# THE RIGHT TO A FAIR TRIAL: A CRITICAL ANALYSIS

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This thesis is presented for the Honours Degree of Bachelor of Laws of Murdoch University

November 2013

## DECLARATION OF ORIGINALITY

I, Roshan Singh Chopra, declare this thesis as my own work and that it has not been submitted anywhere else. Where other sources have been used, they have been citied accordingly.

Date: 11 November 2013

## ACKNOWLEDGEMENTS

I am especially grateful to Lorraine Finlay from the Murdoch University School of Law for all her advice, support and patience in the writing of this thesis.

I would also like to thank all my family and friends for their kindness and encouragement.

## ABSTRACT

The concept of fairness is essential to the administration of justice. The right to a fair trial embodies this notion of fairness and informs the development of almost every aspect of law. This is most clearly visible in the criminal process.

However, the practical application of the right to a fair trial raises a number of issues. In part, its presence in almost every area of law means that the right is composed by a number of other rights. Further, because the concept of fairness is not static, the right to a fair trial has an ever changing scope, content and meaning. These considerations have resulted in the absence of clear principles guiding the application of the right in the everyday administration of justice.

If left unattended, there is real risk that this lack of guidance may eventually dilute the substance of the right to a fair trial. As a consequence of its fundamental nature, a weakening of the right brings implications for the continued public confidence in the administration of justice.

This paper will contend that the application of the right to a fair trial should be directed toward the goals of the criminal process. This means that the right to a fair trial should protect the rights of the defendant to promote the legitimacy of the verdict. Fundamentally however, the right to a fair trial means the right that all persons have to a factually accurate verdict. The continued significance of the right to a fair trial therefore requires the formation and application of the law to be directed toward the goal of factually accuracy in the verdict and also, to reach such a verdict in a way that is fair to all parties.

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# THE RIGHT TO A FAIR TRIAL- A CRITICAL ANALYSIS

ROSHAN SINGH CHOPRA

## I INTRODUCTION

The fundamental and overarching right to a fair trial resonates strongly in the contemporary criminal justice system. The High Court of Australia has emphasised the significance of the right as being 'the central thesis of the administration of criminal justice'[1] and 'the central prescript of our criminal law'[2]. The right to a fair trial is by no means a recent development. It has been observed that the right to due process of law can be traced back to the *Magna Carta* in 1225.[3] Indeed in 1923 Issacs J wrote that the right to a fair trial was 'so elementary as to need no authority to support it'.[4]

The right to a fair trial at common law is primarily grounded in the inherent power of the court to stay a trial for an abuse of process. This, as Sir Anthony Mason observes, represents 'the most significant development of the fair trial'.[5] The right is also personified in other ways which, broadly, include 'rules of law and practise designed to regulate the course of the trial'.[6] The concept of fairness permeates almost every aspect of criminal law.[7] This is apparent in the rules of evidence. For instance, in the

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[1] *McKinney v The Queen* (1991) 171 CLR 468,478 (Mason CJ, Deane, Gaudron and McHugh JJ).

[2] *Jago v District Court (NSW)* (1989) 168 CLR 23, 56 (Deane J).

[3] William Sharp McKenchine, *Magna Carta: A Commentary on The Great Charter of King John* (James Maclehose & Sons, 1914) 376; Article 29 of the Magna Carta provides 'To no man we will sell, to no man will we deny or delay justice or right'. Indeed, the Magna Carta is 'the groundwork for all constitutions' *Ex Parte Walsh and Johnson* (1925) 37 CLR 36, 79 (Issacs J). It represents the conceptual foundation of contemporary human rights. See Lord Derry Irvine, 'The Spirit of Magna Carta Continues to Resonate in Modern Law' (2003) 119 *Law Quarterly Review* 227, 234. It has been acknowledged that this is the ancestor of the right to a fair trial as expressed numerous international human rights instruments and constitutions. See Richard Vogler, 'Due Process' in Michael Rosenfeld and Andras Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 930-8.

[4] *R v Macfarlane; Ex parte O' Flanagan and O' Kelly* (1923) 32 CLR 518, 541-2.

[5] Sir Anthony Mason, 'Fair Trial' (1995) 19 *Criminal Law Review* 7, 11.

[6] *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ) citing *Bunning v Cross* (1978) 141 CLR 54.

[7] James Spiegelman, 'The truth can cost too much: The Principle of a fair trial' (2004) 78 *Australian Law Journal* 29, 36.

seminal case of *R v Christie*,[8] Moulton LJ held that the discretion to exclude evidence which is more prejudicial than probative 'is based on an anxiety to secure for everyone a fair trial'.[9] The concept of fairness allows procedures to be flexible and evolve in line with society's conceptions of justice.[10]

In addition to being entrenched in the common law, the right has found exposition in most major human rights instruments and bills of rights. The right is embodied most prominently in article 10 of the *Universal Declaration of Human Rights* and article 14(1) of the *International Covenant on Civil and Political Rights* ('the ICCPR').[11] It is also expressed in article 6 (1) of the *European Convention on Human Rights* ('the ECHR').[12] Key aspects of the right are also present in several other United Nations human rights instruments.[13] The right to a fair trial is clearly part of the body of customary international law and informs human rights norms.[14]

The right is also expressed in the Bill of Rights of the United States,[15] Canada,[16] the United Kingdom,[17] and New Zealand.[18] In the United States, the Supreme Court has

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[8] *R v Christie* [1914] AC 545.

[9] *R v Christie* [1914] AC 545, 599; See also *Pfenning v The Queen* (1995) 182 CLR 461, 490-513 (McHugh J).

[10] Spiegelman, 'The truth can cost too much', above n 7, 43; See also *Ridgeway v The Queen* (1995) 184 CLR 19, 82-90 Where Gaudron J observes that 'notions of justice and injustice…must reflect contemporary values'.

[11]*International Convention of Civil and Political Rights* opened for signature 16 December 1966, [1980] ATS 23 (entered into force 13 November 1980) ('*ICCPR').*

[12] *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 ( entered into force 3 September 1953), as amended by Protocols No. 11 and 14. ('*ECHR'*).

[13]*Convention on the Rights of the Child,* opened for signature 20 November 1989, [1991] ATS 4 (entered into force 16 January 1991) art 40; *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965 [1975] ATS 40 (entered into force 7 March 1966) art 5(a); *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984 [1989] ATS 21 (entered into force 26 June 1987) art 15; *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008) art 13 citied in Sangeeta Shah,' Administration of Justice' in Daniel Moeckli, Sangeeta Shah and Sandeh Sivakumaran (eds) *International Human Rights Law* ( Oxford University Press, 2010) 315-6

[14] Shah, above n 13, 316-7; Bahma Sivasubramaniam, The Right of an Accused to a Fair Trial: Independence of the Impartiality of the International Criminal Courts (PhD Thesis, Durham University, 2013) 16-35 < http://etheses.dur.ac.uk/6982/> for a succinct overview of the right to a fair trial in the various international human rights treaties.

[15] See *United States v. Agurs* 472 U.S. 97, 107 (1976) with respect to *United States Constitution* amend V; *Betts v. Brady*, 316 U.S. 455, 473 (1942) regarding *United States Constitution* amend XIV

held that the *United States Constitution* provides all accused a right to a fair trial which 'must be maintained at all costs'.[19] The right is constitutionally protected in South Africa as an 'overriding requirement to which all the rules of evidence in criminal trials will have to conform'.[20] In Malaysia, it has been held that articles 5(1) and 8(1) of the *Federal Constitution of Malaysia* make certain 'that a fair and just punishment is imposed according to the facts of the case'.[21] The right also finds expression in the *Hong Kong Bill of Rights Ordinance 1997* which is based on the ICCPR.[22] Further, the right is evident in jurisdictions outside the common law such as Germany,[23] and Japan.[24] In Australia, the right is a fundamental common law right and statutorily embodied in the *Human Rights Act 2004* (ACT) ('the HRA') and the *Charter of Human Rights and Responsibilities 2006* (Vic) ('the Charter'). [25]

This list is by no means exhaustive. The entrenchment of the right to a fair trial in a multitude of constitutions and human rights instruments signifies its fundamental and

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citied in Sanjay Chhabiani, 'Disentangling the Sixth Amendment' (2008) 11 *University of Pennsylvania Journal of Constitutional Law* 487.

[16] *Canadian Charter of Rights and Freedoms* art 11(d).

[17] *European Convention on Human Rights,* Article 6 (1) the right is incorporated into the *Human Rights Act* 1998 (UK), s 1.

[18] *New Zealand Bill of Rights Act* 1990 (NZ) s 25(a).

[19] *Estes v. Texas*, 381 U.S. 532, 540 (Clark J) (1965); *United States Constitution* amend V.

[20] Matthew Chaskalson et al , *Constitutional Law of South Africa Revision Service 5* 1999 Juta & Co Ltd, 26-7citing *Constitution of the Republic of South Africa Act 1996* s 35(3); The *Constitution of the Republic of South Africa 1996* ss 33, 34, makes clear that the right applies equally in civil and administrative proceedings.

[21] *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261,290A (Gopal Sri Ram JCA) cited in Thio Li-Ann, *A Treatise On Singapore Constitutional Law* (Academy Publishing, 2012) 671-2.

[22] *Hong Kong Bill of Rights Ordinance* (Hong Kong) cap 383, art 10; The appellate courts in Hong Kong have adopted a holistic approach to the concept of 'fairness' in judicial review of legislation. In Hong Kong, aggrieved persons may seek judicial review not only on the grounds of procedural fairness but also on pragmatic aspects of decision making which include, for example, the design of questionaries. See *Sakthavel Prabakar v. Secretary for Security* [2005] 1 HKLRD 289; See generally, Swati Jhaveri, Transforming "fairness" as a ground of judicial review in Hong Kong (2013) 11 (2) *International Journal of Constitutional Law* 358.

[23] *Grundgestz fur die Bundesrepublik Deuchland* [Basic Law for the Federal Republic of Germany 1949] art 103.

[24] *The Constitution of Japan 1947* (Japan) art 31.

[25] *Human Rights Act 2004* (ACT) ss 21, 22; *Charter of Human Rights and Responsibilities Act 2006* (VIC) ss 24, 25.

universal nature.[26] As Baroness Hale has observed, these instruments 'place some limits upon what a democratically elected parliament may do… Democracy is the will of the people, but the people may not will to invade the rights and freedoms which are fundamental to democracy itself.'[27] And in this light, the right to a fair trial is a key constitutional right 'intrinsic to the idea of the rule of law'.[28]

The right is thus one which is 'fundamental and absolute'.[29] However, its application requires a balance between competing considerations.[30] As Deane J observes, notions of fairness defy 'analytical definition'.[31] Indeed what is fair or otherwise in the individual case must be determined by the court in the exercise of its discretion.

It is arguable that despite its judicial emphasis, determinations as to the application of the right to a fair trial have not been drawn with much certainty.[32] Indeed, often only the 'minimum requirements' of the right are expressed.[33] In part, the right's status as a fundamental common law right makes determinations as to its content and scope elusive. Common law rights have customarily operated as 'broad

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[26] See generally, David Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 *International and Comparative Law Quarterly* 352; M Cherif Bassiouni, 'Human Rights in the context of criminal justice: Identifying international procedural protections and equivalent protections in national constitutions' (1993) 3 *Duke Journal of Comparative & International Law* 235, 267 where the author notes that aside from international treaties, the right is embodied in thirty eight national constitutions.

[27] *R v (Countryside Alliance) v Attorney General* [2007] UKHL 52, [113] citied in Rabinder Singh, Interpreting Bills of Rights (2008) 29 (2) *Statute Law Review* 82, 83.

[28] TRS Allan, 'Review of Richard Bellamy, "Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy' (2008) 67 *Cambridge Law Journal* 423,425; The rule of law and the right to a fair trial share a number of characteristics. For example an independent and impartial judiciary is both a feature of the rule of law and the fair trial See Augusto Zimmermann, The Rule of Law as a Culture of Legality: Legal and Extra –legal Elements for the Realisation of the Rule of Law in Society (2007) 14 (1) *eLaw Journal : Murdoch University Electronic Journal of Law* 10, 17-23 < http://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_rule_law_culture_legality.pdf>.

[29] *Brown v Stott* [2003] 1 AC 681, 719 (Lord Styen).

[30] *Jago v District Court (NSW)* (1989) 168 CLR 23,33 (Mason CJ)

[31] Ibid 57.

[32] *Momcilovic v The Queen* (2011) 245 CLR 1, 152 [382], 172[409] (Heydon J)

[33] See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2); *Human Rights Act 2004* (ACT) s 22(2).

aspirations'.[34] As such they 'were conceptions of generally desirable outcomes, not a tool for defining a baseline of acceptable law and conduct for government'.[35]

Such ambiguity has led some to express serious concerns about the future of the right. For example, Langford observes that the fair trial 'is like rugby, the boy's scouts, and television, simply a diffused cultural trait'.[36] It has also been argued that society's interest in bringing accused persons to trial often trumps their right to a fair trial.[37] These issues are compounded by the continuously evolving meaning of the right.[38]

There is a real risk that in the absence of clear principles guiding its application, the continued significance of the right in shaping the administration of justice may be diminished.[39] Indeed these issues have, arguably, already diluted the influence right so as to render it 'an obscure and weak entitlement'.[40]

This paper contends that core aspects of the right to a fair trial enjoy substantial protection in the Australian legal landscape. However, it argues that the right to a fair trial is not protected in the full sense of the term. It submits that the continued significance of the right to a fair trial requires its judicial and legislative application to be directed to the goals of the criminal process. That is, 'to accurately determine whether or not a person has committed a crime and to do so fairly'.[41]

First, an overview of the broad characteristics of the right to a fair trial will be provided by this paper. The rest of this analysis builds, in large part, on these

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[34] Paul Rishworth, 'Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights' (2004) 15 *Public Law Review*103, 106.
[35] Ibid106.
[36] Ian Langford, 'Fair Trial: the history on an idea' (2009) 8(1) *Journal of Human Rights* 37, 51.
[37] Mirko Bagaric, Theo Alexander and Marlene Ebejer, 'The illusion that is the right to a fair trial in Australia' (2011) 17 (2) *Australian Journal of Human Rights* 59, 65.
[38] See generally Langford, above n 36.
[39] Bagaric, Alexander and Ebejer, above n 37, 62.
[40] Ibid 81.
[41] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 3rd ed, 2005) 22.

interrelated characteristics of the right. Thereafter, the principle manifestations of the right at common law will be illustrated. It will be argued that while the courts have the power to ensure a fair trial, the right remains vulnerable to statutory abrogation in certain circumstances.

The goals of the criminal trial will then be introduced. It will be argued the criminal trial is concerned with protecting rights. This leads to the issue of the extent to which the right is protected from legislative inroads. This analysis will involve testing the strength of the fair trial protections under the statutory bills of rights in Victoria and the Australian Capital Territory. It will be argued that these instruments do not substantially protect the right in relation to remedying legislation which detracts from the right to a fair trial. The discussion will then turn to the constitutional issues surrounding the right. It will be argued that any Chapter III implication of the right is limited and the right is not constitutionally protected in the full sense of the term.

Finally, it will be argued that another fundamental goal of the criminal trial is a factually accurate verdict. In this light, the practical operation of the right will be considered using the example of the admissibility of expert evidence in criminal trials. It will be seen that public confidence in the administration of justice is contingent on the application of fair trial rights directed to the goals of the criminal process. This involves protecting the rights of the accused and, fundamentally, ensuring a factually accurate verdict.

## II THE RIGHT TO A FAIR TRIAL- CHARACTERISTICS AND EXPRESSIONS

### A *An Outline*

As the right to a fair trial is present in almost all areas of law and informs numerous practices and procedures, it is not feasible to attempt to describe all the ways in which the right manifests itself. However, it is useful to conceive of the right as containing a number of key characteristics.

#### 1 *Right to a fair trial not confined to the criminal law*

The first characteristic is that although the right is most vividly demonstrated in criminal law, the right is similarly applicable in civil proceedings. The right is part of the body of core principles inherent to both the criminal and civil areas of law.[42] For instance, fair trial principles in the civil sphere are illustrated in the obligation to discover all relevant documents.[43] However, its application in the civil areas of law differs from its application in criminal law.[44] It has been argued that the discretion to exclude evidence which is more prejudicial than probative operates in its full sense in criminal trials.[45] As most civil matters are heard by a single judge, it would be artificial if the judge would consider the evidence and then exclude it as the finder of fact.[46] Also, in general, issues of expediency and efficiency weigh more heavily in the civil sphere.[47] Such differences aside, it may be said that in both civil and criminal law the 'court's procedure is there for the sole purpose of seeing that there is

[42] Tomas Bingham, *The Rule of Law* (Penguin Books, 2010), 90.
[43] Bernard Cairns, *Australian Civil Procedure* (Lawbook, 9th ed, 2011) 355.
[44] Spigelman, 'The truth can cost too much', above n 7, 30.
[45] JR Forbes, 'Extent of the Judicial Discretion to Reject Prejudicial Evidence in Civil Cases' (1988) 62 *Australian Law Journal* 211, 213-4.
[46] Ibid 214; Andrew J. Wistrich, Chris Guthrie and Jeffrey J. Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 *University of Pennsylvania Law Review* 1251.
[47] See especially *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; Dorne Boniface and Michael Legg, 'Cost, Delay and Justice: The High Court of Australia Recognizes the Importance of Case Management in Civil Litigation- Aon Risk Services Australia Limited v Australian National University' (2010) 39 (2) *Common Law World Review* 157; See generally Tania Sourdin and Naomi Burstyner, 'Cost and time hurdles in civil litigation: Exploring the impact of pre-action requirement' (2013) 2 *Journal of Civil Litigation and Practice* 66.

a fair trial of each and every set of proceedings'.[48] However, this paper will focus on the criminal process given the consequences of a verdict in a criminal trial is likely to impinge upon individual freedoms and liberties.

### 2 *The fair trial extends throughout the trial process*

Secondly, the trial represents but one step in the entire criminal process. The right cannot be confined to the trial and must operate throughout the criminal process from investigation to sentencing.[49] The importance of this was illustrated in the well-known case of *Mallard v The Queen* where police impropriety during the investigation caused Mallard to be wrongly convicted of murder.[50] Ultimately, Kirby J invoked the right to a fair trial in holding that, because material evidence was not disclosed to Mallard; his trial was unfair and a miscarriage of justice resulted.[51] Other cases of police and forensic impropriety have proven that unfair and inappropriate practices during the investigative stage can infect the whole trial and lead to wrongful convictions.[52] In addition to increasing the possibility of miscarriages of justice, a corruption of process at an early stage may impugn the 'moral validity' of the verdict.[53] Consequently, public confidence in the administration of justice requires that authorities observe the requirement of fairness

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[48] *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15, 18 (YoungJ).
[49] *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ), 47 (Brennan J); T.R.S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001), 272
[50] *Mallard v The Queen* (2005) 224 CLR 125; See generally, *Report on the Inquiry into Alleges Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence , the Prosecution and Appeals of Mr Andrew Mark Mallard and Other Related Matters* (Perth: Corruption and Crime Commission, 2008)
[51] *Mallard v The Queen* (2005) 224 CLR 125, 156-7; For an overview of prosecution disclosure in various common law jurisdictions see *Muhammad bin Kadar v Public Prosecutor* [2011] SGCA 32 (26 August 2011), [77]-[99] (VK Rajah JA).
[52] See, eg, *R v Jama* [2009] VSCA (7 December 2009) Mr Jama was wrongfully convicted of rape on the basis of a matching DNA profile; See generally Victoria, Inquiry into the circumstances that led to conviction of Mr Farah Abdulkadir Jama, *Report* (2010); Jeremy Gans, 'Ozymandias On Trial: Wrongs and Rights in DNA Cases' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimaging Common Law Procedural Traditions* (Oxford and Portland, 2012) 195, 208-13.
[53] Allan, *Constitutional Justice,* above n 49, 272.

in all stages of the criminal process.[54] Therefore, the court has a broad power to stay a trial for an abuse of its processes to preserve the integrity of the trial and safety of the verdict.[55] Indeed, in many respects, the right to a fair trial has been embedded in legislation. Examples of this include the requirement that confessions be recorded. [56]

### 3 *The right to a fair trial is right to all parties*

Third, the right to a fair trial does not apply only to the accused. It applies to all actors in the adjudicative process.[57] The criminal trial involves 'a triangulation of interests' between the accused, the victim and society.[58] Therefore, the fair trial requires a balance between the interests of the accused and those of society in deciding the guilt or innocence of persons charged with a crime.[59] These competing interests underpin the adversarial nature of the criminal trial.[60] As Barwick CJ has observed it is 'a trial in which the protagonists are the Crown on the one hand and the

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[54] *Antoun v The Queen* (2006) 159 A Crim R 513, 521-22 [28] (Kirby J); *X7 v Australian Crime Commission* (2013) 298 ALR 570, 612-3 Justice Kiefel has noted that '[t]he accusatorial nature of the system of criminal justice involves not only the trial itself , but also pretrial inquiries and investigations': at [160]

[55] *Moti v The Queen* (2011) 245 CLR 456, 479; *Police (SA) v Sherlock* (2009) 103 SASR 147, 173 (Korakis J)

[56] See *Crimes Act* 1914 (Cth) s 23V; *Criminal Investigation Act* 2006 (WA) s 118; *Criminal Procedure Act* 1986 (NSW) s 281; *Summary Offences Act* 1953 (SA) ss 74C-G; *Crimes Act 1958* (Vic) s 464H; *Police Administration Act 1978* (NT) s142; *Police Powers and Responsibilities Act 2000* (Qld) ss 436-9.

[57] See Jeremy Gans, Evidence law under Victoria's Charter: Rights and goals (Pt1) (2008) 19 *Public Law Review* 197, 200-1; *Human Rights Act 2004* ACT s 21 (1) '*Everyone* has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.' (emphasis added).

[58] *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118 (Lord Steyn); See *McKinney v The Queen* (1991) 171 CLR 468, 488. Justice Dawson notes that; '[n]o one would deny that an accused is entitled to a fair trial, but a fair trial is one which is fair to both sides'

[59] *Police (SA) v Sherlock* (2009) 103 SASR 147,159,165 (Doyle CJ); *Jago v District Court (NSW)* (1989) 168 CLR 23, 33 (Mason CJ).

[60] But see Mark Findlay Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4th ed, 2009) 166 where it is noted that 'the adversary model should not be regarded as sacrosanct'. The authors note that it would serve the end of justice if the judge were to call witnesses who could then be cross examined by both parties ; John Faulks , 'A Natural Selection? The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia' (2010) 35 *University of Western Australia Law Review* 185.

accused on the other'.[61] As such, the trial must be fair to both the prosecution, as well as the accused.[62]

The right to a fair trial must also be balanced against the interests of society in the allocation of limited resources. This is pertinent in light of recent funding cuts to courts in some Australian jurisdictions.[63] Indeed Brennan J has noted that courts can only conduct 'as fair a trial as practicable' in light of finite resources.[64] The tension between limited resources and the fair trial is best expressed by White J who observes, that '[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person'.[65]

4 *Right to a fair trial is composed of a number of rights*

The fourth characteristic is that the right to a fair trial is composed of a number of rights. While the exact scope of these rights remains elusive, international instruments such as the ICCPR express some of the elements of the right.[66] According to King J, the right to a fair trial as provided in s 24 of the Charter 'already exists at common law' and the provisions in s 25 forms 'the basis of what

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[61] *Ratten v The Queen* (1974) 131 CLR 510, 517 cited in *X7 v Australian Crime Commission* (2013) 298 ALR 570, 598 (Hayne and Bell JJ).

[62] See *Dietrich v The Queen* (1992) 177 CLR 292, 335 Justice Deane has held that '[i]n determining the practical content of the requirement that a criminal trial be fair regard must be had to the interests of the crown acting on behalf on the community as well as to the interests of the accused'

[63] See, eg, Sean Fewster,' SA Chief Justice Chris Kourakis says retiring judges will not be replaced due to funding cuts' *The Advertiser* (online) 25 June 2013 <http://www.adelaidenow.com.au/news/south-australia/sa-chief-justice-chris-kourakis-says-retiring-judges-will-not-be-replaced-due-to-funding-cuts/story-e6frea83-1226669629349> where Kourakis CJ of the Supreme Court of South Australia expressed dissatisfaction on funding cuts to courts. His Honour noted , among other things, that due to funding cuts , cases may take longer which may discourage guilty pleas as any 'judgment or trial date is way beyond the horizon'; Similar concerns have been expressed in Western Australia by Martin CJ. See Chief Justice Wayne Martin, (Media Statement, 28 August 2013) where his Honour notes that due to lack of funding, 'there will be a continuing reduction in the standard of service provided by the Supreme Court'; This issue is also present in the United States. In a letter to Vice President (as President of the US Senate) Hon. Joseph R. Biden, the Chief Justices of 87 Federal District Courts noted 'we believe that our constitutional duties, public safety, and the quality of the justice system will be profoundly compromised by any further cuts' The Third Branch News, *87 U.S. Chief Judges Appeal to Congress for Funding Help* (15 August 2013) United States Courts < http://news.uscourts.gov/87-us-chief-judges-appeal-congress-funding-help>.

[64] *Dietrich v The Queen* (1992) 177 CLR 292,325.

[65] *Patterson v New York* 432 US 197, 208 (1977).

[66] *Dietrich v The Queen* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J).

constitutes a fair hearing'.[67] Application of these rights is largely based on a 'check list' approach where the conduct of the trial is held up against a list of rights to ascertain whether any of these rights have been infringed.[68] However, there are core elements of the right to a fair trial without which the right cannot exist. The most fundamental element of the right is an independent and impartial judiciary.[69] This point is evident in the implication of the right to a fair trial from Chapter III of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12 , s 9 ('the *Constitution*').[70]

It is important to note that while there are certain core elements of the right, the content of these elements will wax and wane according to the case at hand and the prevailing social climate.[71] An example of this can be illustrated within the rubric of the privilege against self-incrimination which is another key element of the right to a fair trial.[72] This ground of privilege is a 'fundamental bulwark of liberty'.[73] Parliament has however, limited this right in certain contexts. An example is s 68 of the *Australian Securities and Investments Commission Act 2001* (Cth) which abolishes the right against self-incrimination although the statements of the person examined cannot be admitted into evidence.[74] More recently, the New South Wales

[67] *R v Williams* [2007] VSC 2 (15 January 2007) [54-6]; See also *Momcilovic v The Queen* (2011) 245 CLR 1, 51.
[68] Langford, above n 36, 48.
[69] Spigelman, 'The truth can cost too much', above n 7, 34.
[70] *Dietrich v The Queen* (1992) 177 CLR 292, 326-9.
[71] See *Dietrich v The Queen* (1992) 177 CLR 292, 353 (Toohey J).
[72] The right is expressed in *United States Constitution* amend V; *ICCPR* art 14; *Charter of Human Rights and responsibilities Act 2006* (Vic) s 25 (2)(k); *Human Rights Act 2004* (ACT) s 22(2) (h)(i).
[73] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340; See *X7 v Australian Crime Commission* (2013) 298 ALR 570, 599 [102-04] ( Hayne and Bell JJ) Their Honours go on to illustrate the nature of the accusatorial process and the fundamental role which this privilege plays within the criminal justice framework; at 602-4 [116-126]; See JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 9th Australian Edition, 2013) 808-9 [25120].
[74] See RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 77- 82[3.170] for an overview of the investigative powers of ASIC. See also *Competition and Consumer Act 2010* (Cth) s 155.

