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THE *EASTMAN* CASE: IMPLICATIONS FOR AN AUSTRALIAN CRIMINAL CASES REVIEW COMMISSION

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I INTRODUCTION

Assistant Commissioner of the Australian Federal Police (AFP) Colin Winchester, was shot dead on 10 January 1989. On 3 November 1995 David Eastman was convicted in the Australian Capital Territory Supreme Court (ACTSC) of Winchester's murder. Eastman's appeals were dismissed by the Full Federal Court on 25 June 1997[1] and the High Court of Australia on 25 May 2000.[2] Eastman engaged in numerous other efforts to challenge his conviction, including a first Judicial Inquiry which reported there had been no miscarriage of justice on 6 October 2005.[3] However, on 21 August 2014, following a second lengthy and expensive Commission of Inquiry,[4] the Full Court of the ACTSC quashed the conviction and ordered a retrial.[5] Eastman had served almost two decades in prison following an investigation and trial that were ultimately shown to be severely flawed. The problems had remained largely hidden despite

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1 *Eastman v The Queen* (1997) 76 FCR 9.

2 *Eastman v The Queen* (2000) 203 CLR 1.

3 Acting Justice Miles, *Inquiry under s 475 of the Crimes Act 1900 into the matter of the fitness to plead of David Harold Eastman*, 6 October 2005.

4 Acting Justice Martin, *Inquiry into the Conviction of David Harold Eastman for the Murder of Colin Stanley Winchester, Report of the Board of Inquiry*, 29 May 2014.

5 *Eastman v Director of Public Prosecutions [No 2]* [2014] ACTSCFC 2, [309].

Eastman's conviction being the subject of almost continuous litigation over the interim.

The Eastman case raises significant questions regarding the effectiveness of criminal procedure. More specifically, it provides an illustration of the recognised causes of wrongful convictions — familiar from the extensive work of the innocence projects in the US[6] — playing out in the Australian context. The Eastman case also provides a clear demonstration of the difficulties that convicted defendants face in persuading criminal justice authorities to examine the correctness of the conviction, particularly post-appeal.

Of course, the authorities' resistance to reopening trial verdicts cannot be attributed to sheer bloody-mindedness. Verdict finality is desirable in order to maintain an affordable criminal justice system that provides closure to victims and society. However, the Eastman case is not unique[7] in raising doubts about whether the current system places too much weight on efficiency and finality and not enough on justice and truth. In this article I argue that the Eastman case provides a further demonstration of the need for Australia to adopt a Criminal Cases Review Commission (CCRC) based on the European model.[8] It also presents some interesting questions about the shape an Australian CCRC might take.

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6 See, eg, Innocence Project, *Causes of Wrongful Convictions* <http://www.innocenceproject.org/causes-wrongful-conviction>.

7 One of the more complete lists of known Australian wrongful convictions appears as a Table in Rachel Dioso-Villa's article in this issue. See also Innocence Project <http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide .php> for US DNA exonerations; and CCRC, Case Library, <www.ccrc.gov.uk/case-library/> for England, Wales and Northern Ireland cases dealt with by the CCRC.

8 See also David Hamer, 'Wrongful convictions, appeals, and the finality principle: The need for a Criminal Cases Review Commission' (2014) 37 *University of New South Wales Law Journal* 270.

II THE PROSECUTION CASE AT TRIAL

Before looking for lessons in the Eastman case I will outline the key events in its history. This part examines the prosecution case that secured Eastman's conviction at trial. The next part discusses the problems that were uncovered by the recent Judicial Inquiry.

The prosecution case at trial, while purely circumstantial, was substantial:

> ... the Crown presented in excess of 200 witnesses. There were almost 7000 pages of transcript and over 300 documentary and other exhibits.[9]

As outlined below, the prosecution presented evidence that Eastman had motive, means and opportunity to commit the offence. The prosecution linked him to the murder weapon and the crime scene, and adduced evidence of his confessions and guilty lies.

A *Motive and threats*

At about 9.15pm on 10 January 1989 Assistant Commissioner Winchester was shot in the head twice as he was getting out of his car having returned home from a visit to his brother. Eastman was an early suspect since, as was widely known, he was angry with Winchester and the AFP over perceived mistreatment. He was unsuccessfully seeking to get the police to drop assault charges — arising out of an incident with his neighbour, Mr Russo, in December 1987 — which he thought posed a serious obstacle to his re-entry into the Commonwealth Public Service.

He met with Assistant Commissioner Winchester on 16 December 1988 but Winchester refused to interfere, infuriating Eastman. Eastman's doctor, Dr Roantree, testified that on 6 January 1989 during a medical visit Eastman had said, with reference to

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9 Martin, above n 4, [35]; *Eastman v The Queen* (1997) 76 FCR 9, 14.

Winchester, 'I should shoot the bastard'.[10] In March 1988 he said 'I'll probably have to kill someone to get attention paid to the injustice that's been done to me'.[11] It was thought that earlier on the day of the killing Eastman had received a final letter from the AFP indicating that the charges would not be dropped.

B *Consciousness of guilt*

The prosecution argued at trial that, in a number of respects, Eastman's behaviour and statements demonstrated his consciousness of guilt. Most damning, perhaps, was Eastman's account of his movements on the night of the murder. Interviewed the next day Eastman claimed that he had been driving around Canberra but could not remember times or locations. The prosecution argued that this was implausible — Eastman was highly intelligent and had, in other respects, displayed an excellent memory. According to the prosecution Eastman was claiming memory loss so as not to betray his guilt.[12]

The prosecution also had evidence that subsequently during the investigation Eastman lied about motive and means: falsely denying that he was concerned about the impact assault charges would have on his efforts to re-join the public service, and lying about his motivations for acquiring firearms in the year preceding the murder.[13]

C *Link to murder weapon*

The murder weapon was never found but inspection of cartridge shells found at the scene led to the conclusion that it was a Ruger 10/22 rifle. These shells were matched with shells from a Ruger 10/22 rifle that had belonged to Louis Klarenbeek. He had sold it

[10] Martin, above n 4, [36]; *Eastman v The Queen* (1997) 76 FCR 9, 24.
[11] Martin, above n 4, [36]; *Eastman v The Queen* (1997) 76 FCR 9, 22.
[12] Martin, above n 4, [37]; *Eastman v The Queen* (1997) 76 FCR 9, 28.
[13] Martin, above n 4, [35]; *Eastman v The Queen* (1997) 76 FCR 9, 19.

privately on 31 December 1988. Klarenbeek failed to pick out Eastman as the buyer but he was identified by another customer, Raymond Webb, as having been at the seller's place around that time.[14] There was also evidence from sports-store owner Dennis Reid that Eastman had tried to sell him a Ruger 10/22 matching the description of the Klarenbeek rifle on 8 January 1989, two days before the murder.[15] Both identifications received support from descriptions of cars nearby resembling Eastman's car.[16]

D *Means and opportunity*

There was evidence that Eastman had taken steps to give himself the means and the opportunity to commit the murder. While Eastman denied buying the Klarenbeek rifle, he did admit that in the 12 months before the killing he had made extensive inquiries about rifles that were advertised for sale, had bought and disposed of two rifles and had considered the purchase of a further rifle in November 1988.[17] According to the prosecution, Eastman's explanation — that he was fearful of his neighbour Mr Russo who also possessed a firearm — was not borne out by the other evidence. As noted above, the prosecution argued that this was a lie showing Eastman's consciousness of guilt.

Winchester's address was not listed in the phone book but there was evidence that Eastman had inspected the electoral roll in 1988 from which it could have been obtained.[18] A couple of days before the murder a car matching the description of Eastman's (including a close match on the number plate), with the driver acting suspiciously was seen outside Winchester's house.[19] Eastman was seen hanging around the AFP car park earlier on the day of the murder.[20]

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14 Martin, above n 4, [35]; *Eastman v The Queen* (1997) 76 FCR 9, 16.
15 Martin, above n 4, [35]; *Eastman v The Queen* (1997) 76 FCR 9, 17.
16 Martin, above n 4, [35]; *Eastman v The Queen* (1997) 76 FCR 9, 17.
17 Martin, above n 4, [35]; *Eastman v The Queen* (1997) 76 FCR 9, 17-8.
18 Martin, above n 4, [1724]-[1728].
19 Martin, above n 4, [37]; *Eastman v The Queen* (1997) 76 FCR 9, 28.
20 Martin, above n 4, [36]; *Eastman v The Queen* (1997) 76 FCR 9, 24.

