

MACCORMICK'S THEORY OF LAW, MISCARRIAGES OF JUSTICE AND THE STATUTORY BASIS FOR APPEALS IN AUSTRALIAN CRIMINAL CASES

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I INTRODUCTION

Coherence, consistency and compliance are core values of a properly functioning legal system. In Australia, those values have been compromised in the part of the system which deals with miscarriages of justice in criminal trials.

Part II of this article examines the legislated right of appeal and suggests that its interpretation and application by the Australian appeal courts is inconsistent with the international human rights obligations to which Australia is committed. It also discusses the grounds of appeal to explain that there is a degree of incoherence between the various statutory provisions and elements of inconsistency in the interpretation of them by the courts. The question arises as to whether the right of appeal legislation should be amended (as it has been in South Australia) and the grounds of appeal legislation simplified so as to rectify these problems.

Part III compares Australian and United Kingdom ('UK') appellate cases. It reveals that the UK places a greater weight on human rights and due process issues. Australia emphasises outcomes, discusses trial defects in light of the whole of the record of the trial and tolerates significant aspects of non-compliance by legal officials.

The logical problem is that where non-compliance prevails there may be little point in altering the applicable rules. On the other hand, any rule-based incoherence or inconsistency may be partly responsible for some of the non-compliance problems. If so, clarification of the rules might form part of the solution to inconsistency, incoherence and non-compliance in criminal appeals. Also, deviation from the applicable rules should generate pressure to restore conformity.

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II THE STATUTORY BASIS FOR APPEALS

A MacCormick's Concepts for Analysis

Professor Sir Neil MacCormick's institutional theory of law sees legal reasoning as a species of 'practical reasoning'.¹ This is to distinguish it from the area of logic which can be seen as entailing demonstrability and certainty. Legal reasoning depends upon social and interpretive practices which have a degree of openness and flexibility about them. At the same time, MacCormick says, there are inherent constraints which can be discerned as part of this practice and which lessen the chances of arbitrariness or ad hoc decision-making. They are an important part of what he describes as the 'institution of law'.

Coherence is the foremost amongst these. According to MacCormick, 'law as administered in the courts ought to exhibit coherence of principle, and should not be "a wilderness of single instances"'.² The institutional theory sees law as being constituted by a system of rules (norms, standards or principles) which are action-guiding or action-determining. A norm is a rule which contains within it the element of 'ought' in respect of the person or conduct to which it applies. In order to operate as effective and rational guides to conduct, such rules must be able to be construed as being part of a coherent and consistent framework. These concepts are key components of any form of practical reasoning and particularly of justice according to law.³ Law as an institutional normative order implies that the norms or values which it propounds must be coherent which 'is of a significant value for law, and is indeed an essential element of the Rule of Law. [A] [l]ack of coherence in what is said involves a failure to make sense'.⁴ This means that the norms can be seen as part of an integrated and rational whole. Normative coherence deals with the justification of the normative propositions within a system of norms – in this case, a legal system. Narrative coherence has to do with the justification of findings of fact and the drawing of inferences from evidence.⁵

Consistency tells us something about the formal relationship between propositions and is satisfied by non-contradiction. Propositions are consistent if each can be asserted in conjunction with each other without contradiction.⁶ Consistency means that like cases should be treated alike. Inconsistency will give rise to incoherence and non-compliance because contradictory rules cannot provide an effective guide to conduct; compliance with one rule necessarily entails non-compliance with another.

1 Neil MacCormick, *Practical Reason in Law and Morality* (Oxford University Press, 2008).

2 Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978) 187.

3 Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) 188. The explanatory value of these concepts was initially taken up by MacCormick in *Legal Reasoning and Legal Theory*, above n 2, and subsequently developed in Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007).

4 MacCormick, *Rhetoric and the Rule of Law*, above n 3, 132, 189.

5 *Ibid* 189.

6 *Ibid* 190.

On the other hand, consistency will not necessarily entail coherence. MacCormick uses the example of the stranger who enters a house to commit a crime where the watchdog failed to bark: 'a story which contains no contradictions; but once Sherlock Holmes has drawn our attention to it, we see that it does not make sense – it does not “hang together”'.⁷ Much the same could be said of the circumstances put forward by the prosecution in the Lindy Chamberlain case.⁸ A mother was said to have taken two young children from a public barbeque, put one to bed in a tent, and then taken the baby girl to a car, cut her throat, hidden the body, removed the traces of blood, and returned moments later to the barbeque appearing calm and collected. Whilst there are no formal contradictions within such an account, it does not fit with our knowledge of human psychology and with the personal history of this family involving an apparently loving mother and a devout Christian.⁹

To avoid incoherence or inconsistency, differences in outcomes should be justified by differential norms, without which questions of compliance arise. If coherence, consistency and compliance are indicia of a properly functioning legal system, then the existence of incoherence, inconsistency and non-compliance will be indicative of some dysfunction. The presence of such elements will require remedial action. We then have to be careful that such action does not introduce further dysfunctional elements.

For example, as we will see shortly, the Australian Human Rights Commission ('AHRC') has determined that the right to appeal legislation in Australia is inconsistent with the international human rights obligations to which Australia is committed. As a result, the South Australian Parliament legislated to create a new right of appeal. However, having a new right of appeal in one state means that there is now some inconsistency in the appeal rights in that state vis-a-vis the other states, which gives rise to a further question as to whether this situation is inconsistent with human rights and rule of law principles which require equality before the law.

As is clear from MacCormick's analysis, the concepts of coherence, consistency and compliance are complementary diagnostic concepts which can frequently be applied to emphasise different aspects of a particular situation.

Coherence deals with the element of 'fit' or interpretive compatibility between propositions. For example, if:

7 Ibid.

8 See Northern Territory, Royal Commission of Inquiry into Chamberlain Convictions, *Report of the Commissioner the Hon Mr Justice T R Morling* (1987); *Reference under s 433A of the Criminal Code by the Attorney-General for the Northern Territory of Australia of Convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain* [1988] NTSC 64 (15 September 1988). See also John Bryson, *Evil Angels* (Viking, 1985).

9 A similar analysis was made by the trial judge in relation to the circumstances arising in *Western Australia v Rayney [No 3]* [2012] WASC 404.

1. international human rights obligations require an effective right of appeal;
2. domestic appeal laws close off that option; and
3. further domestic laws require conformity between 1 and 2

then we cannot interpret them in a manner which makes sense.

Inconsistency always gives rise to incoherence. Consistency emphasises the element of non-contradiction between applicable norms. The human rights requirement that a person should be entitled to an effective appeal is not consistent with (is contradictory to) the domestic procedural rules which preclude appropriate access to the appeal courts.

Compliance means that there is consistency between the applicable norm and the conduct to which it refers. The norms of law and morality have the distinguishing feature that they are about 'obligations' which means that their requirements make conduct non-optional.¹⁰ In the case of groups or societies there exists some reciprocity of expectations based upon the norms as shared standards of conduct.¹¹ This involves an understanding of the attitudes people take to each other in relation to their conduct. There evolves:

a 'critical reflective attitude' to patterns of behaviour as common standards for members of groups. The critical reflective attitude is evinced also by expressions of criticism for deviance from the pattern, and widespread ... acceptance of such criticisms as justified.¹²

There should be pressure for compliance with the standards as declared and the mere existence of the non-compliant aspect has *justificatory* value within the normative context.

MacCormick says that with the emergence of institutionalised dispute resolution agencies (courts) there also emerges an institutionalised capacity for authoritatively declaring or changing the rules for dispute resolution (precedent and statute):

This specialised system requires as its centrepiece a certain acknowledgment of duty on the part of those charged with dispute resolution or adjudication. They must conceive themselves duty bound to apply certain rules and standards of conduct in making their adjudications. ... And the very idea of institutionalising procedures for declaring, or even in due course changing, a community's rules implies a duty, binding upon those who adjudicate, to apply the rules as they are declared or changed.¹³

In its extended form, this means that there is a special duty on the part of legal officials such as judges, attorneys-general, solicitors-general, prosecutors, expert witnesses and police to observe the laws and codes of conduct which apply to their professional responsibilities.

10 Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Kluwer Academic Publishers, 1986) 15.

11 *Ibid.*

12 *Ibid* 131, citing H L A Hart, *The Concept of Law* (Clarendon Press, 1961) 54–6, 83–96.