Parliament has limited the right to silence in criminal proceedings.[75] In this vein, Gleeson CJ has warned against presupposing the presence of an inherent 'principle of fairness' in the law which only a judge can reveal in the individual case.[76] A doctrine of law may operate more strictly in some cases than in others and fairness in the specific case is only one factor to which the law reacts.[77]

5 *Right to a fair trial as an evolving principle*

Related to this is the fifth and perhaps most significant aspect of the right. That is, the right is one which is 'not written in stone for all time' and will correspond to the prevailing social attitudes to justice.[78] The concept of fairness is not static and responds to changes in the social climate which is in turn reflected in criminal law and procedure.[79] Indeed the contemporary criminal justice system is the result of an organic development of laws and practices and not that of 'some single organising theory about the administration of justice'.[80]

As illustration of this would be the way in which the independence of the judicial process, a core element of the right, corresponds to changes such as the prevalence of social media and the internet. In the United Kingdom, the case of *Attorney General v Frail* brought this issue to prominence where it was held that the inappropriate use of social media by jurors may impugn 'long established principles which underpin the

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[75] *Evidence Amendment (Evidence of Silence) Act 2013* (NSW) s 89A; *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013*; In WA, the right to silence is firmly entrenched in the *Evidence Act 1906* (WA) ss 8 (1), 11.

[76] Murray Gleeson 'Individualised Justice – The Holy Grail' (1995) 69 *Australian Law Journal* 421, 432.

[77] Ibid.

[78] Sir Anthony Mason, above n 5, 7.

[79] Bingham, above n 42, 91; *R v Lobban* (2000) 77 SASR 24, 42 (Martin J); *Dietrich v The Queen* (1992) 177 CLR 292, 364 Justice Gaudron has noted that 'notions of fairness are inevitably bound up with prevailing social values'.

[80] *X7 v Australian Crime Commission* (2013) 298 ALR 570, 604 [123] (Hayne and Bell JJ); See also *Dietrich v The Queen* (1992) 177 CLR 292,319 (Brennan J) 'Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby'.

right of every citizen to a fair trial'.[81] Perhaps a recent case in the United States where a juror updated her Facebook status to announce that 'it's gonna be fun to tell the defendant they're guilty: P' after the first day of the trial best illustrates the need for procedures to adapt to preserve the fairness of the trial.[82] Such issues are not confined to the jury as judges also use social media.[83] These concerns strike at the heart of the fair trial as it can frustrate the ability of the prosecution or defence to respond to all the evidence available to the jury in making their decision.[84]

Chief Justice Spigelman has pointed out that the internet has presented challenges to procedures which previously served to shield jurors from prejudicial information.[85] However, the right to a fair trial is composed of, and is secured by, a framework of laws and procedures which evolved through pragmatic experience.[86] The advent of the internet and social media represent only the latest problem which requires a practical reworking of the relevant law and procedure.[87] The point was best expressed by Lord Bingham who said:

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[81] *Attorney General v Fraill* [2011] EWCA Crim 1570 (June 14 2011) [29] (Lord Judge).

[82] Neil M, 'Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict', *ABA Journal* (2 September 2011) <http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in> citied in Lorana Bartels and Jessica Lee, 'Jurors using social media in our courts: Challenges and responses' (2013) 23 *Journal of Judicial Administration* 35, 39; See Generally Marilyn Krawitz, 'Guilty As Tweeted: Jurors Using Social Media Inappropriately During the Trial Process' (Research Paper No 2012-02, University of Western Australia, 2012).

[83] See, Marilyn Krawitz, 'Can Australian judges keep their "friends" close and their ethical obligations closer? An analysis regarding Australian judges use of social media' (2013) 23 *Journal of Judicial Administration* 14.

[84] *R. v Karakaya* [2005] Cr App R 5, 82 (Lord Justice Judge); See also Issac Frawley Buckley, 'Pre-Trial publicity, social media and the "fair trial": Protecting impartiality in the Queensland criminal justice system' (2013) 33 *Queensland Lawyer* 38, 42-9.

[85] James J Spigelman, 'The internet and the right to a fair trial' (2005) 29 *Criminal Law Journal* 331, 333.

[86] Ibid 335.

[87] Ibid; See also Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) 102-4. Where it is argued that the judicial process must adhere to fair trial principles even in light of technological advancements which have the potential to alter the trial process.

> A time is unlikely to come when anyone will ever be able to say that perfect fairness has been achieved once and for all, and in retrospect most legal systems operating today will be judged to be defective in respects not yet recognized [88]

## B *The Common Law Right to a Fair Trial*

### 1 *Overview*

The broad characteristics of the right being established, it is now necessary to elucidate the right at common law. At common law, it has been observed that the right best conveyed in 'negative terms as a right not to be tried unfairly…for no person can enforce a right to be tried by the State' although it is not 'unduly misleading' to refer to the right in positive terms. [89]

Elucidation of the common law right to a fair trial is pertinent as; first, the right to a fair trial is a fundamental common law right. Second, as will be examined below, the Charter and the HRA do not significantly add to the protection the right enjoys at common law. Further, the implication of the right to a fair trial in the *Constitution* by Deane and Gaudron JJ in *Dietrich* build on the right to a fair trial as a fundamental common law right.[90]

It is possible to unpack the common law conception of the right into three distinct but interrelated expressions. First, the right informs the interpretation of legislation through the principle of legality. Second, the common law right to a fair trial manifests itself in the power of the court to stay a trial for an abuse of its processes. Finally, the right to a fair trial guides the formation of the law. As noted above, this is most pronounced in the rules of evidence. The common law right to a fair trial is

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[88] Bingham, above n 42, 91

[89] *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J); Cf *R v DA* [2008] ACTSC 26 (31 March 2008) [7]-[8] (Higgins CJ).

[90] *Dietrich v The Queen* (1992) 177 CLR 292; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* ( Federation Press, 5th ed, 2010) 701

largely a result of the interplay between these three broad concepts. This being said, as it arises in an infinite variety of contexts, it is impossible to exhaustively describe all the aspects of the right.[91] As such, a number of considerations remain beyond the scope of this paper.[92]

2 *The right to a fair trial as a rule of statutory interpretation*

The significance of the law of statutory interpretation cannot be understated. Chief Justice Spigelman notes that it has 'become the most important single aspect of legal practice'.[93] The law of statutory interpretation is of such critical importance as it is how the common law has traditionally protected rights.[94] It is a basic principle of statutory interpretation that the court is to interpret the words used by parliament.[95] Accordingly, as parliament is assumed to legislate to uphold rights, courts must approach questions of statutory construction on this premise.[96]

*(a) The principle of legality*

The 'principle of legality'[97] refers to the presumption that where ambiguity in a statute exists, the statute will not be interpreted so as to restrict fundamental common

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[91] *Dietrich v The Queen* (1992) 177 CLR 292, 300 (Mason CJ, McHugh J), 353 (Toohey J); Spigelman, 'The truth can cost too much', above n 7, 33.

[92] See Jeremy Gans, *Criminal Process and Human Rights* (Federation Press, 2011) 382-9; The right to a fair trial is linked to the notion of 'miscarriages of justice' as expressed in appeal statutes. This is because the court, on appeal, will have to determine whether the trial of the accused was fair in the sense that 'no substantial miscarriage of justice has actually occurred' See, eg, *Criminal Appeals Act 2004* (WA) ss 14(2), 30 (4); *Weiss v The Queen* (2005) 224 CLR 300; The right also manifests itself it the power of the court to punish a contempt of court. See *X7 v Australian Crime Commission* (2013) 298 ALR 570, 583-4 [38] (French CJ and Crennan J); *Hammond v Commonwealth* (1982) 152 CLR 188.

[93] James Spigelman, *Statutory Interpretation and Human Rights* (Mcpherson Lecture Series, University of Queensland Press, 2008) 62.

[94] Ibid 12; James Spielgelman, 'Principle of legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769.

[95] *R v PLV* (2001) 51 NSWLR 736, 743; *Bryne v Australian Airlines Ltd* (1995) 185 CLR 410, 459 (McHugh and Gummow JJ).

[96] *R v Secretary of State for the Home Department; Ex parte Pierson* [1997] ALL ER 577, 603 (Lord Steyn).

[97] Chief Justice Gleeson has played an integral role in the development of this principle in Australia; See *Al- Kateb v Godwin* (2004) 219 CLR 562, 577; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 211 CLR 309, 328; See also *Momcilovic v The Queen* (2011) 245 CLR 1, 46-

law rights save 'unmistakable and unambiguous' language to the contrary.[98] This principle is not novel and was expressed by O'Connor J in 1907. [99] Subsequently, numerous cases have emphasised the importance of this principle in the protection of rights.[100] Indeed, Glesson CJ has expressed the view that this presumption is a manifestation of the rule of law.[101]

The principle of parliamentary sovereignty gives parliament the prerogative to legislate to constrain or abrogate human rights.[102] If parliament wishes to constrain or abolish rights, the words of the legislation must clearly indicate that parliament turned their mind to and decided as such.[103] In what has come to be accepted as an authoritative statement of the principle,[104] Lord Hoffman observed:

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7 [43] (French CJ); *X7v Australian Crime Commission* (2013) 298 ALR 570, 596 [87] (Hayne and Bell JJ).

[98] *Coco v The Queen* (1994) 179 CLR 427, 437; *R v Secretary of state for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131-2 (Lord Hoffman).

[99] *Potter v Minahan* (1908) 7 CLR 277, 304; See also *Sargood Bro's v Commonwealth* (1910) 11 CLR 258, 279 (O' Connor J); *Ex Parte Walsh and Johnson; In Re Yates* (1925) 37 CLR 36, 93 (Issacs J) noted that while although Parliament has absolute power over the region it controls; there is the presumption that Parliament will respect fundamental common law rights; See especially, *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 447-52 [307-14] (Gageler and Keane JJ)

[100] See, eg, *Coco v The Queen* (1994) 179 CLR 427, 437, 446; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 ( Gleeson CJ, Gaudron , Gummow and Hayne JJ); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 517.

[101] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 328; See also Lord Irvine, above n 3, 243. Where his Lordship notes that the 'doctrine of legality' which prohibits government action in the absence of lawful justification 'represents the kernel of the rule of law'.

[102] See Lord Nicolas Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] *Public Law* 397, 397 'The growing complexity of life has necessarily led governments , of all political shades, to intervene in many respects of our daily lives'. For example, parliament regularly constrains rights in the context of national security through the enactment of anti-terrorism laws. According to Professor Williams, the Commonwealth has enacted 54 individual anti- terrorism statutes from September 11 2001 to September 11 2011 which affect or constrain numerous rights. George Williams, 'A Decade of Australian Anti- Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1145.

[103] *Coco v The Queen* (1994) 179 CLR 427, 437; *Al- Kateb v Godwin* (2004) 219 CLR 562, 577; *Minister for Immigration and Citizenship v Haneef* (2007) 243 ALR 606, 634; *Evans v New South Wales* (2008) 250 ALR 33, 49; *K- Generation Pty Ltd v Liquor Licencing Court* (2009) 237 CLR 501, 520; *R v Secretary of state for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131-2.

[104] See *Plaintiff S157/ 2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ).

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.[105]

The assertion that the right to a fair trial is part of this presumption centres on the fact that the right to a fair trial is a fundamental common law right.[106] Indeed, Spigelman CJ has observed that the right to a fair trial 'is perhaps the best established example of a presumption' which forms the common law bill of rights as it is a fundamental common law right which amongst other things directs the formation of the law.[107] As a result, any abridgement or curtailment of the right must be manifest in the words used by parliament.[108]

*(b) The Right to a fair trial and the binary application of the principle of legality*

It may safely be concluded that the right to a fair trial is part of the principle of legality and informs the interpretation of legislation. However, its application in practise raises certain issues. It has been argued that in practise, courts adopt a binary or 'all or nothing' approach in applying the principle of legality.[109] If the court finds that the principle of legality can be applied to uphold a common law right, then the person seeking to uphold his or her rights gets the full benefit of the right.[110] Conversely, if the words of the relevant legislation clearly exclude such rights, that person cannot enjoy any benefit of the right.[111] This results in a situation where judicial application of the principle of legality does not allow countervailing rights or

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[105] *R v Secretary of state for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131-2.
[106] Spigelman, *Statutory Interpretation and Human Rights,* above n 93, 30-34.
[107] See *Connely v Director of Public Prosecutions* [1964] AC 1254, 1347 Lord Delvin notes that '[n]early, the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see what was fair and just was done between the prosecutors and accused' citied in Spigelman, *Statutory Interpretation and Human Rights,* above n 93, 31.
[108] Spigelman, *Statutory Interpretation and Human Rights,* above n 93, 34-7.
[109] Dan Meagher, 'The Principle of Legality in the Age of Rights (2011) 35 *Melbourne University Law Review* 449, 460 citing *S v Boulton* (2006) 151 FCR 364, 383 (Jacobson J).
[110] Meagher, above n 109, 461 citing *R & R Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 618-9 (French CJ).
[111] Meagher, above n 109,462 citing *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

interests to be balanced.[112] By contrast, what is required to uphold the right to a fair trial must be determined in the circumstances of the case and often requires a balance between countervailing interests.[113] As a result, the binary or 'all or nothing' nature of the principle of legality in practise limits the ability of the right to inform the interpretation of legislation. The difficulty this brings to application of right to a fair trial is illustrated in the divergent approaches of the High Court in two recent cases.

(i) *X7 v Australian Crime Commission*

In *X7 v Australian Crime Commission* ('*X7*'),[114] the High Court considered the interplay between the principle of legality and the right to a fair trial in the context of the privilege against self-incrimination. The plaintiff was subject to a number of charges under the *Criminal Code 1995* (Cth) for, inter alia, allegedly conspiring to traffic in a controlled drug.

The plaintiff was questioned by the Australian Crime Commission ('ACC') pursuant to the *Australian Crime Commission Act* 2002 (Cth) (the 'ACC Act'). The ACC Act provided that an examiner may require that a person answer such questions and produce such documents and things that the examiner instructs.[115] It is an offence to refuse to answer such questions.[116] However, such answers or things are not admissible as evidence against that person.[117] The examiner may also specify that such information not be published. The examiner *must* so specify that the information not be published if it 'might prejudice the fair trial of a person who has been, or may be charged with an offence'.[118] The plaintiff was examined by the ACC in relation to the drug offences he was charged with under the *Criminal Code 1995*

[112] Meagher above n 109,462.
[113] *Dupas v The Queen* (2010) 245 CLR 237, 251 [37].
[114] *X7 v Australian Crime Commission* (2013) 298 ALR 570.
[115] *Australian Crime Commission Act* 2002 (Cth) s 25A.
[116] Ibid s 30 (6).
[117] Ibid ss 30(4), (5).
[118] Ibid s 25 A (9) (d) (emphasis added).

(Cth). The principal issue before the Court was whether the examiner was empowered to conduct an examination in relation to the offence with which the accused was charged.[119]

In dissent, French CJ and Crennan J held that the legislative framework of the ACC Act makes the provision of evidence otherwise protected by the privilege against self-incrimination mandatory.[120] On the other hand, the ACC Act restricted the publication of such information and ensured the fair trial of the accused.[121] As such, the ACC Act contemplated that the public interest in the prosecution of alleged criminals outweighed the privilege against self-incrimination.[122] Their Honours also placed weight on the fact that the ACC Act preserved the onus of proof the prosecution bears.[123] Further, it was observed that other safeguards, such as the use only of derivative evidence (evidence which is derived from the direct evidence) and the discretion of the trial judge to exclude evidence which is unfairly prejudicial were also protected.[124] As a result, their Honours held that the ACC Act did allow the examination.

On the other hand, Hayne and Bell JJ (Keifel J agreeing) did not base their judgement on the fairness or unfairness of the examination and its impact on the fair trial. Their honours were of the view that the whole of the criminal law has been developed as an accusatorial process.[125] The prosecution therefore must prove the

[119] *X7 v Australian Crime Commission* 298 (2013) ALR 570, 573. The other issue before the Court was whether the examination under the ACC Act contravened the 'constitutional right to a fair trial under Ch III (including s 80) of the Constitution'. The Court did not find it necessary to determine this issue.
[120] Ibid 570-80 [28-9].
[121] Ibid 580 [30].
[122] Ibid.
[123] Ibid 588-59 [55] it was held that the 'fair trial' in ss 25 (9) , (11) of the ACC Act 'must be informed by the fundamental principle that the onus of proof of the offence rests on the prosecution, whom the accused is not required to assist, and by the rule that accused is not compellable at his or her trial'.
[124] Ibid 588-9 [52-59].
[125] Ibid 598 [97-101]; But See *Assistant Commissioner Cordon v Pompano Pty Ltd* (2013) 295 ALR 638, 682 [157] ( Hayne , Crennan, Keifel and Bell JJ) ' Consideration of other judicial systems may

guilt of the accused beyond a reasonable doubt.[126] The accused need not, in any way, assist the prosecution in proving his or her guilt. Any modification to this would need to be express or clearly implied from the legislation.[127] There were no express words in the ACC Act and no implication could be drawn which permitted an examiner to conduct an examination on a criminal charge the subject of which was an offence under that charge.[128] As such, the court must interpret the legislation so as to uphold the right against self-incrimination. Accordingly, the majority found that the plaintiff enjoyed the full benefit of the right and was not required to undergo the examination.

(ii) *Lee v New South Wales Crime Commission*

This binary application of the principle of legality, as limiting the application of the right to a fair trial, is depicted in *Lee v New South Wales Crime Commission ('Lee').*[129] In this case, the Court had to consider whether s 31D of the *Criminal Assets Recovery Act 1990* (NSW) ('the CAR Act') allowed the examination of persons who had been charged but not convicted of an offence where the subject of the examination concerned the subject of those charges.[130]

Among other things, the CAR Act provided that if the New South Wales Crime Commission makes an application to the Supreme Court for a confiscation order, the Court may make 'an order for the examination on oath' of either the 'affected person' or 'another person'.[131] Such an examination would be made before the Court or an Officer of the Court pursuant to the Rules of Court.[132]

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be taken to demonstrate that it cannot be assumed that an adversarial system of adjudication is the only fair means of resolving disputes'.

[126] *X7 v Australian Crime Commission* (2013) 298 ALR 588, 598-9 [101] See also the reasons of Keifel J who notes that this principle has a 'constitutional dimension': at 613 [160].

[127] Ibid 604 [124-5].

[128] Ibid 609 [142].

[129] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363.

[130] See Ibid 438-9 [267-9] (Gageler and Keane JJ).

[131] *Criminal Assets Recovery Act 1990* (NSW) s 31D.

[132] Ibid.

The appellants argued that permitting the examination would unfairly prejudice the defence as counsel could not lead evidence, cross examine or give submissions which proposed an alternative factual scenario than that given by the client in the examination.[133]

In contrast to *X7*, the majority, French CJ, Crennan, Keane and Gageler JJ held that the CAR Act did permit such an examination. In separate judgements, French CJ and Crennan J held that s 31D, read in light of the purpose and the legislative framework of the CAR Act, permitted such an examination. Their Honours held that in contemplating that such an examination be conducted only before a Court or an Officer of the Court, the CAR Act did not pursue this end at all costs.[134] This is because the Court or an Officer of the Court had the power to modify the examination or otherwise prevent an unfair trial.[135] In this sense, their Honours adopted similar reasoning to that expressed in *X7*.

The minority, Hayne, Bell and Keifel JJ gave much weight to the precedent set in *X7* and were reluctant to deviate from the principle so expressed.[136] Although as Keane and Gageler JJ were not on the Bench in *X7,* the concentration on the joint judgement of their Honours is helpful.[137]

Justices Keane and Gageler outlined the principle of legality and noted that it is a longstanding and fundamental rule of statutory interpretation.[138] However, their Honours held that the right to silence and other interrelated rights may be limited in

[133] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 449 [304-5].
[134] Ibid [55-6] (French CJ), 62 [143-4] (Crennan J).
[135] Ibid 389-90 [55-6] (French CJ), 410 [143-4] (Crennan J).
[136] Ibid 392-5 [69] – [84] (Hayne J), 86 [213] (Kiefel J), 103 [265] (Bell J).
[137] Ibid 392 [70] Justice Hayne observed that '[a]ll that has changed between the decision in *X7* and the decision in this case is the composition of the Bench'.
[138] Ibid 449-52 [307-314].

certain cases.[139] Indeed, the right to silence 'is not monolithic: it is neither singular nor immutable'.[140] Further, while the criminal trial operates on an accusatorial foundation, there is, in Australia, 'no free standing or general right of a person charged with a criminal offence to remain silent'.[141]

It was held that although the defence may be limited to the facts as produced in the examination, this does not alter the accusatorial trial as the prosecution retains the burden to prove the guilt of the accused.[142] Read in light of other provisions of the CAR Act, s 31D permitted an examination in relation to criminal offences irrespective of whether the examination concerned the subject of those charges.[143] Indeed, s 31D was a result of 'carefully integrated and elaborate legislative design'.[144] Consequently, the examination under this provision did not result in a 'real risk of interference with the administration of justice' solely because the subject of the examination coincided with the subject of the charge.[145] The CAR Act contemplated such a situation and allowed for the examination to be conducted by the Supreme Court or an Officer of the Court. [146] This allowed for the risk of an interference with the administration of justice to be mitigated as the Court or an Officer of the Court was able to vary such an examination so as to prevent unfairness. [147] In contrast to *X7*, the appellants in this case did not enjoy any benefit of the right to silence. Their right to silence (and privilege against self-incrimination) were held to be limited by the CAR Act.

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[139] Ibid 453-4 [318] Their Honours held that 'the right to silence' is a label used to describe a bundle of rights which include the right to a fair trial. On this point see Anthony Gray, Constitutionally Heeding the Right to Silence in Australia (2013) 39 (1) *Monash University Law Review* 156, 157-9.
[140] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 454 [318].
[141] Ibid 454 [318].
[142] Ibid 456 [324].
[143] Ibid 457-8 [326-31].
[144] Ibid 458 [333].
[145] Ibid 458-9 [335].
[146] Ibid 459-50 [340].
[147] Ibid 459-60 [340].

Thus from the divergent approaches of the High Court in *X7* and *Lee*, it may be suggested that insofar as the right to a fair trial is part of the principle of legality, it does not confer much substantive protection. In part, this may be due to the broad and indeterminate scope of the right which causes much difficulty in its application. The judgement of Hayne and Bell JJ in *X7* is illustrative of this. Their Honours noted that the question of whether the examination of a person charged with an offence on the subject of the charge is fair or unfair 'at best would be unhelpful and at worst, would be distracting' as there is no objective standard of fairness on which such a question can be answered.[148] Thereafter in *Lee,* the right to a fair trial did not inform the interpretation of the relevant provision of the CAR Act. Rather, the majority were of the view that it was within the power of parliament to legislate to modify or curtail the right to silence (and its related rights). Thus, the words of the CAR Act, read in light of the purpose of the legislation are that which should be followed.

Indeed McHugh J has previously stressed that while vague concepts such as fairness are appealing on paper, they often cause uncertainty in practise.[149] The ambiguity of such terms causes much disagreement when it comes to applying those terms to a set of facts.[150] This limits the utility of such standards.[151] Although there is a risk that well defined rules may be limited in scope, such rules are preferred as they promote certainty in the everyday administration of justice.[152]

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[148] *X7 v Australian Crime Commission* (2013) 298 ALR 588, 596 [88-9]. Indeed,'[q]uestions of fairness must be put to one side because they are not relevant; at [90].

[149] *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 211 [80] It should be noted that his Honour made this point in the context of delineating the boundaries of the duty of care in tort.

[150] Ibid 211-2.

[151] Ibid 211 [80] 'But attractive as concepts of fairness and justice may be in appellate courts, in law reform commissions, in the academy and among legislators, in many cases they are of little use, if they are of any use at all, to the practitioners and trial judges who must apply the law to concrete facts'.

[152] Ibid 212 [81].