E *Gunshot residue*

At the heart of the prosecution was forensic evidence tying Eastman to the crime scene. A forensic expert, Robert Barnes, gave evidence that he had found gunshot residue in Eastman's car with a profile matching the gunshot residue found at the scene. Further, the composition profile was distinctive to one brand of ammunition — PMC — and different from another 150 or so types of ammunition that Barnes had tested.[21]

F *Confession evidence*

After the initial police interview the day after the killing, Eastman sought to exercise the right to silence and avoid communication with police. However, the police bugged Eastman's home. They recorded Eastman talking to himself while at home alone. The recordings were not that clear, and the prosecution and defence each presented their own voice experts and transcripts. However, a number of passages of the recordings were open to highly incriminating interpretations. For example, even the defence experts accepted that Eastman had 'probably' said: 'He was the first man I ever killed'.[22]

G *Conclusion*

The many independent strands of the prosecution case told a story of Eastman's threatening conduct prior to the killing, linked him to the murder weapon and the crime scene, and then showed his guilty post-offence conduct. As the Full Court commented, dismissing his appeal:

> **...** [t]he Crown case established a very strong circumstantial case against the appellant. … [T]he force of the coincidence of so many strands of evidence … combine[d] to point the finger of guilt at him.[23]

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[21] Martin, above n 4, [37]; *Eastman v The Queen* (1997) 76 FCR 9, 29.

[22] Martin, above n 4, [37]; *Eastman v The Queen* (1997) 76 FCR 9, 32.

[23] *Eastman v The Queen* (1997) 76 FCR 9, 114: 'Circumstantial evidence ... works by cumulatively, in geometrical progression, eliminating other possibilities'; *R v Kilbourne* (1973) AC 729, 758 quoted in *Shepherd v The*

III THE EASTMAN INQUIRY

Over the years Eastman made numerous efforts to question the legitimacy of his trial and to have his conviction overturned. He had very little success until the second Board of Inquiry, ordered by the ACT Supreme Court in September 2012, reporting in May 2014. The Inquiry was on a similar scale to the original trial — six months of hearings, more than 50 witnesses, 260 exhibits,[24] culminating in a 450 page report plus a confidential section that was not released. It uncovered several serious flaws in the investigation and trial, and led to the quashing of Eastman's conviction by the Full Court of the ACT Supreme Court on 22 August 2014.

A *Questionable forensic evidence*

The Inquiry called into question the strength of a number of the key strands in the prosecution case, most significantly the gunshot residue evidence which strongly linked Eastman most directly to the shooting.

Robert Barnes, of the Victorian Forensic Science Laboratory, was involved in the gathering and analysis of material from the crime scene and later from Eastman's car. He gave evidence that gunshot residue in Eastman's car matched that at the scene. He testified that the match was highly significant since the residue was from a particular brand of ammunition, PMC, and could not have come from any of 150 or so other types of ammunition that appeared in his gunshot residue database. This evidence was not subject to effective challenge. In sentencing Eastman the trial judge commended 'one of the most skilled, sophisticated and determined forensic investigations in the history of criminal investigations in Australia'.[25]

Queen (1990) 170 CLR 573, 592 (McHugh J); *Burrell v The Queen* [2009] NSWCCA 163 [88].

[24] See annexures 2-4 of Martin, above n 4.

[25] Martin, above n 4, [1111].

At the Inquiry, however, Barnes's forensic evidence unravelled. Barnes lacked relevant tertiary qualifications[26] and serious problems were revealed with his methodology. His evidence rested heavily upon a database of ammunition profiles. While Barnes had not revealed this, the database was actually not his work but had been compiled by a student, Mr Strobel, as part of a Masters project that Barnes was supervising.[27] Problematically, the ammunition profiles were based on the analysis of only small amounts of material. The Inquiry received strong evidence that the composition of ammunition is highly variable, within a single cartridge, within a batch and across batches over time. It is not possible to identify a particular profile with a particular kind of ammunition, particularly on the basis of the analysis of limited quantities of material.[28]

At the Inquiry Barnes was also heavily criticised for his failure to keep proper records of his work.[29] This made it impossible to examine his reasoning and test his conclusions. As a result his reasoning could not be properly explained or tested at the Inquiry.[30] It appeared possible that certain particles had been mixed up.[31] Evidence was given of results that appeared to contradict Barnes's claims that the crime scene gunshot residue matched that found in Eastman's car.[32] It was questioned whether certain tests reported by Barnes ever took place.[33]

Compounding concerns about Barnes's competence were concerns about his objectivity and honesty. He had been subject to disciplinary charges in the years before the Eastman trial for misusing state laboratory resources for paid private work.[34] Further,

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26 Ibid [502].
27 Ibid [483].
28 Ibid [1078]-[1082]. Of course, in these respects ammunition profiles are totally unlike a DNA profile which can be generated from a tiny biological sample which does not vary depending on the source or timing of the sample.
29 Ibid [747], [830], [874]-[876], [910].
30 Ibid [833].
31 Ibid [857], [978].
32 Ibid [846], [965], [1010].
33 Ibid [846], [920], [939].
34 Ibid [438]-[442].

the Inquiry considered that, in connection with the Eastman investigation and trial, Barnes:

> ...behaved in a manner totally inconsistent with the independence of a forensic expert. He identified himself with the prosecution and plainly demonstrated his bias in favour of the prosecution.[35]

The close examination conducted by the Inquiry had 'a devastating impact upon the reliability and the veracity of the trial evidence given by Mr Barnes'.[36] The gunshot residue in Eastman's car could have come from the PMC ammunition used in the killing, but it could have come from other ammunition used in other rifles that Eastman had had in the car. This link between Eastman and the killing was weakened considerably.[37]

B *Prosecution non-disclosure*

The flawed forensic evidence was related to a second major problem — prosecution non-disclosure. At the time of the trial, while the full extent of the problems with Barnes's evidence were not appreciated, the police and prosecution had seen warning signs. This had prompted the prosecution to employ several experts from overseas to review and check Barnes's work.[38] They had raised doubts about his methods and his record management.[39] Much of this was not disclosed. On the contrary, in some respects, prosecution evidence was presented so as to avoid revealing the difficulties.[40]

The Inquiry considered that the prosecution non-disclosure had a serious impact. With disclosure, defence could have made significant challenges to his evidence in cross-examination:

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35 Ibid [409], [1114].
36 Ibid [1103].
37 Ibid [1124], [1127].
38 Ibid [352].
39 See, eg, Ibid [499]-[558].
40 Ibid [577]-[578].

> In stark contrast to the situation at trial where defence Counsel was struggling to find any chink in the armour of Mr Barnes, it would have been the prosecution struggling to defend the integrity and reliability of Mr Barnes.[41]

C *Police misconduct*

The Inquiry found that during the lengthy investigation the police had harassed Eastman over months and years with the aim of securing a confession. Eastman and his solicitor told the police on numerous occasions that he would be exercising his right to silence and any police contact should be through his solicitor.[42] But the police ignored this and deliberately sought to put pressure on him in hope that he would crack and confess.

