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Editorial

Both judicial discretion and constraints on that discretion are necessary for the effective functioning of the law. Recent Australian and international case law has highlighted the role of judicial discretion in deciding private law disputes, particularly in the area of constructive trusts as a response to breach of fiduciary duty. Judicial discretion is also much discussed with regard to its compatibility with the elegant tidiness of Peter Birks’ taxonomy in private law. In the exercise of discretion, judicial officers must balance a range of considerations, as they must do when reasoning in any complex decision.

The Judicial College of Victoria delivers a range of educative programs for the Victorian judiciary, presented by judicial officers and eminent legal scholars speaking on areas of law selected for their relevance and timeliness in the context of judicial learning, and in which the presenters have many years’ reflective experience. In this third edition of its Journal, the College has gathered papers selected from two of its recent programs: the Judicial Discretion in Private Law program, held in collaboration with the Melbourne Law School, and the Adequate, Sufficient and Excessive Reasons program presented at the College by Justice Mark Weinberg.

As a collection, the papers in this edition cover a number of aspects of judicial decision-making. What limits should or do apply to judges’ discretion in private law? How does the exercise of remedial discretion fit within the overall scheme of private law? In fiduciary law, are constructive trusts recognised as of right or awarded as a remedy? When might even lengthy reasons in a judgment be deficient, and what reasoning is superfluous? These are some of the important and timely questions discussed in this compilation.

The insights of the distinguished presenters are valuable, not only to the judiciary, but also to the wider legal profession and the community. The Journal aims to share those insights with a wider audience of practitioners, students and members of the public.

The Hon Hartley Hansen QC
Judicial Discretion and the Rule of Law: Is There a Clash?*

The Hon Murray Gleeson AC QC

The topic to be addressed was provided to me in the context of a forum to consider various aspects of the subject: ‘Judicial Discretion in Private Law’. Hence, I will not deal with public law issues such as constitutional adjudication and judicial review of administrative action.

The concept of judicial discretion is protean. In his famous statement, in *Re Will of F B Gilbert (decd)*, of the principles governing appellate review of discretionary decisions, Sir Frederick Jordan was dealing with the power of a judge to make provision for a claimant under the *Testator’s Family Maintenance and Guardian of Infants Act 1916* (NSW) (the ‘TFM Act’). Somewhat grudgingly, the Chief Justice referred to the primary judge’s ‘so-called discretion’. It was so called by Parliament. Section 3 of the Act postulated a testator who was found by a judge to have left a widow or children without proper provision for their maintenance, education or advancement in life, and provided that in such a case the court ‘may at its discretion’, and ‘taking into consideration all the circumstances of the case’, order such provision out of the estate ‘as the court thinks fit’. Sir Frederick said the primary judge ‘is in a position analogous to that of a Judge trying without a jury issues as to whether the plaintiff is entitled to a common law right of damages and if so how much’. He said that:

where [damages] are at large, it is improbable that any two [people] would arrive at precisely the same figure. Hence it has been laid down that, although the members of the Court of Appeal might themselves have been disposed to award somewhat more or somewhat less, it is not proper for them to embark upon a re-assessment of the damages . . . unless they are satisfied that the trial Judge has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant, or that the amount awarded is so much out of all reasonable proportion to the facts proved in evidence that the award should not be allowed to stand. But in a proper case a Court of Appeal will not hesitate to review the determination of a trial Judge upon quantum of damages, if it is satisfied that this is necessary in the interests of justice.3

This statement, made in 1946, was approved by the High Court in 1951, in another case under the same Act, *Ellis v Leeder*. The plurality judgment, to which Dixon CJ was a party, added: ‘Normally an appellate court will not interfere with the exercise of the judge’s discretion except on grounds

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* Former Chief Justice of the High Court of Australia. This paper is based on a presentation delivered at the ‘Judicial Discretion in Private Law’ program held by the Judicial College of Victoria and Melbourne Law School in March 2014.

1   (1946) 46 SR (NSW) 318, 323 (‘Re Gilbert’).
2   Ibid.
3   Ibid.
4   (1951) 82 CLR 645.
of law, but it has an overriding duty to intervene to prevent a miscarriage of justice’.\(^5\)

Almost 100 years after the enactment of the *TFM Act* it would be difficult to think of a better example, where Parliament decides to legislate to disturb existing substantive rights and create new rights, of the need to meet the justice of individual cases by conferring a broad, but not unconfined, judicial discretion. If it appears to Parliament that the law of succession should permit freedom of testamentary disposition, but that such freedom should not be absolute and should in some limited circumstances yield to the demands of what used to be called moral obligation, how else might it be done? Some legal systems provide that people with certain kinds of relationship to a deceased have specified rights of inheritance. That is not the policy of the common law, which in general favours freedom to dispose of property by will. An alternative, adopted throughout Australia, following the lead of New Zealand, is to confer on courts, in certain circumstances, a discretionary power to modify freedom of testamentary disposition. Over the 20th century, a series of cases dealt with the principles according to which the discretion should be exercised. It was never unconfined, but the circumstances under which, and the extent to which, a judge might think fit to interfere with a person’s capacity to dispose of property will obviously reflect values that run deep in society. If there is to be such a law, then resort to judicial discretion seems almost inevitable. If the law of succession is to adopt an intermediate position between rigid prescription of rights of inheritance and complete freedom of testamentary disposition, then giving courts a discretionary power to intervene is a practical and sensible solution.

Similarly, where an award of damages is ‘at large’, and there is no specific amount that can be said to be correct, or incorrect, a judgment about what is excessive or inadequate will reflect contemporary values. An award of damages for pain and suffering in a personal injury case, or an award of damages for defamation, is likely to be affected by the standards and expectations held within a particular jurisdiction, and is never completely predictable.

Sir Frederick Jordan contrasted the appellate approach to the exercise of this kind of discretion with that adapted to discretionary decisions on matters of practice and procedure. Here, he said, ‘if a tight rein were not kept upon interference with the orders of Judges at first instance, the result would be disastrous to the proper administration of justice’.\(^6\) The reasons he gave were pragmatic. The civil justice system would collapse under its own weight if every litigant aggrieved by the grant or refusal of an adjournment, or the making of a procedural direction, or some other procedural matter, could expect appellate review. Appeals are creatures of statute, not rights inherent in the common law, and the system could not work unless some kinds of decision were virtually final.

The standard for appellate review of a discretionary judicial decision is a corollary of the nature and ambit of the discretion. The words used in s 3 of the *TFM Act*, ‘proper provision’, ‘may’, ‘at its discretion’, ‘taking into consideration all the circumstances of the case’ and ‘such provision as the court thinks fit’, are classic formulae used to designate a capacity for choice. The word ‘may’

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\(^5\) Ibid 653–654.

\(^6\) *Re Gilbert* (1946) 46 SR (NSW) 318, 323.
does not always do that by itself. It depends on the context. All lawyers are taught early on that sometimes ‘may’ simply designates a power, and in effect means ‘shall, if certain conditions are fulfilled’. Such cases may be put to one side for present purposes. What is interesting about the discretionary power conferred by s 3 of the \textit{TFM Act} is the body of judge-made law that developed over the first half of the twentieth century as to the principles according to which the power should be exercised. When some judges began to find moral obligations slightly embarrassing as a controlling principle, it was amusing to see how they proposed to replace it. That is part of a larger story beyond the scope of this paper. It is worth remembering, however, that discretions reflect values, and laws generally reflect moral standards. If the justification for intervening in a person’s decision as to how to dispose of his or her property ceases to be moral, what does it become? The \textit{TFM Act} itself was replaced by the \textit{Family Provision Act 1982} (NSW), but both Acts gave rise to learning about wise and just testators, obligations, competing claims, conduct disentitling and related concepts, not found in the legislation itself, by which a court’s power to do what it thought fit was confined and directed by developed principle and appellate supervision. Perhaps there are some judges who think that the principles embodied in the legislation and case law are unenlightened or paternalistic or, worst of all, socially regressive but they are, nevertheless, bound by precedent, and appellate review, and, in the case of courts of appeal, the constraints of collegiate decision-making, all of which are powerful forces of conservatism. It is because of the very existence of such forces that Parliament is willing to confer the discretion. What would be the prospects of securing the passage of legislation that gave individual judges an unconfined and unappealable discretion to re-arrange people’s wills? Without the constraint upon the discretion, the discretion would not exist.

This is the way most discretions conferred on judges work in practice. Appellate courts insist that they be exercised judicially, that is to say, that they are not unconfined but are governed by legal principles, usually found to be expressed or implied in the statute creating the discretion or in a body of common law developed by way of judicial exegesis.

Sometimes the principles develop by way of what is described as a dialogue between the courts and Parliament. Such a dialogue, conducted on one side at high volume, is familiar in the area of sentencing discretion. Third parties from time to time also make their voices heard. Another example is in the development, over time, of principles relating to the exercise of judicial power to regulate, upon dissolution of marriage, aspects of the future affairs of the parties and their children. Obviously, it is necessary for judges to have a discretion in such matters, because no Parliament could hope to formulate a code, to be applied mechanically, that could expect to meet the justice of every individual case. At the same time, requirements of consistency and predictability are important. Without such requirements the power itself would not be tolerated by the public, and without principles to govern the discretion the power would place an intolerable burden on judges.

The costs of civil proceedings are often a major element in the ultimate resolution of a dispute. Generally, costs are in the discretion of the judge, but that does not mean the judge’s choice is
uncontrolled. Appellate courts have formulated principles according to which costs decisions are made. The starting point is that in the ordinary case costs follow the event. The rationale for that is explained in *Oshlack v Richmond River Council*.

The object is to indemnify a person who has had to incur legal expense to vindicate rights. However, some circumstances, or conduct, may negate or modify the application of that primary position.

Remedies provide many examples of controlled discretion. Some forms of common law relief, such as an award of liquidated damages, or an order for payment of a debt, or an order for the possession of land, are granted *ex debito justitiae*. Equitable remedies are often discretionary. A claim for an injunction, for example, may be refused on the ground of unreasonable delay. An order for specific performance of a contract may be refused on the ground that damages are an adequate remedy. Decisions on such matters involve judgments upon the justice of an individual case about which opinions may reasonably differ. An application for an interlocutory injunction has built into it a consideration of the balance of convenience. This is necessarily an area of discretionary judgment even if, in some cases, the answer may be obvious.

Controlled judicial discretion of the kind I have been discussing is different from decision-making *ex aequo et bono*. When it is said that an appellate court will intervene in a discretionary decision if satisfied that the primary judge has acted upon a wrong principle, or has neglected to take into account something that is relevant, or has taken into account something that is irrelevant, or that the order made is not in reasonable proportion to the facts, then the hypothesis must be that, however general its formulation, there is a legal standard or principle by which the exercise of judicial power is governed. On the other hand, a power conferred upon a decision-maker to resolve a disagreement by reference to no standard other than the decision-maker's personal opinion of what is a fair outcome in the circumstances of the case is to be contrasted with a power to make a decision according to law. The contrast is drawn, for example, in the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, which provide that a tribunal shall decide *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so.

Certain kinds of power are sometimes conferred, by statute or by contract, to be exercised in the absolute discretion of some person or body. In such a case, whether ‘absolute’ means exactly what it appears to mean may depend upon the true construction of the instrument which confers the discretion, but judicial discretion is not normally left unbounded in this fashion. Even a decision that may be made *ex aequo et bono* cannot be based on whim or caprice but would need to result from a bona fide attempt to work out what is fair. The reason why judicial discretion is more tightly controlled is based upon the nature of law, and considerations of the rule of law.

The Australian Constitution confers upon the Commonwealth Parliament a power to make laws with respect to taxation. Suppose Parliament were to impose a tax according to which citizens were liable to contribute to the revenue such proportions of their annual income as seemed fair
to the Commissioner of Taxation. That would be a tax, but I would not accept that it would be a law within the meaning of the Constitution, which is informed by the principle of the rule of law.¹⁸ Undirected considerations of fairness do not guide a court’s decision in a revenue case. To permit that would be subversive of the rule of law, as Deane J pointed out in a passage quoted with approval in *Federal Commissioner of Taxation v Westraders Pty Ltd.*

A V Dicey identified as the first aspect of the rule of law what he described as regularity as opposed to arbitrariness or unconfined discretion.¹⁰ He contrasted the rule of law with discretionary power.¹¹

Professor Finnis identified, as measures of the extent to which a legal system is a rule of law system, the existence of rules which are promulgated, and are clear and coherent with one another and are sufficiently stable to allow people to be guided by their knowledge of the content of the rules, the making of decrees and orders guided by rules that are clear, stable and relatively general, and the consistent application of such rules.

There is a philosophical debate, which is outside the scope of this paper, about what may be described as the value content in the idea of the rule of law. What is called a ‘thin’ version of the rule of law, and is sometimes associated with legal positivism as opposed to natural law theory, would not allow questions of moral content to intrude. On this approach, for there to be rule of law it is not necessary for the content of the law to satisfy some other standard. In a liberal democracy, such as Australia, it may be accepted that, when people talk of law, they contemplate at least some minimum level of moral content reflected in the notion of justice. Furthermore, the idea of law is bound up with questions of efficiency. In a market economy, law plays an important part in enabling individuals and societies to pursue their objectives. Consider, for example, land law. Transparency, security, and transferability of title to real estate is an essential condition of an effective market in land, which is in turn, a major contributor to prosperity. The Torrens system of land title is one of Australia’s greatest legal products, and has been exported successfully. Essential to that system is the paramountcy of the Register, and indefeasibility of title. It is, as Sir Garfield Barwick said, not so much a system of registration of title as of title by registration. The implications of this for the market are extensive. Our economic system is constructed upon the theory that free, open and efficient markets create wealth, by facilitating choice, and directing capital to its most efficient uses.

Commercial people, who engage in markets of any kind, need to know, as far as reasonably possible, where they stand, and what the outcome, in terms of rights and liabilities, of their conduct will be. When they enter into contracts, and allocate risks, they make choices. The better informed their choices, and the better calculated their risks, the more effectively will the market allocate capital and maximize economic opportunity. For this, the transparency, predictability and stability of the legal system are essential.

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¹⁸ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.


¹¹ Ibid 188.
Professor Cheryl Saunders, writing with Katherine Le Roy, said:

At the heart of the rule of law there lie three core principles. First, the polity must be governed by general rules that are laid down in advance. Secondly, these rules (and no other rules) must be applied and enforced. Thirdly, disputes about the rules must be resolved effectively and fairly. In a common law system, a fourth principle may be added: that government itself is bound by the same rules as citizens and that disputes involving governments are resolved in the same way as those involving private parties.\(^\text{12}\)

That fourth point may be related to the matter of doing business with governments. When international businesses enter into transactions with foreign governments, their prices are normally constrained by competition, but they need to cover their costs and such an acceptable level of profit. Profit is the reward for risk, and a risk factor commonly taken into account is sovereign risk. If parties cannot count on observance of the law by a government, then sovereign risk will be factored into the price the government pays for goods or services it acquires. It is, therefore, a very short-sighted government that does not honour its contracts. Whether dealings are with governments, or between private parties, risk and uncertainty create costs, and someone has to pay.

The word ‘interpretation’ in relation to law is used in two different ways. In one sense, it means the exposition of the meaning of a legal text, including an Act of Parliament, where such meaning is unclear. From a rule of law perspective, this sense is benign, provided the rules of interpretation are faithful to the source of authority for the text, are transparent, and are regularly applied. There is, however, another sense. In some legal systems interpreting law means filling in gaps. Laws are promulgated in a deliberately vague or general form, and public authorities or officials fill in the details. Such activity is essentially legislative. Discretion is a word sometimes used to describe the power being exercised in such cases. The borderline between judicial discretion and legislative or administrative discretion of such a kind is not entirely clear. In the area of public law, with which this paper is not concerned, there is much learning on the characterization of powers as legislative, administrative or judicial, and the answer may be determined by the identity of the authority on whom it is conferred.

Another concept with different shades of meaning is ‘policy’. All rational law-making proceeds according to some kind of policy. Much of our law is judge-made. Courts, usually courts of final resort, from time to time make and develop or refine the principles of common law and equity. The theory according to which they act can be described as policy, but it is a kind of policy different from that which moves a democratically elected Parliament. Parliaments act on the basis of policies that are contested in the electoral process and they are subject to a well-established form of public accountability. When courts formulate and act upon policy, there is no such contest and

no such accountability. Parliament has democratic legitimacy. Courts do not. The kinds of policy
decisions made on some occasions by some courts are, by hypothesis, not decisions of a kind that
ought to be left to the process of representative democracy. There is room for argument about
where to draw the line, but it cannot be doubted that sometimes it needs to be drawn.

Writing of the United States, Chief Judge Frank H Easterbrook said:

[I]n a democracy, policy-makers are supposed to be on short leashes: for the federal government
two years (the House), four years (the President and his appointees), or six years (the Senate).
Judges serve for 20 years or more and never face the voters. Democratic choice under the
constitutional plan depends on interpretive methods that curtail judicial discretion.13

An Act of Parliament, or a principle of common law or equity, which obliged judges to exercise
the power and responsibility of making policy decisions of a kind that, in a liberal democracy,
should be made by people with political legitimacy and accountability, would be subversive of
representative democracy. Unless a thin version of the rule of law, empty of moral content, be
accepted, then it would be subversive of the rule of law. It would also undermine, rather than
enhance, the authority of the courts. When commentators complain about ‘unelected judges’, they
are not seeking to make a case for popular election of judges. They are making a case about the kind
of power that ought not to be given to officials who are not subject to democratic accountability.
In a particular instance, their case may be strong or it may be weak. Their major premise is that,
in a democratic system, some kinds of decision ought only to be taken by Parliament. Their minor
premise is that a certain decision is of that kind. The debate will usually be about the minor
premise. Parliaments are sometimes tempted to evade their own responsibilities by committing
to the judiciary decision-making of a kind that is bound to be unpopular.

