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Details of Filing

Document Lodged:	Expert Report
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File Title:	AUSTRALIAN BROADCASTING CORPORATION v MARTIN KANE & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 30/09/2019 1:31:19 PM AEST

Registrar

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Tuesday 24 September 2019

WRITTEN OPINION FOR USE IN A LEGAL PROCEEDING IN THE FEDERAL COURT

I, MATTHEW DAVID RICKETSON, of Hastings Street, McKinnon, Victoria, Professor of Communication at Deakin University, do solemnly and sincerely affirm as follows:

1. I write this opinion from my own knowledge, study and experience.

My professional qualifications

2. I have been professor of communication at Deakin University since April 2017 and before that I was the inaugural professor of journalism at the University of Canberra between 2009 and 2017.
3. I worked as a journalist on staff at *The Age*, *The Australian* and *Time Australia* magazine, among other publications, for 12 years before becoming a lecturer in journalism at RMIT where I subsequently headed the journalism program between 1995 and 2006. I then returned to *The Age*, as Media and Communications editor, between 2006 and 2009.
4. In 2011 I was appointed by the federal government to assist Ray Finkelstein QC in an Independent Inquiry into the Media and Media Regulation. The inquiry examined whether the regulations for print and online media in Australia were functioning well. It also examined journalism ethics and standards.
5. I was president of the Journalism Education and Research Association of Australia (JERAA) between 2012 and 2018. JERAA is the peak body representing academics working in more than 30 journalism programs around Australia.
6. I have been the Media Entertainment and Arts Alliance's (MEAA) representative on the Press Council since 2016. The MEAA is the journalists' union, and it is its Code of Ethics that requires journalists to protect confidential sources. The Press Council is a national self-regulatory body that hears complaints about journalistic coverage in print and online media.
7. I have been chair of the board of directors of the Dart Centre Asia-Pacific since 2012. Dart is a not-for-profit organisation whose headquarters are at Columbia University's school of journalism in the United States. Dart's role is to assist journalists who cover traumatic events and issues, including war and war crimes. Dart advocates for ethical journalism about traumatic events and issues, including war and war crimes.
8. I am the author or editor of four books about the theory and practice of journalism: *Australian Journalism Today*, *Writing Feature Stories*, *The Best Australian Profiles* and *Telling True Stories*. The last named book draws on my PhD thesis, entitled "Ethical Issues in the Practice of Book-length Journalism", which I completed at Monash University in 2009.

My obligations

9. My report complies with the Federal Court's Expert Evidence Practice Note and the court's Expert Witness Code of Conduct, copies of which have been provided to me.
10. The questions that I have been asked to address by Michael Rippon, Senior Lawyer for the Australian Broadcasting Corporation (ABC), in a letter to me dated 23 September 2019 are as follows:
 - What are the obligations of journalists in relation to: promising not to disclose the identity of an informant; and keeping a promise not to disclose the identity of an informant?
 - What effect, if any, can a journalist's promise not to disclose the identity of an informant have on the willingness of that informant to provide information to journalists?
 - If the identity of an informant were discovered, or put at risk of discovery, through the seizure of documents under a search warrant, what effect, if any, could that discovery, or risk of discovery, have on: that informant; and the willingness of other informants to provide information to journalists?

Protection of confidential sources

11. The requirement of journalists to protect the identity of confidential sources of information is an important element of the MEAA Code of Ethics, which is available online at <https://www.meaa.org/meaa-media/code-of-ethics/>. The code applies to journalism in all the news media, including print, broadcast or online. The Walkley awards are the most prestigious prizes in Australian journalism; those entering them are required to affirm that they have abided by the MEAA Code of Ethics in their work.
12. Clause three of the MEAA Code requires that journalists:

Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.

13. The current drafting of this clause is more nuanced than was the original code, which was drafted in 1944. At that stage the Code simply required that a journalist *respect all confidences received by him in the course of his calling*. The modern clause requires that journalists think carefully before agreeing to keep a source's identity confidential. This change came about because of a recognition that, on the face of it, failing to disclose the identity of a source is contrary to the free flow of information that is central to the role of journalism.
14. The granting of anonymity to sources can be abused as it enables sources to make allegations about people to which they do not need to put their name. That is why the MEAA, following a review of the code of ethics in the 1990s, considered it necessary to account for and mitigate against the inherent tension between openness and secrecy in the use of confidential sources, as well as addressing the possibility of sources acting in bad faith.
15. The current drafting of the code requires a journalist to consider whether the free flow of information can be achieved without recourse to a source who is unwilling to speak on the record for publication or broadcast. It further requires a journalist consider the source's motives for disclosure before promising to keep their identity confidential.
16. This means that by the time anonymity has been promised the journalist has already made a judgement call that they cannot obtain disclosure without keeping the source's identity secret. In my experience journalists do consider this hurdle imposed by the modern form of the Code. By definition, then, it is reasonable to assume that those disclosures would not have been made without the promise of anonymity.
17. Once the journalist makes the agreement, though, the Code requires them to keep it. This requirement applies even if that means refusing to reveal a source's identity in court

proceedings up to and including non-compliance with an order to reveal a source's identity. In my experience, this is a commitment that is taken very seriously and is central to the personal ethical code of the many journalists whose work I have studied and with whom I have discussed the issue over the course of my career.

18. The journalist's agreement to keep a source's identity confidential, even if that means going to gaol for contempt of court, is a powerful tool for journalists aiming to win the trust of source who themselves could be at risk of legal action or losing their livelihood (or in extreme cases their lives) if their identity was known to the people and institutions about whom they disclose information.
19. In the case of informants who are the victims of crime or abuse who work up the courage to disclose information about their abusers, in my experience journalists reporting on these issues consider that it is particularly important that the trust informants show to a journalist is honoured. This is because the journalists consider that to do otherwise would compound the damage that has already been done to these informants' ability to place their trust in others.
20. In the case of informants who work within institutions, including military and intelligence services, and disclose information about failures, real or perceived, in their institutions, in my experience journalists reporting on these issues consider that it is similarly important that the trust informants show to a journalist is honoured. This is because not only of the courage that is required for informants to speak out about problems in their institution but of the consequences of speaking out, which may include being ostracised, demoted, forced to resign or charged with an offence.
21. It is my opinion, based on the many years I have been observing, studying and writing about the theory and practice of journalism, that if these types of informants became aware that a journalist's promise of confidentiality was unreliable, there would be significantly fewer disclosures by victims and other witnesses of crime and abuse.
22. It is my opinion too that the discovery, or the risk of discovery, of an informant's identity through the seizure of documents under a search warrant would have a chilling effect on the willingness of prospective informants to come forward because of the penalties applied to those found to have disclosed to a journalist information that has been deemed by an institution, including military and intelligence services, to be secret. These penalties are included in a number of pieces of legislation.
23. There is an inherent and legitimate tension between freedom of the press and national security. Freedom of the press is a principle exercised by the news media on behalf of the general public, and national security is a principle exercised by governments and law enforcement agencies on behalf of the general public. The tension arises from weighing the merits of these two principles, both of which are valued in the body politic. One does not always outweigh the other but it is difficult to discern which one does, and in what circumstances. There is a need to weigh the public interest importance of the journalism against the importance, or the imminence, of the threat to national security.
24. It is my opinion, based on study and experience, that there have been instances of the news media producing journalism that is not in the public interest, but is instead irresponsible or sensationalist or unethical. It is equally possible to find instances of governments using national security to cloak actions and behaviours that are incompetent or corrupt or illegal. It is a difficult task for parliaments to frame laws that ensure those in positions of power, whether in the news media or in government or law enforcement agencies, are held to account for the actions they take on behalf of the public.
25. It is more difficult when there has been a proliferation in the past two decades of national security laws that preclude almost any public scrutiny and which impose significant penalties on those working within institutions who feel impelled to disclose failings, real or perceived, of the institutions. It is important that there is balance between the strength of laws that protect national security and those that protect freedom of the press and the whistleblowers who make disclosures to the press.



