



Research Proposal for Confirmation of Candidature

**The Grammar of Judicial Bias: A comparative analysis of the lexical qualification of Judicial Impartiality in the Australian Judicial Systems.**

Eddie James Fraser

Doctor of Philosophy

Faculty of Business, Education, Law and Arts

School of Law and Justice

March 2021

Principal Supervisor: Dr Vito Breda

Associate Supervisor: Dr Sol Azuelos-Atias

## Table of Contents

<a href="#"><u>Aims and objectives of the research</u></a> .....	2
<a href="#"><u>Literature review</u></a> .....	4
<a href="#"><u>Proposed research methods, including analysis of data</u></a> .....	17
<a href="#"><u>Ethical Considerations</u></a> .....	17
<a href="#"><u>Proposed contribution to the field of research</u></a> .....	18
<a href="#"><u>Milestones and timelines</u></a> .....	18
<a href="#"><u>Resources required to complete the research</u></a> .....	20
<a href="#"><u>Limitations of the study</u></a> .....	20
<a href="#"><u>Type of Thesis expected to be submitted</u></a> .....	21
<a href="#"><u>Bibliography</u></a> .....	21
<a href="#"><u>Figures, tables, references</u></a> .....	23

### Aims and objectives of the research.

The project aims to explore Judicial bias in the Australian court system lexically and cognitively. The project outcomes may have relevance in addressing and ultimately reducing the costs of judicial bias related to appeals. Judicial objectivity is perceived as a fundamental element of modern liberal systems. The existence of the connection between objectivity and impartiality, in the context of judicial appointment, is considered essential the legitimacy of the judicial system.

However, it is left to judges to define its conceptual and practical implications. Studies in Europe and UK judicial practices show that judges tend to construct their version of judicial objectivity<sup>1</sup>. Le Grand uses the term prejudices to describe the set of criteria used by judges in different jurisdictions.

---

<sup>1</sup> Vito Breda, *The objectivity of judicial decisions : a comparative analysis of nine jurisdictions* (Peter Lang, 2017).

In Australia, there is, however, minimal comparative research on lexical qualifications and the pragmatic implications of a context-specific idea of judicial objectivity.

There are two fundamental questions the project will seek to answer.

Do allegations of bias in Australia generate a cluster of judicial responses in different states across an area of law?

Does the cluster of responses show an indication of convergence or divergence of judicial decisions?

This study focuses on textual references – retrieved by using Langacker's studies on semiotics and cognitive grammar (1987)<sup>2</sup> and Levinson's Pragmatism (1983)<sup>3</sup> – to the concept of judicial objectivity as constructed by Australian judges. The results will be compared to studies carried out in other jurisdictions. The results of this study will be compared with analogous studies carried out in Europe and the United Kingdom.

The proposed thesis will look at objectivity and concepts and pragmatic lexical activities carried out by judges in the jurisdiction under examination. These will include, for example, the reasonable person test, apprehended bias criteria and objective interpretation of the contract. Also, the proposed research will be informed by Coleman and Leiter and the idea of hard/moderate/soft categorisation applied to judicial objectivity. Furthermore, the thesis will make recommendations concerning the analysed data.

The analysis of case law and literature reviews will form the basis of the project and recommendations may be drawn from the material. The scope of the analysis will

---

<sup>2</sup> Ronald W. Langacker, 'An Introduction to Cognitive Grammar' (1986) 10(1) *Cognitive Science* 1-40.

<sup>3</sup> Stephen C. Levinson, *Pragmatics* (Cambridge University Press, 1983).

include seeking to ascertain convergence or divergence trends on the judicial qualification of the concept of objectivity across various areas of the law.

The thesis will also include a possible recommendations flowing from the research findings.

Finally, a comparative analysis of the project results will be made with studies carried out in the UK and Europe.

### Literature review

#### **Langacker - *Cognitive Grammar: A Basic Introduction* (2008)<sup>4</sup>**

Langacker presupposes the theory of Cognitive Grammar ("CG") in his works as a means to the understanding of the view of the structure of language. In doing so Langacker argues that grammar is meaningful.<sup>5</sup> CG provides several tools that allow for explicit precise descriptions of the essential structure and that those descriptions are based on linguistic evidence and subject to empirical verification.<sup>6</sup> He states that the basic semiological function of language needs at least three kinds of structures and that the claim of CG is that the only three structures needed are semantic, phonological and symbolic.<sup>7</sup> The definition of lexicon presupposed by CG is the set of fixed expressions in the language.<sup>8</sup> CG then Proposes that grammar should be constrained to the words and structures that are heard as opposed to what cannot be seen (imaginary).