The transparency and stability of the rules that are applied to resolve private disputes in a rule of law
system are not necessarily undermined by content that requires the exercise of value-judgment.
Terms like ‘reasonable’, ‘fair’, ‘equitable’, and ‘convenient’ are built into much legislation and
judge-made law. It would be impossible to devise a just and coherent system of rules for dispute
resolution that did not contain such elements. Not only is that kind of discretion consistent with
the rule of law, it is essential to sustain its aspirational, opposed to its formal, content. A question of
degree arises. Some element of judicial discretion is necessary for a just legal system, but excessive
discretion can undermine the stability and predictability that the rule of law requires.

One aspect of the rule of law is that the outcome of dispute resolution should depend as little as is
reasonably practicable upon the chance factor of the identity of the decision maker. Reasonable
consistency of decision-making is an attribute of a stable legal system. Absolute consistency is
unattainable, and people understand and accept that, within limits, individual judges may
see things differently. Appellate review is one way in which the system seeks to iron out these
differences. Most lawyers, when asked by a client to predict the likely outcome of a case, are

embarrassed if they have to acknowledge that much will depend on which judge is assigned to try the case. If that is the honest answer to the question, then the rule of law is diminished.

Fixing an appropriate balance between certainty and flexibility commonly depends upon the kind of law in question. In the area of commercial law, there is emphasis upon the need for clarity and predictability of outcome. Commercial contracts allocate risks, and if parties are confident about the way in which their agreements will be interpreted and applied then they can cover their risks by insurance or by appropriate pricing. Commercial people want to know where they stand, and they make their choices and decisions accordingly. Disputes about contracts may affect the interests of third parties, such as financiers or assignees. On the other hand, in the area of consumer protection, a different, and more discretionary, approach to contractual enforcement may be warranted. The principles of equity, developed to modify the inflexibility of the common law, were never unmindful of the different considerations that could be at work in different contexts. A judgment as to what is harsh and unconscionable in a transaction may depend heavily on the commercial setting.

The kinds of judicial discretion that are most likely to clash with the requirements of the rule of law are those which are most subjective. Sir Owen Dixon, in a well-known letter to Justice Frankfurter, said that a judge ‘ought to appear to believe that he has some external guidance even if, in his ignorance, he regards it as untrue’.  

A useful practical test of compliance with the ‘external guidance’ standard is the amenability of a decision to appellate review according to the principles stated in Re Gilbert. It may be revealing to ask of a particular judicial discretion, how one would go about appealing from it. How would an appellate court decide whether a judge had acted upon a wrong principle, or had neglected to take into account something that is relevant, or had taken into account something irrelevant? The reference to a wrong principle assumes there is a right principle. The reference to relevance assumes that evidence can be related to a principle.

Judges work in public, and give reasons for their decisions. A requirement to give reasons for the exercise of a discretion implies an external standard of decision-making, and so assists to reconcile the discretion with the rule of law.

One of the most famous passages in English legal history is in the writing of Sir Edward Coke, who criticized legislation that permitted justices to convict according to their discretion rather than according to the laws and customs of England. He said that ‘all causes [should be] measured according to the golden and straight metwand of the law, not the incertain and crooked cord of discretion’. Other writings indicate that he was referring to the crooked cord of ‘private opinion,
which the vulgar call discretion’. 17

The contrast between private opinion, or personal sentiment, and law is what leads us to accept that the behavioural norms applied by judges are expressed in terms of measurable standards external to the judge. This, in turn, means that a reasoned decision of the judge can itself be judged in terms of conformity to the standard. The standard may be such that different opinions are fairly open. Of all legal standards, the one most commonly applied by judges, and, at least in the past, by jurors, is that of reasonable care. The law of negligence is framed so as to require a court to make, as a decision of fact, a value judgment upon which, in many circumstances, minds may reasonably differ. That is not antithetical to the rule of law; on the contrary, it has enabled the law to fashion a fair and just principle to govern a certain form of tortious liability. Similarly, a principle or a statute that empowers a court to refuse to enforce a contract on the ground that it is harsh and unconscionable calls for the application of a standard about which, in a particular case, judgments may differ.

A rational legal system requires an appropriate level of judicial discretion. A tension between discretion and law, where it exists, is most likely to arise because of the unconfined or insufficiently confined nature of a particular discretion or because the subject matter of a particular legal topic demands a legal response that is inflexible, or at least highly predictable. These two considerations are often closely related. Some areas of law require a more open-ended or nuanced response than others. In other areas, law requires certainty. As counsel put it in argument in a leading English case which refused to modify the doctrine of privity of contract, there are areas where ‘it is more important that the law should be clear than that it should be clever’. 18

I would answer the question: No, provided the discretion is appropriate and adapted to the subject matter of the law. So long as that condition is fulfilled, judicial discretion facilitates the rule of law.

The Benefit of Legal Taxonomy*

The Hon Justice James Edelman

I.  Peter Birks

Birks wrote a great deal on the taxonomy of private law. His academic writing on taxonomy divided the academy. It divided judges. It divided courts. He proposed a taxonomy of private law which separated legal events from legal responses. Birks’ taxonomy drew from the work of the Roman jurist Gaius whose taxonomy, by the time of Justinian, divided all of Roman private law into contract, quasi-contract (‘as though from contract’), delict and quasi-delict (‘as though from delict’). Birks divided private law claims into events of consent, wrongs, unjust enrichment and other events. He represented his taxonomic scheme diagrammatically as follows. The horizontal axis contains legal categories of events. The vertical axis reflects the different goals of remedies given by a court within each legal category.

<table>
<thead>
<tr>
<th>Consent</th>
<th>Wrongs</th>
<th>Unjust Enrichment</th>
<th>Other</th>
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<tr>
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<td>Restitution</td>
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<td>Punishment</td>
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<td>Perfection</td>
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<td>Other responses</td>
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* Judge of the Supreme Court of Western Australia. Adjunct Professor of Law, University of Western Australia and University of Queensland; Conjoint Professor, University of New South Wales. This article was first published in (2014) 1 Curtin Law and Taxation Review and is reproduced with the permission of Curtin University. Numbered footnotes in this article appear as in the original. This article is developed from a paper delivered at the ‘Judicial Discretion in Private Law’ program held by the Judicial College of Victoria and Melbourne Law School in March 2014.


In the short compass of this article, it is not possible to engage with the entirety of the scholarship created by Birks’ work on taxonomy. For instance, it generated taxonomies of legal taxonomy; it generated an extraordinary work which aimed to map the entirety of the French and English law of wrongs; and it sparked an enterprise of examination of the nature of difference between the study of law as a social science and the study of natural sciences. Instead, this article sets out several of the major criticisms of Birks’ taxonomic enterprise before explaining why the enterprise is nevertheless, valuable. The value of the exercise in taxonomy that Birks so powerfully reinvigorated lies in a fundamental lesson which can be drawn from it.

II. Criticisms of Birks’ Taxonomy

There are significant weaknesses in Birks’ taxonomy. Most of these weaknesses were recognised by Birks. It is sufficient to focus only on three. First, to the eye of a scientific taxonomer Birks’ taxonomy might appear to be a Panglossian ordered and formal law that envisages little discretion for the judge and which constrains legal innovation by reference to abstract, intangible concepts. It was, perhaps, for this reason that in Bofinger v Kingsway Group Limited, a joint judgment of the High Court of Australia said, in relation to the absence of a category for ‘equity’ that ‘the experience of the law does not suggest debilitation by absence of a sufficiently rigid taxonomy in the application of equitable doctrines and remedies.’ Another joint judgment of the High Court subsequently described Birks’ approach to the law concerning restitution of unjust enrichment as ‘a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development’. As Associate Professor Low has said, the difficulty of a taxonomy of a social science is that there are no observable facts by which a classification can be tested and the classification is not independent of its subject matter. For instance, in the original edition of Systema Naturae Linnaeus misclassified a whale as a fish, but this misclassification was corrected based on observable facts, and the reclassification did not physically affect any whales. In contrast, Birks’ taxonomy of law was intended to affect its subject matter directly. For instance, as I explain below, the classification as ‘wrongs’ of actions in equity for actual fraud, and common law actions for deceit directed attention to whether differences in the subject matter of the classification, the actions themselves, should be altered.

6 E Descheemaeker The Division of Wrongs (Oxford University Press, 2009).
10 Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89, 158 [154].
A second and related weakness in Birks' taxonomy, which Justice Leeming has described,\(^{12}\) is the absence of any role for statute despite its impact and dominance. Legislation need not, and does not always, respect taxonomic boundaries. Legislation and common law are inextricably intertwined. A coherent system of law cannot treat of the two (in Lord Justice Beatson's metaphor) as 'oil and water'.\(^ {13}\) The common law and statute law ‘coalesce in one legal system’.\(^ {14}\) As Justice Gageler has observed,\(^ {15}\) ‘the meaning of a statutory text is also informed, and reinforced, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists’.

A third weakness in Birks' taxonomy is the absence of a number of internal boundaries which are essential markers in many areas of private law. One boundary is between personal rights and property rights. Birks' taxonomy treated of the two alike. So an obligation to transfer title to, say, a car is an obligation created by consent,\(^ {16}\) but the property right that the purchaser obtains to the car can be generated by a different and subsequent event of conveyance. The latter event generating the purchaser’s property right needs to be classified separately as either arising by consent (even though the conveyance is something that the vendor is legally obliged to do) or as an ‘other event’. Another internal boundary which is concealed by Birks' taxonomy is the distinction between primary and secondary rights.\(^ {17}\) For instance, Birks' taxonomy treats wrongs and unjust enrichment as the same type of event. But the law only recognises a wrong if it has already recognised a pre-existing duty. Furthermore, Birks' taxonomy of private law has no place for a person’s duty not to assault another, not to commit trespass, not to defame another, and so on. The only ‘event’ which gives rise to those rights is a person’s birth. Birks was left to say that these fundamental rights are ‘superstructural’ to his taxonomy. A final internal boundary which is not recognised in Birks' taxonomy is the boundary between different types of right: claim rights, immunities, privileges, and powers. The different nature and character of those ‘rights’ is essential to understand their interaction as a recent decision of the High Court of Australia has vividly illustrated.\(^ {18}\)

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12 M Leeming ‘Theories and Principles underlying the development of the common law’ (2013) 36 NSWLJ 1002, 1028.
18 For an important recent example see Western Australia v Brown [2014] HCA 8. There is a basic difference between freedoms from liability which almost never conflict (eg from liability for trespass to minerals by a mining licence and freedom from trespass to land by native title) and competing claim rights or claim rights and freedoms (eg to ‘exclusive’ possession) which almost always do and require one to give way to the other.
There is sometimes a fourth argument made against Birks’ taxonomy. This fourth argument should be rejected. It is the argument that the taxonomy is drawn from the long-distant past of Roman law with no contemporary place in the law. This misunderstands both the contribution and the significance of Roman law to our law today. Not only is Roman law the source of much of our private law but it continues to have direct influence. As Dr Lee has observed, Roman scholarship was relied upon in three of the most important private law decisions given by the House of Lords in the last 15 years: in 2001, 2002, and 2007. In the first case, the late, brilliant, Lord Rodger drew from the conflicting views of Ulpian and Julian in relation to the complex question of causation in the law of torts. In the second case, Lord Hoffmann and Lord Hope of Craighead drew from Roman law the principles concerning confusio (and the writings of Iavolenus and Ulpian) to try to resolve the question of tracing of mixed funds. In the third, Baroness Hale referred to the development in Roman law of the vindicatio action in her revolutionary dissent concerning whether conversion as a tort extended to intangibles. To put the influence of these Roman scholars in perspective, it would be as if something that one of us had written today on a single point of law, and published extra-judicially, was relied upon as an important authority by a court in the year 3800.

III. A Fundamental Lesson from Birks’ Taxonomy

Despite its limitations there is a fundamental lesson which can be drawn from Birks’ taxonomy. One aspect of the rule of law demands that like cases be treated alike. The lesson from Birks’ taxonomy is that we can only have a coherent understanding of what cases are materially alike, and what cases are materially different, through the use of taxonomy and classification. Despite all its limitations, Birks’ taxonomy directs our attention to the need for us to refine the taxonomies within which we operate. It is impossible to argue rationally against any form of classification or taxonomy. The human mind operates by classifying and comparing. The need to classify and compare is greater now than it has been at any time in history. Almost a century ago, Benjamin Cardozo said this:

The fecundity of our case law would make Malthus stand aghast. Adherence to precedent was once a steadying force. The guarantee, as it seemed, of stability and certainty. We would not sacrifice any of the brood, and now the spawning progeny, forgetful of our mercy are rendering those who spared them... An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less and appeal to an informing principle is tending to count for more.
This multiplication of case law has increased at an exponential rate in recent decades as judgments from many courts and tribunals move online and, in turn, the unpublished judgment begins to become a relic. With this growing mass of case law, and its ease of accessibility, there is a great danger of what Birks described as ‘stovepipe mentality’. He said that the ‘intelligent analysis of the client’s problem, the capacity to recognise the cards the client holds, and the presentation of innovative arguments, all these crucially depend upon a sure grasp of the structured overview of the law as a whole.’

To have any real understanding of how the law fits together, and to coherently answer legal problems, we therefore need a mental taxonomy of the law. One very important benefit of Birks’ taxonomy is that it directs our attention to the fact that all of our current taxonomies of private law are underdeveloped and problematic. Most law schools today divide private law into a taxonomy which includes principal subjects of contract, torts, trusts, and property. Justice Gummow has described the three great sources of obligation in private law as contract, tort and trust. This is a discontinuous and incomplete taxonomy. The taxonomies are not continuous because they include contract alongside trust, but a contract could be the source of a trust. Two persons can contract in terms which create a trust. The taxonomies are also incomplete because there are many obligations which arise other than by contract, tortious act, or creation of a trust. Statute is a prolific example: for instance, the obligation to pay tax. Another example is a unilateral bond or a letter of credit. In relation to the former, after the decline of covenant this was one of the most common obligations. The obligation was created by deed which commonly recited, in Latin, ‘Know all men etc., that I, AB, am firmly bound to CD in £n to be paid at Michaelmas next following’.

It is unsurprising that our modern taxonomies of private law are underdeveloped. The trust arose from the ashes of the executed use in the 16th and 17th centuries, but the modern law of contract did not completely emerge from its foundations of assumpsit until the mid-19th century when, following publication of a translation of Pothier’s Traité des obligations, key English cases in the mid-19th century such as Hadley v Baxendale and Smith v Hughes developed the will theory of contract. Barely two centuries ago, Pothier lamented in his work upon the law of contract that the science of jurisprudence ... has been too generally estimated as a mere collection of positive rules ... a mere acquaintance with the particular rules and institutes of [a lawyer’s] own profession will be a very inadequate foundation for the character of a perfect lawyer.

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Although contract emerged from assumpsit by the turn of the 20th century, the law of torts, in the form we understand it today, did not emerge until the mid-20th century after *Donoghue v Stevenson* 31 began the process of generalizing a duty of care. Finally, the law of unjust enrichment only clearly and distinctly emerged in judicial decisions in 1987 in Australia 32 and in 1991 in England. 33 In *Equuscorp Pty Ltd v Haxton*, 34 French CJ, Crennan and Kiefel JJ said that unjust enrichment ‘has a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another.’

One very significant example can be given of the importance of Birks’ taxonomy and the need which it provokes for lawyers to understand the nature and interrelationship of doctrines within the systemic whole of the law. As I explained at the start of this article, the High Court of Australia has suggested that ‘the experience of the law does not suggest debilitation by absence of a sufficiently rigid taxonomy in the application of equitable doctrines and remedies.’ I do not think that this statement was intended to be understood as suggesting that equitable doctrines and remedies should not be categorised and treated alongside common law categories. That view is very commonly held. Birks’ taxonomy directs attention to why it must be rejected.

Many lawyers think of the law of torts and the law of equity as two mutually exclusive categories. ‘Tort’ is a French word which describes a common law wrong. It is a French delicacy that had crept into our law by the time that Mrs Donoghue decided to sample a snail, with a little ginger, but why should the law of torts be confined to civil wrongs, whose jurisdictional origin is common law rather than equity? Consider, for example, the tort of deceit. It has been recognised for more than a century that the common law tort of deceit is identical to the equitable wrong of deceit. As Lord Chelmsford explained of deceit in equity,

> [i]t is precisely analogous to the common law action for deceit. There can be no doubt that Equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at Law and in Equity. 35

Not only is it historical to treat of deceit as a doctrine which is subject to different rules depending upon its jurisdictional origin in Chancery or in the King’s courts, but a taxonomy such as that of Birks directs attention to deep underlying questions which anyone defending an independent and separate classification of ‘equity’ must answer. If all the equitable principles that arose in the courts of Chancery are somehow based upon a different ‘conscience’ or a different discretion then why did the Courts of Chancery tussle with the common law for centuries concerning the appropriate test for the wrong of deceit?

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33 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.
35 *Peek v Gurney* (1873) LR 6 HL 377, 393.
IV. Conclusion: The History and Future of Taxonomy

The focus of this article has been on the importance of taxonomy. As the criticisms of Birks’ taxonomy show, there are serious weaknesses in any attempt to classify or map private law, but there are also significant benefits which can be reaped so long as the limitations of the exercise are not forgotten. The exercise of taxonomy in the future is likely to be primarily undertaken by the academy. In an era where judges are increasingly specialised, increasingly submerged beneath a sea of ever-expanding judicial decisions with arguments that raise finer and finer points of law, the relationship between the judiciary and the academy is more important today than it ever has been in history. It is the academic branch of the profession which, in the future, will have the time, the focus, and hopefully the vision consistently to refine our taxonomy of law.