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PERSONAL DETAILS

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ACADEMIC QUALIFICATIONS

2010 - Doctor of Philosophy, Monash University. Title of thesis: "Ethical issues in the practice of book-length journalism". The thesis was passed in January 2010 and I graduated in April 2010. The thesis was graded as being in the top five percent in the world by the international examiner.

2000 - Master of Arts (Communication Studies), RMIT University. The masters degree was done by project rather than thesis. The project was a journalistic biography of the Australian author Paul Jennings. It was accompanied by a 20,000 word exegesis about the issues that arose in researching and writing the biography.

1980 - Bachelor of Arts (Honours), Monash University. Majored in English and history. Honours in English. Thesis on the playwright Tom Stoppard. Overall result: HIIA.

EMPLOYMENT HISTORY

2017- Professor of Communication, Deakin University

Duties include responsibility as Head of Academic Group for the Bachelor of Communication with streams in Advertising, Digital Media, Journalism and Public Relations as well as a Masters of Communications. Supervision of 24 full-time academic staff members.

2009 –2017: Professor of Journalism, University of Canberra

July 2015 – Head of Discipline of Communication, convenor of Bachelor of Sports Media and, from February 2015, deputy chair of Academic Board

Duties include responsibility for bachelor degrees in Advertising, Communication, International Studies, Journalism, Public Relations and Sports Media. Supervision of 16 full-time academic staff members.

January 2014 to June 2015: Convenor of Bachelor of Sports Media and member of Academic Board

Duties included overseeing an undergraduate degree and hiring sessional contract staff members.

July 2013 to December 2013: Acting Head of Discipline of Journalism and Creative Writing

Duties included responsibility for bachelor degrees in Journalism and Creative Writing as well as a graduate diploma in Creative Writing. Supervision of four full-time academic staff members.

April 2012 to June 2013: Convenor of the Bachelor of Journalism and Bachelor of Sports Media; member of Academic Board (from March 2013)

Duties included overseeing two undergraduate degrees and hiring sessional contract staff members.

September 2011 to March 2012: Member of the Independent Inquiry into the Media and Media Regulation

I was appointed by the federal Labor government to assist retired Federal Court judge, Ray Finkelstein, QC, in conducting an inquiry into Australia's media. The report was delivered to government at the end of February 2012.

March 2009 to October 2011: Head of Discipline of Journalism and Communication

Duties included responsibility for bachelor degrees in Advertising, Communication, Journalism and Public Relations as well as coursework masters degrees in Advertising and Marketing Communication and in Information Studies. Supervision of 24 full-time academic staff members.

June 2006 to March 2009: Media and Communications Editor, *The Age*

In this position I reported on and analysed the media as a round for the newspaper, for both its print edition and its website. The position included writing news articles, opinion and features about media regulation, trends, consumer habits, and the future of the media across the print, broadcast and online media. Starting in 2007 I wrote a blog entitled *Media Matters* that was published at theage.com.au.

Between June 2006 and February 2009 I had more than **500 articles** published in *The Age*. The bulk of these articles were also published online at theage.com.au and a minority were published in *The Sydney Morning Herald*. During this period I was away from *The Age* for four months, between December 2007 and March 2008, on a leave of absence to work on my PhD.

Among the issues I covered were: the leaked affidavit by Channel Nine producer Mark Llewellyn; Chris Masters' book *Jonestown*; the federal coalition government's package of bills to overturn the cross-media ownership laws; the shake-up of the media landscape following the passing of the bills, including the merger of John Fairfax Holdings with Rural Press and the staged withdrawal of James Packer from the media; the Australian Communication and Media Authority's report on Alan Jones' broadcasts leading up to the Cronulla riots; the profile of Wendi Deng that *Good Weekend* commissioned but did not publish; an observational feature on the making of *The Chaser's War on Everything*; the

scandal surrounding Channel Seven's broadcast about two AFL players' medical records; media coverage of the 2007 federal election campaign, including the role of Caroline Overington of *The Australian* in the newspaper's campaign against *Media Watch*; the Campaign for the Right to Know by Australia's leading media companies; the Future of Journalism summit; the controversy sparked by Sam Newman's mishandling of a mannequin dressed to represent chief football writer of *The Age*, Caroline Wilson; the Australian Law Reform Commission's report on Privacy and the media, and Fairfax Media's decision to slash its workforce by 550.

From July 2008 I was responsible for the production of a weekly broadsheet half-page on media issues that appeared in the Business section on Wednesdays. It included a segment called My Media diet and a column and/or news stories written by me. News stories included reports on the latest research from the Australian arm of the World Internet Project, research on how people engage with the video sharing website, YouTube, and, in late October, an exclusive interview with federal Communications Minister, Stephen Conroy, that ran on page one.

February 1993 to April 2006: Lecturer and Senior Lecturer in Journalism, RMIT University

Duties included running the Journalism program between 1995 and 2006 at undergraduate and postgraduate levels, teaching an extensive range of undergraduate and postgraduate subjects in journalism, and supervising postgraduate projects and theses.

November 1989 to January 1993: Senior writer, *Time Australia* magazine

July 1989 to October 1989: Journalist, *The Sunday Herald*

July 1986 to June 1989: Journalist, *The Australian*

January 1982 to June 1986: Cadet and graded journalist, *The Age*

September 1981 to January 1982: Journalist, Standard Newspapers

January 1981 to September 1981: Trainee, D'Arcy, McManus and Masius advertising agency

RESEARCH PROJECTS

2016: Award-winning journalists and the subjects of their stories: two perspectives on trauma reporting.

