more relevant to this article, there has been limited legal analysis on the definition of greenwashing. In particular, there is no standard legal definition of the concept. By ‘legal definition’, I refer to the elements that would need to be proved to substantiate an enforcement action to address such conduct. In Australia, for example, the ACCC’s draft guidance says that it ‘considers a business will be engaging in greenwashing where they use any claim that makes a product, service or business seem better or less harmful for the environment than it really is’.<sup>10</sup> ASIC defines greenwashing as ‘the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical’.<sup>11</sup> While these definitions are helpful at a higher level, it is important to spell out the exact elements of a greenwashing claim so that, inter alia, regulators can target their interventions, companies and financial sector actors can act appropriately, and civil society can hold entities to account. To do so, I consider the rationales for regulating greenwashing in the following Part.

### III GREENWASHING AS THE ENFORCEMENT ARM OF SUSTAINABLE FINANCE

Perhaps it is so obvious it goes without saying, but attempts to regulate greenwashing are undertaken for a reason. Despite this, and perhaps surprisingly, the rationale for addressing greenwashing has largely been taken for granted in academia and practice. In other words, while greenwashing is most definitely seen as a ‘bad’ thing, there has been limited clarity as to precisely why it is so problematic. Nevertheless, it is important to articulate the underlying motivations driving greenwashing regulation. This is not least because this will inform how the concept itself ought to be defined, but also how it ought to be used as an enforcement tool. Indeed, in this Part, I start to make the argument that greenwashing is the primary enforcement arm for sustainable finance regulation. The core rationale underpinning this is to provide protection against behaviour or practices that cause harm to the market system and market participants. While I concentrate on the Australian context, similar observations may be made in other jurisdictions.

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<sup>9</sup> Thomas P Lyon and A Wren Montgomery, ‘The Means and End of Greenwash’ (2015) 28(2) *Organization and Environment* 223, 226.

<sup>10</sup> *Environmental and Sustainability Claims* (n 1) 9.

<sup>11</sup> ‘How to Avoid Greenwashing’ (n 2).

## A Sustainable Finance Regulation

Greenwashing interventions are situated within the broader context of sustainable finance regulation. This requires a definition of sustainable finance regulation. Taking the ‘sustainable finance’ part of this first, there is not one single definition of sustainable finance. At its most narrow, it could merely be understood as finance that delivers returns in the longer term. However, this misses the critical connection between the concept of sustainability and its relationship with social and environmental challenges. Reflecting this, therefore, others have put forward a broad definition of sustainable finance. For example, the Australian Government has defined ‘sustainable finance’ as describing ‘financial flows that integrate consideration of impacts on society and the natural environment’, reflecting the role that the financial sector can play in addressing global challenges and that these challenges also pose opportunities and risks to financial entities and the system itself.<sup>12</sup> From an academic perspective, Schoenmaker and Schramade have said that it ‘looks at how finance (investing and lending) interacts with economic, social and environmental issues’.<sup>13</sup> A slightly more narrow approach, in the sense that it focuses on the positive impact of finance, suggests that sustainable finance ‘is the management of financial resources and investments with the aim of promoting long-lasting, positive, and measurable social and environmental impacts’.<sup>14</sup>

The ‘regulation’ part of the concept of ‘sustainable finance regulation’ refers to legal and regulatory tools that aim to enable (both in terms of promoting and removing barriers to) sustainable finance.<sup>15</sup> In other words, sustainable finance regulation is about informing and enabling activities by and decisions from market participants that support sustainability objectives. Jurisdictions around the world are introducing regulatory instruments to further such objectives. These instruments include disclosure frameworks like those from the Task Force on Climate-Related Finance Disclosures<sup>16</sup> and from the International Sustainability Standards Board,<sup>17</sup> as well as sustainable finance

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<sup>12</sup> Department of the Treasury (Cth), ‘Sustainable Finance Strategy’ (Consultation Paper, November 2023) 5 (‘Sustainable Finance Strategy’).

<sup>13</sup> Dirk Schoenmaker and Willem Schramade, *Principles of Sustainable Finance* (Oxford University Press, 2018) 4.

<sup>14</sup> Felipe Arias Fogliano de Souza Cunha, Erick Meira and Renato J Orsato, ‘Sustainable Finance and Investment: Review and Research Agenda’ (2021) 30(8) *Business Strategy and the Environment* 3821, 3826.

<sup>15</sup> A similar definition of ‘regulation’ is in the following article, although the authors focus on the enabling part of regulation: Iris H-Y Chiu, Lin Lin and David Rouch, ‘Law and Regulation for Sustainable Finance’ (2022) 23(1) *European Business Organization Law Review* 1, 1–2.

<sup>16</sup> Task Force on Climate-Related Financial Disclosures, *Recommendations of the Task Force on Climate-Related Financial Disclosures* (Final Report, June 2017) (‘Recommendations of the Task Force’).

<sup>17</sup> International Sustainability Standards Board, *IFRS S2 Climate-Related Disclosures* (Report, 2023) (‘IFRS S2 Climate-Related Disclosures’).

taxonomies such as those developed in the European Union.<sup>18</sup> This core purpose of sustainable finance regulation also therefore means that greenwashing interventions are key to enforcement.

### **B The Central Role for Market Enforcement Regulators**

The first point to note in relation to understanding the rationale for greenwashing interventions is that such regulation in Australia has largely not come from environmental and climate policy-makers. Rather, regulation to address greenwashing has largely come from the Treasury portfolio. The Treasury portfolio is comprised of activities aimed at achieving ‘strong sustainable economic growth for the good of Australians’.<sup>19</sup> Interventions to address greenwashing, therefore, are not necessarily be at first instance about providing good environmental outcomes, although this may be an ancillary outcome of such regulation. Greenwashing, instead, is situated in the context of Treasury’s focus on economic activities. Of the entities that fall within Treasury’s remit, enforcement agencies, namely, the ACCC and ASIC have been the most active in addressing greenwashing.

The protective mandates of these regulators, the ACCC as competition and consumer watchdog and ASIC as market conduct regulator (including consumer protection), have shaped the way greenwashing regulation is approached in Australia. In particular, greenwashing regulation is a tool for enforcement and compliance. This compliance and enforcement function relates back to the mandates of each of these regulators. The ACCC aims to ‘enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.<sup>20</sup> ASIC has responsibilities to, inter alia, ‘maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy’ and to ‘promote the confident and informed participation of investors and consumers in the financial system’.<sup>21</sup>

Greenwashing regulation therefore has been developed by market conduct regulators. In recent years, both the ACCC and ASIC have issued soft-law guidance briefly discussing why they are taking enforcement action to address greenwashing. Importantly, the reasons they give relate back in a broad sense to the need to protect market participants and the market system itself (the

<sup>18</sup> *Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088 (Text with EEA Relevance)* [2020] OJ L 198/13.

<sup>19</sup> ‘Treasury Portfolio’, *Treasury* (Web Page) <<https://treasury.gov.au/the-department/about-treasury/our-portfolio>>.

<sup>20</sup> *Competition and Consumer Act 2010* (Cth) s 2.

<sup>21</sup> *Australian Securities and Investments Commission Act 2001* (Cth) ss 1(2)(a)–(b).

significance of this is developed below). In its draft guidance for businesses making environmental and sustainability claims, the ACCC focuses primarily on the harm to consumers, as well as touching on the detriment to other market participants. They state that environmental claims that are false or misleading:

- limit a consumer's ability to make informed choices
- lead consumers to pay more for the value of an environmental benefit that doesn't exist
- unfairly disadvantage businesses which do make significant investments in genuinely pursuing more sustainable products or services
- undermine consumer trust in environmental claims in general and can create a disincentive for businesses to invest in more sustainable practices.<sup>22</sup>

ASIC's guidance similarly focuses on the harm of greenwashing and the need to protect a particular cohort, namely, investors. In its information sheet, the regulator has said that greenwashing

distorts relevant information that a current or prospective investor might require in order to make informed investment decisions. It can erode investor confidence in the market for sustainability-related products and poses a threat to a fair and efficient financial system.<sup>23</sup>

ASIC and the ACCC therefore then focus on the harm of greenwashing and the need for enforcement action to address this.

### **C The Core Harm Focus of Greenwashing Regulation**

Above, I have argued that greenwashing regulation in Australia has largely been implemented by regulators with protection and enforcement mandates. In other words, it is an enforcement tool in sustainable finance regulation. However, this raises the question, what does it aim to protect? Below I argue that the primary purpose for regulatory interventions relating to greenwashing are to address harm, or the potential for harm, to market participants and the market system itself. Both of these are taken in turn below. To do this, I broaden the focus beyond the Australian context and include analysis from interdisciplinary and inter-jurisdictional literature.

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<sup>22</sup> *Environmental and Sustainability Claims* (n 1) 7.

<sup>23</sup> 'How to Avoid Greenwashing' (n 2).

## 1 Harm to Market Participants

Greenwashing regulation aims to prevent or minimise actual or potential harm to three key groups of participants in the market system. These groups are consumers, businesses and investors.

First, as recognised in the ACCC's draft guidance set out above, greenwashing has the potential to cause harm to consumers. This might include direct financial harms.<sup>24</sup> A straightforward example is where a consumer pays more for a product that claims to have some environmental benefit that does not actually exist. Another example is where an individual switches to a different electricity provider or superannuation fund based on their inaccurate environmental representations and is priced out of access to a cheaper plan. Several studies in this regard have aimed to causally link greenwashing with consumer purchase intentions and behaviour.<sup>25</sup> However, it is important to note that greenwashing does not necessarily have to involve actual harm such as financial loss. Indeed, it may be hard to pinpoint this type of harm in individual cases.<sup>26</sup> For example, a business might attract a consumer on the basis of a misleading environmental claim, but the consumer might not have paid more for the product.

As such, greenwashing regulation not only aims to address *actual* financial harm to consumers. It also aims to address the harm that greenwashing might have on consumer *choice*. In this regard, greenwashing might increase consumers' confusion and mistrust, diminish their willingness to pay more for certain products, and negatively impact their view of environmentally conscious businesses and products.<sup>27</sup> It could also lead to '[s]earch and informational costs involved in evaluating green claims', increase green information making it difficult for consumers 'to pick the "cherries" from the "lemons" which may make them disengage from the market' and reduce trust and increase scepticism for sustainable products and claims.<sup>28</sup> Protecting consumer choice is of fundamental importance, particularly in Western liberal market economies and therefore justifies regulatory intervention.

Beyond consumer protection, I argue that greenwashing regulation exists to address harm to businesses. Market conduct regulators like the ACCC and ASIC are also concerned about taking enforcement action to address greenwashing

<sup>24</sup> Kristal Burry, 'Consumer Protections for Shoppers Seeking Sustainable Purchasers: What Is Missing?' (2023) 31(1) *Australian Journal of Competition and Consumer Law* 76, 77.

<sup>25</sup> For a review of these publications, see Célia Santos, Arnaldo Coelho and Alzira Marques, 'A Systematic Literature Review on Greenwashing and Its Relationship to Stakeholders: State of Art and Future Research Agenda' (2024) 74(3) *Management Review Quarterly* 1397, 1411–12.

<sup>26</sup> Miriam A Cherry, 'The Law and Economics of Corporate Social Responsibility and Greenwashing' (2014) 14(2) *UC Davis Business Law Journal* 281, 301.

<sup>27</sup> Hendy Mustiko Aji and Bayu Sutikno, 'The Extended Consequence of Greenwashing: Perceived Consumer Scepticism' (2015) 10(4) *International Journal of Business and Information* 433, 438–9.

<sup>28</sup> Burry (n 24) 76–7.

because of the actual or potential harm such behaviour could cause to other businesses. For example, greenwashing might be used by companies to make themselves look better than they are and to get them ahead of their competitors who are acting legitimately.<sup>29</sup> Greenwashing therefore has the potential to unfairly disadvantage businesses investing in sustainable practices and cause them to lose customers they should otherwise have gained. This harm is likely to be especially true in circumstances where companies are paying more to take steps to 'green' their business activities.

Moreover, beyond potentially damaging businesses doing the 'right' thing, businesses engaged in greenwashing might also cause harm to other businesses who are their customers. For example, greenwashing might cause harm to businesses who are in contractual relationships with entities engaged in greenwashing. Lane argues that green commercial players may make misleading representations to business consumers and lead to breach of contract claims, trademark infringement actions or fraud cases.<sup>30</sup> In addition, greenwashing could cause harm to businesses who are themselves engaged in greenwashing. For example, some have shown that if stakeholders perceive that a firm is engaging in greenwashing, this negatively impacts the entity's reputation and credibility,<sup>31</sup> as well as their ability to attract investors.<sup>32</sup>

Finally, enforcement action aims to address harm to investors potentially caused by greenwashing. In this regard, investors are reliant on information from firms to make decisions about where to put their money. If they do not have this information, they are unable to make informed choices. Greenwashing may cause harm because it distorts the information that is available to investors. This may have flow on effects in terms of reducing investor confidence in the sustainability market. The need for high-quality information about the veracity of companies claims regarding their climate commitments and management of climate change risks has driven the rise of frameworks like those proposed in the Task Force on Climate-Related Financial Disclosures' final recommendations and now the International Sustainability Standards Board Reporting Standards.<sup>33</sup> The core focus of greenwashing regulation therefore is as an enforcement tool to address harm to these three groups of market participants.

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<sup>29</sup> Yu-Shan Chen and Ching-Hsun Chang, 'Greenwash and Green Trust: The Mediation Effects of Green Consumer Confusion and Green Perceived Risk' (2013) 114(3) *Journal of Business Ethics* 489, 490.

<sup>30</sup> Eric L Lane, 'Greenwashing 2.0' (2013) 38(2) *Columbia Journal of Environmental Law* 279, 303.

<sup>31</sup> Juliane Keilmann and Thomas Koch, 'When Environmental Claims Are Empty Promises: How Greenwashing Affects Corporate Reputation and Credibility' (2024) 18(3) *Environmental Communication* 266, 281.

<sup>32</sup> Lucia Gatti, Marta Pizzetti and Peter Seele, 'Green Lies and Their Effect on Intention to Invest' (2021) 127 *Journal of Business Research* 228, 229.

<sup>33</sup> *Recommendations of the Task Force* (n 16); *IFRS S2 Climate-Related Disclosures* (n 17).

## 2 Harm to the Market System

Greenwashing regulation is also the enforcement arm of sustainable finance as it aims to address harm to the market system itself. Market conduct regulators like the ACCC and ASIC, and similar bodies in other jurisdictions, are therefore regulating in this area to prevent these harms. I argue that harm to the market system from greenwashing may manifest in at least two ways.

In one sense, greenwashing has the potential to undermine competitive markets. In Western liberal economies, competitive markets are understood to be ‘an efficient means to transmit information, to allocate resources (allocative efficiency), reduce costs (productive efficiency) and to promote invention and innovation (dynamic efficiency)’.<sup>34</sup> Information is essential for competitive markets to function. For example, if a market participant is provided with inaccurate or misleading information, or information is omitted, they cannot make rational decisions before acting. In this way, greenwashing may undermine competitive markets. In addition, companies may use greenwashing to ‘exercise market power or gain unfair competitive advantage’, reducing competition overall.<sup>35</sup> This is problematic because competitive markets are seen as the main vehicle through which to enhance consumer welfare.

In addition to, and beyond, harm to market competition, I argue that enforcement bodies are taking action to address greenwashing to prevent harm to the specific market for green claims and activities.<sup>36</sup> Greenwashing has the capacity to undermine the existence of the market in the first place. For example, it may undermine consumer trust, increase consumers’ suspicion towards green claims and reduce demand for green activities and products.<sup>37</sup> In other words, ‘[i]f the market is so distorted by “greenwashing noise” that it is difficult to tell real from fake [corporate social responsibility], then why should anyone continue to support such an endeavour?’<sup>38</sup> Thus, greenwashing threatens the integrity of the market. It may be difficult to distinguish greenwashing claims from legitimate claims which therefore decreases transparency. This may have flow on effects in terms of achieving good environmental outcomes. Enforcement action therefore might be undertaken to preserve the integrity of green markets.

## 3 The Enforcement Arm of Sustainable Finance

Putting together the sections above, I argue that the central focus of greenwashing regulation is to be the enforcement arm of sustainable finance

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<sup>34</sup> Arlen Duke, *Corones’ Competition Law in Australia* (Thomson Reuters, 7<sup>th</sup> ed, 2018) 27.

<sup>35</sup> Burry (n 24) 77.

<sup>36</sup> Magali A Delmas and Vanessa Cuerel Burbano, ‘The Drivers of Greenwashing’ (2011) 54(1) *California Management Review* 64, 65.

<sup>37</sup> Chen and Chang (n 29) 489–90.

<sup>38</sup> Cherry (n 26) 302.

regulation. Market conduct regulators like ASIC and the ACCC in Australia are responding to greenwashing to address harm to market participants and the market system. This is protection against harms to individual participants, namely, consumers, businesses and investors, as well as protection against harm to the economic system. This rationale for regulating greenwashing, in turn, can help to usefully identify the scope of a legal definition of the concept, a task to which I now turn in the next section.

#### IV LEGAL ELEMENTS OF GREENWASHING IN SUSTAINABLE FINANCE ENFORCEMENT

Given that a legal definition of greenwashing has been lacking in the literature, in the following Part, I propose a definition based on an analysis of the 38 legal interventions addressing greenwashing in the Australian and Pacific Climate Litigation Database<sup>39</sup> as at November 2023. Almost all these interventions were brought pursuant to misleading and deceptive conduct provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'), the *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law') and the *Corporations Act 2001* (Cth) ('Corporations Act') (see discussion in the following sections).

In short, I define greenwashing as conduct (being acts or omissions) that has some connection to sustainability where that conduct is actually, or is likely to be, misleading or deceptive, or otherwise false, as to its impact on sustainability matters. Moreover, an additional characteristic to help regulators to prioritise enforcement action could be a requirement for mental elements, for example, intention, recklessness, negligence and/or knowledge or the existence of actual harm, but these are not essential to prove a greenwashing claim. This definition of greenwashing is informed by the rationale for greenwashing regulation identified above and places redress for actual or potential harm to the market system and market participants by corporate and financial sector entities at its heart. Before discussing each element in turn, I first provide a brief overview of trends in greenwashing cases in Australia.

In addition, I note here that it is beyond the scope of this article to comprehensively assess the analytical or normative force that this definition may play in the future. Rather, providing a clear legal definition of the term is the first step. With a clear definition in place, it will arguably help entities to understand what behaviour does and does not constitute greenwashing. It may also help regulators in terms of prioritising what they should and should not address as

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<sup>39</sup> This database records all cases of climate-related litigation in Australia and the Pacific: 'Australian and Pacific Climate Change Litigation', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/index.php>>.