3 *Abuse of process and the right to a fair trial*

The second way in which the right to a fair trial is manifested is through the power of the court to prevent an abuse of its processes.[153] Generally speaking, an abuse of process is commonly 'found in the use of criminal process inconsistently with some aspect of its true purpose'.[154] Such a power stems from the policy interests of maintaining and defending public confidence in the administration of justice.[155] However, the exercise of this power must be balanced against the public interest in ensuing that persons charged with a crime are tried.[156] This consideration weighs heavily in the exercise of this power as stay of proceedings is 'tantamount to a continuing immunity from prosecution'[157] and therefore will only be exercised 'sparingly and with the utmost caution'.[158] If courts are too quick to grant a stay, victims of a crime who are not party to the proceedings, may lose confidence in the administration of justice and 'be driven to self-help to rectify their grievances'.[159] In what has been labelled an 'authoritative statement of principle'[160] Brennan J held that the court will only exercise the power to stay proceedings if there is a 'fundamental defect' resulting in unfairness which the court is otherwise powerless to prevent.[161] Thus while the court does have the power to stay a trial for an abuse of process, not every abuse of process will be severe or fundamental enough to warrant a permanent

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[153] *Barton v The Queen* (1980) 147 CLR 57, 103 (Gibbs ACJ and Mason J) 'There is ample authority for the proposition that the courts possess all the necessary powers to prevent an abuse of process and to ensure a fair trial'; This applies in the civil as well as criminal spheres of law. See, eg, *Rules of the Supreme Court* 1971 (WA) OO, 16 r 1 (1), 20 r 19(1), 67 r 5 (1).
[154] *Jago v District Court (NSW)* (1989) 168 CLR 23, 47 (Brennan J).
[155] *Moevao v Department of Labour* [1980] 1 NZLR 464, 481 (Richardson J) citied in *Jago v District Court (NSW)* (1989) 168 CLR 23, 29-30 ( Mason CJ); *Dupas v The Queen* (2010) 241 CLR 237, 243; See also *Police (SA) v Sherlock* (2009) 103 SASR 147, 158-9 ( Doyle CJ).
[156] *Jago v District Court (NSW)* (1989) 168 CLR 23, 50 (Brennan J); *R v WRC* (2003) 59 NSWLR 273, 282 (Spigelman CJ).
[157] *Dupas v The Queen* (2010) 241 CLR 237, 251; *Moti v The Queen* (2011) 245 CLR 456, 464
[158] *Attorney General (NSW) v Watson* (1987) 20 Leg Rep SL 1 (Mason CJ, Wilson and Dawson JJ); See *Jago v District Court (NSW)* (1989) 168 CLR 23, 76 (Gaudron J); See also *R v Milne (No 1)* (2010) 260 FLR 166,186-7 (Johnson J).
[159] *Jago v District Court ( NSW)* (1989) 168 CLR 23, 50 (Brennan J)
[160] *Dupas v The Queen* (2010) 241 CLR 237, 245.
[161] *R v Glennon* (1992) 173 CLR 592, 605 (Brennan J); See also *Barton v The Queen* (1980) 147 CLR 75, 11 (Wilson J)

stay.[162] The court therefore, has a broad discretion to modify the trial to prevent an abuse of process if the unfairness is not serious enough to warrant a stay.[163]

The concept of an abuse of process was addressed by Kourakis J in *Police (SA) v Sherlock.*[164] His Honour explained that an abuse of process can be classed as stemming from either: a) the concept of a fair trial in the sense that the circumstances would result in an unfair trial to the accused; or, b) that proceedings were commenced for an improper purpose.[165] The court need not be satisfied that an unfair trial would result in the latter instance as the primary interest lies in maintaining public confidence in the administration of justice.[166] While unfairness to the accused is a relevant consideration in determining whether there is an abuse of process in this regard, the emphasis must be on the institutions charged with the administration of justice. [167]

This was illustrated in *Moti v The Queen.*[168] Julian Moti, an Australian citizen (and the former Attorney General of the Solomon Islands), was charged with sexual intercourse with a person under 16 years while he was outside of Australia.[169] His grounds of appeal were that there was an abuse of process arising out of substantial payments from the Commonwealth to the victim's family and that his deportation

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[162] See *Ridgeway v The Queen* ( 1995) 184 CLR 19, 61 (Toohey J).
[163] *Tofilau v The Queen* (2007) 231 CLR 396 [28] (Gummow and Hayne JJ) These include among other things deciding on the admissibility of evidence. For instance, in deciding whether a confession made by the accused was voluntary, the trial judge may decide to exclude such evidence 'of the confession for reasons of fairness, reliability, probative value or public policy'.
[164] *Police (SA) v Sherlock* (2009) 103 SASR 147; See especially, *Williams v Spautz* (1992)174 CLR 509 where the Court distinguished between a stay for an abuse of process resulting in a unfair trial and a stay for improperly instituting proceedings. It was held that for the latter case, the court need not be satisfied that an unfair trial would result: at 519.
[165] *Police (SA) v Sherlock* (2009) 103 SASR 147, 173.
[166] *Moevao v Department of Labour* [1980] 1 NZLR 464, 481 (Richardson J) citied in *Jago v District Court (NSW)* (1989) 168 CLR 23, 29-30 (Mason CJ); *Police (SA) v Sherlock* (2009) 103 SASR 147, 158-9 (Doyle CJ).
[167] *Moevao v Department of Labour* [1980] 1 NZLR 464, 481 (Richardson J) citied in *Jago v District Court (NSW)* (1989) 168 CLR 23, 30-1 (Mason CJ).
[168] *Moti v The Queen* (2011) 245 CLR 456.
[169] *Crimes Act 1914* (Cth) ss 50BA, 50AD; The offences for sexual intercourse with a child outside Australia is now contained in *Criminal Code Act* 1995 (Cth) s 272.8.

was unlawful as it was in substance an extradition.[170] In the High Court, the majority was of the view that the payments were lawfully made and proper in the circumstances.[171] The majority held that an abuse of process was grounded in the notion that 'the end of criminal prosecution does not justify the adoption of any and every means'.[172] Emphasis was placed on the conduct of Australian authorities and the need to guard the public confidence in the administration of justice.[173] Consequently, it was held that due to the impropriety surrounding the circumstances under which Moti was brought to Australia continuing prosecution would be an abuse of process.

This being said, it has been observed that it is not in the interest of justice to completely disassociate the right to a fair trial and an abuse of process. As Toohey J points out, if we were to conceive of these two concepts as separate and distinct from each other, what will remedy an abuse of process might not remedy an unfair trial.[174] As such, '…greater justice will be achieved if the two notions are understood as bearing on each other.'[175] In *Police (SA) v Sherlock*, [176] Doyle CJ concluded, amongst other things, that the power to stay a trial to prevent an abuse of process is antecedent to the right to a fair trial.[177] Indeed if the judicial system is to be viewed as independent and impartial, it must have a broad scope to determine what amounts to an abuse of process and to stay proceedings for an abuse of process even where a fair trial is attainable.[178]

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[170] *R v Moti* (2009) 235 FLR 320; *Moti v The Queen* (2011) 245 CLR 456, 461-3.
[171] *Moti v The Queen* (2011) 245 CLR 456, 465-6.
[172] Ibid 479.
[173] Ibid 478-9.
[174] *Jago v District Court (NSW)* (1989) 168 CLR 23,117.
[175] Ibid.
[176] *Police (SA) v Sherlock* (2009) 103 SASR 147.
[177] Ibid 159-62.
[178] Spigelman, 'The truth can cost too much', above n 7, 31; Allan, *Constitutional Justice,* above n 49, 280-1.

Finally, the right to a fair trial finds vivid expression through the law of evidence.[179] However, it is impossible to completely separate the various manifestations of the right especially in light of the fact that the law of evidence is largely embodied in statute through the various *Evidence Acts*.[180] Indeed, when interpreting the provisions of any of the *Evidence Acts*, there is a presumption that the legislature did not intend to abrogate or modify fundamental common law doctrines.[181]

The link between evidence and rights is clear. Chief Justice Spigelman notes that generally speaking, the laws of evidence are centred on seeking the truth.[182] However, this pursuit is not absolute and insofar as the laws of evidence derogate from its truth seeking goal, it is to protect countervailing rights.[183] The goal of factual accuracy also promotes human rights. The substantive law must be proved though the rules of evidence and while some cases turn on purely legal issues, the majority of cases focus on questions of fact.[184] A factually correct application of the

[179] See, eg, *O'Meara v The State of Western Australia* [2013] WASCA 228 (2 October 2013) [20]-[28], [40]-[57] where the court examined, inter alia, the role of fairness in relation to the rule against the state splitting its case and the relationship of prior inconsistent statements with the discretionary exclusion of evidence.

[180] In this paper, all references to the *Evidence Act* are to the *Evidence Act* 1995 (Cth) unless otherwise indicated. The *Evidence Act* 1995 (Cth) *Evidence Act* 1995 (NSW), *Evidence Act* 2001 (Tas), *Evidence Act* 2008 (Vic), *Evidence Act* 2011 (ACT), *Evidence (National Uniform Legislation) Act* 2011 (NT) are similar but not wholly identical. See Heydon, above n 73, 125-30. For an analysis on the constitutional issues surrounding the Evidence Acts, see E Campbell, 'Rules of Evidence and the Constitution' (2000) 26 *Monash University Law Review* 312, 313-21.

[181] *Dupas v The Queen* (2012) 218 A Crim R 507, 553.

[182] James J Spigelman, Truth and the Law (2011) 85 *Australian Law Journal* 746, 750.

[183] Ibid 751-3 citing *Pearse v Pearce* (1846) 1 De G & Sm 12, 27; It is in relation to this limitation on the truth seeking function of the laws of evidence that Knight Bruce VC observed almost 170 years ago that the truth, 'like all other goods things, may be loved unwisely- may be pursued too keenly – may cost too much' This statement has been approved by the High Court on numerous occasions. See *R v Ireland* (1970) 126 CLR 321, 335 where Barwick CJ observed that ' convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price'; *Bunning v Cross* (1978) 141 CLR 54, 72 (Stephen and Aickin JJ); *Ridgeway v The Queen* (1995) 184 CLR 19, 48-9 (Brennan J); *Tofilau v The Queen* (2007) 231 CLR 396, 445; *Burrell v The Queen* (2008)238 CLR 218, 236 (Kirby J).

[184] John D Jackson, *The Function of the Criminal Trial in Legal Inquiry* in Anthony Duff et all (eds) *The Trial on Trial* (Hart Publishing, 2006) vol 1, 124.

substantive law would include accurate application of the law pertaining to human rights.[185]

The law of evidence serve two interrelated functions. First, it prescribes the rules applicable to the admissibility of matters required to prove the facts in issue.[186] Second, it prescribes the way in which such matters are presented to the court.[187] That is, evidence seeks to ascertain 'facts' through a 'rational' procedure.[188]

In this regard, discretion plays a significant part in the exclusion of relevant evidence. Relevant evidence may be excluded if, for example, it may cause an 'undue waste of time'.[189] More pertinently, relevant evidence may be excluded on the grounds of unfairness (the 'general unfairness discretion').[190] This discretion is founded on the need to secure a fair trial.[191] In Australia, this discretion was first used in the context of confession evidence.[192] Although at present it is clear that it applies to all evidence.[193] Thus in *R v Lobban*,[194] Martin J emphasised the courts distinct discretion to exclude relevant evidence if the 'strict rules of admissibility would operate unfairly against the accused'.[195]

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[185] Gans, 'Evidence law under Victoria's Charter', above n 57, 198.
[186] Hodge M. Malek (ed), *Phipson On Evidence* (Sweet and Maxwell, 17th ed, 2010), 1 [1-01]
[187] Ibid.
[188] J L Montrose, Basic Concepts of the Laws of Evidence (1954) 70 *Law Quarterly Review* 527, 527; See also *Federal Rules of Evidence,* 28 USC App § 102 (2011).
[189] *Evidence Act* 1995 (Cth), s 135 This discretion is largely mirrored in the United States. See *Federal Rules of Evidence*, 28 USC App § 403 (2011) which allows the court to exclude otherwise admissible evidence if it may result in 'unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'
[190] *R v Lobban* (2000) 77 SASR 24, 45,77 (Martin J).
[191] *Ridgeway v The Queen* (1995) 184 CLR 19, 49 (Brennan J); *R v Lobban* (2000) 77 SASR 24, 45 (Martin J); See also *Harris v Director of Public Prosecutions* (*UK*) [1952] AC 694, 707 (Viscount Simon).
[192] *McDermott* (1948) 76 CLR 501, 506-7.
[193] *R v Edelsten* (1990) 21 NSWLR 542, 554 where the Court notes that while the discretion of 'fairness' primarily arises in relation to confessional evidence, it 'ought in principle to be available wherever such unfairness appears'; *R v Lobban* (2000) 77 SASR 24, 46 ( Martin J)
[194] *R v Lobban* (2000) 77 SASR 24.
[195] Ibid 39-40 citing *Driscoll v The Queen* (1997) 137 CLR 517, 541 (GibbsJ).

This general discretion has its roots in a narrower discretion first expressed in the seminal case of *R v Christie* (the '*Christie* Discretion').[196] As aforementioned, the object of this discretion is the protection of the fair trial.[197] The *Christie* Discretion allows the trial judge to exclude evidence which is more prejudicial than probative.[198] It serves to prevent the jury from giving undue weight to evidence and maintains the accuracy of the verdict.[199] As all relevant evidence is prima facie admissible, this discretion allows the judge to exclude evidence which may misguide the jury by unfairly employing their prejudice at the expense of factual accuracy.[200] This discretion cannot be exercised merely on the basis that the evidence is prejudicial to the accused. The court will exclude the evidence 'if the evidence has little or no weight but may be gravely prejudicial to the accused'.[201] Conversely, if the evidence is highly probative as well as highly prejudicial, 'the fact that its prejudicial effect is also high is nothing to point'.[202] The common law position is largely reflected in ss 135-7 of the *Evidence Act* the only clear difference being the definition of probative value.[203]

It is evident that there is much overlap between the general unfairness discretion and the narrower *Christie* Discretion. It has been noted that notwithstanding confession

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[196] *R v Christie* [1914] AC 545; *R v Sang* [1980] A.C. 402 HL, 437 (Lord Diplock); See *Driscoll v The Queen* (1977) 137 CLR 517, 541 (GibbsJ).
[197] *R v Christie* [1914] AC 545, 559-60 (Moulton LJ).
[198] See, eg, *Evidence Act* 1995 (Cth) ss 135,137; *Federal Rules of Evidence*, 28 USC § 403 (2013); *Police and Criminal Evidence Act 1984* (UK) s 78 which provides that the court may exclude evidence if 'the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.
[199] See *Alexander v The Queen* (1981) 145 CLR 395, 402-3 (Gibbs CJ); *Papakosmos v The Queen* (1999) 196 CLR 297, 325 (McHugh J).
[200] *Festa v The Queen* (2001) 208 CLR 593, 609-10 Justice McHugh notes that prejudicial evidence is evidence which ' may inflame the jury or divert the jury from their task'; See also *R v Duke* (1979) 22 SASR 46, 47-8 ( King CJ) citing *Noor Mohamed v The Queen* [1949] AC 182.
[201] *Driscoll v The Queen* (1977) 137 CLR 517, 541 (Gibbs J).
[202] *R v Hulse* (1971) 1 SASR 327, 330 (Bray CJ, Mitchell and Wells JJ).
[203] Tim Smith and Stephen Odgers, Determining "probative value" for the purposes of section 137 in the uniform evidence law (2010) 34 *Criminal Law Journal* 292, 297-8; The *Evidence Act 1995* (Cth) s 135 defines the probative value of the evidence as 'its effect on 'the assessment of the probability of the facts in issue'. It also provides that the court *may* exclude evidence if, among other things, its probative value is *substantially outweighed* by its prejudicial effect. Section 137 goes further and prescribes that the court *must* not admit evidence if its prejudicial value outweighs its probative value (emphasis added).

evidence, it difficult to envisage circumstances which will warrant the exercise of the unfairness discretion instead of the *Christie* Discretion.[204] These two discretions diverge however in one important respect. Ligertwood and Edmond contend that the *Christie* Discretion serves primarily to ensure the factual accuracy of the evidence and prevent wrongful convictions on the grounds of inaccurate facts.[205] The scope of the broader unfairness discretion extends to the protection of matters beyond factual accuracy.[206]

### 5 *Conclusions*

As it has been argued that the right to a fair trial at common law manifests itself in three broad but interrelated ways. First, it can be conceived as a rule of statutory interpretation. Second, it is present in the inherent power of the court to prevent an abuse of its process. This power is focused on the agencies responsible for the administration of justice. Finally, the right is present in the rules of evidence, most visibly through the unfairness discretion.

It is also clear that the application of the right is contingent on the circumstances of the case. Where the admission of evidence has the potential to cause unfairness, the court may exclude it using the *Christie* Discretion.[207] In cases where the evidence was improperly obtained, such evidence may be excluded through the public policy discretion.[208] If the unfairness stems from some procedural aspect of the trial, such as

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[204] JD Heydon, above n 73, 374 [11125]; *R v McLean and Funk; Ex parte A-G* [1991] 1 Qd R 231, 252.

[205] Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principles Approach to the Common Law and Uniform Evidence Act* ( LexisNexis Butterworths, 5th ed, 2010) 74-7.

[206] Ibid 77-8.

[207] Ibid 83.

[208] Ibid.

an improper extradition or delay, the court has the power to stay or modify a trial to prevent an abuse of process.[209]

However, if the root of the unfairness stems from the application of a statute, the remedies are much narrower in scope. Although the right to a fair trial can inform the interpretation of legislation, the binary application of the principle of legality limits the right to a fair trial. This is clear from the decision in *Lee.* Further, the right to a fair trial may be limited through the words of the statute. Parliament may, through 'unmistakable and unambiguous language', limit or abolish rights.[210] In such circumstances it is 'not for the courts …to determine whether the course taken by parliament is unjust or contrary to human rights'.[211]

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[209] Ibid 83-4.
[210] *Coco v The Queen* (1994) 179 CLR 427, 437.
[211] *Al- Kateb v Godwin* (2004) 219 CLR 462, 595 (McHugh J).

## III Human Rights and the Right to a Fair Trial

### A *Objectives of the criminal process – protection of rights and the legitimacy of the verdict*

It is the 'overriding objective' of criminal procedure 'that criminal cases be dealt with justly' which involves, among other things, recognising the right to a fair trial.[212] In this sense, the right, at its most basic, refers to a trial where precise application of the legal principles has been carried out through an independent and impartial tribunal pursuant to the laws of evidence.[213] The right is also 'an evolving concept which has a number of dimensions, some of which are concrete while others are poorly defined'.[214] Thus Spigelman CJ notes the right to a fair trial is best thought of as the 'principle of the fair trial'.[215]

As will be explained below, it is fundamental that the criminal trial produce a factually accurate verdict. However, it 'does not involve the pursuit of truth by any means'.[216] The criminal trial must also protect the rights of the defendant.[217] It has been seen that the common law contains some of these protections and the specific protection available largely depends on the particular circumstances of the case. Indeed, the common law right to due process is grounded in 'a defendant – protective philosophical base'.[218] As will be explained below, these protections to the right to a

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[212] Supreme Court of Western Australia *Consolidated Practice Directions 2009,* 02 April 2012, 160; *Criminal Procedure Rules* 2012 (UK) 2012/ 1726 (L6), ss 1.1 (1), (2) (c). The instrument specifies that the rights of the defendant must be recognised 'particularly those under Article 6 of the European Convention on Human Rights'.

[213] See Don Mathias, 'The Accused Right to a Fair Trial: Absolute or Limitable?' [2005] *New Zealand Law Review* 217,218-9.

[214] Mirko Bagaric, 'The Right to an Impartial Hearing Trumps the Social Imperative of Bringing Accused to Trial even 'Down Under'' (2010) 4(3) *Criminal Law and Philosophy* 321, 322 citing *Dietrich v The Queen* (1992) 177 CLR 292, 328 ( Deane J).

[215] Spigelman, 'The truth can cost too much', above n 7, 30.

[216] *R v Apostilides* (1984) 154 CLR 563, 576 citied in *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 456 [324] (Gageler and Keane JJ).

[217] Ashworth and Redmayne, above n 41, 22-4.

[218] Gans et al, above n 92, 511 This is a manifestation of the 'Blackstone Ratio' which posits that 'it is better that ten guilty persons escape, than that one innocent suffer'; at 380-1 citing *R v Carroll* (2002) 213 CLR 563, 643 (Gleeson CJ and Hayne J).

fair trial are also contained most broadly in the *Constitution* and more specifically in the Charter and the HRA.

While the right extends throughout the legal process, its operation is most vivid in the criminal trial. Professor Ho notes that the importance of the criminal trial derives from its position as regulating the exercise of power by the executive.[219] Protections which restrain the exercise of power to protect rights are desirable because they promote the recognition and legitimacy of the verdict.[220] Therefore, if the trial is seen as regulating the exercise of coercive power by the executive, a breach of fair trial standards 'is *in itself* a wrong'.[221] It is a wrong because the state has exercised its power without proper validation or justification.[222] Consequently, breaches of fair trial rights serve to dilute the legitimacy the verdict in the eyes of society.[223]

It is this aspect of the fair trial which is the focus of the following analysis. Concentration will be on the extent to which parliament is able to legislate to limit or curtail the right to a fair trial. This involves testing the strength of the fair trial protections embodied in the Charter, HRA and the *Constitution* and the extent to which they can be reconciled with the right to a fair trial in its fullest sense. This issue is pertinent as '[l]egislative action is more likely to violate fundamental rights than legislative inaction'[224].

[219] Ho Hock Lai, Liberalism and the Criminal Trial (2010) 32 *Sydney Law Review* 243, 244

[220] Ibid 253-4; But See Ashworth and Redmayne, above n 41, 25 who caution against theories which focus on legitimacy as '[l]egitimacy is a rather elusive concept'.

[221] Ho, above n 219, 254 (emphasis in original); Allan, *Constitutional Justice,* above n 49, 271-2.

[222] Ho, above n 219, 254.

[223] Ibid ;See also *Assistant Commissioner Cordon v Pompano Pty Ltd* (2013) 295 ALR 638, 688 [186] (Gageler J) 'Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice'

[224] Richard H Fallon, The core of an Uneasy Case *For* Judicial Review (2008) 121(7) *Harvard Law Review* 1693, 1700.

### B *Human Rights and the Fair Trial- An Overview*

In Australia, the right to a fair trial is not an express constitutional right although it has been observed that its implication derives from the separation of judicial power in Chapter III of the *Constitution*.[225] More recently, the right has found statutory protection in the Australian Capital Territory and Victoria through the *Human Rights Act 2004* (ACT) ('the HRA') and the *Charter of Rights and Responsibilities Act 2006* (Vic) ('the Charter').[226]

This chapter fulfils two interrelated objectives; first, it elucidates the protection conferred on the right to a fair trial by the Charter and the HRA. Second it contends that insofar as providing a remedy to legislation which infringes on the right to a fair trial, these statutory rights instruments do not represent a significant deviation from the pre-existing common law approach outlined above.

#### 1 *Varying approaches to the right to a fair trial*

While various instruments provide for the right to a fair trial, there exist significant differences as to how the right is expressed and applied. Given such differences, it is neither feasible nor productive to engage in an analysis of every expression of the right. As Lord Hoffman notes, 'at the level of abstraction, human rights may be

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[225] *Dietrich* (1992) 177 CLR 292, 326,362 (Deane J and Gaudron J).

[226] *Human Rights Act 2004* (ACT) ss 21, 22; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24, 25; In addition to these statutes, the right to a fair trial is also provided by the *Human Rights (Parliamentary Scrutiny) Act* 2011(Cth) s 3(1) (C) which states that the rights embodied in the *ICCPR* fall within the definition of 'human rights' in s 3(1). However, for a number of reasons, it may be suggested that the protection this statute provides to the right to a fair trial is limited. See George Williams and Lisa Burton, Australia's Exclusive Parliamentary Model of Rights Protection (2013) 34(1) *Statute Law Review* 58, 62-73.

universal'.[227] However, upon application, such rights often lead to a 'messy detail of concrete problems'.[228]

Even within a given jurisdiction, fair trial rights can take many different forms. In the United States for instance, there is debate as to whether the Fifth and Fourteenth Amendments to the *United States Constitution* confers a right to procedural or substantive due process.[229] 'Procedural due process' refers to fairness in relation to the procedures or conduct of the trial.[230] 'Substantive due process' arises were laws which unfairly deny an individual's ''life, liberty or property' are struck down even if those individuals receive an adjudication in which 'the fairest possible procedure[s]' are observed'.[231] Further, from these two broad conceptions of due process, at least eight different subclasses of due process can be discerned.[232]

Even the Charter and the HRA are not homogeneous in relation to the fair trial. The Charter confers the right only to a 'person charged with a criminal offence or a party

[227] Lord Hoffmann, 'The Universality of Human Rights' (Speech delivered at the Judicial Studies Board Annual Lecture, 19 March 2009) 8; See also Catherine Branson, 'The Influence of Human Rights on Judicial Decision Making' 5(2) (2009) *High Court Quarterly* 65, 66-9.
[228] Lord Hoffmann, above n 227.
[229] Ryan C. Williams, 'The One and Only Substantive Due Process Clause' (2010) 120 *Yale Law Journal* 408; Nathan s Chapman and Michael W McConnell, 'Due Process as Separation of Powers' (2012) 121 *Yale Law Journal* 1672.
[230] Williams, above n 229, 418; See also, Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411; Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235, 239.
[231] Williams, above n 229, 418.
[232] Ibid 419-422 Procedural due process may be classed as; 1) ''Positivist' due process' which means that the right to due process is limited to that prescribed by positive law, 2) ''Judicial Intervention' Due Process' which mandates limited control on the legislature. This interpretation requires that any coercive action must be preceded by a determination from an independent and impartial tribunal. 3) ' 'Fair procedures' Due Process' denotes not only compliance with law and the curial process but also compliance with 'some normative conception of fairness' 4) ''Common Law Procedures' Due Process' this form of due process allows individuals to claim due process based on historical common law rules.; Conceptions of substantive due process constitute; 1) 'Vested Rights' Due Process refers to the notion, based on natural law, which prescribes that where rights become vested in persons, the legislature cannot curtail such rights 2) 'General Law' Due Process denotes that legislatures cannot deprive rights by specific enactment. Rather, legislation must only prescribe general rules 3) 'Police Powers Due Process' which mandates that legislation which is beyond the scope of legislative power is invalid 4)' Fundamental Rights ' Due process places weight on the identification of certain interests which are so fundamental that the government cannot infringe on them; at 422-27.

to a civil proceeding'.[233] By contrast, under the HRA, '*[e]veryone* has the right to… a fair hearing.[234] Arguably, the restrictive wording of the Charter is inconsistent with the right to a fair trial which must be fair to all parties beyond those directly involved in the trial.[235] For instance, in family law, the interests of the children are always the foremost priority even though the dispute may be between the parents of the child. [236] Thus non-parties to proceedings under the Charter may not be protected by the right to a fair trial and must rely on other substantive provisions of the Act.[237] This being said, the divergent approaches in the different rights instruments are most apparent in relation to their basis of enforcement.