Co-chief investigator with Professor Elana Newman, University of Tulsa. Initial phase of the research is being funded by a period of OSP leave in the second half of 2016. I have recently spent five weeks working at the Dart Center for Journalism and Trauma, at Columbia University, in New York, including three days working with Professor Newman in Oklahoma.

2015: Australian Press Council consultancy about comments policies and practices in newspapers and their websites.

Co-chief investigator, with Dr Glen Fuller. Value of consultancy: \$13,000.

2015-2017: New Beats: mass redundancies and career change in Australian journalism. ARC Discovery Project (DP150102675).

Administering university is La Trobe. Value of grant: \$236,700. Share of grant to University of Canberra: \$44,500.

2014-2016 New Beats: mass redundancies, career changes and the future of Australian journalism. ARC Linkage project (LP140100341).

Administering university is La Trobe. Value of grant: \$270,756. Share of grant to University of Canberra: \$43,308.

PUBLICATIONS

A – BOOKS - 3

A1 Authored – research

Ricketson, M. *Telling True Stories: Navigating the challenges of writing narrative non-fiction*, Allen & Unwin, 2014.

Ricketson, M. *Writing Feature Stories*, Allen & Unwin, 2004

Ricketson, M. *Paul Jennings: “The boy in the story is always me”*, Viking, 2000.

A2 Authored – other

A3 Edited - 2

Ricketson, M, ed. *Australian Journalism Today*, Palgrave Macmillan, 2012.

Ricketson, M, ed. *The Best Australian Profiles*, Black Inc., 2004.

A4 Revision/New Edition - 1

Ricketson, M and Caroline Graham. *Writing Feature Stories*, Allen & Unwin, 2nd edition, January 2017.

B – BOOK CHAPTER - 17

Ricketson, M. (2018) When one person’s noble whistleblower become another’s poisonous leaker. In J. Lidberg & D. Muller (Eds), *In the name of security - secrecy, surveillance and journalism* (pp. 101-120). London: Anthem Press. (Indexed Trove)

Ricketson, M. "The ghost in the memoir machine: exploring the relationship between ghostwritten memoir and biography", in *Mediating Memory: Tracing the Limits of Memoir*, Routledge Interdisciplinary Perspectives on Literature, edited by Bunty Avieson, Fiona Giles and Sue Joseph, Routledge, New York, 2018, pages 43-58.

Mascall-Dare, S and M. Ricketson. "What's the story? Journalism ethics and the Anzac centenary", in *Beyond Gallipoli: new perspectives on ANZAC*, edited by Raelene Francis and Bruce Scates, Monash University Publishing, Clayton, 2016, pp 37-54.

Ricketson, M. "Wanted for questioning: interviewers on the art and craft of interviewing", in *Media Innovation and Disruption*, edited by Andrew Dodd and Helen Sykes, Future Leaders publications, Melbourne, 2016, pp 99-113.

Ricketson, M and K. Murphy. "The Abbott and Turnbull governments and the media", in *From Abbott to Turnbull: A New Direction?* Australian Commonwealth Administration 2013-2016, edited by Chris Aulich, Echo Books, West Geelong, 2016, pp 95-116.

Ricketson, M. "John Clarke and the power of satire in journalism", *The Funniest Pages: International Perspectives on Humor in Journalism*, edited by David Swick and Richard Lance Keeble, Peter Lang, New York, 2016, pp 153-167.

Ricketson, M. "The Return of the Long-Form Profile: A Case Study of the *Quarterly Essay* and *The Monthly* in Australia", in *Profile Pieces: Journalism and the 'Human Interest' Bias*, edited by Sue Joseph and Richard Lance Keeble, Routledge, Oxford, 2016, pp 70-86.

Tiffen, R and M. Ricketson. "Regulating Journalism in Australia", in *Perception and Consideration of Media Regulation issues in Represented Countries*, edited by Pierre Trudel and Daniel Giroux, Centre d'études sur les medias, University of Montreal Press, Montreal, Canada, 2014, pp 15-40.

Young, S and M. Ricketson. "The Gillard government and the media", in *The Gillard Governments: Australian Commonwealth Administration 2010-2013*, edited by Chris Aulich from ANZSOG Institute of Governance, Melbourne University Press, Carlton, 2014, pp 287-308.

Papandrea, F and M. Ricketson. "State aid for newspapers: Not a priority in Australia", in *State Aid for Newspapers - Theories, Cases, Actions*, edited by Paul Murschetz, Springer-Verlag, Berlin, Germany, 2013, pp 115-131.

Nolan, S and M. Ricketson. "Unintended consequences", in *By the Book? Contemporary Publishing in Australia*, edited by Emmett Stinson, Monash University Publishing, Clayton, Melbourne, 2013, pp 29-39.

Ricketson, M. "The new appreciation of long-form journalism in a short-form world", in *Australian Journalism Today*, edited by Matthew Ricketson, Palgrave Macmillan, South Yarra, 2012, pp 217-233.

Ricketson, M. "Staniforth Ricketson and the rejuvenation of *The Argus*," in *The Argus: The life and death of a great Melbourne newspaper, 1846-1957*, edited by Muriel Porter, RMIT University, Melbourne, 2004, pp 159-173.

Ricketson, M and Rick Snell. "Freedom of Information: threatened by governments, under-used by journalists - still a sharp tool," in *Journalism, Investigation and Research*, edited by Stephen Tanner, Pearson Education Australia, 2002, pp 150-164.

Ricketson, M. "True Stories: The power and pitfalls of literary journalism," in *Journalism: Theory in Practice*, edited by Suellen Tapsall and Carolyn Varley, Oxford University Press, Sydney, 2001, 149-165.

Ricketson, M. "Newspaper feature writing in Australia 1956-1996," in *Journalism: Print, Politics and Popular Culture*, edited by Ann Curthoys and Julianne Schultz, University of Queensland Press, Brisbane, 1999, pp 168-184.

Ricketson, M. "Helen Garner's *The First Stone*: Hitchhiking on the credibility of other writers", in *Bodyjamming*, edited by Jenna Mead, Random House, Sydney, 1997, pp 79-100.

An edited version of this book chapter was reprinted in *Authority and Influence: Australian literary criticism 1950-2000*, edited by Delys Bird, Robert Dixon and Christopher Lee, University of Queensland Press, St. Lucia, 2001.