### **Aim**

---

<sup>4</sup> Ronald W. Langacker, *Cognitive grammar : a basic introduction* (Oxford University Press, 2008).

<sup>5</sup> Ibid,1.

<sup>6</sup> Ibid 2.

<sup>7</sup> Ibid 15.

<sup>8</sup> Ibid 16.

This literature review aims to define the methodology that will be used to substantiate research findings of Cognitive Grammar and Pragmatics to analyse usage and function of elements of language in a sample of over 100 cases. It is expected that the results will produce a range of meanings attributable to “objectivity and bias” across a cluster of cases that may be specific to areas of law and jurisdictions under examination. Langacker, in his work, notes that Levinson misinterprets his statement regarding the distinction between pragmatics and semantics being largely artificial. In fact, Langacker suggests that semantics and pragmatics form a range without a clear boundary between them.<sup>9</sup>

### **Profiling**

Langacker defines profiling as an expression selecting a certain body of conceptual content and that the conceptual base is identified as the maximal scope in all the domains of the matrix of the expression.<sup>10</sup> Looking at the expression “objectivity” as a noun or thing in the notion of a profile in CG, the notion of profiling indicates a specific focus of attention and characterisation of its base objectivity. Profiling continues then allowing dissection into parts, be it judicial objectivity, grammatical objectivity, scientific objectivity, technological objectivity and so on. Langacker uses the example of a wheel. The term “wheel” acts as a base for the profile. The parts of the wheel namely, the hub, spoke and the rim depict the different parts of the term wheel as a whole (known as the profile).<sup>11</sup>

### **Trajector and Landmark**

---

<sup>9</sup> Ibid 40.

<sup>10</sup> Ibid 66.

<sup>11</sup> Ibid 66.

The trajector, for example, is identified as the preposition (beyond) specifying a point in space, "beyond a reasonable doubt" where (doubt) is the noun identified as the trajectory and (reasonable) the adjective, can be characterised as the primary focus within the profiled relationship. In this example, this then lends (reasonable) to be the landmark which is of secondary importance. Placement of the primary focus would change the position of the trajector and landmark depending on what the writer wishes the reader to perceive. Langacker notes, objects are not bordered with heavy lines to mark them as profiles; he does not suppose that something is naturally a trajector or a landmark positing that similar to other aspects of construal, importance is seen as one conceptual phenomenon amongst others that construct our understanding of how we see the world.<sup>12</sup>

## **Construal**

The term construal refers to the capacity of individuals to conceive and portray the same situation in alternate ways when compared to others.<sup>13</sup> To illustrate, in the example of reasonable doubt, if the intention is for the reader to focus on (doubt) as the principal concept as the assignment of meaning, then doubt assumes the trajectory role in the meaning construction and (reasonable) occupies the landmark role. If the intention is for the reader to focus on (reasonable) as the principal element, (doubt) performs the landmark function. This example shows the significance of intentional focus and the capacity of differential meaning construction. Focussing the attention of the reader on the possibility of doubt being beyond reasonable is quite different to assigning focus to the fact that the doubt is beyond reasonable. As part of its value,

---

<sup>12</sup> Ibid 72.

<sup>13</sup> Ibid 43.

each symbolic structure construes the content in a certain way.<sup>14</sup> CG claims that all linguistic generalisations occur from schematization from more specific structures.<sup>15</sup> The judgment of a well-formed expression relies on the extent that it bears that relationship of elaboration rather than that of the extension to the schemas that it invokes to characterize it.<sup>16</sup>

An important aspect of construal in the realms of CG is the notion of subjectivity vs. objectivity. Subjective construal is characteristic of the viewers' role whilst objective construal characterises the onstage focus of attention.<sup>17</sup> From this, objective construal is described as correlating with profiling and explicit mention whilst subjective construal as correlating with unspoken consciousness.<sup>18</sup> Langacker introduces this concept through a visual perception asking the reader to imagine themselves in the audience of a theatre watching a gripping play (let us say a murder mystery to evoke the visualisation). The reader's attention is then directed to the attention of the stage and more specifically focused on the actor that is speaking. The consequence of the viewers' focussed attention then dramatically reduces self-awareness of immediate circumstances. The imbalance between the viewer and what is being viewed is maximised and is referred to as 'the subject and object of perception'.<sup>19</sup> In this example where the imbalance in viewing role is maximised 'the viewing subject construed with maximal subjectivity and the object with maximal objectivity so ultimately the objective construal in that capacity of characterising the onstage focus of attention does not

---

<sup>14</sup> Ibid 55.