The murder taskforce investigating the Winchester killing, in particular Commander Ninness and Detective Sergeant Thomas McQuillen, sought pretexts to visit Eastman at his home.[43] In an effort to provoke him, they claimed to have knowledge of his visits to brothels and his sexual interest in boys.[44] The taskforce got involved in other lesser police inquiries involving Eastman for the opportunity to pressure him further.[45] On one occasion McQuillen hijacked an interview at a police station on another matter and repeatedly accused Eastman of killing Winchester.[46] The police engaged in overt surveillance, for example, openly following him as he travelled to his solicitor's office several times a week.[47] Ninness and McQuillen orchestrated a situation which involved a police woman, unofficially working undercover, befriending Eastman and accompanying him to the Australian War Memorial on some kind of date. Here they approached the couple in Eastman's car to request an interview with him, taking the keys to prevent him driving off.[48] On

41 Ibid [1117].
42 Ibid [1461], [1462], [1616].
43 Ibid [1469].
44 Ibid [1662].
45 Ibid [1612].
46 Ibid [1620]-[1628].
47 Ibid [1598]-[1599].
48 Ibid [1479]-[1482].

this and other occasions the objective was to 'to harass and provoke the applicant into a reaction'.[49]

The Inquiry considered that, even recognising that 'police were not obliged to observe the "social niceties"',[50] and applying the standards as they stood in the period 1989-1995,[51] 'there were occasions when police crossed the line and engaged in both unfair and unlawful conduct toward the applicant'.[52] The Inquiry added that '[t]he inappropriate nature of the conduct is exacerbated when regard is had to [Eastman's] mental state and the intention of police to play upon and aggravate that mental state'.[53] As the police recognised, Eastman was suffering from a long term paranoid personality disorder.[54]

Despite the finding that the police had behaved improperly, the confession evidence was not considered inadmissible.[55] The Inquiry took the view that the confessions were made independently of the police harassment.[56] This may seem a bit surprising given that the Inquiry accepted that the object of the harassment was to obtain confessions:

> Knowing that the applicant suffered from a Paranoid Personality Disorder … [t]he harassing and provocative conduct was undertaken with the deliberate intention of provoking the applicant into saying something incriminating which could be recorded on listening devices in his home.[57]

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49 Ibid [1665]; See also [1458], [1477], [1654].
50 Ibid [1668] quoting *Eastman v The Queen* (1997) 76 FCR 9, 110.
51 Martin, above n 4, [1674].
52 Ibid [1669].
53 Ibid.
54 Ibid [150], [151]: A psychiatrist, Dr Milton, provided the police with reports on the particular risks that Eastman's disorder posed for those involved in the investigation and the proceedings and the public more broadly from February 1989.
55 Ibid [1444].
56 Ibid [1718], [1767].
57 Ibid [1666].

However, the seriousness and circumstances of the case did justify fairly robust overt surveillance. The marginal extent to which the police crossed the line was considered not to have contributed to Eastman's confessions.[58] Eastman met the police campaign with a high degree of resilience and effective measures of counter-surveillance.[59] Medical evidence before the Inquiry attributed Eastman's need to talk to himself to his underlying circumstances and condition — his social isolation and narcissism.[60]

While not undermining the confession evidence, the police misconduct was relevant to another aspect of the trial — the relative credibility of the police witnesses and Eastman.[61] The willingness of the police to breach standards of propriety could have thrown doubt on the credibility of police evidence at trial. Further, this knowledge would have enhanced, or reduced damage to, Eastman's credibility. At trial the dismissal of Eastman's constant complaints about police harassment contributed to a broader prosecution attack on his credibility.[62] This attack would not have been viable had the extent of the police harassment been known.

D *Ineffective defence*

The various factors noted above — dubious forensic evidence, prosecution non-disclosure, police misconduct — had increased impact due to the weakness of Eastman's defence at trial. This did not reflect on Eastman's legal advisors but was the product of Eastman's paranoid personality disorder. Eastman claimed that his disorder rendered him unfit to plead. On this occasion as previously — it was the subject of the previous Inquiry[63] — Eastman's argument was unsuccessful.[64] The Inquiry noted Eastman's

58 Ibid [1668], [1767].
59 Ibid [1712].
60 Ibid.
61 Ibid [1719], [1799].
62 Ibid [1688].
63 Miles, above n 3.
64 Martin, above n 4, [145].

intelligence and that he 'consistently demonstrated an excellent grasp of the issues with which he was confronted'.[65]

While not sufficient to render Eastman unfit to plead, the Inquiry found that his 'mental condition was responsible for decisions that worked strongly to [his] disadvantage'.[66] He terminated instructions numerous times prior to and during the trial, often later re-engaging the same counsel. His preparation for trial was severely disrupted and over the trial he was represented by five different sets of counsel, with periods of self-representation in between.[67] Eastman misguidedly believed this was an effective way to manipulate the court and the progress of the trial.[68] One consequence of this extreme disruption was his failure to effectively challenge the expert evidence, in particular the forensic evidence on gunshot residue. The prosecution had a senior solicitor working on the expert evidence full time for 2½ years, whereas at the time of trial the defence was 'woefully under-prepared'.[69] This evidence formed a crucial component of the defence and its significant vulnerabilities, discussed above, remained hidden.

While self-represented Eastman chose not to cross-examine certain witnesses as a protest, he said, against 'judicial condonation of harassment'.[70] One such witness was Dr Roantree who gave the very damaging evidence of Eastman's threat to shoot Winchester days before the murder. Effective cross-examination would have shown that Dr Roantree had, on other occasions, expressed doubt about whether Eastman said this at all, and suggested that if he had,

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65 Ibid [144].
66 Ibid [1782].
67 Ibid [34].
68 Ibid [117], [1775], [1785].
69 Ibid [769]. He had sacked the solicitor, Mr Mark Klees, who had previously invested considerable time in getting on top of the forensic evidence: See Ibid [761].
70 Ibid [34], [125].

it could have been just a quip.[71] Eastman deprived himself of the opportunity to neutralise this key item of prosecution evidence.[72]

A further consequence of Eastman's mental disorder was that it led him to frequent flagrant breaches of court etiquette. He made 'vile, foul-mouthed, vituperative comments'[73] to the judge, telling him, on one occasion 'you would not know the law from a bull's foot ... You are a silly old man, and a rather ... nasty old man as well'.[74] On other occasions he called the judge a 'corrupt shit'[75] and a 'lying cunt'.[76] The Inquiry found that the trial judge 'displayed quite extraordinary patience in the face of repeated provocation which was, at times, particularly unpleasant', reacting inappropriately on 'only [one] occasion'.[77] The Inquiry found no substance to claims that the trial judge was biased against Eastman,[78] and considered that Eastman on the whole conducted his proceedings in a 'calm and logical' fashion and engaged in 'calm' communications with the trial judge.[79] Nevertheless, as the trial judge told him, Eastman was 'doing [him]self no good by behaving in this fashion in front of the jury'.[80]

E *Doubtful eyewitnesses*

The Inquiry noted that, with Barnes's gunshot residue evidence and Dr Roantree's threat evidence much weakened, the evidence linking Eastman to the murder weapon would have been required to carry far greater weight for the conviction to be sustained.[81] This consisted primarily of the evidence of two eyewitnesses. First, Webb, who claimed to identify Eastman as the man he saw at Klarenbeek's

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71 Ibid [1359]-[1360].
72 Ibid [1797].
73 Martin, above n 4, [34]; *Eastman v The Queen* (1997) 76 FCR 9, 28, 34.
74 Martin, above n 4, [34]; *Eastman v The Queen* (1997) 76 FCR 9, 36.
75 Martin, above n 4, [34]; *Eastman v The Queen* (1997) 76 FCR 9, 36.
76 Martin, above n 4, [34]; *Eastman v The Queen* (1997) 76 FCR 9, 36.
77 Martin, above n 4, [130].
78 Ibid [239].
79 Ibid [128].
80 Martin, above n 4, [34]; *Eastman v The Queen* (1997) 76 FCR 9, 35.
81 Martin, above n 4, [1794].

place, where and about the time the murder weapon was sold, a couple of weeks before the murder. Second, the sports store owner, Reid, who identified Eastman as the person who had attempted to sell him a rifle matching the description of the Klarenbeek rifle a couple of days before the murder.

The Inquiry noted that, although deriving support from further evidence of cars matching the description of Eastman's car,[82] both of these identifications of Eastman suffered weaknesses. Webb had initially told police that he had not seen anyone at the Klarenbeek property, and gave sworn evidence to that effect at the Inquest.[83] When he changed his story and provided the positive identification he explained his earlier denials on the basis that he did not want to get involved and was worried about the safety of his family.[84] But, the Inquiry noted, Webb's evidence remained 'open to strong challenge'.[85]

Reid's identification was also less than ideal. Reid only provided a confident identification of Eastman on his third attempt. He failed to pick Eastman out from a photo line-up, he provided a tentative identification in an arranged crowd-scene, and only said he was certain it was Eastman when this exercise was repeated and he spoke to Eastman.[86] Delayed multiple-attempt identifications are recognised as being highly problematic because of the increased risk of contamination.[87] And, of course, both these identifications did not provide direct evidence of the murder, but only circumstantially linked Eastman with the murder weapon. It was not definite that the person visiting Klarenbeek's place bought the murder weapon, or that it was the murder rifle that this person was offering to sell to Webb.