13 MacCormick and Weinberger, above n 10, 15, citing Hart, above n 12, chapter 6 (emphasis altered).

In MacCormick's view, the 'critical reflective attitude' in the context of incoherence, inconsistency or non-compliance is essential to the considered development of the law.¹⁴ Where we can identify elements of incoherence or inconsistency within the applicable norms, or elements of non-compliance by legal officials with those norms, according to MacCormick, we should expect a desire to reflect upon the underlying values which they seek to protect and to act so as to resolve those dysfunctional elements, as we do in this article.

B The Right of Appeal

A problem with Australian criminal appeals is that the appeal courts have interpreted the legislation granting the right of appeal to mean that only one appeal is allowed.¹⁵ After an unsuccessful appeal, if compelling evidence emerges to show there was a wrongful conviction, there is no legal right to any further appeal.¹⁶ The statutory referral procedure (commonly, but somewhat inaccurately, known as the 'petition of mercy' procedure) is said to give rise to an 'unfettered discretion' on the part of an attorney-general. It is said that the statutory provision does not give rise to any legally enforceable rights to a referral or even to a fair consideration of the case.¹⁷

In South Australia, there had been concerns about a number of potential miscarriage of justice cases where petitions for referral had been refused.¹⁸ A Bill was introduced into the South Australian Parliament in November 2010 to establish a Criminal Cases Review Commission ('CCRC') similar to that which operates in the UK.¹⁹ A CCRC would have the power to investigate cases and refer them to the Court of Appeal for review.²⁰ The Bill was referred to the parliamentary Legislative Review Committee which invited public submissions. The AHRC submission supporting the creation of a CCRC referred to a fundamental issue of inconsistency:

This submission refers to the criminal law as it stands generally across all State and Territory jurisdictions in Australia. ... The Commission is concerned that the current systems of criminal appeals in Australia, including in South Australia, may not adequately meet Australia's obligations under the [*International Covenant on*

14 This is sometimes described as having an 'internal attitude' to the legal norms: Hart, above n 12, 4.

15 *Grierson v The King* (1938) 60 CLR 431.

16 The *Crimes (Appeals and Review) Act 2001* (NSW) ss 76–82 contains a number of ancillary powers not available in other jurisdictions. See also Bibi Sangha and Robert Moles, 'Post-appeal Review Rights: Australia, Britain and Canada' (2012) 36 *Criminal Law Journal* 300.

17 *Von Einem v Griffin* (1998) 72 SASR 110, cited in Bibi Sangha and Robert Moles, 'Mercy or Right? Post-appeal Petitions in Australia' (2012) 14 *Flinders Law Journal* 293.

18 For examples of such petitions, see Robert N Moles, *Petitions [Legal Submissions] South Australia/New South Wales*, Networked Knowledge <<http://netk.net.au/Reports/Petitions.asp>>.

19 For a copy of the Bill, relevant parliamentary statements and media comments, see Robert N Moles, *Appeals and Post-conviction Reviews Homepage*, Networked Knowledge <<http://netk.net.au/AppealsHome.asp>>.

20 For an overview of the powers and functions of the CCRC, see Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010) chapter 7.

Civil and Political Rights ('ICCPR')²¹] in relation to the procedural aspects of the right to a fair trial. More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction.²²

The AHRC also made clear that in Australian law '[i]t has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law'.²³ It added: 'the content of Australia's international obligations will therefore be relevant in determining the meaning of these provisions.'²⁴

This meant that there was inconsistency between the international human rights obligations to which Australia has committed itself and Australia's domestic law dealing with criminal appeals. In order to resolve this inconsistency, the Committee recommended a new statutory right of appeal,²⁵ which led to the *Statute Amendment (Appeals) Act 2013* (SA).²⁶ This provided for a further appeal where there is 'fresh and compelling' evidence of a 'substantial miscarriage of justice'.²⁷

The problem identified by the AHRC remains uncorrected in the other states and territories of Australia, which means that appeal rights in other states are now inconsistent with those in South Australia, with the rights under the *ICCPR* and with the decisions of the Australian courts cited by the AHRC.²⁸ The Australian

21 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

22 AHRC, Submission to Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, 25 November 2011, [6], [15].

23 Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, quoting *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 [97] (Gummow and Hayne JJ), citing *Polites v Commonwealth* (1945) 70 CLR 60, 68–9, 77, 80–1; Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

24 Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264–5 (Brennan J); Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, citing *Gerhardy v Brown* (1985) 159 CLR 70, 124 (Brennan J); Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, citing *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1 (Brennan CJ), 239–40 (Dawson J), 250–1 (McHugh J), 294 (Gummow J).

25 Legislative Review Committee, Parliament of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010* (2012). The Committee also recommended an inquiry into the use of expert evidence in criminal trials and a Forensic Science Review Panel to refer suitable cases to the Court of Criminal Appeal.

26 The Act came into force on 5 May 2013.

27 *Criminal Law Consolidation Act 1935* (SA) s 353A, as inserted by *Statute Amendment (Appeals) Act 2013* (SA) s 7.

28 Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, quoting *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 [97] (Gummow and Hayne JJ), citing *Polites v Commonwealth* (1945) 70 CLR 60, 68–9, 77, 80–1; Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264–5 (Brennan J); Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, citing *Gerhardy v Brown* (1985) 159 CLR 70, 124 (Brennan J); Sangha and Moles, 'Post-appeal Review Rights', above n 16, 314, citing *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1 (Brennan CJ), 239–40 (Dawson J), 250–1 (McHugh J), 294 (Gummow J).

appeal rights have been in 'common form' for around a century. The justificatory value for common form provisions is that in relation to certain basic rights, such as the right to appeal a wrongful conviction, Australian citizens should be treated equally – in accordance with the principle of equality before the law.

The inconsistency can be resolved if further appeal rights are introduced in the other states and territories, and discussions are now taking place with that in mind.²⁹ The purpose of this article is to suggest that, when considering legislation concerning the *right of appeal*, consideration should also be given to an improvement to the legislated *grounds of appeal*, of which it has been said:

The common form provision is widely regarded as unclear, internally inconsistent, complex and outdated. In 1998 Brooking JA, a senior judge of the Victorian Court of Appeal, summed up this widely held view when he said that, ever since he had encountered the provision, he had wondered what it meant. He continued that it was 'extraordinary that, 90 years after the legislation providing for appeals in criminal cases was first enacted, doubt should exist about its effect'.³⁰

As we have explained, being 'internally inconsistent', 'unclear' and 'complex' in terms of action-guiding rules is to be incoherent and dysfunctional. The appropriate response is to clarify with some particularity the nature of the problems in the hope that this will provide a fruitful basis for their resolution.

C The Grounds of Appeal

It is important to first identify the possible elements of inconsistency and incoherence in the legislated grounds of appeal just referred to. We will then explain the different responses to them in Australia and the UK, and suggest that further amendment can and should be made to the Australian provisions.

29 'Mr Quigley [Shadow Attorney-General for Western Australia] revealed yesterday that he would draft changes to legislation, similar to a South Australian model': Amanda Banks and Colleen Egan, 'Bid to Take Politics Out of Appeals', *The West Australian* (online), 14 August 2013 <<http://au.news.yahoo.com/a/18491993/bid-to-take-politics-out-of-appeals/>>; 'Recognising the fallibility of juries, South Australia in April introduced a statutory right of appeal where compelling evidence suggests a wrongful conviction has occurred': Tim Barlass, 'Juries Found Guilty of Failing Too Frequently to Get It Right', *The Sydney Morning Herald* (online), 4 August 2013 <<http://www.smh.com.au/national/juries-found-guilty-of-failing-too-frequently-to-get-it-right-20130803-2r62u.html>>; Michael Kirby stated that he hoped 'other jurisdictions would take steps to enact similar legislation': Michael Kirby, 'Welcome New Hope for the Wrongly Convicted', *The Australian Financial Review* (Melbourne), 2 May 2013, 63; 'A new South Australian law, which gives convicted criminals a statutory right of appeal in the event of compelling evidence, will be "closely monitored" in Victoria': Nino Bucci, 'Murder Law Reform Considered', *The Age* (online), 28 May 2013 <<http://www.theage.com.au/national/murder-law-reform-considered-20130527-2n7ie.html>>.

30 Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, 'Harmonisation of Criminal Appeals Legislation' (Discussion Paper, July 2010) 7–8 [1.6], quoting *R v Gallagher* [1998] 2 VR 671, 672–3.