Birks’ taxonomy was born in the academy. It is likely that academic gestation and development of taxonomy will be the way of the future, but it is easy to forget that the professional law schools, and the beginning of a divide between the judiciary and the academy, began barely 150 years ago. The Romans did not recognise a divide between the academic and the practitioner. The jurists were the great scholars. They were the law in action. This divide is very recent in the life of our law. Over the last six hundred years the greatest developments in the taxonomy of the common law also came from extra-judicial academic writing mostly by judges. Glanvill, who wrote the first great book on English law in the 12th century, was Henry II’s Chief Justiciar in the Curia Regis. His foundational book was Tractatus de legibus et consuetudinibus regni Angliae: A treatise on the laws and customs of the English Kingdom. Although it is not clear how much of his great work36 was actually written, or edited, by Bracton, there is a consensus that his contribution came before he had turned 30. Bracton started sitting as a judge at 35. Littleton sat as a judge in common pleas. He was writing only a couple of decades after Gutenberg revolutionised printing and his treatise on Tenures became the first printed legal book in English, or rather law-French. It was an indispensable work for more than three centuries. The same pattern has repeated itself again, and again, and again. Sir Edward Coke, who wrote the Institutes, was Chief Justice of Common Pleas (and then later the Chief Justice of the King’s Bench). Fortescue, from whose great work,37 we know the maxim that it is better that 20 guilty men go free than one innocent man be condemned, was Chief Justice of King’s Bench. So too, Blackstone also sat on the King’s Bench.

The beauty of the common law is that it works itself pure. It moves in search of a truth. The shape of the common law is not the product of any single court, nor any single writer. The common law is, as the late Lord Rodger said, like a fine wine: ‘trying to rush the process will only spoil the vintage’.38 That shape is ultimately determined by taxonomy.

36 De Legibus et Consuetudinibus Angliae (On the Laws and Customs of England).
Discretion and Taxonomy in Private Law*

Professor Matthew Harding

How are we to understand the relationship between discretion and taxonomy in private law? According to one influential view — the view of Peter Birks — the relationship between these two phenomena is not a happy one, at least when it comes to the award of private law remedies. Birks famously argued that the exercise of discretion in the award of private law remedies is inconsistent with the project of thinking taxonomically about private law that, for Birks at least, is a necessary condition for the rational development of that body of law. For Birks, discretion and taxonomy do not mix and discretion should be eradicated from the award of private law remedies as a result.¹

I would like to offer two lines of thought in response to Birks’ view of the relationship between discretion and taxonomy in private law. Each of my lines of thought casts doubt on his view that the relationship is one of inconsistency and his conclusion that discretion should be eradicated from the award of private law remedies if private law is to be rendered rational.

The first thought begins with the following question. When we follow Birks and think taxonomically about ‘private law’, what do we think taxonomically about? According to Birks himself, the project of thinking taxonomically about private law must seek to identify a ‘unity’ as its subject matter.² For Birks, the ‘unity’ that is private law is characterised by two features: (a) it is law; and (b) it is ‘concerned with the rights which, one against another, people are able to realize in courts’.³ Most of Birks’ writings on the taxonomy of private law relate to this second characteristic feature of private law. But we should not forget the first one. Birks’ taxonomy is a taxonomy of law, and it would therefore seem to follow that anything that is not law does not stand to be classified according to the Birksian taxonomy of private law.

What counts as law for the purposes of the Birksian taxonomy? Birks points to the answer to this question in the following passage in the introduction to English Private Law: Volume 1:

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³ Ibid.
The core of the answer is the identification of the sources of law. This is necessarily borrowed from public law, since the sources of law in any one state are a matter for the constitution of that state. For the rest the answer is part of general jurisprudence, which is the reflective study of all and every aspect of the law.4

In telling us that what counts as law for the purposes of his taxonomy is to be identified with reference to the sources of law, according to general jurisprudence, Birks gestures in the direction of legal positivism and its central thesis that the validity of law is to be ascertained with reference to the sources of law. And perhaps the most famous version of the ‘sources thesis’ is that of HLA Hart, who argued that what counts as law is made up of rules recognised as valid in accordance with the ultimate source of law: the rule of recognition.5

Is an exercise of discretion in the award of a private law remedy an engagement with law in this sense? Hart, of course, argued that in hard cases where rules do not determine the result, judges who exercise discretion act unconstrained by law.6 In cases where judges exercise discretion in the award of private law remedies, rules do not determine the result; such cases are invariably, in their own modest way, hard cases. If this is accepted, then it would seem that the exercise of discretion in the award of private law remedies does not entail engagement with law. And a taxonomy that takes as its subject matter ‘law’ should have nothing to say about such exercises of discretion. And Birks’ taxonomy of private law purports to be a taxonomy of law. The upshot of all of this is that it seems possible to adhere rigorously to the Birksian taxonomy when thinking about the classification of the source-based rules that constitute private law, but remain studiously uninterested in the phenomenon of discretion in the award of private law remedies.7

It might be objected that this misrepresents Birks’ thinking. For while it is possible to adhere to a Birksian taxonomy of private law and, at the same time, remain agnostic about discretion in the award of private law remedies, Birks was no agnostic. For Birks, judges who currently exercise discretion in the award of private law remedies should stop doing so and instead develop and apply rules for the award of such remedies; moreover, for Birks, judges should think taxonomically about the content and relations of such rules when developing and applying them. This argument proposes taxonomy as the solution to what Birks perceived as the problem of discretion in the award of private law remedies. For Birks, part of the argument’s normative force is found in the

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4 Ibid xxxvii.
7 More generally, it might be said that insofar as legal taxonomy is a descriptive enterprise, it is ‘normatively inert’, delivering no arguments for or against anything, and instead simply organising what it sees: see Emily Sherwin, ‘Legal Taxonomy’ (2009) 15 Legal Theory 25, 34. And a similar argument has been made about the central thesis of legal positivism that the validity of law depends on its sources not its merits; according to one leading legal positivist, the ‘sources thesis’ simply organises what it sees as well: see generally John Gardner, ‘Legal Positivism: 5½ Myths’ (2001) 46 American Journal of Jurisprudence 199.
value of taxonomical thinking, a value that Birks seems to have treated as self-evident. And, for Birks, part of the normative force of the argument is located in specific objections to discretion in the award of private law remedies. In what follows, I will focus on a couple of these specific objections. And this leads me to the second line of thought that I alluded to at the outset.

My second line of thought begins with two key values that Birks associates with thinking taxonomically about private law but dissociates from discretion: the values of rationality and the rule of law. Central to Birks’ thinking that discretion is opposed to these important values is his assumption that discretionary decision-making is intuitive decision-making, experienced by the decision-maker not so much as a response to the specific demands of individuated reasons as the outworking of a felt sense of what is appropriate in the round. And this idea that discretionary decision-making is intuitive decision-making seems to be echoed at times in the words of those who would defend discretionary remedialism in private law. There seems little reason to doubt that intuitive decision-making is inconsistent with the values of rationality and the rule of law. But is discretionary decision-making really intuitive in the way that Birks, and some discretionary remedialists, seem to think? And, if discretionary decision-making is not really intuitive, is discretionary decision-making actually of concern in light of the values of rationality and the rule of law?

In 1956 HLA Hart delivered a talk on discretion to a gathering of lawyers and philosophers at Harvard University; he subsequently wrote up the talk as a paper and circulated it, but the paper was not published in his lifetime and when he died it was not among his possessions. Hart’s paper on discretion was thought to be lost to intellectual history until it was discovered recently by the American scholar Geoffrey Shaw in an archive at Harvard. It was finally published in the Harvard Law Review in late 2013, presumably Hart’s final contribution to jurisprudence. Happily, Hart’s lost paper on discretion addresses precisely the questions I just posed: to what extent is discretionary decision-making really intuitive?; and to what extent is discretionary decision-making really at odds with the values of rationality and the rule of law?

8 Classification is indispensable. Neither the universal diversity in which we find ourselves, nor any one of the sub-diversities within it, of which the law forms a single example, can be made manageable without classification. Rational thought being impossible without taxonomy, the law must make its taxonomy explicit

9 See, eg, Birks, ‘Equity, Conscience, and Unjust Enrichment’, above n 1, 19–20. (See also 27-29.)


Hart’s subtle analysis of the concept of discretion shows it to be something other than a matter of intuition. Indeed, Hart’s account of discretion shows that one of the ways in which an exercise of discretion is a distinctive way of making a decision is precisely that it is not guided by intuition. Hart locates discretion in the place:

between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious.13

Thus understood, discretion is not a matter of responding to compelling reasons or determinate rules, but it still entails responsiveness to the demands of reason; discretion is as much a matter of identifying relevant reasons and engaging sensitively with them as it is a matter of choice. An exercise of discretion may be appraised as ‘sound’ or ‘unsound’, ‘wise’ or ‘unwise’ according to how successfully it identifies and engages with reasons in this way.14

Understood along the lines Hart proposes, discretion is consistent with the value of rationality. Indeed, according to Hart, ‘we have in discretion the sphere where arguments in favour of one decision or another may be rational without being conclusive’.15 Indeed, we may go further and argue, with Hart, that discretion serves the value of rationality in a special way, by enabling rational decision-making in circumstances of indeterminacy, for example, when a choice must be made among incommensurable options.16 And, going further still, we might suggest, with Geoffrey Shaw, that discretion serves the rule of law too, given that in circumstances of indeterminacy in which the application of determinate rules is inappropriate but a decision is called for, the best available option, given that the rule of law is among other things the rule of reason, is to make a rational decision in just the way that discretion enables.17

These last thoughts are preliminary and require much more extended exploration before they can be accepted without qualification. But Hart’s account of the concept and value of discretion gives us enough to say with some confidence that Birks’ fears about intuitive decision-making are not fears about discretion, properly understood, and that discretion is consistent with the value of rationality; Hart’s account also gives us grounds to say in a more qualified way that discretion and the rule of law are not necessarily opposed to each other. Earlier, I suggested that Birks’ view of what counts as law for the purposes of his taxonomy of private law is informed by a legal positivism that views exercises of judicial discretion as, in a sense, beyond law. Now I might add that, when contemplating such extra-legal exercises of judicial discretion, at least in the award of private law remedies, Birks seems to adhere to a relatively extreme version of legal realism, according to which judges exercise political power in a completely unconstrained way.18 Hart’s paper on discretion

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14 Ibid 660.
15 Ibid 665.
16 Ibid 661–663, 665.
17 Shaw, above n 13, 709, 726–727.
shows us that between this nightmare — one that has arguably been encouraged by some of the rhetoric from discretionary remedialists — and the noble dream of Birks’ taxonomy of private law, there is much to be said about discretion that shows it to be defensible in light of intellectual and political ideals.

And this brings me to one last point about the relationship of discretion and taxonomy in private law. Assuming that discretion entails undetermined choice that is, nonetheless, rational, taxonomical thinking may play a role in classifying the reasons that stand to guide exercises of discretion in particular types or ranges of cases. In this way, far from taxonomy being the solution to the problem of discretion in private law, taxonomy might function as discretion’s handmaiden. Consider, for example, Elise Bant and Michael Bryan’s recent work presenting a set of principles to govern the award of proprietary remedies in private law.19 In one sense, these principles serve a normative function, informing a general argument about how and why certain moral and prudential considerations ought to influence the award of proprietary remedies. But in another sense, their function is taxonomical, as they organise different reasons relevant to the award of proprietary remedies in ways that clarify and direct thinking about those reasons. Such a taxonomical tool may assist a judge, exercising discretion in the matter of awarding a proprietary remedy, in engaging with the reasons bearing on the case at hand and in arriving at a sound, defensible, and rational choice.

Discretionary Remedialism in Private Law? Bribes and the Remedial Constructive Trust*

Professor Michael Bryan

I. What is discretionary remedialism?

Some slurs are worn by their recipients as badges of honour. The Kaiser’s supposed reference to the British expeditionary force in 1914 as a ‘contemptible little army’ resulted in regimental veterans’ associations proudly designating themselves as the ‘old contemptibles’.¹ So, in an academic legal context, the term ‘discretionary remedialism’ was coined by its opponents to identify an approach to awarding remedies in private law which ought in their view to be rejected.² The judges and writers identified as discretionary remedialists have, by and large, embraced the designation and continued to emphasise the role of discretion in the selection of a remedy.

Opposed to them in recent years are rights theorists who have put forward some original and challenging reformulations of private law doctrine. There is no fixed model of rights theory, but for the purposes of this paper rights theorists adopt two defining positions. The first is that the law can be explained in terms of its own concepts without reference to external (or instrumental) explanations, whether economic or social. Secondly, the role of the judge in private law litigation is to define and enforce recognised rights, and to this end there is no place for discretion in the absence of a legislative mandate for its exercise. In general terms, a rights (or rights-based) theorist views a legal remedy as replicating the right that has been infringed. The remedy is (or should be) the most complete substitute that the law can provide, whether by way of a money order or compelled performance, for the infringed right.³

The remainder of this section of the paper examines discretionary remedialism in more detail while the next section does the same for rights theory, as it applies to private law remedies. The theories are then applied to recent decisions and dicta on whether fiduciaries are accountable as constructive trustees for bribes they have received, discussed in the final part of the paper.

Discretionary remedialism comes in several varieties, but its distinguishing characteristic is that discretionary remedialists insist that in selecting a remedy it is legitimate for a court to

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¹ The reference is usually attributed to an army order issued by Kaiser Wilhelm II on 19 August 1914.
² P Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 University of Western Australia Law Review 1, noting, however, that the origins of the term are obscure.
³ R Zakrzewski, Remedies Reclassified (Oxford University Press, 2005) 78–79.
take into account matters which are not relevant to the imposition of liability. So, for example, Grant Hammond has distinguished between ‘monist’ and ‘dualist’ conceptions of remedies. The former views a remedy as being integral to a legal right. While there may be practical reasons for separating out the curial procedures for determining liability and awarding relief, conceptually the remedy reflects the right which has been infringed. A dualist, on the other hand, treats the inquiry into the selection of remedy as calling into play a distinct process from the ascertainment of the right and the finding of infringement. On a dualist approach some facts and policies which are irrelevant to the determination of liability may nonetheless be material to the selection for remedy. There is no unanimity between remedialists as to what these facts and policies are, and probably no definitive list could be drawn up. Hammond includes as potentially relevant remedial considerations: the relative severity of the claimed remedies on the parties, economic efficiency (in some contexts), the weight or moral value to be attached to the interest at stake, the conduct of the parties, the difficulty of calculating loss, and the practicability of enforcement.

The listed factors are intended to supply no more than guidelines to assist in the selection of the appropriate remedy. ‘Appropriateness’ is the touchstone of discretionary remedialism. ‘Appropriateness’ may be no more than a synonym for the application of common sense in the award of remedies — after all, has a judge ever deliberately awarded an inappropriate remedy? — but otherwise it is a somewhat elusive notion.

Paul Finn, whose argument for discretionary remedialism contains a careful deconstruction of the concept of ‘appropriateness’, as applied to the award of remedies, makes the point that in many, perhaps most, cases the remedy will ultimately be determined by the ‘policy and purpose of the particular doctrine in question’. This may be no more than a concession to the truism that most of the time the findings of fact will ineluctably point to the award of one rather obvious remedy. Nevertheless, there is (according to the dualist’s view of the remedial cosmos) a residue of ‘hard cases’ in which matters which played no part in the establishment of the initial entitlement become relevant to determining relief. Among matters identified by Finn are the impact of a particular remedy on third parties (with special reference to the constructive trust) and the role of the public interest (with special reference to the injunction).

Three aspects of discretionary remedialism in private law deserve emphasis for present purposes. First, in the long running (some would say interminable) debates about the relationship between

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4 Birks, above n 2, 2.
5 Currently a judge of the New Zealand Court of Appeal and Chair of the New Zealand Law Commission. He was formerly a professor of law at New Zealand and Canadian law schools.
9 Ibid 273.
common law and equity, remedialists are fusionists. The selection of the appropriate remedy should not be determined by jurisdictional boundaries but by rational criteria — although identifying these criteria remains a matter for animated debate. To classify specific performance as a secondary remedy to an award of damages for breach of contract only because equity is acting in its auxiliary jurisdiction in granting specific relief is not to make a rational statement about the prioritising of remedies. There are in fact compelling justifications for recognising damages, and not specific performance, as the primary remedy for breach of contract. Some of these justifications are instrumental, in the sense of being founded on values external to the law, such as economic efficiency. Others are non-instrumental, in the sense of being internal to the law, such as the argument that in sale of goods cases a damages award provides the most complete substitute for the seller's defective performance. But a hierarchical distinction between legal and equitable remedies, which awards equitable relief for equitable claims but subordinates it to common law damages where a common law wrong resulting in loss has been committed, is not sufficient. It is a historical justification — and, some would add, none the worse for that, since historical explanations of legal doctrine often conceal persuasive contemporary rationales.

An important coda to this discussion of fusion is that scepticism as to the value of remedial hierarchies, especially as applied to common law and equitable remedies, is not a point of distinction between discretionary remedialists and rights theorists. The latter, too, reject a jurisdictional prioritising of remedies, though for reasons other than those advanced by the remedialists. Both positions are inconsistent with the traditional accounts of equity and equitable remedies to be found in the textbooks.