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82 Martin, above n 4, [35]; *Eastman v The Queen* (1997) 76 FCR 9, 17.
83 Martin, above n 4, [1390].
84 Ibid [1404].
85 Ibid [1794].
86 Ibid [1793].
87 See, eg, James Michael Lampinen, Jeffrey S Neuschatz and Andrew D Cling, *The Psychology of Eyewitness Identification* (Taylor and Francis, 2012) 122, 160.

Recognising the frailties to the threat, gunshot residue and identification evidence, the confession evidence assumes heightened importance. Moreover, although the confessions were found admissible despite police harassment, the Inquiry indicated that the confessions lacked sufficient clarity to provide the 'sole basis for a finding of guilt'.[88] The Inquiry concluded '[t]he combination of these flaws demonstrates that the applicant did not receive a fair trial'[89] and recommended that Eastman's conviction be quashed.

F *The alternative hypothesis*

As well as revealing weaknesses with the prosecution case against Eastman, the Inquiry also weighed up evidence that supported an alternative hypothesis regarding Winchester's murder, that it had been a 'professional hit' by a criminal organisation.

This theory was actually given serious consideration early in the investigation. Winchester had previously been involved in a major drug operation against the Calabrian mafia, Ndrangheta, leading to a trial of 11 people for drug offences which was getting underway at the time of the murder. The murder could have been revenge for Winchester's role in the operation, and a warning to potential witnesses not to testify at the trial.[90] Several inquiries were conducted to investigate this possibility with one viewing it as established on the balance of probabilities.[91] However, subsequent investigation failed to turn up any solid evidence, and this alternative hypothesis was not seriously pursued at trial.[92]

The Inquiry confirmed that, on the evidence available at the time of the trial, 'suspicion that members of the crime group might have been involved in the murder is raised, but such suspicion falls well

88 Martin, above n 4, [1795].
89 Ibid [1801].
90 Ibid [1327].
91 Ibid [1288].
92 Ibid [1330].

short of a reasonable hypothesis'.[93] However, the Inquiry had available to it another body of fresh evidence — heard in private, and contained in a sealed report: 'The fresh evidence potentially lifts suspicion to the level of a reasonable hypothesis consistent with the applicant's innocence'.[94] As the Inquiry observed, this 'adds a new dimension' to the case;[95] a rather uncertain dimension given that it is clouded in secrecy,[96] however, it 'adds weight to the view that the conviction cannot stand'.[97]

G *Common causes of wrongful conviction*

At trial in 1995 the prosecution case against Eastman appeared strong and well-constructed, and his appeals against conviction were dismissed. Almost 20 years later the Inquiry found serious problems with the police investigation and the trial and his conviction was quashed by the Full Court. The sharp contrast between the appearance of a case in initial proceedings and later proceedings is not unique to the Eastman case. Wrongful convictions are regularly being revealed in Australia and foreign jurisdictions. The Eastman case resembles many other wrongful convictions in the causes and in the time it took to come to light.

The Innocence Project, based at Cardozo School of Law at Yeshiva University, achieved 330 exonerations through DNA analysis in the last three decades. The average time served was 14 years.[98] The Innocence Project identifies the common causes of wrongful conviction as: 1) eyewitness misidentification; 2) unvalidated or improper forensic science; 3) false confessions / admissions; 4) government misconduct; 5) informants or snitches; and 6) bad lawyering. All but the fifth of these played at least a

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93 Ibid [1333].
94 Ibid [1829].
95 Ibid.
96 Ibid [1336]: 'The fresh evidence was received in two private hearings which were not open to the public and from which all persons were excluded other than Senior Counsel assisting the Inquiry and my associate'.
97 Ibid [1830].
98 Innocence Project <http://www.innocenceproject.org>.

potential role in the Eastman case. As discussed in Part III above, the Inquiry revealed (using the Innocence Project numbers): (1) potential weaknesses with the eyewitnesses linking Eastman to the murder weapon, the Klarenbeek rifle; (2) the unvalidated and improper forensic science of Robert Barnes relating to the gunshot residue; (4) prosecution non-disclosure of known weaknesses with Barnes's evidence; (3,4) concerns about the voluntariness and reliability of Eastman's recorded confessions flowing from police harassment, and their lack of clarity; and (6) the poor quality of the defence mounted at trial, a consequence of Eastman's mental disorder.

A further common cause of wrongful convictions, a species of 'government misconduct', is tunnel vision, a type of confirmation bias.[99] Investigators and prosecutors tend to fix upon a particular theory of the case giving greater weight to evidence consistent with the favoured theory, while filtering out or discounting evidence inconsistent with the theory. There was no sign of tunnel vision during the Eastman investigation. Both the Eastman hypothesis and the organised crime alternative hypothesis were entertained and thoroughly investigated. However, it seems that more recently tunnel vision presented an obstacle to the proper reconsideration of the safety of Eastman's conviction. The Full Court commented on:

> ... [t]he apparent reluctance to seriously and thoroughly conduct any reinvestigation based on the new information ... This reluctance appears to have flowed, at least in part, from a policy position or "stance" in relation to any reinvestigation given that Mr Eastman had already been convicted.[100]

[99] See, eg, Dianne L Martin, 'Lessons about Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence' (2002) 70 *University of Missouri Kansas City Law Review* 847 for confirmation bias.

[100] *Eastman v Director of Public Prosecutions [No 2]* [2014] ACTSCFC 2, [198]-[199].

IV IMPROVING THE IDENTIFICATION OF WRONGFUL CONVICTIONS

Wrongful conviction cases like that of Eastman present a host of questions and law reform challenges. These arise at the front end — what are the causes, and what reforms can be introduced to reduce the incidence of wrongful convictions?[101] And at the back end — when errors do occur why do they often take so long to identify, and what reforms can facilitate their identification? This paper focuses on the back end. While prevention is better than cure, front-end reforms will not totally halt wrongful convictions. Some rate of error is inevitable — it is built into the criminal standard of proof which does not demand absolute certainty.[102] Any mature rational criminal justice system should acknowledge this, and provide an effective mechanism for addressing it.

Broadly speaking obstacles to the identification of wrongful convictions fall into three categories; reactive adversarial resistance by state actors; institutional commitment to verdict finality; and a lack of resources of wrongfully convicted defendants.

A *Entrenched adversarial positioning*

The first of these involves a natural reluctance by the authorities responsible for the original conviction — the police, the prosecution, and associated actors — to acknowledge error.[103] The criminal justice system operates in an adversarial fashion which is built upon an institutional commitment by the state authorities to the proposition of the defendant's guilt.[104] Ethical obligations and codes

[101] See, eg, Gary Edmond, 'The "Science" of Miscarriages of Justice' (2014) 37 *University of New South Wales Law Journal* 376.

[102] See, eg, Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (Stevens & Sons, 3rd ed, 1963) 190.

[103] See, eg, Daniel S Medwed, 'The Zeal Deal: Prosecutorial resistance to post-conviction claims of innocence' (2004) 84 *Boston University Law Review* 125.

[104] See, eg, Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1949) 80.

of conduct seek to prevent this commitment from interfering with the proper achievement of justice.[105] However, it is not uncommon for these standards to be breached, as the Eastman case demonstrates with its elements of police harassment, biased and flawed prosecution forensic evidence, and prosecution non-disclosure. These features, as noted above, are often present in wrongful conviction cases.

As the Eastman case also shows, this over attachment to the prosecution theory of the case can continue long after conviction. Above I noted the prosecution's unwillingness to return to the possibility that the killing was the work of organised crime rather than Eastman. More generally, the police and prosecution approached the Inquiry in a highly adversarial fashion.

