

# *Apologies as a Legal Remedy*

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## *Abstract*

An apology is an unorthodox legal remedy. Most likely it is also regarded as unsuitable as a remedy in the eyes of many lawyers. Yet we know that apologies are very important to many people, including complainants, litigants and victims of crime and that there has been increasing attention paid by the law to apologies in recent years. The reference to apology in a legal context inevitably raises questions about its meaning. What does an apology involve? What makes an apology meaningful? Is the law concerned whether an apology is given sincerely? Is an ordered apology an apology? This article addresses these and other questions, the role of apologies as a remedy for parties to a civil action, and court orders to apologise, and the grounds on which ordered apologies have been justified. It also refers to the apology as a remedy in litigation and other legal proceedings aimed at advancing public and professional interests by means of economic and professional regulation. The aim of the article is to demonstrate that apologies have an established remedial role in areas of Australian law and to identify some important issues and challenges that arise as a result.

## **I Introduction**

Lawyers might wonder whether there is much that can be said about apologies as a remedy. We know that it is uncommon, unorthodox and in the eyes of many, unsuitable as a legal remedy. At the same time we know that apologies are very important to many people, including complainants, litigants and victims of crime, and that there has been increasing attention paid in the law to the importance of apologies. This article examines the role of apologies as a remedy for parties to a civil action and of court orders to apologise. It also refers briefly to apologies as a remedy in litigation and other legal proceedings aimed at advancing public and professional interests by means of economic and professional regulation. The aim is to demonstrate that apologies have an established remedial role in areas of Australian law and to identify issues and challenges that have arisen.

In pt II, the way that ‘remedy’ is used in this article is explained and distinguished from other ways that an apology can be understood as ‘remedial’ or as a form of ‘redress’. Part III considers the meanings of apology and how the law defines apology. In pts IV, V and VI, the circumstances in which an apology is available as a remedy, the justification that has been given for ordering a person to

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apologise, and a number of issues raised by orders to apologise are identified. Part VII provides some concluding remarks.

The article draws upon the author's published research relating to apology orders, provides an extended analysis of the remedial role of apologies and discusses recent developments. In work to date, the following propositions have been advanced, (sometimes with co-authors):

- A court exercising equitable jurisdiction has the power to order a person to make an apology, spoken or in writing, in private or in public and to publish the apology in some manner. The order will be one for specific relief. In most cases it would be in the form of a mandatory injunction; if the purpose is to enforce a promise to apologise it will be an order akin to specific performance;<sup>1</sup>
- When a plaintiff seeks an apology from the defendant a court should give consideration to the plaintiff's remedial choice in exercising its discretion and determining the appropriate remedial response to the defendant's wrongdoing;<sup>2</sup>
- It is not appropriate for a court to order a defendant to apologise unless this is a remedy sought by the plaintiff;<sup>3</sup>
- Aside from the usual discretionary factors that a court considers when deciding whether to grant specific relief, it needs to consider the remedial 'fit' between the aims and purposes of the cause of action and the remedy. Where the relief sought is statutory, a court will also be guided by statutory goals;<sup>4</sup>
- An ordered apology, and other forms of specific relief, have the potential to strengthen the vindicatory function of the law and to meet the psychological needs of plaintiffs;<sup>5</sup>
- An ordered apology has the potential to be 'good enough' to satisfy the purposes of a plaintiff and the law if an apology is understood as having multiple components that need not all be present in all circumstances.<sup>6</sup>

There is a growing body of literature on apologies that draws from a range of disciplines and areas of professional practice including psychology, sociology,

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<sup>1</sup> Robyn Carroll, 'Beyond Compensation: Apology as a Private Law Remedy' in Jeff Berryman and Rick Bigwood (eds), *The Law of Remedies: New Direction in the Common Law* (Irwin Law, 2010) 342.

<sup>2</sup> Ibid 353.

<sup>3</sup> Ibid 376.

<sup>4</sup> Ibid 376–84.

<sup>5</sup> Ibid 363; see also Robyn Carroll, 'You Can't Order Sorrow, so Is There any Value in an Ordered Apology? An Analysis of Apology Orders in Anti-Discrimination Cases' (2010) 32 *University of New South Wales Law Journal* 360.

<sup>6</sup> Alfred Allan, Diane McKillop and Robyn Carroll, 'Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints' (2010) 17 *Journal of Psychiatry, Psychology and Law* 538; Carroll, above n 5.

philosophy, ethics, criminology, mediation and law. The literature reflects a wide range of views about the authenticity and value of apologies offered in a legal setting. The law is described variously as advancing moral, remedial, restorative, instrumental, cynical and unethical purposes. Much of the literature concerns the non-coercive role of law. There is a small but growing body of empirical research that explores the influence of apologies on litigant decision-making and provides insights into the role of apologies in the settlement decision-making processes of individual litigants. Jennifer Robbennolt reports:

This research has generally found that apologies influence claimants' perceptions, judgments, and decisions in ways that are likely to make settlement more likely — for example, altering perceptions of the dispute and the disputants, decreasing negative emotion, improving expectations about the future conduct and relationship of the parties, changing negotiation aspirations and fairness judgments, and increasing willingness to accept an offer of settlement.<sup>7</sup>

In her own research, Robbennolt has empirically explored how lawyers respond to apologies offered in litigation when advising claimants about settlement, and has compared the reactions of lawyers to those of lay litigants. She concludes that while there is evidence that apologies influence claimants in ways that are likely to make settlement more likely, the reaction of lawyers to apologies is different to that of claimants.<sup>8</sup>

Research has also been conducted in Australia into the role that apologies play in medical negligence cases. Researchers have found that people interviewed about their experience of adverse medical events and who express satisfaction about the disclosure process typically 'are those whose expectations of a full apology ... and an offer of tangible support were met'.<sup>9</sup> In the light of evidence that apologies can have psychological<sup>10</sup> and, most probably, health<sup>11</sup> benefits, it is no surprise that efforts have been made in recent years within the health and legal professions in Australia and overseas to encourage medical and health care professionals to make disclosure and offer apologies in a timely way following an adverse medical incident.

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<sup>7</sup> Jennifer K Robbennolt, 'Attorneys, Apologies and Settlement' (2008) 13 *Harvard Negotiation Law Review* 349, 350 n 3, citing Russell Korobkin and Chris Guthrie, 'Psychological Barriers to Litigation Settlement: An Experimental Approach' (1994) 93 *Michigan Law Review* 107; Jennifer K Robbennolt, 'Apologies and Legal Settlement: An Empirical Examination' (2003) 102 *Michigan Law Review* 460; Jennifer K Robbennolt, 'Apologies and Settlement Levers' (2006) 3 *Journal of Empirical Legal Studies* 333.

<sup>8</sup> Robbennolt, 'Attorneys, Apologies and Settlement', above n 7, 351.

<sup>9</sup> Rick Iedema et al, 'Patients' and Family Members' Experiences of Open Disclosure Following Adverse Events' (2008) 20 *International Journal for Quality in Health Care* 421, 430.

<sup>10</sup> Alfred Allan and Brent Munro, *Open Disclosure: A Review of the Literature* (October 2008) Edith Cowan University <[http://www.ecu.edu.au/\\_data/assets/pdf\\_file/0005/178295/86\\_Allan\\_OD\\_Literature\\_Review.pdf](http://www.ecu.edu.au/_data/assets/pdf_file/0005/178295/86_Allan_OD_Literature_Review.pdf)>; Rick Iedema, *Open Disclosure: A Review of the Literature* (February 2008) Australian Commission on Safety and Quality in Health Care <[http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/com-pubs\\_OD-Resources/\\$File/Open%20Disclosure%20literature%20review.pdf](http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/com-pubs_OD-Resources/$File/Open%20Disclosure%20literature%20review.pdf)>.

<sup>11</sup> Alfred Allan and Diane McKillop, 'The Health Implications of Apologizing after an Adverse Incident' (2010) 22 *International Journal for Quality in Health Care* 126.

So far as the author is aware, there has been no empirical research into ordered apologies. In one study, however, participants offered their views on the hypothetical possibility of an ordered apology. That study was conducted through interviews with 24 parties to complaints about unlawful discrimination and harassment dealt with in the Western Australian Equal Opportunity Commission and State Administrative Tribunal.<sup>12</sup> The study investigated peoples' perceptions of the value to them of an apology, including apologies offered in this legal setting. This study, albeit small, supports the hypothesis that some parties to legal proceedings perceive that an ordered apology could have some value. There is much we do not know about the perceived value of apologies to parties to litigation. Nor do we know much about the perceived value attached to an ordered apology by other participants in the legal system such as politicians, lawyers, judges and mediators.<sup>13</sup>

## II The Meaning of 'Remedy' and the Wider 'Remedial' Role of Apologies in the Law

The law recognises that apologies have a remedial role to play in the resolution of legal disputes. There are laws that are 'remedial' in the broad sense of supporting the resolution of legal disputes. Included in this category are rules of evidence that provide that communications made in settlement negotiations and mediation, which can include apologies constituting an admission, are confidential and inadmissible in subsequent legal proceedings.<sup>14</sup> Another example is legislation that limits the admissibility of apologies in civil proceedings to establish liability for personal injury, damage to property and economic loss.<sup>15</sup> This legislation can be argued to have a remedial purpose, even though there are other underlying objectives and functions. These laws recognise that apologies are a social interaction that can assist in recovery, forgiveness and reconciliation. The emphasis we see today on settlement processes that improve the likelihood of meaningful dialogue between parties is based, in part at least, on the knowledge

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<sup>12</sup> Allan, McKillop and Carroll, above n 6, 540.

<sup>13</sup> For insight into the views expressed in reported and unreported cases in equal opportunity cases see Carroll, above n 5. For views expressed in disciplinary proceedings relating to members of the legal profession see Francesca Bartlett, 'The Role of Apologies in Professional Discipline' (2011) 14 *Legal Ethics* 49.

<sup>14</sup> See, eg, *Evidence Act 1995* (Cth) s 131 (excluding evidence of settlement negotiations); *Federal Court of Australia Act 1976* (Cth) s 53B (rendering communications in mediation inadmissible in subsequent proceedings). The law clearly distinguishes between apologies and admissions of liability. In recent years, the High Court has emphasised that care must be taken in identifying any admission within an apology: see *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, 327 [25] (Gleeson CJ), 340–1 [69]–[70] (Gummow J), 331 [40] (McHugh J agreeing with Gummow J), 372 [177] (Heydon J agreeing with Gummow J); *Hardie Finance Corporation Pty Ltd v Ahern (No 3)* [2010] WASC 403 (22 December 2010) [339].