‘greenwashing’ behaviour. Future research projects could look at whether or not these provisions are ‘fit for purpose’ in terms of providing adequate scope to addressing greenwashing harms.

### A Trends in Greenwashing Cases Over Time

Several empirical trends can be identified by analysing greenwashing claims in the Australian and Pacific Climate Litigation Database. This database adopts a definition of climate litigation proposed by Peel and Osofsky. Peel and Osofsky define climate litigation as cases where climate change is not only a central issue in the dispute, but also where climate change is raised as a peripheral issue, where climate concerns motivate the lawsuit, or where the case has implications for mitigation or adaptation.<sup>40</sup> The database also includes some legal interventions that occur beyond the courtroom. The definition of ‘climate litigation’ adopted in the database is broader than those put forward by international litigation database providers.<sup>41</sup> However, the advantage of a broader definition of climate cases means that the database arguably captures trends at the frontier of climate litigation and law. This includes greenwashing cases.

Turning to trends in greenwashing cases in the Australian context, legal interventions to address greenwashing have become more common in recent years. Indeed, more of these interventions have been brought in the last two years (15 in 2023 and 12 in 2022) than in all preceding years (11 cases).<sup>42</sup> Another important observation is that these cases have not just been confined to litigation filed to judicial bodies. Indeed, while just over half of these cases have been brought in courtrooms or before another complaint resolution body (20 cases), other legal interventions have included 12 legal letters written by not-for-profit groups and individuals and 6 infringement notices that have been issued by ASIC.

Greenwashing legal interventions have been brought by and against a range of actors. The parties primarily involved in greenwashing cases have been government regulators, not-for-profit civil society groups and corporate and financial sector participants. On the complainant side, ASIC and not-for-profit groups have been the main complainants in these cases (15 interventions commenced by ASIC and 16 commenced by not-for-profit groups). On the defendant side, these actors have included companies in sectors such as energy, mining, oil and gas, vehicles, banking, and household products (25 cases), and

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<sup>40</sup> Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 8.

<sup>41</sup> Sabin Center for Climate Change Law, *Climate Change Litigation Databases* (Web Page) <<https://climatecasechart.com/>>; Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, *Climate Change Laws of the World* (Web Page) <<https://climate-laws.org/>>.

<sup>42</sup> These numbers are current as at November 2023.

entities in the financial sector namely superannuation fund trustees and an investment manager (9 cases).

Beyond the number and ‘who’ of greenwashing interventions, greenwashing cases can also be categorised as falling into several main ‘types’. In other words, there is arguably a typology of greenwashing interventions that can be identified in the database. These are distinguished by the type of activity that is said to have constituted greenwashing. In this regard, greenwashing cases have pertained to company products or projects or financial products, related to company-wide claims or financial-entity-wide claims, and cases relating to accreditation schemes or logos and symbols. Cases falling into these types have been mainly brought pursuant to provisions in the *Corporations Act*, the *ASIC Act* and the *Australian Consumer Law*, amongst other provisions. Below lists the provisions that claims for each of these types have been brought pursuant to:

- Company products or projects: *Australian Consumer Law* ss 18, 29, 33; *ASIC Act* ss 12DA–12DB; *Corporations Act* s 1041H; Australian Association of National Advertisers, *Environmental Claims Code* (at 1 May 2018) ss 1–2 (‘AANA Environmental Claims Code’); *Trade Practices Act 1974* (Cth) ss 52–53 (‘Trade Practices Act’);
- Financial products: *ASIC Act* ss 12DB, 12DF;
- Company-wide claims: *Australian Consumer Law* ss 18, 29, 33; *Corporations Act* s 1041H; *AANA Environmental Claims Code* ss 1–2;
- Financial entity-wide claims: *ASIC Act* ss 12DA–12DB, 12DF; *Corporations Act* ss 247A, 1041H;
- Accreditation schemes or logos and symbols: *Australian Consumer Law* ss 18, 29, 33; *Copyright Act 1968* (Cth) ss 31, 36; *Trade Marks Act 1995* (Cth) s 120; *Renewable Energy (Electricity) Act 2000* (Cth) ss 24B, 154N; *Trade Practices Act* ss 53, 87B.

A typology of greenwashing cases is particularly useful to identify two ‘generations’ of greenwashing cases that have been filed in Australia: first generation and next generation greenwashing cases.<sup>43</sup> To elaborate, as per the graph below, between 2008 to 2021, ‘first generation’ greenwashing cases only fell into two of the types identified above, namely, cases related to company products or projects, or to accreditation schemes or logos. The cases in these categories related to false or misleading claims made in relation to particular products or projects marketed as having ‘green’ credentials, for example, tyres or paint, or claims made by companies that their products or services were

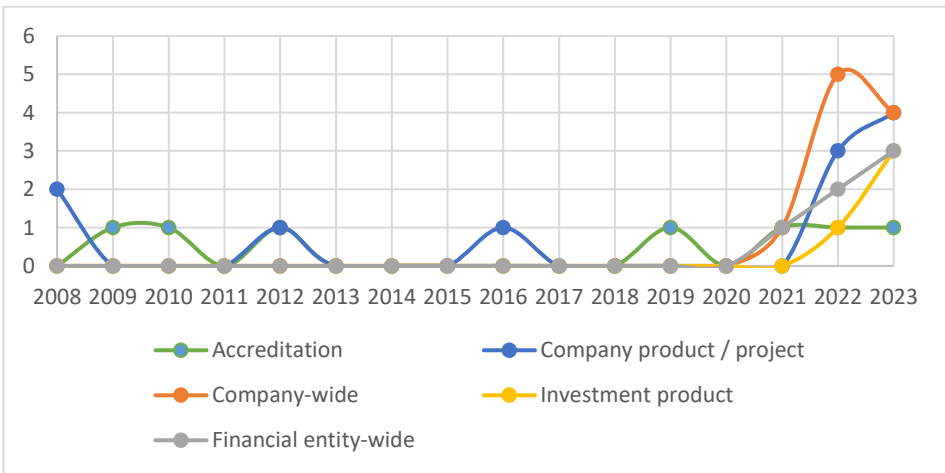
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<sup>43</sup> The idea of ‘distinguishing between’ is inspired by Jacqueline Peel, Hari Osofsky and Anita Foerster, ‘Shaping the “Next Generation” of Climate Change Litigation in Australia’ (2017) 41(2) *Melbourne University Law Review* 793.

accredited under particular schemes. Such claims have continued to be filed, with an increase in the number of company product/project cases in particular in 2022 and 2023. However, at the same time, there has also been a rise in ‘next generation’ greenwashing cases.

The next generation of greenwashing cases have appeared between 2021 and 2023. Unlike first generation cases that related to particular company products and projects, next generation cases have related to financial product, company-wide and financial-entity-wide claims. Taking each of these in turn, similar to greenwashing cases brought in relation to misleading claims about company products or projects, claimants in next generation greenwashing cases have challenged representations made by financial sector entities about financial products. These products have included misleading claims about the ‘greenness’ of superannuation products or other investment fund products. However, cases falling into the next generation of greenwashing legal interventions have also challenged sustainability conduct at an entity-wide level. These cases challenge the conduct of corporate and financial sector entities.

**Table 1: Trends in Greenwashing Cases Over Time**



In terms of thinking about the future of greenwashing cases, it is likely that enforcement action will continue to grow. This may include claims falling across the range of types of interventions identified thus far. While forecasting future trends in greenwashing litigation is beyond the scope of this article, what is important is the observation that an increasing interest in the topic means it is essential to clearly identify what is, and what is not, greenwashing. As such, in the following section, I consider elements of a legal definition of greenwashing.

## B Elements of a Legal Definition of Greenwashing

Despite the increasing number of greenwashing cases being pursued by regulators and civil society groups elements of enforcement action to address greenwashing have not been spelled out in detail in existing case law or literature.<sup>44</sup> This may be due to the fact that greenwashing is still a relatively new phenomenon and therefore the contours of the concept are still being navigated. However, I argue that it is important to identify elements of an enforcement action to address greenwashing. This will help regulators understand where to prioritise their interventions, so companies and financial sector actors can act in accordance with the law and so that others (including civil society groups and individuals) can identify what constitutes greenwashing behaviour and what constitutes legitimate environmental action. Possible elements are therefore identified below. While this concentrates on the Australian context, these elements could be adopted in other jurisdictions.

### 1 Conduct (Act or Omission)

First, enforcement action must relate to some ‘conduct’ undertaken by a corporate or financial sector entity. This conduct includes ‘positive’ acts or representations made by a corporate or financial sector entity. By positive acts or representations, I mean entities actively ‘doing something’, rather than commenting on the morality of the conduct. Such positive conduct could include empty or exaggerated claims, provision of inconsistent or irrelevant information, outright lies, and/or suggestive terminology, imagery and sounds.<sup>45</sup> For example, in *Australasian Centre for Corporate Responsibility v Santos Ltd*,<sup>46</sup> complaints relate to statements made in Santos’ reports and briefings. In this case, the statements themselves are the positive conduct. Similarly, positive conduct has involved representations made by a company as to the environmental benefits of Eagle LS2000 tyres in media releases, point of sale material, flyers and the company’s website.<sup>47</sup> In other cases, positive conduct has included statements in a Facebook

<sup>44</sup> However, since writing this article, the Federal Court of Australia has said that greenwashing is not governed by a specific statutory regime and is instead to be determined pursuant to existing provisions on misleading and deceptive conduct: *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Ltd* [2024] FCA 850, [53] (Horan J) (‘ASIC v Mercer’).

<sup>45</sup> This ‘positive’ conduct was identified by European regulators, although they focus only on the provision of information: European Securities and Markets Authority, *Progress Report on Greenwashing* (Report, 31 May 2023) 18 (‘Progress Report on Greenwashing’).

<sup>46</sup> (Federal Court of Australia, NSD858/2021, commenced 25 August 2021). The case was adjourned, part heard, on 6 November 2024 by the Federal Court. For discussion, see ‘Australasian Centre for Corporate Responsibility v Santos Ltd’, *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=701&browseChron=1>>.

<sup>47</sup> See ‘Australian Competition and Consumer Commission v Goodyear Tyres’, *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=618&browseChron=1>> (‘Goodyear Tyres’).

post,<sup>48</sup> ASX announcements,<sup>49</sup> and statements on the entity's website<sup>50</sup> or product disclosure statements.<sup>51</sup>

Beyond positive conduct, I also argue that enforcement action could address the 'negative' conduct of a corporation or financial sector entity. By negative conduct, I refer to entities not doing something ie omissions. Such negative conduct could include selective disclosure, lack of information, vague statements, lack of clear and meaningful comparisons, unsubstantiated claims or outdated information.<sup>52</sup> For example, in one case, a complaint was lodged about statements made by Glencore that discussed their involvement in mining minerals for a low carbon future but were silent about their current operations focused on coal mining.<sup>53</sup> In this case, the conduct was the omission of information. There is an open question as to whether the complete lack of action by a corporate or financial sector entity could constitute greenwashing. However, it might be argued that this sort of conduct could be better captured under provisions relating to a lack of continuous disclosure to the marketplace<sup>54</sup> or breaches of directors' duties, especially the duty of care and skill.<sup>55</sup> This is because these provisions either specifically account for omissions (eg failure to correct an incorrect information being supplied to the market place pursuant to continuous disclosure provisions) or are sufficiently broad so as to potentially encompass omissions (eg directors'

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<sup>48</sup> Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (S02515914, 21 April 2023). For discussion, see 'ASIC Issues Infringement Notice to Future Super Investment Services for Greenwashing', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=959&browseChron=1>>.

<sup>49</sup> Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (B00725794, 20 December 2022) ('*Black Mountain Energy Infringement Notice*'). For discussion, see 'ASIC Issues Infringement Notices to Black Mountain Energy Limited for Greenwashing', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=897&browseChron=1>>; 'ASIC Issues Infringement Notice to Tlou Energy Limited for Greenwashing', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=892&browseChron=1>> ('*Tlou Energy*').

<sup>50</sup> Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (S02553193, 11 November 2022). For discussion, see 'ASIC Issues Infringement Notice to Superannuation Trustee Diversa Trustees Limited (Diversa) for Greenwashing', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=896&browseChron=1>>.

<sup>51</sup> Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (S02553190, 11 November 2022). For discussion, see 'ASIC Issues Infringement Notice to Vanguard Investments Australia for Greenwashing', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=894&browseChron=1>>.

<sup>52</sup> *Progress Report on Greenwashing* (n 45) 18.

<sup>53</sup> Ad Standards Community Panel, *Case Report* (Case 0225-22, 28 September 2022). For discussion, see 'Complaints Over Glencore's Net Zero by 2050 Claims', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=945&browseChron=1>>.

<sup>54</sup> *Corporations Act 2001* (Cth) s 674 ('*Corporations Act*'); ASX, *Listing Rules* (at 5 June 2021) r 3.1.

<sup>55</sup> *Ibid* s 180.

failing to provide information about their current activities constituting a breach of their duty of due care and skill).

## 2 Conduct Relates to Sustainability

In addition, enforcement action to address greenwashing must be directed at conduct that has a connection to sustainability. Greenwashing conduct may be related to sustainability in at least three different ways.<sup>56</sup> First, greenwashing cases have aimed to challenge conduct relating to the product/project or entities' environmental impact. For example, a legal letter written to the ACCC by civil society groups has argued that statements made by the Australian Petroleum Production and Exploration Association about the environmental benefits and future role of gas constitute greenwashing.<sup>57</sup> In another case, ASIC issued infringement notices to Black Mountain Energy<sup>58</sup> and Tlou Energy<sup>59</sup> for making claims that their gas projects would have net zero carbon emissions, when this was unlikely to be true. Other cases relate to sustainability in terms of the environmental impact of certain products such as cars, paint and tyres.<sup>60</sup>

In addition, greenwashing conduct could also be connected to sustainability in terms of the methods and procedures used by company or financial sector entity. For example, in *Australian Securities and Investments Commission v LGSS Pty Ltd*,<sup>61</sup> ASIC had commenced civil penalty proceedings against Active Super for

<sup>56</sup> These are environmental impact, methods and procedures, and strategy and engagement (including targets). Note that in the European context they have said that sustainability topics about which a claim is communicated have related to three categories: governance and resources, environment, social and governance ('ESG') strategy, and sustainability metrics and targets. See *Progress Report on Greenwashing* (n 45) 18.

<sup>57</sup> See 'Complaint Lodged on Potentially False or Misleading Conduct by APPEA', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=971&browseChron=1>>. *Black Mountain Energy Infringement Notice* (n 49).

<sup>59</sup> Australian Securities and Investments Commission, *Infringement Notice: Section 12GX of the Australian Securities and Investments Commission Act 2001* (S02563037, 18 October 2022). For discussion, see 'Tlou Energy' (n 49).

<sup>60</sup> See, eg, *Mitsubishi Motors Australia Ltd v Begovic* (2023) 98 ALJR 155, discussed in 'Mitsubishi Motors Australia Ltd v Begovic', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=681&browseChron=1>>; *Australian Competition and Consumer Commission v DuluxGroup (Australia) Pty Ltd* [2014] FCA 1158, discussed in 'Australian Competition and Consumer Commission v DuluxGroup (Australia) Pty Limited', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=735&browseChron=1>>; *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166, discussed in 'Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=641&browseChron=1>>; 'Goodyear Tyres' (n 47).

<sup>61</sup> *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587. For discussion see 'Australian Securities and Investments Commission v Active Super (LGSS Pty Limited ACN 078 003 497 as Trustee for Local Government Super ABN 28 901 371 321)', *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=974&browseChron=1>>.

claiming to have screened and eliminated investments that pose too great a risk to the environment and the community. The connection to sustainability there was in the methods used by Active Super to screen investments. In a similar vein, the case of *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* relates to representations that all securities in the Vanguard Ethically Conscious Global Aggregate Bond Index Fund were screened against certain ESG criteria.<sup>62</sup> This case was preceded by an infringement notice issued by ASIC over claims that the fund had excluded sales of tobacco. Similarly, *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Ltd* relates to claims that a ‘Sustainable Plus’ investment option excluded investments in certain industries.<sup>63</sup>

Finally, conduct might also be related to sustainability in terms of the entity’s sustainability strategy and engagement. For example, a legal letter written to HESTA’s trustees challenged representations that:

HESTA is a leader on climate action and investment in clean energy; HESTA’s corporate and investment strategy are aligned with the Paris Agreement; HESTA is reducing its portfolio emissions and aims to reach net zero by 2050; HESTA’s investment decisions are in line with [SDGs]; HESTA’s investment strategy ... will help deliver long-term value for HESTA members; HESTA is committed to reducing its environmental impact; and HESTA has been engaging with those companies in which it is invested (including Woodside and Santos) to transition them in line with the Paris Agreement.<sup>64</sup>

Another complaint challenged the sustainability representations made by Shell regarding their plans, or lack thereof, to reduce the overall amount of oil and gas produced.<sup>65</sup> In addition, applicants have also sought documents from the Commonwealth Bank after believing that certain investments put the company in breach of their environmental and social investment policy frameworks.<sup>66</sup>

<sup>62</sup> [2024] FCA 308, [3]–[4] (O’Byrne J). For discussion see ‘Australian Securities and Investments Commission v Vanguard Investments Australia Ltd’, *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=972&browseChron=1>>.

<sup>63</sup> *ASIC v Mercer* (n 44) [2] (Horan J). For discussion see ‘Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited’, *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=901&browseChron=1>>.

<sup>64</sup> Letter from Environmental Defenders Office to The Trustees for HESTA, 4 August 2022, 2 [3] <<https://www.edo.org.au/wp-content/uploads/2023/02/Letter-to-HESTA-Trustees.pdf>>. See also Hannah Wootton, ‘Bushfire Survivor in Legal Challenge Over Super Fund’s Woodside Shares’, *The Australian Financial Review* (Sydney, 27 June 2023); ‘Legal Letter to HESTA Over Investments in Santos and Woodside’, *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=967&browseChron=1>>.

<sup>65</sup> Ad Standards Community Panel, *Case Report* (Case 0280-22, 25 January 2023). For discussion see ‘Complaint Over Shell’s Net Zero by 2050 Claims’, *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=944&browseChron=1>>.

<sup>66</sup> See, eg, ‘Abrahams v Commonwealth Bank of Australia’, *The University of Melbourne* (Web Page) <<https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=700&browseChron=1>>. This case was resolved by consent, see Order of Markovic J in *Abrahams v Commonwealth Bank of Australia* (Federal Court of Australia, NSD864/2021, 13 April 2023).