The legislative provisions giving rise to a right of appeal are standard across Australian jurisdictions (subject to a recent variation in Victoria).³¹ For example, the South Australian provisions state that:

The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convictions should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.³²

This standard form of wording was adopted from the *Criminal Appeal Act 1907* (UK). If it is decided that any of the above grounds apply, then the court has to consider the proviso which effectively states that:

the court may dismiss the appeal, notwithstanding it is of the opinion that the point or points raised by the appeal may be decided in the appellant's favour, if it considers that no substantial miscarriage of justice has actually occurred.³³

A major cause of concern arises in the attempt to interpret the wording of the proviso consistently with the grounds of appeal to which it is said to apply.

For example, where the first ground is made out, and it is determined that there is an unreasonable jury verdict, the proviso cannot apply. As Stephen Odgers QC said:

It is fairly apparent that the proviso only has practical application to the second and third grounds for success in an appeal. Substantively, the first ground is concerned with cases where there is insufficient evidence to support the verdict and the conviction must be quashed and a verdict of acquittal entered.³⁴

Where it has been accepted that there is insufficient evidence to support a verdict, it would be incoherent to say that that defect could be overlooked (and the conviction maintained), because it failed to constitute a 'substantial' miscarriage of justice.

Another problem arises in the relationships between the various grounds of appeal. The third ground of appeal is the residual category of 'a miscarriage of

31 *Criminal Appeal Act 1912* (NSW) s 6; *Criminal Code* (NT) s 411; *Criminal Code Act 1899* (Qld) s 668E; *Criminal Law Consolidation Act 1935* (SA) s 353; *Criminal Code Act 1924* (Tas) s 404(1); *Criminal Procedure Act 2009* (Vic) s 276, but see below n 33; *Criminal Code Act Compilation Act 1913* (WA) s 689.

32 *Criminal Law Consolidation Act 1935* (SA) s 353.

33 *Criminal Appeal Act 1912* (NSW) s 6; *Criminal Code* (NT) s 411; *Criminal Code Act 1899* (Qld) s 668E; *Criminal Law Consolidation Act 1935* (SA) s 353; *Criminal Code Act 1924* (Tas) s 404(1); *Criminal Code Act Compilation Act 1913* (WA) s 689. It should be noted that in Victoria the *Criminal Procedure Act 2009* (Vic) s 276 removes the proviso and incorporates the requirement of establishing a substantial miscarriage of justice into the substantive grounds of appeal for the second and third grounds of appeal: '(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice: or, (c) for any other reason there has been a substantial miscarriage of justice'.

34 Stephen Odgers, 'The Criminal Proviso: A Case for Reform?' (2008) 26 *Law in Context* 103, 105. See also the assertion that '[t]he proviso has ... been treated as having no potential for application where the criterion in para (a) is made out': *Baini v The Queen* (2012) 246 CLR 469, 486 [48] (Gageler J).

justice on any *other* ground'. The implication is that each of the first two grounds also deals with miscarriages of justice:

Although the third ground speaks of miscarriage of justice specifically, each of the first and second grounds is also concerned with the occurrence of such a miscarriage. For an error of law or a verdict which is unreasonable or cannot be supported on the evidence will amount to a miscarriage of justice.³⁵

In the recent submission by the New South Wales ('NSW') Office of the Director of Public Prosecutions to the NSW Law Reform Commission, it was said that the grounds of appeal should be amended to reflect this implication and to simply state that an appeal may be allowed where there has been 'a miscarriage of justice'.³⁶ Such a provision, without an accompanying proviso, might well prove to be an effective solution to many of the problems in this area.

A further problem arises in relating the three grounds of appeal to the proviso. As we have seen, the identification of a 'miscarriage of justice' is a precondition for the operation of the proviso. The proviso then allows the miscarriage of justice to be disregarded, for the purposes of the appeal, if it does not amount to a 'substantial' miscarriage of justice.

This is clearly the structure of the legislative provision, and the courts are obliged to give effect to its terms. As the High Court has repeatedly stated, "close attention must be paid to the language" of the relevant provision because "[t]here is no substitute for giving attention to the precise terms" in which that provision is expressed'.³⁷

Yet this position sits uneasily with other statements by the High Court where it fails to distinguish between a miscarriage of justice and a substantial miscarriage of justice. For example, the High Court has held that '[i]f [the appellant] can show a miscarriage of justice, that is sufficient'.³⁸ Furthermore, it has stated that '[f]rom the beginning, [the English Court of Criminal Appeal] has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that *on any ground* there was a miscarriage of justice'.³⁹

There may also be a degree of incoherence (and possibly inconsistency) between the idea that there has been a miscarriage of justice (where the court will not intervene) and the requirement that a conviction must be arrived at 'beyond a reasonable doubt'. Many would take the view that the existence of a miscarriage of justice necessarily entails some reasonable doubt about the safety of the conviction. As the Chief Justice of the High Court recently noted, '[i]n the

35 *Whitehorn v The Queen* (1983) 152 CLR 657, 685 (Dawson J).

36 NSW Office of the Director of Public Prosecutions, Submission No 7 to the NSW Law Reform Commission, 25 August 2013.

37 *Baini v The Queen* (2012) 246 CLR 469, 476 [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), quoting *Fleming v The Queen* (1998) 197 CLR 250, 256 [12].

38 *Hargan v The King* (1919) 27 CLR 13, 23 (Isaacs J).

39 *Davies v The King* (1937) 57 CLR 170, 180 (emphasis added). This issue was referred to in *Nudd v The Queen* (2006) 80 ALJR 614, 617 [4] (Gleeson CJ). See also the discussion of this issue in *R v Stafford* [2009] QCA 407, [149] (Keane JA).

second edition of the *Oxford English Dictionary* “miscarriage of justice” is defined as “a failure of a court to attain the ends of justice”.⁴⁰

It is interesting to note that:

as the Court of Appeal of the Supreme Court of Victoria observed in 1997, courts had ‘been able to apply this legislation for almost a century without ... finding it necessary to decide what, if anything, is the difference between a miscarriage of justice and a substantial miscarriage of justice’.⁴¹

This distinction is clearly at the heart of the Australian appeal provisions, and, if the difference cannot be satisfactorily resolved, then the provisions should now be changed to remove it.

However, there is a deeper level to the possible confusion in the concepts used here. In identifying the applicability of the grounds of appeal the court will need to determine:

If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.⁴²

It is the process the court is obliged to undertake which makes the matter problematic. Three preceding passages in *M v The Queen* provide some guidance:

the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.⁴³ ... a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.⁴⁴ ... The question is one of fact which the court must decide by making its own independent assessment of the evidence ...⁴⁵

The emphasis here is upon whether ‘an innocent person has been convicted’ or whether ‘the accused was guilty’. There is no mention of whether the accused, innocent or guilty, has received a fair trial. The court’s assessment of the evidence might be an integral part of determining if the verdict of the jury is unreliable, but it becomes problematic when that same assessment then extends to the proviso.

In *Weiss v The Queen*, a seminal case on the meaning of the proviso, it was emphasised that the appeal court must decide for itself if a substantial miscarriage of justice has occurred, and that it can only do so by examining the record for itself.⁴⁶ As the High Court emphasised, ‘the appellate court’s task must

40 *Cesan v The Queen* (2008) 236 CLR 358, 378 [66] (French CJ).

41 *Baini v The Queen* (2012) 246 CLR 469, 490 [54] (Gageler J), citing *R v Gallagher* [1998] 2 VR 671, 679 (Brooking JA).

42 *M v The Queen* (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ).

43 *Ibid* 493 (Mason CJ, Deane, Dawson and Toohey JJ).

44 *Ibid* 494 (Mason CJ, Deane, Dawson and Toohey JJ).

45 *Ibid* 492 (Mason CJ, Deane, Dawson and Toohey JJ). See also *Weiss v The Queen* (2005) 224 CLR 300, 316 [41].

46 (2005) 224 CLR 300, 316 [41].

be undertaken on the *whole* of the record of the trial'.⁴⁷ It is not to consider what it thought that the jury would do, whether this jury or some hypothetical reasonable jury.⁴⁸

The High Court has also stated that where a trial has miscarried (as it must have done in any case where the proviso is being considered) a guilty verdict cannot be upheld on a basis *not* left to the jury because that would be to trespass on the constitutional function of the jury.⁴⁹ If the conviction is to be upheld, it can only be upheld on the basis that *was* left to the jury.⁵⁰

However, this requirement is not capable of fulfilment in a proviso case. In such a case, the appeal court knows that there has been a miscarriage of justice, because that is a condition precedent to the invocation of the proviso. The court is then required to look at 'the whole of the record of the trial' and make an assessment as to whether 'an innocent person has been convicted' or whether 'the accused was guilty'. In doing so, the court will be required to make an assessment of the potential significance of the miscarriage of justice element in the context of the record of the whole trial. This is something the jury was unable to do at the time of the trial because it could not have known that part of the evidence or procedure they were dealing with constituted a miscarriage of justice.