<sup>15</sup> In Australia, see *Civil Liability Act 2002* (NSW) s 69; *Civil Liability Act 2002* (Tas) s 7; *Civil Liability Act 1936* (SA) s 75; *Civil Liability Act 2003* (QLD) s 72; *Civil Law (Wrongs) Act 2002* (ACT) s 14; *Civil Liability Act 2002* (WA) s 5AH.

that judicial proceedings and legal remedies often do not meet the psychological needs of plaintiffs.<sup>16</sup>

Within the law of remedies, apologies sometimes play a role in the assessment of damages or as a form of defence. An apology, or the lack thereof, is significant as a mitigating or aggravating factor in assessing damages for torts that provide protection in some circumstances to reputation, autonomy and personal liberty, and property. Best known, perhaps, is the role of apologies in defamation cases as terms of an offer to make amends in mitigation of damage to reputation. Apologies are also significant in assessment of damages for civil contempt and to fines and other penalties for criminal contempt,<sup>17</sup> in sentencing generally and in some disciplinary proceedings.<sup>18</sup> More generally, in the public sector a growing interest in finding ways to resolve complaints against government and to provide suitable redress other than through civil suit and awards of damages can be discerned.<sup>19</sup>

Apologies clearly can be ‘remedial’ or provide ‘redress’ in these general ways and may be all the relief that a plaintiff or a victim of wrongdoing seeks. In this article, however, ‘remedy’ refers to an order of a court as a remedy for civil wrongdoing, including contravention of a statute.<sup>20</sup> The most obvious example of the apology order as a remedy is where power is conferred by statute upon a court to make an order in these terms. It may also be available as an equitable remedy. These instances are discussed in pt IV below.

### III The Meanings of Apology

The reference to ‘apology’ in a legal context, and more so in a statutory context, inevitably raises questions about its meaning. What does an apology involve? What makes an apology meaningful? Is the law concerned whether an apology is given sincerely? Is an ordered apology an apology? These questions are the subject of theories and scholarship of writers from a range of disciplines, including ethics, psychology, sociology, philosophy and law. In recent times there has been

<sup>16</sup> See, eg, Nathalie Des Rosiers, Bruce Feldthusen and Olena Hankivsky, ‘Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Legal System?’ (1998) 4 *Psychology, Public Policy and Law* 433.

<sup>17</sup> *Gallagher v Durack* (1983) 152 CLR 238, 245 (Gibbs CJ, Mason, Wilson and Brennan JJ). A ‘formulaic’ apology, however, in which person charged with contempt apologises for his conduct but does not accept responsibility for his actions and blames the failure to comply with the court’s orders on a multitude of factors other than his own wrongdoing will have little, if any, positive effect: see, eg, *Australian Competition and Consumer Commission v Rana* (2008) ATPR 42-223 [41].

<sup>18</sup> Bartlett, above n 13.

<sup>19</sup> See, eg, New South Wales Ombudsman, *Apologies: A Practical Guide* (2009) <[http://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0013/1426/Apologies-Guidelines-2nd-edition-March-2009\\_.pdf](http://www.ombo.nsw.gov.au/_data/assets/pdf_file/0013/1426/Apologies-Guidelines-2nd-edition-March-2009_.pdf)>; A F M Brenninkmeijer, *Apologies in Public Administration* (2010) National Ombudsman’s Office <[http://pestenpesten.files.wordpress.com/2011/03/apologies\\_in\\_public\\_administration.pdf](http://pestenpesten.files.wordpress.com/2011/03/apologies_in_public_administration.pdf)>.

<sup>20</sup> This meaning is one of five attributed to ‘remedy’ by Birks, who refers to it as ‘a right born of a court’s order issued on a discretionary basis’: Peter Birks, ‘Rights, Wrongs and Remedies’ (2000) 20 *Oxford Journal of Legal Studies* 1, 16.

considerable debate about the place of apologies in law<sup>21</sup> and dispute resolution.<sup>22</sup> As noted above, much of the debate has concerned laws aimed at encouraging apologies in civil and criminal law. The uncommon nature of apology orders has meant that there has been less analysis of the apology as a remedy.<sup>23</sup>

The word ‘apology’ conveys a range of meanings. Its significance to a group or individual will be heavily influenced by cultural and disciplinary background and training. Nick Smith, for example, a lawyer and philosopher, identifies types of apology and undertakes a normative exploration of apology through an exploration of what he refers to as the ‘elements of a categorical apology’.<sup>24</sup> He contrasts this to attempts to define ‘apology’ based, for example, on sociological or ethical theories. According to sociologist Nicholas Tavuchis, an apology has two fundamental requirements: ‘the offender has to be sorry and has to say so’.<sup>25</sup> Based on this definition, Tavuchis rejects any notion that an apology can be compelled.<sup>26</sup> He also rejects the idea that it is possible for lawyers to apologise on behalf of their clients.<sup>27</sup> From an ethical viewpoint, heartfelt remorse is regarded by some as a definitive element of an apology.<sup>28</sup>

When seeking ways to give meaning to apologies within a legal context, we need to acknowledge that the law is simultaneously pragmatic, instrumental and aspirational. We know that law can guide, influence and direct behaviour, but it cannot compel emotions and heartfelt speech. It is in this context that the meaning of an apology as a legal remedy needs to be understood and it is why, from a legal viewpoint, it is helpful to understand ‘apology’ as having multiple meanings. A distinction is sometimes made in the law and apology literature between ‘full’ and ‘partial’ apologies. This is helpful to the extent that it recognises that there are components to an apology. There is consensus that a ‘full’ apology incorporates an expression of heartfelt regret and remorse for what has happened, sympathy for the

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<sup>21</sup> Jonathan R Cohen, ‘Advising Clients to Apologize’ (1999) 72 *Southern California Law Review* 1009; Jonathan R Cohen, ‘Legislating Apology: The Pros and Cons’ (2002) 70 *University of Cincinnati Law Review* 819; John Kleefeld, ‘Thinking Like a Human: British Columbia’s *Apology Act*’ (2007) 40 *University of British Columbia Law Review* 769; Prue Vines, ‘Apologising to Avoid Liability: Cynical Civility or Practical Morality?’ (2005) 27 *Sydney Law Review* 483. Regarding settlement of tort claims, see generally Daniel W Shuman, ‘The Role of Apology in Tort Law’ (2000) 83 *Judicature* 180; C Brown, ‘Apology Legislation: Oiling the Wheels of Tort’ (2009) 17 *Tort Law Review* 127.

<sup>22</sup> See, eg, Deborah L Levi, ‘The Role of Apology in Mediation’ (1997) 72 *New York University Law Review* 1165; Donna L Pavlick, ‘Apology and Mediation: The Horse and Carriage of the Twenty-First Century’ (2003) 18 *Ohio State Journal of Dispute Resolution* 829; Elizabeth Latif, ‘Apogetic Justice: Evaluating Apologies Tailored Towards Legal Solutions’, (2001) 81 *Boston University Law Review* 289.

<sup>23</sup> Notable exceptions include Latif above n 22; Brent White, ‘Say You’re Sorry: Court Ordered Apologies as a Civil Rights Remedy’ (2006) 91 *Cornell Law Review* 1261.

<sup>24</sup> Nick Smith, *I Was Wrong: The Meanings of Apology* (Cambridge University Press, 2008).

<sup>25</sup> Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, 1991) 36.

<sup>26</sup> See also Kleefeld, above n 21.

<sup>27</sup> Tavuchis, above n 25, 14.

<sup>28</sup> See, eg, Lee Taft, ‘Apology Subverted: The Commodification of Apology’, (2000) 109 *Yale Law Journal* 1135.

victim, and acknowledges the wrongdoer's transgression.<sup>29</sup> For some people, it must also offer some form of recompense and a commitment to change in the future.<sup>30</sup> A 'partial' apology will consist of some, but not all of these components. A partial apology might include an expression of sympathy or empathy alone ('I'm sorry you were hurt when my car hit you'), an expression of regret for the act or its outcome alone ('I regret that my car hit you'), an expression of sorrow alone ('I'm very sorry for what happened when my car hit you') or an acceptance of responsibility ('I am responsible for my car hitting you') or fault ('It was my fault that you were hurt when my car hit you') without any expression of sympathy or regret. A full apology would encompass all of these ('I am truly sorry that you were hurt when my car hit you. I regret that you have suffered as a result of my actions. I am responsible for your injuries and will make it up to you.')

The distinction between 'full' and 'partial' apologies is less helpful if it leads to the assumption that only a full apology is morally acceptable and of any value. For this reason it can be more helpful to speak, as Smith does, about the components of an apology and types of apologies instead of adopting a binary, 'is or is not' definition of apology.<sup>31</sup> This is consistent with the multidimensional theory of apology developed by Allan and others.<sup>32</sup> Recognition that there are components of an apology reflects the reality that what constitutes an apology in a particular situation and context is highly variable.<sup>33</sup> These components can be described in general terms as an acknowledgment of wrongdoing, an expression of regret or remorse, and a willingness to act in some way that is consistent with being sorry. Research has shown that what is considered to be a 'good enough' apology depends on which of these components needs to be present to meet the psychological needs of the recipient. In turn, this is influenced by the recipient's perception of the seriousness of the harm, the level of responsibility they attribute to the wrongdoer and the perceived wrongfulness of the behaviour with reference to the principle that was violated.<sup>34</sup> When an apology is given in a legal context, this will also have an impact on what people are willing to accept as an apology.<sup>35</sup> Thus, while the components of an apology can be identified, which and how many of the components are necessary for an apology to be beneficial in particular circumstances will vary.

In a legislative context, the meaning attributed to 'apology' will depend on the intent of the particular legislation.<sup>36</sup> For example 'apology' is defined in the *Civil Liability Act 2002* (WA) and in similar legislation in other jurisdictions that restrict the admissibility and legal effect of evidence of apologies in civil

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<sup>29</sup> Alfred Allan, 'Apology in Civil Law: A Psycho-Legal Perspective' (2007) 14 *Psychiatry, Psychology and Law* 5, 7.

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

<sup>31</sup> Smith, above n 24, 12.

<sup>32</sup> Debra Slocum, Alfred Allan and Maria Allan, 'An Emerging Theory of Apology' (2011) 63 *Australian Journal of Psychology* 83.

<sup>33</sup> This is demonstrated by reference to a range of legal contexts in Alfred Allan, 'Functional Apologies in Law' (2008) 15 *Psychiatry, Psychology and Law* 369.

<sup>34</sup> Slocum, Allan and Allan, above n 32, 90.

<sup>35</sup> Allan, McKillop and Carroll, above n 6, 548.