### 3 Sustainability Conduct is, or is Likely to be, Misleading, Deceptive or False

The third, and arguably most important, part of a legal enforcement action to address greenwashing, is that the conduct related to sustainability is actually, or likely to be, misleading and deceptive or false. Indeed, almost all greenwashing claims have been brought pursuant to misleading and deceptive conduct provisions under Australian law. This is arguably what distinguishes greenwashing from other types of problematic behaviour. Greenwashing in this regard is not problematic because it relates to conduct that is necessarily 'morally' wrong (although greenwashing could be characterised as moral problem). If the 'wrongness' of greenwashing came from its morally dubious undertones, it would be more likely to see cases brought in relation to unfair practices, unconscionable conduct or unfair contract terms. Rather, greenwashing interventions focus on the harm to market participants and the market system (as set out in Part III).

To elaborate on the harm aspect of greenwashing, claimants in greenwashing cases have relied on a range of provisions prohibiting misleading and deceptive conduct and, in particular, the *ASIC Act* ss 12DA, 12DB(1)(a), (c), (e), 12DF, the *Australian Consumer Law* ss 18, 29 and 33 and the *Corporations Act* s 1041H. These provisions are all slightly different but in the broad sense prohibit misleading or deceptive conduct relating to financial products and services and in relation to corporate goods and services.<sup>67</sup> The central question in these cases is 'whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter'.<sup>68</sup> A successful claim for greenwashing will therefore depend on whether the conduct is likely to be misleading or deceptive to the public and/or to an identified individual.

### 4 Mental Elements

The above has set out the three main elements of a legal enforcement claim to address greenwashing. Enforcement proceedings are therefore based on showing that there was some conduct (act or omission) relating to sustainability and that conduct was, or was like to be, misleading or deceptive or otherwise false. However, beyond these elements, other factors may help regulators to

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<sup>67</sup> It is beyond the scope of this paper to discuss the fragmented nature of this regime. For discussion, see Elise Bant and Jeannie Marie Paterson, 'Developing a Rational Law of Misleading Conduct' in John Eldridge, Michael Douglas and Claudia Carr (eds), *Economic Torts and Economic Wrongs* (Hart Publishing, 2021) 275–302.

<sup>68</sup> *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932, [98] (O'Bryan J). See also *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198 (Gibbs CJ).

distinguish between the types of cases that they ought to bring. In particular, regulators might wish to address greenwashing conduct that involves some ‘mental’ element, for example, where the corporate or financial sector entity was intentionally misleading or deceptive, negligent or reckless or otherwise had knowledge that their conduct was likely to be misleading or deceptive. These mental elements are not necessarily included in legislation or in case law to date, however, they could be factors that inform the decision from a regulator whether to bring an enforcement action in the first place. In addition, regulators might prioritise greenwashing interventions that cause actual harm to the market system or market participants. This is a space for future research. It also invites further consideration in the next section of how greenwashing might be implemented as a tool for sustainable finance enforcement.

## V IMPLEMENTING THE ENFORCEMENT ARM OF SUSTAINABLE FINANCE

Above I have defined greenwashing as the primary enforcement tool of sustainable finance that focuses on harm to the market system and market participants. Below, I look at how greenwashing might be implemented as an enforcement tool in practice and I provide a typology of the different legal tools that have emerged in Australia to address greenwashing. To date, regulators have largely relied on existing enforcement tools. These have concentrated on prohibiting and punishing harmful conduct, rather than defining what is ‘good’ environmental conduct. Future research projects could look at whether or not these existing provisions are sufficient to redress the harm that greenwashing causes.

### A *Typology of Enforcement Responses*

Enforcement measures to address greenwashing can be characterised according to an ‘regulatory enforcement instrument pyramid’.<sup>69</sup> This instrument-pyramid ranges from measures that are less coercive, less interventionist and cheaper, at the bottom of the pyramid, to measures that are more coercive, more interventionist and more expensive at the apex of the pyramid. Below provides a typology of these regulatory responses.

#### 1 *Persuasion*

Two tools of ‘persuasion’ have emerged in the Australian context to address the harm of greenwashing. The first approach has been to compile surveillance reports on greenwashing. This has been used by regulators as a way to gather

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<sup>69</sup> The ‘regulatory enforcement pyramid’ has developed in, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 39.

information and also to signal to companies and financial sector entities that they should not engage in greenwashing conduct. ASIC, for example, provided a report on its greenwashing surveillance activities to ‘provide transparency to the market on the nature of the matters where [they] have recently intervened’.<sup>70</sup> Similarly, the ACCC issued a report on greenwashing that aimed to ‘identify industries or sectors which commonly use environmental and sustainability claims, and to assess whether these claims have the potential to mislead consumers’.<sup>71</sup> These reports concentrate on the harm caused by the greenwashing conduct.

To complement these surveillance and information tools which concentrate on persuasion, ASIC and the ACCC have also issued guidance to companies and financial sector entities to prevent them from doing the wrong thing. In particular, ASIC has put together a list of questions to consider when offering or promoting sustainability-related products. These questions include:

Is your product true to label? Have you used vague terminology? Are your headline claims potentially misleading? Have you explained how sustainability-related factors are incorporated into investment decisions and stewardship activities? Have you explained your investment screening criteria?<sup>72</sup>

The ACCC has gone down the ‘principles approach’ route by identifying eight principles for trustworthy environmental and sustainability claims.<sup>73</sup> Again, these guides are not prescriptive as to what ‘good’ looks like but, rather, they concentrate on making sure entities do not cause harm.

## 2 Direct Engagement

The second type of enforcement tool that has been used to address greenwashing in Australia has invoked more direct engagement with corporate and financial sector entities. Engagement is arguably more interventionist and coercive than persuasion because it is a tool for direct contact with an entity in relation to its conduct. In this regard, for example, ASIC has engaged with a number of entities to ensure they correct their greenwashing behaviour.<sup>74</sup> However, it is not only regulators who may use direct engagement as an enforcement tool. Indeed, civil society groups have been particularly active on this front by writing warning letters to companies and financial sector entities, as well as regulators, to set out evidence that the firm is arguably engaging in greenwashing behaviour.<sup>75</sup> This has been used as tool to not only try to address the problematic behaviour directly by

<sup>70</sup> Australian Securities and Investments Commission, *ASIC’s Recent Greenwashing Interventions* (Report No 763, 10 May 2023) 3 (‘*ASIC’s Recent Greenwashing Interventions*’).

<sup>71</sup> Australian Competition and Consumer Commission, *Greenwashing by Businesses in Australia: Findings of the ACCC’s Internet Sweep of Environmental Claims* (Report, 2 March 2023) 4.

<sup>72</sup> ‘How to Avoid Greenwashing’ (n 2).

<sup>73</sup> *Environmental and Sustainability Claims* (n 1) 5–6.

<sup>74</sup> See generally *ASIC’s Recent Greenwashing Interventions* (n 70).

<sup>75</sup> See above Part IV.

asking for regulatory intervention but to also use these letters as a public ‘name and shame’ tool.

### 3 Administrative Notices

Enforcement action on greenwashing has been more coercive than persuasion or direct engagement. These interventions might be most appropriately saved for entities that have failed to respond to the less coercive enforcement mechanisms identified above. In particular, regulators like ASIC and the ACCC have more coercive enforcement powers to address the actual or potential harm caused by greenwashing to the market system and market participants. For example, ASIC has the power under the *ASIC Act* to issue an infringement notice if they believe ‘on reasonable grounds’ that there has been a contravention under the Act.<sup>76</sup> As at May 2023, they had issued 11 such infringement notices which are also available on a register on the ASIC website. The ACCC similarly has power to issue infringement notices to entities to address harmful behaviour.<sup>77</sup>

### 4 Civil and Criminal Penalties

At the most extreme end of measures to address greenwashing, both ASIC and the ACCC have taken, and have the power to take, enforcement action in the courts. Indeed, in calendar years 2022–23 and 2023–24, both regulators made enforcement in relation to greenwashing a key priority. For example, one of the ACCC’s 2023–24 compliance and priorities was ‘[c]onsumer, product safety, fair trading and competition concerns in relation to environmental claims and sustainability’.<sup>78</sup> ASIC similarly has made ‘[m]isleading conduct in relation to sustainable finance including greenwashing’ a key priority.<sup>79</sup> This included taking enforcement steps in the courts, which occurred in 2024 and preceding years. Civil and criminal penalties might therefore be thought of as the apex of enforcement action in relation to sustainable finance in Australia.

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<sup>76</sup> ASIC has power to issue infringement notices under a range of provisions. The website with the register is available here: ‘Infringement Notices’, *Australian Securities and Investments Commission* (Web Page, 30 March 2023) <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/infringement-notices/>>.

<sup>77</sup> The ACCC’s infringement notice website is available here: ‘Infringement Notices Register’, *Australian Competition and Consumer Commission* (Web Page) <<https://www.accc.gov.au/public-registers/infringement-notices-register>>.

<sup>78</sup> ‘Compliance and Enforcement Priorities’, *Australian Competition and Consumer Commission* (Web Page) <<https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-policy-and-priorities>>.

<sup>79</sup> ‘ASIC Enforcement Priorities’, *Australian Securities and Investments Commission* (Web Page, 14 November 2024) <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>>.

## B Further Steps to Strengthen Greenwashing Enforcement

There are at least three ways policy-makers could strengthen the use of greenwashing as an enforcement tool. First, I argue that there is a need to think for policy-makers and regulators to think around how interventions could be prioritised. One possibility could be to prioritise enforcement action against those ‘entities that flagrantly disregard Australian laws and misrepresent their sustainability related risks, credentials and strategies’ as compared to ‘entities that adopt a “best endeavours” approach to managing their sustainability related risks, credentials and strategies’.<sup>80</sup> This would attempt to address concerns about ‘greenhushing’ ie entities who fail to disclose any of their actions on sustainability for fear of regulatory enforcement. In addition, an alternative or complementary factor could be to prioritise interventions in terms of the conduct that has the most potential to cause harm to the market system and market participants. Further thought could be given to devising these criteria for legal interventions.

Second, and in addition to specific enforcement tools outline above, thought could be given to creating an administrative body to issue administrative guidance on, and to ‘police’, greenwashing. This body would step in prior to enforcement action being brought in court. The body’s mandate would be to act as a watchdog on false, misleading or deceptive sustainability-based conduct that might cause, or which has caused, harm to market participants or the market system. It could do this by determining disputes regarding whether or not particular conduct constituted greenwashing. In this way it could publish decisions on greenwashing behaviour. The body could also provide a space for government, private sector and civil society groups to work together to identify what is positive environmental conduct (ie what is not greenwashing), potentially informed by sustainable finance taxonomies being developed around the world.

Finally, the forthcoming reform to the *Corporations Act* in Australia will make climate risk disclosure mandatory, alongside the Australian Accounting Standards Board consultation on reporting standards. While, currently, these changes will require entities to disclose their climate-related risks, it is likely that these standards will be broadened in the future to encompass other sustainability matters, like nature.<sup>81</sup> The disclosure of this information could help strengthen greenwashing enforcement by providing investors and regulators with information about how entities are responding to sustainability challenges like climate change. Market participants, like investors, will have access to more information through reporting about the credibility behind an entities’ climate commitments. In addition, this could help regulators to prioritise which entities

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<sup>80</sup> Business Council of Australia, Submission No 57 to Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Greenwashing* (June 2023) 3.

<sup>81</sup> ‘Sustainable Finance Strategy’ (n 12) 5.

to bring enforcement actions against, while also supporting those who need assistance in meeting sustainability targets.

## **VI ENFORCEMENT AS PART OF AN INTEGRATED SUSTAINABLE FINANCE SYSTEM**

In Part V, I argued that legal responses to greenwashing are the essential enforcement arm of sustainable finance regulatory architecture. As explained earlier, I define sustainable finance regulation as legal and regulatory developments that provide support for and remove barriers to financial flows that integrate consideration of impacts on society and the natural environment. However, given the narrow focus of greenwashing, it is also important to consider how it fits within a broader architecture of sustainability finance regulation in each country. In this Part, I concentrate on the Australian context but suggest that similar thinking might be undertaken in other jurisdictions.

### ***A An Overarching Governance Body***

It is important that there is an integrated legal and regulatory architecture to govern sustainable finance in Australia. Up to now, much of the focus of regulators and policy-makers, as well as firms and civil society, has been to develop the building blocks for sustainable finance. This includes taking steps to address greenwashing. However, with the Treasury's Sustainable Finance Strategy released in November 2023, there is an opportunity to start to draw all these strands together to ensure that the financial system plays a role in addressing global challenges, including by delivering financial flows for climate change mitigation and adaptation, and that it manages its own risks and opportunities in the face of these challenges.<sup>82</sup>

Implementation of this overarching legal and regulatory architecture could be led by a 'Sustainable Finance Taskforce', a permanent governance body situated within, or exterior to, Treasury that aims to draw together all the different components of sustainable finance in Australia. This Taskforce would adopt a 'regulatory instrumentalist' approach (put simply, a problem-solving approach) where law and regulation are used as the means to implement policy to address sustainable finance problems.<sup>83</sup> In particular, the Taskforce might report annually to Treasury with law, regulation and policy recommendations that are necessary to achieve priority outcomes on sustainable finance.

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<sup>82</sup> These ideas were developed in Sustainable Finance Hub, Melbourne Climate Futures, Submission to the Department of the Treasury (Cth), *Sustainable Finance Strategy* (1 December 2023).

<sup>83</sup> This is the approach taken in another new area of regulation: Iris H-Y Chiu, *Regulating the Crypto Economy: Business Transformations and Financialisation* (Hart Publishing, 2021) 45.

## **B Review Existing and New Legislative and Regulatory Actors and Tools**

The first activity for the Taskforce could be to undertake three mapping and review exercises with a view to understanding how all the different components of sustainable finance ‘fit’ together and, most relevant to this article, how these interact with greenwashing regulation. First, the Taskforce could undertake a mapping and review exercise of the different actors involved in regulatory standard setting and policy development relevant to sustainable finance. This would include reviewing all the mandates of government departments, firms involved in standard setting and non-government organisations and civil society groups also involved in regulatory development. Second, the Taskforce might undertake a mapping and review of existing legal frameworks in Australia relevant to sustainable finance, including a review of current corporate governance obligations, prudential frameworks and oversight, and review of the superannuation system. Third, the Taskforce might undertake a mapping and review exercise of the new legal and regulatory tools that are being developed such as the disclosure framework, the sustainable finance taxonomy and labelling requirements for sustainable investment products.

The aim of these mapping and review exercises would be to assess how well all these mandates and frameworks fit together to provide a framework to address greenwashing. Some ideas include:

- Assessing the mandates of regulators like ASIC and the ACCC to determine whether they are broad enough to include interventions to address greenwashing, as well as to assess any capacity constraints.
- Considering whether the misleading and deceptive conduct provisions are sufficiently broad to address greenwashing or whether there needs to be some expansion to these provisions.
- Using tools like the forthcoming Australian Sustainable Finance Taxonomy,<sup>84</sup> new disclosure reporting requirements and investment labelling to identify what is and what is not greenwashing.
- Creating a regulatory space (potentially in an administrative body) where firms, regulators and civil society actors could provide examples of ‘best practice’ sustainability behaviour to drive conduct away from greenwashing conduct.

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<sup>84</sup> ‘Taxonomy Project’, *Australian Sustainable Finance Institute* (Web Page) <<https://www.asfi.org.au/taxonomy>>.

## VII CONCLUSION

Addressing greenwashing has become a significant priority for policy-makers and regulators in recent years. This makes it all the more important to articulate a crisp legal definition of greenwashing. A clear legal definition could help to clarify that the purpose of greenwashing is to regulate conduct of corporate and financial sector entities that could harm market participants or the market system. However, interventions to address greenwashing cannot exist in isolation. Rather, there ought to be careful consideration as to how this enforcement tool fits within an integrated sustainable finance regulatory architecture. This includes by providing for an overarching governance body and reviewing the range of tools that could be used to address greenwashing and other sustainable finance issues.

# THE 24<sup>TH</sup> WA LEE EQUITY LECTURE

## THE INTERACTION OF ABORIGINAL AND TORRES STRAIT ISLANDER CUSTOMARY LAW WITH SOME ASPECTS OF THE LAW OF EQUITY: IS THE VIEW ANY DIFFERENT THROUGH THE LENS OF THE *HUMAN RIGHTS ACT*?

2 NOVEMBER 2023, BANCO COURT,  
SUPREME COURT OF QUEENSLAND

THE HON CHIEF JUSTICE HELEN BOWSKILL\*

### I INTRODUCTION

Good evening everyone — friends and colleagues, members of the legal and broader community. I acknowledge all of you as distinguished guests and as most welcome visitors to the Banco Court this evening. I also acknowledge the first owners and custodians of this land, the Turrbal people and the Jagera people, and of the land and waters across Australia. I pay my respects to their ancestors and elders, and thank them for their wisdom and leadership.

It is a great honour to have been asked to give the WA Lee Equity Lecture this year. Unlike many of the previous speakers, I was not a student of Professor Lee's — although I have admired his scholarship from afar and have been the great beneficiary of his industry, in the form of his seminal academic works including, of course, *Ford & Lee's Principles of the Law of Trusts* and *Lee's Manual of Queensland Succession Law*. So I cannot begin this lecture, for example as the former Chief Justice de Jersey did, in 2010, with a story about what Tony did at the start of his lecture on the day of the moon landing on 16 July 1969. Nor can I share with you, as my colleague Justice Applegarth did in 2020, a witty anecdote about those halcyon university days, complete with an adaptation of an ABBA song about Tony Lee's equity lectures; although I wish I could.

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\* Chief Justice of Queensland. I gratefully acknowledge the assistance of my associate, Ms Lucy Cornwell, and research assistant, Ms Paige Mackie, with research for this lecture.

What a remarkable legacy this lecture series is, reflecting contemporary and thought-provoking discussions on matters of equitable jurisdiction and principle across the 23 years since the first lecture was given by Professor Lee himself.

I am very sorry that Professor Lee was not able to be here this evening. He was very keen to be, but has sent a regretful apology, as his health is such that it was just not possible. Although now 93, Tony Lee has not stopped thinking about equity and trust issues, nor lost the ability to express those thoughts with enviable clarity. He has been generous enough to share his latest thoughts with all of us, in the form of a ‘three minute tutorial’. It is entirely apt that we start this evening by reference to W A Lee’s ‘trustee’s duties in twelve words’:

*A trustee’s duty is to achieve unequivocally the purpose of the settlor.*

As far as I know trustees duties have never before been expressed in this way. Judges rarely refer to trustees’ general duties. Their task is to determine which of the parties before them in court should succeed, the losing party paying costs. To express a personal opinion might indicate bias or even a departure from normally accepted law. A judge who does refer to trustees’ duties probably uses words that have been used from the middle of the nineteenth century viz that a trustee must observe strictly the terms of the trust. This is unsatisfactory. Trusts can exist without having terms, such as a bequest in a will and oral trusts. Words used may be vague or ambiguous, leaving the litigants unsure of what they may or must do or must not do and even for go to appeal. As an example suppose a testator leaves ‘suitable provision’ for ‘my handicapped daughter Susan’. Many years later the testator dies but Susan has predeceased the testator leaving a posthumous child, no name. The words of the will can hardly be seen as making suitable provision for the unborn child, although a TFM application may be possible, but if the will defines trustees’ duties in the manner suggested the trustees should have no difficulty in making suitable provision for the unborn child.