<sup>15</sup> Ibid 57.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid 77.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

engage in viewing'.<sup>20</sup> It can be surmised that an entity that is construed objectively is more prominent than when it would be construed subjectively.

### **Linguistic units**

Individual units can be joined to form symbolic expressions that in turn form simple or complex sentence structures. Langacker notes that structures in symbolic assemblies are linked by relationships, categorisation and correspondence.<sup>21</sup> The component structures when viewed can be seen as acting as stepping stones for arriving at the required composite structure through the subsequent levels of the organisation. The ultimate target being the top level such as in the example of jar lid to jar lid factory being used by Langacker.<sup>22</sup> Langacker invites the reader of CG to view that specific assemblies constitute linguistic expressions such as words, clauses, phrases and sentences and that the more schematic assemblies should be referred to as constructional schemas within the CG realm that provide a basis for grammatical and semantic composition.<sup>23</sup> To see grammar as consisting of established patterns for putting symbolic assemblies together, the views of CG is that the patterns themselves are symbolic assemblies specifically analogous to these complex expressions that they characterise. However, these assemblies are schematic rather than specific.<sup>24</sup>

### **A Case Example**

Within the sample of cases analysed, there is an example how the word objectivity can be construed in different contexts. The meaning of the noun objective on its own can be schematically composed to adopt in various contexts. The meaning objective is

---

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 185.

<sup>22</sup> Ibid 167.

<sup>23</sup> Ibid 169.

<sup>24</sup> Ibid.



influenced and adapts according to the situational context. The research question under examination for this thesis is that of judicial bias. The cluster of cases examined produced a range of results. A false-positive result was reflected in the case of *Australian Competition and Consumer Protection Commission v Pratt*.<sup>25</sup> In this case, it was apparent that the reference to objectivity was that of the parties rather than that of judicial bias with reference is made at [25] concerning a precedent case...

The application of the duty of fairness imposes a heavy responsibility upon prosecutors and one which requires of them a considerable degree of objectivity, for it is no part of their function improperly to strive for a conviction or to permit their judgment to be swayed by feelings of professional rivalry. In *R v Apostilides* (1984) 154<sup>26</sup>

This example contrasts with the result in the case of *Chacmol Holdings Pty Ltd and Another v Handberg*<sup>27</sup> in this case the judiciary discusses at that the court will adopt an objective approach:

The court will generally adopt an objective approach, which is to say that it will consider what would have been the intention of reasonable persons in the position of the actual parties to the contract. Where the words of a contract are clear the court must give effect to them: see K Lewison, *The Interpretation of Contracts*, 1989, Sweet & Maxwell, London, at [2.03]–[2.05]. In the absence of a contrary intention, a deed usually speaks from the date of delivery: see Lewison at [9.03].<sup>28</sup>

The two examples provided how the term construed in different contexts through the construction surrounding the word providing a variance of expression.

The premise of CG is that functional considerations should inform the process of CG from the outset and inform analysis of language function from the perspective of symbolisation of conceptual structures. CG looks at the need to characterise structures at a level of explicit detail and technical rigour that are natural and

---

<sup>25</sup> *Australian Competition and Consumer Protection Commission v Pratt* (2008) 250 ALR 661,670.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Chacmol Holdings Pty Ltd and Another v Hanberg* (2005) 215 ALR 755.

<sup>28</sup> *Ibid.*

appropriate. CG further posits that languages should be described without artificial boundaries and be broadly compatible with findings across other disciplines.

In considering CG one should keep in mind that the aim to reduce grammar into a cognitive process is an attempt to explain the meanings and structures in terms of a cognitive process. This perspective focuses on assigning meaning to things and relations in terms like profile, base, trajectory and landmark informed by the figure-ground perception or categorisation and schematization. The similarities and construal of adopting different points of view are illustrated by the way the following expressions are written and heard; the cat was chased away as opposed to the dog chased the cat away.