<sup>36</sup> Robyn Carroll 'Apologising "Safely" in Mediation' (2005) 16 *Australasian Dispute Resolution Journal* 40, 42-3.

proceedings.<sup>37</sup> There are no statutory definitions of ‘apology’ in anti-discrimination statutes but case law provides some guidance. In *Ma Bik Yung v Ko Chuen*,<sup>38</sup> the Court of Final Appeal of Hong Kong regarded an apology as meaning ‘simply to say sorry’ and defined an apology, in the context of disability discrimination legislation, as ‘a regretful acknowledgement of a wrong done’ that can be made privately or publicly.<sup>39</sup> In *Burns v Radio 2UE Sydney Pty Ltd (No 2)*,<sup>40</sup> the New South Wales Anti-Discrimination Tribunal defined an ‘apology’ as an ‘acknowledgement of the wrongdoing’ that is a ‘fulfilment of a legal requirement rather than as a statement of genuinely held feelings.’ In this way, the Tribunal distinguished between a personal apology, which is an expression of sincere feelings of remorse and regret and incapable of being achieved by a court order, and an apology ordered for statutory purposes. These purposes are discussed in pt V below.

## IV Availability of Apology as a Remedy

The cases in which courts order defendants to apologise predominantly arise where wide remedial powers are conferred upon a court by a statute which creates a right of action for a private litigant or a regulator. There are also instances where statutory power to order an apology has been conferred on a professional disciplinary body. These instances encompass outcomes described as ‘remedial’ and ‘remedy’ in this article, depending upon who is entitled to seek the order and to whom the apology is to be made. This part discusses the few reported common law cases in which an order for an apology has been sought. These cases support the conclusion that a court exercising equitable jurisdiction has the power to order an apology as a form of specific relief.

### A *The Apology as a Remedy for General Law Wrongs*

As noted, the common law has long recognised the significance of an apology where there has been damage to a plaintiff’s reputation and dignity. This is reflected in uniform defamation legislation in Australia.<sup>41</sup> Beyond regarding an apology as an indicator of a wrongdoer’s attempts to mitigate the harm they have caused and as an expression of regret and remorse, it is arguable that a court could, in an appropriate common law action, order a defendant to apologise by way of mandatory injunction.

#### 1 *Breach of contract*

It is not uncommon for parties to defended proceedings to enter into a binding agreement by way of compromise. Where a term of the agreement provides that an

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<sup>37</sup> See, eg, *Civil Liability Act 2002* (WA) s 5AF (definition of ‘apology’).

<sup>38</sup> [2002] 2 HKLRD 1 (*Ma Bik Yung*).

<sup>39</sup> *Ibid* 14–15.

<sup>40</sup> [2005] NSWADT 24 (16 February 2005) (*‘Burns No 2’*).

<sup>41</sup> See, eg, *Defamation Act 2005* (WA) s 38 (factors in mitigation of damages).



apology will be published, difficulties in enforcement may arise if a party refuses to apologise as promised.<sup>42</sup> In *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd*,<sup>43</sup> the plaintiff sought a declaration that the parties had reached an agreement that an apology in an agreed form of words would be made by the defendant's employee, published in two local newspapers and broadcast on radio.<sup>44</sup> The apology was sought in respect of allegedly defamatory statements about the plaintiff, made by the defendant during a radio broadcast by the Australian Broadcasting Commission. The Court was required to decide first, whether an agreement between the plaintiffs and defendant existed, and second, whether an order 'akin to specific performance' requiring the defendant to publish the apology should be granted.

As to the first question, Young J concluded that the parties had reached an agreement.<sup>45</sup> As to the second question, his Honour stated:

A court hearing an action in defamation cannot order a defendant to give an apology. All that the court can do is to order damages if it finds the defendant liable, though it can take into account the fact that an apology has been given when assessing the damages.<sup>46</sup>

Neither his Honour nor counsel for the defendant was able to find any case where a court exercising equitable jurisdiction had granted an injunction or made an order akin to specific performance to compel someone to say something in atonement of a defamatory statement.<sup>47</sup> While acknowledging that in some circumstances equity will order a person to make a statement,<sup>48</sup> Young J considered 'it needs to be an exceptional case before the courts should exercise their discretion to grant an order like specific performance to compel a person to give an apology.'<sup>49</sup>

His Honour acknowledged that there would be no difficulty carrying out an order to publish the apology in the agreed terms and that it was therefore possible to grant the order sought by the plaintiff. He concluded, however that it was not appropriate to make the order for two reasons. The first was the reluctance of the courts to grant an interim injunction to restrain continued publication of an alleged

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<sup>42</sup> See, eg, *Giuong Van Phan v The Vietnamese Herald Pty Ltd* [2006] NSWSC 247 (6 April 2006) where Simpson J upheld an agreement that included a promise to apologise. In this case, the dispute as to whether the agreement was binding arose after and notwithstanding that an apology had been published.

<sup>43</sup> (1998) 45 NSWLR 291 ('*Summertime Holdings*').

<sup>44</sup> *Ibid* 298.

<sup>45</sup> *Ibid* 296. The finding that agreement had been made was significant, because any rights in defamation that the plaintiffs otherwise might have had against the defendants merged into the new contract.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid* 297. See, eg, *Guard Dog Patrol & Security Services Pty Ltd v Tiheti Pty Ltd* (1990) 19 IPR 259, 263 (upon dissolution of a partnership, the court ordered the partner in possession of the former business premises to put a recorded message for callers on the telephone); *Barrow v Chappell & Co Ltd* [1976] RPC 355 (order that a musical work be published as a remedy for breach of an agreement to publish the work).

<sup>49</sup> *Summertime Holdings* (1998) 45 NSWLR 291, 297.

defamation.<sup>50</sup> As his Honour explained, this approach, and the concern ‘not to chill too readily the press and free speech’,<sup>51</sup> predates international and constitutional instruments that protect the right to freedom of expression. Although courts of equity occasionally grant injunctions in defamation cases, such injunctions are rare because, as a matter of public policy, the court regards it as undesirable to prevent without due cause the publication or expression of matters of fact or of opinion.<sup>52</sup> Second, Young J drew on the right to freedom of expression in art 19 of the *International Covenant on Civil and Political Rights*<sup>53</sup> to support his decision not to make an order for specific performance of the agreement to broadcast an apology.<sup>54</sup>

## 2 Torts

Apologies can be significant to the resolution of tort claims, particularly when the claim alleges injury to reputation, dignity and feelings. There are undoubtedly mitigatory and vindictory elements to a published apology, which explains why apologies are a common term of settlement in defamation cases. In terms of remedies, however, as noted by Young J in *Summertime Holdings*, the apology is not a common law (as distinct from equitable) remedy for defamation,<sup>55</sup> nor, it appears, any other tort. An ordered apology made other than pursuant to statute will rely on the exercise of a court’s equitable jurisdiction. There are two reported cases in which a court has considered whether a court can grant injunctive relief that requires the defendant to correct, retract or apologise for a defamatory publication. In *TV3 Network Ltd v Eveready New Zealand Ltd*<sup>56</sup> the New Zealand Court of Appeal rejected the argument that it was beyond the court’s power to order a mandatory injunction to broadcast corrective advertising in a case of defamation and malicious falsehood. All three members of the Court of Appeal agreed that the Court had jurisdiction to grant an injunction requiring corrective advertising. They differed on the question whether the relief sought was clearly untenable. Cooke P and Gault J concluded it was not and dismissed the appeal.<sup>57</sup> They accepted that the jurisdiction was likely to be exercised in exceptional circumstances only, but, on their view of their pleadings the plaintiffs had an arguable case and the exercise of jurisdiction could not be dismissed as unthinkable.

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<sup>50</sup> *Chappell v TCN Channel 9 Pty Ltd* (1988) 14 NSWLR 153; more recently, see *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57.

<sup>51</sup> *Summertime Holdings* (1998) 45 NSWLR 291, 297.

<sup>52</sup> *Ibid*, citing I C F Spry, *Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (LawBook Co, 5<sup>th</sup> ed, 1997) 326.

<sup>53</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976).

<sup>54</sup> *Summertime Holdings Pty Ltd* (1998) 45 NSWLR 291, 298. The plaintiff was held to be entitled to damages for the failure to publish the apology as promised and awarded \$10 000, an amount said to represent ‘the value of the apology or the lack of it’.

<sup>55</sup> *Ibid* 296.

<sup>56</sup> [1993] 3 NZLR 435 (New Zealand Court of Appeal) (‘*TV3 v Eveready*’).

<sup>57</sup> McKay J dissented on this point, finding the relief sought was untenable given the weight of authority against ordering correction as a remedy for defamation: *ibid* 452.

In the second case, *Moore v Canadian Newspapers Co Ltd*,<sup>58</sup> Rosenberg J allowed an appeal against a decision of the Provincial Court in British Columbia ordering an apology against the defendant, *The Globe and Mail* newspaper, as a form of equitable relief for libel. Although the appeal was decided on other grounds, Rosenberg J went on to consider whether the order violated the defendant's freedom of expression as guaranteed by s 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>59</sup> He concluded that an apology order for libel was potentially a valid form of relief that would withstand a *Charter* challenge on the same basis and reasoning as in *Slaight Communications v Davidson*.<sup>60</sup>

In *Slaight Communications*, the Supreme Court of Canada held that the court can make an order that interferes with a defendant's freedom of expression when it can be shown to be demonstrably justified in a free and democratic society.<sup>61</sup> In that case, the Court upheld an order made by the adjudicator of an unfair dismissal claim. The order required the employer to give an employee a letter of recommendation setting out, among other things, the sales quota he had been set, the amount of sales he had actually made and the fact that he had been unjustly dismissed.<sup>62</sup> Further, it was ordered that the employer be prohibited from answering a request for information about the employee except by sending that letter of recommendation.<sup>63</sup> In *Slaight Communications*, the object of the order was to counteract the effects of the employee's unjust dismissal by enhancing his ability to seek new employment without untrue statements being made by his previous employer. In *Moore*, Rosenberg J applied the same reasoning to the case before him, namely that there was an 'unequal balance between the plaintiff in this case and *The Globe and Mail* and the fact that the ordered apology is rationally linked to the objective of attempting to undo the harm caused by the libel'.<sup>64</sup>

In both *TV3 v Eveready* and *Moore*, the courts concluded that the interference with the defendant's right to freedom of expression as conferred by the Bill of Rights<sup>65</sup> and the *Charter of Rights and Freedoms* that the orders would cause could be justified as a reasonable limit on that freedom.

### 3 Breach of fiduciary duty

No cases have been found in which an apology order has been sought or granted against a defaulting fiduciary. It is suggested that this is unlikely to arise in Australia because the interests protected by fiduciary obligations are essentially financial and proprietary in nature, rather than personal and non-pecuniary.

<sup>58</sup> (1989) 69 O.R. (2d) 262 (Divisional Court) ('*Moore*').

<sup>59</sup> *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

<sup>60</sup> (1989) 69 OR (2d) 262 (Divisional Court) [20]–[22] following *Slaight Communications v Davidson* [1989] 1 SCR 1038 ('*Slaight Communications*').

<sup>61</sup> *Slaight Communications* [1989] 1 SCR 1038 [100].

<sup>62</sup> *Ibid* [58].

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

<sup>64</sup> *Moore* (1989) 69 O.R. (2d) 262 (Divisional Court) [22].