C – JOURNAL ARTICLES - 21

C1 Refereed article in a scholarly journal

Dodd, A., Davies, K., Snowden, C. & Ricketson, M. (2018) Collaboration on a national scale: Journalism educators, students and the 2016 Australian federal election. *Australian Journalism Review*, 40(1), 35-50.

Ricketson, M. "Taking journalism and trauma seriously: the importance of the A-Z case", *Australian Journalism Review*, 39 (2), December 2017, pages 177-189.

Ricketson, M. "The underappreciated role of creativity in journalism", *Text*, Special Issue 40, "Making it new: finding contemporary meanings for creativity", April 2017, <http://www.textjournal.com.au/speciiss/issue40/Ricketson.pdf>.

Zion, L, A. Dodd, M. Sherwood, P. O'Donnell, T. Marjoribanks and M. Ricketson. "Working for less: the aftermath for journalists made redundant in Australia between 2012 and 2014", *Communication Research and Practice*, vol. 2, issue 2, 2016, pp 117-136.

Zion, L., Sherwood, M., O'Donnell, P., Dodd, A., Ricketson, M., and Marjoribanks, T.(2016). "It has a bleak future": The effects of job loss on regional and rural journalism in Australia. *Australian Journalism Review*, 38, (2), pp. 115-128.

Ricketson, M. "When slow news is good news: Book-length journalism's role in extending and enlarging daily news", *Journalism Practice*, vol 10, issue 4, 2016, pp 507-520. Published online 1 December 2015.

Dodd, A and M. Ricketson. "The Australian's Media supplement: A lapdog, a watchdog, an attack dog or all of the above?", *Media International Australia*, vol 57, no 1, November 2015, pp 68-78.

Hess, K., Waller, L. and M. Ricketson, "Are there news gaps in rural/regional Australia? Researching media plurality beyond Finkelstein", *Australian Journalism Review*, vol 36, no 2, December 2014, pp 171-182.

Ricketson, M. "From making front page to landing between covers: An ethical inquiry into contemporary book-length journalism in Australia", *Ethical Space: the international journal of communication ethics*, vol 11, no 4, 2014, pp 12-20.

Sweet, M., P. Dudgeon, K. McCallum and M. Ricketson, "Decolonising practise: can journalism learn from health care to improve Indigenous health outcomes?" *Medical Journal of Australia*, 200 (11), June 2014, pp. 626-7.

Ricketson, M. "Speaking truth to media power", *Australian Journalism Review*, vol 35, no 2, December 2013, pp. 149-156.

Ricketson, M. "Navigating the access swell, the independence shoals and the siren song of narrative: a comparison of the work of Bob Woodward, Mark Danner and WikiLeaks". *Text*, vol. 17, no 2, October 2013. Under the previous ranking system, *Text* was an "A" journal.

Breit, R, and M. Ricketson. "News' Australian Story of Ethics and Self-regulation: A Cautionary Tale," *Television & New Media*, Online first edition, October 2011.

Ricketson, M. "Not muddying, clarifying: towards understanding the boundaries between fiction and non-fiction," *Text*, vol. 14, no 2, October 2010. Under the previous ranking system, *Text* was an "A" journal.

Ricketson, M. "Truman Capote and the world he made," *Meanjin Quarterly*, vol 69, issue 3, Spring, 2010: 89-101. Under the previous ranking system, *Meanjin* was initially an "A" journal and later was unranked.

Ricketson, M. "The vibrant state of book-length journalism in Australia," *Australian Journalism Review*, 32 (1), August 2010, pp 67-79.

Ricketson, M. "Reassessing Janet Malcolm's *The Journalist and the Murderer*", *Australian Journalism Review*, vol.28, issue 1, 2006, pp 219-228.

Ricketson, M. "Freedom of Information and authors: an unsung treasure trove", *FOI Review*, issue 94, August 2001.

Ricketson, M. "Freedom from information", *FOI Review*, issue 63, June 1996.

Ricketson, M. "Ten years of Freedom of Information: what has it meant?" *FOI Review*, issue 53, October 1994.

Ricketson, M. "Why journalists should use and cover Freedom of Information laws", *Australian Journalism Review*, vol. 12, 1990.

C2 Other refereed contribution to a scholarly journal -1

Ricketson, M and S. Joseph. Guest editors, *Australian Journalism Review*, vol 37, issue 2, December 2015, "Literary journalism: Looking beyond the Anglo-American tradition" which included eight articles.

C3 Non refereed articles

Ricketson, M. "Teaching non-fiction: overcoming prejudices to non-fiction writing when teaching literary journalism", *IALJS Newsletter*, Winter 2018, pages 27 and 22.

Ricketson, M. "Strengths and defects", *Sydney Review of Books*, 12 February 2015.
<http://www.sydneystudies.com/triumph-demise-power-failure/>.

Ricketson, M. Book review: *David Syme: Man of 'The Age'*, by Elizabeth Morrison, Monash University Publishing, Clayton, 2014. *The Age*, 8 November 2014.

Ricketson, M. Book review: *The Snowden Files: The inside story of the world's most dangerous man*, by Luke Harding, Vintage, London, 2014. *Ethical Space: The International Journal of Communication Ethics*, vol 11, no 3, 2014.

Ricketson, M. Book review: *Rupert Murdoch: A Reassessment*, by Rodney Tiffen, NewSouth, Sydney, 2014, 374 pages. *Australian Journalism Review*, 36 (1), 2014.

Ricketson, M. Book review: *Fairfax: The Rise and Fall* by Colleen Ryan Melbourne University Publishing, Carlton, 302 pages, and *Killing Fairfax: Packer, Murdoch & the Ultimate Revenge* by Pamela Williams Harper Collins, Sydney, 352 pages. *Sydney Review of Books*, November 2013.

Ricketson, M. Book review: *Literary Journalism Across the Globe*, by John Bak and Bill Reynolds, University of Massachusetts Press, Amherst, 306 pages, and *Global Literary Journalism: Exploring the Journalistic Imagination*, by Richard Keeble and John Tulloch, Peter Lang, New York, 408 pages. *Australian Journalism Review*, 35 (1), 2013.

Ricketson, M. Book review: *Rupert Murdoch: An Investigation of Political Power* by David McKnight, Allen & Unwin, Sydney, 285 pages, and *Dial M for Murdoch* by Tom Watson and Martin Hickman, Allen Lane, London, 340 pages. *Australian Journalism Review*, 34 (2), December 2012.

Ricketson, M. Book review: *The Inside Scoop: A Guide to Nonfiction Investigative Writing and Exposés*, by Sarah Statz Cords, Libraries Unlimited, Westport, Connecticut, 449 pages. *Australian Journalism Review*, 33 (1), July 2011.