And now, onto the Lecture — which I hope you will not mind is somewhat more than 12 words.

With some encouragement from John de Groot, I am perhaps adapting the theme slightly in what I have planned to say tonight. But I hope that you will ultimately find that I have not strayed too far from some of the fundamental equitable principles, such as: the notion of equity as enabling equality of enjoyment of rights;<sup>1</sup> the emphasis on substance rather than form;<sup>2</sup> the role of conscience;<sup>3</sup> and the need for the law to adapt, in order to be apt to address the many and varied circumstances in which it is called upon to act.<sup>4</sup> And I like to think

<sup>1</sup> See, eg, *Re Dickens* [1935] Ch 267, 290 (Lord Hanworth MR), 300–1 (Romer LJ) and 309 (Maugham LJ); *Baumgartner v Baumgartner* (1987) 164 CLR 137, 149–50 (Mason CJ, Wilson and Deane JJ).

<sup>2</sup> See, eg, *Parkin v Thorold* (1852) 16 Beav 59, 66–7 (Lord Romilly MR).

<sup>3</sup> See, eg, *Norton v Rely* (1764) 2 Eden 286, 288; 28 ER 908, 909 (Lord Northington LC); *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J); *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 697 (Young J).

<sup>4</sup> See, eg, *Dudley v Dudley* (1705) Prec Ch 241, 244 (Lord Cowper).

that Professor Lee the law reformer would approve of the provocation of thought that is intended by my address to you.

On any view, the history of First Nations Australians' occupation of this continent dates back many tens of thousands of years, with current research suggesting the temporal reach is upwards of 60,000 years. The diverse groups of people who occupied the lands and waters across Australia prior to first European contact — both Aboriginal peoples and Torres Strait Islander peoples — did so according to a subtle and elaborate system of laws,<sup>5</sup> particular to distinct groups, which provided a stable order of society by governing rights, obligations and relationships between people and in relation to land and waters. Spiritual and cultural beliefs were and are central to the existence and regulation of these rights and obligations.<sup>6</sup>

As we know, the truth of that history was obscured for a long time. Ownership of this continent was claimed by the English Crown in the 18<sup>th</sup> century by fastening onto what had become an enlarged concept of *terra nullius*, meaning 'a territory belonging to no one'. Although originally the concept meant exactly that, it became 'enlarged' in the sense that a territory did not necessarily need to be a complete 'desert uninhabited country' to justify acquisition. Acquisition could be justified by reference to the (then) perceived benefits to those inhabitants of Christianity or European civilisation and the concomitant 'discriminatory denigration of [I]ndigenous inhabitants, their social organization and customs'.<sup>7</sup>

The reception, here, of the common law of England, as the law of the land (albeit adapted as necessary), likewise depended upon the fallacy that the First Peoples of this country had no laws and no social organisation, prior to the arrival of English colonists.<sup>8</sup> Nothing could be further from the truth.

In 1992, the truth of our shared history was recognised and acknowledged by the High Court in the *Mabo* decision.<sup>9</sup> The unjust and discriminatory expanded doctrine of *terra nullius* was rejected as a fiction that was both incorrect and no longer acceptable, in terms of the expectations of the international community and the contemporary values of the Australian people.<sup>10</sup> It was acknowledged that, by acquiring sovereignty over the land, the Crown had acquired what might be called the radical title to the land, but that acquisition of sovereignty did not of itself confer absolute beneficial title to previously occupied land. At common law, a mere change in sovereignty over a territory does not extinguish pre-existing

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<sup>5</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267 (Blackburn J).

<sup>6</sup> *Yanner v Eaton* (1999) 201 CLR 351, 373 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, 64–5 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Ward*'); *Northern Territory v Griffiths* (2019) 269 CLR 1, 38 [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>7</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 40 (Brennan J) ('*Mabo*').

<sup>8</sup> *Ibid* 31–9 (Brennan J).

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid* 42 (Brennan J).

rights and interests in land in that territory.<sup>11</sup> The rights and interests in relation to land that were held by the original inhabitants survived the Crown's acquisition of sovereignty and continued, as a burden on the radical title — although those rights and interests were susceptible to extinguishment by subsequent valid exercise of the sovereign power in a manner inconsistent with their continued existence. The customary laws acknowledged and observed by those original inhabitants also survived the acquisition of sovereignty — not as a separate legal system that could operate in opposition to or alongside the Australian legal system,<sup>12</sup> but as a basis for the foundation of rights capable of recognition within the Australian legal system, with native title being a clear example of that.<sup>13</sup>

One year later, the *Native Title Act 1993* (Cth) was enacted by the Commonwealth parliament, in response to the *Mabo* decision. That Act is concerned with rights and interests (which necessarily includes obligations) in relation to land and waters. Native title rights, as defined, are of course inalienable, at least in the sense we understand that concept by reference to property. But the transmission of obligations, including in relation to property, may be dealt with in other ways.<sup>14</sup>

Almost thirty years later, the *Human Rights Act 2019* (Qld) ('*Human Rights Act*') was enacted by the Queensland Parliament. Among the 'human rights' protected and promoted by this Act are the cultural rights of Aboriginal peoples and Torres Strait Islander peoples, a concept that is much broader than the rights and interests that may be held in relation to land or waters.

In that regard, s 28 of the *Human Rights Act* provides:

**28 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples**

- (1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
- (2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community –
  - (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
  - (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and

<sup>11</sup> *Western Australia v The Commonwealth* (1995) 183 CLR 373, 422–3 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>12</sup> *Walker v New South Wales* (1994) 182 CLR 45, 48–50 (Mason CJ); *Coe v Commonwealth* (1993) 68 ALJR 110, 115 (Mason CJ); *Wik Peoples v Queensland* (1996) 187 CLR 1, 214 (Kirby J); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443–4 [44] (Gleeson CJ, Gummow and Hayne JJ). See also *Love v Commonwealth* (2020) 270 CLR 152, 226–8 [200]–[205] (Keane J).

<sup>13</sup> *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244, 248 (von Doussa J) ('*Bulun Bulun*').

<sup>14</sup> See the discussion in Prue Vines, 'Drafting Wills for Indigenous People: Pitfalls and Considerations' (2007) 6(25) *Indigenous Law Bulletin* 6 in relation to 'obligations vs property as a commodity'.

- (c) to enjoy, maintain, control, protect and develop their kinship ties; and
  - (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
  - (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
- (3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

As articulated in s 3 of the *Human Rights Act*, the main objects of the Act are:

- (a) to protect and promote human rights; and
- (b) to help build a culture in the Queensland public sector that respects and promotes human rights; and
- (c) to help promote a dialogue about the nature, meaning and scope of human rights.

Section 4 of the Act contemplates that those objects will be ‘primarily achieved’ in a number of ways — including:

- (f) requiring courts and tribunals to *interpret statutory provisions*, to the extent possible that is consistent with their purpose, in a way *compatible with human rights*;<sup>15</sup> and
- (g) conferring jurisdiction on the Supreme Court to declare that a statutory provision can not be interpreted in a way compatible with human rights.

Giving effect to that purposive statement is s 48, dealing with ‘interpretation’, which relevantly provides:

#### **48 Interpretation**

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

The question of the interaction of customary laws of Aboriginal people or Torres Strait Islander people, with the received (English) law of the land had already arisen in some cases, prior to the enactment of the *Human Rights Act* — as it happens, and as I will shortly explain, in the context of cases involving the application of equitable principles. That is an interesting enquiry in and of itself. But the further question I pose for the purposes of this lecture is whether the outcome in some of those cases may have been different, if they had been decided after the commencement of the *Human Rights Act*.

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<sup>15</sup> Emphasis added.

## II DECEASED ESTATES

In the Queensland case of *Eatts v Gundy*,<sup>16</sup> the court was concerned with whether a relationship between the deceased and the person recognised as her ‘child’ as a matter of a particular Aboriginal law and custom could fall within the relevant provisions of the *Succession Act 1981* (Qld) (‘*Succession Act*’) dealing with intestacy or family provision.

Bradley Gundy was the biological son of Roslyn Eatts. But he was raised from the time he was a baby by Roslyn’s sister, Doreen. He called Doreen ‘Mum’ and she treated him as her son. The family were members of the Maiawali Karawali people. There was evidence before the Court that an arrangement had been made between the sisters, Roslyn and Doreen, that Bradley would be brought up by Doreen as her son, and that the relationship between Doreen and Bradley was a permanent relationship that amounted to a mother-and-son relationship according to the laws and customs of the Maiawali Karawali people. However, no ‘legal’ adoption — in the sense of an act under the *Adoption Act 2009* (Qld) (‘*Adoption Act*’), or its predecessors — had ever taken place.

Doreen Eatts died without leaving a will. Letters of administration were issued to her mother, Joslin Eatts. Bradley commenced proceedings in the Supreme Court, seeking *inter alia* a declaration that, pursuant to s 10(1) of the *Status of Children Act 1978* (Qld) (‘*Status of Children Act*’), he was a ‘child’ of Doreen Eatts and that she was his ‘parent’ under ‘Aboriginal tradition’ within the meaning of the *Child Protection Act 1999* (Qld),<sup>17</sup> and also for the purposes of parts 3 (intestacy) and 4 (family provision) of the *Succession Act*. He sought, in effect, either a declaration that he was entitled to the whole of Doreen’s estate, as her only surviving issue (child), there being no surviving spouse, or alternatively, that he was entitled to further and better provision from the estate, as the child of Doreen.

The administrator, Doreen’s mother, applied to strike out Bradley’s claim, on the basis that he had no interest on intestacy (as his biological mother did not predecease Doreen)<sup>18</sup> and also that he did not fall within the ambit of persons entitled to make an application for further provision from the estate. It was that strike out application which led to the reported decisions in this matter.

<sup>16</sup> At first instance, *Gundy v Eatts* [2013] QSC 297 (Atkinson J) (‘*Gundy v Eatts*’); and on appeal, *Eatts v Gundy* [2015] 2 Qd R 559 (‘*Eatts v Gundy*’).

<sup>17</sup> The definition of the term ‘Aboriginal tradition’ is now found in schedule 1 to the *Acts Interpretation Act 1954* (Qld) — it means ‘the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships’. See also the term ‘Island custom’, a similar term in relation to ‘the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community group of Torres Strait Islanders’.

<sup>18</sup> See *Succession Act 1981* (Qld) s 37(2).

At first instance, Atkinson J, approaching the matter with the requisite caution,<sup>19</sup> concluded that the application to strike out should be dismissed, because the evidence was such that Bradley may well be able to prove that he was the child of Doreen, according to Aboriginal tradition, and so have a claim under the family provision jurisdiction. Her Honour noted that outcome ‘is perhaps not surprising’ since one of the fundamental legislative principles, set out in s 4 of the *Legislative Standards Act 1992* (Qld) (*‘Legislative Standards Act’*), required legislation to have sufficient regard to ‘the rights and liberties of individuals’ (s 4(2)(a)), and the same legislation further provided that that might depend on whether, for example, the legislation ‘has sufficient regard to Aboriginal tradition and Island custom’ (s 4(3)(j)). Justice Atkinson also considered it was arguable that Bradley could show he was a child or descendant of Doreen, and therefore the ‘issue’ of Doreen, for the purposes of the intestacy provisions of the *Succession Act*.<sup>20</sup>

The administrator successfully appealed that decision, with the result that Bradley’s claim was summarily dismissed.<sup>21</sup> The Court of Appeal held that, even if Bradley could establish that he was in a parent–child relationship with Doreen, according to Aboriginal tradition, ‘his claims must fail upon the correct construction of the statutory provisions’.<sup>22</sup>

For the purposes of the intestacy provisions, Bradley’s claim could only succeed if he was Doreen’s surviving ‘issue’ and ‘child’ within the meaning of sch 2, pt 2 and s 36A of the *Succession Act*. There is no definition of ‘issue’ in the *Succession Act*, but it was held by the Court of Appeal (Fraser JA, Muir JA and Martin J agreeing) that in the context of succession, the ordinary and prima facie legal meaning of ‘issue’ is ‘descendants or progeny’.<sup>23</sup> That is a broader category than ‘child’ or ‘children’, and includes descendants of any degree.<sup>24</sup> In *Matthews v Williams*, the High Court endorsed the statement that ‘the essence of the word “issue”, which primarily means all descendants, is totality rather than succession’.<sup>25</sup>

There is no generally applicable definition of ‘child’ in the *Succession Act* either.<sup>26</sup> The Court of Appeal in *Eatts v Gundy* referred to and relied upon earlier authority for the proposition that in the context of the intestacy provisions of the *Succession Act*, the meaning of ‘child’ focusses upon a biological connection or

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<sup>19</sup> *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129–30 (Barwick CJ); *Agar v Hyde* (2000) 201 CLR 552, 575–6 [57] (Gaudron, McHugh, Gummow and Hayne JJ); *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 275 [46] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

<sup>20</sup> *Gundy v Eatts* (n 16).

<sup>21</sup> *Eatts v Gundy* (n 16).

<sup>22</sup> *Ibid* [7] (Fraser JA, Muir JA and Martin J agreeing).

<sup>23</sup> *Ibid* [16].

<sup>24</sup> See also *Buick v Equity Trustees Executors and Agency Co Ltd* (1957) 97 CLR 599, 603 (Dixon CJ).

<sup>25</sup> (1941) 65 CLR 639, 650 (Rich ACJ, Dixon and McTiernan JJ) citing *In re Cust*; *Glasgow v Campbell* (1919) VR 221, 254–5 (Cussen J).

<sup>26</sup> Cf *Succession Act 1981* (Qld) s 40, which contains a definition of ‘child’ for the purposes of part 4 — family provision.

blood relationship.<sup>27</sup> This was contrasted with the definition of ‘child’ for the purposes of pt 4 of the Act (family provision), which extends to ‘any child, stepchild or adopted child’ of the deceased person. Although even in that context, it was held that Bradley could not bring himself within the provisions, because he was not the (biological) ‘child’ of Doreen and ‘adopted child’ had a narrow definition,<sup>28</sup> referring to adoption ‘in accordance with the law’ (taken to mean the statute law), which did not extend to adoption in accordance with Aboriginal law or custom.

In support for the meaning of ‘child’ as focussing upon a biological connection, the Court of Appeal cited *Sidle v Queensland Trustees Ltd*.<sup>29</sup> In that case, Isaacs and Powers JJ said that the word ‘child’:

[I]s not a term of art. It is a common English word, and, standing by itself usually means a descendant in the first generation. The context may, however, extend or alter that meaning ...<sup>30</sup>

In that regard, Fraser JA referred to some ‘established extensions’ of the terms ‘child’ and ‘issue’ — for example, to include a person who, although not the natural child of the husband, was born during the subsistence of the marriage.<sup>31</sup> The case cited as an example of that ‘extension’ is *Re Clark Trust* (‘Clark’), a Canadian decision of the Manitoba King’s Bench.<sup>32</sup> The question with which *Clark* was concerned was in fact whether an adopted child was the lawful ‘issue’ of the deceased. But in reasoning towards a positive finding about that, Dysart J made reference to this other example, explaining that:

The combined term, ‘lawful issue,’ does not coincide in meaning with natural born children. It may include a child who is not the natural offspring of a man, and may exclude another child who is his natural offspring. Thus in law, every child born of a couple during their marriage is ‘lawful issue’ of the couple, even though the husband is not in fact the child’s natural father. This rule of law is based, not upon truth or fact, but upon public policy, which seeks to uphold the purity of the marriage relationship and to protect children born in wedlock.<sup>33</sup>

So that is an example where the meaning of ‘child’ was extended or altered — on the basis of public policy (or perhaps societal expectations). This principle is now reflected in statute law. Section 24(1) of the *Status of Children Act* states the (rebuttable) presumption that a child born to a woman while she is married is

<sup>27</sup> *Eatts v Gundy* (n 16) [16]–[20] (Fraser JA, Muir JA and Martin J agreeing).

<sup>28</sup> The term ‘adopted child’ is defined in s 5 of the *Succession Act* to mean ‘a child that is adopted by such person or by such person and another person jointly, in accordance with the law of the State or Territory, or country, where the adoption takes place, as in force, the date of the adoption’.  
<sup>29</sup> (1915) 20 CLR 557.

<sup>30</sup> *Ibid* 560.

<sup>31</sup> *Eatts v Gundy* (n 16) [17] (Fraser JA, Muir JA and Martin J agreeing).

<sup>32</sup> [1946] 3 WWR 490.

<sup>33</sup> *Ibid* 491 (emphasis added).

presumed to be the child of the woman and her husband. But it did not need to be expressed in a statute to be recognised as a matter of law.

It was observed by Fraser JA in *Eatts v Gundy* that, although ‘a more liberal’ construction of the word ‘child’ may be adopted in the construction of a will or other instrument, it does not follow that such a construction may be applied to the word ‘child’ in a statute such as the *Succession Act*.<sup>34</sup>

Of course, and as also noted in *Eatts v Gundy*, in the case of a child adopted under statute law, the effect of s 214 of the *Adoption Act* (which contains a statutory declaration that, upon the making of a final adoption order, the adopted child becomes a child of the adoptive parent(s)) and s 216 of the same Act (which provides that s 214 has effect in relation to dispositions of property by will or on intestacy) is that an adopted child is treated as the ‘issue’ of the deceased for the purposes of the intestacy rules.<sup>35</sup>

Similar statutory ‘extensions’ of the meaning of ‘child’ for the purposes of dispositions of property by will or on intestacy have also been made in relation to a child born through a surrogacy arrangement, where a parentage order has been made.<sup>36</sup> In the *Status of Children Act*, parentage presumptions are provided for in relation to a child born as a result of a fertilisation procedure (‘IVF’),<sup>37</sup> which would then operate so that the reference to ‘child’ in the *Succession Act* applied. But even these provisions may warrant consideration, to see if they meet modern societal expectations — and indeed the contemporary legal landscape — given their distinction between ‘married women’, who have male ‘husbands’ or de facto or civil partners; and other women, who have female de facto partners.