<sup>65</sup> *Bill of Rights Act 1990* (NZ).

## B *The Apology as a Statutory Remedy*

### 1 *Equal opportunity legislation*<sup>66</sup>

An apology order is one of a number of statutory remedies available in the equal opportunity jurisdiction in Australia and some other countries.<sup>67</sup> Apology orders have been made by Australian courts and tribunals in cases where a complainant has been unlawfully harassed or discriminated against or vilified in contravention of the legislation.<sup>68</sup> While in practice apology or retraction orders are most often sought in vilification proceedings,<sup>69</sup> there are numerous instances where these orders have been made in cases of discrimination and harassment.<sup>70</sup>

In each of the states and territories, the power to order an apology is conferred for the purpose of redressing loss or damage caused to the complainant by the respondent's unlawful conduct. In a number of jurisdictions apology orders are made pursuant to the power to order a respondent 'to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant'.<sup>71</sup> The legislation in New South Wales and Queensland makes express reference to orders to apologise as remedial orders.<sup>72</sup> Apology orders are also available as a remedy for unlawful conduct under federal anti-discrimination legislation.<sup>73</sup>

Apology orders have been made by Australian courts and tribunals against respondents, notwithstanding that the order has been opposed.<sup>74</sup> Applying legislation in similar terms to the Australian legislation, the Hong Kong Court of Final Appeal held in *Ma Bik Yung* that the Court had power to make an order against an unwilling defendant, described by the Court as 'one who does not feel sorry'.<sup>75</sup> The Court recognised that 'it will be a rare case where enforcement of an apology order will not be futile or disproportionate and contrary to the interests of

<sup>66</sup> For analysis of ordered apologies under equal opportunity legislation, see Carroll, above n 5.

<sup>67</sup> A comprehensive list of federal and state anti-discrimination legislation in force is set out in CCH, *Australian and NZ Equal Opportunity Commentary* ¶2-720. For a summary table of legislation, see CCH, *Australian and NZ Equal Opportunity Commentary* ¶ 2-780. For commentary on the range of remedies awarded under the legislation see Australian Human Rights Commission, *Federal Discrimination Law: Damages and Remedies* (21 October 2011) <<http://www.hreoc.gov.au/legal/FDL>>. The power to order apologies is conferred on courts and tribunals exercising anti-discrimination jurisdiction in a number of overseas jurisdictions. In Hong Kong, see *the Disability Discrimination Ordinance* (Hong Kong) cap 487, s 72(4)(b). In the Republic of South Africa, s 21(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa) confers power on the Equality Court to make a wide range of remedies orders, including 'an order that an unconditional apology be made': s 21(2)(j).

<sup>68</sup> See, eg, *De Simone v Bevacqua* (1994) 7 VAR 246 ('*De Simone*').

<sup>69</sup> Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) 722.

<sup>70</sup> *De Simone* (1994) 7 VAR 246.

<sup>71</sup> See, eg, *Equal Opportunity Act 1984* (WA) s 127(b)(iii).

<sup>72</sup> *Anti-Discrimination Act 1997* (NSW) s 108(2); *Anti-Discrimination Act 1991* (Qld) s 209.

<sup>73</sup> *Federal Court Act 1976* (Cth) s 23; *Federal Magistrates Act 1999* (Cth) s 4.

<sup>74</sup> See, eg, *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625 (7 April 2004) ('*Falun Dafa*').

<sup>75</sup> *Ma Bik Yung* [2002] 2 HKLRD 1, 11.

administration of justice'.<sup>76</sup> In making an order, the circumstances to be considered include 'the nature and aim of the legislation, the interest of the community, the gravity of the unlawful conduct and the plaintiff's circumstances, including the extent of the loss and damage suffered'.<sup>77</sup> Only then can the question be answered whether in the particular instance the guaranteed freedoms of the applicant justify the making of an order, notwithstanding the guaranteed freedoms, including freedom of expression, of the respondent. The Court concluded that to make an order against an unwilling defendant the circumstances would have to be 'exceptional'.<sup>78</sup>

There are many factors that courts and tribunals take into account when deciding whether to order a defendant to apologise.<sup>79</sup> Predominant among these is the anticipated benefit to the applicant of the order (even if in terms modified by the court) and the extent to which the apology will be offered willingly and is likely to be sincere. Sometimes the order is made by consent. A respondent who defends the complaint against them but is found to have engaged in unlawful conduct may be willing to apologise on terms agreed to and made as consent orders. Other factors that have influenced courts' decisions include the conduct of the respondent<sup>80</sup> and the likelihood of a subsequent infringement of the statute.<sup>81</sup>

Three cases are presented here to illustrate the circumstances in which apology orders have been sought and the types of relief that has been granted.

In *Russell v Commissioner of Police, New South Wales Police Service*<sup>82</sup> Mr Russell, an Aboriginal man, was found to have been the subject of unlawful racial discrimination and vilification while being taken into custody. The enquiry by the Equal Opportunity Tribunal related to a complaint under the *Anti-Discrimination Act 1977* (NSW) lodged by Helen and Ted Russell on behalf of their son, Edward John Russell. The complaint was lodged with the Anti-Discrimination Board on 6 February 1998. At that date Edward John Russell was alive but was in prison. He subsequently died, in late 1999, in circumstances that were not the subject of the Tribunal's enquiry. The New South Wales Administrative Decisions Tribunal found the complaints substantiated and, in addition to ordering the payment of damages, ordered the Commissioner of the New South Wales Police Service and

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<sup>76</sup> Ibid 20–1.

<sup>77</sup> Ibid 19.

<sup>78</sup> Ibid 19.

<sup>79</sup> For a more detailed of these factors see Robyn Carroll, 'Ordered "Apologies" for Discrimination, Vilification and Related Unlawful Conduct in Australia — An Analysis of the Futility Argument' in Russell Weaver and François Lichère (eds), *Recognition and Enforcement of Judgements: Comparative and International Perspective* (Presse Universitaire d'Aix Marseille, 2010).

<sup>80</sup> See, eg, *Wilson & McCollum v Lawson* [2008] QADT 27 (6 November 2008) [104], where a full apology was considered necessary because 'an essential characteristic of the conduct in question was that it was designed and intended to be hurtful'.

<sup>81</sup> *JM v QFG and GK and State of Queensland* [1997] QADT 5 (31 January 1997).

<sup>82</sup> [2001] NSWADT 32 (26 February 2001). There was an appeal to the New South Wales Court of Appeal over liability to pay the \$30,000 damages awarded to the estate of the deceased by the Tribunal: *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232. The outcome of the appeal did not affect the apology orders made by the Tribunal.

each of the police officers named in the orders, individually, to write a letter of apology to the parents of the late Mr Russell in the following terms:<sup>83</sup>

On the 11 December 1993, eleven police officers stationed at the Bathurst Police Station apprehended and arrested Edward John Russell, an aboriginal person, on the Wiseman's Creek Road at Oberon. The Equal Opportunity Division of the Administrative Decisions Tribunal has found that the conduct of the police officers, and the language used by them, towards Mr Russell during his arrest, were in breach of the racial discrimination and the racial vilification provisions of the Anti Discrimination Act. The Tribunal also found that the NSW Police Service was liable under the Act for the conduct of the officers on that occasion. On behalf of the NSW Police Service I wish to apologise to you for the conduct of the police officers on that occasion.

In *Burns No 2*,<sup>84</sup> the second respondents, two radio presenters, made comments during a morning broadcast that were held to be unlawful vilification pursuant to the *Anti-Discrimination Act 1977* (NSW) s 49ZT(1) because they were capable of inciting severe ridicule of gay men. The complainant proposed that the presenters 'each read an apology, in specified terms, on air for seven consecutive days at specified times, and that Radio 2UE publish a written apology in four specified newspapers in specified terms'.<sup>85</sup> The Tribunal ordered the various respondents to publish or cause to be read and broadcast apologies as directed.<sup>86</sup> In so doing it stated that in these circumstances:

The apology is acknowledgement of the wrongdoing and, seen as fulfilment of a legal requirement rather than as a statement of genuinely held feelings, it can properly be compelled by way of order. There would be a welcome extra dimension to the apology if it reflected that the person actually regrets the conduct.<sup>87</sup>

The most recent example is a case in which the Federal Court refused to make an apology order as requested. In *Eatoock v Bolt*,<sup>88</sup> Bromberg J found that the writing of certain newspaper articles for publication by columnist Andrew Bolt and the publication of those articles by the Herald and Weekly Times Pty Ltd contravened the *Racial Discrimination Act 1975* (Cth) s 18C in that the imputations the newspaper articles conveyed:

were reasonably likely to cause some Aboriginal persons of mixed descent who have a fairer, rather than darker skin, and who by combination of descent, self-identification and communal recognition are, and are recognised as Aboriginal persons were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated.<sup>89</sup>

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<sup>83</sup> The police officers involved were also ordered to publish a further letter of apology in the local newspaper in terms set out as 'Appendix A' to the Tribunal's reasons.

<sup>84</sup> [2005] NSWADT 24 (16 February 2005).

<sup>85</sup> *Ibid* [26].

<sup>86</sup> *Ibid* [47].

<sup>87</sup> *Ibid* [29].

<sup>88</sup> *Eatoock v Bolt* (2011) 197 FCR 261.

<sup>89</sup> *Ibid* 363 [452].

In *Eatock v Bolt (No 2)*,<sup>90</sup> Bromberg J ordered the publication of a Corrective Notice (the terms of which were set out in the judgment) and made orders restraining the respondents from further publishing or republishing the newspaper articles or any substantial parts thereof. In rejecting the applicant's request for an ordered apology from the Herald and Weekly Times, Bromberg J stated that he was not persuaded he should compel the newspaper to articulate a sentiment that was not genuinely held. He reiterated the point he made in his reasons for judgment on the substantive claim that 'an apology is but one means of addressing the public vindication sought by those who have been injured by the contravention of s 18C'.<sup>91</sup>

These decisions highlight the significance of the facts in each case as to whether it is appropriate to order an apology and the attendant difficulty of predicting when such an order will be made. They may also reflect different judicial views about the significance of the respondent's unwillingness to apologise without an order.

## 2 *Copyright – protection of an author's moral right*

There is a wide range of orders available for infringement of copyright under the *Copyright Act 1968* (Cth). When relief under that Act is sought for infringement of an author's moral rights in respect of a work or for infringement of a performer's moral rights a court has the power to order 'that the defendant makes a public apology for the infringement'.<sup>92</sup> Anything done by the defendant to mitigate the effects of the infringement may be taken into account by the court in exercising its discretion as to the appropriate relief.<sup>93</sup> The nature of the apology envisaged by this provision, a *public* apology, suggests that one aim is to ensure that the public is made aware of the plaintiff's status as author or that the defendant's treatment of the work was unauthorised. The loss suffered by a plaintiff for infringement of their moral rights will be very difficult to assess. The apology order might therefore be seen as a better way to correct loss than ordering the payment of a sum that is difficult to calculate.