This is apparent from the efforts expended by the Director of Public Prosecutions of the ACT (DPP) to confine the Inquiry by adopting a narrow interpretation of the terms of reference.[106] The prosecution sought to prevent the Inquiry from fully investigating the most flawed aspect of the trial, the biased and methodologically weak forensic evidence of Robert Barnes. The prosecution argued that para 5 of the Order setting up the Inquiry concerned prosecution *non-disclosure* of information regarding the Barnes' veracity, and

[105] See, eg, NSW Police Force, *Code of Conduct and Ethics*; NSW Police Force *Standards of Professional Conduct*; Office of the DPP (NSW), *Prosecution Guidelines* (see particularly Guideline 18 on Disclosure); *Uniform Civil Procedure Rules 2005* (NSW) sch 7 — Expert Witness Code of Conduct applicable to criminal proceedings under *Supreme Court Rules 1970* (NSW) r 75.3J; Gary Edmond, '(Ad)ministering Justice: Expert Evidence and the Professional Responsibilities of Prosecutors' (2013) 36 *University of New South Wales Law Journal* 921. See generally Kent Roach, 'Wrongful Convictions: Adversarial and Inquisitorial Themes' (2010) 35 *North Carolina Journal of International and Comparative Regulation* 388.

[106] Martin, above n 4, [40]; Jack Waterford, 'David Eastman case suffocated by jurisdiction challenges', *Sydney Morning Herald* (online), 29 January 2014 <http://www.smh.com.au/federal-politics/political-opinion/david-eastman-case-suffocated-by-jurisdiction-challenges-20140128-31l75.html>.

this did not permit consideration of Barnes' veracity. This argument was rejected by the Inquiry. The Commissioner stated:[107]

> In my opinion the investigations undertaken by the Inquiry were authorised by Paragraph 5 of the Order. However, if in some respects the investigation proceeded beyond the limits authorised by Paragraph 5, the interests of the administration of justice more than justified extending beyond the reach of Paragraph 5 to that limited extent. This conviction, and the role played in the conviction by the forensic evidence, have been the subject of great controversy over many years and it is time that the controversy was put to rest. More importantly, unless the controversy is put to rest through a thorough investigation of the issues agitated by the applicant, the possibility that a miscarriage of justice has occurred will not have been resolved.
>
> As this Report demonstrates, the investigation by the Board has uncovered serious flaws in the critical forensic evidence and, in my opinion, a substantial miscarriage of justice has occurred. It is both short-sighted and contrary to the administration of justice to suggest that the Board should not have investigated and reported on these matters.

A further illustration of the entrenched adversarial positioning that marked the Inquiry is provided by its interactions with discredited forensic expert witness, Barnes. He was represented by counsel[108] who complained to the Inquiry that its 'attacks mounted personally against Mr Barnes' were 'unreasonable and unjustified'; 'have no parallel in Australian legal history'; 'display vehemence and a hypercritical tone that has not characterized criticisms of any expert witness in any Australian judicial inquiry into a conviction previously'; were 'pursued … with unparalleled zealotry'; and were 'fundamentally flawed'.[109]

The Inquiry responded in a similarly defensive tone. Barnes's Counsel's submissions 'attacked the integrity of the Board, and those assisting the Board'[110] but were 'unsubstantiated'.[111] '[T]he Inquiry

[107] Martin, above n 4, [279]-[280].
[108] Ibid [330].
[109] Ibid [1101].
[110] Ibid.
[111] Ibid [1102].

has undertaken a detailed and searching examination of the forensic work undertaken by Mr Barnes':[112]

> The criticisms of Mr Barnes found in this Report are based on the evidence presented to the Board … Whether the criticisms have no parallel in Australian legal history is beyond the Board's knowledge, but if that assertion is correct it merely serves to highlight the gravity of the flaws that have been exposed.[113]

These kinds of bellicose exchanges, as well as being a distraction from the Inquiry's main objectives, are also expensive. Jack Waterford in the *Canberra Times* writes:

> The inquiry had minimal help from police or the prosecution system, which spent millions attempting to prevent it happening or to rein it in. Their lawyers at the inquiry were not seeking to have the truth established, but trying doggedly to prevent any criticism of their clients over events 25 years ago.[114]

The Inquiry has been reported to have cost the ACT Government around $12 million, including $3.3 million on legal aid for Eastman, $5.4 million on the courts, the director of public prosecutions and corrections, and $3.2 million on police.[115] The costs continue to mount. While the Inquiry recommended that there be no retrial,[116]

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[112] Ibid.

[113] Ibid [1103].

[114] Jack Waterford, 'Eastman Inquiry shows importance of the nagging doubt', *The Canberra Times* (online), 1 June 2014 <http://www.canberratimes.com.au/act-news/eastman-inquiry-shows-importance-of-the-nagging-doubt-20140531-zrtrh.html>.

[115] Kirsten Lawson, 'Costs mount for David Eastman inquiry', *Sydney Morning Herald* (online), 8 August 2014 <http://www.smh.com.au/it-pro/costs-mount-for-david-eastman-inquiry-20140807-101lxg>; up $2m from an estimate only two months earlier: Christopher Knaus, 'Eastman Inquiry estimated to have cost more than $10 million', *The Canberra Times* (online), 4 June 2014 <http://www.canberratimes.com.au/act-news/eastman-inquiry-estimated-to-have-cost-more-than-10-million-20140604-zrxt6.html>.

[116] Martin, above n 4, [1833].

the Full Court decided to leave this for the prosecution,[117] and latest reports are that the prosecution will bring the case back before the trial court.

B *Verdict finality*

Barnes, the police, and the prosecution responded defensively to the Inquiry's efforts to examine the correctness of the conviction. This clearly made it more difficult for Eastman and the Inquiry to uncover the problems that attended the trial. Quite apart from that adversarial response, the criminal justice system more broadly places a high value on verdict finality.[118] It tightly restricts efforts to call verdicts into question.

There is, of course, a fairly broad opportunity for convicted defendants to appeal against conviction. However, some restrictions do apply. Strictly speaking, in most jurisdictions it is only correct to talk of a 'right' to appeal where the ground is an error of law[119] and the appeal notice is filed within a short time period, generally around 28 days.[120] Appeals that are out of time or rely upon factual matters — such as the accused's factual innocence — require leave. Nevertheless, leave is usually obtained fairly readily where to deny leave might cause a miscarriage of justice.[121]

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[117] *Eastman v Director of Public Prosecutions [No 2]* [2014] ACTSCFC 2, [308]: partly for the reason that the legislation would not allow the Full Court to order an acquittal at [300]; *Crimes Act 1900* (ACT) s 430(2).

[118] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1, 17 [34].

[119] See, eg, *Criminal Appeal Act 1912* (NSW) s 5(1)(a)-(b).

[120] See, eg, Ibid s 10(1)(a). The less extensive ACT appeal legislation appears silent on these matters, with the implication that leave is not required. See, eg, *Supreme Court Act 1933* (ACT) s 37E.

[121] With regard to leave to appeal on a matter of fact or mixed fact or law: *Krishna v DPP (NSW)* (2007) 178 A Crim R 220, 228 [43], 231 [53] (Rothman J); Hugh Donnelly, Rowena Johns and Patrizia Poletti, 'Conviction Appeals in NSW' (Monograph No 35, Judicial Commission of NSW, June 2011) 23. With regard to extensions of time: *R v Young* [1999] NSWCCA 275.