Secondly, the consumer protection provisions of the Trade Practices Act 1974 (Cth) and its successor, the Australian Consumer Law (ACL), specifically the remedies enumerated in Part 5.2 of the ACL, have had an important influence on debates about discretionary remedialism in Australia. As is well known, those sections permit the court to select from a 'basket of remedies' (or smorgasbord, if one prefers Swedish cuisine), including all relevant private law remedies except the account of profits, as well as remedies which function in a specific statutory context, such as repair orders, orders to perform specified services, orders that the defendant establish compliance programs and so on. The remedial provisions of the ACL are manifestly 'dualist', in the sense that they do not presuppose that infringement of a statutory proscription, for example of misleading or deceptive conduct in trade or commerce under s 18, confers an entitlement to any remedy, let alone a remedy that is ordained by a right that has been infringed. Moreover, High Court decisions on the assessment of compensatory damages under the legislation have

11 Robert Stevens, ‘Damages and the Right to Performance: A Golden Victory or Not’ in J Neyers et al (eds), Exploring Contract Law (Hart Publishing, 2009) ch 7. Internal justifications for private law doctrine are primarily associated with rights theorists but they can also be found in discretionary remedialist accounts of remedies. See, eg, the discussion of the role played by doctrinal aims in Finn, above n 8, 269–270.
13 Competition and Consumer Act 2010 (Cth), Schedule 2.
emphasised the ‘sui generis’ character of statutory liability, and that damages are not necessarily to be assessed on a tortious, or indeed any other category-specific, basis.14

For some writers the statutory basket of remedies under the ACL is not to be viewed as an isolated statutory endorsement of remedialism but, on the contrary, offers a model for organising private law remedies that is undeniably attractive when placed alongside the jurisdictional hierarchy of common law and equitable remedies.15 The appeal to legislation as a template for the development of private law, however, challenges the conventional assumption that legislation modifies the common law only to the extent authorised by its provisions either expressly or by necessary implication. It also raises constitutional questions as to when legislation can be invoked for purposes outside its enacted scope. These are not questions which have so far received detailed treatment in the literature on discretionary remedialism.

Finally, the factors of which account can be taken by a discretionary remedialist in the search for the fact-specific ‘appropriate’ remedy are more numerous and varied in character than for the rights theorist. For the latter a remedy is simply the reflection of the infringed right. Cases on equitable relief emphasise the chasm between their respective positions. The search for the appropriate equitable remedy will often highlight matters which cannot be organised in an equity textbook under the rubric of ‘discretionary bars to relief’. Disagreement here has focused on the remedial constructive trust. In determining the availability of constructive trust relief courts, including the High Court,16 have often taken into account such matters as the expectations of third parties who, at the time of adjudication of constructive trust relief, had no independent rights of their own to enforce.17 Proprietary estoppel cases involving work undertaken on family farms and other properties, in particular, are replete with examples of courts taking into account both proprietary and non-proprietary interests of other family members as part of the process of fashioning equitable relief.18 They also demonstrate the relevance in this area of policies more commonly found in cases of divorce and other relationship breakdown, such as the desirability of promoting a ‘clean break’ between parties to the terminated relationship, the parties’ ages, their needs and (in cases where a relationship has been terminated by the representor’s death) the likelihood of other claims on the representor’s estate.19

A critical point of difference between remedialists and rights theorists relates to the application of consequentialist reasoning in the selection of relief. For a remedialist it is legitimate for the court to take into account the potential consequences of a proposed order, including its likely

15 Finn, above n 8, 255.
16 John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1 (‘John Alexander’s Clubs’).
impact on third parties, when choosing and fashioning a remedy. Proprietary estoppel, discussed above, provides copious examples of assessments of the potential consequences of different kinds of relief, on parties and non-parties alike, influencing the order ultimately made. As we will see in the next section, however, rights theory holds that, once the nature and extent of a right has been defined, for example as a beneficial interest under a trust, enforcement of the right ought not be prevented or modified by reference to discretionary considerations, such as the adverse impact of enforcement on creditors of the party who is subject to a duty to respect the right. The permissibility of consequential reasoning is critical to debates on the imposition of constructive trusts over bribes or secret commissions received by fiduciaries.

II. Rights theorists

The leading modern unjust enrichment scholar, Peter Birks, was an arch-opponent of discretionary remedialism. His statement that a remedy is ‘the same as the right looked at from the other end’ epigrammatically summarises the ‘monist’ creed that it is meaningless to distinguish a legal right from the remedy awarded to enforce it. Birks’ distrust of judicial discretion, save where it was legislatively mandated, was not premised on a theory of rights, although most of his writings on unjust enrichment and the taxonomy of private law are consistent with a rights analysis of the law of unjust enrichment. He deplored the application of strong discretions, for example by the exercise (as he saw it) of unstructured unconscionability doctrines.

An important strand of scholarship in recent years has developed a ‘rights’ or ‘rights-based’ analysis of private law doctrine. Tort law, contract law, property law and trusts have been re-examined in terms of the claim that ‘private law is simply about the rights we have one against another’. Not all rights theorists are disciples of Peter Birks and few are restitution writers, but they have established a framework for private law analysis which is implicit in

21 Cf A Koucorek, ‘Rights are not protected interests, but the means by which interests are protected’ in A Koucorek, ‘Various Definitions of Jural Relation’ (1920) 20 Columbia Law Review 394, 402.
23 See Donal Nolan and Andrew Robertson, ‘Rights and Private Law’ in D Nolan & A Robertson (eds), Rights and Private Law (Hart Publishing 2011) ch 1, for a summary of the principal characteristics of rights analysis on which this account is based.
25 Stevens, above n 11.
his work but which he failed to formulate in his lifetime. Put negatively, rights theory rejects instrumental explanations of private law doctrine, such as economic analysis, utilitarian theory, feminist analysis or sociological explanations of legal doctrine. Policy explanations of doctrine, for example in terms of deterrence, are also rejected. These theories and explanations can provide frameworks for assessing doctrine — as the voluminous literature on law and economics literature demonstrates. They can also provide a method for critiquing judicial method — but they must not be confused with the method itself. Expressed positively, the function of the courts in private law disputes is to enforce those rights which have been infringed either by the commission of a wrong (such as a tort, breach of contract or breach of trust) or by the occurrence of some other legal event which gives rise to legal liability, such as restitution of a mistaken payment. The analysis of rights and of their correlative duties gives us, in the view of rights theorists, the most coherent account of private law.

We have already noticed that, on this understanding of the private law world, the remedy awarded for infringement of a right is, or ought to be, the remedy that constitutes the most complete substitute for the right itself. The remedy awarded for breach of a duty should be the remedy that comes closest to performing the duty, or, if performance is impossible, at least constitutes the most complete monetary equivalent. Specific performance of a contract will often be the remedy that provides the most efficacious substitute for contractual performance, allowing for the obvious limitation that performance by court order inevitably means, from the plaintiff’s point of view, delayed performance. Likewise, an account of profits ordered against a trustee who has made a profit at the expense of the trust will usually be the closest substitute for performance of the trustee’s obligation to invest and apply the trust property for the benefit of the objects of the trust.

We have also noticed that rights theorists reject the legitimacy of consequentialist reasoning to determine the availability of relief: once a legal right has been infringed a court should not limit the relief by reference to the consequences, either to the defendant or to third parties, of awarding the relief. For example, to withhold enforcement of a constructive trust on the ground that its award will deprive the defendant’s creditors of a valuable asset which would otherwise be sold off to pay off his debts is wrong because it treats the plaintiff as a means to an end (the means of meeting the creditor claims) and not as an end (enforcement of a right to a beneficial interest in trust property). 29 It is undeniable that courts in practice have regard to the consequences of their proposed orders and often modify relief in the light of identified third party claims and interests. 30

Proprietary estoppel is, as we have seen, a case study in practical consequentialism. Moreover, the High Court of Australia has actively promoted consequentialism by giving standing to secured creditors of a defendant to argue against the award of a constructive trust over the defendant’s property. 31 Rights theorists deplore these developments on the ground that they derogate from a

claimant’s established property right.

Equitable remedies present a formidable challenge for rights theorists. This is partly because a court will often be invited to select from a menu of potential remedies, all of which relieve against specific consequences of the breach of fiduciary duty or other wrong. The menu is often in practice quite short. Indeed, the facts will generally point to just one remedy which effectively enforces the principal’s infringed rights. In other cases, where the breach of duty has caused loss to the plaintiff and accrued a gain to the defendant, the plaintiff will be put to an election between inconsistent remedies.32

Equitable relief also poses a problem because equitable rights cannot be easily disassociated from the remedies that enforce them. As Goulding J stated in Chase Manhattan Bank NA v Israel-British Bank (London) Ltd, ‘right and remedy are indissolubly connected and correlated, each contributing in historical dialogue to the development of the other’.33 The story of the express trust is, in large measure, the story of the emergence of the equitable interest from the remedies that protected the beneficiary’s rights from interference by the trustee and third parties.34 The same point can be made with respect to common law rights. The rights to enforce contracts and to protect one’s personal, proprietary and reputational interests in tort law are products of the gradual expansion over centuries of the writ system, and the concomitant willingness of judges to allow juries to assess damages for interference with these interests. Nevertheless, it is arguable that the writ system created a clear-cut distinction between ‘right’ and ‘remedy’ at common law, whereas the chancellor’s jurisdiction resulted in some commingling of the two concepts. The existence and extent of an equitable right is still largely co-extensive with the degree of equitable enforcement. In the final analysis an equitable ‘rights’ theory is a ‘remedies’ theory.

III. The US Restatement of Restitution, Constructive Trusts and Discretion

The recent publication in the United States of the Restatement (Third) of Restitution and Unjust Enrichment (the ‘Restatement’) has sharpened the terms of debate between discretionary remedialists and rights theorists.35 Paragraph 55(1) of the Restatement provides that:

[i]f a recipient is unjustly enriched by the acquisition of legal title to specifically identifiable property at the expense of the claimant or in violation of the claimant’s rights, the recipient may be declared a constructive trustee, for the benefit of the claimant, of the property in question and its traceable product.

34 FW Maitland in AH Chaytor & WJ Whittaker (eds), Equity: A Course of Lectures (Cambridge University Press, 1929) 29–32.
A fiduciary who has made unauthorised gains out of his fiduciary position is unjustly enriched ‘in violation of the claimant’s rights’ for this purpose. Importantly, however, the availability of the constructive trust is qualified by para 56(4) which provides that ‘a claimant will not be permitted to obtain a profitable recovery in restitution at the expense of adequate provision for creditors and dependants of the recipient.’

The *Restatement* draws a sharp distinction between ‘two party’ cases of breach of fiduciary duty and ‘three party’ cases. In a ‘three party’ case, where the successful assertion of a proprietary remedy by the plaintiff would diminish the assets available to meet the claims of the fiduciary’s creditors and dependants, the plaintiff will be remitted to an equitable lien over property wrongly obtained by the fiduciary. The lien secures payment of the amount owed to the plaintiff who will accordingly not be entitled to any gains made by the fiduciary from successful investment of that amount.

Paragraph 56(4) is consequentialist in form and intent. The availability of a constructive trust depends on whether a court has identified creditors or dependants whose own claims will be adversely affected by its imposition. The sub-paragraph has been criticised by rights theorists on this account. They argue that the right to a constructive trust, once established, must not be modified or abrogated by reference to parties who themselves, if they are unsecured creditors, do not hold rights capable of defeating a proprietary claim. To deny a claimant a constructive trust solely on the ground that the defendant is insolvent or has numerous creditors, it is said, offends the principle of treating the claimant as ‘an end, not as a means’.

**IV. How Is All This Theory Relevant to Fiduciaries?**

Recent decisions on unauthorised profit-making by fiduciaries provide an instructive case study of the differences between remedialist and rights-based perspectives. The relevant authorities can be simplified for this purpose into three basic factual configurations. The first consists of cases of the fiduciary misappropriating (or, colloquially, stealing) the principal’s property. The award of relief in cases of this type usually involves no exercise of discretion and is uncontroversial. The principal is entitled to a constructive trust over the misappropriated property or its traceable proceeds unless the claim is defeated by the application of a recognised bar to relief. The court order recognises the principal’s pre-existing proprietary right or, in the case of trust property,

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36 For some of the practical difficulties to which the distinction between ‘two party’ and ‘three party’ constructive trust cases gives rise, see M Bryan, ‘Constructive Trusts: Understanding Remedialism’ in J Glister and P Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) ch 10.


38 *Black v S Freedman & Co* (1910) 12 CLR 105. The category includes, for present purposes, cases of so-called self-dealing and fair-dealing by trustees, although in some cases of the latter the constructive trust is not automatic but depends on beneficiary election. See James Edelman, ‘The Fiduciary “Self-Dealing” Rule’ in J Glister & P Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) ch 5.
restores the property or its proceeds to the trust. A discretionary remedialist would concede that there is little room for the exercise of discretion. For the rights theorist, the constructive trust provides the most complete substitute for the principal or trustee’s title.

The second factual configuration consists of cases of the fiduciary exploiting a business opportunity for personal gain when the opportunity should have been pursued on behalf of the principal. Most of the leading authorities on unauthorised advantage-taking by delinquent (and in some cases fallible but non-delinquent) fiduciaries fit this pattern. Although the reasoning in some of the decisions is opaque, and the orders made not always spelt out with translucent clarity, most authorities hold that the principal is entitled to a constructive trust over property obtained, or gains made, from the realisation of the opportunity. The award of proprietary relief in these cases is controversial. Discretionary remedialists and rights theorists both accept the outcome of the cases and the availability of disgorgement relief, but they defend them on very different grounds. The former justify the imposition of the constructive trust on policy grounds. The constructive trust, on their analysis, both deters fiduciary delinquency and promotes standards of disinterested performance of duty by fiduciaries. In the words of McLachlin J (as her ladyship then was):

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

This dictum, and countless others like it which have been enunciated over the last three hundred years or so, is music to the ears of the discretionary remedialist, for whom the enforcement of fiduciary obligations is policy-driven, and who view the constructive trust as a critical means for maintaining probity in commercial dealings. To rights theorists, in contrast, these dicta are cacophony. They reject justifications of the constructive trust remedy in terms of deterrence or maintaining the integrity of social institutions. Their position is straightforward. Since the fiduciary has agreed to subordinate his or her interests to those of the principal on a particular matter or with respect to a particular area of activity, it follows that the fiduciary must not make a

39 The misappropriation of specific trust chattels effects no change of legal title to the property, which at all relevant times will be vested in the delinquent trustee(s). Title to money will, however, usually have passed. A highly probable consequence of the breach of duty is that the trustees will be replaced and the property vested in new trustees. See Trustee Act 1958 (Vic) s 48.
40 The order made in Boardman v Phipps [1967] 2 AC 46 has long been in doubt because Wilberforce J’s order appears to have been lost but, in spite of Lewison J’s supposition to the contrary in Sinclair Investments (UK) Ltd v Versailles Trading Finance Ltd [2011] EWCA Civ 347 [1546], circumstantial evidence suggests that a constructive trust was imposed. See Michael Bryan, ‘Boardman v Phipps’ in C & P Mitchell (eds), Landmark Cases in Equity (Hart Publishing, 2012) 581; Andrew Hicks, ‘Proprietary Relief & the Order in Boardman v Phipps’ [2013] Conveyancer 232.
42 Soulou v Korkontzilas (1997) 146 DLR (4th) 214 [33], cited in Finn, above n 8, 271.
profit to which the principal has not consented out of the relationship.\textsuperscript{43} A disgorgement remedy fully enforces the principal’s right to the profit. It does not have to be justified in terms of social policy.

A criticism of both schools of analysis is that they provide a more convincing justification for compelling fiduciaries to hand over unauthorised gains by way of an account of profits than for the award of a constructive trust. What evidence is there that a constructive trust deters wrongdoing more effectively than an account of profits? Can a remedy properly be described as deterrent if its effect is simply to compel a fiduciary to hand over property which he should never have had in the first place?\textsuperscript{44} And while we can readily agree that fiduciaries cannot keep gains they had undertaken to make for their principals, why (on the rights-based account) does the constructive trust, rather than the account of profits, provide the most complete substitute for the right infringed?

If we examine the justifications for imposing a constructive trust, it is by no means clear that either theory can offer us principles to guide courts in awarding constructive trust relief in cases where the principal had no prior title to the property claimed. Such principles ought, one might reasonably suppose, relate to the special characteristics of the trust as a proprietary remedy. The primary advantages of the constructive trust are, first, that it entitles the beneficiary to the trust property in priority to the fiduciary’s unsecured creditors by virtue of the finding that the fiduciary is not beneficially entitled to the property; and, secondly, that the property (or its traceable proceeds) is recoverable from third party recipients who are not good faith purchasers.\textsuperscript{45} Both discretionary remedialism and rights theory offer plausible explanations of why a principal should be entitled to a gains-based remedy against a fiduciary who has made an unauthorised profit. Neither explains why the remedy should be proprietary.

V. Bribes and Secret Commissions

Cases of fiduciaries who accept bribes from a third party in return for influencing the exercise of the principal’s discretion in favour of the third party have long been the most controversial in constructive trust jurisprudence. The taking of bribes by fiduciaries not only attracts criminal sanctions but also undermines the core value of trust that lies at the heart of fiduciary relationships. It is undoubted that the fiduciary is civilly accountable for the bribe received.\textsuperscript{46} But

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\item\textsuperscript{43} Stevens, above n 29, 125–126; Lionel Smith, ‘Deterrence, Prophylaxis and Punishment in Fiduciary Obligations’ (2013) 7 Journal of Equity 87, 100–103. Compelling a fiduciary to transfer specific property to the principal may well be a deterrent if the property has special value to the fiduciary, such as a painting on which the fiduciary had set his heart on owning.
\item\textsuperscript{44} Smith, above n 43, 105.
\item\textsuperscript{45} Richard Nolan, ‘Bribes: A Reprise’ (2011) 127 Law Quarterly Review 19, 22. Denial of the constructive trust does not necessarily result in the bribe or other payment becoming available to the unsecured creditors. It may leave the payment in the hands of secured creditors, as occurred in Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2012] Ch 453.
\item\textsuperscript{46} Lister & Co v Stubbs (1890) 45 Ch D 1. The bribe is recoverable in a claim in money had and received or in a personal claim in equity: Boston Deep Sea Fishing & Ice Co v Ansell (1888) 39 Ch D 339, 367 (Bowen LJ). The principal must elect between seeking compensation for fraud and claiming the proceeds of the bribe: Mahesan v Malaysia Housing Society [1979] AC 374.
\end{itemize}
is the fiduciary accountable as constructive trustee of the bribe or its proceeds? The bribe is by definition not money paid from the principal’s own resources. Nor does it represent the proceeds of the exploitation of a commercial opportunity that the fiduciary ought to have exploited on behalf of the principal. Nevertheless, a proprietary remedy has obvious advantages (and a personal accounting order has corresponding disadvantages) if the fiduciary is bankrupt or if the principal claims property purchased wholly or in part with the bribe.