Ricketson, M. Book review. *Breaking News: The Golden Age of Graham Perkin*, Scribe, Carlton, 536 pages. *Australian Journalism Review*, 32 (2), December 2010.

Ricketson, M. Book review: *Word Bytes: Writing in the Information Society*, by Carolynne Lee, Melbourne University Press, Carlton, 299 pages. *Australian Journalism Review*, 32 (1), August 2010

C4 Letter or note

D – MAJOR REVIEWS

E – CONFERENCE PUBLICATIONS

E1 Full written paper – refereed - 6

Nolan, S and M. Ricketson. "Journalism's long cosmopolitan turn", Australian and New Zealand Communication Association conference, University of Newcastle, Newcastle, Creating Space in the Fifth Estate, 6-8 July 2016.

Ricketson, M., and S. Nolan, "An unseen weakening of Fairfax's journalism culture: The impact of copy sharing in *The Age*, *Sydney Morning Herald* and *Canberra Times* books pages", the Australian Sociological Association conference, University of South Australia, Adelaide, 24-27 November 2014.

Birnbauer, B., Dodd, A., and M. Ricketson. "We have the means, but what's the model? A better way for universities and industry to produce investigative journalism", Australian and New Zealand Communication Association conference, Esplanade hotel, Fremantle, Perth, 3-5 July 2013. Paper accepted for refereed stream and published later in 2013.

Ricketson, M. "The perils of writing interior monologues in narrative journalism," Australian Association of Writing Programs conference, RMIT, Melbourne, 25-27 November 2010.

Ricketson, M. "Is quick, is good. Or is it? Perils of the 24/7 News Cycle." Communications Policy Research Forum, The Auditorium, Sydney, Monday 15 November 2010.

Ricketson, M. "The practice of book-length journalism: re-framing the debate", Australia and New Zealand Communications Association conference, old Parliament House, Canberra, Thursday 8 July 2010.

E2 Full written paper – non refereed

Ricketson, M. "Where to next? One future for innovative journalism training", essay in *Digital News Report: Australia 2016*, by J. Watkins et al, News and Media Research Centre, for the Reuters Institute for the Study of Journalism, 2016, pp 54-57.

Ricketson, M. "Ian Maxwell address". Invited keynote address at the Victorian Association for the Teaching of English annual conference held at Deakin University, Burwood campus, on 3 December 2015.

Fuller, G. and M. Ricketson. "The Feed is the People", essay in *Digital News Report: Australia 2015*, by J. Watkins et al, News and Media Research Centre, for the Reuters Institute for the Study of Journalism, 2015, pp 40-42.

Ricketson, M and A. Dodd. "*The Australian's* Media section: Watchdog, lapdog, attack dog, or all of the above?" Paper presented at a symposium organised by the Macquarie University's Centre for Media History, Sydney, 7-8 July 2014.

Ricketson, M. "Media Accountability in Australia. Or, Whatever Happened to the Finkelstein Report?" Invited talk for the University of the Third Age, Weston Club, Canberra, 30 April 2013.

Ricketson, M. "Speaking Truth to Media Power". Invited plenary address at the Journalism Education Association of Australia annual conference entitled "Critical Times? Changing Journalism in a Changing World" held at Monash University's Law school in Melbourne, 2-5 December 2012.

Ricketson, M. "From Daily Journalism to Long-form Journalism". Masterclass presented for the ACT Writers Centre at the Walkley Media conference 2012 at the National Film and Sound Archive in Canberra on 29-30 November 2012.

Ricketson, M. "Journalism's Moral Maze". Invited panellist at the Walkley Media conference 2012 at the National Film and Sound Archive in Canberra on 29-30 November 2012.

Ricketson, M. "The Role of the Media in a Democracy". Chair of a panel including Andrew Fowler (ABC *Four Corners*), Margaret Simons (Centre for Advancing Journalism) and Melissa Sweet (University of Canberra PhD student and president of the Public Interest Journalism Foundation) at the Bedell Nonfictionnow conference, RMIT, Melbourne, 21-24 November 2012.

Nolan, S and M. Ricketson. "Parallel fates: Structural changes in newspaper publishing and their consequences for the book industry". Independent Publishers Association conference, Melbourne, 8 November 2012.

Ricketson, M. "Confronting change in the media". Invited speaker at the annual conference of the Independent Scholars Association of Australia, National Library of Australia, 18-19 October 2012.

Ricketson, M. "The relationship between journalists and their sources," Media and Privacy Law conference, Thomson Reuters, Intercontinental hotel, Sydney, 11-12 October 2012.

Ricketson, M. "Living with the Fink?" Invited panel member at the New News conference, Melbourne Writers Festival, The Wheeler Centre, 24 August 2012.

Ricketson, M. Invited to be a keynote speaker, along with Professor Terry Flew, on the academy's role in public policy-making about media, at the Australian and New Zealand Communication Association annual conference, in Adelaide, 4-6 July 2012.

Ricketson, M. "Regulating the media". Invited panel member for the 2012 Mumbrella 360 conference, Sydney, Hilton hotel, 6-7 June 2012.

Ricketson, M and G. Hambly. "The Finkelstein Report and Media Regulation – Two Views". Invited to speak with Gail Hambly, corporate counsel for Fairfax Media, at the Sydney Institute, 28 May 2012. Podcast available here:
<http://www.thesydneyinstitute.com.au/podcasts/page/3/>.

Ricketson, M. "You Wouldn't Read About It: Everything you haven't been told about media accountability and the Finkelstein inquiry". Invited lecture at the Centre for Advanced Journalism, University of Melbourne, 17 May 2012.

Breit, R, and M. Ricketson. "Hacking, sacking and News: Can journalism educators learn from *Guthrie v News Limited*?" International Association for Media and Communication Research conference, Istanbul, Turkey, 13-17 July 2011.

Ricketson, M, S. Brady and J. Wilson. "News Limited and the National Rugby League: A case study in organisational conflict," Australian and New Zealand Communication Association conference, Waikato, New Zealand, 5-8 July 2011.

Ricketson, M. "The suitability of a virtue ethics approach for the practice of book-length journalism." Journalism Education Association conference, University of Technology, Sydney, 24-26 November 2010.

Ricketson, M. "Writing media releases disguised in narrative form? A comparison of the work of Bob Woodward and Mark Danner", Australian and New Zealand Communications Association conference, old Parliament House, Canberra, Wednesday 7 July 2010.

Ricketson, M. "The historical development of book-length journalism in Australia." Australian Media Traditions conference, at Sydney University, 23-25 November 2009.

Ricketson, M. "A tripartite framework for examining the ethics of book-length journalism." Journalism Education Association conference, at University of Wollongong, 1-3 December 2008.