On appeal, however, it is not a straightforward task for a wrongfully convicted defendant to have the error corrected. The position is very different from the original trial where the prosecution has to prove guilt beyond reasonable doubt. On appeal the conviction is presumed correct and the defendant bears the burden. If the defendant can establish legal error then the appeal will be upheld unless it appears that the error made no real difference — the conviction was inevitable anyway.[122] But if the defendant cannot identify legal error and is merely arguing that the conviction is factually erroneous, the defendant carries the considerable burden of showing that no reasonable jury could have convicted.[123] Further, the appeal court will be reluctant to allow the defendant to adduce new evidence in support of these claims. There will be no difficulty if the evidence is genuinely fresh and could not reasonably have been adduced at trial. But if the failure to adduce the evidence was deliberate or unreasonable the appeal court will only consider it if the evidence clearly shows the conviction is erroneous.[124] On further appeal, the High Court will not consider any new or fresh evidence.[125]

These factors worked against Eastman in his earlier appeals. While he attempted to attack Barnes's forensic evidence, the Full Federal Court held that the evidence was not genuinely fresh — it was not evidence 'which was not available, or could not with reasonable diligence have been available on the trial'.[126] As merely new evidence, it was not 'of sufficient strength to justify interference with the verdict'.[127] Eastman had not demonstrated any legal errors at trial, and he was unable to satisfy the higher threshold of proof attaching to factual errors. Indeed, the defence conceded that on the evidence presented at trial, a properly instructed jury could have convicted.[128] In the High Court Eastman's task was tougher still

[122] See, eg, *Wilde v The Queen* (1988) 164 CLR 365, 372; Hamer, above n 8, 283.
[123] *M v The Queen* (1994) 181 CLR 487, 493; Hamer, above n 8, 283.
[124] *Abou-Chabake* (2004) 149 A Crim R 417, 428 [63] (Kirby J); *Ratten v The Queen* (1974) 131 CLR 510, 518–9 (Barwick CJ).
[125] *Mickelberg v The Queen* (1989) 167 CLR 259.
[126] *Eastman v The Queen* (1997) 76 FCR 9, 108.
[127] Ibid.
[128] Ibid 114.

because the court, by a majority, held it lacked jurisdiction to consider any further evidence whatsoever.[129]

If the defendant fails on appeal, post-appeal the defendant's task becomes still more difficult. The institutional resistance to revisiting the conviction becomes still stronger. There is some variation between jurisdictions,[130] but generally speaking there is no direct route back to the appeal court. The ACT actually has one of the more evolved mechanisms among Australian jurisdictions.[131] But this still required Eastman to persuade the ACT Supreme Court to make an exceptional[132] order for an Inquiry, to persuade the Inquiry to find a doubt about the defendant's conviction and recommend that the conviction be quashed, and to persuade the Full Court to adopt the recommendation, with the prosecution and other parties opposing him at every stage. Surprisingly perhaps, Eastman succeeded.

C *Lack of resources of the defence and the accused*

In many wrongful conviction cases, the defendant is required to overcome a strong institutional preference for verdict finality and satisfy stringent legal requirements, while facing strenuous opposition of amply-resourced repeat-players, the prosecution and the police. In many cases, the wrongfully convicted defendant will be

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[129] *Eastman v The Director of Public Prosecutions (ACT)* (2000) 203 CLR 1, 11 (Gleeson CJ), 24 (Gaudron J), 40-1, 53-4 (McHugh J), 62-3 (Gummow J), 108 (Hayne J); 93 (Kirby J, dissenting), 123 (Callinan J, dissenting).

[130] See Hamer, above n 8, 286-98.

[131] *Crimes Act 1900* (ACT) Pt 20. Although both the Inquiry and the Full Court raised questions as to precisely how this mechanism operated: Martin, above n 4, [1802]-[1807]; *Eastman v Director of Public Prosecutions [No 2]* [2014] ACTSCFC 2 [19]-[75]; the High Court considered the operation of the previous ACT scheme in *Eastman v DPP* (2003) 214 CLR 318.

[132] Hamer, above n 8, 288-91 on how few orders have been made under similar NSW provisions. An AustLII search for the key terms "doubt or question" (*Crimes Act 1900* (ACT) s 422 "Grounds for ordering inquiry") in decisions of the Supreme Court, Court of Appeal and Full Court of the ACT Supreme Court decisions on AustLII brings up only one application for review of a conviction other than Eastman's, and it was unsuccessful: *Application for an inquiry by Parker under s 424 of the Crimes Act 1900* [2003] ACTSC 38 (16 May 2003).

hampered by a poor educational background, poor mental health, and drug problems.[133] Following trial and appeal, and stuck in prison, their financial resources will typically be depleted. And by this stage whatever support network they did possess will often have melted away.

In important respects Eastman does not fit the mould. While, in common with many criminal defendants, Eastman was hampered by poor mental health, he also had the benefit of strong forensic abilities. One medical report prepared prior to trial described him as 'unusual[ly] ... intelligent, persistent, aggressive and abnormally suspicious'.[134] Eastman, an inveterate and tenacious litigator, has applied these qualities on many occasions. A search over AustLII for 'David Harold Eastman' turns up over 100 cases, many of which were commenced by Eastman in connection with the Winchester murder. Beginning with his first arrest he has brought actions against the magistrate sitting on the committal for breach of natural justice,[135] an ex parte application for habeas corpus addressed to the officer in charge of the cells of the ACT Supreme Court prior to trial,[136] and another addressed to the governor of the prison where he resided following conviction,[137] in addition to appeals against conviction in the Full Court and the High Court,[138] and considerable further litigation around an earlier Inquiry into the conviction which also reached the High Court.[139] But despite Eastman's remarkable

[133] See, eg, Craig Jones and Sandra Crawford, 'The Psychosocial Needs of NSW Court Defendants' (2007) 108 *Crime and Justice Bulletin* 1; Michele LaVigne and Gregory J Van Rybroek, 'Breakdown in the Language Zone: The Prevalence of Language Impairments among Juvenile and Adult Offenders and Why It Matters' (2011) 15 *UC Davis Journal of Juvenile Law & Policy* 37.

[134] Martin, above n 4, [164] quoting a report prepared by Dr Milton for the investigating police.

[135] *David Harold Eastman v Magistrate Michael Somes Sca* [1992] ACTSC 28.

[136] *Re Officer In Charge of the Cells ACT Supreme Court; Ex Parte Eastman* [1994] HCA 36.

[137] Transcript of Proceedings, *Eastman Ex parte: The Governor, Goulburn Correctional Centre and ANOR* S178/1998 [1999] HCATrans 64 (23 March 1999).

[138] *Eastman v The Queen* (1997) 76 FCR 9; *Eastman v The Queen* (2000) 203 CLR 1.

[139] *Eastman v Director of Public Prosecutions* (ACT) (2003) 214 CLR 318.

tenacity and capacity as a litigator, it still took almost 20 years to have his conviction overturned. How much more impossible it must be for a typical wrongfully convicted defendant without Eastman's intellectual capacities and emotional fortitude.

D *Criminal Cases Review Commission and the finality principle*

The Eastman case is a further addition to the list of wrongful convictions and miscarriages of justice[140] that raise concerns about the accuracy and correction mechanisms of the current criminal law system. Consideration should be given to front-end reforms that address the causes of wrongful conviction, and back-end reforms which address their identification and correction.

One obvious model for Australian back-end reform is provided by the Criminal Case Review Commissions (CCRCs) of Europe. The English CCRC was the first to be established following revelations regarding a series of wrongful convictions in the 1980s and the Runcimann Royal Commission into Criminal Justice that reported in 1993. The CCRC receives applications from defendants claiming to have been wrongfully convicted who have failed on appeal.[141] It is equipped with the powers and resources to conduct investigations where they appear warranted.[142] If doubt is thrown on the conviction, the Commission can refer a further appeal to the Court of Appeal Criminal Division (CACD).[143] Importantly, in the CACD the CCRC is not a party. The appeal is a regular appeal between defence and prosecution. This may assist in the CCRC in staying above the fray, maintaining a level of independence and objectivity.

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[140] Dioso-Villa, above n 7; Innocence Project, above n 7; CCRC above n 7.

[141] The CCRC does have the power to consider applications where there has not yet been an appeal, but will only consider the application in exceptional circumstances: *Criminal Appeal Act 1995* (UK) s 13(1)(c); CCRC, *Annual Report and Accounts 2014/2015* (2015) 14.

[142] *Criminal Appeal Act 1995* (UK) ss 17-22.

[143] Ibid ss 9-12.