2 *Basis of enforcement*

Fundamentally, some of these rights documents are constitutional while others are statutory. Instruments such as the *United States Constitution* (and the *Australian Constitution*) protect rights through the judicial review of legislation.[238] The United States model, rooted in the principle of *Marbury v Madison*,[239] involves; first, conferring rights more authority than ordinary legislation.[240] Second it necessitates precluding such rights from repeal or amendment through the ordinary legislative process.[241] Finally, enforcement of their authority occurs 'by means of judicial power to set aside conflicting legislation exercise of which is unreviewable by ordinary

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[233] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24 (1).
[234] *Human Rights Act 2004* (ACT) 21 (1) (emphasis added).
[235] This point has been discussed above. See above nn 57-65 and accompanying text.
[236] Gans, 'Evidence law under Victoria's Charter', above n 57, 201.
[237] Ibid.
[238] Stephen Gardbaum, The New Commonwealth Model of Constitutionalism,(2001) 49 *The American Journal of Comparative Law* 707; See also Janet L. Hiebert, Parliamentary Bills of Right: An Alternative Model? (2006) 69(1) *Modern Law Review* 7; As to the meaning of judicial review, see Jeremy Waldron, The Core of the Case Against Judicial Review 115 *Yale Law Review* 1346, 1353-59. Essentially, '[j]udicial review is the subjection of the legislature to the rule of law' : at 1354
[239] *Marbury v Madison* 5 US 137 (1803); The principle in this case has been affirmed on numerous occasions in Australia. See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 263 (Fullagar J) where his Honour notes ' in our system the principle of *Marbury v Madison* is accepted as axiomatic'; See generally, MRLL Kelly, Marbury v Madison – An Analysis (2005) 1 (2) *High Court Quarterly Review* 58.
[240] Gardbaum,'The New Commonwealth Model', above n 238, 707-8.; This model has been widely adopted throughout numerous jurisdictions: at 708-18
[241] Ibid 707-8.

legislative majority'.[242] This is a stark deviation from the traditional British approach to the protection of rights which retains parliamentary supremacy subject to certain fundamental common law doctrines.[243]

Instruments such as the *Human Rights Act 1998* (UK) (the 'HRA UK'), the *New Zealand Bill of Rights Act 1990* (NZ), the Charter and the HRA, are indicative of a shift toward 'a new third model of constitutionalism which straddles the gap between a fully constitutionalized bill of rights and full legislative supremacy'.[244] These instruments rejected the American – style judicial review.[245] Their focus is on informing parliament as to the formulation of law and policy to prevent breaches of human rights from the outset.[246] In this sense, it fosters a 'dialogue' between the various arms of government to ensure that respect for fundamental rights is borne in mind in the everyday exercise of executive power.[247]

### C *The Charter, the HRA, the HRA UK and the Right to a Fair Trial*

#### 1 *An Outline*

While there are certain differences, these Acts enforce rights though similar mechanisms. First, the Charter, HRA and HRA UK entrench fundamental human rights such as the right to a fair trial, right to life and freedom of expression.[248] If a legislative provision limits the human rights expressed in the Acts, such a limitation

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[242] Ibid 708.
[243] The traditional approach has been modified by the *Human Rights Act 1998*(UK) and the *ECHR* See generally, Richard Stone, *Textbook on Civil Liberties and Human Rights* (Oxford University Press, 9th , 2012) 9- 16, 36-67.
[244] Gardbaum, 'The New Commonwealth Model' above n 238, 719.; Mark Tushnet, ' Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 252
[245] See generally Tushnet, above n 244; Waldron, 'The Core of the Case' above n 238, 1355-6
[246] George Williams, The Victorian Charter of Human Rights and Responsibilities: Origins and Scope (2006) 30 *Melbourne Law Review* 880, 893-4; See David Kinley and Christine Ernst, Exile on main street: Australia's legislative agenda for human rights [2012] 1 *European Human Rights Law Review* 58, 62-3.
[247] Williams ,'The Victorian Charter of Human Rights and Responsibilities', above n 246, 893-4, 903-4
[248] See *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8-27; *Human Rights Act 2004* (ACT) ss 7-27A.

is reasonable if it can be ‘demonstrably justified in a free and democratic society’[249] (the ‘justification provision’). If a legislative provision unreasonably limits a right, the court can interpret the provision to enforce the right subject to the purpose of the legislation (the interpretation provision).[250] If such an interpretation is not possible, then the court may make a declaration of inconsistency (the declaration provision).[251] However, the validity of an Act is not affected even if it found that it cannot be interpreted consistently with human rights.[252] According to Dr. Debeljak this is the ‘preferred method’.[253]

2 *Interpretation*

The role of interpretation is significant in light of the dialogue model of rights protection embodied in the Charter, HRA and HRA UK.[254] Indeed, it is the opinion of Sir Philip Sales that the interpretation provision of the HRA UK ‘will be the leading statutory principle in the future concerning interpretation of statutes in light of fundamental human rights’[255] Further, as seen above, pursuant to the principle of legality, statutes will be interpreted in light of the right to a fair trial save express words to the contrary.

As aforementioned, despite the fact that both the HRA and the Charter are based on the HRA UK, their operation is not consistent with that in the United Kingdom. This is especially so in relation to the interpretive provisions of the Acts. The three Acts

[249] *Human Rights Act 2004* (ACT) 28(1); *Charter of Human Rights and Responsibilities Act 2006* ( Vic), 7 (2) includes the words ‘based on human dignity, equality and freedom’’
[250] *Human Rights Act 2004* (ACT), s 30 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31 (1); *Human Rights Act* 1998 (UK) s 3(1).
[251] *Human Rights Act 2004* (ACT) s 32(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(2); *Human Rights Act 1998* (UK) s 4 (2).
[252] *Human Rights Act 1998* (UK), s 3; *Charter of Rights and Responsibilities Act* 2006 (Vic) s 32 (2); *Human Rights Act 2004* (ACT) is silent in this regard.
[253] Julie Debeljak, Who is sovereign now? The Momcilovic Court hands back power over human rights that parliament intended it to have (2011) 22 *Public Law Review* 15, 20-2.
[254] Lara Pratt, Political Protections of Fundamental Rights as a Means of Mitigating the Weakness of Legal Protections (2012) 10 *Macquarie Law Journal* 77, 83.
[255] Sir Philip Sales, ‘A Comparison of the Principle of legality and section 3 of the Human Rights Act 1998’ (2009) 125 *Law Quarterly Review* 598, 606.

have similar interpretation provisions which provide that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'[256]

3 *The United Kingdom approach*

In relation to the HRA UK, the interpretation provision, s 3, has been a key mechanism of judicial enforcement of human rights.[257] Indeed, it has been given an expansive application.[258] In *Ghaidian v Godin-Mendoza*,[259] s 3 of the HRA UK was applied in relation to discriminatory provisions in the *Rent Act* 1977 (UK). It was held that the meaning of a legislative provision given by application of s 3 HRA UK must be consistent 'with the underlying thrust of the legislation being construed'.[260] Aside from this however, the Court is able to adopt a broad interpretation of the legislation so as to make it 'Convention- compliant'.[261] Thus for the purposes of the *Rent Act*, 'marriage' was construed as 'living together'.[262] It has been acknowledged that this case reflects the current approach in relation to s 3 of the HRA UK.[263]

In the UK, it may be suggested that as long as an interpretation does not go against 'the grain of the legislation'[264] statutes will be interpreted to give full effect to the

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[256] *Human Rights Act 1998* (UK), s 3 (1); *Charter of Rights and Responsibilities Act* 2006 (Vic) s 32 (1); *Human Rights Act* 2004 (ACT) s 30. However, the *Human Rights Act* 1998 (UK) s 3 (1) does not have the words 'consistently with their purpose'.

[257] See especially *R v A (No 2)* [2002] 1 AC 45 where approach of the House of Lords effectively involved attaching to all legislative provisions the condition that it is to be interpreted 'subject to the right to a fair trial in the ECHR' See also, Stone, above n 243, 56 This judgement represents the 'high water mark' of s 3 HRA UK. See John Wadham, 'The Human Rights Act: One Year On' [2001] *European Human Rights Law Review* 620, 638.

[258] Julie Debeljak, Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-Making (2007) 33 (1) *Monash University Law Review* 9, 44-6.

[259] *Ghaidan v Godin- Mendoza* [2004] 2 AC 557.

[260] Ibid 572 (Lord Nicholls).

[261] Ibid 571-2.

[262] Ibid 572 (Lord Nicholls). In other words, the phrase 'as his or her wife or husband' was interpreted to mean '*as if they were* his wife or husband': at 577 (Lord Steyn) (emphasis in original).

[263] See *Momcilovic v The Queen* (2011) 245 CLR 1, 49(French CJ); Julie Debeljak, 'Who is sovereign now?' above n 253, 21.

[264] *Ghaidan v Godin- Mendoza* [2004] 2 AC 557, 572 (Lord Nicholls), 601 (Lord Roger).

right to a fair trial.[265] This obligation extends over and above the principle of legality at common law.[266] As Lord Steyn describes, this approach is 'remedial'.[267] Thus Gardbaum has observed that under the interpretation provision in the UK, 'courts have advanced beyond even the broadest conception of their pre- HRA common law rights- protective interpretive powers'[268]

4 *The Australian approach - Momcilovic v The Queen*

Necessarily, the position in Australia is different from that of *Ghaidian* in light of the particular federal and judicial structure entrenched by the *Constitution.*[269] This was made clear in the most significant High Court case to consider the provisions of the Charter (which largely applies to the HRA),[270] *Momcilovic v The Queen* ('*Momcilovic*').[271] While the decision in *Momcilovic* did not centre specifically on the right to a fair trial it focused on the presumption of innocence which is a fundamental component of the right to a fair trial.[272]

In that case, Vera Momcilovic was found guilty of drug trafficking pursuant to the *Drugs, Poisons and Controlled Substances Act 1981(Vic)* ('the Drugs Act').[273] Her partner, Velimir Markovski, who lived in the same apartment, was convicted for

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[265] See Stephen Gardbaum, 'How Successful and Distinctive is the Human Rights Act? An Expatriate Comparatists's Assessment (2011) 74 (2) *The Modern Law Review*195, 201.

[266] See *Ahmed v Her Majesty's Treasury* [2010] AC 534, 646 Where Lord Phillips notes 'I believe that the House of Lords has extended the reach of s 3 of the HRA beyond that of the principle of legality'; Sir Philip Sales, above n 255, 612-4. But See Debeljak, 'Who is sovereign now?' above n 253, 21.

[267] *Ghaidan v Godin- Mendoza* [2004] 2 AC 557, 577 [49].

[268] Gardbaum, 'How Successful and Distinctive is the Human Rights Act?' above n 265, 201.

[269] *Momcilovic v The Queen* (2011) 245 CLR 1, 84 where Gummow J observes that human rights jurisprudence in other common law countries are of limited applicability in view of the *Constitution*; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 'The Constitution displaced or rendered inapplicable the English common law doctrine of the general competence and unqualified supremacy of the legislature.'

[270] See also *Hogan v Hinch* (2011) 275 ALR 408.

[271] *Momcilovic v The Queen* (2011) 245 CLR 1, 49 (French CJ).

[272] Hock Lai Ho, The Presumption of Innocence as a Human Right in Paul Roberts and Jill Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford and Portland, 2012) 275-77; Anthony, Gray, Constitutionally Protecting the Presumption of Innocence (2012) 31(1) *University of Tasmania Law Review*132, 148-9.

[273] *Drugs, Poisons and Controlled Substances Act 1981*(Vic) s 71AC; See *R v Momcilovic* (2010) 25 VR 436.

possession of drugs in a separate trial and he testified that Momcilovic was not aware of the presence of the drugs.[274] Section 5 of the Drugs Act operated to reverse the onus to the defendant to prove that she was unaware of the drugs.[275] However, this was not consistent with the presumption of innocence is expressed in s 25(1) of the Charter. Further, as noted above, s 32 of the Charter provides that all statutes must be interpreted in light of human rights. Momcilovic argued that in light of s 32 of the Charter, s 5 of the Drugs Act operated to impose only an evidential burden as opposed to a legal burden.[276] Also, the issue of whether the power to make a declaration of inconsistency under s 36 (2) is a valid exercise of judicial power was considered.

A majority held that s 5 was not applicable to the offence contained in s 71 AC of the Drugs Act. As such, the lower court had misdirected the jury.[277] Significantly, in relation to the interpretation provision of the Charter, French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ held that it did not permit the court to separate from the clear meaning of s 5 of the Drugs Act. [278] Essentially, as French CJ held, any variation to the established process of statutory interpretation must be clearly expressed by parliament.[279] It is not clear from the text of the provision that Parliament intended that such a change to established principles be made.[280] The

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[274] *Momcilovic v The Queen* (2011) 245 CLR 1, 33.

[275] *Drugs, Poisons and Controlled Substances Act 1981(Vic),* s 5 states that a person will be deemed to be in possession 'unless the person satisfies the court to the contrary'

[276] *Momcilovic v The Queen* (2011) 245 CLR 1, 31 (French CJ), 242 (Bell J) If s 5 of the Drugs Act were to impose only an evidential burden, it would mean that Momcilovic would have only to lead some evidence to prove that the drugs were not in her possession. The prosecution then retains the burden to prove beyond a reasonable doubt that she was in possession of the drugs

[277] Ibid 57-8 [70] (French CJ), 99 [200] ( Gummow J), 128 [297] (Hayne J), 230 [611] ( Crennan and Keifel JJ)

[278] Ibid 49-50 (French CJ), 85-6 (Gummow J), 123 [280] (Hayne J), 250 (Bell J) Justices Crennan and Kiefel based their judgement on the words 'consistently with their purpose' in s 32(1) of the Charter: at 210.

[279] Ibid 49-50 [49]-[50].

[280] Ibid 49-50 [49]-[50], 55 [62].

other justices expressed largely corresponding views.[281] As such s 5 could not be interpreted to impose only an evidential burden. In this sense, the interpretation provision of the Charter operates the same as the principle of legality at common law.[282]

In relation to the justification provision, four out of seven justices held that it informed the interpretation provision.[283] Justice Heydon held that the justification provision was too vague to be applied. In his Honours view, it 'is highly general, indeterminate, lofty, aspirational and abstract. It is nebulous turbid and cloudy'.[284] Further, a majority held that the declaration provision was not an exercise or incidental to an exercise of judicial power and therefore it cannot be exercised where Victorian courts exercise federal jurisdiction.[285] It is clear from *Momcilovic* that any adoption of the *Ghaidian* approach would be inconsistent with Chapter III of the *Constitution*.[286] Further, it can be suggested that application of the justification provision is also inconsistent with Chapter III as it may be classed as an exercise of non-judicial power.[287]

5 *The limits of the 'dialogue model' of rights protection in Australia*

While the issues surrounding the right to a fair trial and the *Constitution* are examined below, the separation of judicial power as expressed in Chapter III has an

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[281] Ibid 85 [146] Justice Gummow held that the reference to 'purpose' in s 32 of the Charter meant that recourse must be sought to the intention of the legislature, 210 [545] (Crennan and Keifel JJ), 250 [684] (Bell J).

[282]See *Momcilovic v The Queen* (2011)245 CLR 1, 50 (French CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

[283] *Momcilovic v The Queen* (2011) 245 CLR 1, 92 (Gummow J), 123 [280] (Hayne J), 169-70 (Heydon J), 249-50 (Bell J).

[284] Ibid 170.

[285] Ibid 65-66 [90-1] (French CJ), 96-7 [187] (Gummow J), 184-59 [465] (Heydon J), 241 [661] (Bell J); See Will Bateman and James Stellios, Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights (2012) 36 (1) *Melbourne University Law Review* 1, 27 where the it is noted that, amongst other cases, the declaration provision is inapplicable in circumstances where; the Commonwealth is a party, the prosecution of a resident of another state and any proceeding which brings up a constitutional issue.

[286] Bateman and Stellios, above n 285, 16.

[287] Ibid.

impact on the Charter and the HRA. As Bateman and Stellios observe, it is evident that a 'remedial style' interpretation would be inconsistent with the separation of powers in Chapter III of the *Constitution*.[288] Further, the *Kable* Principle may limit the application of this provision as it cannot be applied in circumstances where Victorian courts exercise federal jurisdiction.[289] In short, by fostering a 'dialogue' between the various arms of government, the Charter risks constitutional invalidity.[290]

All things considered, it is suggested that there is little difference between the operation of the right at common law and under the Charter and the HRA. For instance, in *Slaveski v Smith*,[291] the issue of whether the Victorian Legal Aid (VLA) is obliged to provide legal aid when the applicant satisfies the conditions of the *Legal Aid Act 1978* (Vic) was considered in light of the right to a fair trial as expressed in the Charter. It was held that the requirement to interpret statutes in light of the fair trial did not permit deviation from the meaning of the statutory provisions.[292] Thus, the Court held that the relevant provisions did allow the VLA discretion to determine the allocation of legal aid.[293] The Court also held that in relation to the right to legal representation, the right to a fair trial under the Charter 'is no more than reflective of the position at common law'.[294] Indeed, the fair trial provisions of the Charter were not brought up in subsequent cases which considered the right to a fair trial and self-

[288] Ibid.
[289] Ibid 27; Williams and Burton, above n 226, 90.; The *Kable* Principle is discussed below See below Part IV (B).
[290] *Momcilovic v The Queen* (2011) 245 CLR 1, 67 (French CJ); Justice Gummow expressed that the 'dialogue' model raises 'issues of basic constitutional principle which arise on this appeal at a level of generality, upon false assumptions of homogeneity between disparate constitutional systems, and at the expense of analysis of doctrines well established in this Court': at 84.
[291] *Slaveski v Smith* (2012) 218 A Crim R 252.
[292] Ibid 260-1, 264 [45] (Warren CJ, Nettle and Redlich JJA).
[293] Ibid 261-2.
[294] Ibid 266 [52] (Warren CJ, Nettle and Redlich JJA).

represented litigants.[295] Further, it is also arguable that other fair trial rights such as the right to cross examine have not been significantly bolstered by the enactment of the Charter.[296]

### D *Conclusions*

While the waters of the dialogue charters remain murky,[297] it is open to suggest that it does not represent a significant deviation from the pre-existing common law approach in relation to remedying legislative provisions which abrogate the right to a fair trial. This being said, because the Charter and HRA express a positive right as opposed to the common law position ('the right not to be tried unfairly'), it allows the accused persons to be made aware of their right to a fair trial.[298] This may serve to promote its enforcement.[299]

All things considered however, the *Momcilovic* decision limits any UK style 'remedial' interpretation from being part of the Charter and HRA. Also, it is clear from this case that the *Constitution* presents particular challenges to any attempt to legislate in relation to human rights.[300] Thus a fundamental issue which must be addressed is whether the right to a fair trial is constitutionally protected.

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[295] See *MK v Victorian Legal Aid* [2013] VSC 49 (18 February 2013); *Andelman v The Queen* [2013] VSCA 25 (25 February 2013); See also *R v Chaouk* [2013] VSC 48 ( 15 February 2013) although holding that the fair trial required the accused be given legal aid, Lasry J did not apply the right as expressed in the Charter. Rather, it was held that in the circumstances, the risk of a wrongful conviction warranted that the accused be represented.

[296] Mirko Bagaric, Fair Trial and the right of the accused to cross examine their accusers (2010) 34 *Criminal Law Journal* 78; Bagaric, Alexander Ebejer, above n 37, 72-3 citing *R v Darmody* (2010) 213 A Crim R 79.

[297] See, eg, *WK v The Queen* (2011) 216 A Crim R 421, 435 In light of the differing views in *Momcilovic* Nettle JA noted;' I am not sure how s 6(1) of the *Surveillance Devices Act 199 (Vic)* should be construed in light of s 32' of the Charter.

[298] Gans et al, above n 92, 389.

[299] Ibid 458; See also Sally Kift, 'The *Dietrich* Dilemma' (1997) 13 *Queensland University of Technology Law Journal* 211 224-5; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 404-5 where the authors allude to the possibility of a modification of the hearing rule in relation to procedural fairness as a result of the Charter and HRA.

[300] See Michael McHugh, A Human Rights Act, the courts and the Constitution (2009) 11(1) *Constitutional Law and Policy Review* 86. His Honour notes, in relation to the *Human Rights Act*

## IV CONSTITUTIONAL CONSIDERATIONS

The right to a fair trial has been distinguished as 'the most fundamental constitutional right of all'.[301] The constitutional issues surrounding the right are significant as the criminal trial is directly influenced by the relationship between the various arms of government.[302] Further, there is a strong connection between the separation of powers and the doctrine of due process.[303] As Brandeis J observed, the separation of powers does not seek to 'promote efficiency but to preclude the exercise of arbitrary power'[304]

On its face, the issue of whether the right to a fair trial is entrenched in the *Constitution* is uncontroversial. Justices Deane and Gaudron have held that the right is implied from the separation of judicial power and entrenchment of an independent and impartial judiciary in Chapter III.[305] Further, Spigelman CJ has observed that the right to a fair trial has become such a fundamental principle as to give it a constitutional character.[306] His Honour suggests that although the right to a fair trial is a common law right, it has become so central to justice that parliament is unlikely

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*1998* (UK),'what may be praised as "carefully and subtly" drafted in the United Kingdom may sow the seeds for constitutionally destruction of similar legislation in Australia': at 89

[301] Allan, above n 28, 425 citied in Ho above n 219, 245.

[302] See, eg, *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1, 98 (Toohey J), 107 (Gaudron J); Rachel E Barkow, Separation of Powers and the Criminal Trial (2006) 58 *Stanford Law Review* 989.

[303]See *Re Tracey: Ex Parte Ryan* (1989) 166 CLR 518, 580 (Deane J); *Polyukhovic v The Commonwealth* (1991) 172 CLR 501, 611-5 (Deane J), 706-8 (Gaudron J) citied in Anthony Gray, The Common Law and the Constitution as Protectors of Rights in Australia (2010) 39 *Common Law World Review* 119, 132-7.

[304] *Myers v United States* 272 U.S 52 , 293 (1926) citied in Michael McHugh , Tensions Between the Executive and the Judiciary (2002) 76 *Australian Law Journal* 567, 569; See also Ho above n 219, 243; Burt Neuborne, 'Judicial Review and Separation of Powers in France and the United States' (1982) 57 *New York University Law Review* 363, 372 where the author notes that government power is ' a bomb so potent that no single organ can be trusted with its formula' citied in Barkow, above n 302, 991.

[305] *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362(Gaudron J).

[306] Spigelman, 'The truth can cost too much', above n 7, 33.

ever to legislate contrary to this right.[307] Therefore, the right to a fair trial has been conferred constitutional complexion.[308]

There are however, a number of issues which cast doubt on a constitutionally implied right to a fair trial. For one, a constitutional right to a fair trial has the potential to work against the interests of justice as it would mean that legislation which operated to reduce the time and expense of litigation would be inoperable.[309] Another issue is that the federal parliament does legislate contrary to the right to a fair trial in a number of contexts. The most apparent being that of anti-terror legislation.[310] Indeed, Professor Williams has noted that there are laws which permit, among other things, detention for up to a week, searches without a warrant, preventative detention orders and intrusive surveillance measures to prevent terrorist acts.[311] The learned author contends that it is difficult if not impossible to challenge the constitutional validity of such laws in the absence of a federal bill of rights.[312]

It is argued that while the right to a fair trial can be implied in the *Constitution*, the right is not constitutionally entrenched in the full sense of the term. This analysis builds primarily on two characteristics of the right (as explained above). First it shows that the right to a fair trial is made up of a number of rights whose content

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[307] Ibid

[308] Ibid; See also *Carr v Western Australia* (2007) 232 CLR 138, 172 (Kirby J)*; X7 v Australian Crime Commission* (2013) 298 ALR 570, 573. The other issue before the Court was whether the examination under the ACC Act contravened the 'constitutional right to a fair trial under Ch III (including s 80) of the Constitution'. The Court did not find it necessary to determine this issue; D Williams, Judicial Power and Good Government (2000) (11) *Public Law Review* 133, 139. The learned author observes, 'procedural due process appears to be a fundamental right protected by the Constitution, as may be the right to a fair trial'

[309] Janet Hope, 'A constitutional right to a fair trial? Implications for the reform of the Australian criminal justice system' (1996) 24 *Federal Law Review* 173, 190-2; See also Gideon Boas, *Dietrich,* the High Court and Unfair Trials Legislation: A Constitutional Guarantee (1993) 19 *Monash University Law Review* 256, 269-73 for a similar analysis although the author does not apply it to the right to a fair trial.

[310] See Kent Roach, 'The 9/11 effect: Comparative Counter Terrorism (Cambridge University Press, 2011) where the Australian response to terrorism has been described as 'hyper legislation'. The author notes that the amount of anti-terror legislation enacted in Australia has surpassed the United States, the United Kingdom and Canada; at 310

[311] See Williams, 'A Decade of Australian Anti-Terror Laws', above n 102, 1146-57.

[312] Ibid 1157.

cannot be exhaustively defined. Second, it is an illustration that the right in its full sense cannot be confined to the trial alone and extends from investigation to appeal.

This chapter will first outline the separation of judicial power in Chapter III. Second, it will briefly examine the notion of implied rights from Chapter III jurisprudence and the right to a fair trial expressed by Deane and Gaudron JJ in *Dietrich v The Queen*.[313] Thereafter, it considers the principle in *Kable v Director of Public Prosecutions (NSW)* and the extension of an independent and impartial judiciary to the states.[314] Finally, it argues any implied 'constitutional right to a fair trial' does not encompass the right to a fair trial in the full sense of the term.

### A *The Separation of Powers and Chapter III*

#### 1 *Overview*

At its core, the separation of powers as expressed in the *Constitution* serves to safeguard individual rights through the resolution of controversies by an impartial and independent judiciary.[315] The notion of separating judicial power so as to safeguard rights can be drawn from Montesquieu who wrote that 'there is no liberty if the judiciary power be not separated from the legislative and the executive'.[316] Indeed, this doctrine was incorporated into the *United States Constitution* and thereby formed the basis for s 71 of the *Australian Constitution.*[317] Separating

[313] *Dietrich v The Queen* (1992) 177 CLR 292.
[314] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[315] Leslie Zines, *The High Court and the Constitution,* (Federation Press, 5th ed, 2008), 273 citing *R v Quinn* (1977) 138 CLR 1.
[316] See *R v Trade Practices Tribunal : Ex Parte Tasmanian Breweries*(1970) 123 CLR 361, 392 ( Windeyer J) citied in *Wilson v Minister for Aboriginal* (1996) 189 CLR 1, 11-12 ( Brennan CJ, Dawson, Toohey, McHugh , Gummow JJ); For a succinct overview of the philosophy of Montesquieu in relation to the separation of powers See Augusto Zimmermann, The Law of Liberty Natural Law Roots of Western Constitutionalism (2011) 15 *International Trade and Business Law Review* 432, 448-51.
[317] See *R v Trade Practices Tribunal: Ex Parte Tasmanian Breweries* (1970) 123 CLR 361, 392 (Windeyer J). See also JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1959) v The influence of the American Constitution in the drafting of the *Australian Constitution* has been eloquently put by La Nauze who notes that the *American Constitution* was

judicial power from the legislative and executive branches fulfils the constitutional objectives of preventing the interference of politics with the judiciary and the judiciary from acting as to diminish public confidence in the administration of justice.[318] In other words, it entrenches a judiciary which is independent and impartial.[319]

### 2 *Constitutional framework*

It has been emphasised that Chapter III of the *Constitution* provides an 'exhaustive' statement of the methods in which judicial power may be conferred.[320] The *Boilermakers' Case* established a 'high standard' for the separation of the judicial and non-judicial powers in Australia.[321] In *Boilermakers,* two fundamental principles were enunciated; first, parliament can only vest judicial power in the High Court and 'in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'.[322] Second, courts which exercise federal judicial power cannot exercise non judicial power unless it is incidental to the exercise of judicial power.[323] In this regard, although the term 'judicial power' cannot be exhaustively defined it has been held as; power exercised to resolve an issue in

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'quoted or referred no more than any other single work; never criticised, it was regarded with the same awe , mingled with reverence, as the Bible would have been in an assembly of churchmen'.

[318] *Wilson v Minister for Aboriginal* (1996) 189 CLR 1, 12-13 (Brennan CJ, Dawson, Toohey, McHugh , Gummow JJ).

[319] See *R v Quinn* (1977) 138 CLR 1, 11-2; *Polyukhovic v The Commonwealth* (1991) 172 CLR 501, 613 (Deane J) Parliament cannot pass legislation which curtails the provisions in Chapter III of the Constitution. To do so would ' invad[e] the heart of the exclusively judicial function of determining criminal guilt'

[320] *R v Kirby; Ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254, 269. ('*Boilermakers Case'*).