If it is clear that the jury dealt with the evidence unaware of the existence of the miscarriage of justice element – and the appeal court is dealing with the evidence fully aware of the miscarriage of justice element – then the appeal court must surely be assessing the case on a basis different to that which was left to the jury. This also sits uneasily with the view of the High Court that it is not for a 'Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically'.⁵¹

It is also important to note that the proviso is said to be inapplicable in cases involving 'fundamental error'. If the accused has not had a proper trial, in *that* sense, then there has been a substantial miscarriage of justice.⁵² In *Cesan v The Queen*, the point on appeal was that the judge was said to have been sleeping at times during the trial. The Chief Justice of the High Court made it clear that in

47 Ibid 317 [43] (emphasis in original).

48 The High Court further stated that

[t]he fundamental task committed to the appellate court by the common form of criminal appeal statute is to decide the appeal. In so far as that task requires considering the proviso, it is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do. Rather, in applying the proviso, the task is to decide whether a 'substantial miscarriage of justice has actually occurred'.

Ibid 314 [35].

49 *Osland v The Queen* (1998) 197 CLR 316, 326 [20] (Gaudron and Gummow JJ).

50 Ibid 327 [21] (Gaudron and Gummow JJ).

51 *Mallard v The Queen* (2005) 224 CLR 125, 135 [23] (Gummow, Hayne, Callinan and Heydon JJ).

52 *Wilde v The Queen* (1988) 164 CLR 365, 373 (Brennan, Dawson and Toohey JJ), cited in *Patel v The Queen* (2012) 247 CLR 531, 566 [126] (French CJ, Hayne, Kiefel and Bell JJ).

certain types of cases an error will be such that '[i]t does not necessarily require the demonstration of a wrong decision'.⁵³ He added:

to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceedings said to be affected by the miscarriage. It is enough if what is done is not justice according to law.⁵⁴

It appears then that all due process errors would need to be classified as 'fundamental errors' in order to avoid the application of the proviso and the process of assessing possible guilt or innocence in the context of the record of the whole trial.

These tensions between the proper role of a court of review and the finality of a jury verdict demonstrate elements of inconsistency and incoherence which could and should be avoided in this important area of the law.

1 The Evolution of the Confusion

Where such problems are identified between applicable norms, it is sometimes helpful to understand how they may have come about. Before the introduction of the *Criminal Appeal Act 1907* (UK), there was no formal right of appeal against a conviction on indictment. However, there was a limited procedure by way of a writ of error. This enabled a decision to be challenged for an error on the face of the record. Sometimes a decision was set aside for unmeritorious technical error such as minor typographical errors in the indictment.⁵⁵ The court often felt obliged to set aside a conviction where any such error was established.

When the *Criminal Appeal Act 1907* (UK) was passed establishing the Court of Appeal, the Court did not have the power to order a retrial. Where appealable error at trial was identified, the only remedy was to enter a verdict of acquittal, which meant that the verdict was overturned and the person could not thereafter be retried. If that was to be avoided for clearly unmeritorious appeals, and in the light of the previous practice of the Court, the obvious means by which that could be done was to have a 'proviso'. The proviso allowed (and indeed encouraged) the Court to put to one side the type of minor errors which, in its opinion, would not have impacted upon the jury verdict.

However, when the appeal provisions were introduced in Australia, the Australian appellate courts *were* granted the power to order a retrial. Because of this, it can be argued the proviso should not have been included in the Australian legislation. The grounds of appeal in themselves did not require any proviso to save the verdict from undesirable consequences. Situations where the verdict of the jury is 'unreasonable' and where there has been a 'miscarriage of justice' or a 'legal error at trial' could easily be accommodated

⁵³ *Cesan v The Queen* (2008) 236 CLR 358, 380 [69] (French CJ).

⁵⁴ *Ibid*, quoting *Wilson v Wilson* (1967) 10 FLR 203, 216 (Asprey JA).

⁵⁵ Rosemary Pattenden, *English Criminal Appeals 1844–1994: Appeals Against Conviction and Sentence in England and Wales* (Clarendon Press, 1996); Roger J Traynor, *The Riddle of Harmless Error* (Ohio State University Press, 1970).

by canons of construction which would allow for the distinction between significant and insignificant errors:

minor inaccuracies and omissions will not be likely to make it possible that the verdict was affected. Bare and remote possibilities may be disregarded, but if it is considered reasonably possible that the misstatement may have affected the verdict and if the jury might reasonably have acquitted the appellant if the misstatement had not been made, there will have been a miscarriage of justice, and a substantial one.⁵⁶

The Victorian appeal courts had, in effect, managed for 100 years to deal with the distinction between a miscarriage of justice and a substantial miscarriage of justice in the proviso by ignoring it. This means that the grounds of appeal could be better expressed by simply requiring the court to identify if there had been a miscarriage of justice, as mentioned earlier.⁵⁷ The proviso in Australia should be removed as, in fact, it has been now in the UK.

We noted above that it was the original UK provisions for criminal appeals which were adopted and retained in Australia. Whilst Australia has, with minor variations, retained the original provisions for appeals, the UK has meanwhile introduced a number of substantial reforms. The principal reform involves the idea of an 'unsafe' verdict.

2 *The UK Transition to 'Unsafe'*

In 1964 the UK introduced a limited power to order a retrial based upon fresh evidence presented at appeal.⁵⁸ In 1968 further changes were introduced which allowed for an appeal against conviction where the Court of Appeal found:

- (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
- (b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or
- (c) that there was a material irregularity in the course of the trial ...⁵⁹

It still maintained, at that time, a proviso to enable the Court to dismiss the appeal if it thought that no miscarriage of justice had occurred.

So, the 'error of law' principle was continued, the 'miscarriage of justice' provision was replaced with one which referred to 'a material irregularity in the course of the trial' and there was a change from a verdict of a jury which was 'unreasonable or cannot be supported having regard to the evidence' to one which was 'unsafe or unsatisfactory'.

It was only in 1988 that the UK granted an unconditional power to order a retrial.⁶⁰ It was not long before it became clear that the continuation of a proviso was unnecessary.

56 *Baini v The Queen* (2012) 246 CLR 469, 490 [54] (Gageler J), quoting *R v Gallagher* [1998] 2 VR 671, 679 (Brooking JA).

57 See NSW Office of the Director of Public Prosecutions, above n 36.

58 *Criminal Appeal Act 1964* (UK) s 1.

59 *Criminal Appeal Act 1968* (UK) s 2(1).

60 *Criminal Justice Act 1988* (UK) s 43.

In 1993 the Royal Commission on Criminal Justice ('Runciman Royal Commission') concluded that the Court of Appeal seldom distinguished between verdicts which were 'unsafe' and those which were 'unsatisfactory'. It also thought that this ground could cover a wrong decision on any question of law as well as a material irregularity in the course of the trial.

A majority therefore recommended a simpler test: 'whether a conviction "is or may be unsafe"'.⁶¹ They said that a clearly unsafe conviction could result in a verdict of acquittal and a lesser degree of confidence could result in an order for a retrial. There would be no need for a proviso.⁶² Professor Michael Zander and two other members of the Commission were concerned that the expression 'safety' may not cover cases where there was a serious procedural irregularity in the context of a strong prosecution case. He said that the simpler test would, in effect, be encouraging the Court of Appeal to undercut a part of its moral force by saying that the issue of unfairness can be ignored where there is sufficient evidence to show that the defendant is actually guilty.⁶³

This is a situation which we have suggested is similar to the current position in Australia. As we have seen, the Australian position is that due process errors have to be classified as 'fundamental' in order to avoid the operation of the proviso. As Zander added:

The more serious the case, the greater the need that the system upholds the values in the name of which it claims to act. If the behaviour of the prosecution agencies has deprived a guilty verdict of its moral legitimacy the Court of Appeal must have a residual power to quash the verdict no matter how strong the evidence of guilt. The integrity of the criminal justice system is a higher objective than the conviction of any individual.⁶⁴

The 'integrity of the criminal justice system' is another way of referring to the issues raised in MacCormick's discussion of the obligations of legal officials to comply with the norms governing their behaviour. Zander and MacCormick appear to agree that compliance by legal officials with the norms governing *their* conduct (in the conduct of criminal trials) is a condition precedent to any successful prosecution. This is an important point which has particular significance for our later discussion of *R v Catt*.⁶⁵

The recommendation of the majority of the Runciman Royal Commission was partly taken up in the *Criminal Appeal Act 1995* (UK) amending section 2 of the *Criminal Appeal Act 1968* (UK) which now reads:

- (1) Subject to the provisions of the Act, the Court of Appeal –
 - (a) shall allow an appeal against conviction if they think the conviction is unsafe; and
 - (b) shall dismiss such an appeal in any other case.