This is not the place to examine in detail the authorities on equitable relief awarded against bribe-taking fiduciaries. It is a complex story, characterised by frequent misreading and oversimplification of prior authority. Two points stand out. First, the judgments in the cases have not until recently supported analysis in terms of either discretionary remedialism or rights theory. While constructive trusts over the proceeds of bribes have been recognised in some cases and rejected in others, there was no suggestion, until the Full Federal Court decision in Grimaldi v Chameleon Mining NL (No 2), that courts are entitled to exercise a discretion in selecting the remedy against the bribe-taking fiduciary beyond the discretion involved in applying the bars to relief, such as delay. Nor do the decisions conform to rights theory. There is a strong policy flavour, particularly deterrence policy, running through the judgments in this area.

Secondly, while it is convenient to shoehorn the decisions into a third configuration of bribe-taking fiduciaries — a convenience adopted in this paper — many of the cases do not involve bribes. Neither of the cases discussed in this part of the paper involves bribes. Grimaldi concerned inter alia the receipt of unauthorised commissions by fiduciaries but not the taking of bribes. The same can be said of the payment received by the agent in the recent English decision of FHR European Ventures LLP v Cedar Capital Partners LLC. The case concerned what was described as an ‘exclusive brokerage agreement’ and it was accepted that the payment made pursuant to the agreement was ‘not intended to be a corrupt payment or a bribe’.

The term ‘bribe cases’ is no more than a convenient, if occasionally inaccurate, shorthand for decisions on the award of a constructive trust involving neither wrongful taking of trust property (or other property subject to fiduciary obligations) nor unauthorised advantage-taking. In other words, it is simply a residual category.

(A) Grimaldi v Chameleon Mining NL (No 2)

Grimaldi is a complex case involving the misapplication of money by directors of a mining company in order to obtain control of another company. The control in turn enabled the latter company to acquire valuable mining tenements. The directors, both individually and through

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50 [2014] 3 WLR 535 (‘FHR European Ventures’).
51 FHR European Ventures LLP and others v Mankarious and others [2014] 1 Ch 1, 7 [4] (Lewison LJ).
companies they controlled, made substantial profits from the exploitation of the tenements. Chameleon, the mining company whose assets had been misapplied, successfully sued the delinquent directors for breach of fiduciary duty. In addition, Chameleon obtained relief against the companies controlled by the directors for knowingly receiving the proceeds of breaches of fiduciary duty and for knowingly assisting their commission. The equitable relief ordered at trial and for the most part upheld by the Full Federal Court was extensive. It included account of profits orders against both the directors and the companies who had knowingly received the profits. The profits in respect of which the companies were accountable included future, as well as accrued, profits from operating the mining tenements acquired by the directors in breach of obligation until the tenements were worked out.

Amongst the various benefits obtained by the directors from their breaches of duty was a ‘spotter’s fee’ in recognition of their success in identifying and exploiting the opportunity to acquire the mine. The directors were held to be personally accountable for the spotter’s fee. It was an unauthorised profit vis–à–vis the plaintiff company, not a bribe. Nevertheless, all the authorities on proprietary remedies imposed over bribes and their traceable proceeds were reviewed and the dicta will rightly influence future cases in which proprietary claims to bribes and secret commissions are brought.

The Full Federal Court confirmed the authority of previous decisions holding that the principal was entitled to the benefit of a constructive trust over a bribe, or its proceeds, received by the fiduciary. However, the constructive trust does not arise automatically; the award is discretionary. It will not be made if there are other orders capable of doing full justice. In a critical passage the Full Court gave the example of ‘a bribed fiduciary, having profitably invested the bribe, [who] is then bankrupted and, apart from the investment, is hopelessly insolvent’. ‘[I]n such a case’, the Court continued, ‘a lien on that property may well be sufficient to achieve “practical justice” in the circumstances’.

The suggestion in Grimaldi that an equitable lien to secure payment of the bribe to the principal may be the most appropriate remedy when the fiduciary is insolvent is a compromise solution. The fiduciary’s creditors will be entitled to any profits sourced from the bribe, as well as to the benefit of any appreciation in the value of property purchased with the bribe. Although the Full Federal Court did not say so, it is also the solution favoured by the Restatement, where a lien is

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53 Ibid 450–454 [725]–[749].
54 Ibid 453 [740]. Taking the account was remitted to the trial judge. It was suggested that the accounting order might take the form of a royalty payment.
55 Ibid 423 [584].
56 It has been suggested, however, that the judgment in Grimaldi (2012) 200 FCR 296 gave insufficient weight to the earlier High Court decision of Ardlethan Options Ltd v Easdown (1915) 20 CLR 285, where the High Court assumed, without contrary argument, that the only relief available against the recipient of the bribe was personal. See KR Handley, ‘Fiduciaries and Bribes’ (Paper presented in Sydney, 30 August 2013).
57 The most relevant was A-G for Hong Kong v Reid [1994] 1 AC 324. Decisions which denied the availability of proprietary relief, and which accordingly were disapproved in Grimaldi (2012) 200 FCR 296, include Lister & Co v Stubbs (1890) 45 Ch D 1; Sinclair Investments Ltd v Versailles Trade Finance Ltd [2012] Ch 453.
preferred to a constructive trust on these very facts. 59

The dictum will be welcomed by remedialists and condemned by rights theorists. The Full Federal Court’s reasoning is explicitly consequentialist: the principal’s proprietary entitlement, if any, is said to turn on the fiduciary’s solvency. The suggestion is consistent with the High Court’s adherence to the concept of the remedial constructive trust, and the emphasis placed, particularly in John Alexander’s Clubs, 60 on identifying and taking account of third party interests in constructive trust litigation. But a rights theorist will nonetheless reject an approach that renders a plaintiff’s entitlement vulnerable to the defendant’s solvency. He or she will protest that the principal is being used as the means for promoting fairness in bankruptcy outcomes.

Theory aside, some attention needs to be paid to the practicalities of applying the dictum. It offers a common sense solution to an easy case — that of the ‘hopelessly insolvent’ fiduciary. But some harder cases will require determination, such as the fiduciary who has creditors but whose solvency, at the time of the constructive trust litigation, is uncertain. Or cases where third party claims have been brought against the fiduciary but their validity has not been tested by the time of the constructive trust hearing. Will a constructive trust be ordered in these cases? Should the third parties be joined to the litigation, as dicta of the High Court in John Alexander’s Clubs suggest? The difficulty with principles which distinguish between ‘two party’ and ‘three party’ cases in the award of relief is that every ‘two party’ case is potentially a ‘three party’ case. The solvency of a fiduciary will often be doubtful, not least because one of the consequences of detection of bribe-taking is loss of employment.  Not every fiduciary resembles Tom Boardman in Boardman v Phipps 61 whose solvency as a successful solicitor and farmer made it a matter of complete indifference as to whether he was personally accountable or subject to a constructive trust.

**(B) FHR European Ventures LLP**

In the recent decision of FHR European Ventures 62 a seven-judge panel of the Supreme Court of the United Kingdom reviewed the conflicting authorities on proprietary claims to bribes and secret commissions. The Court held that the principal was entitled to claim a constructive trust over a bribe paid to a fiduciary and its traceable proceeds. The facts were that the claimant had purchased for €211.5m the share capital of the company which owned a long leasehold interest in the Monte Carlo Grand Hotel. The defendant, a provider of consultancy services to the hotel industry, negotiated the purchase on behalf of the claimant. At the same time the defendant had entered into what was termed an ‘exclusive brokerage agreement’ with the vendor of the shares. Upon completion of the sale the vendor paid the defendant €10m. The payment was not a bribe but it was unauthorised. Moreover, it could not be argued that the defendant was under a duty to obtain the payment for the claimant. If such a duty had existed, a constructive trust order could easily have been justified, as the cases in the previous section of the paper show.

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59 Restatement (Third) of Restitution and Unjust Enrichment (US) [55(1)].
It was held at first instance that the defendant had not made adequate disclosure of the payment to the claimant. At a further hearing Simon J applied authority, binding on him, in holding that the claimant was only entitled to a personal remedy, assessed as the value of the payment. Since the defendant had few assets within the jurisdiction the remedy was virtually worthless. The Court of Appeal distinguished the authorities on which the trial judge had relied and held that the defendant was in breach of the duty it owed to the claimant to negotiate the lowest price possible for the shares in the hotel. The breach justified an award of a constructive trust over the payment. Upon further appeal the Supreme Court, which was unfettered by the previous authorities binding on the lower courts, confirmed the award of the constructive trust.

Lord Neuberger, delivering the judgment of the Court, stated that a correct decision must be based on ‘legal principle, decided cases, policy considerations and practicalities’. The parties formulated different versions of the applicable legal principle, and the decided cases were not reconcilable, so it was perhaps inevitable that ‘policy considerations and practicalities’ were accorded the greatest weight in reaching the decision.

Among the reasons given for favouring the imposition of a constructive trust over the proceeds of a bribe were: the ‘clarity and simplicity’ of requiring all benefits acquired by a fiduciary in breach of duty to be held on trust for the principal; the moral dissonance involved in imposing proprietary relief over property acquired by honest fiduciaries who had mistaken the scope of their obligations (as in Boardman v Phipps) but not over the proceeds of deliberate bribe-taking; the policy of deterring bribes by imposing the most draconian sanctions available to a court of equity; and the desirability of harmonising the principles of English equity with those of other common law jurisdictions, including Australia.

The policy argument often adduced for denying the principal a proprietary remedy, namely that its award can disadvantage the fiduciary’s unsecured creditors, did not convince the Supreme Court. It was rejected on the grounds that the proceeds of a bribe should never form part of an insolvent fiduciary’s estate (although Lord Neuberger conceded that an insolvent’s estate will often include assets which should never have been there in the first place if the fiduciary had performed his obligations), and that constructive trust relief was desirable because it enables the principal to trace the proceeds of a bribe into the fiduciary’s other assets, as well as into the hands of third parties.
parties.  

Lord Neuberger’s judgment offers some encouragement to both rights theorists and discretionary remedialists but is committed to neither.

Let us take rights theory first. If, as Lord Neuberger asserts, all benefits obtained by the fiduciary acting within the scope of the fiduciary relationship belong to the principal, so that the fiduciary comes under a duty to ensure that the principal receives these benefits, it can be accepted that the remedy which most completely enforces the duty is the constructive trust. The conclusion is consistent with the premise of rights theory that the appropriate remedy for the court to award is the one providing the most complete substitute for the performance of the obligation broken by the fiduciary. The objection to this mode of reasoning, however, is that it assumes an answer to the very point in issue in *FHR European Ventures*, namely whether the fiduciary’s duty is to ensure that the principal receives all such benefits. One of the reasons why the authorities in this area are hard to reconcile is precisely because they rest on varying, and often unstated, assumptions as to how the fiduciary’s obligations are to be defined. The authorities holding that the principal is not entitled to a constructive trust over a bribe, for example, define the fiduciary’s obligation as being to ensure that the principal receives *in specie* the benefits that the fiduciary had undertaken to obtain for the principal. This is a somewhat narrower formulation of a fiduciary’s duties than that recognised by Lord Neuberger and would result in denying constructive trust relief in cases of bribe-taking. In applying rights theory the critical question is how the right in issue (and the correlative duty whose breach attracts legal sanction) is defined.

The discretionary remedialist can also derive only limited assistance from *FHR European Ventures*. The policy justifications put forward by Lord Neuberger in support of imposing a constructive trust over bribes and their proceeds manifests a willingness to rely on ‘instrumental’ reasons (including economic reasons) to vindicate the award of an equitable remedy. This much can be conceded to the remedialists. But the constructive trust recognised *FHR European Ventures* is not really remedalist at all. In *Grimaldi* the Full Federal Court stated that the fiduciary’s solvency was material in determining whether a constructive trust ought to be imposed over the proceeds of a bribe. In other words, the consequences of awarding the remedy form a necessary part of the inquiry into whether the principal is entitled to the remedy. Applying *FHR European Ventures*, on the other hand, the award of the constructive trust is automatic, assuming that the proceeds of the bribe are traceable. The fiduciary’s solvency is irrelevant in determining the availability of the remedy. For the Supreme Court the practical consequences of applying a remedy are relevant to the formulation of the legal rule which determines its availability. The practical consequences are not, however, relevant to the application of the rule to different situations, such as whether the fiduciary is or is not insolvent.

This paper does not have as one of its objectives an assessment of whether the principles laid down

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in *Grimaldi* are preferable to those laid down in *FHR European Ventures*. Views on such a question are inevitably coloured by the assumptions the assessor makes as to the role of equitable doctrines and remedies in a commercial context. There is here, as elsewhere in the law, the perennial trade-off between predictability of outcome and remedial flexibility, with *Grimaldi* offering the potential of greater remedial flexibility and *FHR European Ventures* offering greater commercial certainty in remedial outcomes for a very particular kind of commercial dispute. What the cases do illustrate, however, are the different approaches the courts of the two countries take in evaluating the consequences of granting different forms of equitable relief.

VI. Conclusion

The Supreme Court in *FHR European Ventures* affirmed that English courts should ‘lean in favour’ of harmonising the development of the common law around the world.\(^{74}\) Harmonisation must not, however, be taken to imply that legal rules in different jurisdictions have to be identical, or even that the application of the same rule in different jurisdictions will lead to identical outcomes. Significant differences remain between the model of constructive trust recognised in *Grimaldi* and the model applied in *FHR European Ventures*. Dicta in *Grimaldi* follow the path signposted by the High Court in holding that the criteria for the award of a constructive trust include the solvency of the fiduciary and the interests of third parties in the subject-matter of the claims. English equity, on the other hand, even after *FHR European Ventures*, does not recognise the remedial constructive trust; the award of constructive trust relief does not therefore depend on the presence or absence of other claims on the fiduciary’s resources.

The Australian espousal of the remedial constructive trust enjoys the obvious advantage of flexibility, and builds on the age-old power of courts of equity to fashion relief to meet the justice of the individual case. Care needs to be exercised, however, in applying remedialism to cases of breach of fiduciary obligation. It would be wrong for a principal’s claim to the return of his or her own property to be subjected to the exercise of a broadly-based discretion. Rights theorists properly insist that accrued rights must not be placed in jeopardy by the exercise of discretion, however benevolent that exercise might be. Furthermore, well-meaning generalisations about ‘taking into account third party interests’ ought to attract closer scrutiny than they have so far received. The work of identifying and valuing third party interests within a structure of discretionary proprietary relief has scarcely begun. Many judges and writers have applauded the arrival of the Australian remedial constructive trust. But what ‘remedial’ means in this context remains obscure.\(^{75}\)

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74 *FHR European Ventures* [2014] 3 WLR 535, 552–553 [45].
Adequate, Sufficient and Excessive Reasons

The Hon Justice Mark Weinberg

It is said that Lord Mansfield once advised a businessman, who had recently been appointed as one of the King's Justices, that he should only ever give judgments (which would probably be right) and never give reasons (which would almost certainly be wrong).

Judges give reasons in almost every case. The giving of reasons is a normal incident of the judicial process. The obligation to explain how, and why, a particular decision has been reached stems from the common law. In more recent times, it has been suggested that this duty has a constitutional dimension as well.

As a matter of sound practice, administrators usually give reasons. However, unlike judges, they are only obliged to do so when statute so demands.

Complaints about the failure to give any, or any adequate, reasons have become more common in recent years. As I hope to demonstrate, the law in this area has grown rapidly. There is also a significant body of legal writing on this topic.

The justification for giving reasons

Plainly, there are a number of justifications for requiring the provision of reasons.

In the case of judicial review, reasons enable a reviewing court to be satisfied that the decision-maker took into account all matters that he or she was required to consider, and did not have regard to extraneous material. Reasons also enable the reviewing court to determine whether any other form of jurisdictional error has been demonstrated.

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*A judge of the Court of Appeal, Supreme Court of Victoria. The opinions expressed in this paper are my own. They are not to be taken as reflecting the views of any other member of the Court of Appeal. I acknowledge the assistance of my Associate, Emily Brott, in the preparation of this paper. This paper is based on the presentation delivered at the ‘Adequate, Sufficient and Excessive Reasons’ program held by the Judicial College of Victoria in March 2014.

1 Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 (‘Osmond’).
2 Wainohu v New South Wales (2011) 243 CLR 181 (‘Wainohu’). In Wainohu, legislation which empowered Supreme Court judges to make specific declarations and decisions, but included a provision stating that any judge making such an order was not required to provide reasons, was held to be invalid. The exemption from the duty to give reasons was repugnant to institutional integrity and incompatible with the exercise of judicial power. At the same time it was recognised that not every judicial order need be accompanied by reasons.
3 Osmond (1986) 159 CLR 656.
There is an ongoing debate, amongst administrative lawyers, as to whether a failure on the part of a decision-maker to provide reasons when asked to do so, should of itself be regarded as establishing a breach of procedural fairness, or some other ground of judicial review.

In *Osmond v Public Service Board of New South Wales*, Kirby P, in the New South Wales Court of Appeal, held that there was a general common law duty to give reasons. That duty existed irrespective of whether the decision was judicial or administrative in character. His Honour emphasised that the duty existed whether or not the legislature had chosen to impose such an obligation.

President Kirby explained the benefits of a duty to provide reasons. First, it enabled the recipient to see whether any appealable or reviewable error had been committed, thereby informing the decision whether to appeal, or let the matter lie. Secondly, it answered the frequently voiced complaint that good and effective government could not win support or legitimacy unless it was accountable to those whose rights it affected. Thirdly, the prospect of public scrutiny would provide officials with a disincentive to act arbitrarily. Fourthly, the discipline of giving reasons could make decision-makers more careful, and rational. Finally, the provision of reasons could provide guidance for future cases.