[321] P H Lane, *A Manual of Australian Constitutional Law* (Law Book Company Limited, 6th ed, 1995), 207- 212. Interestingly, when the *Boilermakers Case* went on appeal to the Privy Council, Sir Owen Dixon corresponded with Lord Simon who was going to hear the appeal in that case. In reply to a letter by Lord Simon informing Sir Owen Dixon of the Privy Council's decision to dismiss the appeal, his Honour wrote ' I regard the doctrine concerning judicial power as almost basal to the system…I blame myself for not intervening from the Bench years ago & forcing the issue. I ought to have done so twenty years ago.' cited in Phillip Ayres, *Owen Dixon* (Miegunyah Press, 2003) 257.

[322] *Australian Constitution* s 71*;* See *Boilermakers Case* (1956) 94 CLR 254, 269-57 citied in Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* ( LexisNexis Butterworths , 3rd ed, 2012) 502-3.

[323] *Boilermakers Case* (1956) 94 CLR 254, 269-57.

relation to life, liberty or property as between citizens.[324] Further, it must result in an 'authoritative and binding decision'.[325]

The separation of powers doctrine is clearly evinced in s 71 which defines judicial power as distinct from other powers.[326] Section 72 provides for tenure which is crucial in ensuring the independence of judges.[327] Moreover, s 51(xxxix) expressly indicates that Parliament may make laws 'incidental to the execution' of the power of the federal judicature suggesting that Parliament must look to Chapter III if it wishes to legislate on judicial power. [328] Indeed, the separation of judicial power is 'the most resilient' of the implications derived from the *Constitution*.[329]

3 *Separation of judicial power and the fair trial*

In the early 1990's, there were a succession of cases which culminated in the recognition of rights such as a 'due process' principle being implied from the separation of judicial power.[330] Thus in 2001, McHugh J noted (extra judicially) that in light of the decisions in the previous 15 years, it is difficult to see legislatures abrogating due process and 'quasi substantive rights' such as the right to a fair trial or the presumption of innocence.[331] Further, his Honour suggested that in relation to

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[324] *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) citied in Suri Ratnaphala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 151.

[325] *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); See also *R v Trade Practices Tribunal: Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 532, 685; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83,109,110.

[326] Gabriel Moens and John Trone, *The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths Australia, 7th ed, 2007) 273.

[327] See Guy Cumes, 'Separation of Powers, Courts, Tribunals and the State' (2008) 19(1) *Australian Dispute Resolution Journal,* 10, 11.

[328] *Boilermakers Case* (1956) 94 CLR 254, 269-70 ( Dixon CJ, McTiernan, Fullugar, Kitto JJ) ' the existence in the *Constitution* of Chap. III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss 71-80.' at 269

[329] Fiona Wheeler, 'The Rise and Rise of Judicial Power Under Chapter III of the Constitution: A Decade in Overview' (2000) 20 *Australian Bar Review,* 282, 283.

[330] Ibid 285-6; Jennifer Clarke et al *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 9th ed, 2013) 1292 [10.7.1].

[331] McHugh, above n 230, 239.

the fair trial, the rights expressed in various international instruments such as the ICCPR may eventually be found to be protected by Chapter III.[332]

Indeed, in *Polyukhovic,* it was held, inter alia, that laws which determine guilt based on retrospective conduct are contrary to Chapter III as they infringe on judicial power.[333] The implication derived from Chapter III was expressed by Deane J in *Polyyukhovic*, that '…the Constitution's intent and meaning were that judicial power would be exercised by those courts acting as courts with all that notion essentially requires'.[334] Thereafter, in *Leeth v Commonwealth*,[335] Leeth argued that a federal law which used state law to determine non parole periods for a federal offence was invalid as it infringed the right to equality before the law implied in the *Constitution*.[336] While it was held that there was a constitutional right to equality, it was not infringed in that case. The majority held that the implication derived from the separation of judicial power is that the exercise of this power by Courts must be coextensive with the duty to adhere to the requirements of the curial process.[337] Then in *Chu Kheng Lim* it was held that the legislature cannot require the exercise of judicial power in a way that is contrary to the judicial process.[338] As such, citizens have 'a constitutional immunity' from imprisonment except by an order of a court through the application of Commonwealth judicial power under s 51 (xix) of the *Constitution*.[339]

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[332] McHugh, 'Does Chapter III of the Constitution Protect substantive as well as procedural rights?', above n 230, 241.
[333] *Polyukhovic v Commonwealth* (1991) 172 CLR 501, 535 ( Mason CJ)
[334] Ibid 607 (Deane J).
[335] *Leeth v Commonwealth* (1992) 174 CLR 455.
[336] Ibid 460-4.
[337] Ibid 470 (Mason CJ, Dawson and McHugh JJ).
[338] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27, 36( Brennan, Deane and Dawson JJ)
[339] Ibid 28-9 (Brennan, Deane and Dawson JJ). This 'constitutional immunity' does not however, extend to non- citizens who may be detained by the executive for expulsion without contravening Chapter III at: 29-32.

Professor Zines has pointed out that the protection of individual rights requires more than an independent judiciary but also recognition that procedures are in accord with '"due process, "a fair trial" or "natural justice".' [340] As the learned author earlier observed, this is only a 'short step' from the requirement that Courts exercise judicial power.[341] Indeed, these three cases, read together, shed new light on the separation of powers with their focus on civil and political rights.[342] It is through this lens in which the judgement in *Dietrich* is best appreciated.

4 *Dietrich v The Queen*

The seminal case in relation to the right to a fair trial in Australia is *Dietrich v The Queen ('Dietrich').*[343] There, Olaf Dietrich was unrepresented in his trial for the importation of heroin. He was convicted and appealed to the High Court on the grounds that a fair trial entails the right to provision of legal representation by the state to persons charged with a serious criminal offence.[344] Justice Brennan, in dissent, was essentially of the view that it was not the place of the court to import into the law a requirement for all indigent accused to be afforded representation at state expense.[345] Such concerns were largely echoed the dissenting opinion of Dawson J.[346]

Chief Justice Mason, McHugh, Deane, Toohey and Gaudron JJ held that there is no general right to representation at state expense. However, it was held that if an indigent accused who is charged with a serious criminal offence cannot obtain legal

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[340] Zines, *The High Court and the Constitution,* above n 315, 273
[341] Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 168.
[342] Wheeler, 'The rise and rise of judicial power', above n 329, 284-6.
[343] *Dietrich v The Queen* (1992) 177 CLR 292; The right to a fair trial was examined in a number of decisions preceding *Dietrich*. See *Barton v The Queen* (1980) 147 CLR 75; *Jago v The Queen* (1989) 168 CLR 23; *Mckinney v The Queen* (1991) 171 CLR 468.
[344] *Dietrich v The Queen*(1992) 177 CLR 292, 293.
[345] Ibid 317, 323- 25 essentially, his Honour held that the allocation of public funds and consideration of various interests involved should be left to the legislature. '[T]he remedy does not lie with the courts; the remedy must be found, if at all, by the legislature and the executive who bear the responsibility of allocating and applying public resources'.
[346] Ibid 349-51.

representation through no fault of their own, the trial should be stayed or adjourned until representation can be obtained.[347] Further in the event that such an application is refused and the trial is an unfair one, any conviction cannot stand for 'there has been a miscarriage of justice in that the accused has been convicted without a fair trial'.[348] Accordingly, it was held that a Court has an inherent power to stay a trial in circumstances where the trial would be unfair.[349]

Justices Deane and Gaudron JJ went further and held that the right to a fair trial was implied from the separation of judicial power in Chapter III of the *Constitution*.[350] Justice Deane held that the right to a fair trial is a 'fundamental prescript' of the criminal law which is implied in Chapter III.[351] His Honour held that the separation of Commonwealth judicial power in Chapter III implies that such power be exercised pursuant to the law to effect a fair trial.[352] Justice Gaudron held that the right to a fair trial is implied from the *Constitution* which requires the concomitant exercise of judicial power with judicial process.[353] Her Honour held that the 'requirement that a trial be fair is not one that impinges on the substantive law…' but only on 'evidentiary and procedural rules'.[354]

Professor Wheeler points out that while both Deane and Gaudron JJ clearly held that there was a connection between due process and the right to a fair trial, their Honours did not comment further on the nature of this connection.[355] Read in light of the entire case however, the principle that can be gleaned is that Deane and Gaudron JJ

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[347] Ibid, 315, 337, 353; See also Richard Stewart, 'The self-represented litigant: A Challenge to justice' (2011) 20 *Journal of Judicial Administration* 146.
[348] *Dietrich v The Queen*(1992) 177 CLR 292, 315 ( Mason CJ and McHugh J).
[349] Ibid 298 (Mason CJ, McHugh J).
[350] Ibid 326,362-64.
[351] Ibid 326.
[352] Ibid.
[353] Ibid 362.
[354] Ibid 362-3. It should be noted that Gaudron J has played a key role in the development of fair trial principles in Australia. See Cheif Justice Marilyn Warren, Justice Gaudron's contribution to the jurisprudence of the criminal law (2004) 15(4) *Public Law Review* 328.
[355] Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 (2) *Monash University Law Review,*248, 265.

regard that the power of the Court to prevent an abuse of process resulting in an unfair trial through a stay of proceedings as a fundamental aspect of judicial power.[356] Accordingly, if the legislature took this power away from the Court, then Dietrich would have to be tried through an unfair use of judicial power. This, according to Deane and Gardron JJ would be contrary to Chapter III.[357]

### B *The Kable Principle, the expansion of judicial power and the right to a fair trial*

This implication of the right to a fair trial from chapter III has, arguably, been strengthened through the expansion of judicial power. It has been seen that the right to a fair trial is made up of number of rights whose content cannot be exhaustively defined. However, Mason CJ and McHugh J have noted that broadly speaking, conventions such as the ICCPR provide guidance as to the content of the right.[358] A common feature amongst these instruments is that they recognise that a fundamental element of the right to a fair trial is the entrenchment of a 'fair and public hearing by a competent, independent and impartial tribunal'.[359]

Thus as the right to an independent and impartial judiciary represents the core of the right to a fair trial it can be suggested that the right to a fair trial has been strengthened as a consequence of the expansion of judicial power as embodied in Chapter III.

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[356] Ibid 266.
[357] Ibid.
[358] *Dietrich v The Queen* (1992) 177 CLR 292, 300; See also McHugh, Does Chapter III of the Constitution Protect substantive as well as procedural rights?', above n 230, 241; There is also a longstanding presumption that legislation is to be read consistently with international law See *Mabo v Queensland (No2)* (1992) 175 CLR 1, 42 (Brennan J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 , 287 (Mason CJ and Deane J)
[359] *ICCPR* art 14(1); *ECHR* art 6(1) ; *Charter of Human Rights and Responsibilities Act* 2006(Vic) s 24(1); *Human Rights Act 2004* (ACT) s 21(1); The point is best expressed in *Millar v Dickson* [2002] 1 WLR 1615, 1628 where Lord Bingham notes that the right to an independent and impartial judiciary as expressed in the *ECHR* ' is a safeguard which should , least of all in the criminal field, be weakened or diluted, whatever the administrative consequences'

The doctrine of separation of powers was expanded in *Kable* which established that the separation of judicial power applies to state courts.[360] In a nutshell, the Court in *Kable* held that because they exercise commonwealth judicial power; state legislative bodies cannot confer power so as to impugn the 'institutional integrity' of courts.[361] Second, where a state court exercises federal judicial power, that court must be independent and impartial ('the *Kable* Principle').[362]

In recent years, the High Court has been vigilant in protecting courts which administer federal judicial power as the '*Constitution* does not permit different grades or qualities of justice'.[363] First, in *International Finance Trust,*[364] the Court held invalid a provision which effectively removed the discretion of the Court in the making of a restraining order.[365] A majority held that this provision would result in a court engaging 'in activity which is repugnant to the judicial process in a fundamental degree'.[366] In *South Australia v Totani*,[367] the *Serious and Organised Crime (Control) Act* 2008 (SA) provided that if the Police Commissioner applies to the Magistrates Court, that Court must make a control order against that person if it finds that he or she is part of a 'declared organisation'.[368] The High Court held that this provision was an impermissible interference by the executive which impugns the

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[360] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[361] Ibid 98 (Toohey J) ; 103, 107-8 (Gaudron J), 117-8 (McHugh J), 138-43 (Gummow J); See also *Momcilovic v The Queen* 245 CLR 1, 66-7 (French CJ).
[362] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98 (Toohey J) ; 103, 107-8 (Gaudron J), 117-8 ( McHugh J), 138-43 ( Gummow J); See also *Momcilovic v The Queen* 245 CLR 1, 66-7 (French CJ); See James Stellios, *The Federal Judicature: Chapter III of the Constitution: Commentary and Cases* (LexisNexis Butterworths, 2010) 421-2; Due to the differing opinions expressed, it is difficult to distil a precise expression of the principle from that case. Indeed, before being appointed to the High Court, Hayne JA noted, 'I confess that I do not find it easy to identify the principle that underlies the decision in *Kable*.' *R v Moffatt* (1998) A Crim R 557, 577.
[363] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51,103 citied in *Wainohu v State of New South Wales* (2011) 243 CLR 181, 228-9 (Gummow, Hayne, Crennan and Bell JJ); See Ronald Sackville, 'An age of judicial hegemony' (2013) 87 *Australian Law Journal* 105, 114; But See *Public Service Association & Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 293 ALR 450, 467-8 [62] (Heydon J).
[364] *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319.
[365] *Criminal Assets Recovery Act 1990* (NSW) s 10.
[366] *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 385 (HeydonJ), 366-365 (Gummow and Bell JJ), 355 (French CJ).
[367] *South Australia v Totani* (2010) 242 CLR 1.
[368] *Serious and Organised Crime (Control) Act* 2008 (SA) s 14 (1).

appearance of independence and impartiality and this thus constitutionally invalid.[369] Essentially, the legislation was invalid as it rendered 'the Court an instrument of the Executive'.[370] Thereafter in *Wainohu,*[371] the High Court declared invalid, a provision which allowed a judge to declare an organisation a 'declared organisation'.[372] This was because that provision did not require reasons for such a decision, and, as a result, it was inconsistent with the exercise of judicial power.[373]

Indeed whether or not a legislative provision impugns the exercise of judicial power would depend on, inter alia, 'evaluative judgements' which cannot accurately defined.[374] If such a judgement is in conflict with a legislative provision of a state then the power of that state is limited accordingly.[375] In this vein, Professor Gray argues that although it is not express in the reasoning adopted by the court in the preceding cases, it is clear that in applying the *Kable* Principle, the Court has adhered to the concept of a fair trial as expressed in *Dietrich.*[376] In other words, 'the result and the reasoning is similar to what would have occurred if the *Dietrich* notion of a fair trial had been applied'.[377] And in this sense, the right to a fair trial remains a constitutional right.

The extension and ambiguity of the separation of powers doctrine to the States and its vigilant enforcement by the High Court has in turn bolstered the right to a fair trial by strengthening the right to an independent and impartial judiciary.[378] As Professor Bagaric notes, the development of the *Kable* Principle has highlighted that

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[369] *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92-3 [236] (Hayne J), 160 [436] (Crennan and Keifel JJ), 172-3 [479-81] (Bell J).
[370] Ibid 160 (Crennan and Bell JJ).
[371] *Wainohu v New South Wales* (2011) 243 CLR 181.
[372] *Crimes (Criminal Organisations Control ) Act 2009* (NSW) Pt 2.
[373] *Wainohu v New South Wales* (2011) 243 CLR 181, 219-20 [68-72] (French CJ and Keifel J); 228 [104] (Gummow, Hayne, Crennan and Bell JJ).
[374] Sackville, above n 363, 115.
[375] Ibid.
[376] Gray,'Constitutionally Heeding the Right to Silence in Australia', above n 139 , 179-81
[377] Ibid 179.
[378] See Sackville, above n 363, 113-5 in relation to the wide and indeterminate scope of the *Kable* Principle.

legislatures cannot 'summarily and wantonly violate important individual rights without due process'.[379]

### C *The 'constitutional right to a fair trial'?*

However, as the right to a fair trial is comprised of a number of rights, there are certain hurdles which the 'constitutionally entrenched right to a fair trial' must overcome in order for its existence to be firmly established.

The central issues, is it argued, revolve around two characteristics of the right as explained above. First, the right to a fair trial is comprised of a number of rights, not all of which are constitutionally protected in their fullest sense. Second, the right to a fair trial cannot be confined only to the trial. It extends throughout the criminal process from investigation to appeal.[380]

#### 1 *Right to examine witnesses not constitutionally protected*

It is expressed in a number of human rights instruments that a key fair trial right is the right to examine witnesses.[381] Accordingly, the argument that the right to a fair trial is not constitutionally protected in the full sense of the term is strengthened by the approach of the High Court in *Assistant Commissioner Cordon v Pompano* ('*Pompano*').[382] In this case, the Court considered certain provisions of the *Criminal Organisation Act 2009* Act (Qld) ('the COA Act') in relation to the making of a

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[379] Mirko Bagaric, 'The Revived Kable Doctrine as a Constitutional Protector of Rights?' (2011) 37 *Criminal Law Journal* 197, 200. The author notes that the development of the *Kable* Principle is not been consistent but through this 'opaqueness'...' [i]t leaves open the capacity for the courts to refine the doctrine to deal with unforseen legislative devices' thereby 'serving as a de facto constitutional bill of rights'; at 200-1; Clarke et al, above n 330, 1100 [ 9.5.59]

[380] This issue has been explained above. See above nn 49-56 and accompanying text.

[381] *ICCPR* art 14 (3) (e); *ECHR* art 6 (3) (d); *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 25 (2) (g); *Human Rights Act 2004* (ACT) 22 (2) (g); These instruments essentially provide for the right 'to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses'; *Dietrich v The Queen* (1992) 177 CLR 292, 335, 363; *United States Constitution Amend* VI; The US Supreme Court has last considered this provision in *Crawford v Washington* 541 US 36 (2004).

[382] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638.

declaration that an organisation is a 'criminal organisation'.[383] The applicant (the Assistant Police Commissioner) must provide supporting information such as 'criminal intelligence' in order for a court to make such a declaration.[384] However, the 'criminal intelligence' cannot be adduced in court by the informant.[385] Further, the respondents were barred from being present when the Court was considering issues of 'criminal intelligence'.[386] In short, the COA Act allowed 'for closed hearings and the use of secret evidence' known only to the State.[387]

The respondents argued that the 'institutional integrity' of the Court was impugned because the COA Act allowed the Court to receive information which cannot be disclosed to them.[388] The Court unanimously held that because the Supreme Court has the power to control its processes and act 'fairly and impartially' the provisions of the COA Act were valid.[389] In contrast to *Wainohu* it was held that the COA Act does not limit the Courts discretion to prevent unfairness.[390]

Although holding the provisions valid, Gageler J noted that because a respondent would not be able to respond to the evidence, '[i]t is not difficult to see how

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[383] *Criminal Organisation Act 2009* Act (QLD) ss 8, 10, 70, 78. *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 641 [8] (French CJ) The Assistant Police Commissioner of Queensland sought a declaration under s 10 of the COA Act to declare the Finks Motorcycle Club Gold Coast Chapter and Pompano Pty Ltd (which was alleged to be 'part of' the Finks Motorcycle Club) a 'criminal organisation'.

[384] *Criminal Organisation Act 2009* Act (QLD) ss 8(2) (d), 72. 'Criminal Intelligence' is defined in s 59.

[385] Ibid s 72 However, an officer of the agency must provide an affidavit that the information given by the informant is accurate.

[386] Ibid s 78. This section provides that '[t]he court must order any part of the hearing of the substantive application in which the declared criminal intelligence is to be considered (the relevant part) to be a closed hearing'.

[387] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 641 [4] (French CJ).

[388] Ibid 667 [97] (Hayne, Crennan, Keifel and Bell JJ).

[389] Ibid 665 -6 [88-9] ( French CJ), 682-4 [160- 69] , 686 [177-8] (Gageler J) Justices Hayne Crennan Keifel and Bell also held that while the means through which the commissioner intends to prove the allegation is not known, the respondent is aware of ' *what* is the allegation that is made against it': at 683 [163] (emphasis in original).

[390] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 684[168] (Hayne, Crennan, Keifel and Bell) 684 [167]. As Gageler J held 'The criminal intelligence provisions are saved from incompatibility with Ch III of the Constitution *only by the capacity* for the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest': at 686 [178] (emphasis added).

unfairness…might arise'.[391] Indeed, the use of such evidence, which cannot be tested through cross examination, is contrary to the fair trial on a number of levels.[392] The most apparent danger is that the reception of such evidence has the potential to 'positively mislead'.[393] And it is due to this risk that the right to challenge evidence 'occupies such a central place in the concept of the fair trial'.[394]

It may be suggested that although the *Kable* Principle has strengthened the notion of an independent and impartial judiciary, its boundaries remain unclear. While this ambiguity may serve to protect rights in some cases, it is difficult to reconcile any 'constitutional right to a fair trial' in the absence of a constitutional right to confront witnesses.

2 *The inadmissibility of fresh evidence on appeal- limiting the right to a fair trial*

A number of human rights instruments also provide that an element of the fair trial is a right to the review of a conviction.[395] Therefore, while Chapter III entrenches and independent and impartial judiciary, it does not fully protect the right to a fair trial as it limits the accused rights of appeal. This is evinced by the High Court's

[391] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 692 [202] See also *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 354 [54] Chief Justice French observed that Chapter III 'requires that a court be and appear to be impartial , and to provide each party to proceedings before it with the opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it'; *Nicolas v The Queen* (1998) 193 CLR 173, 208 (Gaudron J).

[392] See Anthony Gray, 'Due Process, natural justice, Kable and organisational control legislation' (2009) 20 *Public Law Review* 290, 292- 296; See also Greg Martin, 'Jurisprudence of Secrecy: *Wainohu* and Beyond' (2012) 14 *Flinders Law Journal* 189, 208-24.

[393] *Al Rawi v Security Service* [2012] 1 AC 531, 592- 593 [93] (Lord Kerr) citied in Steven Churches, How Closed can a Court be and Still Remain a Common Law Court? (2013) 20 *Australian Journal of Administrative Law* 117, 120.

[394] *Al Rawi v Security Service* [2012] 1 AC 531, 592- 593 [93] citied in Churches, above n 393, 120; *Crawford v Washington* 124 S. Ct 1354 (2004) confrontation 'is to ensure reliability of evidence' cited in Mike Redmayne, Confronting Confrontation in Paul Roberts and Jill Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* ( Oxford and Portland, 2012) 294-303.

[395] *ICCPR* art 14 (5) *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 25(4); *Human Rights Act* 2004 (ACT) s 22(4). See Australian Human Rights Commission, Submission No 16 to Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, 25 November.

interpretation of s 73 which does not allow for highly probative evidence to have an effect on the accuracy of the verdict.

Section 73 of the *Constitution* establishes the High Court on the summit of the Australian judicial hierarchy. Notwithstanding certain exceptions, s 73 secures the right to appeal to the High Court from the 'judgements, decrees, orders and sentences' of various courts.[396]

In *Mickelberg,* it was held that s73 precluded fresh evidence from being received on appeal.[397] This interpretation was expanded in *Eastman.*[398] In that case, it was held that fresh evidence could not be received from Federal Courts and Courts exercising federal jurisdiction as the 'appeals' in s 73 were intended to apply 'regardless of the identity of the particular court'. [399]

As French CJ has summarised, the reason for the Court's reluctance to receive fresh evidence on appeal stem from; first, the fact that as a matter of history, the grant of appellate jurisdiction to the High Court at federation did not encompass the understanding that such jurisdiction allowed the reception of fresh evidence.[400] Second, as aforementioned, the reception of fresh evidence is inconsistent with the position of the High Court at the apex of the Australian judicial system.[401]

A broader interpretation of s 73 was advocated by Kirby J's dissent in *Eastman*.[402] His Honour observed that in 1900, the words 'jury trial' in s 80 reflected a jury of

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[396] *Australian Constitution* s 73.
[397] *Mickelberg v The Queen* (1989) 167 CLR 259, 266-9 where Mason CJ observed 'Over the years this Court has consistently maintained that it has no power to receive fresh evidence in the exercise of its appellate jurisdiction'. Justices Toohey and Gaudron agreed: at 298
[398] *Eastman v The Queen* (2000) 203 CLR 1.
[399] Ibid 63 [190] (Gummow J).
[400] *Clodumar v Nauru Lands Committee* (2012) 288 ALR 208, 215. In this case, the High Court found that fresh evidence may be admitted in the High Court under s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth).
[401] *Clodumar v Nauru Lands Committee* (2012) 288 ALR 208, 215
[402] *Eastman v The Queen* (2000) 203 CLR 1, 79-80 [240-44] cited in Bibi Sangha and Robert Moles, Post- appeal review rights: Australia, Britain and Canada (2012) 36 *Criminal Law Journal* 300,309.

men only. The High Court excluded such elements from the law passed down from England. Consequently, his Honour questions why the interpretation of the word 'appeal' is restricted but 'jury' is not.[403]

'Fresh evidence' is evidence is evidence that was not available at the time of the trial but arose subsequent to proceedings.[404] The criminal trial is not perfect and miscarriages of justice sometimes occur for a variety of reasons.[405] In some cases, relevant and probative evidence may arise after the appeal processes.[406] Generally speaking, if an accused is convicted, an appeal may be brought to the court of appeal.[407] However, as Sangha, Roach and Moles point out, in Australia, there are limited post appeal review rights.[408] For one, as explained above, the High Court cannot receive fresh evidence on appeal. Thus even if probative evidence of innocence is available, it cannot be received in the High Court.[409] Application of this rule may entail that in certain circumstances, the High Court is not able to receive fresh evidence discovered after the trial 'whatever the reason and however justifiable the delay'.[410] This is contrary to justice.[411]

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[403] *Eastman v The Queen* (2000) 203 CLR 1, 79-80 [240-43].

[404] *Wood v The Queen* [2012] NSWCCA 21(24 February 2012) [707-14] (Mclellan CJ) 'New evidence' is evidence that was reasonably available to the accused but not adduced in the trial.

[405] See generally, Lynne Weathered, Wrongful Convictions in Australia (2012) 80(4) *University of Cincinnati Law Review* 1391; R A Leo, 'Rethinking the Study of Miscarriage of Justice: Developing a Criminology of Wrongful Conviction' (2005) 21 *Journal of Contemporary Criminal Justice* 201, 211 'one must go beyond the study of individual sources of error to understand how social forces, institutional logics, and erroneous human judgments and decisions come together to produce wrongful convictions.'

[406] See, eg, *Mickelberg v The Queen* (1989) 167 CLR 259.

[407] This would depend on inter alia; which court the case is appealed from and the grounds of appeal. In WA, leave must be sought for an appeal from the Magistrates Court to a single judge of the Supreme Court of Western Australia; *Criminal Appeals Act* 2004 (WA) ss 7(1), 9; the Supreme Court will not allow leave if 'unless it is satisfied the ground has a reasonable prospect of succeeding' s 9(2) *Criminal Appeals Act 2004* (WA)

[408] Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010) 138-9.

[409] Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 *Adelaide Law Review* 195, 205-6.