Interestingly, the framework from the *Adoption Act* (and the *Surrogacy Act 2010* (Qld)) has recently been replicated, at least in the case of Torres Strait Islander traditional adoptions, in the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld) (‘*Meriba Omasker Kaziw Kazipa Act*’).<sup>38</sup> Section 66 of that Act makes provision for the making of a ‘cultural recognition order’, which has the effect of transferring a person’s parentage from their birth parents to their ‘cultural parents’, and of effectively declaring that the person becomes the child of the cultural parents and stops being the child of the birth parents. As defined in s 10, a cultural parent ‘is a person who, in accordance with Ailan Kastom child rearing practice, agrees to accept the permanent transfer of the parental rights and responsibility for a child from the child’s birth parents to the person’. Section 67 provides that a cultural recognition order has effect in

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<sup>34</sup> *Eatts v Gundy* (n 16) [18].

<sup>35</sup> See *GE v KM* [1995] 1 VR 471 cited in *Eatts v Gundy* (n 16) [17].

<sup>36</sup> *Surrogacy Act 2010* (Qld) ss 17, 39, 40.

<sup>37</sup> *Status of Children Act 1978* (Qld) ss 16–23.

<sup>38</sup> See also *Akiba (on behalf of the Torres Strait Islanders of the Regional Seas Claim Group) v Queensland* (No 2) (2010) 204 FCR 1, 62–3 [196]–[201] (Finn J) in relation to Torres Strait Islander laws and customs on adoption.

relation to ‘dispositions of property, whether by will or otherwise’ and ‘devolutions of property in relation to which a person dies intestate’.

In contrast, s 7(1) of the *Adoption Act* provides that the Act is to be administered under the following principles:

- (a) because adoption (as provided for in this Act) is not part of Aboriginal tradition or Island custom, adoption of an Aboriginal or Torres Strait Islander child should be considered as a way of meeting the child’s need for long-term stable care only if there is no better available option;
- (b) it is in the best interests of an Aboriginal or Torres Strait Islander child —
  - (i) to be cared for within an Aboriginal or Torres Strait Islander community; and
  - (ii) to maintain contact with the child’s community or language group; and
  - (iii) to develop and maintain a connection with the child’s Aboriginal tradition or Island custom; and
  - (iv) for the child’s sense of Aboriginal or Torres Strait Islander identity to be preserved and enhanced.

It is not apparent from my research where the generalised statement that appears in s 7(1)(a) of the *Adoption Act* came from. It is no doubt correct, read literally — that is, adoption, *as provided for in the Adoption Act*, is not part of Aboriginal tradition or Island custom. But, as has now been recognised by the legislature, an equivalent form of permanent change in parentage is part of Torres Strait Islander custom. It is also, as far as I am aware, part of the custom acknowledged and observed by some groups of Aboriginal people.<sup>39</sup> On the present state of the law, a person ‘adopted’ in accordance with traditional law and custom — other than the Ailan Kastom recognised by the 2020 Queensland Act — is in a difficult, and potentially disadvantaged, position for the purposes of the intestacy rules, or any family provision application.

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<sup>39</sup> See, eg, *O’Donnell on behalf of the Wilyakali Native Title Claim v State of South Australia* [2023] FCA 1000 [10] (orders) (defining native title holders, including by reference to adoption), [50] (reasons) (Raper J); *Alvoen on behalf of the Wakaman People v State of Queensland* [2023] FCA 953 [1] (schedule to orders) (definition of native title holders), [6], [12], [18] (reasons) (Collier J); *Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No 18)* [2023] FCA 735 (Mortimer CJ) [1] (schedule to the orders) (definition of native title holders). See also *Western Australia v Ward* (2000) 99 FCR 316, 379 [233] (Beaumont and von Doussa J) (the claim on behalf of the Miriuwung and Gajerrong people in Western Australia); *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 448 [9], 476–7 [114]–[116] (Wilcox, French and Weinberg JJ). See also Loretta de Plevitz and Larry Croft, ‘Aboriginality under the Microscope: The Biological Descent Test in Australian Law’ (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 104, 111; *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* (2020) 379 ALR 248, 283 [148] (Basten JA, McCallum JA agreeing); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, 620–1 [65] (Allsop CJ), 686 [396] (Mortimer J).

The Court of Appeal in *Eatts v Gundy* disagreed with the primary judge's reliance upon s 4(3)(j) of the *Legislative Standards Act*, as supporting a broader construction of the meaning of the words 'issue' and 'child' for the purposes of parts 3 and 4 of the *Succession Act*, to capture cultural (as opposed to only blood) relationships, holding that that Act was intended to operate *prospectively* and so could have no bearing upon the construction of the *Succession Act*, a prior Act. The Court said that the *Legislative Standards Act*

is incapable of bearing a construction that it requires legislation which predated its commencement to be construed in a way which ensures that it has 'sufficient regard to rights and liberties of individuals' in any of the respects referred to in s 4(3), including the requirement that legislation 'has sufficient regard to Aboriginal tradition and Island custom' (s 4(3)(j)).<sup>40</sup>

The same cannot be said of the *Human Rights Act*. With only limited exceptions, the *Human Rights Act* applies to all Acts and statutory instruments, whether passed or made before or after the commencement of the Act on 1 January 2020.<sup>41</sup> Consequently, the Act could have a bearing on the construction of the words 'issue' and 'child' and the words could be required 'to the extent possible that is consistent with their purpose, [to] be interpreted in a way that is compatible with human rights', including cultural rights of Aboriginal peoples and Torres Strait Islander peoples.<sup>42</sup>

One matter that may be worthy of consideration is whether — even apart from the question of Aboriginal law and custom — the construction of 'child' where it appears in the *Succession Act*, as confirmed in *Eatts v Gundy*, reflects a social conservatism, for want of a better term, which lacks contemporary relevance. The notion that the term 'child' means, *prima facie*, a 'legitimate' (that is, born in wedlock) biological child seems to stem from observations made by Lord Cairns in 1873.<sup>43</sup> In another case, a broader construction of the word 'child' (or 'children'), which would include step-children, was rejected on the basis that the word was not used (in a similar statutory context) 'as a popular, loose and flexible expression', and should be given its *accepted* meaning — 'sons and daughters, children of the blood, or "natural children"'.<sup>44</sup> But that begs the question: accepted by whom, and in what sociological context?

Is it 'popular, loose and flexible' to take account of the many different circumstances in which families are created in contemporary times? Or is it appropriate and adapted? What about surrogacy, or IVF utilising donor eggs or sperm? Legislation has been passed to address those developments in the

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<sup>40</sup> *Eatts v Gundy* (n 16) [24].

<sup>41</sup> *Human Rights Act 2019* (Qld) s 108(1). The exception is laws relating to termination of pregnancy (s 106) and the *Human Rights Act* also does not affect native title rights and interests (s 107).

<sup>42</sup> *Human Rights Act 2019* (Qld) ss 28, 48(1).

<sup>43</sup> *Hill v Crook* (1873) LR 6 HL 265, 282–3.

<sup>44</sup> *Harris v Ashdown* (1985) 3 NSWLR 193. See also *Popple v Rowe* [1998] 1 VR 651, 653 (Brooking JA).

composition of our society, but does that mean it is necessarily required in order to expand the meaning of ‘child’ more broadly? A similar point was made by Kirby P, then of the Court of Appeal in New South Wales, in *Harris v Ashdown*, when he said:

I cannot leave this examination of the authorities without saying that, in my view, the observations of Lord Cairns in 1873 must, even as providing a judicial dictionary, be regarded as of doubtful applicability to the task of deriving the testator’s intention, at least in the case of a will drawn today. Attitudes to personal relationships and the provisions of the law on matters such as illegitimacy and adoption, have changed so significantly in the past hundred years, that it is no longer safe to adopt, even as a rule of thumb, the principle that by the use of the word ‘child’ in his will, a testator must be taken to mean only a legitimate child. Quite apart from the provisions of legislation on adoption and the status of illegitimacy, social attitudes to such children have so changed since the 19th century, as to make the rule laid down by Lord Cairns inapplicable to modern conditions.<sup>45</sup>

A similar analogy may be drawn from the principle that, where ordinary English words are used, current usage is relevant to the task of interpretation. An example of the application of this principle is *Bruyn v Perpetual Trustee Co Ltd*,<sup>46</sup> in which the Court considered the proper construction of the phrase ‘to the children of George Rooke and Ernest Bruyn’. Previous decisions had construed a similar phrase as a gift to Ernest Bruyn and to the children of George Rooke (essentially on the basis that the omission of a second ‘of’, before Ernest Bruyn, was taken to be intentional). The Court stated the principle that, in the construction of language used in a will, where there is more than one correct grammatical construction, that one is to be preferred which conforms with current usage.<sup>47</sup> It was observed that ‘current usage’ suggested that the inclusion of a second ‘of’ was not necessary or appropriate — indeed would be regarded as ‘heavy’; and that it was ordinary practice not to repeat the preposition ‘of’ twice in such a sentence. It was therefore held that, in the light of current English usage, it could readily be inferred the testator intended to include the children of both George and Ernest. In the course of their reasons, the Court (Stephens and Jacobs JJ, with Menzies J (albeit the latter had passed away by the time judgment was delivered)) referred to the following words of Viscount Simon LC in *Perrin v Morgan*:

[I]t seems to me a little unfortunate that so many of such cases should find their way into the books, for in most instances, the duty of a judge who is called on to interpret a will containing ordinary English words is *not to regard previous decisions as constituting a sort of legal dictionary to be consulted and remorselessly applied* whatever the testator may have intended, but to construe the particular document so as to arrive at the testator’s real meaning according to its actual language and circumstances.<sup>48</sup>

<sup>45</sup> *Harris v Ashdown* (1985) 3 NSWLR 193, 199–200 (Kirby P).

<sup>46</sup> (1974) 131 CLR 387.

<sup>47</sup> *Ibid* 391.

<sup>48</sup> [1943] AC 399, 408 (Viscount Simon LC) (emphasis added).

One might respectfully ask the rhetorical question — is that what was done in *Eatts v Gundy*? Were the previous decisions on the meaning of ‘child’ applied as though they constitute a sort of legal dictionary?

Of course, the question of the proper construction of a word or phrase used in a statute is a different task to that which is involved in construing a will or other instrument.<sup>49</sup> The task, when construing a statute, is to ascertain the intended meaning of the words used, a process which must be undertaken having regard to the context for the provision, including its purpose.<sup>50</sup> But in this regard, the intended meaning is not the subjective purpose or (actual) intention of the legislature,<sup>51</sup> but rather the objective purpose or intention, as it may be revealed by the text which has been used, in the context of the whole Act, and the broader context. The native title cases on extinguishment provide a clear example of the operation of this principle. The task, in construing a statutory provision in that context, is to determine whether the provision reveals a clear and plain intention to extinguish native title. At the time such legislation was enacted, native title was not within the contemplation of the legislative drafters, but that does not mean that the intention to extinguish native title could not be demonstrated (for example, by the creation of entirely inconsistent rights). The enquiry is an objective one.<sup>52</sup>

Plainly, the drafters of the *Succession Act 1981* did not contemplate ‘issue’ or ‘child’ potentially including a descendant or child, not related by blood, or legal adoption under the relevant statute law, but rather being recognised as having that relationship by virtue of the operation of traditional laws and customs acknowledged and observed by a particular group of Aboriginal people or Torres Strait Islander people. But that does not *of itself* mean that the words cannot be construed to include such a relationship. Questions of public policy, contemporary societal attitudes and modern usage are all relevant — as is a statutory direction (such as s 48 of the *Human Rights Act*) that requires the statutory provision, to the extent possible consistent with its purpose, to be interpreted in a way that is *compatible with human rights*.<sup>53</sup> In that sense, the *Human Rights Act* now forms part of the context in which a statute is to be construed.

So, could a different conclusion have been reached, had *Eatts v Gundy* been decided after the enactment of the *Human Rights Act*?

<sup>49</sup> *Harris v Ashdown* (1985) 3 NSWLR 193, 199 (Kirby P); *Popple v Rowe* [1998] 1 VR 651, 657 (Brooking JA).

<sup>50</sup> *R v A2* (2019) 269 CLR 507, 520–1 [32]–[33], 521 [36] (Kiefel CJ and Keane J).

<sup>51</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 68 (Brennan J).

<sup>52</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 85 (Brennan CJ). See also *Ward* (n 6) 89 [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>53</sup> See s 8 of the *Human Rights Act* for the meaning of ‘compatible with human rights’. See also *Momcilovic v The Queen* (2011) 245 CLR 1, 49–50 [49]–[51] (French CJ), 92–3 [169]–[171] (Gummow J), 216–17 [565]–[566] (Crennan and Kiefel JJ), 250–1 [684] (Bell J) in relation to s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which is in equivalent terms to s 48 of the *Queensland Act*, referred to in *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, 293 [111] (Martin J).

Historically, the purpose of English intestacy rules was to protect the interests of the family property.<sup>54</sup> Intestacy provisions have been likened to the will the law would expect a member of an average family to make if he or she got around to it.<sup>55</sup> Family provision legislation was enacted in order to ‘subject freedom of testamentary disposition to discretionary curial intervention in certain classes of case, where moral rights and obligations of support were disregarded’.<sup>56</sup> The focus of the provisions was ‘the family’, described as ‘the social and legal institution within which these ... rights and obligations are worked out’.<sup>57</sup>

It is perhaps difficult to see how it could be said that a broader approach to the meaning of ‘child’ or ‘issue’, including by reference to Aboriginal or Torres Strait Islander custom, could be inconsistent with those purposes. In addition, if public policy supported recognition of a child born ‘in wedlock’ as the husband’s ‘issue’, even if the husband was not the child’s father, one might think it is not too difficult to imagine public policy considerations supporting recognition of a parent–child relationship established as a matter of Aboriginal or Torres Strait Islander custom, particularly in the light of s 28 and s 48 of the *Human Rights Act*.

I do not express a view about the ultimate answer to this question. It is a difficult one, which would benefit from careful consideration and submissions if it were to be argued before a Court. I wish to do no more than provoke the following thought: is this an area of the law where the statutory invocation, to expressly consider human rights in the interpretation of a statute, could result in a change to the law?

These issues could of course be addressed if the person makes a will. But that is not a straightforward ‘fix’. As the authors of an article in relation to legal recognition of Torres Strait Islander traditional adoption have observed:

Low will-making rates and the taboo subjects of death and dying among many Aboriginal and Torres Strait Islander people have been referred to by Vines in her research conducted over decades. This leads to high levels of intestacy among Aboriginal and Torres Strait Islander people. This sociocultural context coupled with the decision in *Eatts v Gundy* highlights the ongoing failure of state law to currently provide recognition of traditional adoption and points to the critical need to provide an avenue of legal recognition so that traditional adoptees do not experience discrimination.<sup>58</sup>

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<sup>54</sup> See Fiona Burns, ‘The Changing Patterns of Total Intestacy Distribution between Spouses and Children in Australia and England’ (2013) 36(2) *University of New South Wales Law Journal* 18.

<sup>55</sup> Queensland Law Reform Commission, *Intestacy Rules* (Report No 42, 1993) 1 [1.1].

<sup>56</sup> *Barns v Barns* (2003) 214 CLR 169, 173 [2] (Gleeson CJ) citing *Schaefer v Schuhmann* [1972] AC 572.

<sup>57</sup> *Barns v Barns* (2003) 214 CLR 169, 173 [2] (Gleeson CJ) quoting *Schaefer v Schuhmann* [1972] AC 572, 596 (Lord Simon).

<sup>58</sup> Heron Loban, Kathryn E van Doore and Zoe Rathus, ‘Parentage not parenthood: Ending discriminatory laws and policies regarding the legal recognition of Torres Strait Islander traditional adoption’ (2018) 31(3) *Australian Journal of Family Law* 135, 149 (citations omitted).

That article was published in 2018 and contained a particularly pointed call for government action in relation to Torres Strait Islander traditional adoptions, which I infer is what we now see in the *Meriba Omasker Kaziw Kazipa Act*.

Prue Vines, referred to in the passage just quoted, has undertaken extensive research and publication in relation to the issue of making wills for Aboriginal people, in order to address this sociocultural disadvantage. She has advocated for increased will-making for Aboriginal people, and provides helpful assistance in relation to drafting culturally appropriate and effective wills, to address the fact that the intestacy laws in Australia are, in her words, 'grossly inadequate' to deal with the inheritance issues of Aboriginal and Torres Strait Islander people.<sup>59</sup> Professor Vines' work has culminated in the publication of the very useful work, *Aboriginal Wills: Handbook*, now in its third edition.<sup>60</sup> In her articles, she raises some interesting, practical suggestions in relation to making culturally appropriate wills, including:

- (a) The need for care to be taken when using words to indicate kinship, because whilst the common law's view of kinship is limited by blood and a linear view of time, that may not be reflected in an Aboriginal or Torres Strait Islander person's conception of kinship. The designations of 'child', 'mother', 'cousin' or 'aunty', for example, may be much broader. Professor Vines therefore suggests naming each person designated by a kinship term, to ensure the will reflects the real intentions of the testator.
- (b) The need to be aware of the mix of property and obligations owned and/or held by an Indigenous person, and for care to be taken as to how these things, which may reflect the traditional and non-traditional combination of elements of a particular person's life, are dealt with.
- (c) Using principles of equity to consider how to deal with obligations as opposed to property as a commodity in a will. The example Professor Vines gives is in relation to an artwork based on ritual knowledge and, in her 2007 article, she posed the following question:

The artwork itself may be copyright and therefore be an item of property which the common law recognises and which can be passed on to other people. That raises no legal difficulty, except that the fact that it is based on ritual knowledge may mean that it is important to place conditions on the gift in the will. However, the ritual knowledge itself may not amount to property at common law. It certainly will not be copyright because copyright protects the expression of an idea rather than the idea itself. If

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<sup>59</sup> See, eg, Prue Vines, 'Making wills for Aboriginal people in NSW' (2011) 49(8) *Law Society Journal* 72; Prue Vines, 'Drafting Wills for Indigenous People: Pitfalls and Considerations' (2007) 6(25) *Indigenous Law Bulletin* 6.

<sup>60</sup> Prue Vines, *Aboriginal Wills Handbook: A Practical Guide to Making Culturally Appropriate Wills For Aboriginal People* (3<sup>rd</sup> ed, NSW Trustee & Guardian, 2019).

the testator is the person who has done the artwork their major concern may be to ensure that the knowledge itself is protected and passed on. This may happen in life, in which case there is no need for the will to do it. But if it does not happen in life, can we create a vehicle in equity which will both protect and keep secret the knowledge itself? For example, can we by the use of secret or half-secret trusts, set up a situation where a person is entitled to keep cultural information such as traditional medicine secrets and pass it on? Can such information be recognised as property in equity? And can it be kept secret?<sup>61</sup>

- (d) The benefits of including a direction about dealing with the body of the deceased person, in the will, in an attempt to prevent arguments arising subsequently.