## 3 *Proposed invasion of right to privacy legislation*

The Australian Law Reform Commission ('ALRC'), New South Wales Law Reform Commission ('NSWLRC') and Victorian Law Reform Commission ('VLRC') have each proposed the introduction of a statutory cause of action for invasion of privacy.<sup>94</sup> The proposed statutory cause of action is limited to wilful or

<sup>90</sup> *Eatock v Bolt (No 2)* (2011) 284 ALR 114.

<sup>91</sup> *Ibid* 118 [14].

<sup>92</sup> *Copyright Act 1968* (Cth) s 195AZA(1)(d) (author); s 195AZGC(1)(d) (performer).

<sup>93</sup> *Ibid* s 195AZA(2)(d) (author); s 195AZGC(1)(d) (performer).

<sup>94</sup> ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008); NSWLRC, *Invasion of Privacy*, Report No 120 (2009); VLRC, *Surveillance in Public Places*, Final Report No 18 (2010). For comment, see Norman Witzleb, 'A Statutory Cause of Action for Privacy? A Critical Appraisal of Three Recent Australian Law Reform Proposals' (2011) 19 *Torts Law Journal* 104.

intentional acts of invasion of privacy. The remedies proposed by the VLRC are confined to compensatory damages, injunctions and damages. The NSWLRC proposed that courts be given a broad discretion to award remedies including damages, prohibitive injunctions, declarations, and '[s]uch other relief as the court considers necessary in the circumstances'.<sup>95</sup> The ALRC, in addition, makes specific references to an account of profits, an order requiring the defendant to apologise to the plaintiff and a correction order.<sup>96</sup> In recommending that a court be given express power to order an apology, the NSWLRC concluded there may be rare cases where there would be value in an order to apologise.<sup>97</sup> Should any of these proposals for a statutory cause of action for invasion of privacy be adopted, it is possible that we will see another instance of the apology as a remedy for injury to feelings and loss of dignity.

### C *Statutory Power to Order Apologies other than as a Personal Remedy*

There is evidence of a growing interest in apologies as a form of redress in complaints against government and in consumer protection cases where the amount of pecuniary loss suffered by a member of the public or a consumer is small or non-existent. In Australia and elsewhere it is becoming more common to see an apology as a form of redress that is encouraged or recommended by way of resolving complaints made to ombudsman offices. There is provision, for example, in the *Broadcasting Services Act 1992* (Cth) for the Australian Communications and Media Authority to recommend that the Australian Broadcasting Corporation ('ABC') or Special Broadcasting Service ('SBS') take action to comply with a relevant code of conduct when the Authority is satisfied that a complaint against the broadcaster was justified. The action to be taken pursuant to the *Broadcasting Services Act 1992* (Cth) s 152(2) may include 'broadcasting or otherwise publishing an apology or retraction.'

The Law Commission (Eng) and Scottish Law Commission recently published a consultation paper that considers ways to protect consumers from misrepresentation and unfair practices. They proposed a remedial approach to damages for distress and disappointment involving three bands of what they refer to as 'damages'. In the lowest band of damages, where loss is nominal, they identify as suitable remedial responses 'making an apology, sending flowers or vouchers'.<sup>98</sup> These are signs that consideration is being given to a more explicit role for apologies as a form of redress than in the past. They are not orders to apologise but nevertheless may be a strong influence on the terms upon which a complaint or dispute is settled.

In other circumstances statutory power is conferred on courts to order an apology, not as a personal remedy in favour of a civil litigant, but as an remedial

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<sup>95</sup> NSWLRC above n 94, 88 (cl 76(1)(e)).

<sup>96</sup> ALRC, above n 94, recommendations 74–5.

<sup>97</sup> NSWLRC, above n 94, [8.45]–[8.46].

<sup>98</sup> Law Commission and Scottish Law Commission, *Reforming Consumer Redress for Misleading and Aggressive Practices: What Do You Think? Summary* (2011) 14 [1.62].



order sought by a regulator against a person, which includes a corporation, who has contravened a statute or some other legal duty. The following section provides examples from four areas of legal regulation.

### 1 *Australian competition and consumer law*

Apologies feature in decisions concerning orders made under the *Australian Competition and Consumer Act 2010* (Cth) ('CCA'). An apology may be significant to mitigation of damages,<sup>99</sup> a pecuniary penalty,<sup>100</sup> and to a fine for contempt.<sup>101</sup> Orders incorporating apologies can also be sought by the Australian Competition and Consumer Commission ('ACCC') and made by a court pursuant to remedy provisions in the CCA including provisions now contained in The Australian Consumer Law ('ACL') (previously in the *Trade Practices Act 1974* (Cth) and now found as sch 2 to the CCA). The power to grant an injunction under the CCA s 80 includes the power to order corrective advertising.<sup>102</sup> Section 80(1AA) makes provision for the grant of an injunction by consent. The same power to grant injunctions in this form is available in the ACL s 232. Correction notices ordered to be published under these provisions will sometimes be headed 'Apology' and may incorporate some form of apology in the body of the notice. A court also has power to make a non-punitive order under the CA ss 86C(1) and 86C(2)(d) of the CCA for contraventions of pts IV, IVB or s 95AZN of the CCA requiring a person to publish an advertisement in specified terms.

Correction orders can be made by consent provided the court is satisfied that the public interest is served by approving settlement. A court is required to ensure that the orders made by consent are within the court's power and appropriate and that there is a sufficient nexus between the conduct and the orders sought.<sup>103</sup> In each case a court needs to be satisfied that the aim of the correction order is to protect the public, not to punish the defendant. In *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc*,<sup>104</sup> French J reviewed the authorities and principles governing the making of orders to publish a notice by way of apology and concluded that it is a legitimate purpose to inform the relevant public or markets of the outcome of the litigation (effectively to warn the public and prevent repetition of the contravening conduct). Justice French reiterated this view in *Australian Competition and Consumer Commission v McCaskey*, at the same time stressing that it is not appropriate to make orders for such notices 'simply to announce a win for the

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<sup>99</sup> *Switzerland Australia Health Fund Pty Ltd v Shaw* (1988) 81 ALR 111.

<sup>100</sup> See, eg, *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238.

<sup>101</sup> See, eg, *Australian Competition and Consumer Commission v Levi (No 3)* (2008) ATPR 42-257.

<sup>102</sup> See, eg, *Janssen Pharmaceutical Pty Ltd v Pfizer Pty Ltd* (1985) 6 IPR 227, 238; *Hospitals Contribution Fund of Australia Ltd v Switzerland Australia Health Fund Pty Ltd* (1987) 78 ALR 483, 491.

<sup>103</sup> *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia* (1999) 95 FCR 114, 131 [39].

<sup>104</sup> *Ibid* 133 [49].

ACCC or the contrition of the respondent'.<sup>105</sup> Despite the reservations French J expressed about the inappropriateness of offers for the publication of statements of contrition, his Honour was prepared in *McCaskey* to make orders sought by consent by which a notice was to be published and headed 'An Apology'.<sup>106</sup> In other cases, courts have rejected applications by the ACCC for orders by consent in terms which include an apology.<sup>107</sup> In *On Clinic*,<sup>108</sup> for example, the ACCC sought an apology for misleading conduct in relation to treatment provided by the respondents. The court concluded that an apology was not appropriate given the respondent's cooperative behaviour. It was ordered instead that the respondents should express their regrets 'to any person who may have been misled' by their assertions. Corrective advertising was ordered in this case to redress the loss or damage suffered by the clients of the respondents.<sup>109</sup>

Some similarity can be detected between orders made under the CCA and the equal opportunity legislation referred to above. In each case, an 'apology' is regarded as a form of redress for loss or damage that can benefit the public by providing information about what constitutes wrongdoing and its consequences. Unlike the equal opportunity cases, there is no scope under the CAA for an individual applicant to seek a personal apology, which is not surprising given that the interests protected by that Act are economic, rather than personal. Where apologies are the subject of orders under the CAA they are only made by consent.

## 2 *Privacy legislation*

Apology orders are available in some Australian jurisdictions pursuant to privacy legislation; eg, the *Privacy and Personal Information Protection Act 1998* (NSW) s 55(2)(e). In *NZ v Director General, Department of Housing*,<sup>110</sup> for example, pursuant to this subsection, the New South Wales Administrative Appeals Tribunal ordered a government department to render a written apology to the applicant for disclosing personal information about the applicant to a third person without lawful authority. The *Workplace Relations Act 1996* (Cth) previously provided for an apology to be ordered pursuant to s 170CA(2) of that Act. There is no provision for an apology order in the *Fair Work Act 2009* (Cth) and no such order can be made under that Act.<sup>111</sup> It is to be expected that apologies will continue to be relevant to assessment of damages and pecuniary penalties that can be ordered under the *Fair Work Act 2009* (Cth) s 546.

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<sup>105</sup> *Australian Competition and Consumer Commission v McCaskey* (2000) 104 FCR 8, 30 [61] ('*McCaskey*').

<sup>106</sup> *Ibid* 30 [62].

<sup>107</sup> *Australian Competition and Consumer Commission v Dell Computers Pty Ltd* (2002) ATPR 41-878; *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR 41-778; *Australian Competition and Consumer Commission v On Clinic Australia Pty Ltd* (1996) 35 IPR 635 ('*On Clinic*').

<sup>108</sup> *On Clinic* (1996) 35 IPR 635.

<sup>109</sup> *Ibid* 640-1.

<sup>110</sup> [2006] NSWADT 173 (7 June 2006).

<sup>111</sup> *Deakin University v Rametta* (2010) 196 IR 42, 61 [44].

### 3 *Professional disciplinary proceedings*

Apologies are sometimes significant to proceedings in which professionals are regulated and disciplined. This is evident from decisions concerning professional misconduct by legal practitioners. There are numerous decisions in which a disciplinary body has taken account of an apology by a practitioner. Sometimes the apology offered is viewed in a favourable light, at other times it is not.<sup>112</sup> To date though, Australian disciplinary bodies do not have the power to order a practitioner or a law firm to apologise. This is set to change in jurisdictions that enact the proposed draft National Laws. The *Legal Profession National Law* will confer power on the Legal Services Commissioner when determining both consumer and disciplinary matters to make an order requiring an apology from the respondent legal practitioner or a legal practitioner associate of the respondent law practice.<sup>113</sup>

Currently in New Zealand, the power to order a legal practitioner (against whom a complaint has been substantiated by investigation and hearing) to apologise to the complainant is conferred by the *New Zealand Lawyers and Conveyancers Act 2006* (NZ) s 156(1)(c) on the Standards Committee established by that Act. Similarly, the *Legal Services Act 2007* (UK) s 137(2)(a) provides that a determination of a complaint under the ombudsman scheme created by that Act may contain a number of directions including a direction that ‘the respondent make an apology to the complainant’.