[410] Ibid 205-6; *Sinanovic's Application* (2001) 180 ALR 448, 451(Kirby J) citied in Sangha , Roach and Moles, above n 408, 141-2.

[411] Kirby, above n 409, 205-6.

The potential for this to result in an unfair trial is best illustrated in *Stuart v The Queen*.[412] Stuart, an illiterate Aboriginal Australian man, was convicted of the rape and murder of a nine year old girl and sentenced to death. In his appeal to the High Court, he argued, that expert evidence regarding the fact that the alleged confession was typed in language which he could not possibly have dictated or understood, should be received.[413] The Court was however, 'confined on appeal to the material which was before the Court appealed from'.[414] Indeed, *Stuart* is not the only instance where application of this rule has resulted in unfairness.[415]

It is recognised that courts below the High Court may receive fresh evidence.[416] Further, there are arguments that an expansive review of post appeal review rights might work to extend the trial process depriving victims of closure.[417] While these considerations carry much weight, the fact remains that in some cases, s 73 of the *Constitution* has operated inconsistently with the right to a fair trial.

### D *Conclusions*

Fundamentally, the challenge with implying the right to a fair trial (in its full sense) in the *Constitution* is that its primary purpose was not as instrument of rights protection such as the Charter or HRA.[418] There are a number of observations that

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[412] *Stuart v The Queen* (1959) 101 CLR 1; See generally, Kirby, above n 409.
[413] *Stuart v The Queen* (1959) 101 CLR 1,4.
[414] Ibid 5.
[415] See *Mickelberg v The Queen* (1989) 167 CLR 259 where the accused were charged and convicted of stealing from the Perth mint. Although it was later found that police falsified evidence, such evidence could not be received in the High Court. See Sangha , Roach and Moles, above n 408, 235-6; Western Australia, Police Royal Commission, *Into Whether There Has Been Corrupt or Criminal Conduct By Any Western Australian Police Officer: Final Report Volume I* (2004) 100.
[416] Broadly speaking , courts may receive fresh evidence on appeal if such evidence is relevant and highly probative; See, eg, *Criminal Appeals Act 2004* (WA) s 40; *Criminal Procedure Act 2009* (Vic) ss 317-320; *Criminal Appeal Act 1912* (NSW) s 12; *Supreme Court Act 1933* (ACT) s 37N(3).
[417] Margaret Cunneen, 'Living Within the Law' (2008-2009) 11(1) *Newcastle Law Review* 71, 84-6; Uli Orth ' Secondary Victimisation of Crime Victims by Criminal Proceedings ' (2002) 15 (4) *Social Justice Review* 313, 314 where it is observed that in some cases, the stress of the criminal trial may cause psychological harm to the victim.
[418] See *Kruger v Commonwealth ( Stolen Generations)* (1997) 190 CLR 1, 61 ( Dawson J) '[t]hose who famed the Australian Constitution accepted the view that individual rights that individual rights were on the whole best left to the protection of the common law and the supremacy of the Parliament'

support this point.[419] First, the architects of the *Constitution* were primarily concerned with building a federation and not protecting rights.[420] Second, the architects of the *Constitution* firmly believed in the common law as a vehicle of rights protection.[421] This is clearly evinced by the express rejection of an American style due process clause in the *Constitution*.[422] Third, at the time of federation, there was much intellectual animosity toward fundamental human rights led by the work of Bentham.[423]

The right to a fair trial was held to be a necessary implication from the vesting of an independent and impartial judiciary in Chapter III of the *Constitution.* However, it is difficult to reconcile any 'constitutional right to a fair trial' with the interpretation of s 73 and the absence of other key fair trial rights. These examples highlight that the constitutional protection of the right to a fair trial under the *Constitution* is not protected in the full sense of the term.[424]

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[419] See generally, Hillary Charelsworth, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195.
[420] Clarke et al, above n 330, 1125-1128
[421] See *Theophanous v Herald and Weekly Times Limited* (2994) 182 CLR 104, 141 (Brennan J); *Cheatle v The Queen* (1993) 177 CLR 541, 552 citied in Zines, *The High Court and the Constitution*, above n 315, 567.
[422] Clarke et al, above n 330, 1195 [10.5.2] citing Hillary Charlesworth, 'Individual Rights and the Australian High Court' (1986) 4 *Law in Context* 52, 186; See also Zines, 'A judicially created bill of rights?' above n 341, 183. Who argues 'to limit governmental power by reference to fundamental principles of the common law has, at best, a tenuous link with anything in the Constitution and resembles more notions of "higher law" or " natural law", which depend very much on personal values'.
[423] Clarke et al, above n 330,1195[10.1.6]
[424] See *Frugtniet v Victoria and others* (1997) 148 ALR 320, 325 ( Kirby J)

## V The Admissibility of Expert Evidence And The Objectives of the Criminal Process

### A *Objectives of the Criminal Process- Factual Accuracy of the Verdict*

The preceding analysis has focused on the strength of the protections given to the right to a fair trial as a human right. As noted above, this is important as breaches of fair trial standards are wrong *per se* in light of the position of the criminal trial as regulating the exercise of the power by the state.[425] This wrong, is divorced from considerations of whether the verdict of the trial is factually correct, as any breach of fair trial standards detracts the rights all citizens have for liberty and equal treatment.[426]

However, as alluded to in the analysis of s 73 of the *Constitution,* this presents only one part of the fair trial. In *Stuart,* the accused was denied a fair trial but not because of a breach of his due process rights. Indeed his trial was, 'a trial according to law'.[427] Simply, his trial was unfair because he was convicted despite his innocence.

As Professor Dennis explains, the right to a fair trial has both a truth seeking and right protecting function. To be conferred legitimacy, the verdict of the trial must 'carry moral authority' though protecting rights and also be factually correct.[428] This is because the right not to be wrongly convicted is 'even more basic than the vaunted right to a fair trial'.[429] The fact that rights take precedence over factual accuracy in

[425] Ho, above n 219, 253-55; *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 395 [83] (Hayne J) citing *Tuckiar v The King* (1934) 52 CLR 335, 346.
[426] Ian Dennis, 'The Human Rights Act and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 333, 346; See also *Assistant Commissioner Cordon v Pompano Pty Ltd* (2013) 295 ALR 638, 688 [186] (Gageler J).
[427] *Police v Sherlock* (2009)103 SASR 147, 165 (Doyle CJ).
[428] Dennis, above n 426, 349; Gary Edmond and Andrew Roberts, 'Procedural Fairness , the Criminal Trial and Forensic Science and Medicine' (2011) 33 *Sydney Law Review* 359,364.
[429] Paul Roberts and Jill Hunter, The Human Rights Revolution in Criminal Evidence and Procedure' in Paul Roberts and Jill Hunter (eds) *Criminal Evidence and Human Rights* (Hart Publishing, 2012) 13; It is recognised that the acquittal of guilty persons also threatens the right to a fair trial. However, this paper proceeds on the basis that the conviction of innocent persons is more serious and presents a greater danger to the administration of justice See Ashworth and Redmayne, above n 41, 24.

some cases simply illustrates the fact that sometimes, rights have a greater value than the truth.[430]

The relationship between a factually accurate verdict and the right to a fair trial was best expressed by Gaudron J in *Dietrich* where her Honour held: 'A trial is not necessarily unfair because it is less than perfect, but it is unfair if it involves a risk of the accused being improperly convicted.'[431] Therefore, the proper purpose for the criminal trial is to determine whether the accused is criminally responsible.[432]

However, certain practices limit the factual accuracy of the verdict. As Nobels and Schiff note, the truth seeking function of the criminal trial

> is its strength , in terms of the law's claim to legitimacy, and a weakness , as a source of endless critique on the manner in which trial falls below science or even journalism as a method for establishing truth.[433]

The remainder of this paper considers the critique of the criminal trial and its ability to determine the truth. It will be argued that as the criminal trial is directed toward achieving a factually accurate verdict, the right to a fair trial is lost where the admission of certain evidence detracts from this goal. This point will be illustrated through an analysis of expert evidence in criminal trials.[434]

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[430] Paul Roberts, 'Renegotiating forensic cultures: Between law, science and criminal justice' (2013) 44 *Studies in History and Philosophy of Biological and Biomedical Sciences* 47, 57.
[431] *Dietrich v The Queen* (1992) 177 CLR 292, 365, 325 (Brennan J).
[432] *Jago v District Court (NSW)* (1989) 168 CLR 23, 47 (Brennan J) 'The purpose of criminal proceedings, generally, speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment'; *Tehan v United States* 382 US 406, 416 (Stewart J) (1966)' The basic purpose of a trial is the determination of truth' G Davies, 'Exclusion of Evidence illegally or improperly obtained' (2002) 76 *Australian Law Journal* 170,172; Edmond and Roberts, above n 428, 362-4; Julius Stone and W A N Wells , *Evidence: Its History and Policies* (Butterworths, 1991) 59 Where it is noted that evidence seeks only 'approximate rather than absolute truth'.
[433] Richard Nobels and David Schiff, 'Theorising the Criminal Trial and Criminal Appeal: Finality, Truth and Rights' in Anthony Duff et all (eds) *The Trial on Trial* (Hart Publishing, 2006) vol 2 243-4.
[434] It should also be noted that while fair trial principles are manifest in the civil field, considerations in relation to admissibility of expert evidence do not apply with the same force to such claims. See

First, this chapter discusses the important contributions that scientific evidence provides to the administration of justice.[435] Thereafter, it argues that the law governing the admissibility of expert evidence in criminal trials must be directed to be consistent with the goal of the criminal process in seeking a factually accurate verdict.[436] In order to achieve the goal of factual accuracy, expert evidence which is unreliable or of unknown reliability should not be admitted.[437] This is because the specific nature of this evidence makes it difficult for the finder of fact to be made fully aware of its shortcomings. Equally, where reliable expert opinion exists to explain the unreliability of evidence, it is important that such expert evidence be admitted so as to avoid miscarriages of justice. This reflects the most important characteristic of the fair trial which is its ability to adapt and evolve in line with societal and technological advancements.[438]

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Gary Edmond, 'Bacon's Chickens? Re-thinking Law and Science (and Incriminating Expert Opinion Evidence) in Response to Empirical Evidence and Legal Principle' in Justin Gleeson and Ruth Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 150; Deirdre Dwyer, '(Why) are Civil and Criminal Expert Evidence Different?' (2007) 43 *Tulsa Law Review* 381.

[435] The term 'science' is defined as 'the systematic study of the nature and behaviour of the material and physical universe, based on observation, experiment, and measurement, often leading to the formulation of Law s to describe the results of such procedures in general terms' *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009) 1476. Thus in this paper the term 'scientific evidence' will be used to describe findings from the process of science. The term 'expert scientific evidence' refers broadly 'to evidence concerning matters such as ballistics, fingerprinting and blood analysis' Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practise, Procedure and Advocacy* ( Lawbook Co, 5th ed, 2013) 1075 [ 12.5.01]

[436] Edmond and Roberts, above n 428, 363; Gary Edmond, Specialised Knowledge, the Exclusionary Discretions and Reliability (2008) 31 (1) *University of New South Wales Law Journal* 1, 46-7.

[437] Edmond and Roberts, above n 428, 362; Gary Edmond, 'Pathological Science? Demonstrable Reliability and Expert Forensic Pathology Evidence' (Working Paper No 6, University of New South Wales, 2008) 1-2.

[438] *McKinney v The Queen* (1990) 171 CLR 468, 478.' It is obvious that the content of the requirement of fairness may vary with changed social conditions, including developments in technology' (Mason CJ, Deane J, Gaudron J, McHugh J)

### B *Scientific research as informing the fair trial*

The law has adopted practices which seek to ascertain the truth and it is only natural that reliable scientific knowledge supports this objective.[439] As will be seen throughout this discussion, the legal system relies heavily on the sciences, in particular forensic sciences, for the determination of guilt or innocence.[440]

For instance, it has been suggested that advances in neuroscience may have an impact on, inter alia, the law relating to criminal offences with an element of intent (or *mens rea*), provocation as a defence,[441] strict liability offences, and bias in decision making by judges or juries.[442] This potential is however, contingent upon the willingness of courts to remain receptive to empirical evidence in informing and directing the right to a fair trial. This is clear in contrasting the approach of the High Court of Australia and the Supreme Court of New Jersey in two recent cases.

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[439] Roberts, 'Renegotiating forensic cultures' above n 430, 53; Cf Susan Haack, 'Irreconcilable Differences? The Troubled Marriage of Science and the Law' (2009) 72 *Law and Contemporary Problems* 1,7 who notes the notes the 'irreconcilable differences' stemming from the inherently divergent goals of the law and science. Essentially, the learned author argues that while a scientist must be exhaustive in search of material to test a hypothesis, the lawyer need only persuade a tribunal to the relevant standard of proof; at 12-3; See also Anita K.Y Wonder, 'Science and Law, a Marriage of Opposites' (1989) 29 *Journal of the Forensic Science Society* 75.

[440] Paul Roberts, 'Renegotiating forensic cultures' above n 430, 50 where the author notes that the Forensic Science Service in the UK receives 130,000 referrals from police investigators.

[441] See generally Thomas Crofts and Arlie Loughnan, Provocation: The good, the bad and the ugly (2013) 37 *Criminal Law Journal* 23.

[442] Erin Ann O'Hara, 'How neuroscience might advance the law' (2004) 359 *Philosophical Transactions of the Royal Society of Biological Sciences* 1677, 1680-82; See Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions' (2010) 94 *Minnesota Law Review* 1997, 2021-27 for a succinct overview of the commentary in this field; See also Fredrick Schauer, 'Can Bad Science be Good Evidence? Neuroscience, Lie Detection and Beyond' (2010) 95 *Cornell Law Review* 1191. For an overview of the advances in neuroscience which have increased the accuracy and reliability of lie detection. It is argued that the admissibility or integration of neurological research into the law is a legal question and not contingent on the reliability of the conclusions in this field of science. There is however, much debate in this area. See, eg, Michael S Pardo and 'Dennis Patterson, Philosophical Foundations of Law and Neuroscience' [2010] *University of Illinois Law Review* 1211.

1 *Dupas v The Queen*

First, in *Dupas v The Queen,*[443] the High Court had to decide whether pre-trial publicity tainted the tribunal of fact, so as to deny the accused a fair trial.[444] The appellant, Peter Dupas,[445] had been convicted for two murders prior to the trial. These murders were publicised in over 120 newspaper articles, 7 internet sites and 4 books.[446] He argued that adverse pre-trial publicity conferred an 'irremediable prejudice' on the jury which precluded him from a fair trial.[447] In a unanimous judgement, the Court emphasised its power to order a permanent stay of proceedings on the ground of an 'irremediable prejudice to a fair trial'.[448] The Court held that the 'public interest in the administration of justice', and the continuance of public confidence in the judiciary, were key considerations in the determination of an abuse of process.[449] It was held that the directions given by the trial judge to the jury in this case balanced any unfairness arising from pre-trial publicity.[450]

On its face, the Court's reasoning is uncontroversial and consistent with the characteristics of the right to a fair trial, as outlined above. The public interest of an accused person with significant media exposure being brought to trial was considered, and it was concluded that allowing the trial to proceed was fair.[451] The fair trial must balance the rights of all parties involved. It necessitates, among other

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[443] *Dupas v The Queen* (2010) 241 CLR 237.
[444] Ibid 241.
[445] Peter Dupas is an infamous serial murderer and rapist. He has been convicted of the murders of Nicole Amanda Patterson, Margaret Josephine Maher and Mersina Halvagis. After this case was heard in the High Court, he appealed the conviction for the murder of Mersia Havagis on the grounds that, among other things, the trial judge should not have admitted the identification evidence against him. The Victorian Court of Appeal dismissed the appeal. See *Dupas v The Queen* (2012) 218 A Crim R 507; He is also suspected of the murder of 95 year old Kathleen Downes See Anthony Dowsley, ' Serial killer Peter Dupas could face another murder charge over stabbing death of Kathleen Downes', *Herald Sun* ( Melbourne ), July 30 2013.
[446] See *R v Dupas (No 3)* (2009) 198 A Crim R 454, 473 (Ashley JA).
[447] *Dupas v The Queen* (2010) 241 CLR 237, 241 [2]*; Tuckiar v The King* (1934) 52 CLR 355 is still the only case where a conviction has been quashed by reason of pre-trial publicity.
[448] *Dupas v The Queen* (2010) 241 CLR 237, 245-6 [18-9].
[449] *Dupas v The Queen* (2010) 241 CLR 237, 244 citing *Williams v Spautz* (1992) 174 CLR 509, 520.
[450] *Dupas v The Queen* (2010) 241 CLR 237, 248-50.
[451] Ibid 251 [37].

things, consideration of the 'social imperative'[452] of bringing to trial those who are accused of a criminal offence to trial.[453]

However, the High Court did not make clear why jury directions were able to cure the adverse publicity.[454] This is despite the fact that whether the publicity had an effect on the jury and, whether the directions mitigated its effect were the key issues before the court.[455]

Indeed, empirical research has suggested that jury directions are ineffective in curing unfairness arising from pre-trial publicity.[456] Further, jurors are likely to be most prejudiced when subjected to both television and print media as was the case in *Dupas*.[457] In an analysis of 44 relevant studies it was determined that such publicity had a negative effect on the verdict at trial.[458] Also, these issues sit on top of deficiencies in relation to jury directions such as the fact that juries often do not follow such directions.[459]

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[452] *R v Dupas* (No 3) [2009] VSCA 202, [63] (Nettle JA).

[453] See *R v Dupas (No 3)* (2009) 198 A Crim R 454, 519 [251] Where in the Victorian Court of Appeal, Weinberg JA remarked that if excessive pre-trial publicity where to necessitate a stay in all cases, such a stay would have to be granted to Jack the Ripper, Charles Manson or Osama bin Laden; See also *R v Glennon* (1992) 173 CLR 592, 598-99 (Mason CJ and Toohey J)

[454] Bagaric, Alexander and Ebejer above n 37, 68; As to the issues in relation to jury directions in Victoria See generally Criminal Law Review, *Jury Direction: A New Approach* (2013); *Jury Directions Act 2013* (Vic).

[455] Bagaric , Alexander and Ebejer, above n 37, 68.

[456] See Lorraine Hope, Amina Memon and Peter McGeorge, Understanding Pre-trial Publicity (2004) 10 (2) *Journal of Applied Psychology : Applied* 111, 111 where the authors note that ' [a]lthough a small number of studies report null effects, over 35 years of research …has produced a considerable body of literature that demonstrates a prejudicial impact of PTP [ pre-trial publicity] on juror decision making'

[457] James Ogloff and Neil Vidmar, The impact of pre-trialpublicity on jurors (1994) 18 (5) *Law and Behavior* 507 cited in Bagaric , Alexander and Ebejer, above n 37, 69

[458] Nancy Mehrkens Stedlay et al The Effects of Pre-trial Publicity on Juror Verdicts: A Meta-Analytic Review (1999) 23 (2) *Law and Human Behaviour* 219, 228-9

[459] See *Huruna v The Queen* [2013] WASCA 170 (1 August 2013) where the jury foreperson, a law student, communicated with a State solicitor in relation to issues at trial in disregard of jury directions. See also Roxanne Burd and Jacueline Horan, 'Protecting the right to a fair trial in the 21st Century- has trial by jury been caught in the world wide web' (2012) 36 *Criminal Law Journal* 103.112-17; See also Mark Weinberg, 'The Criminal Law- A 'Mildly Vituperative Critique'' (2011) 35 *Melbourne University Law Review* 1177, 1191-5 where his Honour notes the practical difficulties in relation to jury directions. This includes the fact that directions may take hours and that they are often 'couched in language that almost defies understanding': at 1193; Chief Justice Marilyn Warren, 'Making it Easier for Juries to be the Deciders of Fact' (Paper presented at the AIJA Criminal Justice in Australia

This body of research would have assisted the court in the determination of why, in the circumstances of *Dupas*, jury directions were able to cure any unfairness.[460] In this regard, Bagaric has argued that 'the irreducible aspect is that human cognition is a science' and evidence should have been adduced to determine the effect of the publicity on the accuracy of the verdict. [461]

The intention of this point is not to criticise the Court. Indeed, the High Court was under no obligation to consider such empirical findings.[462] Further, it is likely that in any event, fairness necessitated that the interests of society take precedence over the right of Peter Dupas to an impartial tribunal. The aim of this analysis is simply to highlight the potential of science to explain and inform the direction of the law in relation to the fair trial.[463]

### 2 *State v Henderson*

The Supreme Court of New Jersey in the United States has recently taken advantage of this potential in its response to 'hundreds of scientific studies…which cast doubt on well settled law'.[464] In *State v Henderson,* [465] Henderson was charged with the murder of Rodney Harper. James Womble, who was intoxicated at the time,[466] heard the shooting while being held at gunpoint near where the shooting occurred. During

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and New Zealand – Issues and Challenges for Judicial Administration, Sydney, 8 September 2011) 1-5.

[460] Mirko Bagaric, 'Fair Trial and Prejudicial (Social) Media Comment- The Problem is not Social Media but the Existing Law' (2012) 36 *Criminal Law Journal* 333, 333.

[461] Bagaric, 'The Right to an Impartial Hearing', above n 214, 352.

[462] This is especially as there has been some controversy on the accuracy of such empirical findings. Among other things, the methodology of such studies have been criticised See Andreas Kapardis, *Psychology and Law: A Critical Introduction* (Cambridge University Press, 3rd, 2010) 169.

[463] See Stephen Gageler, Fact and Law (2008-2009) 11 *Newcastle Law Review* 1, 8-10 Where the author notes a number of High Court authorities which used extra-legal sources to guide their decision. These include; *Church of the New Faith v Commissioner of Pay- Roll Tax (Vic)* (1983) 154 CLR 120; *Secretary Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218; *Jaensch v Coffey* (1984) 155 CLR 549; See also *Winmar v Western Australia* (2007) 35 WAR 159 where the Supreme Court of Western Australia referred to numerous psychological materials in relation to eyewitness identification evidence.

[464] Chief Justice Stuart Rabner, 'Evaluating Eyewitness Identification Evidence in the 21st Century' (2012) 87 (5) *New York University Law Review* 1249, 1250.

[465] *State v Henderson* 27 A. 3d 872 (NJ, 2011).

[466] Ibid 882 He had ingested crack cocaine and alcohol.

investigation the police presented Womble with a number of photographs and Henderson was identified as the perpetrator. However, it was found that the police had encouraged him to do so. [467] The trial court had previously admitted Womble's identification evidence pursuant to the 'Manson/ Madison' test.[468] The Supreme Court remanded the case to the trial court to determine validity of this test 'in light of recent scientific and other evidence'.[469] After an exhaustive review of the scientific commentary, the Supreme Court determined that the 'Manson / Madison' test be altered.[470]

Importantly, the Court took into consideration the fact that any changes to the status quo must

> be flexible enough to serve twin aims: to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the State's interest in presenting critical evidence at trial.[471]

The Court outlined a non-exhaustive list of considerations in relation to 'estimator variables' and 'system variables' which should be taken into account in determining the admissibility of eyewitness evidence.[472] While noting that courts should not be constrained by these guidelines, it was made clear that any potential changes to police investigation or admissibility of such evidence must be drawn from 'reliable

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[467] Ibid 881 Womble subsequently testified that the detective was ''nudging' him to choose the defendant's photo, and that there was pressure to make a choice'.

[468] In *Manson v Brathwaite* 432 US 98 (1977) the US Supreme Court expressed a two stage test in relation to assessing eyewitness evidence. This was affirmed in New Jersey in *State v Madison* 536 A.2d 254 (NJ, 1988) See Chief Justice Rabner, above n 464, 1253-4.

[469] *State v Henderson* 27 A. 3d 872, 884 (NJ, 2011).

[470] Ibid 878 The Court noted that the '*Manson/ Madison* [test] does not adequately meet its stated goals: it does not provide a sufficient measure of reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony': at 918.

[471] *State v Henderson* 27 A. 3d 872, 922 (NJ, 2011).

[472] Ibid 920-2 The court expressed a list of 9 'system variables' and 13 estimator variables which should be taken into account. System variables refer to things that can be controlled such as line-up processes. Estimator variables refer to things that beyond control such as when, where and the conditions under which the witness saw the incident; at 895; See Gary L Wells 'Applied Eyewitness-Testimony Research: System variables and estimator variables (1987) 36 (12) *Journal of Personality and Social Psychology* 1546. As to system and estimator variables generally.

scientific evidence'.[473] The Court held that this flexibility would secure the right to a fair trial for the accused and also assist the prosecution of criminals.[474] Thus in informing the right to a fair trial, the court considered the scientific evidence and balanced the interests of society in the conviction of criminals with practical considerations of the criminal justice system.

While this case can be distinguished from *Dupas* as the scientific evidence in relation to the unreliability of eyewitness evidence is more established than that in relation to jury bias,[475] it illustrates that scientific evidence can guide the right to a fair trial. As *Henderson* demonstrates, scientific evidence can be integrated into the criminal justice system. A balance with competing interests and the practicalities of the justice system to direct the development of the right to a fair trial is indeed possible.