The CCRC model overcomes many of the obstacles to correction of wrongful convictions noticed above. It has the powers and resources to carry out the investigative work required to uncover a wrongful conviction. Thus a poorly resourced defendant should not be too disadvantaged.[144] Further, the CCRC works in a highly inquisitorial manner, independently gathering evidence. This often avoids the distracting and costly skirmishes experienced by the adversarial Eastman Inquiry.[145] As noted above, the Eastman Inquiry was estimated to cost about $10 million which is not much cheaper than the annual budget of the English CCRC at about £6 million.[146] But whereas the Eastman Inquiry looked at one case which was returned to the Full Court, the English CCRC in 2014/15 considered 1632 applications, and made 36 referrals to the CACD.[147] About 70 percent of the CCRC referred appeals are consistently upheld.[148]

The CCRC then has the appearance of being a far more effective and efficient means of identifying and correcting wrongful convictions and miscarriages of justice. Of course, it does not immediately follow that CCRCs would work in Australian jurisdictions. A range of comparative questions arise such as to whether there is reason to expect the incidence of uncorrected

[144] Although the impact of resource differentials cannot be totally avoided: The defendant has to overcome the first hurdle of getting the CCRC to act upon the defendant's application. The CCRC acceptance rate is low. A well-resourced defendant, able to make a good case to the CCRC perhaps with legal advice, may increase his chances of acceptance: Jacqueline Hodgson and Juliet Horne, *The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC): A Report Prepared for the Legal Services Commission* (Warwick School of Law, 2008) 8-9.

[145] It is not uncommon for the prosecution to not contest CCRC referred appeals. Such cases are often highlighted in the Annual Reports: See, eg, CCRC, *Annual Report and Accounts 2012/2013* (2013) 17; CCRC, *Annual Report and Accounts 2013/2014* (2014) 23; CCRC, above n 141, 23.

[146] CCRC, above n 141, 29.

[147] Ibid 15. This is a referral rate of 2.2 percent, but if applications which are outside of jurisdiction and applications where there has not yet been an appeal are put to one side, the long-term referral rate is 7.5 percent.

[148] Ibid 7.

mistaken convictions to be as high here as in England,[149] and, if a CCRC is to be established, what would be the most appropriate institutional design for Australia's smaller criminal jurisdictions operating within a federal system?[150]

These are important and complex questions that cannot be pursued here. Instead, I want to address a more fundamental question. Any increase in the rate at which potential mistaken convictions are identified and corrected as the result of establishing a CCRC would be at the expense of verdict finality. Can this cost be kept at a manageable level?

E *Balancing truth and finality*

As observed above, verdict finality is recognised as a good thing. It brings various benefits — it respects the constitutional fact-finding role of the jury,[151] provides a degree of closure to victims and society,[152] and contains the cost of appeals and retrials.[153] Of course, to the extent that wrongful convictions occur and come to light, these benefits may prove illusory. Respect for jury fact-finding may be undermined; victims and society would question the accuracy of

[149] See, eg, NSWCCA is much more prepared to overturn jury verdicts on the facts as compared with the English Court of Appeal (Criminal Division): Hamer, above n 8, 303.

[150] In these respects it may be worth considering the CCRCs of the smaller jurisdictions, Scotland and Norway: See, eg, Ulf Stridbeck and Svein Magnussen, 'Opening Potentially Wrongful Convictions – Look to Norway' (2012) 58 *Criminal Law Quarterly* 267; Fiona Leverick and James Chalmers, 'The Scottish Criminal Cases Review Commission and Its Referrals to the Appeal Court: The First Ten Years' [2010] *Criminal Law Review* 608.

[151] *Cheng v The Queen* (2000) 203 CLR 248, 290 [123], quoting Patrick Devlin, *Trial by Jury* (Steven and Sons, 1966) 164; *Darkan v The Queen* (2006) 227 CLR 373, 414 [139], quoting *Hocking v Bell* (1945) 71 CLR 430, 440; *Mechanical & General Inventions Co Ltd v Austin* [1935] AC 346, 373 (Lord Wright).

[152] See, eg, South Australia, *Report of the Legislative Review Committee on Its Inquiry into the Criminal Cases Review Commission Bill 2010*, Parl Paper No 211 (2012) 82.

[153] Richard Nobles and David Schiff, 'The Right to Appeal and Workable Systems of Justice' (2002) 65 *Modern Law Review* 676.

convictions and be denied closure; and the expense of occasional Eastman-style inquiries and retrials would be unavoidable. Absolute verdict finality is unworkable, but totally abandoning the finality goal and granting unlimited rights of appeal is equally unworkable. The challenge, as is so often the case, is to find the right balance.

Various restrictions might be placed on the types of cases that are eligible for CCRC referral back to the Appeal Court: convictions only, excluding sentencing cases; indictable or serious-indictable cases only; cases where the defendant is still imprisoned only. While these are all worthy of consideration, the experience of the English CCRC, which imposes no such restrictions, is that these would do little to control the flow of cases. Most applications are in respect of convictions for serious offences where the defendant is still serving a sentence.[154]

1 *Chance of success*

Three further restrictions may be more effective: a requirement that the ground of challenge be genuinely fresh; that it support a claim of factual innocence rather a legal technicality; and that it have some likelihood of success on appeal. With regard to the last of these, the English CCRC provides a model. The English legislation requires that the CCRC find 'a real possibility' of success in order to make a referral.[155] The CCRC may be fairly conservative in its interpretation of this formula.[156] It refers only a few percent of the applications to the Court of Appeal, and enjoys a 70 percent success rate of referred

[154] Hamer above n 8, 309-10.

[155] *Criminal Appeal Act 1995* (UK) s 13(1)(a).

[156] Kevin Kerrigan, 'Real Possibility or Fat Chance?' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) 166; Graham Zellick, 'The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective' [2005] *Criminal Law Review* 937, 939; Richard Nobles and David Schiff, 'After Ten Years: An Investment in Justice?' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) 151, 159. The position of the CCRC is that it is simply following the statutory test: CCRC, above n 141, 7.

appeals.[157] While it would be a matter for concern if worthy cases are not being referred, the CCRC's conservatism is understandable. A low success rate would pose dangers for the Commission. It could be accused of wasting resources, and falsely raising and then dashing the hopes of applicants. The CCRC's relationship with the CACD would be damaged, and the Commission's continued existence could be threatened.[158]

2 *Fresh or new grounds*

To restrict referred appeals to those raising fresh or new grounds may be more controversial. A requirement of a 'fresh' ground would be stricter. Whereas a 'new' ground is one that was not raised in previous proceedings, a 'fresh' ground is one that was not raised and could not reasonably have been raised.

Consider how such restrictions might operate on the Eastman case. Some material in the Eastman Inquiry was clearly genuinely fresh. Consider, for example, the points relating to prosecutorial non-disclosure of potential weaknesses with Barnes's forensic analysis of the gunshot residue. Material that the prosecution has an obligation to reveal to the defence, which it fails to reveal, is, of its very nature, material that the defence has a reasonable explanation for not providing at trial. This remains the case notwithstanding that had Eastman not repeatedly sacked his legal advisors they would have been better prepared to challenge the forensic evidence.

Other of the Inquiry's findings in *Eastman* rested on material that could not be considered genuinely fresh. The strong threat evidence that came out in Dr Roantree's evidence, for example. At the Inquiry it was revealed that this evidence was not as strong as it appeared at trial. Prior to trial Dr Roantree had qualified his statements about

[157] CCRC, above n 141, 7, 15.

[158] Kerrigan, above n 156, 174; Michael Zander, 'Foreword' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009), xvi, xviii; Nobles and Schiff, above n 156, 157–8.

Eastman's threat — it may not have happened at all, and if it did may have just been a quip. This challenge to Dr Roantree's evidence was new but it was not fresh. Eastman should have raised the challenge at trial.

The Full Court in *Eastman* indicated that in an ordinary appeal it would not allow a defendant to present merely new evidence of this kind. As discussed above, while an appeal court will readily consider fresh evidence, it will only grant an appeal on the basis of new evidence if the evidence makes it clear that the conviction is unsafe. ('Great latitude must of course be extended to an accused in applying any restriction of this kind').[159] However, the Full Court in *Eastman* took the view that the inquiry provisions in the Act allowed a broader consideration of evidence than occurs on an ordinary appeal.[160] This may be correct as a matter of strict statutory interpretation. But from the perspective of the finality principle it appears questionable. Why should a late subsequent appeal be more open than a first appeal? It appears preferable that the referral and subsequent appeal be subject to a restriction similar to that operating on the first appeal.

The English CCRC generally requires the grounds of referral to be new. Referrals should not be made other than on the basis of 'an argument, or evidence, not raised' in previous proceedings[161] although this may be bypassed in 'exceptional circumstances'.[162] The Court of Appeal will then apply the usual restrictions applying to fresh and new evidence.[163]

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[159] *Ratten v The Queen* (1974) 131 CLR 510, 516 (Barwick CJ).