It is common to the proposed Australian law and the UK and New Zealand legislation that they confer power on a statutory body to order a respondent to apologise to a complainant. The proposed *Legal Profession National Law* goes further and also confers power in a disciplinary matter on the Legal Services Commissioner to require an apology from the respondent without stipulating to whom the apology is to be offered. Clause 5.4.5 provides (in part) that:

- (1) The Commissioner may, in relation to a disciplinary matter, find that the respondent lawyer or a legal practitioner associate of the respondent law practice has engaged in unsatisfactory professional conduct and may determine the disciplinary matter by making any of the following orders:
  - (c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice[.]

Presumably the Commissioner would specify the recipient of the apology in the order. An order of this nature appears to be similar to corrective advertising orders made under the CCA, referred to above. In those cases, however, a court is only likely to make an order for a notice in the form of an apology if the order is made by consent and it is considered insufficient to refer to the publication as a correction or a statement of regret. No doubt it is intended that an order made pursuant to cl 5.4.5 will serve the public interest and restore the reputation of the legal profession. The use of apology orders in this disciplinary context raises serious questions about the circumstances in which it is appropriate to order an

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<sup>112</sup> See Bartlett, above n 13.

<sup>113</sup> Ccl 5.3.6 (consumer matter); 5.4.5 (disciplinary matter).

apology. An order to apologise to the public or to members of the legal profession is a long way from being a remedy for a person who has been wronged by the respondent and has or is likely to suffer loss or damage as a result. Compare the situation when a person has been found to have committed contempt of court. In this situation an apology is a factor in assessing damages or fixing a penalty; it is not compelled.

#### 4 *Regulation of the media*

In a recent report into the media and media regulation, the Hon Raymond Finkelstein QC recommended to the federal government that a News Media Council be established.<sup>114</sup> The Council would be responsible for setting journalistic standards for the news media in consultation with industry and handling complaints made by the public when those standards are breached.<sup>115</sup> Significantly, and controversially, it recommended that the proposed Council ‘should have the power to require a news media outlet to publish an apology, correction or retraction, or afford a person a right to reply’.<sup>116</sup>

The use of apologies as a way of responding to complaints about the media is by no means novel. It is pointed out in the *Finkelstein Report* that this already occurs under existing self-regulation mechanisms. It is reported, for example, that the Australian Press Council (APC) which deals with newspaper media, currently receives about 450 complaints each year (excluding those outside its jurisdiction). In 2010–11, the APC’s involvement led to a correction, apology or some other form of remedial action by the publisher in 134 cases.<sup>117</sup>

The proposed News Media Council would be established to replace existing external and self-regulatory mechanisms for establishing standards and dealing with complaints by the public relating to all media platforms: print, online, radio and television. It is beyond the scope of this article to consider the arguments for and against the recommendations in the *Finkelstein Report*, including the recommended rights of reply, correction and apology set out in ch 9. The *Finkelstein Report* signals serious contemplation of ordered apologies as one of a number of remedial responses to complaints against the media to ‘redress wrongful harm which a publication may cause’.<sup>118</sup> It remains to be seen, if the recommendations become a reality, whether apologies will feature to any greater

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<sup>114</sup> R Finkelstein (assisted by M Rickertson), Australian Government, *Report of the Independent Inquiry into the Media and Media Regulation* (2012) Australian Government) (*Finkelstein Report*).

<sup>115</sup> *Ibid* 8, recommendation 8.

<sup>116</sup> *Ibid* 9, recommendation 12.

<sup>117</sup> *Ibid* 230. The APC’s mandate to consider complaints extends to all print publications and related digital outlets, such as websites, of its constituent bodies. If a complaint cannot be resolved by agreement, the complainant can ask for adjudication by the APC. In 2010–11, 71 per cent of adjudicated complaints were upheld. Although some data about adjudication outcomes is set out in the *Finkelstein Report*, it does not state whether outcomes of the adjudication process include apologies.

<sup>118</sup> *Ibid* 245 [9.4].

extent under the proposed regulatory scheme than they do at present and the circumstances in which they will be ordered.<sup>119</sup>

## V The Purposes of an Apology Order

The purpose of a plaintiff seeking an order that a defendant apologise will depend upon the circumstances of each case. It is possible to imagine a plaintiff seeking an apology for a range of motives, including a desire for reconciliation or to forgive the defendant, or the need for their suffering to be acknowledged. The plaintiff might seek to be vindicated as the innocent party in their own eyes and the eyes of others and, (vindictively perhaps), to see the defendant suffer and even be punished for his or her wrongdoing. This section of the article speculates on a plaintiff's motive in seeking an apology order. The aim is to identify the purposes attributed by the courts to an order of this nature. It does so by drawing on cases decided in the equal opportunity jurisdiction because it is there that these orders are most numerous.

### A Purposes Identified in Equal Opportunity Cases

The primary purpose of an apology order and, arguably, a prerequisite to any orders being made under the equal opportunity legislation, is to 'redress loss or damage'.<sup>120</sup> This implies a compensatory purpose. 'Redress' is not defined to mean monetary compensation only, and it is evident that an apology is viewed by the courts as a way to redress non-monetary loss or damage. A number of other purposes, identified in the section, have been attributed by courts to apology orders, not always consistently. In more general terms, remedial actions under equal opportunity legislation have been described in Australia and elsewhere as redressing systematic discrimination.<sup>121</sup>

#### 1 Compensation

There is express reference in some cases to an apology serving a compensatory purpose, either to supplement an award of damages for economic and non-economic loss, or to redress non-economic loss where there is no evidence of economic loss. The manner in which the order compensates an applicant has not been explained by the courts. Presumably it provides solace for the emotional harm caused by the wrongful conduct and reduces the mental distress, hurt and indignity

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<sup>119</sup> Similar controversy surrounds the recommendation of Lord Leveson that a Board to governing an independent self-regulatory body have the power 'to direct appropriate remedial action for breach of standards and the publication of corrections and apologies' by publishers who choose to be members of the regulatory body. Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (The Stationery Office, 29 November, 2012) pt K, ch 7, [4.37] recommendation 15.

<sup>120</sup> See, eg, *Falum Dafa* [2004] VCAT 625 (7 April 2004). The Victorian Act presupposes the existence of 'loss, damage or injury' but does not specify that these must be in the nature of matters which would attract general damages.

<sup>121</sup> *Jones v Toben* (2002) 71 ALD 629 [111] (Branson J), endorsing the approach of the Canadian Human Rights Tribunal in *Citron v Zündel (No 4)* (2002) 41 CHRR D/274.

associated with the experience. For example, in *Cooke v Plauen Holdings Pty Ltd*,<sup>122</sup> Driver FM gave the following reason for ordering an apology:

I have also taken into account in assessing what is an appropriate award of damages that Ms Cooke should receive an apology. She has received an oral expression of regret but she is entitled to a formal apology. An apology is frequently worth more to an applicant than money. In this case I am satisfied that a written apology would go a long way to compensating the applicant for the distress and loss of confidence that she suffered.<sup>123</sup>

## 2 Vindication

Given the circumstances in which an apology order is made, it is not difficult to imagine that vindication is a significant reason for an applicant seeking the order. No uniform view about the ability of an apology order to achieve a vindicatory purpose is evident from the cases. In some cases it has been stated that an ordered apology can serve to vindicate a complainant in the eyes of the complainant's community. In *Creek v Cairns Post Pty Ltd*,<sup>124</sup> for example, Kiefel J noted that a short apology would have been ordered for this purpose had the discrimination complaint been made out. On other occasions an apology has been seen as important to vindicate an applicant in the eyes of others more specifically identified, for example fellow employees.<sup>125</sup> Other decision-makers apparently doubt the utility of an apology to achieve this purpose, referring instead to the vindicatory effect of the decision, an award of damages,<sup>126</sup> and published reasons for their decision.<sup>127</sup> In one case an order was declined because a declaration on the public record was considered to be vindication enough.<sup>128</sup>

## 3 Acknowledgment of wrongdoing

Apology orders have been made in a number of cases for the express purpose of acknowledging wrongdoing. In these cases, the apology is described as the 'fulfilment of a legal requirement'<sup>129</sup> that is properly compellable by way of order, or as 'a public acknowledgment of wrongdoing rather than as an actual statement of regret.'<sup>130</sup>

<sup>122</sup> [2001] FMCA 91 (27 September 2001).

<sup>123</sup> *Ibid* [43].

<sup>124</sup> See, eg, *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 360 [34].

<sup>125</sup> See, eg, *De Simone* (1994) 7 VAR 246.

<sup>126</sup> *Lynton v Maugeri and Queensland Anti-Discrimination Commission* [1995] QADT 3 (4 May 1995).

<sup>127</sup> *Dunn-Dyer v ANZ Banking Group Ltd* [1997] HREOCA 52 (29 August 1997) ('*Dunn-Dyer*'). In *Ma Bik Yung* [2002] 2 HKLRD 1, 23, the Court regarded the award of damages and its judgment, 'which set out the facts in full and unequivocally condemned the defendant's actions as conduct that should not be tolerated in our society', as providing further vindication to the plaintiff..

<sup>128</sup> *Ryan v Dennis and Dennis Deals Pty Ltd* [1998] HREOCA 36 (28 October 1998); *Dunn-Dyer* [1997] HREOCA 52 (29 August 1997); *Ralph v Pemar Pty Ltd* [1999] HREOCA 16 (26 July 1999).

<sup>129</sup> *Burns No 2* [2005] NSWADT 24 (16 February 2005).

<sup>130</sup> *Sunol v Collier (EOD)* [2006] NSWADTAP 51 (27 September 2006) [54].

#### 4 *Educate the public about the unlawful nature and harmful effects of the unlawful conduct*

This educative purpose has been emphasised in vilification cases, which by their nature involve public attitudes and perceptions. For example, the Queensland Anti-Discrimination Tribunal in *Menzies v Owen*,<sup>131</sup> adopting the reasoning of the New South Wales Anti-Discrimination Tribunal in *Burns No 2*, expressly referred to the educative purpose of an apology order in such cases: that ‘the members of the public that have been incited to hatred, serious contempt or severe ridicule should be told by the respondent that such conduct was unlawful’.<sup>132</sup> Closely aligned to the educative purpose of an apology order are the declaratory and corrective purposes of a corrective notice as ordered in *Eatock v Bolt (No 2)*.<sup>133</sup> In that case, Bromberg J ordered the publication of a corrective notice which referred to the court’s decision and reasons and declared the conduct described in the notice to be unlawful as a contravention of the *Racial Discrimination Act 1975* (Cth) s 18C. Arguably, an ordered apology also serves a corrective and declaratory purpose.