### C *Expert Evidence in Criminal Trials- An Overview*

#### 1 *Admissibility of expert evidence*

##### *(a) The Opinion Rule*

The ability for scientific evidence to inform and direct the fair trial is contingent however, on the means through which such scientific evidence is brought to the attention of the court. In our adversarial system, facts are ascertained by the tribunal of fact through two broad ways. Facts may come into the court by way of testimony or by way of real evidence which the tribunal of fact can experience themselves. In any case, it will be necessary for a witness to testify in order to bring any real evidence into issue.[476] A lay witness cannot however, express their evidence as an

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[473] *State v Henderson* 27 A. 3d 872, 922 (NJ, 2011).
[474] Ibid 928.
[475] See Kapardis, above n 462, 28-9; For example, in 1995 there were more than 2000 academic publications in psychology relating to the reliability of eyewitness evidence. This is as eyewitness evidence involves numerous psychological and cognitive processes.
[476] Ligertwood and Edmond, *Australian Evidence,* above n 205, 575.

opinion (the 'opinion rule').[477] To do so would be to subvert the role of the tribunal of fact in the determination of facts or inferences.[478] However, this cannot be 'a strict or hard and fast rule without…impairing the judicial process'.[479] Accordingly, a witness may express an opinion as to their observations.[480] There are however, cases where expertise is required to make certain observations such as the probability of a given DNA sample matching another.[481] In other words, an opinion is admissible if it 'so far partakes of the nature of science as to require a course of previous habit or study in order to make knowledge of it'.[482]

*(b) Rules of admissibility*

In order for such an opinion to be admissible, a number of formal rules must be satisfied.[483] First, as the expert opinion must 'be able to assist' the tribunal of fact in the determination of the facts in issue (the 'common knowledge rule').[484] This rule seeks to preclude evidence which is regular and familiar to the jury.[485] Second, the evidence must constitute 'part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience' [486] (the 'field of expertise rule'). Third, the witness must be an expert

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[477] See *Evidence Act 1995* (Cth) s 76; It is recognized that separation between fact and opinions is not always clear See *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 602 [31].
[478] Ligertwood and Edmond, *Australian Evidence,* above n 205, 603.
[479] *Sherrard v Jacob* [1965] NI 151, 156 (Lord Mac Dermott LCJ) citied in *Grubisic v Western Australia* (2011) A Crim R 457, 466-7.
[480] *Sherrard v Jacob* [1965] NI 151, 156 (Lord Mac Dermott LCJ) where a non-exhaustive list of lay opinion evidence that are admissible. These areas include; 1) identification of handwriting , persons and things, 2) apparent age 3) the bodily plight or condition of a person including death or illness 4) the emotional state of a person 5) the condition of things 6) questions of value 7) estimates of speed or distance; Ligertwood and Edmond, *Australian Evidence,* above n 205, 605-6; See Freckelton and Selby, above n 434, 30 [ 2.5.10].
[481] See generally Freckelton and Selby, above n 434, 1135-97 as to DNA evidence.
[482] *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon J) This applies to the *Evidence Act 1995* (Cth) s 79.
[483] See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 743-4 ( Heydon JA).
[484] *Murphy v The Queen* (1989) 167 CLR 94, 110 (Mason and Toohey JJ) 126 (Deane J), 130 (Dawson J); *R v Truner* [1975] QB 834, 841 ' An experts opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the judge or jury'.
[485] Heydon , above n 73, 956 [29050].
[486] *R v Bonython* (1984) 38 SASR 45, 46-7 (King CJ).

and not a 'quack, a charlatan or an enthusiastic amateur'[487] (the 'expertise rule'). The expertise of the witness need not necessarily derive from study or training but may be a result of practical experience.[488] Fourth, the testimony of the expert must be based on admissible evidence (the basis rule).[489]

The provisions of the *Evidence Act* are akin to the common law rules of admissibility.[490] First, the expert must have 'specialised knowledge'.[491] The opinion of the expert must then be based 'wholly or substantially' on such specialised knowledge.[492]

2 *Admissibility and reliability*

As will be explained below, the continued significance of the right to a fair trial requires the underlying basis of the expert's testimony be reliable. The term 'reliable' has a different meaning in a legal sense than it is used in a scientific context.[493] In essence, a scientific technique is reliable if it has been subject to empirical testing.[494] In other words, '[t]he more rigorous the testing, the more likely any results will be trustworthy'.[495]

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[487] *R v Robb* (1991) 93 Cr App R 161, 166.

[488] *Weal v Bottom* (1966) 40 ALJR 436.

[489] *Dasreef v Hawchar* (2011) 243 CLR 588, 605 This pertains to the admissibility of the evidence and not its weight; But see Gary Edmond et al, 'Admissibility Compared: The Reception of Incriminating Expert Evidence (I.E Forensic Science) in Four Adversarial Jurisdictions' (2013) 3 *University of Denver Criminal Law Review* 31, 79; Gary Edmond, 'Actual 'Innocents? Legal limitations and their implications for forensic science and medicine' (2011) 43 *Australian Journal of Forensic Sciences* 177,182-3 where it has been argued that in practise, the basis rule is often glossed over.

[490] *Evidence Act 1995* (Cth) ss 60, 76, 79, 80, 177.

[491] Ibid s 79(1).

[492] Ibid.

[493] Emma Cunliffee, Independence, reliability and expert testimony in criminal trials (2013) 45(3) Australian Journal of Forensic Sciences 284, 286-7. The legal use of the term reliability is akin to the scientific use of the term 'validity' In sum, a scientific test is reliable if ; a) it can achieve what it asserts it can achieve 2) the ability to apply the techniques 3) the extent to which such techniques have been applied properly in the specific circumstances; See also Ray Corsini, *The Dictionary of Psychology* (Brunner-Routeledge, 2002) 1044 the validity of a test is 'the ability of a test to measure what it is supposed to measure'

[494] Edmond, 'Pathological Science?' above n 437, 31-42.

[495] Ibid 43-5 where Professor Edmond outlines numerous 'indicia of reliability'.

As noted above, in Australia, the issue of whether novel scientific evidence is admissible turns on whether such evidence 'is sufficiently organised or recognised as a reliable body of knowledge or experience'.[496] Thus if novel scientific or expert evidence is to be admitted, the court will determine whether the community of experts in that field are of the view that such evidence is reliable.[497] Although this requires a minimum standard of reliability, courts have had difficulty with this standard.[498]

Australian courts have shown a general reluctance to expressly incorporate reliability into admissibility standards.[499] The concept of reliability is also absent from the words of s 79 of the *Evidence Act*. Thus in *R v Tang*,[500] Spigelman CJ held that in relation to the requirement for 'specialised knowledge' under the *Evidence Act 1995* (NSW), it is the words of the Act that require attention not 'extraneous ideas of reliability'.[501]

The Australian position reflects the approach adopted in *Frye v United States.*[502] In that case, the Supreme Court of the District of Columbia had to determine the admissibility of the results of an early polygraph machine.[503] It was held that the admissibility of novel scientific evidence is contingent on whether that evidence is 'sufficiently established to have gained general acceptance in the particular field in

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[496] *R v Bonython* (1984) 15 A Crim R 364, 366 (King CJ); *Casley – Smith v Fs Evans & Sons Pty Ltd and District Council of Sterling (No 1)* (1988) 49 SASR 314 , 328 (OlssonJ); *R v Harris (No3)* [1990] VR 310, 318 (Ormiston J); See Heydon, above n 73, 962

[497] *Casley-Smith v F S Evans & Sons Pty Ltd and District Council of Sterling (No1)* (1988) 49 SASR 314, 328-9 (OlssonJ) citied in Freckelton and Selby, above n 434, 63 ; *Clark v Ryan* (1960) 103 CLR 486, 491 ( Dixon J)

[498] Ligertwood and Edmond, *Australian Evidence,* above n 205, 615-17.

[499] See *HG v The Queen* (1999) 197 CLR 414, 427 ( Gleeson CJ) ; *R v McIntyre* [2001] NSWSC 311 (11 April 2001), [14] (Bell J); *Amaba Pty Ltd v Booth* [2010] NSWCA 344( 10 December 2010) [57] (Basten JA)

[500] *R v Tang* (2006) 161 A Crim R 377

[501] *R v Tang* (2006) 161 A Crim R 377, 409 [137]; See also Australian Law Reform Commission , *Uniform Evidence Law ,* Report No 102 (2005) 290

[502] *Frye v United* States 293 F 1013 (DC Cir, 1923); Freckelton and Selby, above n 434, 66 [2.10.180]; Heydon, above n 73, 962; See also *R v Parker* [1912] VR 152, 154-5.

[503] *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579, 585 (Blackmun J) (1993); See James Edelman, Admissibility of polygraph (lie detector) examinations (2005) 29 *Criminal Law Journal* 21 as to the admissibility of 'lie detector' evidence in Australia.

which it belongs' (the 'general acceptance test').[504] Notably, this approach does not specifically necessitate that such evidence be reliable and its focus is on the extent to which such a technique is accepted within the relevant community of scientists.[505]

In contrast to this position is the prevailing United States approach expressed in *Daubert v Merell Dow Pharmaceuticals*.[506] In that case, the United States Supreme Court held that that in order for scientific opinion evidence be of assistance to the finder of fact it must follow that such evidence be grounded upon 'a reliable basis in the knowledge and experience' of the relevant field of science.[507] Thus the test for admissibility is twofold. First, the evidence must be relevant and second, it must be reliable.[508] The Court then expressed a list of non-exhaustive 'general observations' to consider in determining reliability.[509] Subsequent cases have expanded the scope of *Daubert* which initially applied only to scientific evidence.[510] Indeed, the requirement for reliability has been given statutory force.[511]

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504 *Frye v United* States 293 F 1013, 1014 (DC Cir, 1923) citied in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579, 586 (Blackmun J) (1993).
505 See Freckelton and Selby, above n 434, 64-6; Heydon, above n 73, 962-3.
506 *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993) This approach has been accepted in 29 states and the federal court system. It is often called the 'reliability- validity' model; Gary Edmond et al, 'Admissibility Compared' above n 489, 38-9.
507 *Daubert v Merrell Dow Pharmaceuticals* 509 US 579, 592 (Blackmun J) (1993).
508 See Gary Edmond et al, 'Admissibility Compared' above n 489, 39-40;
509 *Daubert v Merrell Dow Pharmaceuticals* 509 US 579, 593-5 (Blackmun J) (1993) These include; inquiries into whether it can be tested, if it has been peer reviewed, error rates and if it has been generally accepted by the relevant community of experts.
510 See *General Electric Co v Joiner* 522 US 136 (1997); *Kumho Tire Co Ltd v Carmichael* 526 US 137 (1999) where the principles in *Daubert* were extended to apply to other forms of expert testimony such as engineers.; See also *United States v Havvard* 260 F.3d 597 (7th Cir, 2001); *United States v Plaza* F Supp 2d 549 (ED PA, 2002); Megan Dillhoff, 'Science , Law and Truth: Defining the Scope of the *Daubert* Trilogy' (2011) 86 *Notre Dame Law Review* 1289, 1295-99
511 *Federal Rules of Evidence,* 28 USC App § 702 (2011) which provides that "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

### D *Admissibility of expert testimony and the goal of factual accuracy*

On the one hand, expert evidence often plays an important role in assisting the court in the determination of the facts in issue.[512] For example, expert opinion evidence is adduced to assist the court in establishing, amongst other things; causation in relation to an injury,[513] psychiatric or mental injuries,[514] memory,[515] a mental state,[516] dental impression or bite-mark evidence,[517] DNA evidence,[518] whether fingerprints match,[519] and in drug offences.[520]

On the other, it is critical that only expert evidence which is relevant and reliable be adduced in a way that can be understood by the tribunal of fact. To be consistent with the goal of the criminal trial in producing a factually accurate verdict, the right to a fair trial must operate to preclude the admission of scientific evidence the reliability of which is either questionable or unknown.[521] Equally, it is important that the right to a fair trial ensure that scientific evidence which is probative and reliable be admitted. It is argued that it is within this scope where the right to a fair trial must

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[512] *Chicago Colledge of Osteopathic Medicine v George A Fuller Co* 801 F 2d 908, 911 (7th Cir, 1986) Where Posner J has noted that 'in a great deal of complex litigation…expert testimony is a practical if not legal necessity' citied in Heydon, above n 73, 953.

[513] See, eg, *Seltsam Pty Ltd v Mc Guinness* (2000) 49 NSWLR 262. The evidence of medical professionals are the most common form of expert evidence adduced in trials. See Freckelton and Selby, above n 434, 567 [ 9.5.01]

[514] See, eg, *Tame v New South Wales; Annettes v Australian Stations Pty Ltd* (2002) 211 CLR 317. Expert evidence is important as a person seeking to recover damages for pure mental harm under the various *Civil Liability Acts* cannot do so unless such an injury is a 'recognised psychiatric illness' See *Civil Liability Act 2002*(WA) s 5S (1); *Civil Liability Act 2002* (NSW) s 31, *Civil Liability Act 2002* (Tas) s 33 ; *Wrongs Act 1958* (Vic) s 72 (1); *Civil Liability Act 1936* (SA) s 53 (2); *Civil Law (Wrongs) Act 2002* (ACT) , s 35 (1) .

[515] See, eg, *R v Dupas* (2010) 211 A Crim R 81, where Hollingworth J deemed expert opinion on the 'misinformation effect' admissible. This phenomenon occurs where a person unconsciously substitutes information they have seen on TV or newspapers for what they did in fact witness; at 83 [11]-[12]

[516] *Toohey v Metropolitan Police Commissioner* [1965] AC 595; See generally, Tim Rogers, 'Diagnostic Validity and Psychiatric Expert Testimony' (2004) 27 (3) *International Journal of Law and Psychiatry* 281.

[517] See, eg, *Chamberlian v The Queen (No 2)* (1984) 153 CLR 521.

[518] See, eg, *Aytugrul v The Queen* (2010) 205 A Crim R 157.

[519] See *R v O' Callaghan* [1976] VR 676; *R v Lawless* [1974] VR 398, 423 where the court noted '[i]t is a matter for expertise not possessed by the ordinary run of mankind to identify characteristics of fingerprints' citied in Freckelton and Selby, above n 434, 246.

[520] See, eg, *Kalbasi v State of Western Australia* [2013] WASCA 241 (17 October 2013).

[521] Edmond, 'Specialised Knowledge' above n 434, 46.

function to ensure a factually accurate verdict consistent with the goals of the criminal process.

1 *Exclusionary approach in relation to expert eyewitness evidence*

First, an illustration of the risk which excluding expert evidence poses to the fair trial can be built on the example of identification evidence. Indeed, as the Court in *Henderson* made clear, identification evidence is inherently unreliable. However, it also may be highly probative.

Judicial recognition of the various memory and cognitive processes which make eyewitness evidence unreliable is longstanding.[522] This apprehension is not unfounded. Roughly eighty per cent of all wrongful convictions in the US involve some form of identification evidence.[523] As Sotomayor J of the United States Supreme Court emphasised, '[s]tudy after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues'.[524] Indeed, there are numerous variables any of which can have a profound impact on the reliability of this evidence.[525]

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[522] See *R v Dwyer* [1925] 2 KB 799, 802-3 (Lord Hewart CJ); *Craig v The King* (1933) 49 CLR 429, 446 (Evatt and McTiernan JJ); *Davies v The Queen* (1937) 57 CLR 170, 181; See Heydon, above n 73, 64-5.

[523] See *Perry v New Hapmshire* 132 S.Ct 716, 738-9 (Ginsburg J) (2012); Brandon L Garrett, *Judging Innocence* (2008) 108 *Colombia Law Review* 55, 78. See also Andreas Kapardis, *Psychology and Law: A Critical Introduction* (Cambridge University Press, 3rd ed, 2010) 25-6; Gary L Wells and Elizabeth A Olson, Eyewitness Testimony (2003) 54 *Annual Review of Psychology* 277, 287 where the authors note that more than 75% of the people exonerated by DNA tests were convicted on erroneous eyewitness evidence;InnocenceProject,*EyewitnessMisidentification*InnocenceProject <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> .

[524] *Perry v New Hampshire* 132 S.Ct 716, 739 (2012).

[525] Kapardis, above n 462, 39-54 These include; 1) Passage of time 2)Frequency of the event 3) Duration of the event 4)Illumination 5)Type of event 6) whether a weapon was used 7) the degree of violence or trauma caused 8) the type of weapon used 8) the 'flashbulb memory' effect (which posits that the shock or suddenness of the occurrence of the event can effect memory); See especially, *State v Henderson* 27 A. 3d 872, 920-3 (NJ,2011) Other factors include the issues of cross racial identification *R v Dodd* (2002) 135 A Crim R 32.

In general, the veracity of such evidence at trial is not determined with assistance from expert scientific evidence.[526] There are a number of reasons for this.[527] For one, Australian (as well as American and Canadian) Courts have held that the administration of justice operates on certain assumptions, one of them being the fact that people are able to observe and recall things that they observe. [528] In other words, such evidence may be inadmissible by operation of the 'common knowledge rule'.[529]

Freckelton and Selby argue that because of this rule, the fragilities of eyewitness testimony are not commonly explained by way of expert testimony.[530] Rather, much faith is often placed on traditional adversarial safeguards such as cross examination.[531] Consequently, while it is open to defence counsel to adduce expert evidence to testify to the unreliability of eyewitness evidence; generally speaking, courts adhere to the 'basic assumption' that people can accurately recall what they observe. [532]

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[526] See Ian Freckelton, 'Medial Issues: eyewitness Identification law reform: the need for persistence' (2013) 20 *Journal of Law and Medicine* 503, 509. The author notes 'expert evidence on the risks of eyewitness identification either in the particular instance or more generally is very rarely led on behalf of accused persons.'; Gary Edmond et al, 'Admissibility Compared' above n 489, 79; Ian R Coyle, David Field and Glen Miller, The blindness of the eye-witness (2008) 82 *Australian Law Journal* 471,474-5.

[527] See, eg, *United States v Langan* 263 F 3d 613 (6th Cir, 2001), 621 citied in Freckelton and Selby, above n 434, 710; *State v Coley* 32 S.W. 3d 831, 833-4 (Tenn, 2000); Lee Steusser, Experts on Eyewitness Identification: I Just Don't See It (2005) 31 *Manitoba Law Journal* 543, 543 'In my view, admitting this type of expert evidence, with its associated costs, is not necessary to ensure a fair trial. Simply put, we ought to leave the educating of the jury on eyewitness identification to the trial process and not to the experts.'

[528] *R v Smith* [1987] VR 907, 910 (Vincent J); Ian Fraser etal, Is the Accuracy of Eyewitness Testimony Common Knowledge? (2013) 59 *Criminal Law Quarterly* 498, 504-6; See *United States v Langan* 263 F 3d 613 (6th Cir, 2001); Ian Freckelton and Selby, above n 434, 707-12.

[529] *R v Smith* [1987] VR 907, 910 (Vincent J) the court relies on 'assumptions that human beings are capable of observing events , of recalling what has been observed and repeating that which has been heard and that which has been seen' citied in Freckelton and Selby, above n 434, 708.

[530] Freckelton and Selby, above n 434, 703

[531] Ibid 708-9

[532] Ibid citing *R v Smith* (1990) 64 AJLR 588, 588 ( Deane, Dawson, Toohey, Gaudron and McHugh JJ) 'It is basic to the operation of the jury system that general questions as to the credit and reliability of the evidence of witnesses including the reliability of identification are, subject the special exemptions, matters which are within the range of human experience which must be determined by assessment of the jury'

The danger eyewitness testimony poses to the fair trial was expressed in *Festa v The Queen*.[533] First, eyewitnesses are often mistaken but honest and thereby appear as a credible witness to the jury.[534] As explained below, in part, the honestly of the witness negates the ability of fair trial safeguards to expose weaknesses in their evidence. Second, the very nature of this evidence, in connecting the accused to the crime results in a 'tendency for identification evidence to be given special weight, including in the mind of a jury'.[535]

This illustrates that there is a real risk of a wrongful conviction where the fallibility of eyewitness evidence is not brought to the attention of the jury.[536] The central quandary is that eyewitness evidence is a result of an interplay between numerous and complex memory and cognitive processes.[537] As a consequence, the unreliability of this evidence cannot be instinctively identified by a lay jury.[538] If courts have recognised the fallibility of memory and perception,[539] it is unclear why expert evidence which explains the accuracy of this evidence to a lay jury is not regularly admitted or encouraged.[540] And if the jury system is founded on the belief that the

[533] *Festa v The Queen* (2001) 208 CLR 593.
[534] Ibid 643-5.
[535] Ibid 644; *Winmar v Western Australia* (2007) 35 WAR 159, 163-4.
[536] *Winmar v Western Australia* (2007) 35 WAR 159, 163 (Wheeler, McLure, Pullin, Buss and Miller JJA) 'The basal proposition is that there have been significant miscarriages of justice where an honest and confident identification witness has given evidence which is not accurate, and that the potential for such a miscarriage is a risk in most or many identification cases.'; Indeed, the creation of the English Court of Criminal Appeal followed a wrongful conviction derived from mistaken identification evidence; Heydon, above n 73, 64-5.
[537] Kapardis, above n 462, 29-32.
[538] Tanja Rapus Benton et al, 'Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts' (2006) 20 (1) *Applied Cognitive Psychology* 115, 116 '[T]he results of over 25 years of research on this topic show that lay knowledge of eyewitness behavior is not only limited in scope but also highly inaccurate'; Suedabeh Walker, 'Drawing on *Daubert* : Bringing Reliability to the Forefront in the Admissibility of Eyewitnesses Identification Testimony' (2013) 62 *Emory Law Journal* 1204, 1222.
[539] See especially *Craig v The King* (1933) 49 CLR 429, 446; *Winmar v Western Australia* (2007) 35 WAR 159.
[540] Coyle, Field and Miller, above n 526, 497

jury is able to understand the evidence,[541] it follows that reliable expert evidence which highlights the weaknesses in eyewitness testimony should be admitted.[542]

In light of this, it has been argued that there is a need for courts to be more willing to admit expert testimony which highlights the unreliability of eyewitness evidence.[543] This is imperative as the concerns in relation to eyewitness evidence are only going to get more complex in light of the availability of social media through which witness are able to 'recognise' alleged criminals.[544] While expert evidence is not a cure all to the issues of misidentification, 'it cannot be anything other than an improvement to the current state of affairs'.[545] Further, these concerns are not limited to eyewitness evidence and also apply to other areas where expert testimony is needed to explain issues prone to misinterpretation by a jury.[546]

2 *Inclusionary Approach in relation to unreliable expert testimony*

Jeremy Bentham professed that 'to exclude evidence is to exclude justice'.[547] However, not all expert evidence should be admitted. This was recognised by Justice Hand who wrote that the use of expert witnesses precedes the exclusionary rule of

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[541] See Gail S Goodman and Annika Medlinder, 'Child Witnesses Research and Forensic Interviews of Yong Childern: A Review' (2007) 12 *Legal and Criminological Psychology* 1, 5 citied in Anne Cossins, 'Cross –Examination in Child Sexual assault Trials: Evidentiary safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 89.

[542] Coyle, Field and Miller, above n 526, 496-8

[543] Ibid 497; See also Comment, The province of the Jurist: Judicial Resistance to expert Testimony of Eyewitness as Institutional Rivalry (2013) 126 *Harvard Law Review* 2381; where it is argued at in the Unites States, the reluctance of courts to accept expert eye witness testimony can be explained by the protection courts give to the legal profession.

[544] *Strauss v Police* (2013) 115 SASR 90 where a witness alleged that she recognized the accused from a picture on Facebook. '[I]t takes little imagination to see how these advances in technology… greatly magnify the traditional problems associated with identification evidence'; at 96 Justice Peek explained the broad range of complex issues associated with 'Identification Evidence in the age of Facebook' at 96-104; *R v Alexander* [2013] 1 Cr App R 26 , [22]

[545] Coyle, Field and Miller, above n 526, 496.

[546] Annie Cossins and Jane Goodman-Delahunty, Misconceptions or expert evidence in child sexual assault trials: Enhancing justice and jurors' "common sense" (2013) 22 *Journal of Judicial Administration* 171; See also Terese Henning, Obtaining the best evidence from children and witnesses with cognitive impairments – " plus ca change " or prospectus new? (2013) 37 *Criminal Law Journal* 155; Anne Cossins, Time Out for *Longman*: Myths, Science and the Common law (2010) 34 *Melbourne University Law Review* 69.

[547] Paul Roberts, Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial in Paul Roberts and Jill Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford and Portland, 2012) 164

opinion evidence. [548] Although as the rules of opinion evidence developed, the law of expert evidence remained largely untouched.[549]

As noted above, the proper purpose for the court is to determine whether the accused is criminally responsible.[550] However, unlike the United States position, in Australia, there is no express requirement for the underlying basis of expert testimony to be reliable in order to be admissible. Essentially, the danger with this is that it provides a channel for unreliable and prejudicial (and in some cases irrelevant)[551] evidence to be brought before the court.[552] Therefore, the admission of unreliable expert evidence or expert evidence the reliability of which is unknown, into court dilutes the right to a fair trial.[553] The threat to the fair trial is intensified by the very nature of expert evidence. Justice Sophinka has expressed;

> Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves[554]

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[548] Learned Hand, 'Historical and Practical Considerations Regarding Expert Testimony' (1901) 15 *Harvard Law Review* 40, 50.
[549] Ibid.
[550] See above n 432.
[551] See *Smith v The Queen* (2001) 206 CLR 650, 655 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); Gary Edmond, 'Actual Innocents?' above n 489, 181-2.
[552] Gary Edmond and Mehra San Rouqe, The Cool Crucible: Forensic Science and the Frailty of the Criminal Trial (2012) 24 (1) *Current Issues in Criminal Justice* 51.
[553] Ibid 52.
[554] *R v. Mohan* (1994) 89 CCC (3d) 402,411 (Supreme Court of Canada). His Honour went on to emphasise the need for 'special scrutiny to determine whether it meets a basic threshold of reliability'; *R v Tran* (1990) 50 A Crim R 233, 242 (McInerney J); *Dupas v The Queen* (2012) 218 A Crim R 507, 588 [283].

*(a) Identification evidence- facial mapping*

To extend the focus on identification evidence, other more recent forms of such evidence such as 'facial mapping' are problematic.[555] Inherently, images emit an aura of objectivity which, as the case with eyewitness evidence, directly connects the accused to a crime.[556] Although as opposed to eyewitness evidence, facial mapping has not as yet been subject to significant scientific examination.[557]

Facial mapping is used to assist the jury in the determination of whether persons in photos or videos match the accused.[558] This field is not one which requires specialised knowledge or expertise as it has no scientific basis.[559] Accordingly, expert facial mapping testimony is generally inadmissible to the issue of identity.[560] That is; the expert cannot express a definite or direct conclusion such as, for example, whether 'the two men were, indeed, the same man'.[561]

Expert testimony is still able to enter the court if such experts are classed as 'ad hoc' experts.[562] Such experts are admitted on the basis that, for instance, repeated exposure to a video tape enables them to identify the person in that tape.[563] As a result, the testimony of the expert witness is admissible if modified so as to avoid

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555 Facial mapping must be contrasted with 'body mapping'. Expert body mapping evidence for example in walking gait analysis, has been held to be inadmissible *Morgan v The Queen* (2011) 215 A Crim R 33, 60-1 [144-6] (Hidden J).

556 Glenn Porter and Michael Kennedy, 'Photographic truth and evidence' (2012) 44(2) *Australian Journal of Forensic Sciences* 183, 185-6. Indeed, 'seeing is believing': at 186.

557 Xanthe Mallett and Martin P Evison, 'Forensic Facial Comparison: Issues of Admissibility in the development of Novel Analytical Technique' (2013) 58 (4) *Journal of Forensic Science* 859.

558 See Freckelton and Selby, above n 434, 1100; 'Facial Mapping' is a term describing a number of approaches. Primarily, facial mapping comprises of; photo- anthropometry, morphological analysis and photographic superimposition; *R v Tang* (2006) 161 A Crim R 377, 382-3 (Spigelman CJ); See especially, Gary Edmond et al, 'Law's Looking Glass: Expert Identification Evidence Derived from Photographic and Video Images' (2009) 20 (3) *Current Issues in Criminal Justice* 337, 338-341.

559 *R v Tang* (2006) 161 A Crim R 377, 410 (Spigelman CJ); *Murdoch v The Queen* (2007) 167 A Crim R 329, 356 facial mapping was not established as 'a technique that has a sufficient scientific basis to render results arrived at by that means a proper subject of expert evidence'

560 Freckelton and Selby, above n 434, 1106.

561 *Murdoch v The Queen* (2007) 167 A Crim R 329, 356.