### **Levinson - *Pragmatics* (1983)**

#### ***Literature Review***

#### **Introduction**

Levinson states when outlining a definition of pragmatics, at the outset that 'within all disciplines of academics a definition is seldom satisfactory concerning the subject matter'.<sup>29</sup> He notes that 'whilst syntax refers to the study of the properties of words and their parts, semantics being the study of the meaning and so he poses that 'pragmatics is the study of language usage'.<sup>30</sup> He acknowledges that a simple definition does not truly indicate what the practitioners in pragmatics do.<sup>31</sup> 'Levinson offers pragmatics as the study of those aspects of the relationship between language and context that is

---

<sup>29</sup> Levinson (n 3) 1.

<sup>30</sup> Ibid 5.

<sup>31</sup> Ibid 6.

relevant to the writing of grammars including then the study of deixis and presupposition and speech acts'.<sup>32</sup>

## **Deixis**

Levinson defines deixis as concerning how languages encode or grammaticalise features of contexts of utterances and speech events.<sup>33</sup> He outlines the categories of deixis as person, place and time. In the example expression (he came to Court today), the person category is designated in the word (he); the place category is illustrated in the word (came) - acknowledging location; the time category is reflected in the word (today). Discourse deixis then looks at the use of an expression in an utterance that refers to parts of the discourse. Levinson points out that it would be helpful to acknowledge that 'what is being dealt with is are in essence very complex pragmatic ways in which sentence and context utterance interact'.<sup>34</sup> Ultimately it appears that theoretical models underestimate the complexity of deixis and their usage.

## **Grice's Maxims – Implicature**

Levinson discusses the maxims argued by Grice which form the co-operative principle and describes the assumptions that guide the conduct of conversation as being Quality, Quantity, Relevance, Manner.<sup>35</sup>

Application of the maxims, when in use, give participants of a conversation an outcome of maximum efficiency. These maxims can also be cooperatively violated throughout conversation. Levinson calls this violation flouting; defined and suggested as overt and blatant in not following a maxim.<sup>36</sup> For example, applying the maxim of quality a

---

<sup>32</sup> Ibid 9.

<sup>33</sup> Ibid 57.

<sup>34</sup> Ibid 95.

<sup>35</sup> Ibid 101-102.

<sup>36</sup> Ibid 109.

statement and response such as (Our People Matter) and (Yes and like to be shot in the foot) indicates a flouting of the violations. The first speaker makes a claim that would be known to be false to the listener. The response from the listener maintains the falsehood. It is inconceivable to consider being a pleasurable experience to be shot in the foot as a desired outcome. A relevant example in the context of discovery for this thesis is the expression (the Judge made an objective decision). Using the Grice maxims, it is implied that the Judge has made an objective decision in a case. However, this may not be considered truthful when it is considered whether sh/e has an interest in the company under review in a corporation case. From the ways implicatures are calculated it is supposed that those essential properties are generally predictable.<sup>37</sup>

Implicatures are cancellable as they can be false. It can be summarised that the role of conversational implicature is one that is important within language change. It is argued that syntactic and semantic change occurs through implicatures and it appears to be one of the most important mechanisms affecting language structure through language usage feedback. An example of implicature is the agreement on the meaning of an utterance by what a speaker means based by the inference that co-operation is being exercised.

### **Presupposition**

Entailment occurs where if a sentence is true another sentence will also be true. In the example, (The police suspected the judicial bias) there is a supposition that judicial bias is present for this to make sense. Entailment can also be activated with the use of a verb such as in (the judge admitted to being biased). Alternatively, the introduction

---

<sup>37</sup> Ibid 114.

of an adverb (the judge handed down a biased sentence again) implies there was a biased sentence previously and if this was not true then the sentence becomes one of nonsense. Presupposition alongside entailment and implicature formulate the additional information that sentences convey. Levinson asserts that 'this relation is one basic to semantics'.<sup>38</sup> Presupposition requires that some background information has previously been established and that it can survive negation.

### **Speech acts**

Levinson analyses the work of Austin with which the term speech act is associated. The two areas of speech act consist of Direct Speech Act (DSA) and Indirect Speech Act (ISA)<sup>39</sup>. Turning firstly to DSA it is posited that locution (what is said in a sentence) and illocution (what is meant) coincide as shown in example (I sentence you to three years imprisonment). As described by Levinson by saying something, one then does something then those kinds of acts simultaneously function.<sup>40</sup> In contrast, ISA is the result of where locution and illocution differ from the other. For example (can we chat for a second about your results) it can be seen clearly that a discussion regarding one's results would last more than "a second".