But until there is a higher rate of will-making, the solution needs to be found elsewhere.

I am not sure that statutory construction is an adequate answer in itself, even having regard to the *Human Rights Act*. As was emphasised in *Momcilovic v The Queen*,<sup>62</sup> by reference to the Victorian equivalent of s 48 of the *Human Rights Act*, the task called for by the provision is one of interpretation, within the rubric of the established principles of statutory construction, not ‘judicial rewriting’ of legislation. The construction question is by no means straightforward and would involve complex, and therefore costly, litigation.

A more straightforward solution would be legislative amendment.

Part III, div 4A of the *Administration and Probate Act 1969* (NT) might provide a useful guide. Section 71B of that Act make express provision for an application for orders for distribution from an intestate estate to be made, in relation to the estate of an Aboriginal person who has died without leaving a will, where the person claims to have an interest in the estate under the customs and traditions of the community or group to which the deceased belonged. Equivalent provisions can be found in ss 133 and 134 of the *Succession Act 2006* (NSW) and s 34 of the *Intestacy Act 2010* (Tas).

This is a matter worthy of serious consideration by government, because of the real potential for discrimination and legal disadvantage for traditionally adopted people.<sup>63</sup>

The opportunity for this is ripe, given that there is a review of the *Succession Act* underway at present. A consultation paper released by the Attorney-General in September 2023 observes that Queensland’s succession laws are ‘in need of review and modernisation to ensure they give effect to modern societal expectations’ and

<sup>61</sup> Prue Vines, ‘Drafting Wills for Indigenous People: Pitfalls and Considerations’ (2007) 6(25) *Indigenous Law Bulletin* 6.

<sup>62</sup> See above n 46.

<sup>63</sup> See the discussion by Heron Loban, Kathryn E van Doore and Zoe Rathus, ‘Parentage not parenthood: Ending discriminatory laws and policies regarding the legal recognition of Torres Strait Islander traditional adoption’ (2018) 31(3) *Australian Journal of Family Law* 135.

seeks the community's views.<sup>64</sup> That paper notes that, in the context of the intestacy rules, consideration is being given to allowing the definition of 'child' of a deceased person to be expanded by court order to include a person who may be such a child under Aboriginal and/or Torres Strait Islander cultural tradition; and to amending the definition of 'spouse' of a deceased person so that it may be expanded, again by court order, to include a spouse under a traditional marriage. Consideration is also being given to allowing, subject to court order, a deceased person's estate to be distributed to the community or group to which the person belonged, in accordance with cultural tradition, rather than under the intestacy rules. The paper acknowledges the cost implications of all of these options, involving as they would an application to the court. Similar changes, in terms of the expansion of the meaning of 'child' and 'spouse' are also under consideration in relation to eligible applicants for family provision. Responses were sought to be provided by 16 October 2023, so it will be interesting to see what comes next.

Of course, in any event it would be necessary for there to be proof of the law or custom, and its application in the particular case.<sup>65</sup> In some circumstances, that may be relatively straightforward — for example, where there has been a successful native title determination application, the evidence gathered in support of such an application will usually include expert anthropological evidence, and evidence from the claimants themselves, as to the laws and customs observed by the particular group, including in relation to cultural adoption, where that is part of the laws and customs observed. Even if the native title determination application has not been successful — for example, because the requisite continuity of acknowledgement and observance of laws and customs has not been able to be established, due to dislocation and dispossession as a result of white settlement,<sup>66</sup> it may nevertheless be the case that the evidence gathered adequately establishes the custom in relation to adoption. In other cases, it may be anything but straightforward, as has been seen in some of the cases involving burial disputes, the next topic of discussion. But matters of proof in any particular case ought not stifle the development of the law, in a manner which reflects contemporary societal expectations, including by reference to the *Human Rights Act*.

### III BURIAL DISPUTES

In contrast, one area in which customary law, and cultural considerations, have been recognised, respected and applied, even before the *Human Rights Act*, is in the case of burial disputes. It is well established that the Supreme Court has a role in resolving disputes of this kind, as an incident of its inherent power to grant

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<sup>64</sup> Queensland Department of Justice and Attorney General, *Review of the Succession Act 1981* (Report, September 2023).

<sup>65</sup> See, eg, *Re Bunduck* (2021) 357 FLR 322, 324–5 [15] (Barr J).

<sup>66</sup> *Cf Widjabul Wia-bal v Attorney-General of New South Wales* [2022] FCA 1187, [72] (Jagot J).

declaratory relief.<sup>67</sup> That power is of course very broad — as described by the majority in *Ainsworth v Criminal Justice Commission* as follows:

It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.' However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions.<sup>68</sup>

Sometimes, s 6(1) of the *Succession Act* has been identified as the source of the Court's jurisdiction to determine burial disputes.<sup>69</sup> That sub-section provides:

Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.

However, as Henry J pointed out in *Accoom v Pickering*,<sup>70</sup> there is nothing in s 6, or any other sections of the *Succession Act*, which provides for decision-making as to burial. His Honour said:

Section 6(1)'s relevance in the present context is its conferral of power to grant letters of administration and determine all matters relating to the administration. It does not gain that relevance because of its empowerment in connection with estate property, there being no property in the body of a deceased person.<sup>71</sup> Rather, the relevant connection is with determining who should administer the estate.

It is relevant in that way because at common law the 'usual rule' or 'common starting point' is that the person entitled to administration is usually the person responsible for arranging the funeral and burial of the deceased.<sup>72</sup>

In terms of the application of cultural considerations, Henry J recorded that:

It was uncontroversial in Queensland before the enactment of the *Human Rights Act* 2019 that Aboriginal custom, including culture and spiritual beliefs, are a relevant consideration in a case like the present. ... For that reason, this is not a case in which the provisions of the *Human Rights Act* 2019, including s 28 'Cultural Rights — Aboriginal Peoples and Torres Strait Islander Peoples' and s 48 'Interpretation', produce a different approach than that already taken by this Court.<sup>73</sup>

<sup>67</sup> See *Doherty v Doherty* [2007] 2 Qd R 259, 262 [15] (Jones J) quoting *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581–2 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>68</sup> (1992) 175 CLR 564, 581–2 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>69</sup> Eg, *Johnson v George* [2019] 1 Qd R 333, 337 [6] (North J).

<sup>70</sup> (2020) 6 QR 640 (citations omitted).

<sup>71</sup> Subject to exceptions of no present relevance, See *Doodeward v Spence* (1908) 6 CLR 406

<sup>72</sup> *Ibid* 643 [5], citing *Roma v Ketchup* [2009] QSC 442; *Frith v Schubert* [2010] QSC 444; *Johnson v George* [2019] 1 Qd R 333.

<sup>73</sup> *Ibid* 644–5 [11], citing *Johnson v George* [2019] 1 Qd R 333.

His Honour went on to say that, if the outcome of Aboriginal custom in that case were clear cut and yielded a singular result, he would ‘readily honour it’. But the reality was that there was a difficult mix of custom related considerations in play, and his Honour was acutely conscious that no decision he could make would please all, and that it was inevitable the process and the decision would cause added pain to some. A number of the cases in this area contain similar sentiments.<sup>74</sup> This reinforces the point emphasised by Professor Vines, as to the desirability of such wishes being expressed in a will of the deceased.

In any event, as already noted, at common law, the ‘usual rule’ or ‘common starting point’ is that the person entitled to administration of the estate of a deceased person is usually the person responsible for arranging the funeral and burial of the deceased.<sup>75</sup> Where there is a will, and an executor has been named, that person has the ‘primary privilege of burying the deceased’s body’.<sup>76</sup> Where there is no executor named, and the deceased leaves an estate, the person entitled to administration is usually the person responsible — and in identifying who that is, ‘one looks to see the person who is most likely to get the grant of administration’.<sup>77</sup> But it is emphasised in the cases, notably the decision of Doyle CJ in *Jones v Dodd*, that this ‘usual rule’ is not a ‘hard and fast rule’ or principle of law to be applied rigidly.<sup>78</sup>

Where the person has died intestate, without any significant assets, such that there is unlikely to ever be an application for administration, it has been observed that this approach ‘takes on an air of unreality’ and the generally accepted approach is:

[T]o have regard to the practical circumstances, which will vary considerably between cases, and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question.<sup>79</sup>

In *Britt v Office of State Coroner*, Mitchell JA observed that ‘practical considerations may also be significant in a case where persons with equally-ranking rights to apply for administration are in dispute about funeral arrangements’ and that other ‘relevant matters [that] have been recognised include, to the extent they are known to the court, cultural considerations, the deceased’s wishes and the wishes and sensitivities of living close relatives of the deceased’, as well as ‘the need for

<sup>74</sup> See, eg, *Johnson v George* [2019] 1 Qd R 333, 343 [30] (North J); *South Australia v Ken* [2021] SASC 10, [31] (Stanley J); *Dodd v Jones* [1999] SASC 458, [36] (Doyle CJ).

<sup>75</sup> *Accoom v Pickering* (2020) 6 QR 640, 643 [5] (Henry J).

<sup>76</sup> *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 691 (Young J), cited in *Jones v Dodd* (1999) 73 SASR 328, 335–6 [45] (Perry J, Millhouse and Nyland JJ agreeing).

<sup>77</sup> *Ibid.* See r 610 of the *Uniform Civil Procedure Rules 1999* (Qld), for the order of priority of persons to whom the court may grant letters of administration on intestacy.

<sup>78</sup> (1999) 73 SASR 328, 336 (*Jones v Dodd*). See also *Accoom v Pickering* (2020) 6 QR 640, 644 (Henry J).

<sup>79</sup> *Jones v Dodd* (n 78) 336 [50]–[51]. See also *South Australia v Smith* (2014) 119 SASR 247, 260–3 (Nicholson J); *Johnson v George* [2019] 1 Qd R 333, 338–9 [11] (North J).

the funeral and burial to be held in a timely way, and the costs and logistical difficulties attendant upon competing proposals'.<sup>80</sup>

The need for flexible application of the common law 'rules' was recently emphasised, in relation to another category of persons recognised in various cases to have a right to bury a body, where there is no executor or administrator appointed, no will and no estate — namely, the 'parents' of the deceased. *Puruntatameri v Baird* ('*Puruntatameri*') is a decision of the Court of Appeal of the Northern Territory in relation to a tragic case of a dispute about possession of the body of a 15-year-old boy for burial.<sup>81</sup> At first instance, there were competing applications, by the boy's biological mother, on the one hand, and by her sister, who had cared for and brought the boy up as his sole caregiver, from the time he was five years old, on the other. The sister assumed the role of mother and treated the boy as her son for the whole of his life. At first instance, the court ordered that the boy's body be delivered into her possession to arrange the funeral and burial of the boy.

On the appeal, there was an argument that the Court at first instance had erred by not applying a (supposed) common law rule that it is only 'blood' parents who have the duty and right to bury their dead children, a rule said to have been affirmed in the New South Wales decision of *Warner v Levitt*.<sup>82</sup> The Court of Appeal rejected the notion that there was any 'rigid' rule to this effect, referring to *Jones v Dodd* in this regard. Even taking that common law rule as a starting point, the Court of Appeal also rejected the notion that the rule was confined strictly to biological parents rather than other persons *in loco parentis*, including foster parents. The Court applied *Jones v Dodd* and said it was consistent with that approach to 'take into account, and give substantial weight to, who has had the chief responsibility for the care of the deceased child in the time preceding the death'.<sup>83</sup>

The Court of Appeal in *Puruntatameri* (at [38]) contrasted the narrow approach taken in *Warner v Levitt*, in which it was acknowledged that the common law rule was 'founded originally upon religious beliefs which not very many people would today hold, and upon social conditions which have changed quite dramatically', with the approach taken in *Smith v Tamworth City Council*.<sup>84</sup> In that case, Young J observed:

Equity acts as a court of conscience and the conscience is what is right in the eyes of the community for the time being. If one were to ask would the community as a whole consider that a biological mother [the plaintiff in the case] should have the right to have her name endorsed on a tombstone of a child who had been the adopted child of someone else for over twenty years when that other person did not consent to the

<sup>80</sup> [2022] WASCA 75, [57]–[58].

<sup>81</sup> (2020) 356 FLR 284 ('*Puruntatameri*').

<sup>82</sup> (1994) 7 BPR 15,110.

<sup>83</sup> *Puruntatameri* (n 81) [36]–[37].

<sup>84</sup> (1997) 41 NSWLR 680.

biological mother's wishes, I could not see that the community would endorse the biological mother's claim. [But] [i]f it is not against the conscience as judged by *modern community standards*, then it is not a situation in which this Court should give relief.<sup>85</sup>

The Court of Appeal in *Puruntatameri* said that was the approach to be applied, by the Supreme Court in exercising jurisdiction in a matter such as a burial dispute, endorsing the flexible approach articulated in *Jones v Dodd*.

Another recent example in which Aboriginal cultural considerations were weighed in the balance in deciding a dispute about burial is *State of South Australia v Ken*.<sup>86</sup> The reasons of Stanley J in that case commence with an acknowledgement that both the dignity of the deceased and the conscience of the community require that the dispute about where the deceased be buried be decided without delay, but with all proper respect and decency.<sup>87</sup>

In that case, there was evidence of academic research and writing on Pitjantjatjara burial practices. Justice Stanley made a finding by reference to that evidence that the primary cultural connection for Anangu men, such as the deceased, was the relationship to their father's and grandfathers' country. Balancing the common law principles and practical considerations, as well as paying attention to cultural, spiritual and religious factors, his Honour found the burial place proposed by the deceased's father and paternal family should be preferred over the wishes expressed by the deceased's mother and sister.<sup>88</sup> That was not a matter of giving greater weight to the wishes and sensitivities of one side of the deceased's family over the other. Instead, Stanley J said he was persuaded that the deceased should be buried in the place pressed for by his father, 'having weighed the Aboriginal cultural matters and concerns established by the evidence.'<sup>89</sup>

In this context, it can be seen that our received legal system has managed to weigh in the balance, and give effect to, cultural considerations without principled difficulty; albeit that problems of proof, and conflict of views about those considerations, remain. Modern community standards, and questions of 'the conscience of what is right in the eyes of the community' have been accepted as relevant to the understanding and application of common law and equitable rules and principles. When coupled with the statutory instruction provided by ss 28 and 48 of the *Human Rights Act*, these cases could be said to provide an example of how this might also be replicated in other areas of the law.

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<sup>85</sup> Ibid 697 (citations omitted) (emphasis added).

<sup>86</sup> [2021] SASC 10.

<sup>87</sup> Ibid [3]. This phrase is borrowed from *Calma v Sesar* (1992) 2 NTLR 37, 42.

<sup>88</sup> Ibid [28]–[39].

<sup>89</sup> Ibid [30].

#### IV ARTISTIC WORK — RELEVANCE OF CUSTOMARY LAW IN THE PROTECTION OF CULTURAL KNOWLEDGE EMBODIED IN ARTISTIC WORKS

Moving on from deceased estates and burials, another interesting area in which the challenge of the interaction between customary laws observed by First Nations Australians and the Australian legal system has arisen is in the context of protection of cultural knowledge embodied in artistic works. As will be seen, equity has come to the rescue, when other legal principles have been found to be inadequate, or incapable of adaptation.

An early case in which cultural considerations arose is *Yumbulul v Reserve Bank of Australia* ('*Yumbulul*'),<sup>90</sup> a decision of French J (then of the Federal Court). This case concerned a dispute about the design of a special \$10 bank note released in 1988 to commemorate the first European settlement of this country. The note incorporated elements of Aboriginal artworks, including, in part, a reproduction of the design of a 'Morning Star Pole' made by Mr Yumbulul. The reproduction was made under a sub-licence of the copyright in the work granted to the Reserve Bank by the Aboriginal Artists Agency Ltd. That company had an exclusive licence from Mr Yumbulul. The case concerned a claim by Mr Yumbulul that he had been induced to sign the licence by misleading or deceptive conduct on the part of the agency. He had also sued the Reserve Bank for breach of his copyright, but that element of his claim was settled and dealt with by consent orders and so was not addressed in the published judgment.

The *Yumbulul* case explains the special circumstances in which an Aboriginal artist may be authorised, in terms of the laws and customs acknowledged and observed by the person, to paint certain designs — including as a result of 'various levels of initiation and revelatory ceremonies in which he has gradually learnt the designs and their meanings'. That is a unique situation — quite different from (although also captured within) the broader concept of an individual's moral or intellectual rights in a work of art created by them. Having signed the licence agreement, Mr Yumbulul subsequently came under considerable criticism from within his community for permitting the reproduction of the pole by the bank. Although French J found that his causes of action against the agency were not established, because there had been no misleading or deceptive conduct, his Honour did observe that:

It may well be that when [Mr Yumbulul] executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations. Certainly, it appears to be the case that neither Mr Wallis [the director of the agency], nor anyone else at the agency, felt a need to explore these ramifications with him. Mr Wallis saw that as a matter which was Mr Yumbulul's responsibility. It

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<sup>90</sup> (1991) 21 IPR 481 ('*Yumbulul*').

may be that greater care could have been taken in this case. And it may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.<sup>91</sup>

It remains the case that copyright laws do not address these challenges.<sup>92</sup> However, equitable principles have been called in aid to protect cultural knowledge and communal ownership.

For example, in *Milpurruru v Indofurn Pty Ltd* ('*Milpurruru*'),<sup>93</sup> a number of Aboriginal artists and the Public Trustee, on behalf of the estates of other artists, successfully sued a carpet importer for remedies for copyright infringement in circumstances where the imported carpets had been manufactured by incorporating reproductions of the whole or substantial parts of their artworks, without permission. As one of the claimants in that case explained in her evidence, her right to use the image depicted in her artwork arose by virtue of her membership of a particular land-owner group and was an incident arising out of land ownership. She gave evidence that:

As an artist whilst I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story.

The reproduction of the artworks in circumstances where, for example in one case, the dreaming depicted would be walked on, was totally opposed to the accepted cultural use of the imagery. It was accepted that the infringements caused not only personal distress to the claimants, but also that it exposed the artists to embarrassment and contempt within their communities. The court took into account the effect of the unauthorised reproduction of artistic works under customary laws in quantifying the damage suffered.