562 Ligertwood and Edmond, *Australian Evidence,* above n 205, 632.

563 Ibid 632; *Caratti v The Queen* (2000) 22 WAR 527, 576-8 [340-7] (Malcolm CJ) The admission of ad hoc experts is also an issue that raises a number of serious concerns. It has been argued that 'recourse to ad hoc expertise should stop forthwith' See Gary Edmond and Mehra San Rouque, 'Quasi –justice: Ad hoc expertise and identification evidence' (2009) 33 *Criminal Law Journal* 8, 33.

direct identification.[564] Thus they may express their opinion as to how close samples compare but not definite conclusions as to their similarity.[565]

The hazard this poses to the fair trial is that 'facial mapping' is a field of which the reliability is unknown.[566] As Edmond et al note, where the identification is not based on a distinct trait (for instance a tattoo or scar) it is necessary to know the independence of distinct facial features among the population in order for this evidence to be probative.[567] However, there is no database containing such information.[568] There are also multitudes of other variables such as image quality and perspective which are able to significantly affect the probative value of the evidence.[569] As a result, the image is often of low utility.[570] Moreover, the approaches experts adopt are disparate and largely incoherent.[571]

Despite the frailties in the science of facial mapping, generally speaking, such ad hoc testimony is admissible if expressed indirectly.[572] While this has the appearance of fairness, the reality is that the limits of such statements are often pushed and the rule against expressing a conclusion does not offer much substantive protection.[573] And

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[564] Edmond and San Rouqe, 'The Cool Crucible', above n 552, 61.

[565] Ibid; See Simon A Cole, Splitting Hairs? Evaluating 'Split Testimony' as an Approach to the problem of Forensic Expert Evidence (2011) 33 *Sydney Law Review* 459, 463; This is known as 'split testimony'. The testimony cannot profess that the accused is the person in the photograph but that they have 'a high degree of similarity'.

[566] Edmond et al, 'Law's Looking Glass', above n 558, 361'there is no facial mapping 'field' or discipline , no specialised facial mapping *knowledge*, no university courses, no qualifications, no dedicated journals or textbooks, no attempt to standardise or regulate techniques, and no serious attempt to test or validate the range of methods used by its disparate practitioners' (emphasis in original).

[567] Ibid, 357-8.

[568] See Mallett and Evison, above n 557, 862-3.

[569] Glenn Porter, 'CCTV images as evidence' (2009) 41(1) *Australian Journal of Forensic Sciences* 11, 16-23.

[570] See Mallett and Evison, above n 557, 862.

[571] Edmond et al, 'Law's Looking Glass', above n 558, 350-359.

[572] *R v Tang* (2006) 161 A Crim R 377, 406 [120] (Spigelman CJ); *Murdoch v The Queen* (2007) 167 A Crim R 329, 356 [297] (Angel ACJ, Riley and Olsson JJ); *R v Dastagir* [2013] SASC 26 (27 February 2013) [63-4] (Nicholson J); *R v Atkins* [2009] EWCA Crim 1876, 128-9 [31] (Huges LJ).

[573] Edmond and San Rouqe, 'The Cool Crucible', above n 552, 61-2.

as with eyewitness evidence, the difficulties in this field are only going to grow in light of the increasing use of CCTV and other surveillance devices.[574]

These issues are not confined to eyewitness, other identification or psychological evidence but extend to most forms of forensic evidence. The National Research Council released an authoritative analysis on the foundations of the forensic sciences used in trials ('the NRC Report').[575] It was concluded that notwithstanding nuclear DNA analysis, there is no forensic method which has established a reliable technique able to match a particular sample to an individual.[576] Such issues are compounded by varying standards between the numerous disciplines and sub disciplines under the rubric of forensic science which poses a 'serious problem'.[577] These issues are not confined to the United States and are alive in Australia.[578]

Indeed, the fallibility of many forensic techniques in addition to the fact that in certain cases, the rules of admissibility fail to filter unreliable expert testimony has, arguably, allowed 'the expert to mix fact with fantasy and reliable science with speculation indiscriminately and without warning, notice or distinction'.[579]

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[574] Porter, above n 567, 11-13; Dean Wilson, Adam Sutton, 'Watched Over or Over-watched? Open Street CCTV in Australia' (2004) 37 (2) *Australian and New Zealand Journal of Criminology* 211; Sarah J McLean, Robert E. Worden and MoonSun Kim, 'Here's Looking at You: An Evaluation of Public CCTV Cameras and Their Effects on Crime and Disorder' (2013) 38(3) *Criminal Justice Review* 303.

[575] National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009); See also Ligertwood and Edmond, *Australian Evidence,* above n 205, 616-7; See generally Sangha, Roach and Moles, above n 408, 369-402.

[576] National Research Council, above n 575, 7.

[577] Ibid 8.

[578] Ligertwood and Edmond, *Australian Evidence,* above n 204, 616-7; Edmond, 'Bacon's Chickens?' above n 434, 143-4.

[579] David s Bell, Responsibility for misleading expert testimony (2004) 36 (2) *Australian Journal of Forensic Science* 47, 47.

### E *Limited Effectiveness of Fair Trial Safeguards*

The right to a fair trial is personified 'in rules of law and of practise designed to regulate the course of the trial'.[580] However, expert evidence poses specific challenges to the traditional adversarial safeguards of the fair trial.[581] As a result, the danger to the fair trial is amplified by the limited ability of such safeguards to overcome the unique challenges posed by expert evidence.

#### 1 *Cross examination, rebuttal witnesses and other adversarial safeguards*

##### *(a) Exclusionary approach in relation to eyewitness evidence*

Australian courts often place faith in adversarial safeguards such as the rules of evidence, cross examination and warnings to mitigate any dangers of misidentification.[582] In turn, the ability of such safeguards to expose weaknesses in the evidence is limited. For instance, jury directions are a consequence of the right to fair trial.[583] Thus it was held that the dangers of attributing too much weight to eyewitness evidence must be made known to the jury though a '*Domician'* warning.[584] Such a warning, buttressed by the authority of the court,[585] must be given in a manner highlighting the specific weakness of this 'inherently fragile'[586] evidence. Nonetheless, such directions are themselves limited in their effectiveness.[587] Indeed, the fact that about eighty per cent of wrongful convictions

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[580] *X7 v Australian Crime Commission* (2013) 298 ALR 570, 583 (French CJ and Crennan J) citing *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ).
[581] Edmond and Roberts, above n 428, 366.
[582] Freckelton and Selby, above n 434, 703; Coyle, Field and Miller, above n 526, 473; In general, this position has also been taken by courts in the United States see *Perry v New Hapmshire* 132 S.Ct 716, 721 (Ginsburg J) (2012).
[583] Australian Law Reform Commission, above n 501, 90 citing *Conway v The Queen* (2002) 209 CLR 203, 237 (Kirby J).
[584] *Domician v The Queen* (1992) 173 CLR 555, 561; *Evidence Act* 1995 (Cth) ss 116, 165(1) (b); See *Strauss v Police* (2013) 115 SASR 90, 134-7 (Peek J).
[585] *Domician v The Queen* (1992) 173 CLR 555, 561-2 'The jury must have the benefit of a direction which has the authority of the judge's office behind it'.
[586] *Alexander v The Queen* (1981) 145 CLR 395, 426 (Mason J).
[587] Australian Law Reform Commission, above n 501, 591-5.

stem from mistaken identification evidence testifies to the ineffectiveness of jury directions.[588] While the court retains the discretion to exclude evidence which is more prejudicial than probative,[589] this warning remains the principal safeguard in light of the fact that the judge must first warn him or herself in determining the admissibility of the evidence.[590]

Another fair trial safeguard is the right to cross examine.[591] Cross- examination has been described as 'the greatest legal engine ever invented for the discovery of the truth'[592]. However, its capacity to highlight weaknesses in eyewitness testimony is limited. Although dissenting in *Perry,* this point was forcefully made by Sotomayor J. Her Honour noted the 'corrosive effects of suggestion'[593] which may be unintentional, on the ultimate reliability of the evidence.[594] Indeed, it is often the case that eyewitnesses hold honest but mistaken beliefs as to the accuracy of their evidence limiting the ability of safeguards such as cross examination to determine its accuracy.[595]

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[588] Coyle, Field and Miller, above n 526, 472.

[589] As explained above, this is another key fair trial safeguard See above nn 189-195 and accompanying text.

[590] Oliver P Holdenson, Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification (1988) 16 *Melbourne University Law Review* 521, 522; See *Strauss v Police* (2013) 115 SASR 90, 134-5 (Peek J) This warning is also necessary in judge alone trials.

[591] *Perry v New Hapmshire* 132 S.Ct 716, 732 (2012); The ability to examine one's witnesses is a key element of the right to a fair trial. See *ICCPR* art 14 (3) (e); *ECHR* art 6 (3) (d); *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 25 (2) (g); *Human Rights Act 2004* (ACT) 22 (2) (g); *Evidence Act 1995* (Cth) s 27 'A party may question any witnesses, except as provided by this Act'; *United States Constitution* amend VI.

[592] A Best, *Wigmore on Evidence* (Aspen Publishers, 4th ed, 2009) vol 5, [1367] citied in Stone and Wells, above n 432, 636-7.

[593] *Perry v New Hapmshire* 132 S.Ct 716, 731 (2012)

[594] Ibid 731-2 citing *Moore v Illinois* 434 US 220 (1977)

[595] *Perry v New Hapmshire* 132 S.Ct 716, 732 (2012) where her Honour notes 'an eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability. It also impairs the defendant's ability to attack the eyewitness' credibility'; See also Tim Valentine and Katie Maras, 'The Effect of Cross –Examination on the Accuracy of Adult Eyewitness Testimony' (2011) 25 *Applied Cognitive Psychology* 554, 560 who suggest that cross examination has the potential to impugn the accuracy of the eyewitness evidence and mislead honest witnesses.

In one study, it was found that simulated jurors were mostly unaware of possible bias in circumstances where they are told that the accused is part of the line-up.[596] Such jurors were also not aware of possible bias where the line-up was conducted sequentially as opposed to simultaneously.[597] In other study, jurors in a simulated trial it were unresponsive to a number of factors which were established to be facts which affect the reliability of the eyewitness evidence.[598] Rather, the jury was influenced by the confidence of the witness.[599] The hazard with this is that 'studies conducted as early as 1895 have consistently shown that confidence is not, in fact necessarily an indication of accuracy'.[600]

The inability of safeguards such as cross examination and jury directions to expose weaknesses in the testimony of witnesses who have an honest but false belief in their evidence effectively dilutes the ability of the accused to examine the witnesses of the prosecution.[601] This strikes at the heart of the fair trial.

*(b) Inclusionary approach in relation to other incriminating expert testimony*

Similarly, traditional adversarial safeguards such as cross examination and rebuttal experts are generally ill equipped to deal with expert testimony which is unreliable or of unknown reliability.[602] For instance, following an analysis of the relevant empirical literature, it was concluded that cross examination has 'little or no ability'

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[596] Jennifer L Davenport et al, How Effective Are the Cross-Examination and Expert Testimony Safeguards? Jurors' Perceptions of the Suggestiveness and Fairness of Biased Line-up Procedures (2002) 87 (6) *Journal of Applied Psychology* 1042, 1052.
[597] Ibid.
[598] Brian L Cutler et al, Juror Decision Making in Eyewitness Identification Cases (1988) 12 *Law and Human Behaviour* 41, 53.
[599] Ibid.
[600] Fraser et al, above n 528, 503-4.
[601] *Perry v New Hapmshire* 132 S.Ct 716, 732 (2012).
[602] Gary Edmond, 'Actual Innocents?' above n 489, 182-90; *Daubert v Merell Dow Pharmaceuticals* 509 US 579, 596 (1993) 'vigorous cross-examination, presentation of contrary evidence…are the appropriate means of attacking shaky but admissible evidence'.

to determine the veracity of expert testimony.[603] This holds even in the case where the expert's examination in chief 'is fraught with weaknesses and the cross is well designed to expose those weaknesses'.[604] This is on top of the tendency of defence counsel to focus on procedural issues as opposed to the underlying reliability of the scientific evidence.[605]

The criminal trial is of course adversarial and it is always open to each party to call rebuttal witnesses or evidence.[606] Accordingly, while it is open to defence counsel to lead rebuttal witnesses, in practise this does not equate to fairness. The most apparent problem is the vast disparity between the resources available to the state and that of the defendant.[607] Thus in areas like latent fingerprint analysis,[608] the state often has sole access to organised experts with the necessary facilities.[609] These issues aside, there have been a number of studies which question the effect of rebuttal witnesses. It has been suggested that the presence of a rebuttal expert, 'does not effectively counter the testimony offered by the initial expert'.[610] Also, among other things,

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[603] Dawn McQuiston-Surrett and Michael Saks, 'The Testimony of Forensic Science Identification Science: What Experts Witnesses Say and What Fact finders Hear' (2009 33 *Law and Human Behaviour* 436, 439. It is also noted that whether the cross examination is scientifically sound 'had no effect on jurors judgement of the validity of the expert's evidence.'; See also J Cooper, E.A Bennett and H.L. Sukel , Complex scientific testimony: How do jurors make decisions? (1996) (20) *Law and Human Behaviour* 379.

[604] McQuiston-Surrett and Saks, above n 603, 439.

[605] Edmond and Roberts, above n 428, 366.

[606] *Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ).

[607] Edmond and Roberts, above n 428, 366; A. S. Goldstien, 'The State and the Accused: Balance of Advantage In Criminal Procedure' (1960) 69 *Yale Law Journal* 1149.

[608] Fingerprints are visible or may only be visible through the use of powders or other chemicals. The term 'latent fingerprint' refers to fingerprints of any type irrespective of whether they are visible or not. This is the type of fingerprint often left at crime scenes and most relevant to forensic sciences See Sir Anthony Campbell, *The Fingerprint Inquiry Report* (APS Group Scotland, 2011) vol 1, 45

[609] Gary Edmond, 'Actual Innocents?', above n 489, 185; Gary Edmond et al 'Admissibility Compared', above n 489, 104-5 (emphasis in original).

[610] Lora M. Levett and Margaret Bull Kovera, 'The Effectiveness of Opposing Expert Witnesses for Educating Jurors about Unreliable Expert Evidence' (2008) 32 *Law and Human Behaviour* 363, 364 citing Jennifer L Devenport and Brian L Cutler, 'Impact of Defence-Only and Opposing Eyewitness Experts on Juror Judgements' (2004) 28 (5) *Law and Human Behaviour* 569; Edith Greene, Cheryl Downey and Jane Goodman- Delahunty 'Juror Decisions about Damages in Employment Discrimination Cases' (1999) 17(1) *Behavioural Science and the Law* 107.

rebuttal experts may be ineffective in educating jurors on the strength of the scientific evidence.[611]

Yet another issue is that in the absence of research accurately determining the reliability of many forensic techniques, the expert witness may present their evidence in a manner that amplifies its actual reliability.[612] Indeed, this issue has been highlighted in a number of reports in relation to latent fingerprint analysis.[613] Essentially, as Professor Edmond notes, 'facilitating cross-examination or allowing the defence to call rebuttal expertise does not make the trial fair. Structural symmetry is not the same as substantial fairness'.[614]

### F *Right to a Fair Trial- The admissibility of expert evidence and the goals of the criminal process*

It has been explained above that the criminal trial has both a rights protecting and truth seeking function.[615] In other words, the right to a fair trial involves both protecting the rights of all actors in the trial process and, fundamentally, producing an accurate verdict.

In relation to the protection of rights, the accused right to a fair trial is not absolute.[616] Sometimes, considerations of public policy will outweigh the right of an

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[611] Levett and Kovera, above n 610, 370.

[612] Gary Edmond, Expert Evidence in Reports and Courts (2013) 45 (3) *Australian Journal of Forensic Science* 1; See also Andrew Ligertwood and Gary Edmond, Expressing evaluative forensic science opinions in a court of law (2012) 11 (4) *Law Probability and Risk* 289.

[613] See Sir Anthony Campbell, above n 608,685; National Research Council, above n 575, 142 'Although there is limited information about the accuracy and reliability of friction ridge analyses, claims that these analyses have zero error rates are not scientifically plausible'.

[614] Edmond, 'Specialised Knowledge', above n 436, 38.

[615] Ashworth and Redmayne, above n 41, 22 'The twin objects of a criminal trial are accurately to determine whether or not a person has committed a particular criminal offence and to do so fairly'

[616] Cf Mathias, above n 213; Don Mathias, Probative value, illegitimate prejudice and the accused right to a fair trial (2005) 29 *Criminal Law Journal* 8 The learned author argues that the right to a fair trial is absolute and the only acceptable exception for limiting the accused right to a fair trial is in situations of national emergency.

accused to an independent and impartial tribunal. This is evident in *Dupas*.[617] Neither are other elements of the fair trial such as the privilege against self-incrimination absolute.[618] As seen in *Momcilovic,* this is the case even where those rights are embodied in human rights instruments.[619] Arguably, the fact that the rights of the accused yield to other interests in some cases is consistent with the fair trial as it is a right which all parties share equally.[620]

However, the danger in relation to the reception of expert evidence which is unreliable or of unknown reliability is that it increases the likelihood of miscarriages of justice.[621] In this vein, it is useful to reiterate that the NAS Report made explicit the need for more research to determine the reliability of such crucial forensic sciences such as; tool mark and firearms evidence,[622] hair and fibre analysis,[623] questioned document examination,[624] bite mark evidence,[625] and blood stain pattern evidence.[626] Similarly, in the case of eyewitness identification, evidence which is reliable and able to better explain the weaknesses in the evidence to the finder of fact should be more readily admissible. This is significant as eighty per cent of all wrongful convictions involve some form of eyewitness testimony.

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[617] See also Gans ,'Evidence law under Victoria's Charter', above n 57, 200 citing *Pfenning v The Queen* (1995) 182 CLR 461; *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, 406-8 [134-36] (Crennan J).

[618] *X7 v Australian Crime Commission* (2013) 298 ALR 570, 579 [28] (French CJ and Crennan J); *Lee v New South Wales Crime Commission* (2013) 302 ALR 363.

[619] See *Momcilovic v The Queen* (2011) 245 CLR 1, 52 [55] (French CJ), 99 [200] (Gummow J), 200[512] (Crennan and Keifel JJ).

[620] See above nn 57-65 and accompanying text; See also *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 410 [143] (Crennan J).

[621] See, eg, Gans, 'Ozymandias On Trial' above n 52, 206-211; Cunliffe, above n 493; Brandon L Garett and Peter J Neufeild , 'Invalid Forensic Science Testimony and Wrongful Convictions' (2009) 95 (1) *Virginia Law Review* 1, 84-93.

[622] National Research Council, above n 575, 154-5.

[623] Ibid 160-3.

[624] Ibid 166-7 This includes, among other things, analysis of whether the source of the document came from a particular printer or copy machine, handwriting analysis and identification of the source of the ink or paper.

[625] Ibid 176.

[626] Ibid 178-9.

The forgoing analysis highlights that if the fair trial necessitates an accurate verdict, there are essentially two ways of dealing with unreliable evidence. The first is to exclude such evidence.[627] Second, such evidence may be admitted but its weaknesses must be highlighted to the finder of fact.[628] The problem with the latter approach is that fair trial safeguards cannot always ensure that the jury is made fully aware of the fallibilities of such evidence. Accordingly, if the criminal trial pursues the goal of a factually accurate verdict, expert evidence which is unreliable or of unknown reliability should not be admitted.[629] Equally, where expert evidence exists to explain the inherent unreliability of evidence to the finder of fact, it is important that such evidence be admitted so as to avoid miscarriages of justice.

### G *Conclusions*

It is recognised that a balance must be struck between the allocation of limited resources and the right of the accused to a factually accurate verdict.[630] In any case however, the state retains the obligation to adopt procedures most likely to result in an accurate outcome.[631] This is because all parties have a right to a factually accurate verdict.[632]

The exclusion of unreliable expert evidence will serve to further the rational objectives of the criminal trial which is factual accuracy in the verdict.[633] Equally,

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[627] Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish Publishing, 2nd ed, 2004) 6-7.
[628] Ibid 7.
[629] Ibid 7-8.
[630] Edmond and Roberts, above n 428, 364.
[631] Ibid 363-4; But see Edmond, 'Pathological Science?', above n 437, 2-3 where it is argued that incorporating reliability into admissibility standards may increase expediency and reduce the cost of trials.
[632] *R v Sang* [1980] AC 402,456 where Lord Scarman held that 'For the conviction of the guilty is a public interest, as is the acquittal of the innocent. In a just society both are needed'; See also*, R v Noel* (2002) 218 DLR (4th) 385, 427 (L'Hereux-Dube J) 'One cannot over- emphasize the commitment of courts of justice to the ascertainment of the truth. The just determination of guilt or innocence is a fundamental underpinnings of the administration of criminal justice' citied in Gans and Palmer, above n 627, 9; *Berger v United States* 295 US 78,88 (1935).
[633] Edmond, 'Specialised Knowledge', above n 436, 46; *Dasreef v Hawchar* (2011) 243 CLR 588, 611 [59] (Heydon J);' Finally and very importantly, there is increasing concern about the risk of injustice

the reception of reliable expert testimony to accurately explain the weaknesses of the evidence to the jury would also further these objectives. This promotes the right to a fair trial for all persons, the legitimacy of the verdict and confidence in the administration of justice.

Fair trial principles are safeguarded by a framework of laws and practices which are able to adapt to changing circumstances.[634] It therefore follows that continued significance of the right to a fair trial depends on the ability of criminal procedure to develop a principled approach which reflects its underlying purpose in light of scientific developments. As Edmond and Roberts have expressed;

> a serious commitment to the idea of a fair trial requires us to develop rules are procedures that accommodate empirical revelations concerning the tendencies and capacities of the actors in the trial process[635]

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that may flow from unsatisfactory expert evidence. The stricter the admissibility requirements for s 79 tenders the greater the chance that evidence carrying that danger will be excluded' See also, Ligertwood and Edmond, *Australian Evidence,* above n 205, 630. But see South Australian Legislative Review Committee, Parliament of South Australia, *Inquiry into Criminal Cases Review Commission Bill* (2012) 31.

[634] Spigelman, 'The internet and the right to a fair trial', above n 85, 335.

[635] Edmond and Roberts, above n 428, 360.

## VI THE RIGHT TO A FAIR TRIAL IN AUSTRALIA- CONCLUSIONS AND PROSPECTS

The right to a fair trial is fundamental to the administration of justice. It is entrenched in numerous international human rights instruments and, in Australia, remains a key common law right. As Issacs J wrote, '[i]t is a right which inheres in every system of law that makes any pretension to civilisation'.[636] His Honour went on to note that the right to a fair trial 'would be an empty thing, unless the law adequately protected it'.[637]

The reason why the right to a fair trial necessitates protection stems from the right of all persons to fair and equal treatment.[638] This promotes the 'moral authority' of the verdict and fosters public confidence in the administration of justice.[639]

While the common law protects the right in various ways, the right to a fair trial remains vulnerable to legislative inroads. The principle of legality may not adequately protect the fair trial given it is limited by its binary application. Even in *X7,* where the Court upheld the privilege against self-incrimination, the right to a fair trial played a limited role. The majority did not base their decision on the fairness of the trial as it was too abstract to be applied. Thereafter, in *Lee,* the right to silence was found to be limited by the words of the CAR Act. The right to a fair trial did not offer the appellants a remedy to the express words in the Act. Indeed, as *Momcilovic* made clear, the court cannot depart from the meaning of the statute even if there is a statutory requirement to interpret legislation in light of human rights.[640]

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[636] *MacFarlane Ex Parte O' Flanagan; O 'Kelly* (1923) 32 CLR 518, 541.
[637] Ibid 543.
[638] Allan, *Constitutional Justice,* above n 49, 271-2.
[639] Ibid; Ho, above n 219, 253-55. Professor Ho captures the essence of the point where he notes: 'We should treat the accused with respect, dignity and empathy, and give the person due process, because it should matter to us that we lead honourable lives.'; See also Jeremy Waldron, A Right based critique of constitutional rights (1993) 13 *Oxford Journal of Legal Studies* 18, 30.
[640] See Aronson and Groves, above n 299, 337-8.

In this regard, the Charter and the HRA have not substantially added to the protections already available at common law. The central issue is that it is difficult to import a UK- style remedial approach to the interpretation of legislation in light of the particular federal structure entrenched in the *Constitution.*

In turn the *Constitution* does not fully entrench the right to a fair trial. The implied doctrine of separation of powers and its extension in *Kable* have embedded the concept of an independent and impartial judiciary which, as explained above, is the core of the right to a fair trial. Aside from this core however, key fair trial rights are not constitutionally protected in their fullest sense.

The right to a fair trial extends throughout the criminal process, is ever changing in scope and content and also requires a balance between competing considerations. The broad scope of the right requires consideration of a range of interests, including and especially, the logistics of the criminal justice system.[641] And in this sense the legislature is in a better position than the courts to determine how such a balance should be struck.[642] Primary, this is because courts cannot conduct an exhaustive inquiry, beyond the scope of the trial, to consider all the competing interests involved.[643] Nonetheless, the role of the court in the continued significance of the fair trial is 'to stand firm against clear injustice to specific individuals'.[644]

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[641] *Dietrich v The Queen* (1992) 177 CLR 292, 324-5 (Brennan J).

[642] See *Dietrich v The Queen* (1992) 177 CLR 292, 321-3( Brennan J); Allan, *Constitutional Justice,* above n 49, 280; See also, Waldron, 'The Core of the Case', above n 237,1376-79; Indeed the federal parliament has enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). See above n 226; See also Kinley and Ernst, above n 246, 60. Where the authors note that a bill of rights 'ought not to be regarded as the be –all –and –end –all of the human rights agenda'.

[643] *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633. As Mason J has noted 'the court cannot, and does not, engage in the wide-ranging inquires and assessments which are made by governments and law reform agencies as a desirable, if not essential preliminary to the enactment of legislation by an elected legislature'. The issue in this case was the longstanding rule which posits that any landowner is not subject to a duty to keep an animal from walking on a road. The Court did not change the rule.

[644] Allan, *Constitutional Justice,* above n 49, 280-1; Ho, above n 219, 256.

Fundamentally, the right to a fair trial requires an accurate verdict. As explained, this is an outcome which is fair to all parties, promotes the legitimacy of the verdict and the administration of justice. In this regard, expert evidence which is probative and able to better explain the inherent weaknesses of the evidence to the finder of fact should be more readily admissible. Equally, the accuracy of the verdict demands increased scrutiny of expert opinion evidence which is unreliable or of unknown reliability. However, due to a number of legal and institutional reasons, the court may not be the most appropriate venue to determine the reliability of forensic expert opinion.[645] It is therefore, incumbent upon legislatures to critically assess and implement the appropriate strategies to direct the law to achieve accuracy in the verdict and to do so fairly.

[645] Edmond et al, 'Admissibility Compared', above n 489, 92- 102.

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