61 United Kingdom, The Royal Commission on Criminal Justice, *Report* (1993) 168–9 [32].

62 *Ibid.*

63 *Ibid.* 234.

64 *Ibid.* 235.

65 [2005] NSWCCA 279.

Our view is that there are elements of unnecessary complexity and confusion in the Australian statutory grounds of appeal provisions. An interpretive approach can be taken to deal with the 'true but trivial' appeals and to find that they do not constitute miscarriages of justice. The ability to order a retrial can resolve concerns about possibly guilty people who were treated unfairly at their trials. Overturning the conviction resolves the element of unfairness and the retrial promotes the goal of social justice. The proviso could be removed in Australia and the ground of appeal could be reduced to the requirement that the conviction is found to be a 'miscarriage of justice' or 'unsafe'.

In both the UK and Australia, there has been ongoing debate on the emphasis placed by the appeal courts on the two key principles underpinning the criminal appeal system:

1. due process and the right to a fair trial; and
2. assessing the correctness of the trial verdict – the 'correct result'.⁶⁶

We will look briefly at a few cases which illustrate the emphasis on due process in the UK and then compare them with the approach taken in some Australian cases.

III PROCESS AND OUTCOMES

A The UK Cases

Once the UK appellate judges identify an issue which warrants the conviction being set aside, they do not engage in extensive discussion of other related issues. They do not attempt to explain their own view of the evidence on the whole of the record as occurs in the Australian appeals.

In *R v Maynard*, the co-accused (Maynard, Dudley, Bailey and Clarke) were convicted in 1977 of murder and conspiring to cause grievous bodily harm.⁶⁷ A body and various body parts of a person known to them were washed up at separate locations on the Thames foreshore in Essex. As Mantell LJ stated on the appeal, '[a] later post-mortem revealed that he [the victim] had been tied up and tortured before being killed by severe violence to the head; and that his body had been dismembered when he was either dead or (possibly) unconscious'.⁶⁸ Lord Justice Mantell also said: '[i]t would not be unfair to observe that most of the principal personalities ... concerned in the events which gave rise to the charges were either convicted criminals, or members of the families or friends of convicted criminals.'⁶⁹

66 The importance of a correct result is a consistent theme in Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, above n 30.

67 [2002] EWCA Crim 1942.

68 Ibid [18] (Mantell LJ).

69 Ibid [11] (Mantell LJ).

The trial had been ‘the longest murder trial, we were told, ever to have taken place in this country’, lasting for some seven months.⁷⁰ There had been an unsuccessful appeal and a number of other ‘representations, petitions and complaints’ before the matter was again referred to the Court of Appeal by the CCRC.⁷¹

In the 2002 appeal there was new evidence to the effect that a statement said to have been taken by the police could not have been written within the times stated. It was said to have commenced at 4.28pm and concluded at 5.18pm. The statement was handwritten. According to an independent document examiner, studies had shown that the number of characters written in that statement could not have all been handwritten in 50 minutes.⁷²

The prosecutor submitted that it was obvious that either the commencement time of the interview or the finishing time must have been noted down incorrectly and that the jury would have appreciated that point. The Court said that whilst it accepted that such an explanation could well have been a possibility, it also appreciated that there could have been other, less innocent, explanations.⁷³

The Court said that it was not for it to determine which scenario was correct. Once it had determined that there had been a defect in the evidence, not disclosed at trial, and that the defect *might* have affected the decision of the jury, then the Court was obliged to overturn the verdict.⁷⁴ Indeed, the Court determined that the defect in one statement could have led the jury to look at other pieces of evidence against the other co-accused differently. It said the suggestion that the jury might have concluded that the police made a mistake would require the appeal court to look into the minds of the jury and to speculate as to their reasoning in a way that is clearly forbidden by *R v Pendleton*.⁷⁵ In *R v Pendleton*, the House of Lords had made it clear that ‘[t]he Court of Appeal is a court of review, not a court of trial. It may not usurp the role of the jury as the body charged by law to resolve issues of fact and determine guilt’.⁷⁶ It went on to say: ‘[i]t is not permissible for appellate judges, who have not heard any of the rest of the evidence, to make their own decision on the significance or credibility of the fresh evidence’.⁷⁷

Despite the appalling nature of the crime, the fact that the accused had clearly been involved in crime, the great length of the trial, and the fact that the new evidence was not necessarily inconsistent with their guilt and only related directly to one of those accused, the Court set aside all four verdicts. Duncan Campbell, who had reported on the case over 25 years, wrote in *The Guardian* in July 2002 as the appeal was being heard:

70 Ibid [31] (Mantell LJ).

71 Ibid [4] (Mantell LJ).

72 Ibid [44] (Mantell LJ).

73 Ibid [45] (Mantell LJ).

74 Ibid [50] (Mantell LJ).

75 [2001] UKHL 66.

76 Ibid [12] (Lord Bingham).

77 Ibid.

We have become inured to the slow emergence of miscarriages of justice over the years. But it is more than 20 years since Wild [the informant] first indicated that he had made up his evidence; more than seven years since he spelled it out again. Yet only now is the appeal being heard. During those long years inside, Maynard – never a big-time criminal – saw, from afar, his family grow up without him, despaired, and acquired a drug habit; he was released on bail in 2000. Dudley – always the senior partner – missed out on his grandchildren growing up but emerged from jail in remarkably good nick; he was released on parole in 1997. Charlie Clarke is long dead.⁷⁸

In Australia, it is certainly possible that the type of error which occurred in this case would not have been classified as a fundamental error, and would then have been subject to evaluations of guilt or innocence by the appeal court, in the light of the whole of the record of the trial. It is clearly possible that a different conclusion would have resulted.

The case of *R v James* involved a veterinarian whose wife had died by ingesting a toxic substance used in the treatment of animals.⁷⁹ The question was whether his wife had taken it (suicide) or whether James had given it to her (murder). James was convicted of her murder. Some time after, when clearing out a cupboard at his home, a note was found in a magazine. It was in his wife's handwriting and consisted of just two sentences. It could not be determined when it was written, or indeed, if the thoughts were of a suicidal nature.⁸⁰ As the Court of Appeal said, more than one interpretation was capable of being placed upon the note in the circumstances, but none was conclusive and one was undoubtedly consistent with an intention to commit suicide.⁸¹ The Court of Appeal held that the jury's verdict given in ignorance of the note must be regarded as unsafe and it therefore quashed the conviction on that single ground.⁸² It is again questionable whether such a result would have occurred if a similar case had arisen in the Australian context.

In March 1975 George Davis was convicted of participating in an armed robbery. The robbers were armed and a pursuing policeman was shot in the leg.⁸³ The case depended upon the assessment of the adequacy of eyewitness evidence given many years earlier. The Court of Appeal accepted that there were serious difficulties when asking witnesses to recall what happened some 35 years previously. The Court noted: '[w]e should however make it clear that when this court decides whether a conviction is or is not safe it is not deciding whether or not the defendant is guilty'.⁸⁴ It was necessary to emphasise the point in this case because there was other extrinsic evidence which indicated that the accused may well have been guilty.

78 Duncan Campbell, 'Fall Guys', *The Guardian* (online), 10 July 2002 <<http://www.theguardian.com/g2/story/0,3604,752376,00.html>>.

79 Unreported, England and Wales Court of Appeal – Criminal Division, Evans LJ, 31 July 1998.

80 *Ibid* 5.

81 *Ibid* 6.

82 *Ibid*.

83 *R v Davis* [2011] EWCA Crim 1258.

84 *Ibid* [5] (Hughes LJ).

In 1976 because of concerns about the conviction, the Home Secretary remitted the sentence on the robbery. Whilst released, just over a year later Davis committed a similar armed robbery at another bank. He was caught in the act and in due course pleaded guilty and was sentenced to a period of imprisonment. As the Court of Appeal said, '[h]is reputation is, clearly, that of an armed robber whatever the result of this reference'.⁸⁵

However, the Court went on to say that none of this information affected the duty of the Court on the appeal before it. It said that once the appeal is before the Court, the Court's duty is to examine the conviction and to decide whether or not it is securely based, that is to say, safe. As the Court stated, '[i]f it is unsafe, the fact that Davis was a serious active criminal cannot justify it remaining in existence'.⁸⁶ The Court was persuaded that the identification evidence was unreliable and the conviction was quashed. The contrast here between the UK cases and the Australian cases is clear. In the UK, the question of guilt or innocence does not arise in the context of an assessment of the safety of the conviction. In Australia, the question of guilt or innocence is an important part of the analysis for any case which falls under the proviso.