It is fair to say that the merits of giving reasons have never seriously been doubted. That is so even when one factors in the additional burden that this task imposes on decision-makers. Obviously, the need to give reasons can result in significant additional cost and delay.

Of course, statutory obligations to give reasons have been imposed upon administrators for many years. At the same time, it must be recognised that Kirby P’s approach to the duty to give reasons was specifically rejected, on appeal, by the High Court. There it was held that the introduction of such a duty was a matter for the legislature, balancing all competing policy considerations, and not to be effected by the ‘blunt undiscriminating’ approach of judicial innovation.

Why do judges give reasons? In my opinion, there is no better explanation than that given by McHugh JA (as his Honour then was) in *Soulemezis v Dudley (Holdings) Pty Ltd*:

> The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge’s decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment ‘is not only to do but to seem to do justice’: *The Writing of Judgments* (1948) 26 Can Bar Rev at 491. Thus the articulation of reasons provides the foundation for the acceptability

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5 Ibid 467–70.
6 See, eg, at the Commonwealth level, the *Administrative Appeals Tribunal Act 1975* (Cth) s 28(1); the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13. In Victoria, the same general duty is cast upon decision-makers by the *Administrative Law Act 1978* (Vic) s 8.
7 *Osmond* (1986) 159 CLR 656.
8 Ibid 669–70 (Gibbs CJ).
9 (1987) 10 NSWLR 247 (‘Soulemezis’).
of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (In Defence of Judicial Candor (1987) 100 Harv L Rev 731 at 737):

... A requirement that judges give reasons for their decisions — grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary’s exercise of power.

Thirdly, under the common law system of adjudication, courts not only resolve disputes — they formulate rules for application in future cases: Taggart “Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases” (1983) 33 University of Toronto Law Journal 1 at 3-4. Hence the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future.10

There is a difference, it seems to me, between what the law expects by way of reasons from administrative decision-makers, and the obligation imposed upon judicial officers.

In Minister for Immigration and Ethnic Affairs v Wu Shan Liang11 the High Court cited with approval a passage from a judgment of the Full Court of the Federal Court in Collector of Customs v Pozzolanic Enterprises Pty Ltd12 to the effect that, when dealing with the reasons of an administrative decision-maker, these were ‘not to be construed minutely and finely with an eye keenly attuned to the perception of error’.13

I have not seen the Wu Shan Liang admonition applied to judicial reasoning. There is no reason in principle why, in some cases, that should not be done.

The balance of this paper will focus primarily upon the obligations that rest upon courts, in relation to the provision of reasons, rather than any lesser obligations that rest upon tribunals exercising quasi-judicial functions. However, some of what I have to say may be applicable entirely across the board.

What are adequate or sufficient reasons?

Regrettably, this question does not admit of a simple answer. It is always a matter of degree. Judges, acting reasonably, may have quite different views on this subject.14

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11 (1996) 185 CLR 259 ("Wu Shan Liang").
14 See, eg, Ta v Thompson [2013] VSCA 344 (3 December 2013) ("Ta") where the Court was divided on the question of whether adequate reasons had been provided by a magistrate who recorded a conviction for possession of heroin.
In Soulemezis two members of the New South Wales Court of Appeal expressed quite different views as to how much detail had to be provided if a judge’s reasons were to be regarded as adequate. Kirby P, who dissented, held that both the grounds which led the judge to a conclusion on disputed factual questions, and the findings on the principal contested issues, had to be set out, in full. Mahoney JA took a more flexible approach. His Honour observed that the law did not require a judge to make an express finding in respect of every fact leading to, or relevant to, that judge’s final conclusion of fact. Nor did a judge have to reason, and be seen to reason, from one fact to the next, along the chain of inference leading to the ultimate conclusion.

What seems to be clear is that the bald statement of an ultimate conclusion, even by reference to the evidence said to support it, is unlikely, in many cases, to be sufficient. There must be some process of reasoning set out which enables the path by which the conclusion has been reached to be followed.

Reasons may be lengthy, and even prolix, without being adequate. A global, or general pronouncement, on the part of a judge that he or she has considered all the relevant evidence and reached a conclusion based thereon is not an adequate statement of reasons. Nor is it normally sufficient to set out the arguments of both sides and state simply that the contentions of one party are to be preferred to those of the other.

A judge, though obliged to give reasons, is not required to address every submission that was advanced during the course of the hearing. As long as the reasons deal with the principal issues upon which the decision turns, they will normally pass muster.

Plainly, judges are not expected to deal specifically with every consideration that passes through their minds as they proceed to their conclusion. However, any submission that is worthy of serious consideration should, ordinarily, receive some attention in the reasons provided.

One area that often gives rise to difficulty, when it comes to preparing reasons for judgment, is the manner in which findings as to credibility should be expressed. How much detail is required? To what extent should the judge explain precisely why he or she prefers the evidence of one witness to that given by another? This problem can be exacerbated when it comes to dealing with conflicting expert evidence, as often occurs. It will usually be necessary, in such cases, to state not merely whose evidence the judge accepts, but also to explain, in appropriate detail, why the judge reached that conclusion.

In that regard, judges should endeavour to recognise and give effect to the importance to the parties, to the public, and to appellate courts of providing adequate reasons. As I have previously suggested, administrative decisions are generally afforded greater latitude. However, even those decisions should meet the basic requirements of procedural fairness associated with the need to explain why a particular result has been reached.

15 See Dornan v Riordan (1990) 24 FCR 564, where a report of 178 pages was held not to disclose the relevant Tribunal’s reasoning process sufficiently to avoid an error of law.
In *Telstra Corporation Ltd v Arden*16 Burchett J referred with approval to *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* in which it was said that ‘the extent to which a court must go in giving reasons is incapable of precise definition’.17 His Honour reiterated a view that he had previously expressed to the effect that reasons given by administrative decision-makers should not be read pedantically, but sensibly.18 He added that provided the reasons expose ‘the logic’ of the decision, and contain findings on those matters of fact essential to that logic, they would normally be adequate.19

If it is not possible to understand from the reasons given how the conclusion was reached then plainly those reasons will be inadequate. The reasons should trace the major steps in the reasoning process so that anyone reading them can understand exactly how the decision-maker reached his or her conclusion.

If certain evidence presented was relied upon, that fact, and the reasons why it was so relied upon, should be stated. Merely summarising the evidence will not be sufficient.

If the reasons are poorly expressed, and anyone reading them is left to speculate as to the possible route by which the result was achieved, the reasons will fail. The reasons must demonstrate that a finding of fact was based upon logically probative evidence. If they do not do so, an appellate court will not strain to find a basis upon which an appeal of the decision below can be upheld.

**‘Horses for courses’**

The duty to give reasons is, of course, an integral part of any judge’s task in deciding a case. I would add that it is also an important part of any judge’s task in ruling upon a procedural question, an interlocutory issue, or determining an evidentiary point.20

The content of that duty will, of course, vary. The obligation that rests upon a busy magistrate, hearing perhaps dozens of summary matters in a day, will obviously be less onerous than that which rests upon a judge in one of the higher courts.

**Summary justice - Magistrates’ Courts and VCAT**

Magistrates’ Courts and the Victorian Civil and Administrative Tribunal (VCAT) deal, between them, with the overwhelming bulk of all disputes that are institutionally resolved in this State.

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16 (1994) 20 AAR 285.
17 (1983) 3 NSWLR 378, 381 (Hutley JA).
18 *Dodds v Comcare Australia* (1993) 31 ALD 690, 691.
19 Ibid.
20 Rulings given upon points of evidence, in the course of a trial, are normally accompanied by the briefest of reasons. Sometimes, common sense dictates that nothing need be said when the objection taken is obviously frivolous, or, it is plain that the evidence is not admissible. However, in any case in which there is a contestable issue as to whether a particular piece of evidence should be received, the judge should state, albeit succinctly, the basis of the ruling.
VCAT is not a court, but it exercises powers that are, in many respects, judicial in nature. Its members are subject to specific statutory duties, regarding the provision of reasons, under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Magistrates generally give only the most cursory of reasons, particularly in summary criminal matters. This is perhaps, in part, because appeals to the County Court from their decisions in such matters are by way of re-hearing *de novo*. It is obvious that reasons are likely to be of less importance in such circumstances. An appeal lies to the Supreme Court from a magistrate’s decision, but only on a point or points of law. While the prerogative writs are available, the conditions under which they will be granted are so narrowly circumscribed as to make their use a rare occurrence.

A useful illustration of the extent of the duty to provide reasons, at the Magistrates’ Court level (and, it might be said, at the level of the County Court hearing an appeal *de novo*), may be found in the recent decision of the Court of Appeal in *Ta v Thompson*.

In that case the appellant was convicted of possession of heroin in the Magistrates’ Court. His conviction was upheld on appeal to the County Court. The facts were as follows. The police located 0.1g of heroin in the bedroom of a house that was solely occupied by the appellant. The heroin was found in a wardrobe. There was evidence that some days earlier, he had hosted a New Year’s party. The appellant claimed that he knew nothing about the heroin, and that it must have been left there by someone else.

The County Court judge, who heard the appeal, gave her decision immediately after the close of submissions. She said that she had heard the evidence about a party at the appellant’s house, and other matters surrounding the state of the premises. She added that, with regard to that matter, she had no other evidence upon which to rely apart from that given by the appellant. She said that she did not accept his evidence and, accordingly, found the charge proved.

The appellant brought proceedings by way of judicial review seeking orders in the nature of certiorari. He submitted, inter alia, that the judge had failed to provide adequate reasons to explain her decision, and, in particular, why she had rejected his account. The application for review was dismissed by Whelan J (as his Honour then was).

The appellant then appealed. Osborn JA (with whom Beach JA agreed) analysed the County Court judge’s treatment of the appellant’s evidence in some detail. His Honour noted that the judge had observed that there was no evidence corroborating his assertion that there had been a party, on

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21 *Director of Housing v Sudi* (2011) 33 VR 559.
22 Section 46(2).
23 They are not to be criticised for doing so. Where, for example, a magistrate is asked to impose the minimum period of disqualification and fine for a 0.05 offence, and is willing to accede to that request, it is hardly necessary to say anything further.
New Year’s Eve, ‘at which people were sleeping all over the place’. The appellant, being the occupier of premises in which drugs were found, bore the onus of proving that he had no knowledge of their presence. The case therefore depended upon the judge accepting his evidence. The judge had found him to be a witness whose evidence was not credible. Little more needed to be said.

Osborn JA pointed out that there were major hurdles to be overcome if the appeal were to succeed. In the first place, it would have to be shown that the County Court judge’s reasons were so inadequate as to give rise to an error of law. Even that would not be sufficient. Error of law on its own, falling short of jurisdictional error, would not justify the grant of certiorari.

His Honour noted that there was some uncertainty in the authorities as to whether, in the absence of a right of appeal, the duty to give reasons was as extensive as it might otherwise be. However, he was in no doubt that even though no appeal lay from the County Court judge’s determination, it was a final decision of the kind for which reasons had to be given.

In Osborn JA’s opinion, the reasons did not have to be particularly extensive. All that was required was that the judge state the grounds for her decision. That was essential in order to satisfy the various purposes for which reasons were to be provided, as laid down in *Fletcher Constructions Australia Ltd v Lines Macfarlane & Marshall Pty Ltd*.

His Honour found that there were good reasons for concluding:

that the obligation to give reasons did not go as far as that which is imposed where a decision is subject to an appeal by way of rehearing but was limited to that ordinarily imposed when a decision is subject to an appeal on questions of law only.

Osborn JA referred to *Soulemezis*, and to *Huntsman Chemical v International Pools*, in which the New South Wales Court of Appeal re-affirmed the principles expounded in the former case. He said that if the approach taken in *Soulemezis* was to be followed, then the County Court judge’s reasons had to explain the grounds for her conclusion in sufficient detail to enable the Court of Appeal ‘to see the grounds upon which it was based but did not require detailed reasoning as to the evidence’.

Osborn JA concluded that Whelan J had been correct in holding that:

Where there is no right of appeal in relation to factual findings, the requirement for the provision of reasons as to factual findings is less rigorous. This is such a case.

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26 (2002) 6 VR 1, 32 [101].
27 *Ta* [2013] VSCA 344 (3 December 2013) [34].
29 *Ta* [2013] VSCA 344 (3 December 2013) [42].
30 *Ta v Thompson* [2012] VSC 446 (28 September 2012) [30].
His Honour said that he did not accept that

it must be inferred that her Honour’s decision rested upon further grounds which she did not identify. A conclusion that a decision maker is not satisfied to the relevant standard may not bear any or any material elaboration.\textsuperscript{31}

Osborn JA referred, with apparent approval, to Mahoney JA’s comment in \textit{Soulemezis} that

[...]he weight which a judge will give to the evidence of a witness will often be not capable of rationalisation beyond the statement: having heard him, I am not satisfied that I should accept what he says.\textsuperscript{32}

Osborn JA’s judgment in \textit{Ta} seems to have been influenced to some degree by the fact that the appellant bore the onus of satisfying the Court that the heroin found in his wardrobe was not his, and that he knew nothing about it.

In other words, Osborn JA may have come to a different conclusion regarding the adequacy of the reasons given in \textit{Ta} but for the two factors that stood out in that case. First, the absence of any appeal from the County Court on a hearing \textit{de novo}, and second, the fact that the appellant bore the onus of establishing his innocence. Put simply, Osborn JA found that the County Court judge had not been persuaded by the appellant’s evidence and it was sufficient that ‘her reasons made clear that she was not so persuaded’.\textsuperscript{33}

Priest JA delivered a strongly worded dissent.\textsuperscript{34} His Honour noted that it had been recognised, specifically with respect to the County Court exercising its appellate jurisdiction, that a judge is not relieved of the obligation to give reasons simply because of the absence of a further right of appeal. As Priest JA noted, this very question had arisen for consideration in \textit{R v Arnold}\textsuperscript{35} where Phillips JA observed:

One would hope that such a failure on the part of an appellate judge to give any reasons whatever when announcing his determination is an occurrence which, if not unique, is very uncommon. It has frequently been emphasised how important is the giving of reasons to the process of judicial decision-making; see, for example, \textit{De Iacovo v Lacanale} [1957] VR 553 at 557-9 (where the earlier cases are recounted); \textit{Pettitt v Dunkley} [1971] 1 NSWLR 376 at 380-2 (where again earlier authorities are recounted); \textit{Palmer v Clarke} (1989) 19 NSWLR 158 (where the nature of “the common law duty” imposed upon a judge was emphasised); \textit{Soulemezis v Dudley (Holdings) Pty. Ltd.} (1987) 10 NSWLR 247, especially at 278-81 per McHugh JA, and \textit{Sun Alliance Insurance Ltd. v Massoud} [1989] VR 8 at 19-20 per Gray J. In stating the relevant principles, it is always accepted that there is no universal obligation on the decision-maker, even though it be a court, to give reasons (for

\textsuperscript{31} \textit{Ta} [2013] VSCA 344 (3 December 2013) [51].

\textsuperscript{32} (1987) 10 NSWLR 247, 273.

\textsuperscript{33} \textit{Ta} [2013] VSCA 344 (3 December 2013) [62].

\textsuperscript{34} Ibid [64]–[81].

\textsuperscript{35} [1999] 1 VR 179. See also \textit{Munro v Brack} (2000) 112 A Crim R 398, 403 [31]–[34] (Beach J).
which proposition Brittingham v Williams [1932] VLR 237 at 239 is commonly cited) and what is sufficient by way of reasons in a given case will always depend upon the circumstances (of which Wightman v Johnston [1995] 2 VR 637 is a recent example). In Soulemezis at 280, McHugh JA (as he then was) said that ‘the extent of the duty to give reasons is related “to the function to be served by the giving of reasons”’ (quoting Mahoney JA in Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378 at 386). McHugh JA also pointed out (as did Gray J in Massoud) that the obligation to give reasons could no longer be seen as dependent upon the existence of a right of appeal: as to which see Tatmar Pastoral at 386 and Public Service Board (NSW) v Osmond (1986) 159 CLR 656 at 666-7 per Gibbs CJ (although of course the hearing of an appeal has often provided the occasion for pointing out the difficulties created by the absence of reasons below). The duty to give reasons, qualified though it is, can be recognised now as ‘an incident of the judicial process’.36

In explaining why he regarded the County Court judge’s reasons as inadequate, even to the point of justifying the grant of certiorari, Priest JA went on to say:

If the judge’s rejection of the appellant’s evidence turned on credit, she did not say so explicitly. There is nothing in her reasons to suggest that she based her failure to accept the appellant’s word on an assessment of demeanour. And save to say that she probably rejected his evidence based on one or other (or a combination) of the possibilities set out above, the judge’s reasons are enigmatic. The appellant was entitled to know ‘explicitly’ the path of reasoning which led to the order dismissing his appeal. He did not get that.37

A case which bears some similarity to Ta is the well-known decision of the Court of Appeal in Perkins v County Court of Victoria.38 There the appellant had been convicted in the Magistrates’ Court of various summary offences. His appeal to the County Court was only partly successful. He then sought judicial review. He failed before Harper J, and appealed from that decision.

In dismissing the appeal, Buchanan JA said:

Want of reasons may amount to an error of law where the absence of reasons would frustrate a right of appeal, although even where a right of appeal exists, the nature of the decision and the circumstances of the case may require no more than a brief ruling, and, where an appeal is de novo, an absence of reasons for the decision below can have no effect. Moreover, the provision of reasons for decisions affecting persons’ rights and liabilities is usually desirable, serving objectives such as candour in decision-making, the accountability of decision-makers, the reconciliation of parties to the results of litigation and promoting the drawing of conclusions which are rational and soundly based on legal principles. Nevertheless, the general desirability of reasons, and in certain cases their necessity, in my view are not sufficient considerations to found an all-embracing principle that failure to state reasons or adequate reasons for a judicial decision constitutes an error of law.