### **B *General Remedial Purposes***<sup>134</sup>

#### 1 *Plaintiff choice of remedy*

The notion of choice at best recognises that plaintiffs can elect the causes of action on which they rely and the remedies they prefer. It is not for the defendant to specify what cause of action or remedy the plaintiff must seek. It is in this context that the English Court of Appeal in *Joyce v Sengupta*<sup>135</sup> speaks of a plaintiff being entitled to take ‘full advantage of the various remedies English law provides for the wrong of which he complains’.<sup>136</sup> The concept of choice and even a ‘right’ to choose does not create a right to an order for specific relief, however, as the court may ultimately determine in the exercise of its discretion that the relief sought is inappropriate in the circumstances.

#### 2 *An apology can address the psychological needs of the parties*

Victims of wrongdoing are known to try to reduce or eliminate feelings of having been violated, and they can do this by executing revenge; by achieving a sense of justice, for example through litigation; by using psychological defences such as denial or projection; or by forgiveness.<sup>137</sup> Allan explains that many psychologists consider that forgiving is the best way to recover from the wrong. He reviews the

<sup>131</sup> [2008] QADT 20 (19 September 2008).

<sup>132</sup> *Ibid* [279].

<sup>133</sup> *Eatock v Bolt (No 2)* (2011) 284 ALR 114.

<sup>134</sup> A number of these are discussed in greater detail in Carroll, above n 1, 352–69.

<sup>135</sup> [1993] 1 All ER 897.

<sup>136</sup> *Ibid* 902 (Nicholls V-C).

<sup>137</sup> Allan, above n 29, 9, citing Everett Worthington Jr and Nathaniel Wade, ‘The Psychology of Unforgiveness and Forgiveness and Implications for Clinical Practice’ (1999) 18 *Journal of Social and Clinical Psychology* 385.

psychological research on apology and forgiving, and concludes that an apology can facilitate the forgiving process in a number of ways, both cognitive and behavioural.<sup>138</sup>

### 3 *An order to apologise might redress the plaintiff's loss or damage better than an award of damages*

In some cases a plaintiff might seek only an order that a defendant apologise while in other cases additional orders might be sought relating to publication and dissemination of the apology. Alternatively, a plaintiff might seek both damages and an apology. In the latter situation attention would be needed to ensure that there was no 'double recovery' for non-pecuniary losses. An apology order overcomes the difficulty of assessing non-pecuniary loss and can signify a wrong has been committed against the plaintiff in circumstances where no monetary relief is sought. Provided a plaintiff can satisfy a statutory or common law requirement to show either that they have suffered some loss or damage from the wrong or that the wrong is actionable per se, is there any reason why they must claim damages?

### 4 *An apology order can achieve purposes beyond compensating the plaintiff*

Compensation is the dominant purpose of civil actions. There are other functions performed by the law of wrongs including the vindication of rights.<sup>139</sup> Other more normative functions emphasise the law's deterrent<sup>140</sup> and 'exhortatory and retributive function'.<sup>141</sup> From this normative standpoint, the law of wrongs, civil and criminal, forms a single social project for deterring disapproved conduct and avenging its victims.<sup>142</sup> Much of the debate concerning these functions has centred on the role of damages, particularly exemplary damages, and whether the latter have a legitimate role in civil law. It is not suggested here that an apology is, or should be, regarded as an alternative to punitive damages and serving a punitive purpose but it might perhaps achieve incidentally one or more of the other purposes attributed by the High Court to an award of exemplary damages, namely appeasement and deterrence.<sup>143</sup>

## VI Issues Raised by Orders to Apologise

The previous parts of this article have raised a number of issues associated with apologies as a remedy. What are the wrongs for which a court's remedial response should include an order to apologise? Is the selection of appropriate wrongs a

<sup>138</sup> Ibid 10. Allan concludes that it 'is therefore likely that an apology through its role in the forgiving process may influence the behaviour of victims'.

<sup>139</sup> Jeffrey Berryman, 'The Law of Remedies: A Prospectus for Teaching and Scholarship' (2010) 10 *Oxford University Commonwealth Law Journal* 123.

<sup>140</sup> Glanville Williams 'The Aims of Tort Law' (1951) 4 *Current Legal Problems* 137, 153.

<sup>141</sup> Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press, 1996) vi.

<sup>142</sup> Ibid.

<sup>143</sup> *Lamb v Cotogno* (1987) 164 CLR 1.



decision that properly lies with the legislature or should courts be encouraged to use their existing coercive powers for this purpose? What evidence is there that the various purposes identified in the previous section can be achieved by ordering an apology? A number of other more general issues, outlined here, arise when contemplating apology as a remedy.

### A *The Common Law's Preference for Damages*

This preference is manifest in the doctrinal requirement that a court must be satisfied that damages will be an inadequate to remedy a common law wrong before granting specific relief. The requirement can be explained at one level by what is referred to as the 'remedial hierarchy' to be observed when a court grants an equitable remedy for breach of contract or tort. At a practical level, the common law's preference for damages can be explained by the relative simplicity of an award that can be enforced by sequestration of property if necessary. Damages awards are seen to achieve finality of proceedings and to avoid the need for ongoing supervision by the courts of performance of acts other than the payment of money. A money award is also considered the best means to achieve compensation, regarded by many as the purpose of tort law and actions for breach of contract.

Damages also provide a convenient way of calculating and recovering fees payable for legal representation of a successful plaintiff. This cannot be ruled out as one of the many factors that have contributed to a legal system that converts all types of loss and injury, whether tangible or intangible, into a monetary amount. Faced with the choice of recovering an apology for a successful claim — for example, for deprivation of liberty — a plaintiff is unlikely to seek an apology order as their only relief if they will need to pay their lawyer a significant amount of money for advice and representation. Even with a favourable award of costs, the plaintiff would be left out of pocket. If a plaintiff were to obtain an apology as well as damages, it might be argued that there is potential for double compensation and difficulties of calculating the quantum of damages in this situation.

There are two points to note in response to this. First, courts already make this type of calculation when they award damages and an apology in equal opportunity cases. Granted, the awards of damages for non-pecuniary loss in this jurisdiction are typically small. Second, courts have experience in assessing the overall value to a plaintiff of an apology in combination with damages in costs applications by successful plaintiffs to defamation claims. When damages are awarded to the plaintiff after an offer of settlement incorporating damages and an apology, the argument has sometimes been made that the judgment (damages only) was less valuable than the settlement offer (damages and an apology) and therefore the plaintiff should not be awarded damages on an indemnity basis.

In *Timms v Clift*<sup>144</sup> the defendant argued that the indemnity costs rule could not apply because it could not be shown that a judgment was not less favourable than an offer made to publish an apology as the apology was not quantifiable in

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<sup>144</sup> [1998] 2 Qd R 100.

monetary terms. The Queensland Court of Appeal rejected that argument and concluded that ‘a judgment not less favourable’ does not exclude from consideration relief sought other than money claims. The Court found the plaintiff had obtained a judgment ‘no less favourable than the offer to settle’ where the settlement included an apology.<sup>145</sup> In the result, a judgment that does not include an apology can still be viewed as no less favourable than an offer that includes an apology.<sup>146</sup>

## **B Floodgates, Inflated Claims and Over- or Under-Compensation**

There is potential for over compensation if an apology is intended, wholly or in part, to serve the same purpose as non-pecuniary damages. This danger, I suggest, can be avoided in the damages calculation. On the other hand, concerns have also been expressed that a plaintiff might feel obliged to accept an apology and accept less by way of damages than they might need for full compensation. Concerns already exist in the law of torts about exaggeration and inflation of claims for non-pecuniary loss, difficulties of quantifying loss and the proliferation of claims that may unduly burden defendants. Although it is arguable that an order to apologise can overcome some of these concerns, in particular the difficulty of valuing non-pecuniary loss, it can be argued on the other hand that other dangers will arise, such as ‘tokenism’ and cheapening the ‘currency’ of apologies, if apologies are ordered as a remedy more often and in a wide range of circumstances.

## **C Forced speech**

An order to apologise compels a defendant to speak or risk a penalty for contempt. This excites at least two concerns. First, there is a concern about the potential threat to the defendant’s liberty which would not be present if a damages order was made against the defendant. Non-compliance with a coercive order can result in fines or imprisonment for contempt. A court is likely to be reluctant to make an order that will place a defendant in the position where he or she will face proceedings for contempt of court, because the order involves coerced speech and will not prevent threatened or apprehended harm. Key factors likely to be considered by a court are: whether the case involves a willing or unwilling defendant; whether the defendant is a natural or a corporate person; and the possibility that he or she will face imprisonment for contempt as opposed to a fine or some other order that does not impinge upon personal liberty.

The second concern is about interference with freedom of speech. This was one of the grounds on which Young J refused to order the defendant in *Summertime Holdings* to perform the terms of a settlement agreement in which they had agreed to broadcast an apology.<sup>147</sup> This is likely to be a highly significant factor in decision-making concerning an apology order. In the absence of a

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<sup>145</sup> The case concerned the Queensland *District Court Rules 1968* (Qld) reg 118(1).

<sup>146</sup> The same is approach was taken by Carruthers AJ in the New South Wales Supreme Court in *Assaf v Skalkos* [2000] NSWSC 935 (5 October 2000).

<sup>147</sup> *Summertime Holdings* (1998) 45 NSWLR 291, 297.

constitutional right to free speech, however, it is not an absolute impediment to an exercise of equitable discretion in favour of an apology order in a tort claim in Australia.<sup>148</sup> A claim for an apology as a form of specific relief for breach of contract will only arise in circumstances where there has been a promise to apologise, as in *Summertime Holdings*. In those circumstances, it is submitted a court need feel less concerned about the defendant's freedom of speech because the defendant has by, the terms of his or her contract, already agreed to some level of interference with that right.

When an apology order is made as a statutory remedy, a court can determine that Parliament has chosen the right protected by the statute in question over freedom of expression, which is not, after all, an absolute right. This has been recognised to be the case with respect to equal opportunity legislation. Arguably, it will be implicit when Parliament confers power on a court to order a defendant to apologise, that this power may be exercise, in appropriate cases, to override the right to express oneself (for example to speak words that are discriminatory or vilify a section of the public) and in other cases the right to refuse to utter an apology.

#### **D Sincerity and the Value of an Apology that Is neither Heartfelt nor Offered Willingly**

There are two interrelated issues here. The first relates to the belief that an apology, if not spoken with sincerity and with the intention of conveying heartfelt feelings of sorrow, regret and remorse, is not an apology at all and is therefore a meaningless gesture. This view has been expressed by a number of judges and has formed a part, at least, of their reason for refusing to make an apology order. The second relates to the view that to order an apology that is not sincere is an exercise in futility, and should therefore be refused because equity 'will not make an order in vain'.<sup>149</sup> This view is reflected in a number of equal opportunity cases in which judges have declined a request for an apology order on this basis. These concerns — as to whether a plaintiff would be receiving an apology at all, and whether a court should make an order that it does not believe will benefit the plaintiff — are valid. As the author has argued previously, however, an assessment of the 'utility' of an apology, including an ordered apology, needs to take into account the empirically based theory referred to in pt III, that from a psychological point of view, an apology that is not offered freely or sincerely may still have some value to the recipient. When coupled with the other purposes that coercive orders are said to advance, discussed in pt V, a court can take a more expansive view of what benefit there might be to the plaintiff and in the interests of justice more generally in ordering a defendant to apologise for wrongdoing.