Levinson outlines the general types of speech acts and six of these are detailed.<sup>41</sup> Representatives are the first which can be either true or false such as a claim, hypothesis or assertion for example (if I do not report misconduct then I am a part of the problem). Commissives which in turn commit the speaker to take a particular course of action (I'll be online in half an hour). Directives direct the hearer to a particular course of action for example (can you call me back in five minutes?).

---

<sup>38</sup> Ibid 174.

<sup>39</sup> Ibid 236.

<sup>40</sup> Ibid 326.

<sup>41</sup> Ibid 240.

Declarations result in the name they state, for example (I pronounce you husband and wife) although if the speaker does not have delegated authority or power to do so, the statement would be false. Expressives which indicate the attitude of a speaker for example (I am so surprised to see you). Finally, turning to the speech act of Verdictive which looks at the speaker making assessments and judgments for example, (I sentence you to fourteen years imprisonment) similarly with the declarations example above, unless the speaker holds the requisite title or authority to do so this verdictive speech act would be false.

Levinson infers that the future of speech acts would rest on the tenability of the Literal Force Hypothesis in that what is meant (Illocutionary force) remains built into the sentence form (Literal Force Hypothesis).<sup>42</sup>

## **Conversation**

Conversation is described as discourse between people that takes place outside of institutional settings, for example a Court of Law.<sup>43</sup> For a conversation to run smoothly Levinson discusses the notion of turn-taking whereby each speaker takes turns in talking. In a question-and-answer format, the issue is when one participant is talking at what point will the other be given a turn. Self-selection and other-selection rules and cues are formulated to ensure the turn-taking model works. If one speaker stops, there is an assumption the other is then allowed to speak next amongst other rules outlined in the work of Levinson.<sup>44</sup> Overlap may occur between speakers such as multiple speakers speaking at the same time and can occur by way of timing problems, interruption or backchannel (someone speaking without intending to). Another

---

<sup>42</sup> Ibid 282.

<sup>43</sup> Ibid 284.

<sup>44</sup> Ibid 298.

management system in conversation is that of adjacency pairs. This is a derivative of a pair of turns that are produced by two speakers for example, question followed by an answer, an offer followed by acceptance or a request followed by compliance. The pairs are neighbouring, ordered or matched.<sup>45</sup> Conversation then can produce a preferred or dispreferred response with the latter response being associated with ISA. Repair occurs in conversation either self-initiated or other-initiated repair for example (I am sad...sorry Happy!) of the former and example of the latter would be, speaking to James (Joe has 5 dollars) but Tim says (you mean 10).<sup>46</sup> Levinson outlines that much work is yet to be done in this space to clarify linguistic concepts of the topic and their relation to discourse or conversational topic.<sup>47</sup>

### **A Case example**

Within the sample of cases analysed this case illustrates how the word objectivity can be construed in different contexts. The pragmatics of the outcome of meaning changes when the hearer infers what is uttered when considering differing contexts. The noun objective on its own can be schematically composed to adopt in various contexts. The research question under examination for this thesis is that of judicial bias. Within the cluster of cases, some results returned a false positive of objectivity. Conversely other cases returned objectivity discussed in the context under analysis. The cluster of cases examined produced a range of results. A false-positive result was reflected in the case of *Australian Competition and Consumer Protection Commission v Pratt*.<sup>48</sup> In this case, it was apparent that the reference to objectivity was that of the parties rather

---

<sup>45</sup> Ibid 303.

<sup>46</sup> Ibid 340.

<sup>47</sup> Ibid 366.

<sup>48</sup> *Australian Competition and Consumer Protection Commission v Pratt* (2008) 250 ALR 661,670.

than that of judicial bias in that reference is made at [25] concerning a precedent case...

The application of the duty of fairness imposes a heavy responsibility upon prosecutors and one which requires of them a considerable degree of objectivity, for it is no part of their function improperly to strive for a conviction or to permit their judgment to be swayed by feelings of professional rivalry. In *R v Apostilides* (1984) 154<sup>49</sup>

This example is one discussed as the false positive. It could be inferred that in this sentence the judiciary is utilising the speech act of directives. By the nature of the sentence, it directs the hearer (prosecutors) to employ a particular course of action in their dealings with the duty of fairness. This contrasts with the case of *Chacmol Holdings Pty Ltd and Another v Handberg*<sup>50</sup> where the preferred speech act employed is verdictive. In this case, the judiciary comments that the court will adopt an objective approach in concluding concerning delivering a judgment either to dismiss or allow an appeal essentially in this case to give the effect of intention:

The court will generally adopt an objective approach, which is to say that it will consider what would have been the intention of reasonable persons in the position of the actual parties to the contract. Where the words of a contract are clear the court must give effect to them: see K Lewison, *The Interpretation of Contracts*, 1989, Sweet & Maxwell, London, at [2.03]–[2.05]. In the absence of a contrary intention, a deed usually speaks from the date of delivery: see Lewison at [9.03].<sup>51</sup>

The two examples illustrate how the context, through the construction surrounding these sentences, can vary the understanding of the language used, influence the contexts within the text and affect the meanings signified.

Levinson in his works outlines that meanings of words, sentences and phrases can vary across different situational contexts and that the meaning of a sentence can change depending on the context. This is in contrast to the study of semantics where

---

<sup>49</sup> Ibid.

<sup>50</sup> *Chacmol Holdings Pty Ltd and Another v Hanberg* (2005) 215 ALR 755.

<sup>51</sup> Ibid.



conventionalised meanings are independent and behave in the same way across different situations. In Pragmatics, Levinson outlines that there is potential for new and further development within this field and its surrounding fields and highlights that many opportunities exist to expand through research in this field.

### **Other Important Literature**

Due to the word and page restrictions in this document the researcher has not been able to review all the important literature. It should be noted that other important literature contained in the bibliography such as MacCormick looks at the work of Kent Grenwalt and his contributions. Coleman and Leiter discuss liberalism in their work as well as political theory, language philosophy, H.L.A Hart, Dworkin, semantic sceptics, Kripkenstein, Semantic realists and antirealists. Metaphysical and semantic theories.

The final dissertation will detail the work of these authors much more than the brief mention within this document.

### **Proposed research methods, including analysis of data**

The research activity of this project is analysis of data from a collection of extracts of 100 cases in the Australian jurisdiction. Paragraphs or a series of paragraphs taken from the sample of cases, are analysed using Langacker's grammar and further assessed for a cognitive function using Levinson's pragmatics. The raw data is to be made available for review via Australia's Academic and Research Network (AARNet).

The research will analyse data retrieved from a large sample of cases (over one hundred) taken from Australian state jurisdictions, the ACT, and the Northern Territory.

The analysis aims to describe how judges in different jurisdictions lexically qualify allegations of bias.

The researcher will make use of USQ Toowoomba/Springfield Library and data research facilities as well as Online access to legal databases, libraries and research sites. The use of paper-based research material includes but is not limited to books, newspaper articles and so on. This will be coupled with access to publicly available data and digital technology with relevant systems concerning the project.

### Ethical Considerations

This dissertation considers the analysis of qualitative data. The proposed research and analysis in the study do therefore does not require ethical approval from USQ. The data collected and reviewed has been done so voluntarily, respectfully and confidentially and will be analysed and interpreted in the same manner. This dissertation will maintain high ethical standards in all stages of development, preparation and submission.

### Proposed contribution to the field of research

The project aims to explore the causes of perceived judicial bias. By providing insight and offering potential solutions, there is a potential to reduce costs related to appeals.

This project will be informed by the comparative methodology adopted in existing studies evaluating the implication of the clusters of uses of the concept of judicial objectivity in the clusters. In particular, the project will:

- advance research into judicial bias in Australian jurisdictions
- explain the potential benefits of adopting legal semiotics as a qualifier of judicial objectivity

- analyse and evaluate the use of concepts in case law (e.g. judicial impartiality, judicial independence, objective facts, and subjective textual interpretation)
- advance research into how judicial bias/impartiality influences the legal system in an Australian context.

### Milestones and timelines

The literature review will be used to inform various parts of the project and dissertation and assist in the comprehension of the case analysis completed.

At this juncture, the confirmation document and the literature reviews forming the methodology have been completed, in addition to the completion of review and analysis of the over 100 cases selected. The completed tasks thus far are maintaining progress on the schedule of milestones required to arrive at the completed dissertation leading to examination and the awarding of the degree.