A subsequent case, *Bulun Bulun v R & T Textiles* ('*Bulun Bulun*'),<sup>94</sup> involved claims, first, by Mr Bulun Bulun, the creator of an artistic work, for remedies for infringement of his copyright in the work under the *Copyright Act 1968* (Cth) ('*Copyright Act*'), as well as a claim by Mr Milpurruru, on his own behalf and in a representative capacity for the Ganalbingu people, in respect of equitable ownership by that broader community of the copyright in the artistic work. The artistic work the subject of this case was said to incorporate within its subject matter much that is sacred and important to the Ganalbingu people about their

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<sup>91</sup> Ibid 490.

<sup>92</sup> An argument for standalone legislation protecting Indigenous Cultural Intellectual Property is made by Stephanie Parkin and Kyle Pappalardo in 'Protecting Indigenous art and culture: how the law fails to prevent exploitation' (2020) 159 *Precedent* 32.

<sup>93</sup> (1994) 54 FCR 240 ('*Milpurruru*').

<sup>94</sup> *Bulun Bulun* (n 13).

heritage. The respondent had imported and sold in Australia printed clothing fabric, which infringed Mr Bulun Bulun's copyright in the particular work. The claim by Mr Bulun Bulun was resolved by declarations and orders made by consent, including a declaration that the respondent had infringed Mr Bulun Bulun's legal title to the copyright in the artistic work and comprehensive permanent injunctions against future infringement. The trial proceeded only in relation to the claim by Mr Milpurrruru.

It was observed at the outset of the judgment that statutory remedies under the *Copyright Act* were inadequate as a means of protecting communal ownership in an artistic work, a point that had already been made in both *Yumbulul*<sup>95</sup> and *Milpurrruru*.<sup>96</sup> Nevertheless, the Court (von Doussa J) approached the matter from the perspective that 'Australian courts cannot treat as irrelevant the rights, interests and obligations of Aboriginal people embodied within customary law', and said that '[e]vidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system.'<sup>97</sup> Following what was described as a wide ranging search for a way in which the communal interests of the traditional Aboriginal owners in cultural artworks might be recognised under Australian law, the claim by Mr Milpurrruru was ultimately confined to one for recognition of an equitable interest in the legal copyright of Mr Bulun Bulun.<sup>98</sup> While von Doussa J said that, in 1788, there may have been scope for the continued operation of a system of indigenous collective ownership in an artistic work under the common law, the relevant common law had subsequently been subsumed by statute — the *Copyright Act* — the provisions of which (as to who is the author of an artistic work) effectively preclude any notion of group ownership, unless the work is produced by a collaboration of two or more authors.<sup>99</sup>

Although von Doussa J considered the possibility that an express trust had been created, the evidence did not support such a conclusion, because there was no usual or customary practice where artworks were held on trust for the Ganalbingu people and the fact that Mr Bulun Bulun sold and retained the proceeds for his own use was inconsistent with an intention to create an express trust.<sup>100</sup> However, his Honour did find that Mr Bulun Bulun owed a fiduciary obligation to the Ganalbingu people, saying:

The relationship between Mr Bulun Bulun as the author and legal title holder of the artistic work and the Ganalbingu people is unique. The 'transaction' between them out of which fiduciary relationship is said to arise is the use with permission by Mr Bulun Bulun of ritual knowledge of the Ganalbingu people, and the embodiment of that

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<sup>95</sup> *Yumbulul* (n 90) 490.

<sup>96</sup> *Milpurrruru* (n 93) 272.

<sup>97</sup> *Bulun Bulun* (n 13) 248.

<sup>98</sup> *Ibid* 256–7.

<sup>99</sup> *Ibid* 257–8.

<sup>100</sup> *Ibid* 258–9.

knowledge within the artistic work. That use has been permitted in accordance with the law and customs of the Ganalbingu people.

The grant of permission by the Djungayi and other appropriate representatives of the Ganalbingu people for the creation of the artistic work is predicated on the trust and confidence which those granting permission have in the artist. The evidence indicates that if those who must give permission do not have trust and confidence in someone seeking permission, permission will not be granted.

The law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. The artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge. This is not to say that the artist must act entirely in the interests of the Ganalbingu people. The evidence shows that an artist is entitled to consider and pursue his own interests, for example, by selling the artwork, but the artist is not permitted to shed the overriding obligation to act to preserve the integrity of the Ganalbingu culture where action for that purpose is required.

In my opinion, the nature of the relationship between Mr Bulun Bulun and the Ganalbingu people was a fiduciary one which gives rise to fiduciary obligations owed by Mr Bulun Bulun.

The conclusion that in all the circumstances Mr Bulun Bulun owes fiduciary obligations to the Ganalbingu people does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu people as *part of the factual matrix which characterises the relationship as one of mutual trust and confidence*. It is that relationship which the Australian legal system recognises as giving rise to the fiduciary relationship, and to the obligations which arise out of it.<sup>101</sup>

It was further held that equity imposed on Mr Bulun Bulun obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work. However, those obligations did not, without more, vest an equitable interest in the ownership of the copyright in the Ganalbingu people.<sup>102</sup> In those circumstances, as Mr Bulun Bulun had taken appropriate action to enforce the copyright, he had fulfilled his obligations as a fiduciary and there was no occasion to grant any additional remedy in favour of the Ganalbingu people. Accordingly, Mr Milpurrurru's claim was dismissed.

Justice von Doussa's analysis in *Bulun Bulun* was referred to with apparent approval by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court's decision in *Western Australia v Ward*.<sup>103</sup> In that case, the High Court held that, in so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not native title rights and interests protected by

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<sup>101</sup> Ibid 262 (emphasis added).

<sup>102</sup> Ibid 263.

<sup>103</sup> *Ward* (n 6).

the *Native Title Act 1993* (Cth). However, it was noted that the law in relation to confidential information,<sup>104</sup> copyright or fiduciary duties may afford some protection to such rights, referring to *Bulun Bulun* as an example.

In the context of protection of cultural knowledge embodied in artistic works, it is hard to see how the lens of the *Human Rights Act* could alter the view. Already, equity has risen to the challenge, where the received common law, and subsequently enacted statute law, may be said to have failed to adequately adapt, to recognise and deal with rights and obligations that arise under customary law. What these cases, in relation to the disparate topics of burial disputes and artistic works, demonstrate, however, is the potential adaptability of the law, which is one of the fundamental equitable principles. Likewise, they demonstrate the law of equity acting as a court of conscience, that which is right in the eyes of the community for the time being, responding to modern societal expectations and so enabling equality of enjoyment of rights. They appropriately recognise as relevant the rights, interests and obligations of Aboriginal people and Torres Strait Islander people embodied within customary law. Those considerations, coupled with the legislative invocation of the *Human Rights Act*, arguably support an approach to construction of a statute such as the *Succession Act*, in a manner which is compatible with, and gives effect to, the distinct cultural rights of Aboriginal people and Torres Strait Islander people — for example, in relation to kinship ties — and certainly support serious consideration being given to appropriate legislative reform.

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<sup>104</sup> The example referred to is *Foster v Mountford and Rigby* (1976) 29 FLR 233, a case in which a group of Aboriginal men were successful in obtaining an injunction prohibiting the publication within the Northern Territory of a book revealing their tribal, cultural and religious secret ceremonies.

# PROFESSOR HORST LÜCKE (1929–2024): A LIFE

MICHAEL WHITE\* AND NICHOLAS GASKELL†



*Horst Lücke was an outstanding legal scholar who brought to Australia a deep knowledge of comparative law from his native Germany (via a Fulbright Scholarship in the United States of America). He specialised in private law, particularly the law of contract, statutory interpretation and legal history. He was an outstanding Head of School at the University of Adelaide and finished his career as an Honorary Professor at the University of Queensland. He was a delightful and stimulating colleague who contributed to research seminars right up until his death, aged 95, on 26 September 2024. His long life bore witness to profound changes in society, his personal life and academia.*

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Horst Klaus Lücke<sup>1</sup> was born in Germany on 12 June 1929 in the small town of Ronsdorf.<sup>2</sup> Ronsdorf was later amalgamated with other nearby towns into the larger town area of Wuppertal and so his small town became known as Wuppertal-Ronsdorf.

Horst was born into a loving and hard-working family. His father was a businessman, initially working in the steel industry and later in insurance. Life became increasingly hard for Horst and his family after the Nazis took control of Germany during the 1930s. When World War II broke out in September 1939, he was ten years old. In his early teens, Horst was forced to join the Deutsches Jungvolk ('German Youngsters'), a precursor to joining the Hitler Youth. In 1943, as Germany was gradually losing the war, Horst's small township was destroyed by Allied bombing with his and most of the houses being burnt to the ground.<sup>3</sup> His father was away in the Luftwaffe in Holland, and so Horst and his mother had to go and live with his grandparents in central Germany in Lamsringe, not far from Hildesheim. Here, he attended a local school until they all shut with the German surrender in 1945.<sup>4</sup> In 1944, Horst was sent to dig trenches near Arnhem as part of the German response to the Allied Operation Market Garden.<sup>5</sup> In February 1945, now 16, he was pressured to join the Hitler Youth as the Allied Armies gradually closed in on Germany. Boys were instructed by Schutzstaffel ('SS') officers to stand in lines and told that anyone who did not want to join the SS was to take a step forward. None dared. Horst, however, remembered being grateful for German bureaucracy, as when he was taken inside to formally sign up, he said that he needed his parents' written permission and that they expected him to join the Luftwaffe like his father. The annoyed SS officers let him go and he was always rather proud that he was never a member of the SS. A high proportion of 16-year-old boys forced into the SS (including one of his friends) were killed as they were sent to fight against the seasoned Allied troops. Later, in April 1945, near the end of the war, Horst was called up to join pre-military training, but his life was saved by his mother claiming to have 'burned' his boots. She also hid his uniform, without which, of course, he could not go to join his unit.

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<sup>1</sup> Horst Klaus Lücke, AO (Hon), LLB (Adel), MCJ (NYU), Dr Jur (Cologne), Honorary Professor (UQ), Professor Emeritus (Adel); 12 June 1929 – 26 September 2024.

<sup>2</sup> Some information about Horst's life is found in the transcript of Interview with Horst Lücke (Rob Linn, The University of Adelaide, 17 October 2006) <<http://hdl.handle.net/2440/99176>> ('Transcribed Interview with Horst Lücke'). The present article references the interview but is derived mainly from our conversations with Horst over time, along with assistance from his two daughters, Christine and Elizabeth Lücke, and drafts that Horst shared with us of his partially completed Memoirs (as yet unpublished).

<sup>3</sup> Transcribed Interview with Horst Lücke (n 2) 1.

<sup>4</sup> Ibid 2.

<sup>5</sup> Operation 'Market Garden' was an Allied offensive into the retreating German forces, which led to the loss of many lives in September 1944. See generally Raymond Bluhm, 'Operation Market Garden', *Britannica* (Online Encyclopedia Entry, 14 November 2024) <<https://www.britannica.com/event/Operation-Market-Garden>>.

With the peace in Europe on 8 May 1945, Horst's father was released from a British Prisoner of War camp and the family returned to Wuppertal. Sadly, his father took to gambling in an irresponsible way and this caused great hardship to the family. After graduation from school at the end of 1948, Horst had a six months gap before he attended the Law Faculty at Cologne University, in which time he volunteered his services to an International Student Work Camp, an organization set up by the Quakers to help rebuild Europe.<sup>6</sup> Here, Horst had his first exposure to the wider international world and found it very liberating as there were youths there from numerous countries, including New Zealand, the United States ('US'), England, Indonesia, Holland. He realised the extent of Nazi indoctrination when he asked an American sergeant why the Americans had not joined Germany to fight the Communist Russians, and received the laconic reply that the sergeant did not want to fight anyone and only wanted to go home and live in peace. He realised that he had been taught that war was the natural state of things, not peace. For most of this period with the International Work Camp Horst was kept busy doing basic labouring to try to rebuild infrastructure and buildings, but he enjoyed the final task— driving a tractor across parts of Germany back to Wuppertal towing a trailer load of potatoes (loaded in boxes originally meant for landmines) some 400 kilometres to his starving family and friends.<sup>7</sup>

On completion of the International Student Work camp, Horst joined the Cologne University Law School which, he said, 'was a very, very good one'.<sup>8</sup> Horst was born with a strong physical body, a powerful intellect and a splendidly warm and generous character. His intellect saw him achieve high marks at school and it was on display thereafter throughout his life. Horst had a Lutheran upbringing and had been baptized when young into the Christian church and confirmed when he was twenty years old. Towards the end of his law studies, he became interested in joining the Lutheran priesthood, but finally decided against it.<sup>9</sup> Horst's combined interests of law and religion, coupled with his natural intellect, led to two things; first he became very well read in the Christian gospels and writings and, secondly, he developed strong analytical skills that, somewhat ironically, led him to become an agnostic.

Horst completed his law studies at Cologne University in 1953, aged 24, and became as 'Referendar' (a trainee in law). During this time, he was trained in the practical aspects of civil, criminal and administrative law for three and a half years. However, after about one and a half years, Horst won a US Fulbright Scholarship to the New York University Law School. Here, he worked hard at his studies,<sup>10</sup> and, as a result, came 'top of his class' for the Masters of Civil Justice ('MCJ'). The Law School offered Horst a Teaching Fellow's position on the staff

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<sup>6</sup> Transcribed Interview with Horst Lücke (n 2) 2–3.

<sup>7</sup> Ibid 3–4.

<sup>8</sup> Ibid 2.

<sup>9</sup> Ibid 4.

<sup>10</sup> Ibid 5.

for the following year, during which he also set himself up to study some of the undergraduate law courses. Once again, Horst's natural high intelligence and hard work won him praises and the Dean suggested that he go on to take further post-graduate studies at Indianapolis as a visiting professor, which he declined, preferring instead to return to Germany and finish his Refendar studies in Wuppertal in July 1957. Horst always valued his time in New York as widening his intellectual interests and allowing him to make an interesting and diverse group of friends.<sup>11</sup>

During this time in the US, Horst met Ruth Dart, from Brisbane, Australia who was working in the Brooklyn Public Library in New York. Ruth had studied music — the piano in particular — and also librarianship in Sydney, and she had worked as a librarian for two years in England.<sup>12</sup> Horst and Ruth became engaged, a decision that was met with some opposition from Ruth's mentor at the time, Professor Lindeman. Horst returned to Germany to continue his training program, and the plan was that Ruth would finish her PhD in New York over two years and then join him. However, when they were both about 30 they decided that this was too long to wait, and so Ruth went to Germany. The couple were married in Wuppertal on 4 October 1957. Horst then completed his doctoral degree at Cologne University on 4 June 1959 and his final practice examinations before being admitted to practice in Germany.

Over the following year, Ruth became increasingly unhappy with their situation in Germany and, in 1958, said to Horst, in effect: 'I am going to return to Australia and I'd be very pleased if you would come too'.<sup>13</sup> This posed a dilemma for Horst, as he was close to his mother, who, of course, wanted him to stay in Germany. However, Horst chose to follow his wife and so he wrote to contacts in Australia seeking a position, including to Professor Geoffrey Sawer (at the Australian National University, Canberra), who circulated his letter to colleagues at other universities. The Law School at the University of Adelaide responded with an offer of a tutorship, which Horst accepted. So, Ruth travelled out to Adelaide and Horst followed, arriving on 29 July 1959.<sup>14</sup> He always recalled somewhat ruefully that, while Ruth travelled in some comfort back to Australia in her passenger liner, he had to join her in an uncomfortable crowded Italian emigrant ship where there was some, mostly good-natured, trading of insults between the Italian and German passengers.

Horst was eminently qualified in Civil Law, but to advance up the Australian academic ladder he needed Australian legal qualifications, and so while he tutored, he also studied for his Bachelor of Laws ('LLB') at the Adelaide Law School. He was given credit for much of his past studies in Germany and the US

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<sup>11</sup> Ibid 5–6.

<sup>12</sup> Ibid 6.

<sup>13</sup> Ibid 30.

<sup>14</sup> Ibid 7.

but still needed to pass seven subjects in the Adelaide University LLB program. Horst gained his LLB degree in 1960. His studies, his amiability and his many wonderful qualities steadily saw to his advancement. After the appointment as a tutor in 1959, he progressed quickly to become a lecturer, and in 1965 a Reader (Associate Professor in modern usage). In 1967, at the age of 38, he was elevated to a personal professorial chair, being one of only four professors in the school — a meteoric rise.<sup>15</sup> The main areas of his teaching and his publications were in contract, private international law and legal history.<sup>16</sup>

On arrival, and during his years at Adelaide, Horst found most of his colleagues there much to his liking, including Professor Norville Morris as Head of Department, and Professors Alex Castles, Dan O'Connell and Igor Kavass.<sup>17</sup> Horst and Ruth got on particularly well with Professor O'Connell, a famous international lawyer who later moved to the Chichele Chair of International law at Oxford University.<sup>18</sup> Dan's wife, Renata von Heist, was German, from an old and well-known German family, and she and Horst were able to talk of many things in common.

Horst particularly enjoyed the links between Adelaide and Oxford University. Professor Rupert Cross came to teach for a year in 1962; Professor David Williams, Fellow of Keble College Oxford visited in 1967; Professor Derek Davies came a number of times from Catherine College; and, in 1968, Horst spent a very happy time as a visitor at All Souls College, Oxford.<sup>19</sup> As mentioned, Horst's close colleague in Adelaide, Professor Dan O'Connell, went on to become professor of International Law in Oxford in 1972. Horst had taken over teaching Contract from a former Adelaide student, Richard Blackburn, who had gone to Oxford and returned with a Bachelor of Civil Law ('BCL') and who later became a judge of the Northern Territory and other courts.<sup>20</sup> Overall, these were happy years for Horst.

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<sup>15</sup> Ibid 15.

<sup>16</sup> Ibid 16.

<sup>17</sup> Ibid 8.

<sup>18</sup> IA Shearer, 'Daniel Patrick O'Connell (1924–1979)', *Australian Dictionary of Biography* (Web Page, 2006) <<https://adb.anu.edu.au/biography/oconnell-daniel-patrick-11280>>.

<sup>19</sup> Horst's short article displays his sharp sense of humour as he described a 'sit-in' at the college: see Horst K Lücke, 'The Siege of All Souls' (2011) 51 *Supreme Court of Queensland Review of Books* 78, 78–80.

<sup>20</sup> Sir Richard Blackburn served as a Judge of the Supreme Court of the Northern Territory from 1966–71. Justice Blackburn graduated with a Bachelor of Arts from the University of Adelaide and Oxford University and a Bachelor of Civil Law degree from Oxford University. Justice Blackburn was a Rhodes Scholar in 1940 and attended Eldon Law School in 1949. He was called to the Bar at Inner Temple in 1949 and was admitted to practice as a solicitor in South Australia in 1951. Justice Blackburn also served in the Australian Imperial Forces from 1940–45 and rose to the rank of Captain. After his term on the Northern Territory Supreme Court bench, he was appointed as a Judge of the Supreme Court of the Australian Capital Territory. He was appointed Chief Judge in 1977 and became the first Chief Justice of the Australian Capital Territory in 1982. He also served as a Justice of the Federal Court of Australia from 1977–84. See 'The Honourable Sir Richard Arthur Blackburn OBE (Mil)', *Supreme Court of the Northern Territory* (Web Page) <<https://supremecourt.nt.gov.au/about/judges/former-judges/resident-judge/sir-richard-arthur-blackburn>>.