In the case of *R v Smith*, the Court of Appeal reviewed the lower court's response to the submission at trial of 'no case to answer'.⁸⁷ The charges in question involved conspiracy to rob and having offensive weapons. As the Court said, there may well have been evidence to suggest that those involved were engaged in questionable activities or that 'a dispassionate observer might have thought it all looked a bit fishy'. However it warned that 'this at best would be speculative and at worst fanciful'. Adding another twist to the story, the Court went on to ask what the situation would be if, after the wrongful rejection of the submission on 'no case', 'the defendant is cross examined into admitting his guilt?'⁸⁸

In that situation, the Court held that the conviction should still be set aside as being unsafe, because '[t]o allow the trial to continue beyond the end of the prosecution case would be an abuse of process and fundamentally unfair'.⁸⁹

These cases demonstrate that the UK Court of Appeal has given a broad interpretation to the word 'unsafe', allowing it to encompass abuses of process even where the prosecution case has been very strong.⁹⁰ It has been said that a conviction may well be 'unsafe' even where there is overwhelming evidence of guilt:⁹¹

the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or

85 Ibid [6] (Hughes LJ).

86 Ibid [7] (Hughes LJ).

87 [2000] 1 All ER 263.

88 Ibid 266 (Mantell LJ).

89 Ibid.

90 *R v Mullen* [1999] EWCA Crim 278. See also Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (Stationery Office, 2001) 613–14.

91 *R v Togher* [2001] 3 All ER 463; *R v Smith* [1999] 2 Cr App R 238.

by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.⁹²

In *R v Pendleton*, the House of Lords made it clear that the Court of Appeal was not the primary decision-maker. The Court of Appeal would have an incomplete understanding of the process that led to the jury's verdict of guilt. The appeal judges should 'test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it *might*, the conviction *must* be thought to be unsafe'.⁹³

This reflects an element of the Australian decision we considered earlier – *M v The Queen*. Yet, in Australia, the court would go on to look at the error in the context of the whole of the record of the trial. Whatever else that record contains, it will not contain a discussion of the error which has now been brought to light on the appeal. In effect, the Australian appeal court will be trading off against each other matters which are incommensurable, and without any explicit criterion for judgment.

B The Australian Cases

Here we question whether the Australian judicial focus on outcomes and the determination of guilt in criminal appeals has overshadowed the appellate responsibility to maintain the integrity of the criminal justice system. We suggest that the case of *R v Catt* is the type of case Zander had in mind when speaking of the role of the appellate courts in maintaining the integrity of the system.⁹⁴

In 1991 after a series of bitter matrimonial disputes, Catt was convicted of a number of serious offences including solicitation of murder, malicious wounding and assault of her husband.⁹⁵ In 2001 the NSW Attorney-General referred the matter to the Court of Appeal to be heard as an appeal. The Court of Appeal referred the matter to a single judge to determine various factual matters. In 2005 the Court of Appeal issued its judgment based upon those facts.

On the appeal, the Court accepted that the investigating police officer had at various times made complaints about Catt which were 'entirely baseless'.⁹⁶ It accepted that he had a 'propensity to improperly use his office to damage Ms Catt irrespective of the risk of gratuitous collateral damage to others' and that the police officer's behaviour 'indicates a lack of objectivity having descended into malice and abuse of power'.⁹⁷ There were 'serious issues' as to the propensity of the investigating officer to 'pressure witnesses to provide false evidence' and he may well have committed perjury.⁹⁸

92 *R v Hickey* [1997] EWCA Crim 2028, [81] (Roch LJ), cited in *R v Davis* [2001] 1 Cr App R 115, 130 (Mantell LJ).

93 [2001] UKHL 66, [19] (Lord Bingham) (emphasis added).

94 [2005] NSWCCA 279.

95 *Ibid* [6] (McClellan AJA).

96 *Ibid* [79] (McClellan AJA).

97 *Ibid* [80] (McClellan AJA).

98 *Ibid* [105] (McClellan AJA).

The Court of Appeal accepted that the likely false evidence of one witness ‘had seriously adverse repercussions to the case presented on behalf of Ms Catt on all contested issues at her trial’.⁹⁹ Despite this, the Court of Appeal determined that only six of the eight convictions would be set aside, and that the convictions for malicious wounding and actual bodily harm would stand.

Whilst the Court did not make any explicit reference to the invocation of the proviso, the proviso must have been implicit in the Court’s decision. In addition, the discussion of the relevant legal authorities failed to refer to a number of significant High Court decisions including the important statement in *M v The Queen*.¹⁰⁰ If the case was considered from a process perspective, one might have thought that the errors were sufficiently egregious to amount to fundamental error and thus to warrant the overturning of all of the convictions, irrespective of the strength of the evidence relating to the charges which were upheld.

The approach of the Court of Appeal in *R v Catt* can be compared with the High Court’s decision in the more recent Queensland case of *Patel v The Queen*.¹⁰¹ The first 43 days of Patel’s trial were taken up with submissions and evidence to suggest that Patel was incompetent and grossly negligent in recommending various surgical procedures and in his post-operative care of a patient. As it turned out, the expert witnesses did not support those claims. The prosecution then sought to alter the basis on which it presented its case.¹⁰² Allegations that Patel ‘was criminally negligent in the conduct of surgery were no longer maintained, nor was it alleged that the deaths or grievous bodily harm were caused by negligent post-operative care’.¹⁰³

This meant that much of the evidence which had been led during the previous 43 days was now irrelevant and prejudicial. The defence sought to have the trial terminated, but its application was unsuccessful. The judge decided that he could direct the jury to ignore the inadmissible and prejudicial evidence.¹⁰⁴ On appeal the High Court determined that this amounted to a serious error in the conduct of the trial. Once the jury had heard the prejudicial evidence, it would not have been possible for them to disregard it.¹⁰⁵

The analogy with *R v Catt* is that in both cases the jury had heard extensive evidence which could only be described as seriously prejudicial. However, the difference was that in *R v Catt* the jury had been given no instructions to disregard the prejudicial evidence. Indeed, they would have been given careful instructions to pay attention to it, as it was not known at that time that the evidence was unreliable. On the basis of the evidence put to them, the jury had concluded (wrongly as it turned out) that Catt was guilty of solicitation of murder and serious assaults. In that context it might not have been difficult for them to

99 Ibid [128] (McClellan AJA) (emphasis added).

100 (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ).

101 (2012) 247 CLR 531.

102 Ibid 534–5 [2]–[3] (French CJ, Hayne, Kiefel and Bell JJ).

103 Ibid 534 [2] (French CJ, Hayne, Kiefel and Bell JJ).

104 Ibid 534–5 [3]–[4] (French CJ, Hayne, Kiefel and Bell JJ).

105 Ibid 562 [112]–[113] (French CJ, Hayne, Kiefel and Bell JJ).

also accept that she was guilty of more minor assaults. However, when it was revealed that those more serious convictions resulted from evidence which was seriously flawed, how would it be possible to conclude that the jury would not have been influenced by that in their evaluation of the evidence on the more minor charges?

As the High Court said in *Patel v The Queen*, '[i]t is difficult to imagine that evidence of this kind made no impression upon the jury'.¹⁰⁶ Much of it was clearly 'highly prejudicial' and 'irrelevant'.¹⁰⁷ As we have seen above, the proviso enables the appeal court to uphold a conviction where the court is persuaded that the evidence, properly admitted at trial, proved beyond reasonable doubt the accused's guilt of the offence on which the jury returned its verdict of guilty.¹⁰⁸ However, as was explained in *Patel v The Queen*, the proviso has no application where there has been such a departure from the essential requirements of the law that the irregularity goes to the root of the proceedings.¹⁰⁹ Certain errors may be so fundamental that by their very nature they exclude the application of the proviso. The conclusion in *Patel v The Queen* was that '[i]n the present case, no weight can be given to the verdicts of guilty for the reason that so much irrelevant or unnecessary and prejudicial evidence was before the jury'.¹¹⁰ Clearly the same conclusion could have been reached in *R v Catt* in relation to the two remaining charges.