Timeline proposal (Draft)	This proposal table is a guide only and can be updated or amended from time to time as required but aims to assist focus points from start to completion of the project.
Proposed planned or unplanned leave (update as required)	
Confirmation of candidature	(End Semester 1 2022).
Data Collection	(End Semester 3 2020).
Data Analysis	(End Semester 3 2021).
Thesis Draft	(End Semester 3 2026).
Thesis Amendments	(End Semester 3 2027).
Thesis Final Draft	(End Semester 1 2028).
Thesis Submission	(End Semester 2 2028).
Progress self-check (periodically)	Two months schedule



Progress Supervisor reports (periodically)	Yearly report
Mid project check-in and progress analysis	(End Semester 2 2024).
Mid project self-reflection	(End Semester 3 2024).
Thesis Submission	(End Semester 2 2028).
Additional side projects eg, article/book reviews/ lectures/ marking	Periodically during the project with various timeframes dependent on task or project

#### Resources required to complete the research.

The resources that will be required to complete the research and ultimately finalise the dissertation will include but not be limited to the following;

- Online access to legal databases
- Analysis of data retrieved from a large sample of cases (over one hundred) taken from Australian state jurisdictions, the ACT, and the Northern Territory (10 appeal cases for each jurisdiction) and 50 from High Court. The analysis of a large sample of appeal cases provides a comprehensive analysis of the range of cognitive practice used to qualify the concept of judicial objectivity and allegations of bias.
- Use of USQ Ipswich Law Library for bibliographical research
- Access to publicly available data and digital technology within relevant systems concerning the project.

#### Limitations of the study

This research will examine and analyse the terms of objectivity and bias. The findings will add to the currently limited knowledge in Australia. This research will be limited to the analysis of available research in this area internationally and predominantly utilise

the methodologies outlined above. It is important to note that this dissertation will not address or consider decisions of lower courts or tribunal decisions. Additionally it will not look at empirical data or focus on how judges discuss bias or review in detail the current tests for bias. The results may lend themselves to a review of current practice.

It will focus predominately on the Australian jurisdiction within the Australian context.

### Type of Thesis expected to be submitted

This dissertation will be divided into 6 Chapters

- Chapter 1 Introduction
- Chapter 2 Review of Literature
- Chapter 3 Methodology
- Chapter 4 Data Analysis and Results
- Chapter 5 – Findings
- Chapter 6 Conclusions, recommendations and future implications

### Bibliography

#### **A Articles/Books/Reports**

Coleman, Jules L, and Brian Leiter. 'Determinacy, Objectivity, and Authority' (1993)

*University of Pennsylvania Law Review* 549

Groves, Matthew, 'The Rule against Bias' (2009) 39 *Hong Kong Law Journal* 48

Irwin, Honorable John F, Daniel L. Real and Carl Gustave Jung, 'Unconscious

Influence on Judicial Decision-Making: The Illusion of Objectivity' (2010) 42

*McGeorge Law Review* 19

Langacker, Ronald. W 1991. *Foundations of cognitive grammar* (Stanford University Press 1991) Cambridge University Press 1983 vol 2

Legrand, Pierre., 'European Legal Systems Are Not Converging' (1996) 45(1) *The International and Comparative Law Quarterly* 52

Leiter, Brian, 'Law and Objectivity' in Jules L. Coleman, Scott Shapiro and K.E. Himma (eds), *The Oxford handbook of jurisprudence and philosophy* (Oxford University Press, 2004) 969-990

Levinson, Stephen C. *Pragmatics*. Cambridge University Press, 1983

MacCormick, Neil. 'Reasonableness and Objectivity' (1998) 74 *Notre Dame Law Review* 1571

Young, Simon, 'THE EVOLUTION OF BIAS: SPECIES AND THE WEARY LAY OBSERVER' 41 *Melbourne University Law Review* 28

## **B Cases**

Abigroup Contractors Pty Ltd v Transfield Pty Ltd (1998) 217 ALR 435

ABN AMRO Bank NV v Bathurst Regional Council (2014) 309 ALR 445

Akers (as Joint Foreign Representative) v Saad Investments Co Ltd (in Official Liquidation) (a Co Registered in the Cayman Islands) (2010) 276 ALR 508

Akiba on behalf of Torres Strait Islanders of Regional Seas Claim Group v State of Queensland (No 2); sub nom Akiba v Queensland (No 3) (FCR) (No 2) (2010) 270 ALR 564