[160] [2014] ACTSCFC 2 [234]-[237]; *Crimes Act 1900* (ACT) ss 422-430; See also *Mallard v The Queen* (2005) 224 CLR 125 for a similarly broad approach to referred appeals under the more traditional Western Australian review system; Cf *Criminal Law Consolidation Act 1935* (SA) s 353A, demanding "fresh" evidence as a jurisdictional fact for the subsequent appeal; *R v Keogh* (2014) 121 SASR 307.

[161] *Criminal Appeal Act 1995* (UK) ss 13(1)(b)(i),(2).

[162] Ibid s 13(2); see, eg, *Solomon* [2007] EWCA Crim 2633 as discussed in Hamer, above n 8, 304-5.

[163] *Criminal Appeal Act 1968* (UK) s 23; See, eg, *Solomon* [2007] EWCA Crim 2633 discussed in Hamer, above n 8, 304-5.

3 *Factual innocence rather than legal innocence*

A final requirement that may be applied to restrict the flow of referred appeals is that the defendant's challenge to the conviction be directed to its factual correctness. This would rule out purely technical grounds of challenge. The English CCRC has been criticised for not imposing such a requirement;[164] however, it appears this is a factor that the Scottish CCRC takes into account.[165]

There are various ways in which this kind of requirement might operate. First, it might operate to block claims that are unrelated to factual innocence. Consider, for example, Eastman's challenge to the admissibility of the confession evidence on the ground that it was involuntary and the product of police harassment. While the Inquiry ultimately rejected this view in *Eastman*, this is the kind of argument that may potentially lead to the exclusion of highly probative evidence of guilt. (Consider, for example, a confession beaten out of a suspect that appears confirmed by the discovery of the murder weapon precisely where the suspect said he had hidden it). A ground of appeal of this kind, therefore, appears to be entirely severable from a claim of innocence. An argument can be mounted that such a ground should not form the basis of a CCRC referral for a subsequent appeal.

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[164] Michael Naughton, 'The Criminal Cases Review Commission: Innocence versus Safety and the Integrity of the Criminal Justice System' (2012) 58 *Criminal Law Quarterly* 207. A recent example is the referral of the murder convictions in *Hillman and Gowans* on the basis that the Attorney-General's consent for the prosecution had not been obtained, as required under the *Law Reform (Year and a Day Rule) Act 1996* (UK) as the defendants, prior to the victim's death, had previously been convicted of inflicting grievous bodily harm with intent: CCRC, above n 141, 18-9.

[165] Peter Duff, 'Criminal Cases Review Commissions and "Deference" to the Courts: The Evaluation of Evidence and Evidentiary Rules' [2001] *Criminal Law Review* 341, 360. See also the North Carolina Innocence Commission requirement of an assertion of 'complete innocence' together with new 'credible, verifiable evidence of innocence': North Carolina General Statutes § 15A-1460(1).

Another way in which a factual innocence requirement might operate is to require that the claim of factual innocence be backed up by credible evidence. In an ordinary appeal where legal errors have been revealed it would be enough for the defendant to show that these raise a reasonable doubt. But perhaps, for a CCRC to refer a subsequent appeal something more than this should be required. The Eastman Inquiry totally undermined the value of the gunshot residue evidence, significantly weakening the prosecution case. In this respect, the challenge was not severable from a claim of factual innocence. However, despite that, the Inquiry asserted that while the prosecution case was not 'overwhelming' it was 'fairly certain that the applicant is guilty'.[166] This was still considered sufficient for the Inquiry to recommend to the Full Court that the conviction be overturned.[167] The Full Court did this and ordered a retrial.[168] Perhaps, however, innocence should be proven to a higher level of probability for the finality of a conviction to be undermined by the referral of a further appeal.

Concerns may be raised about the referral and subsequent appeal being premised on a non-legal notion of 'factual guilt'.[169] This may be seen as introducing a tension and potential contradiction to the fundamental structure of the criminal law.[170] However, the non-legal consideration, while perhaps finding expression in legislation, would fall to be applied not by the court, but by the executive — the CCRC in determining whether to make a referral.

In this respect the CCRC's position can be compared to that of the Director of Public Prosecutions in bringing a prosecution. The

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166 Martin, above n 4 [8], [1836].

167 Ibid [1837].

168 *Eastman v Director of Public Prosecutions [No 2]* [2014] ACTSCFC 2 [309].

169 This was an issue in the High Court's consideration of the first Eastman inquiry: *Eastman v DPP (ACT)* (2003) 214 CLR 318, 325 [11], 329 [24] (McHugh J), 347 [85] (Heydon J).

170 See, eg, Hannah Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK Is Not the Answer' (2007) 70 *Modern Law Review* 759; Kent Roach raised a question of this kind at the Flinders University Miscarriages of Justice Symposium in November 2014 where I presented this paper.

prospect of conviction is not the sole criterion. The paramount consideration is public interest.[171] So too for a CCRC the public interest may dictate that a subsequent appeal not be referred notwithstanding that it has good prospects of success, because the ground is purely technical, and/or because the defendant appears highly likely to be guilty regardless of the ground of appeal. If a referral is made the appeal court can approach the appeal along ordinary lines.

The imposition of greater than usual demands upon the defendant to succeed in an appeal should not be seen as inconsistent with the presumption of innocence or any other of the defendant's rights. Such a restriction would operate as part of the CCRC package that strengthens the presumption of innocence and defendants' rights by opening up the opportunities for defendants to challenge wrongful convictions. In contemporary Australia a CCRC that presents the prospect of freeing a defendant who is probably factually guilty is not politically viable.

Further, it should be noted that the public interest aspect would enable the CCRC to disregard a factual innocence requirement where the problems with the trial were of a fundamental nature. *Eastman* was such a case. While the Inquiry made the observation about Eastman's almost certain guilt, this consideration was ultimately overridden by fact that a key plank in the prosecution's case at trial — the gunshot residue evidence — had been revealed as almost totally lacking in value. Had Barnes's evidence not been so biased and methodologically flawed or had these weaknesses been disclosed the prosecution case and the trial would have looked totally different. The Full Court quoted Dean J in *Wilde v The Queen*: a 'fundamental prescript of the administration of criminal justice in this country ... that no person should be convicted of a serious crime except by the verdict of a jury after a fair trial according to law'.[172] Furthermore: 'Mr Eastman did not receive a trial according to law ... [There was]

[171] See, eg, Director of Public Prosecutions (NSW), *Prosecution Guidelines* (2007) Guideline 4 <http://www.odpp.nsw.gov.au/prosecution-guidelines>.

[172] (1988) 164 CLR 365, 375.

such a substantial failure of the process of a criminal trial that we cannot decide that the conviction is just'.[173]

IV CONCLUSION

Caution is of course required in drawing lessons from an individual instance. Eastman is a single case, and a rather idiosyncratic case at that. Nevertheless, it echoes the experience of many other wrongful conviction cases. It highlights the familiar weaknesses in investigation and prosecution that can bring about miscarriages of justice — police misconduct, biased experts, prosecution non-disclosure, weak eyewitnesses.

The unusual aspects of the Eastman case serve to enforce the lessons from the broader wrongful conviction literature. As criminal defendants go Eastman is exceptionally intelligent and resilient, and he used these qualities to bring repeatedly challenges against his murder conviction. Surely many defendants would have given up long before Eastman finally had his conviction quashed. This serves to demonstrate the strength of the system's attachment to verdict finality, and the determination with which criminal justice authorities defend even their most inglorious victories.

The analysis in this article provides further confirmation of the need for back-end reforms to improve mechanisms for identifying and correcting errors. The English Criminal Cases Review Commission provides a good model. However, in considering what cases may be eligible for review, regard must be had for the crucial value of verdict finality. Convictions, upheld on appeal, cannot be regarded as merely provisional. Post-appeal review might be limited to reasonably strong claims of factual innocence supported by new argument. Eastman's case may not have met such requirements. However, in another respect, Eastman's case is one that should be open for reconsideration. Regardless of the likelihood of his factual

[173] [2014] ACTSCFC 2 [249].

guilt, his trial was so flawed that his conviction cannot be considered the product of proper criminal process.