1 The Australian View on 'Unsafe or Unsatisfactory'

In view of the distinctive approaches outlined above, it is interesting to note that the Australian cases have suggested that the Australian grounds of appeal can be likened to a conviction being 'unsafe or unsatisfactory'. In *M v The Queen* it was said:

Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is *unsafe or unsatisfactory*, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.¹¹¹

In the Australian context the utilisation of the terms 'unsafe' and 'unsatisfactory' is still being linked to an assessment of guilt albeit through an assessment of what the court thinks would have satisfied a jury. As we have seen, however, the words 'unsafe' and 'unsatisfactory' are not part of the Australian legislative criteria for the determination of such appeals. In *MFA v The Queen*,

106 Ibid 562 [111] (French CJ, Hayne, Kiefel and Bell JJ).

107 Ibid 562 [112] (French CJ, Hayne, Kiefel and Bell JJ).

108 Ibid 564 [120] (French CJ, Hayne, Kiefel and Bell JJ), citing *Weiss v The Queen* (2005) 224 CLR 300, 317 [44].

109 *Patel v The Queen* (2012) 247 CLR 531, 566 [126] (French CJ, Hayne, Kiefel and Bell JJ), citing *Wilde v The Queen* (1988) 164 CLR 365, 373 (Brennan, Dawson and Toohey JJ).

110 *Patel v The Queen* (2012) 247 CLR 531, 566–7 [128] (French CJ, Hayne, Kiefel and Bell JJ).

111 (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ) (emphasis added), cited in *SKA v The Queen* (2011) 243 CLR 400, 405 [11] (French CJ, Gummow and Kiefel JJ).

the High Court said that the expression ‘unsafe or unsatisfactory’ in *M v The Queen* is to be taken as ‘equivalent to the statutory formula referring to the impugned verdict as “unreasonable” or such as “cannot be supported, having regard to the evidence”’.¹¹²

The Discussion Paper prepared for the Standing Committee of Attorneys-General in 2010 makes the point, with reference to *Weiss v The Queen* and subsequent cases, that the more recent decisions of the High Court have decried the use of such expressions and have directed judges to refer only to the statutory grounds of appeal.¹¹³

However, there is a further element of inconsistency here. It appears that the High Court is attempting to change what has become established judicial practice. It says that it is inappropriate to use terms such as ‘unsafe’ and ‘unsatisfactory’, and emphasises the duty to adhere to the terms of the statute. If this is seen as a change of direction or emphasis by the High Court then it is not itself the product of any statutory intervention and the Court is altering the law in the absence of statutory prompting. It is not consistent with the Court’s own admonitions to ‘adhere to the terms of the statute’.

The explanation is that such previous interpretive practices (substituting the words ‘unsafe or unsatisfactory’ for the words of the statute) were wrong, and that the current approach of the Court amounts to no more than the correction of error. Yet, a similar substitution is just what the High Court itself did when faced with a statutory provision of the Australian Capital Territory (‘ACT’). The ACT legislation altered the grounds of appeal to allow the Court of Appeal ‘to give any order it considers appropriate’ and ‘to order a new trial, with or without a jury, on any appropriate ground’.¹¹⁴ In interpreting this provision, the High Court imported the common form provisions applicable in other states, including the proviso.¹¹⁵ In fact, the majority’s insistence upon doing so brought forth one of the most outspoken dissenting judgments from Kirby J, in part, because he thought the importation of the common form provisions to be quite unnecessary. He arrived at the same result by more appropriate means: ‘[i]n what has been described as an unusually vigorous dissenting judgment, Kirby J criticised what he saw as the majority’s failure to have regard to the actual words of the

112 (2002) 213 CLR 606, 623–4 [58] (McHugh, Gummow and Kirby JJ), cited in *SKA v The Queen* (2011) 243 CLR 400, 405 [12]. See also Murray Gleeson, ‘The Role of a Judge in a Criminal Trial’ (Speech delivered at the Lawasia Conference, Hong Kong, 6 June 2007), citing *Doney v The Queen* (1990) 171 CLR 207; Murray Gleeson, ‘The Role of a Judge in a Criminal Trial’ (Speech delivered at the Lawasia Conference, Hong Kong, 6 June 2007), citing *Whitehorn v The Queen* (1983) 152 CLR 657, 682. Justice Callinan also used the terminology of ‘unsafe and unsatisfactory’: *Gipp v The Queen* (1998) 194 CLR 106.

113 Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, above n 30, 45–55.

114 *Supreme Court Act 1933* (ACT) s 370.

115 *Conway v The Queen* (2002) 209 CLR 203, 207 (Gaudron ACJ, McHugh, Hayne and Callinan JJ).

statute'.¹¹⁶ Justice Kirby tried to impress upon his fellow judges the task of applying the words of the statute that they had committed themselves to:

In several recent appeals it has been observed that some who have the responsibility of construing statutory language appear to shy away from the legislative text. It is as if they find that aspect of their task 'distasteful'. They will go to second reading speeches. To law reform reports. To academic commentary and histories. To sociologists' musings. And above all to the words of long-forgotten judges – usually writing in a different country, decades or even centuries before the applicable statutory text was enacted. This is an approach to the task that turns legal analysis on its head. It should be resisted.

Where, as here, the text is found in a statute enacted by an Australian Parliament there is a sound constitutional reason why the text must have primacy. Such a law has legal legitimacy because it has democratic credentials. This is why, for my own part, I approach the powers and duties of the Full Court of the Federal Court (and hence of this Court) in these proceedings, involving an appeal against a criminal conviction, by reference to the statute that confers the applicable powers and duties on the appellate bench of the Federal Court. Not the common law. Not legal history. And certainly not statutory provisions applicable in other parts of Australia that have no application to the Federal Court or to this case.¹¹⁷

Subsequently, the ACT legislated to reinstate the common form statutory provision.

The discussion so far suggests that the wording of the Australian statutory provisions relating to grounds of appeal in criminal cases, and their interpretation by the courts, involves elements of inconsistency and incoherence. There are at least tensions between judicial interpretations of the provisions, and a tendency to favour outcome over process. The UK courts are more focused on due process and eschew attempts to determine guilt where the process has been compromised. The difference in approach cannot be attributed solely to the wording of the respective provisions because Australian judges have frequently rearticulated the Australian provision in terms quite similar to those used in the UK. Even where the statutory wording has been changed in Australia (as in the ACT), the judicial approach remained unaffected.

We now consider the possible influence of 'background factors' in the criminal appeals process. One notable difference is that the UK has had extensive experience with miscarriage of justice cases because of the advent of the CCRC, where the Australian courts' experience of miscarriage of justice cases has been much less. Another is that the UK has been much more influenced by rights-based factors arising from their own human rights legislation and interactions with the European Court of Human Rights.

116 Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, above n 30, 100, citing C W Pincus, 'Appeal – No Substantial Miscarriage of Justice – Case Note: *Conway v R* (2002)' (2002) 26 *Criminal Law Journal* 243, 244.

117 *Conway v The Queen* (2002) 209 CLR 203, 227 [65]–[66] (citations omitted).

C MacCormick and the Role of Background Values

An implication arising from MacCormick's institutional theory of law is that inconsistency and incoherence at the level of legal rules will lead to inconsistency and non-compliance at the level of implementation. However, such difficulties will reflect a deeper issue. MacCormick asserts that '[e]very statement of law will depend to some extent upon an interpretative argument which often presupposes value judgments. However, those values are not idiosyncratic to the judge or advocate but derive from the system itself'.¹¹⁸ His thesis is essentially that we cannot understand the institutional dynamics of a legal order without identifying the underlying values it embodies. Further, we cannot explain those values without some understanding of the deeper systemic influences they represent.

An example of the influence of background values would be the way in which the Chief Justice of NSW in 1999 referred to the important difference in the 'underlying systemic influences' between the UK and Australia. He said that there was a growing influence of 'rights-based jurisprudence' in the legal systems of the United States of America, Canada, Britain and New Zealand, and that the lack of such a focus in Australia might lead it into a degree of intellectual isolation.¹¹⁹ The Chief Justice identified this difference as constituting an important 'background assumption' which might help to explain differences of interpretation. He said it was an example of the 'values and assumptions' which are widely held and which inform principles of statutory interpretation without being expressly referred to.¹²⁰

We pick up on that idea to suggest that the 'rights-based jurisprudence' in the UK significantly informs their emphasis upon issues of due process. We also suggest that it is the 'lack of such a focus' in Australia which not only leads to a degree of intellectual isolation, but also enables the courts to make their own assessments of guilt and innocence, and to overlook 'miscarriages of justice' where they are not thought to be 'substantial'. We are not suggesting that judges should ignore the explicit wording of criminal appeal statutes, but we are referring to the lack of pressure to reform the statutory provisions in Australia. As we have seen earlier, there has been a vigorous and ongoing debate about these issues over the years in the UK which has led to a series of significant reforms. A similar pressure to reform the provisions has not been evident in the Australian context.