Ricketson, M. "Revisiting Janet Malcolm's *The Journalist and the Murderer*", Journalism Education Association conference, Griffith University, December 2005

Ricketson, M. "John Bryson's *Evil Angels*: 20 years on", Australian Media Traditions conference, Canberra, November 2005.

Ricketson, M. Melbourne Press Club annual conference, October 2004. Gave a paper about The Best Australian Journalism of the 20th Century project, focussing on Wilfred Burchett's worldwide scoop about the dropping of the atomic bomb on Hiroshima.

Ricketson, M. "Dumbing up can work: what *The New Yorker* experience can show Australian editors", Journalism Education Association conference, Sydney, December 2003.

Ricketson, M. "Wilfred Burchett and the bombing of Hiroshima: the story behind the story", Australian Media Traditions conference, Melbourne, November 2003.

Ricketson, M. "The Geoff Clark case and *The Age*", Journalism Education Association conference, Perth, 2001.

Ricketson, M. "On writing a journalistic biography", Journalism Education Association conference, Coolumb, Queensland, December 2000.

J – OTHER CREATIVE WORKS

J1 Major written or recorded work

Ricketson, M, and Jennifer. Martin. "Why do institutions fail to protect children?" *Inside Story*, 13 December 2017, <http://insidestory.org.au/what-makes-institutions-fail-to-protect-children/>.

Ricketson, M. "Dance of the elephants", *Inside Story*, 18 September 2017, <http://insidestory.org.au/dance-of-the-elephants/>.

Ricketson, M. "John Clarke and the power of satire", *Inside Story*, 11 April 2017, <http://insidestory.org.au/john-clarke-and-the-power-of-satire/>.

Ricketson, M. "The man behind the "perpetual conflict machine", *Inside Story*, 28 December 2016, <http://insidestory.org.au/the-man-behind-the-perpetual-conflict-machine/>.

Ricketson, M. "Managing Hiroshima", *Inside Story*, 4 August 2016, <http://insidestory.org.au/managing-hiroshima/>.

For the ERA Peer Review of Non-traditional Research Outputs for 2015, I put forward the work I did on the Independent Inquiry into the Media and Media Regulation. The inquiry was chaired by Ray Finkelstein QC; I was appointed to assist him. We produced a 468 page report. Mr Finkelstein was the lead author and I was the co-author. The report is available at: Available at: <http://trove.nla.gov.au/work/166066020?q=+&versionId=183078956>.

Ricketson, M. "Seduction or safety?" *Inside Story*, 5 May 2014, <http://insidestory.org.au/seduction-or-safety/>.

For the ERA Peer Review of Non-traditional Research Outputs for 2012, I put forward a small selection of articles I had written for *The Age* to demonstrate how I was creating a continuously enriching loop between journalism practice and reflection. The portfolio of creative work was sent forward by the university to the ERA assessors.

1. Research background

Current developments in the field of Journalism and Professional Writing have identified the importance of understanding the relationship between practice

and reflection on it. Much research work in this field is conducted from the perspective of a scholar or of a practitioner; less is conducted from the perspective of a reflective practitioner.

2. Research contribution

The three articles included in the portfolio were written while the author was Media and Communications Editor for *The Age*. Working in the news media industry gave him an opportunity to apply in practice insights and theoretical approaches that he had learnt while teaching and researching journalism at a university in Melbourne over an extended period. The three articles have been selected from a much larger body of work because they exemplify different lines of inquiry into the relationship between journalistic practice and reflection on it. The first article, "The Capote Conundrum," *The Age*, A2, 25 February 2006, pp. 17-18, contains original research into the work of Truman Capote, author of *In Cold Blood*, that came to form part of the author's PhD thesis. The second article, "Chaser on the buses," *The Age*, A2, 8 September 2007, pp. 16-17, was an attempt to marry analysis with a narrative-driven account of the making of a television program, *The Chaser's War on Everything*. The article's narrative drew on the author's original research that took the form of accompanying The Chaser team over three days as they prepared for and filmed material. The third article, "Finding their own voice," *The Age*, A2, 24 November 2007, p. 7, was an attempt to make accessible to a general audience a body of academic literature about media consumption. The author synthesised a range of academic research about young people's engagement with the media and combined that with more than a dozen interviews to offer an essay on the topic.

3. Research significance

The significance of this research is twofold: first, it expanded the scope of material published in the mainstream news media in Australia and that, by definition, it reached a general readership. Second, the articles exemplify the benefits to practitioners of creating a continuously enriching loop between practice and reflecting on it. The value of the articles lies first in their being published in a leading Australian newspaper, second, in providing original research that fed directly into the author's PhD thesis and, third, in one of the articles being selected for inclusion in a book to be published by Macmillan in 2012 entitled *Australian Journalism Today*. Disclosure: the author is the editor of this book; the proposal for the book was subjected to peer-review

Ricketson, M. "The Blind Side: Deciding what to tell," *Griffith Review*, 33, "Such is Life," Spring 2011, pages 161-68.

Ricketson, M. "Leaks, sources and passing the salt," *Inside Story*, 29 June 2011, <http://inside.org.au/leaks-sources-and-passing-the-salt/>.

Ricketson, M. Review-essay: *The Routes of Man: How Roads are Changing the World*, by Ted Conover, Alfred Knopf, 333 pages, and *Autophobia: Love and Hate in the Automotive*

Age, by Brian Ladd, University of Chicago Press, 227 pages. Published in *The Weekend Australian, Review*, "Wheels of Misfortune," 16 October 2010.

Ricketson, M. "Eyewitness to 'forever war,'" *The Canberra Times*, Forum section, 27 February 2010, 10-11. The article was reprinted on the online website *Inside Story* at: <http://inside.org.au/words-in-a-time-of-war/>.

J2 Minor written or recorded work

Ricketson, M. "Anderson and Young on reality behind the scenes", review of *Shooting the picture*, *The Weekend Australian, Review* section, 21 January 2017.

Ricketson, M. "Pulitzer prize centennial examines the impact of trauma coverage", Dart Center for Journalism and Trauma website, 21 October 2016, <http://dartcenter.org/resources/pulitzer-prize-centennial-examines-impact-trauma-coverage>.

Ricketson, M and P. Mullins. "'Feral' Senate accusations reflect Coalition's frustration at not getting its own way", *Guardian Australia*, 27 June 2016.

Ricketson, M. "Who should run media body?", *The Australian*, Media section, 13 June 2016, <http://www.theaustralian.com.au/business/media/media-complaintshandling-body-essential/news-story/41773d6016d62f5825337291166cd59c>.

Ricketson, M. "Naming the 'invisible perpetrator': a big step forward for media coverage of violence against women", *The Conversation*, 9 June 2016.