37 Ta [2013] VSCA 344 (3 December 2013) [78] (citations omitted).
vitiating the decision.\textsuperscript{39}

His Honour continued:

The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or of law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law.\textsuperscript{40}

Buchanan JA found that the County Court judge had made clear the grounds for his decision. Therefore, while reasonable minds might differ as to whether that finding was correct, the judge had expressed adequately the basis of his finding.

The reasoning of the Court of Appeal in both \textit{Ta} and \textit{Perkins} speaks for itself. Although magistrates (and County Court judges hearing appeals \textit{de novo}) are obliged to give reasons for what they do, they are not expected to go into matters in anything like the detail that would be expected from judges in the higher courts when delivering reasons for judgment.

\textbf{Trial judges}

Nothing like the same latitude will be extended by appellate courts to trial judges who hear and determine civil cases.

The extent of the obligation to give reasons at trial level is largely to be gauged from an analysis of appellate judgments where the failure to give sufficient reasons has been considered as a ground of appeal.

There is now a significant and growing body of case law dealing with adequacy of reasons. A number of these cases turn upon the serious injury provisions of the \textit{Accident Compensation Act 1985} (Vic) and its interstate equivalents.

Before dealing with the recent case law, a brief excursus into history may be of interest. In \textit{Swinburne v David Syne and Co}, an early libel case initiated by the Victorian Minister in charge of the Department of Water Supply, Madden CJ said that although a judge should give his reasons ‘he is not bound to do so’.\textsuperscript{41} That view would not command support today.

In 1932, Sir Leo Cussen, in delivering the judgment of the Full Court in \textit{Brittingham v Williams},\textsuperscript{42} put the matter more in accord with current thinking:

\begin{itemize}
  \item \textsuperscript{39} Ibid 270 [56].
  \item \textsuperscript{40} Ibid 273 [64].
  \item \textsuperscript{41} [1909] VLR 550, quoted in \textit{Sun Alliance Insurance Ltd v Massoud} [1989] VR 8, 19.
  \item \textsuperscript{42} [1932] VLR 237.
\end{itemize}
We must not be taken as laying down a universal rule that a judge is bound upon request to give reasons for his decision. A case may turn entirely upon a finding in relation to a single and simple question of fact, or be so conducted that the reason or reasons for the decision is or are obvious to any intelligent person; or a claim or defence may be presented in so muddled a manner that it would be a waste of public time to give reasons; and there may be other cases where reasons are not necessary or even desirable.43

New South Wales judges have traditionally been somewhat more inclined to insist upon the provision of adequate reasons in every case. Sir Frederick Jordan, in particular, emphasised the need for all courts, even those exercising summary jurisdiction, to provide reasons. He accepted, of course, that the reasons need not be elaborately stated.

In *Carlson v The King*44 Sir Frederick observed that reasons should contain not merely a summary of the evidence and a statement of the decision reached but should also disclose the actual process of reasoning adopted in arriving at the decision.

The decision of the New South Wales Court of Appeal in *Pettitt v Dunkley*45 provides a useful illustration of the development of principle in this area. In an action for negligence, where the plaintiff had been struck by a motor vehicle, a District Court Judge found for the defendant, saying only this:

> It would not help in view of this lady's condition of health, psychomatic [sic] or otherwise, for me to give any other reasons. I simply enter my verdict. I return a verdict for the defendant.46

The plaintiff appealed under s 142 of the *District Courts Act 1912* (NSW) which gave a right of appeal where the appellant was aggrieved ‘on a point of law’.

Asprey JA, after referring to previous authority, said:

> for a magistrate to content himself saying ‘I have reached my decision after having considered all of the matters which the statute requires me to consider’ is not a proper fulfilment of the obligation which rests upon him as a judicial officer to see that his reasons are ‘explicitly stated’, to use the language of Sir Frederick Jordan...47

His Honour continued:

> where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt

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43 Ibid 239.
44 (1947) 64 WN (NSW) 65.
45 [1971] 1 NSWLR 376.
46 Ibid 384.
as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge’s findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law.48

Returning to the position in this State, in Llewellyn v Reynolds49 the Full Court made it clear that where a judge rejected evidence which had not been challenged, and was not itself inherently improbable, without giving any reasons for having done so, that finding might be set aside.50

In Sun Alliance Insurance v Massoud,51 the Full Court adopted much of Asprey JA’s reasoning in Pettit v Dunkley. There, Gray J expressed the opinion that ‘the decided cases show that the law has developed in a way which obliges a court from which an appeal lies to state adequate reasons for its decision’.52 While his Honour noted that the sufficiency of reasons would always depend on the particular circumstances of the case, he articulated two criteria where reasons would be inadequate: (1) where an appellate court is unable to ascertain the reasoning upon which the decision is based, and (2) where justice is not seen to have been done.53

Soulemezis remains the seminal case on the adequacy of reasons. An injured worker succeeded in gaining compensation in the District Court. However, the judge awarded her only limited benefits, terminating on a particular date. Thereafter she was deemed ‘fit for all work’.54 The date chosen was the date of a CAT scan report that was tendered in evidence. The plaintiff appealed that finding, arguing that she was still incapacitated after that date. She argued that there was no basis for the judge’s finding, and that his Honour had failed to give adequate reasons for the decision reached.

The judgment of Mahoney JA, on appeal, is particularly instructive. In considering what reasons must be given, and what a judge does in writing a judgment, it is relevant to distinguish between the ‘essentials and the peripherals’.55 For example, where there is an appeal from his or her order, it is proper that the judge make apparent those matters which should be apparent if the right of appeal is to be exercised by the unsuccessful party and if the appellate court is to be able to do what, in the particular appeal, it should do.

50 See also De Iacovo v Lacanale [1957] VR 533, 557–9.
52 Ibid 18.
53 Ibid.
55 Ibid 272.
Mahoney JA was at pains to observe that a formulaic approach to judging was impossible. To require a judge to detail the various steps by which he reasoned to his conclusion was to mistake the nature of the reasoning process. In his Honour's opinion, the objection to what the judge had done, at first instance, was that he had not explained with sufficient clarity how the CAT scan could (and did) lead to the conclusion that, after that particular date, the worker's condition had changed.

Nonetheless, and despite the inadequacy of the reasons given, Mahoney JA dismissed the appeal. He concluded that any error on the part of the judge in that respect did not, in the particular circumstances of that case, give rise to a point of law.

McHugh JA agreed with Mahoney JA that the appeal should be dismissed. His Honour considered that the adequacy of a judge's reasons will depend 'on the importance of the point involved and its likely effect on the outcome of the case'. While the finding that the appellant was fit for work from the date of the CAT scan did involve a crucial fact, McHugh JA suggested that 'great care need[ed] to be taken that dissatisfaction with the finding of fact d[id] not mislead the Court into holding that the learned judge ha[d] failed to give his reasons for his finding'. Although the judge had not given any specific reasons for his finding, it could be inferred that he considered the plaintiff to be fit for work because the CAT scan did not reveal any abnormality. It was not to the point that that finding may itself have been incorrect.

According to his Honour:

> An erroneous or perverse finding of fact raises no question of law and cannot be challenged by way of appeal. What is decisive is that his Honour's judgment reveals the ground for, although not the detailed reasoning in support of, his finding of fact. But that is enough in a case where no appeal lies against the finding of fact.

Moving to recent authority dealing with the adequacy of reasons, particularly in the context of serious injury cases in this State, it is worth considering first the decision of the Court of Appeal in *Franklin v Ubaldi Foods Pty Ltd*. There the appellant had sustained a lower back injury during his employment as a chef. He had been lifting crates, and other items weighing between 10 and 25 kilograms. A County Court judge dismissed his application for compensation under the *Accident Compensation Act 1985* (Vic).

Ashley JA considered the adequacy of the reasons given by the judge as then required by the relevant section of the Act. At that time, s 134AE provided that the reasons given by the court in deciding a serious injury application should not be 'summary reasons but shall be detailed reasons which are as extensive and complete as the court would give on the trial of an action'.

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56 Ibid 279.
57 Ibid 281.
58 Ibid 282.
60 Section 134AE was repealed by the *Justice Legislation Amendment (Miscellaneous) Act 2012* (Vic), but continues to have effect in relation to certain cases initiated prior to 1 January 2013 and not decided by that date.
His Honour referred to *Hunter v Transport Accident Commission*\(^\text{\textsuperscript{61}}\) where Nettle JA had said, in relation to an application under s 93(4)(d) of the *Transport Accident Act 1986* (Vic), that although the extent of the reasons required would depend upon the circumstances of the case, they should deal with the substantial points raised by the parties, include findings on material questions of fact, refer to the evidence or other material upon which those findings were based, and provide an intelligible explanation of the process of reasoning that had led the judge from the evidence to the findings, and from the findings to the ultimate conclusion.

Ashley JA went on, in *Franklin*, to say that insofar as the judge may have rejected evidence or other material upon which a party relied, the judge should refer to that evidence or material and explain why it was rejected. While it was not incumbent upon the judge to deal with every argument and issue that may have arisen, where an argument was substantial or an issue significant, it should be addressed. Put simply, failure to expose the path of reasoning was itself an error of law.

Ashley JA made clear that the mere recitation of evidence, followed by a statement of findings, without any explanation as to why the evidence was said to lead to the findings was ‘about as good as useless’.\(^\text{\textsuperscript{62}}\)

To illustrate the requirements that had to be met in a case of the kind that confronted the Court in *Franklin*, it should be noted that Ashley JA discussed seven shortfalls in the trial judge’s reasons for rejecting the appellant’s claim in that case. In brief, they were as follows:

- the starting point of the appellant’s case was that after hard work on 29 October 1999, his pre-existing symptoms got much worse. The judge never addressed whether he accepted or rejected the appellant’s evidence as to the events on 29 October 1999;
- if the judge rejected the appellant’s account, he did not provide any objective circumstances which gave it some support;
- simply to recount various medical histories and the appellant’s response when faced with them in cross-examination, left their significance, as the judge perceived it, unexplained;
- if he rejected the appellant’s account of events concerning 29 October 1999 for the reason that the appellant was not creditworthy, the judge made no finding on that;
- the judge wrongly concluded that the appellant had been made aware that unless he could demonstrate an injury after 20 October 1999, then his present application would fail. The evidence did not necessarily show this;

\(^{61}\) [2005] VSCA 1 (10 February 2005) (‘Hunter’).

• the judge’s statement that the plaintiff ‘chose to press on with employment and only after giving notice of resignation by letter dated 14 October, for the first time he consulted a doctor in respect of what he now describes as “severe pain in his lower back”’ left very uncertain what the judge meant to convey. If he meant to convey that the appellant had made up an injury only after giving notice, then this would stand in opposition to the judge’s conclusion that the appellant had indeed suffered a compensable lower back injury. If he meant something else, he did not say so; and

• if the judge thought that the appellant was un-creditworthy, certain objective evidence tending to the contrary required consideration.63

The Court of Appeal has applied the principles laid down by Ashley JA in Franklin on a number of occasions.

For example, in Alsco Pty Ltd v Mircevic,64 the trial judge dealt with a conflict between medical experts by placing greater weight on the evidence given by those witnesses whose opinion was tested in court. She rejected the evidence of two neurologists, and another acknowledged expert who had arrived at a different conclusion. The Court of Appeal concluded that the judge had provided sufficient justification, in her reasons for judgment, for having done so.

In Meadows v Lichmore Pty Ltd65 the plaintiff, whose work duties included repetitive and quick packing and unpacking, developed a pain syndrome or ‘functional overlay’. The resultant pain and disability had both physical and psychological aspects. The trial judge accepted that the pain and suffering consequences relied on did reach the ‘very considerable’ level required, but was not satisfied that those consequences had an organic basis. The judge therefore dismissed the application for compensation.

The plaintiff appealed on a number of grounds, including that the judge had failed to provide adequate reasons for his decision. Maxwell ACJ (with whom Robson and Dixon AJJA agreed) dismissed the appeal, finding that:

• the trial judge had applied the correct legal test and his decision was well open on the evidence;

• it was not possible on the evidence to separate the physical from the psychological causes of the pain and disability from which the plaintiff was suffering (or at least it was open to the judge to conclude that they could not be separated); and

• the reasons given by the judge were entirely adequate.66

63 Franklin [2005] VSCA 317 (21 December 2005) [40]–[52].
64 [2013] VSCA 229 (4 September 2013).
66 Ibid [5].
In considering the adequacy of the reasons given, Maxwell ACJ held that the judge’s reasons dealt with both the substance of the evidence of the medical practitioners relied on, and the strength and weaknesses of that evidence, in quite sufficient detail to enable [the plaintiff] to appreciate why the application had failed.67

According to Maxwell ACJ, the conclusion arrived at by the trial judge was essentially quite straightforward. It was that the evidence did not allow the judge to be satisfied that the pain and suffering consequences which the plaintiff described were the result of the physical injury, rather than having been brought about by the functional overlay (or chronic pain syndrome) described in the medical reports. In the circumstances, and having regard to the body of evidence that suggested that the pain and disability were primarily due to psychological causes, that conclusion was open to the trial judge.

In Wingfoot Australia Partners Pty Ltd v Kocak68 the High Court turned its attention to the question of adequacy of reasons in cases of this kind. In 1996, the first respondent suffered an injury to his neck while at work. In 2009 he commenced two proceedings in the County Court. The first sought leave to bring proceedings for common law damages in respect of the injury and was, in effect, a serious injury application. The second sought a declaration of entitlement in respect of injury under the Accident Compensation Act 1985 (Vic). This was in the nature of a statutory compensation application.

The statutory compensation application was sent to the Magistrates’ Court. Three medical questions were referred to the medical panel for determination. The medical panel gave a certificate of opinion to the Magistrates’ Court, along with a written statement of reasons for its opinion. After receiving the certificate, the Magistrates’ Court made orders, by consent, which were expressed to ‘adopt’ and ‘apply’ the opinion, and to dismiss the statutory compensation application.

The serious injury application came on for hearing in the County Court. The employer foreshadowed a contention that the County Court was bound by the opinion of the medical panel. The worker applied to the Supreme Court for an order in the nature of certiorari, quashing the opinion of the medical panel on the ground that it had failed to give adequate reasons for its opinion. The application was dismissed by the primary judge. The Court of Appeal allowed an appeal and made the order sought.

On appeal to the High Court, one of the issues to be determined was whether the reasons given by the medical panel were, in fact, inadequate.

67 Ibid [39].
68 (2013) 303 ALR 64.
The High Court reversed the decision of the Court of Appeal. It said:

The Court of Appeal considered that a higher standard was required of a written statement of reasons given by a medical panel under s 68(2) of the Act. On the premise that Brown held that the opinion of a medical panel must be adopted and applied for the purposes of determining all questions or matters arising under or for the purposes of the Act, the Court of Appeal analogised the function of a medical panel forming its opinion on a medical question to the function of a judge deciding the same medical question. Accordingly, it then equated the standard of reasons required of a medical panel with the standard of reasons that would be required of a judge giving reasons for a final judgment after a trial of an action in a court. The application of that judicial standard in circumstances where an affected party had provided to the medical panel opinions of other medical practitioners and had sought in submissions to rely on those opinions, and where the opinion formed by the medical panel itself did not accord with those opinions, meant that ‘it was incumbent on the [P]anel to provide a comprehensible explanation for rejecting those expert medical opinions or, if it be the case, for preferring one or more other expert medical opinions over them’. Rejection of the premise and the analogy, for reasons already stated, entails rejection of the conclusion that the higher standard is required. A medical panel explaining in a statement of reasons the path of reasoning by which it arrived at the opinion it formed is under no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else.69

It may be said that the task that confronts County Court judges faced with resolving serious injury applications is a daunting one. Appellate courts insist that adequate reasons be given for any decision reached, in circumstances where there is often a paucity of material upon which those reasons can be properly based. Usually, in such cases, it is the applicant alone who gives viva voce evidence and is cross-examined. It is rare for any of the medical experts to be called. In such circumstances, the reasons for decision will necessarily suffer from an inability on the part of the judge to see and hear the witnesses give their evidence, and be cross-examined. There will also be little time for reflection.70 However, one thing is clear. The reasons must be such as to reveal (although in a particular case it may be by necessary inference) the path of reasoning which leads to the ultimate conclusion. If reasons fail in that regard, the losing party will not know why the case was lost, rights of appeal will be frustrated, and the consequence will be that the inadequacy gives rise to an error of law.

When it comes to criminal cases, the requirement that judges give reasons takes on a completely different aspect. At least in this State, juries decide questions of guilt or innocence. Their reasons are, of course, inscrutable. Judges give reasons only in relation to rulings in the course of trials, and, importantly, in sentencing remarks.

69 Ibid 79–80 [56] (citations omitted) (emphasis added).
70 This very point was made by Ashley JA in Franklin [2005] VSCA 317 (21 December 2005) [38].
With regard to reasons for sentence (and it might be said, sentencing judgments on appeal), it should be remembered that in *R v Lim; R v Ko*, Brooking JA lamented:

Nowadays, no appeal against sentence is complete without the citation of authority, and Mrs Hampel and Mr Tehan both rose to the occasion by referring us to a number of reported cases. I have not found it necessary to discuss any of them, although I venture to record with respectful concern the melancholy fact that in one of the cases relied on, *R v Downie & Dandy* (1998) 2 VR 517, it was found to be desirable, as an interim measure, to lay down nine large bundles of propositions as part of ‘the law on prevalence’, which was said at 520 to await its Labeo. I note with apprehension that Labeo is the Roman jurist reputed to have written 400 books.

Most appeals against sentence can and should be disposed of without the citation of authority. We must do what we can to strive for simplicity. The present case is no exception so far as authority is concerned.

If at all possible, rulings should be kept brief. Regrettably, in an age of ever-increasing complexity, particularly in trials involving sexual offences, there is often a great deal that must be said. Some evidentiary rulings, particularly in the field of tendency and coincidence evidence, require detailed analysis. Nonetheless, the judge who presides over a criminal trial is usually a great deal better off, in terms of the obligation to provide reasons, than his or her counterpart sitting as a judge alone in civil matters.