A further 'background assumption' can be seen in the discussion giving rise to the new statutory right of appeal in South Australia. In considering the proposals for reform, the Attorney-General of South Australia said that he thought that wrongful conviction cases were 'very rare' and that the 'classic'

118 MacCormick, *Rhetoric and the Rule of Law*, above n 3, 77.

119 James Spigelman, 'Rule of Law – Human Rights Protection' (1999) 18 *Australian Bar Review* 29, 31.

120 This is the expression used in James Spigelman, *Statutory Interpretation and Human Rights: McPherson Lecture Series* (University of Queensland Press, 2008) vol 3, 1, 20.

types of case he had in mind when promoting the new legislation were those which involved new DNA evidence.¹²¹

The implication to be drawn is that the legal system works well and that where wrongful convictions occur they do not result from inadvertence or human error, but from a new awareness gained from scientific advances. Such a view, however, is not consistent with the history of wrongful convictions and ignores the number of cases where convictions have been overturned for reasons unrelated to scientific evidence.¹²²

In the UK the CCRC has been examining wrongful conviction cases since 1997.¹²³ The CCRC's reviews have resulted in 353 convictions being overturned, including some 70 murder convictions.¹²⁴ The causes of those wrongful convictions have included false confessions; false and perjured evidence from police and other witnesses; incorrect scientific evidence; and errors of judgment by prosecutors, defence counsel and judges.¹²⁵ Relatively few cases have been overturned in the UK based upon DNA evidence alone. However, the Innocence Project in the United States of America which focuses mainly upon DNA cases has secured around 312 exonerations.¹²⁶

It is important to note that DNA cases are not specifically about scientific error at trials. DNA techniques introduce a scientific tool which may provide fresh evidence for use in an appeal. It may enable the identification of a wrongful conviction. The American experience is that leading causes of error at trial, *exposed* by the DNA exonerations, arise from eyewitness misidentifications, false confessions and flawed inquiries including misinformation from informants.¹²⁷ There is every reason to suppose that similar errors occur just as frequently in Australia.¹²⁸ There are also significant numbers of cases in all jurisdictions where error at trial is based upon wrong or unreliable expert evidence which will include forensic science and forensic pathology.¹²⁹

121 Today Tonight, Interview with John Rau, Attorney-General of South Australia (Television Interview, 6 May 2013) <<http://netk.net.au/VideosHome.asp>>.

122 See, eg, C Ronald Huff and Martin Killias (eds), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge, 2013). As for possible wrongful convictions in South Australia, see Robert Moles, *A State of Injustice* (Lothian Books, 2004).

123 Laurie Elks, *Righting Miscarriages of Justice?: Ten Years of the Criminal Cases Review Commission* (Justice, 2008).

124 Justice, *About the Criminal Cases Review Commission* (31 January 2013) <<http://www.justice.gov.uk/about/criminal-cases-review-commission>>.

125 See Sangha, Roach and Moles, above n 20, comparing the UK experience with wrongful convictions in Australia, Britain and Canada.

126 See Innocence Project, *DNA Exonerations Nationwide* <http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php>.

127 Brandon L Garrett, 'Judging Innocence' (2008) 108 *Columbia Law Review* 55; Adam Liptak, 'Study of Wrongful Convictions Raises Questions Beyond DNA', *New York Times* (New York), 23 July 2007, A1.

128 Juliette Langdon and Paul Wilson, 'When Justice Fails: A Follow-Up Examination of Serious Criminal Cases Since 1985' (2005) 17 *Current Issues in Criminal Justice* 179.

129 Sangha, Roach and Moles, above n 20.

The general view amongst those who have undertaken academic studies in this area over the last 50 years is that at least one per cent of criminal convictions for serious offences will be wrongful convictions.¹³⁰ Given that Australia has around 29 500 sentenced prisoners currently,¹³¹ we might expect, on a conservative view, to have around 300 wrongful convictions amongst them. That figure might be increased if we were to take into account those historical cases where prisoners have served their sentences and been released. It might also increase if there were found to be significant systemic errors which had not been addressed.

An important consideration in this context is that the rate of imprisonment for Aboriginal and Torres Strait Islander prisoners is 15 times higher than the rate for non-Indigenous prisoners.¹³² One might anticipate that they would be disproportionately affected by any potential miscarriages of justice. This is a point acknowledged recently by Michael Kirby when speaking of the new South Australian right of appeal:

Because such a large proportion of our prison population – I think it's about a quarter or more than a quarter ... are Aboriginal then one would expect that a provision like this will be applied and will be sought for in large numbers of cases involving Indigenous Australians.¹³³

It is thus important to identify issues which might adversely affect our understanding and appreciation of miscarriage of justice issues.

IV CONCLUSION

This article seeks to establish that the legal framework in Australia dealing with the identification of miscarriages of justice in criminal cases is deficient. It suggests that the analysis of such difficulties is assisted by approaching the critique through the framework of MacCormick's institutional theory of law. In respect of the right to appeal, an argument based upon inconsistencies within the normative framework which Australia is committed to has already produced some limited results. South Australia has legislated to create a new right of appeal, and other states are now considering their position.

It is suggested that the analysis should be extended to the grounds of appeal legislation, because that too has problems in relation to its internal coherence and consistency, which gives rise to compliance issues. As we have seen, the High Court sometimes emphasises the fact that appeal rights are strictly a product of

130 This figure has been put at between one per cent and five per cent for serious felonies in the United States of America: Huff and Killias, above n 122, chapter 1.

131 According to the Australian Bureau of Statistics '[a]t 30 June 2012 there were 29 383 prisoners (sentenced and unsentenced) in Australian prisons': Australian Bureau of Statistics, *Prisoner Snapshot* (4 December 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/5087123B0CCE48C1CA257B3C000DC7CE?opendocument>>.

132 Ibid.

133 SBS World News Radio, 'Historic Reform to SA's Criminal Appeals Laws', 20 May 2013 (Karen Ashford).

legislative interpretation, but is not always consistent in that view. There are elements of incoherence and inconsistency between the grounds of appeal and the proviso which are further complicated by the availability of a right of retrial. The argument that a right of retrial is inconsistent with the need for a proviso is supported by the fact that the UK removed the proviso after the introduction of a right of retrial there.

As to the grounds of appeal, adopting a simplified 'miscarriage of justice' or 'unsafe' criterion may be desirable. However, one would need to be mindful of the ACT experience where legislative change resulted in the reinstatement of the *status quo ante* by the High Court. Perhaps there is a lesson to be learnt from MacCormick's discussion of the relationship between the rules of the system and their underlying values, or what the former NSW Chief Justice referred to as the 'background assumptions'. In order to bring about effective and lasting change, it may be necessary to highlight the specific values which the new rules seek to promote.

In the context of a debate concerning the grounds of appeal in criminal cases, we suggest that the distinctive issue is the extent to which 'the right to a fair trial' is a dominant value. Clearly that is an issue which has not been given sufficient prominence in the context of debates concerning criminal appeal rights in Australia. As we have seen, the AHRC stated in November 2011 that the criminal appeal system 'throughout Australia' had failed properly to protect the right to a fair trial since Australia ratified the *ICCPR* (in 1980).¹³⁴

The new right to appeal legislation in South Australia may be seen as making a significant contribution to the correction of the appeal issue.¹³⁵ If there is to be effective change to the grounds of appeal in criminal cases, as in the UK, it must be linked to a clear articulation of the need to protect the right to a fair trial. As demonstrated in a comparison of the UK and Australian cases, there has been a greater emphasis in the UK on due process as opposed to the evaluation of outcomes. The reverse is apparent in Australia.

We have suggested that the UK practice may well be informed by the significant experience of wrongful convictions which has occurred there as a result of the activities of the CCRC. If that is so, then there might be opportunities to promote consideration of the issue of wrongful convictions in Australia in the course of discussions about the need to extend the newly formulated South Australian right of appeal to other jurisdictions. That in turn may well depend upon the experiences of cases which emerge where new rights of appeal exist.

134 AHRC, above n 22.

135 There are in fact some significant difficulties arising from the particular formulation of the new right of appeal in South Australia which we explain in a forthcoming article. A copy can be made available on request to the authors.