Ricketson, M. "We grow up, we remember", Dart Center for Journalism and Trauma website, 29 November 2015, <http://dartcenter.org/resources/we-grow-up-we-remember>.

Murphy, K., and M. Ricketson. "Crossbenchers insist Tony Abbott's 'feral' Senate is simply doing its job", *Guardian Australia*, 10 August 2015. <http://www.theguardian.com/australia-news/2015/aug/10/crossbenchers-insist-tony-abbotts-feral-senate-is-simply-doing-its-job>.

Ricketson, M. "Six reasons Abbott's peace deal on Q&A isn't quite what it seems", *The Conversation*, 13 July 2015. <http://theconversation.com/six-reasons-abbotts-peace-deal-on-qanda-isnt-quite-what-it-seems-44551>. This article was read by 8342 people according to *The Conversation's* social impact metrics report.

Ricketson, M. "24/7 Political crocodile death roll", *The Hoopla*, 9 February 2015. <http://thehoopla.com.au/247-media-crocodile-death-roll/>.

Ricketson, M. "Media students gain critical skills at uni", *The Australian*, 24 October 2014, p 14.

Ricketson, M. "Racism is more than just 'hurt feelings'. We've already had an inquiry to prove it", *The Guardian Australia*, 10 June 2014. <http://www.theguardian.com/commentisfree/2014/jun/10/racism-is-more-than-hurt-feelings-weve-already-had-an-inquiry-to-prove-it>.

Franklin, M and M. Ricketson and J. Stevens, "Discrimination laws still flawed", *The Weekend Australian*, Inquirer, p. 14, 25 May 2013.

Nolan, S and M. Ricketson. "Parallel Fates", *Sydney Review of Books*, 22 February 2013. Available at: <http://sydneyreviewofbooks.com/parallel-fates-2/>.

Ricketson, M. "Calling time in the last-chance saloon", *The Walkley magazine*, 73, October-November 2012, pages 41-2.

Ricketson, M. "Who's Afraid of the Finkelstein Report?" *The Ethnic Broadcaster*, Winter 2012, pages 4-5.

Ricketson, M. "Why I fear for the future of Australian journalism", *The Age* and *The Sydney Morning Herald*, 26 May 2012. Reprinted in Inform, The International Forum for Responsible Media blog. Available at: <http://inform.wordpress.com/?s=Matthew+Ricketson>.

Ricketson, M. "A bridge too far", *The Walkley magazine*, 69, December 2011-January 2012, pages 35-6.

Ricketson, M. "In the line of fire," *The Walkley magazine*, 68, October-November 2011, page 53.

Ricketson, M. "Forensic critique of a paper of influence," a review of Robert Manne's *Quarterly Essay*, "Bad News: Murdoch's *Australian* and the Shaping of the Nation," *The Weekend Australian*, Review, 24 September 2011.

Ricketson, M. "Coming through the inferno," a review of Adrian Hyland's *Kinglake-350*, *The Age, Life & Style*, 13 August 2011.

Ricketson, M. "Andrew Bolt: Expert offender, expert victim," *The Drum*, ABC online, 8 April 2011. This article attracted more than 500 comments.

Ricketson, M. "Singular advice for living in a binary world," *The Weekend Australian*, Review section, 15 January 2011.

Ricketson, M. "No wrong ways to write. Right?," *The Walkley magazine*, 62, August-September 2010, 30-31.

Ricketson, M. "What will journalism look like in five years time?" Public lecture delivered at the University of Canberra, 30 June 2010.

Ricketson, M, "Unmasking Abu Ghraib." Paper delivered at the *Making to unmask* symposium. University of Canberra, 22 June 2010.

Ricketson, M. "Meet the new newsroom," Public Relations Institute of Australia: New South Wales branch event in Sydney on 25 March 2010. Participating chair.

Ricketson, M. "People of the book," *The Walkley magazine*, 59, December 2009-January 2010, 33-34.

Ricketson, M. "The brave new world of media advertising," www.theage.com.au, 28 November 2009. Available at: www.theage.com.au/action/printArticle?id=897882.

Ricketson, M. "The healthy state of journalistic books in Australia". Speaker at announcement of the shortlist for *The Walkley* non-fiction book award, 9 November 2009.

Ricketson, M. "News or disaster porn?" *The Walkley magazine*, 56, May/June 2009, 21-22.

Ricketson, M. "Fact and fiction: Navigating the Borderlands". Participating chair in a panel for the Sydney Writers Festival, 21 May 2009.

Ricketson, M "Writers at the Crossroads". Speaker on a panel for the Media Entertainment and Arts Alliance's freelance journalism convention, March 2009.

OTHER PUBLICATIONS INCLUDING REPORTS TO GOVERNMENT

In 2017 I was a co-author of several submissions to the Senate Inquiry in the Future of Public Interest Journalism, including from Deakin University, where I was professor of communication, the Journalism Education and Research Association of Australia (JERAA), where I was president, the New Beats research team, on which I was a chief investigator, and the Public Interest Journalism Foundation (PIJF) of which I am a board member. These submissions can be found at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Public_Interest_Journalism/PublicInterestJournalis

m.

Finkelstein, R, assisted by M. Ricketson. *Report of the Independent Inquiry into the Media and Media Regulation*, 28 February 2012. Presented to the Minister for Broadband, Communications and the Digital Economy. Available at:

<http://trove.nla.gov.au/work/166066020?q=+&versionId=183078956>.

SUPERVISIONS

I have been a member of six supervision panels, either as primary or secondary supervisor, whose candidates have been awarded their PhD.

They are: Ben Stubbs (2015), Patrick Mullins (2015), Merrill Findlay (2016), Michelle Dunne Breen (2016) Scott Bridges (2017) and Melissa Sweet (2017).

I am a member of six supervision panels, either as primary or secondary supervisor, of current PhD students.

They are: Felicity Biggins, Scherry Bloul, Helen Buchanan, Fotis Kapetopoulos, Nicholas Polson and Elly Varenti.

EXAMINATIONS

I have examined seven PhD theses.

They are by: Janene Carey (2011), Meron Wondermaghen (2012), Andrea Carson (2013), Monica Jackson (2015), Larry Schwartz (2016, 2017), Susie Eisenhuth (2017) and Steve Lillebeun (2018).

AWARDS AND PRIZES

2004: A story for *Griffith Review* about the role of science in Australia's sporting success entitled "Born to win, with a little help" was selected for *The Best Australian Sports Writing 2004* anthology edited by Garrie Hutchinson.

1995: A story for *The Age* about the impact of the Jewish Holocaust centre on those who visit it headlined "Survivors of the Holocaust", was short-listed for a United Nations Media Peace Prize.