**Intermediate appellate courts**

The first thing to say is that these courts are principally concerned with the correction of error. Unlike the High Court, which has broader responsibilities, they are not primarily tasked with the development of the common law, or even the exposition of high points of principle.

That is not to say that courts at this level do not, from time to time, contribute significantly to the development of legal doctrine. They are, of course, concerned to ensure that judgments of the lower courts correctly state the law as part of what might be termed ‘quality control’. Their reasons may therefore need to explain the law for the benefit and guidance of lower courts.

However, intermediate appellate courts have neither the time, nor the resources, to give every case

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72 Ibid [10]–[11].

73 *Crampton v The Queen* (2000) 206 CLR 161, 217 (Hayne J). Even his Honour’s statement that appeals are for the ‘correction of error’ is not quite accurate. In sentence appeals for example, we often allow ‘error’ to be perpetuated since we will not interfere with a sentence that we regard as inappropriate unless we are satisfied that it is ‘manifestly’ excessive or inadequate. In other words, it must be ‘wholly’ outside the range. The fact that we would have chosen a different sentence, and by implication, view the sentence imposed as too high or too low, is of no legal consequence. In that sense, the Court of Appeal does not correct error, in this area, unless the mistake made is egregious.
that comes before them the treatment that, in a perfect world, it might merit.\textsuperscript{74} Courts of appeal throughout this country are swamped with heavy case-loads. The line must be drawn somewhere.

In truth, most of the work done by intermediate appellate courts is carried out in areas where the law is relatively well-settled, and the issues to be determined on appeal concern its application in the particular circumstances of the case. Some of this work, it must be said, is quite mundane. A good deal of it, particularly in civil appeals from judge-alone trials, is purely fact based. Of course, that does not mean that the issues raised are easy to determine.

Criminal cases make up a substantial proportion of the work of the Court of Appeal. Many of the matters that come before the Court are sentence appeals. Although it has been said many times that the submission that a sentence is manifestly excessive (or manifestly inadequate) does not admit of great elaboration, my experience over the years has been that counsel are not dissuaded from putting forward lengthy and even prolix arguments in support of their particular case.

The Court of Appeal almost always provides detailed reasons for its decisions. It differs, in that regard, from its predecessor, the Full Court, whose judgments on sentencing matters were almost always delivered \textit{ex tempore}, and were usually brief in the extreme.

These days, a typical sentencing judgment begins by setting out, in the form of a table, the actual sentence or sentences imposed below. The judgment then sets out the grounds of appeal, which are occasionally elaborately stated. It then usually proceeds to a detailed summary of the circumstances surrounding the offending. Sometimes lengthy extracts from the written summary tendered by the prosecution on the plea are included.

There is often then an outline of each side’s written case. When I speak of an ‘outline’ it may, of course, be far more than that. Written cases tend not to be brief. This is then followed by a conclusion, which, as Brooking JA observed in \textit{Lim and Ko}, all too often contains copious, and sometimes quite unnecessary, reference to authority. There is, on occasion, reference to what are said to be comparable cases, generally ‘cherry picked’ by the party relying upon that material.

In my opinion, many of the sentencing judgments delivered by the Court of Appeal could be shortened considerably without any harm being done to the quality of the reasoning. I can say this because I am myself a habitual offender in this regard. To paraphrase the great French mathematician, Blaise Pascal, I often write long judgments because I simply do not have the time to write short ones.

I was interested to discover, recently, that my colleagues in New South Wales have sought answers to the problem of the excessively long judgment, and have experimented with possible solutions.

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\textsuperscript{74} The former President of the New South Wales Court of Appeal recently described intermediate appellate courts as ‘sweatshops’: K Mason, ‘The Distinctiveness and Independence of Intermediate Courts of Appeal’ (2012) 86 \textit{Australian Law Journal} 308, 312.
In New South Wales, s 45(4) of the *Supreme Court Act 1970* provides:

> If, in dismissing an appeal, the Court of Appeal is of the unanimous opinion that the appeal does not raise any question of general principle, it may, in accordance with the rules, give reasons for its decision in short form.

This section has been used on a number of occasions. The results are readily apparent.75 Judgments that might have been expected to run for perhaps 20 or 30 pages, without really saying anything of great consequence, are reduced to two or three pages at most. It seems to me that nothing is lost by this, and a good deal of judicial time and effort is spared.

Section 45(4) is, of course, narrow in scope. It applies only to civil appeals, and indeed, only to those cases where the appeal is dismissed. It seems to me that there is no reason why a similar provision, perhaps more broadly drafted, could not be adopted in this State.

In one sense, we seek to achieve something similar, at least in criminal cases, by the use of the leave procedure. Often, however, reasons for either granting or refusing leave are given at considerable length, with much attention to detail. This can result in a good deal of wasted effort, as there is a high rate of election in cases where leave has been refused.

In recent years, the High Court has, on a number of occasions, considered the adequacy of reasons given by intermediate appellate courts, in criminal matters. For example, in *BCM v The Queen*76 the appellant appealed against his conviction for indecent dealings with a child under 10 years. There were inconsistencies in the complainant’s evidence (who was aged six at the time of the alleged offending). The jury at trial convicted the appellant on two counts of indecent dealings but could not come to a decision on the third count (which the complainant brought to the attention of authorities more than a year after she complained of the first two instances).

In dealing with the appellant’s challenge to the reasonableness of the verdicts on appeal, De Jersey CJ said that there was a rational explanation for the jury’s inability to reach unanimity on the third count. The fact that the complainant delayed for a year before raising the third allegation concerning events that she alleged had occurred within the same short interval may have been viewed by one or more jurors as adversely affecting the reliability of that allegation. Therefore some jurors may have doubted the reliability of the complainant’s account ‘without doubting her overall credibility’.77

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76 (2013) 303 ALR 387 (‘BCM’).

77 Ibid 392 [29].
The appellant appealed to the High Court arguing that the Queensland Court of Appeal gave insufficient reasons for its decision. The High Court referred to its decision in *SKA v The Queen*78 outlining the principles to be applied in determining a challenge to the sufficiency of the evidence to support a conviction. The majority in *SKA* had highlighted the requirement that the appellate court’s reasons disclose its assessment of the capacity of the evidence to support the verdict.79

In *SKA*, French CJ, Gummow and Kiefel JJ were not satisfied that the New South Wales Court of Appeal had come to its conclusion (that it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the applicant) after having weighed the competing evidence. Therefore, as was said in *BCM*, the Court’s ‘obligation [will not be] discharged by observing that the jury was entitled to accept [the complainant’s] evidence and act upon it’.80 The Court must assess the evidence for itself.

In *BCM* the High Court did not believe it to be ‘in the interests of justice to remit the proceeding to the Court of Appeal for it to determine afresh the challenge to the reasonableness of the verdicts’.81 Instead, it analysed the inconsistencies that the appellant relied on to call into question the complainant’s reliability before discussing the rest of the evidence presented at trial.

The Court concluded that ‘[n]one of the criticisms of [the complainant’s] evidence discloses inconsistencies of a kind that lead, on a review of the whole of the evidence, to a conclusion that it was not open to the jury to convict’.82

It should also be noted that the High Court has imposed upon intermediate appellate courts the very considerable burden of having to deal, in many cases, with each and every ground of appeal that is pursued.83 That obligation arises even if the matter can be disposed of on the basis of one single, and simple, point. This has long been a bone of contention, so far as these courts are concerned. One can understand the logic of the High Court’s position, since a failure to address all grounds that are pressed may lead to unnecessary cost and delay if the decision on the short point is overturned by the High Court. Such cases are likely to be rare. The question must be asked whether, from a policy perspective, the ‘requirement’ that all grounds be addressed really makes good sense.

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78 (2011) 243 CLR 400 (‘SKA’). See also *M v The Queen* (1994) 181 CLR 487.
79 Ibid 409.
80 *BCM* (2013) 303 ALR 387, 392 [31].
81 Ibid [32].
82 Ibid 396 [47]. In civil appeals, a similar burden is placed upon intermediate appellate courts, since they are required, as part of the process of rehearing, to review the whole of the evidence led below. See generally *Allesch v Maunz* (2000) 203 CLR 172, 180.
The High Court

The High Court is this country’s ultimate appellate and constitutional court. Its role is to state and develop the law, and not to correct error in individual cases. It normally hears only those cases that are of general importance in the administration of justice. Many of these cases present difficult issues for decision and require detailed analysis of highly technical legal principles or complex legislation.

At the same time, as has been observed, the contrast between the style of judgment writing in the High Court, in recent years, and that of other courts of ultimate jurisdiction (including the Supreme Court of the United Kingdom and the Supreme Court of the United States) is stark. That contrast cannot be explained solely by reference to the difference in the types of cases heard and determined by each court.

The abolition of appeals as of right to the High Court, and the substitution of the special leave to appeal regime in 1984, were designed to enable that Court to control the flow of appeals, and to give priority to those cases raising questions of the ultimate importance.

The creation of the Federal Court in 1976 was also, in part, designed to alleviate the burden placed upon the High Court in the discharge of its heavy responsibilities.

Nonetheless, the burden presently borne by the seven members of the High Court is obviously crushing. They are required to sift through literally hundreds of applications for special leave to appeal each year. Many of these are dealt with on the papers alone, but each of them must be read and considered. Reasons are given in every case. It is scarcely surprising that in the vast majority of cases that come before the Court, the reasons are extremely brief. Unfortunately, they are also often uninformative.

What does it mean to say that a particular case does not provide ‘a suitable vehicle’ for the grant of special leave? Normally one will have to go back to the transcript of the oral argument to try to work out why the Court has arrived at that conclusion. What is one to make of the statement that the decision below is not ‘attended with sufficient doubt’ to warrant the grant of special leave? How much doubt is sufficient? And what particular aspects of the decision below are attended with any doubt?

Sometimes the Court refuses special leave because the decision below is said to have been correct. That, at least, provides an explanation that is both comprehensible, and meets any conceivable requirement that adequate reasons be given.


85 In Collins (Alias Hass) v The Queen (1975) 133 CLR 120, 122 it was noted that special leave applications are really only applications to commence proceedings. Until the grant of leave there are no proceedings inter partes before the High Court.
The same cannot be said for the template reasons given when special leave is refused. Yet, as a practical matter, the sheer volume of work that confronts the Court requires that reasons be given in a wholly abbreviated form.

The paucity of reasons given on special leave applications is more than amply compensated for by the detail, and attention, that the Court gives to its reasons for judgment in those cases which it hears as appeals.

That is not to say that the decisions of the Court are always written in a helpful manner. Some judgments are written in a style that is unduly dogmatic and even abrasive.86

In some cases, the Court provides reasons that are so difficult to follow as to render them almost incomprehensible.87 Occasionally, the Court produces a judgment that has no discernible ratio, and results in nothing but confusion.88

**How should judgments be written?**

This paper is about the adequacy of reasons, and not how they should be expressed. Questions of style or form are an entirely separate matter. Style is very personal. Some judges write expressively, and even flamboyantly, while others are so ‘judicial’ and measured in what they say that their readers find the end product turgid and uninviting.

Lord Denning MR was a master at presenting attractive opening lines. Two of his classics were: ‘It happened on April 19, 1964. It was bluebell time in Kent,’89 and ‘[i]n summertime, village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch’.90

One of my personal favourites, is the opening sentence, and the following lines delivered by Edmund Davies LJ in his judgment in the celebrated case of *R v Collins*.91 The issue was whether the defendant had committed burglary when he climbed up the ladder to a bedroom on the second floor of a house, looked in through an open window, and saw a young lady sleeping naked in her bed.

Mistakenly assuming that he was her boyfriend, she beckoned him in, and had sexual intercourse with him. It was only thereafter that she realised her mistake.

The question to be resolved on the appeal was whether the defendant had entered the house ‘as a trespasser’. His Lordship commenced his judgment by saying:

86   See, eg, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, where some of the language used by the Court was intemperate and, I would respectfully suggest, quite inappropriate.
87   See *Viro v The Queen* (1978) 141 CLR 88.
89   *Hinz v Berry* [1970] 2 QB 40, 42.
91   [1973] 1 QB 100.
This is about as extraordinary a case as my brethren and I have ever heard either on the bench or while at the bar...

Let me relate the facts. Were they put into a novel or portrayed on the stage, they would be regarded as being so improbable as to be unworthy of serious consideration and as verging at times on farce.92

Not everyone has the ability to use language so effectively. Nor should they necessarily endeavour to do so. Murray Gleeson, former Chief Justice of the High Court, did not write in this vein. Yet his judgments were always clear, and succinct. They were a pleasure to read.

One aspect of his writing that stood out was his ability to formulate, concisely, with precision, and right at the outset, the issue to be determined. Any judge wishing to write well, and particularly at an appellate level, would do well to follow that approach.

Other contemporary judges whose written work I have greatly admired include former Justices Michael Kirby and Dyson Heydon. Both wrote extraordinarily well, with an attention to detail, and rigour, that stood out.

Michael Kirby has also written, extra-judicially, on the subject of judgment writing.93 He speaks, in his paper, of the ‘blessed trinity’ of good judgment style.94 By this he means brevity, simplicity and clarity. It is instructive to note that he puts brevity first among the list of ‘blessed’ attributes.

Recently, I had occasion to revisit several of Dyson Heydon’s quite remarkable judgments on various evidentiary subjects. He is, of course, a complete master in that field.

In Australian Crime Commission v Stoddart95 Heydon J delivered a judgment unlike any other that I have ever read. It is, if you like, a mini-treatise on one small aspect of the law of evidence, but covered in such depth as to evoke nothing but admiration. It was a dissenting judgment. It proves the value of occasional dissents. If you have not had the opportunity to read his Honour’s analysis of the history of spousal privilege, may I suggest that you do yourself a favour, and see how a superbly well written judgment is crafted.

Of course, the rest of us are mere mortals. The pressure under which we work, whether it be as trial judges, or in intermediate appellate courts, means that we do not have the time to write, and re-write, as we would wish.

One thing is critical. We must know our audience. If we are writing, in essence, for the losing party, as is often suggested, we must focus upon why he or she has met that fate. The winning party will seldom care.

92 Ibid 101.
94 Ibid.
95 (2011) 244 CLR 554, 571–620.
If we are writing for the legal profession, present and perhaps future, we will structure what we say quite differently. Even then, we should always aim for the ‘blessed trinity’.

There is one thing I would caution against. Judgments should not be written with an eye to what an appellate court might do. Say what you think, and explain as clearly as possible, how you came to your decision. If someone else, further down the track, takes a different view, then so be it.

Judge Richard Posner is, in my opinion, one of the greatest living American jurists. He is a stern critic of writing that is prolix and unduly complex. Unlike most judges in the United States, he writes his own judgments. He largely avoids footnotes. He despises the ‘Blue Book’ method of citation. His judgments are all the better for that.

A lengthy judgment, littered with copious footnotes, may at first glance seem impressive. All too often, however, one is left with the feeling that there is an element of self-indulgence in writing in that vein.

I have a strong aversion to lengthy judgments. The fact that I am myself a repeat offender in that regard merely means that you should do as I say, and not as I do.

Over the past 16 years I have delivered probably thousands of judgments. Some of these were written as a trial judge, and others as a member of an appellate court. I have been exposed to just about every style of judicial writing. I have also endeavoured, as best I can, to keep up with trends in modern legal scholarship.

I recently sat interstate on a criminal appeal from a judge-alone trial. The trial judge found the accused not guilty of murder, and set out in almost 400 pages, his reasons for acquittal. I am ashamed to say that our own judgment on the appeal came to almost 200 pages. On reflection, I consider that both the trial judge’s reasons and our own judgment were about twice as long as they ought to have been.

When I sat on the Federal Court, I was put on an appellate bench in a case where the primary judgment ran for 1565 paragraphs and took up almost 500 pages in a single volume of the law reports. It took literally weeks to read and digest. We managed to confine the judgment on appeal to a mere 123 pages. Sadly, this case was not unique.

Difficult as it may be to believe, I have seen sentencing remarks that run for more than 100 pages. I have also seen sentencing remarks that are extensively footnoted. I have no idea why that was done. I doubt that the prisoner being sentenced was concerned to know precisely what the various legal authorities cited had to say about arcane aspects of sentencing law.

Judicial writing courses are valuable. I have participated in such courses and benefitted greatly from them. I would encourage all judicial officers to expose themselves to the comments and criticisms of people like Professor James Raymond, who are truly expert communicators.

That is really all I have to say. I would stress that writing does not come easily to me. Every judgment that I prepare goes through at least several drafts. I wish it were not so. I have seen, at first hand, the work of judges who can produce wonderfully clear reasons, overnight, and in a single draft. Indeed, I have seen judges who can routinely produce *ex tempore* reasons that are word perfect. They are few and far between. There are not many of them sitting today.

I believe it was Professor Raymond who said that every word in a judgment must earn its place. Too many judgments, unthinkingly, follow a pattern that is unhelpful to the reader. Is it really necessary to set out, in painstaking detail, the procedural history of the matter? Sometimes that may be required, but I would think only rarely so. Is it essential, to set out verbatim, massively long quotes that have been extracted from previous judgments when what is said could have been summarised in a few short sentences? Is cutting and pasting really to be regarded as good writing? Is it absolutely necessary to recount the entire history of a particular legal doctrine in order to expound the law on some point in issue?

It seems to me that in our reasons for judgment we write far too much. I am not suggesting that those reasons should be ‘dumbed down’. However, even the most complex of legal and factual issues can be dealt with using plain language. If we include unnecessary material in our reasons, then plainly, they are in that sense, ‘excessive’. The giving of excessive reasons may be less of a vice than the failure to provide adequate reasons. It is a vice nonetheless, and one that we would do well to try to overcome.

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97 I refer, in particular, to the contribution made to better judgment writing by Professor James Raymond, and the courses he has run in this country.