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<sup>148</sup> Contrast the situation in the United States where the constitutionally guaranteed freedom of speech under the First Amendment to the *United States Constitution* largely precludes the availability of the apology as a civil remedy or a remedy for unlawful discrimination. For discussion see White, above n 23, 1298–300.

<sup>149</sup> *New Brunswick and Canada Railway and Land Co v Muggeridge* (1859) 4 Drew 686, 699 (Kindersley V-C).

A further point needs to be made about the decision of a court to decline to make an apology order against a defendant. Where a statute has conferred power on a court to make an apology order, it will be a discretionary power. In exercising its discretion, the court is required to weigh up the circumstances of the case and, it is submitted, the possibility that the ordered apology will have value to the plaintiff. It is appropriate that an individual judge's views about the utility of an ordered apology in a *particular* case influence his or her decision. It is submitted that it is not appropriate for judges to decline to make an apology order in every case because they believe that a court-ordered apology serves little purpose. In *Forest v Queensland Health*,<sup>150</sup> Collier J held that the respondent, Queensland Health, had unlawfully discriminated against the applicant, Forest, under the *Disability Discrimination Act 1992* (Cth). It was not in contention that the court had the power to order an apology to be made by the respondent (whether that be the Minister or an authorised officer of the respondent) to the applicant.<sup>151</sup> The issue, as identified by Collier J, was whether it was appropriate for an order to be made in the circumstances of this case. Regarding that issue her Honour stated:

While courts in human rights cases have sometimes ordered that apologies be made ... like many other judges before me, I consider that a court-ordered apology serves little purpose...

Accordingly, I am not prepared to make an order that anyone on behalf of the respondent apologise to the applicant, or to make any observations as to whether an apology should be made in these circumstances.<sup>152</sup>

It is possible to construe as her Honour's reason for declining to make the order as that she was satisfied on the facts that this was a case where a court-ordered apology would serve little purpose. If, on the other hand, the word 'accordingly' is taken to mean that, effectively, there are no circumstances in which she would consider it appropriate to make an order to apologise, it is submitted this is not a proper exercise of the statutory discretion conferred on the court.

## E *Correction versus Apology*

If it is the description of the court order as an 'apology' and the use of words of apology in the absence of sincere contrition or remorse that causes disquiet, there is another way to provide redress through an acknowledgement of unlawful conduct. In *Eatock v Bolt (No 2)*, Bromberg J expressed the view that the purposes a corrective notice can serve to facilitate are:

redressing the hurt felt by those injured; restoring the esteem and social standing which has been lost as a consequence of the contravention; informing those influenced by the contravening conduct of the wrongdoing involved; and helping to negate the dissemination of racial prejudice.<sup>153</sup>

<sup>150</sup> [2007] FCA 1236 (14 August 2007).

<sup>151</sup> An order of this nature can be made pursuant to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46PO(4)(b).

<sup>152</sup> *Forest v Queensland Health* [2007] FCA 1236 (14 August 2007) [13]–[14] (citations omitted).

<sup>153</sup> *Eatock v Bolt (No 2)* (2011) 284 ALR 114, 118 [15].

Others might consider that these aims will also be achieved by an apology in the terms described in *Burns*: that is, an acknowledgment of wrongdoing under anti-discrimination legislation that is understood as fulfilment of a legal requirement. Describing a published statement as a 'corrective notice' rather than an 'apology' overcomes one concern. But it might not serve the purpose of those who believe that what is owed is an apology, not a correction. In the end, the more appropriate description of these types of orders might be an 'acknowledgment of legal wrongdoing'. However the order is described and whether or not in its terms the wrongdoer is required to state that he or she apologises, it is clear that a court cannot compel a personal or sincere apology.

### ***F The Legal Personality of the Parties***

Interesting questions arise when we contemplate apologies ordered in favour of plaintiffs and against defendants that are corporate entities. Concerns about expression of sincerely held emotions, interference with freedom of speech and the consequences of being in contempt are largely premised on the defendant being a natural person, capable of feeling and expressing emotions and entitled to the protection of their liberties. Certainly legal personality is significant to action in torts where the aim of some torts is to protect personal interests, such as reputation, dignity and feelings. Corporate entities do not have the personal attributes of a natural person, accordingly it is their economic interests that are protected by common law and statutory actions and remedies. On the other hand, corporate entities are often defendants in actions in which remedies are sought to protect personal interests. There is nothing novel about an apology order being made against a corporate or even a government body and there are plenty of examples of this in the equal opportunity jurisdiction.

Interesting questions arise, however, about the significance of the legal personality of the defendant to concerns about freedom of speech and the spectre of imprisonment as a penalty for contempt. One would expect a court to be less concerned about these when making an order against a corporation or a government body than where the defendant is a natural person. The argument might even be advanced that an apology order should only be made against an incorporated defendant. If one were to adopt this view, these concerns might be ameliorated. Other concerns arise, however, about the meaning of apology and the value of an apology made by or on behalf of a non-natural person. There is no empirical research to inform us of the significance that the legal personality of a defendant has to the wish for or value of an apology order to a plaintiff. Based on the frequency with which apologies are sought from (and given by) corporate and government entities in the equal opportunity jurisdiction, one can surmise that they have some psychological, vindicatory and other value to the parties who seek them.

## G *Enforceability of an Apology Order*

Apology orders, being coercive in nature, inevitably raise issues of enforcement and the significant consequences of contempt, mentioned above.<sup>154</sup> The likelihood of compliance and the severity of the consequences for the defendant will be factors taken into account by a court or tribunal from whom an apology order is sought. This issue can be anticipated by court orders in some circumstances. For example, in *Cohen v Harguao (No 2)*,<sup>155</sup> the New South Wales Anti-Discrimination Tribunal ordered that an apology be published in two separate newspapers and invoked the default provisions in the *New South Wales Anti-Discrimination Act 1977* (NSW) in ordering that the respondent pay an additional sum of A\$2000 damages to the complainants if the apologies were not published within 28 days.<sup>156</sup>

## H *The Impact of Ordering Apologies on the Settlement of Disputes*

It is an interesting twist that the availability of apologies as a court order might be seen to *discourage* out-of-court settlements. In its *Report on Invasion of Privacy* the NSWLRC noted that it received submissions during the consultation process arguing that the ability of courts to order apologies would act as a disincentive to out-of-court settlements because it would mean that the defendant would be unable to offer the plaintiff something that the courts could not offer.<sup>157</sup> The NSWLRC took a contrary view, and in doing so agreed with the ALRC, that ‘the main incentive for an out-of-court settlement is to save time, costs and the possible emotional trauma of a court hearing’.<sup>158</sup>

The NSWLRC concluded that the court’s ability to order an apology may itself prove an incentive to settle for those defendants who wish to avoid such a remedy at all costs.<sup>159</sup> This is certainly one possible argument to counter the reported submitted concern. Another argument is that the availability of apology orders and the development of judicial reasoning as to their purpose and the circumstances in which they will be made will better inform parties and their lawyers in settlement negotiations.

## VII Conclusion

This article has identified a variety of circumstances in which an apology is available as a remedy in Australian law. Courts invested with equitable jurisdiction have the power to order an apology using some form of order for specific relief. It is suggested, however, that this is a power a court will be slow to exercise for a

<sup>154</sup> See pt VI A of this article.

<sup>155</sup> [2006] NSWADT 275 (22 September 2006).

<sup>156</sup> This example of enforcing compliance through a monetary payment in the event of default is provided in Rees, Lindsay and Rice, above n 69, 608.

<sup>157</sup> NSWLRC, above n 94, 67 [7.25].

<sup>158</sup> ALRC, above n 94, vol 3, 2580 [74.179].

<sup>159</sup> NSWLRC, above n 94, 67–8 [7.26]. This view is also reflected in the judgment of the Hong Kong Court of Final Appeal in *Ma Bik Yung* [2002] 2 HKLRD 1, 23.

number of reasons. First, common law jurisdictions have a marked preference for monetary remedies in the form of compensatory damages, with equitable remedies ranking second and declaratory relief 'a distant third'.<sup>160</sup> Second, a court is likely to be reluctant to depart from remedies traditionally available for common law wrongs for fear of appeal and possible reprimand for unorthodox use of equitable relief. Third, in exercising its discretion to order equitable relief, a court will be concerned about interfering with the defendant's freedom of speech. Fourth, there may be indications of legislative intention that direct courts away from exercising their remedial discretion to develop the apology as an order

An order to apologise is more likely to be made pursuant to a power conferred by statute. In this case, the remedy will usually serve remedial and statutory purposes that go beyond meeting the remedial needs of the individual plaintiff.

Broadly stated, the arguments in favour of ordering an apology as a personal remedy are that it gives effect to a plaintiff's remedial preference and it serves remedial purposes beyond compensation. There has been little empirical research conducted to verify what remedial purposes are actually served by legal remedies generally and there is an absence in particular of research into the value attributed to an ordered apology by litigants, courts and lawyers. There is some support in the empirical research referred to in this paper for the conclusion that an ordered apology may be perceived to have psychological value to a person who has been wronged by another. This supports a theory that apology has many meanings and the value people attribute to each apology is highly circumstantial. Accordingly, the absence of willingness and sincerity will not necessarily mean that an ordered apology has no value to a plaintiff. Some of the circumstances identified in this paper in which apology orders can be made involve an order to apologise to the public or a section of the community rather than to an individual. In the absence of empirical research on the effectiveness of these remedial orders, arguably they will rely for their justification on regulatory theories and theories relating to collective apologies.

There is evidence of growing legal interest in the apology as a means of redress for civil wrongdoing. This article provides an overview of the law on apologies as a remedy and identifies a number of the issues and challenges that need to be addressed if apologies are to play a greater and more formal remedial role than in the past. The potential identified in this article for ordering that apologies be made in circumstances other than when an individual has suffered harm as a result of wrongdoing calls for closer scrutiny and debate, as many of the precepts on which existing orders to apologise have been justified are not necessarily present. As a first step, by ensuring that lawmakers, lawyers, judges and the wider community are aware that orders of this nature can be made, careful consideration can be given to the circumstances in which this is appropriate and to the meaning of apology in the context of legal remedies.

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<sup>160</sup> Grant Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies' in Jeffrey Berryman (ed) *Remedies: Issues and Perspectives* (Carswell, 1991) 87, 94.