As he said: ‘We had lots of parties and we saw a lot of each other, the legal academics represented a relatively close-knit group, in a way.’<sup>21</sup>

Horst recalled that one of the features at the Law School over his years there was the gradual increase in the number of female students. When he taught there as a tutor in 1960 there were no female students in the class, but by the time he left in 1984 female students made up more than half of the student cohort. One influence of this, he felt, was in improvement in the attitude to studies by all students, so that the work ethos steadily improved. Another feature of those years was the pleasure in having so many talented students, which included such people as James Crawford, later Professor of International Law at Cambridge and a member of the International Court of Justice; Ivan Shearer, later Professor of International Law in Sydney, in whose obituary Horst later wrote for the *Adelaide Law Review*. Horst began his tribute by saying: ‘Ivan Shearer was a colleague and a friend; I mourn his passing.’<sup>22</sup>

Other students of Horst included: Graham Parker, later Professor of Legal History in Canada; William Cornish, Professor of Law in Cambridge;<sup>23</sup> and John Finnis, Professor of Jurisprudence at Oxford, about whom Horst later wrote an article.<sup>24</sup> Horst recalled with pleasure how the graduating law class of 1962 invited him back to be the guest speaker at their reunion, the students of which included the Hon Margaret White AO,<sup>25</sup> who was one of the 1962 graduating class.<sup>26</sup> It was aspects like these that made him, overall, look back on his Adelaide years with ‘a good deal of pleasure’.<sup>27</sup>

Another feature of university life that Horst observed over the years was the change from a collegiate structure, in which the Vice Chancellor was more *primus inter partes* and whose salary was not much greater than the other professors, to a commercialisation of the university. This commercialisation led to the gradual development of administrative layers between the academics and the Vice Chancellors, many of whom were paid salaries much greater than the senior academics themselves, which made Universities a less pleasant place in which to work.<sup>28</sup>

As mentioned, over the years Horst steadily worked his way up the academic ladder, and in 1970 he became Head of the Law School at Adelaide University. When offered the position by the Vice Chancellor, Professor Geoffrey Badger,

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<sup>21</sup> Transcribed Interview with Horst Lücke (n 2) 18.

<sup>22</sup> James Crawford et al, ‘Tributes to Ivan Shearer’ (2019) 40(2) *Adelaide Law Review* 393, 405 (‘Tributes to Ivan Shearer’).

<sup>23</sup> Transcribed Interview with Horst Lücke (n 2) 26.

<sup>24</sup> Horst Klaus Lücke, ‘John Finnis and the University of Adelaide: The Christian Faith Half a Century Ago’ (2016) 35(2) *University of Queensland Law Journal* 193 (‘John Finnis and the University of Adelaide’).

<sup>25</sup> Retired Justice of the Queensland Court of Appeal.

<sup>26</sup> Transcribed Interview with Horst Lücke (n 2) 29.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* 27.

Horst asked him whether appointing a German was appropriate. Badger took down a copy of the *University Act* and, to the amusement of them both, said: 'look, it says here that we cannot discriminate'.<sup>29</sup> Upon his appointment as Head of School, Horst was confronted with a difficult situation due to some hostility to the School that had built up during the years of his predecessors from other faculties of the University and the profession. He set to work to correct this and made a point of attending a demanding number of committees and joint working parties in the University, as well as being an active member of the Law Society Council and its various committees.<sup>30</sup> The early 1970s were, of course, a difficult time for many university heads as the student protests about the Vietnam War and other things were well under way. In Horst's words, the situation he found as Head of School was that '[t]he students were rebellious, the Law Society was critical, the other faculties didn't like what the Law School was doing, so one was surrounded by people who had to be persuaded to be more cooperative'.<sup>31</sup>

Then, on 10 May 1972, one of Horst's staff, Dr George Duncan, was drowned in the Torrens River by a thuggish gang who threw him in because he was a homosexual. Unfortunately, Duncan could not swim and, despite one of the gang jumping in to save him, he drowned. Duncan had no living relatives and so Horst, as Head of School, felt it incumbent on him to look after Duncan's reputation and interests. The authorities quietly let the matter drop, although there was a coronial inquiry. Horst considered that this was not right and so he took steps with the newspapers, police and politicians to advocate for a better inquiry into the young man's death. An article later written about the events described Horst's efforts: 'Prof Lücke kept up public pressure on the state government, publicly advocating for the law changes' and in 1975 the government introduced legislation to decriminalize homosexual acts between consenting males.<sup>32</sup> Horst found all of this very difficult, but he became 'a bit of a hero' with homosexual groups because he had taken up Dr Duncan's cause.<sup>33</sup>

Horst was Head of the Law School at Adelaide for three years from 1970 and then again from 1976, which was an onerous position as the head had all the extra burdens, no relief from any teaching and no extra remuneration. Then in the 1980s, Horst could see that some of his colleagues were tending to push for him to take a third term, which was not to his liking. In 1984, however, the University decided to reduce staff and offered a generous retirement package, so Horst took one effective from 9 April 2002. At the age of 55, therefore, he retired from

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<sup>29</sup> Ibid 12.

<sup>30</sup> Ibid 13–14.

<sup>31</sup> Ibid 14.

<sup>32</sup> Jordan Hirst, 'Uni's Tribute to Gay Academic 50 Years After His Murder Changed Australia', *QNews* (online, 1 March 2022) <<https://qnews.com.au/unis-tribute-to-gay-academic-50-years-after-his-murder-changed-australia/>>.

<sup>33</sup> Transcribed Interview with Horst Lücke (n 2) 21.

Adelaide University with his superannuation plus an incentive payment.<sup>34</sup> In recognition of his service, the university appointed him an Emeritus Professor and also as a Visiting Research Professor.<sup>35</sup>

This retirement necessitated a review of his situation. Ruth and Horst had been blessed with three children born during the 1960s — Elizabeth, Christine and Michael, who unfortunately died in 2002. By the time of Horst's retirement, their children had left home and Ruth's mother, who had been living with them, had died, so some downsizing from their large house was called for. After discussions with Ruth, they bought a medium sized house in Semaphore, near Freemantle, a district that had been a port area in its early days. The house and the neighbourhood were run down, and Horst set to work to try to improve both. He founded a Residents' Association and lobbied the Adelaide Council and the government to improve the public buildings and provide more support for the numerous disadvantaged people who lived in the area. Ruth joined a group of ladies offering tea and coffee at St Bede's Hall twice a week and Horst joined the Mental Health Association to lobby for better support for those who were mentally disadvantaged.<sup>36</sup>

Then Horst decided to explore the possibility of returning to academic work. He made enquiries in Australia and overseas about contracted positions that might be available. He finally took an appointment back in Germany, in Hamburg, as a Research Associate at the Max Planck Institute for Private Law and Private International Law. He had been a guest there in 1978 and so was known to them. The Institute initially employed Horst for six years, but later extended this period by two years. This was a very happy period for Horst professionally as it involved research (and translation) but no teaching. It also carried a handsome remuneration and a pension that became very important in later years. Ruth also enjoyed this time and she became active in the community, including joining the English church in Hamburg, which had been established by English traders there in 1611 and, further, had had close connections with the German immigrants to South Australia<sup>37</sup> when they emigrated there from 1836 onwards. The Hamburg residence period covered the years from 1990–98, during which time Horst's major research work was published in the celebrated *International Encyclopedia of Comparative Law*.<sup>38</sup>

After Hamburg, Horst returned to Adelaide Law School and lectured in Comparative Law from 1999–2005. He was then a Visiting Research Professor from 2005–07 and a lecturer in Statutory Interpretation in 2008.<sup>39</sup> He developed

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<sup>34</sup> Ibid 22.

<sup>35</sup> Ibid 25–6.

<sup>36</sup> Ibid 24.

<sup>37</sup> Ibid 25.

<sup>38</sup> Commonwealth, *Government Notices Gazette*, No C2015G00801, 27 May 2015, 2 ('*Government Notices Gazette*').

<sup>39</sup> Ibid.

links for the establishment of a comparative law degree between Adelaide and Mannheim Universities.

In 2007, Horst and Ruth moved from Adelaide to live in Coorabell, in the beautiful hinterland inland from Byron Bay in central New South Wales, to be near his daughter Christine and her family. They also bought an apartment in Macquarie Street, St Lucia, near the University of Queensland so that Horst could be active in the University of Queensland academic sphere and Ruth could join up with members of her Dart family who came from Brisbane. Horst became an Adjunct Professor at Bond University for a while in the 1990s and also did some teaching at James Cook University. In 2007, Horst was also appointed an Honorary Professor at the University of Queensland's TC Beirne School of Law where he actively engaged with his academic colleagues in many research discussions on private and comparative law right up until shortly before his death in 2024. A major flood occurred in Brisbane in 2011, which affected part of Horst and Ruth's St Lucia apartment, and so they sold the apartment and moved to a retirement village in Durack, in the western suburbs of Brisbane, which suited them well. Ruth died on 1 April 2014, but Horst lived on there until his death in 2024, where he continued his engagement with his family, including the wide-ranging Dart family. Horst enjoyed seeing the birth of grandchildren and, in 2024, one great granddaughter.

*Horst Lucke relaxing in his apartment in Durack, Brisbane c. 2020.*<sup>40</sup>



<sup>40</sup> Photo from the family collection held by Christine Lücke, Horst's daughter.

Throughout his life, Horst's academic work was greatly respected and his *Law Quarterly Review* article on *Slade's Case*<sup>41</sup> not only stamped his name as an intellectual force (and played a major part in his employment in the common law system) but was still being cited before the High Court of Australia in a case in 2019.<sup>42</sup> In reading the article today one can only wonder how someone with Horst's civil law background could have analysed so comprehensively the intricacies of medieval English common law. He was able to identify 'the decisive role played by pleaders in sixteenth- and seventeenth-century law reform'<sup>43</sup> as the law of contract (as we now know it) evolved at a time when it was not possible to challenge openly the basis of the previous forms of action. Horst highlighted the procedural dimension of the development of substantive law, in particular that of the doctrine of consideration in contract law. It was a remarkable subject for a civil lawyer to have chosen and mastered.

Like many civilian lawyers who converted to working with the common law, Horst was fascinated by how the system worked and whether it could eventually be codified. In another *Law Quarterly Review* article in 1982,<sup>44</sup> he examined, in the context of judicial law making, the stalled movement in the UK for codification of the law of contract. Horst was at heart a believer in the benefits of, and need for, a system of principled codification over the slow and wasteful nature of the common law.<sup>45</sup> However, he recognised in that article that the traditional methods of English statutory drafting and judicial interpretation needed development and improvement before codification (at least of contract law) could be achieved. Moreover, the article recognised the importance of judicial impartiality, both in fact finding in an adversarial system but also in developing a rationale for decision making — even if 'impartiality is not the same as justice'.<sup>46</sup> He concluded that 'while it would be idle to pretend that judge-made law is without blemish ... those of its fundamentals which give meaning and reality to the judicial commitment to impartiality are sound ... [and] deserve to be preserved

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<sup>41</sup> HK Lücke, 'Slade's Case and the Origin of the Common Counts' (Pt 1) (1965) 81 (July) *Law Quarterly Review* 422; HK Lücke, 'Slade's Case and the Origin of the Common Counts' (Pt 2) (1965) 81 (October) *Law Quarterly Review* 539; HK Lücke, 'Slade's Case and the Origin of the Common Counts' (Pt 3) (1966) 82 (January) *Law Quarterly Review* 81 ('Slade's Case Pt 3'). *Slade's Case* (1598) 4 Co Rep 92 b; (1602) 76 ER 1074 was an English case that concerned how far contractual claims had to be pursued through a writ of debt in the Court of Common Pleas, or could be brought under the more flexible *indebitatus assumpsit* procedure in the Court of King's Bench. The contest of jurisdictions also raised profound questions about judge-made law at a time of absolute monarchy.

<sup>42</sup> As told by then Chief Justice Susan Kiefel AC at a tea party that she gave in honour of Horst for his 90<sup>th</sup> birthday.

<sup>43</sup> Lücke, 'Slade's Case Pt 3' (n 41) 94.

<sup>44</sup> HK Lücke, 'The Common Law: Judicial Impartiality and Judge-Made Law' (1982) 98 (January) *Law Quarterly Review* 29.

<sup>45</sup> He quoted in a footnote Diamond who spoke of the 'tons of verbal pulp that must be squeezed to obtain an ounce of pure judicial law': see *ibid* 31 n 20. See also Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31(4) *Modern Law Review* 361, 362.

<sup>46</sup> Lücke, 'Slade's Case Pt 3' (n 41) 88.

and cultivated'.<sup>47</sup> While developing throughout his life in Australia that intellectual position of a partial convert to the common law system, Horst produced a major body of scholarship on statutory interpretation,<sup>48</sup> doctrinal contract law, legal history and comparative law, as well as contributing a number of perceptive book reviews.

Horst's major area of substantive law expertise was undoubtedly in contract law. In the 1960s and 70s he published a whole series of articles on individual aspects of the subject:<sup>49</sup> these ranged from formation (eg intention to create legal relations, arrangements preliminary to formal contracts, and *consensus ad idem*), to complex areas where comparative approaches were useful (eg mistake of identity, illusory terms and implications). Horst's developing mastery of the subject led him to write a book on the Law of Contract, but he was told that there was then 'no market' for it to be published. This was unfortunate, as it contained a very penetrating analysis of common law doctrines from the insight of a civil lawyer and surely should have been published. Happily, *The Australian Law of Contract in the 1970s* was eventually privately published in 2024 and uploaded on to the University of Queensland's eSpace,<sup>50</sup> and Horst was able to hold a hard copy of it just before he died. It is a pity that he was not able to incorporate into the book many of his later articles on contract law (eg on good faith or damages) along with his contemporary views into an edition on 21<sup>st</sup> century Australian contract law.

During his later years, Horst wrote many works on comparative law and legal history. The latter included articles on the development of Australian legal historical scholarship,<sup>51</sup> an investigation of the influence of German law on the introduction of the Torrens system of real property law of land holding in South Australia,<sup>52</sup> and a 2023 book on Ruth's family history entitled *A Voice from Early Queensland: Eliza Dart of Brookfield*.<sup>53</sup>

Horst's work on the *International Encyclopedia of Comparative Law* has already been noted, and he was rightly proud of his lectures on comparative law at Adelaide. In 2023–24, he was working on editing these for publication. It is hoped that a version of these may be completed by his family and Nick Gaskell and published posthumously by uploading on the University of Queensland's eSpace.

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<sup>47</sup> Ibid 93.

<sup>48</sup> Horst was proud of his lectures on statutory interpretation, although these have never been published. His writings often touch on the subject, or set it in historical context. See, eg, Horst Lücke, 'Statutes and the Intention of the Lawmaker as the Ultimate Guide to their Applicability: History and Prospects' [2010] *Supreme Court History Program Yearbook* 1.

<sup>49</sup> See Appendix for a select list of publications.

<sup>50</sup> Horst Klaus Lücke, *The Australian Law of Contract in the 1970s* (University of Queensland, 2024).

<sup>51</sup> See Horst Lücke, 'Legal History in Australia: The Development of Australian Legal/Historical Scholarship' (2010) 34(1) *Australian Bar Review* 109.

<sup>52</sup> See Horst K Lücke, 'Ulrich Hübbe and the Torrens System: Hübbe's German Background, His Life in Australia and His Contribution to the Creation of the Torrens System' (2009) 30(2) *Adelaide Law Review* 213.

<sup>53</sup> Horst Klaus Lücke, *A Voice from Early Queensland: Eliza Dart of Brookfield* (University of Queensland, 2023). This was a history based around Ruth's grandmother who had kept a detailed diary of her life.

Horst wrote a number of personal appreciations of friends and colleagues, which have a valuable historical flavour.<sup>54</sup> Although Horst was an agnostic,<sup>55</sup> he was keenly interested in the religious beliefs of other intellectuals, as shown by his 2016 article on John Finnis.<sup>56</sup>

Horst never let age diminish his intellectual curiosity. He contributed to UQ Law School seminars well into his 90s and had taught himself to use the earliest available version of the AI program Chat GTP, particularly in producing readable translations from German texts for his personal research. Before he became too sick to continue, Horst was part way through writing his memoirs, which may also be edited for publication by his family.

In 2015, Horst was awarded the honour of an Officer in the Order of Australia (AO) '[f]or distinguished service to the law, particularly in the areas of legal education and legal research'.<sup>57</sup> It was an Honorary Award as Horst never did take out Australian citizenship. Initially this was because he would have to surrender his German citizenship and he needed that to access a small German pension he was receiving, and later, when the Australian government did allow dual citizenship, he never did get around to it.

To his friends and academic colleagues Horst will be remembered as a man with enormous intellectual force, a prodigious memory and a great sense of humour.

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<sup>54</sup> See, eg, Horst Klaus Lücke, 'Isaiah Berlin and Adolf Hitler: Reflections and Personal Recollections' (2019) 40(1) *Adelaide Law Review* 89.

<sup>55</sup> See Lücke, 'Tributes to Ivan Shearer' (n 22) 408.

<sup>56</sup> Lücke, 'John Finnis and the University of Adelaide' (n 24). This article is remarkable for its appendices which show a commitment to transparency in the material used for the research, in particular the correspondence with Finnis himself.

<sup>57</sup> *Government Notices Gazette* (n 38) 1.

## APPENDIX: SELECT BIBLIOGRAPHY OF PUBLICATIONS BY HORST LÜCKE

Some of Horst's publications can be found in:

- the University of Adelaide's digital library:  
[https://digital.library.adelaide.edu.au/dspace/simple-search?query=horst+lucke&sort\\_by=score&order=desc&rpp=10&etal=0&filtername=author&filterquery=Lucke%2C+Horst+K.&filtertype>equals](https://digital.library.adelaide.edu.au/dspace/simple-search?query=horst+lucke&sort_by=score&order=desc&rpp=10&etal=0&filtername=author&filterquery=Lucke%2C+Horst+K.&filtertype>equals)
- the University of Queensland's eSpace:  
<https://espace.library.uq.edu.au/records/search?searchQueryParams%5B%5D=horst+lucke&page=1&pageSize=20&sortBy=score&sortDirection=Desc>

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