1994: A profile for *The Weekend Australian* magazine of leading historian Geoffrey Blainey headlined "Lone Wolf" won the George Munster national award for freelance journalism.

1991: A co-authored cover story for *Time Australia* magazine about the Vietnamese community in Australia headlined "On the Boat" won a citation for the United Nations Media Peace Prizes.

POSITIONS HELD

2012-2018 – President of the Journalism Education and Research Association of Australia (JERAA)

2012 – Chair of the board of directors for the Dart Centre Asia-Pacific, which is part of the Dart Center for Journalism and Trauma that is based at Columbia University's School of Journalism.

2016 – Representative of the Media Entertainment and Arts Alliance (MEAA) on the Australian Press Council (APC).

2013 – Member of the board of the Public Interest Journalism Foundation.

2015-2016: Member of the media advisory board for Our Watch, a national body for improving media coverage of family violence.

Our Ref: 18435

23 September 2019

Professor Matthew Ricketson
Deakin University
Melbourne Burwood Campus
221 Burwood Highway
BURWOOD VIC 3125

By email: Matthew.ricketson@deakin.edu.au

Dear Professor Ricketson

Australian Broadcasting Corporation v Martin Kane & Ors – Federal Court of NSW File Number NSD 989/2019

1. We act for the Australian Broadcasting Corporation (**ABC**).
2. The purpose of this letter is to engage you to provide a written opinion for use in a legal proceeding in the Federal Court of Australia to which the ABC is a party.
3. We request that you provide your written opinion on the questions set out in paragraph 9 of this letter.

Background

4. On 11 July 2017, the ABC published a series of online stories by Daniel Oakes and Sam Clark titled "The Afghan Files" (the **Afghan Files Stories**) on its website at www.abc.net.au/news.
5. In preparing the Afghan Files Stories, Mr Oakes and Mr Clark relied on information provided to Mr Oakes by informants in circumstances where Mr Oakes had promised the informants not to disclose the informants' identity.
6. On 5 June 2019, the Australian Federal Police (**AFP**) executed a search warrant on the ABC's premises in Sydney, and seized certain materials from the ABC's premises. The search warrant related to the publication of the Afghan Files Stories.
7. On 24 June 2019, the ABC commenced a proceeding in the Federal Court seeking, among other things, declarations that the search warrant was invalid, and that the seizure of materials from the ABC's premises was unlawful.
8. One issue in the proceeding is the effect that the disclosure of the identity of confidential informants can have on the flow of information to journalists.

Questions

9. Your written opinion should address the following questions:

- 9.1 What are the obligations of journalists in relation to:
- (i) promising not to disclose the identity of an informant; and
 - (ii) keeping a promise not to disclose the identity of an informant?
- 9.2 What effect, if any, can a journalist's promise not to disclose the identity of an informant have on the willingness of that informant to provide information to journalists?
- 9.3 If the identity of an informant were discovered, or put at risk of discovery, through the seizure of documents under a search warrant, what effect, if any, could that discovery, or risk of discovery, have on:
- (i) that informant;
 - (ii) the willingness of other informants to provide information to journalists?
10. You should answer the questions in paragraph 9 based on your own experience and expertise. Where you refer to any sources, please cite them in an appropriate fashion (endnote or footnote) and explain how those sources support your opinion.

Your obligations

11. As your report will be used by our client in the proceeding, it is subject to the rules of the Court.
12. We **enclose** a copy of:
- 12.1 the Court's Expert Evidence Practice Note; and
 - 12.2 the Court's Expert Witness Code of Conduct.
13. Please read the Practice Note and the Code carefully and ensure that your report complies with the requirements set out in those documents. In particular, we draw your attention to the requirements in cl 5.2 of the Practice Note and cl 3 of the Code.
14. Please enclose a copy of your CV with your report.

Further instructions

15. If you require further instructions, please ask us a precise question or questions in writing and we will respond.

Other matters

16. Your report is required to be served no later than 4pm on Tuesday, 24 September 2019. Accordingly, we would be grateful if you would provide your report as soon as possible.
17. Please let us know if you have any queries regarding this letter.

Yours sincerely



Michael Rippon
Senior Lawyer
ABC Legal
E: rippon.michael@abc.net.au



EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

- 1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* (“**Code**”) (see *Annexure A*) and the *Concurrent Expert Evidence Guidelines* (“**Concurrent Evidence Guidelines**”) (see *Annexure B*), applies to any proceeding involving the use of expert evidence and must be read together with:
- (a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework (“**NCF**”) of the Federal Court and key principles of case management procedure;
 - (b) the Federal Court of Australia Act 1976 (Cth) (“**Federal Court Act**”);
 - (c) the *Evidence Act 1995* (Cth) (“**Evidence Act**”), including Part 3.3 of the Evidence Act;
 - (d) Part 23 of the *Federal Court Rules 2011* (Cth) (“**Federal Court Rules**”); and
 - (e) where applicable, the Survey Evidence Practice Note (GPN-SURV).
- 1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

- 2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.
- 2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the *Evidence Act*).
- 2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:
- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the *Evidence Act*); and
 - (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

- 2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.
- 2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

- 3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.
- 3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
- 3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness¹ should, at the earliest opportunity, be provided with:
 - (a) a copy of this practice note, including the Code (see Annexure A); and
 - (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

¹ Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

- 5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).
- 5.2 In addition, the contents of such a report must also comply with r 23.13 of the *Federal Court Rules*. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:
 - (a) acknowledge in the report that:
 - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
 - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
 - (b) identify in the report the questions that the expert was asked to address;
 - (c) sign the report and attach or exhibit to it copies of:
 - (i) documents that record any instructions given to the expert; and

- (ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

- (a) who should prepare any joint-report;
- (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
- (c) the agenda for the conference of experts; and
- (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
- (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
- (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

- 7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.
- 7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).
- 7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

- 7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.
- 7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

- 8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.
- 8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

- 8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

- 9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.
- 9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT²

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;
 - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
 - (c) the qualifications of the expert to prepare the report;
 - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
 - (e) the reasons for and any literature or other materials utilised in support of such opinion;
 - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
 - (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

² Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

- 4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
- 5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

- 6. If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

- 7. Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique³ will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.
3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.
4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.
5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

³ Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.
7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:
 - (a) the agenda;
 - (b) the order and manner in which questions will be asked; and
 - (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.
8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.
9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.
11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.
13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.
14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

- (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
 - (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
 - (c) the experts will take the oath or affirmation together, as appropriate;
 - (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
 - (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;
 - (f) the judge will guide the process by which evidence is given, including, where appropriate:
 - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
 - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
 - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
 - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
 - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.
15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.
16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.
17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.