Al Jadeed TV v United Broadcasting International Pty Ltd 283 ALR 205

Andrews v Australia and New Zealand Banking Group Ltd (2011) 288 ALR 611

Anvil Hill Project Watch Association Inc v Minister for the Environment

and Water Resources (2007) 243 ALR 784

Austereo Pty Ltd v DMG Radio (Australia) Pty Ltd (2004) 209 ALR 93

Australasian Medical Insurance Ltd v CGU Insurance Ltd (2010) ALR 142

Australian Broadcasting Corp v Kane (No 2)(2020) 377 ALR 711

Australian Competition and Consumer Commission (ACCC) v Pratt (2008) 250 ALR 661

Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd (2009) 261 ALR 501

Bell Lawyers Pty Ltd v Pentelow (2019) 372 ALR 555

Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 290 ALR 647

Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd (2006) 236 ALR 720

BP Australia Pty Ltd v Nyran Pty Ltd (2003) 198 ALR 442 |

British American Tobacco Australia Services Ltd v Laurie (2011) 273 ALR 429

Brock v United States of America (2007) 238 ALR 835

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd (2013) 298 ALR 666

Catch the Fire Ministries Inc v Islamic Council of Victoria Inc (2006) 235 ALR 750

CGU Insurance Ltd v Porthouse (2008) 248 ALR 240

Chacmol Holdings Pty Ltd v Handberg (2005) 215 ALR 748

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 272 ALR 750

Cherry v Steele-Park (2008) 248 ALR 240

Clubb v Edwards, Preston v Avery (2019) 366 ALR 1

Colby Corp Pty Ltd v Commissioner of Taxation (2008) 244 ALR 71

Colina, Re; Ex parte Torney (1999) 166 ALR 545

Commonwealth Bank of Australia v Barker (2014) 312 ALR 356

Commonwealth of Australia v Human Rights & Equal Opportunity  
Commission (2000) 180 ALR 635

Commonwealth of Australia v Yarmirr (1999) 168 ALR 426

Compaq Computer Australia Pty Ltd v Merry, Payes, Bunnett, Sharp,  
Bassat, Kras, Horman & Thomson (1998) 157 ALR 1

Daihatsu Australia Pty Ltd v Deputy Commissioner of Taxation (2001) 182 ALR 239

Downes v Maxwell Richard Rhys & Co Pty Ltd (in liq) (2014) 313 ALR 383

Ebner v Official Trustee in Bankruptcy (2000) 176 ALR 644

Elomar v R (2014) 316 ALR 206

Energex Ltd v Elkington (No 1) (2002) 195 ALR 541

Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 211 ALR 101

Esso Australia Resources Pty Ltd v Commissioner of Taxation (2011) 279 ALR 519

Ewin v Vergara (No 3) (2013) 307 ALR 576

Factory 5 Pty Ltd v State of (2010) 276 ALR 523

Franklins Pty Ltd v Metcash Trading Ltd (2009) 264 ALR 15

Geelong School Supplies Pty Ltd v Dean Others (2006) 237 ALR 612

Golden v V'landys (2016) 339 ALR 610 610

Harrington-Smith obh of Wongatha People v State of Western Australia (No 9) (2007)  
238 ALR 1

Hockey v Fairfax Media Publications Pty Ltd (2015) 332 ALR 257

Hui v Esposito Holdings Pty Ltd (2017) 345 ALR 287

Imbree v McNeilly; McNeilly v Imbree (2008) 248 ALR 647

International Air Transport Association v Ansett Australia Holdings Ltd (2008) 242 ALR  
47



Isaac (obh of Rumburriya Borrooloola Group) v Northern Territory of Australia; Roper (obh of Rumburriya Borrooloola Group) v Same (2016) 339 ALR 98

Isbester v Knox City Council (2015) 320 ALR 432

Jenkins v R (2004) 211 ALR 116

Kingdom of Spain v. Christie, Manson & Woods Ltd [1986] 1 W.L.R. 1120

Lewski v Australian Securities & Investments Commission (ASIC) (2016) 337 ALR 1

Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (2006) 236 ALR 561

Markarian v R (2005) 215 ALR 213

Marku v Republic of Albania (2012) 293 ALR 301

Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd (2015) 327 ALR 45

Masterson v. Holden [1986] 3 All E.R. 39

McGlade v Native Title Registrar (2017) 340 ALR 419

McKinnon v Secretary, Dept of Treasury (2006) 229 ALR 187

Meat & Livestock Australia Ltd v Cargill, Inc (2018) 354 ALR 95

Members of the Yorta Yorta Aboriginal Community v State of Victoria (2001) 180 ALR 655

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538

Minister for Immigration and Border Protection v Stretton (2016) 329 ALR 491

Minister for Immigration and Citizenship v SZOCT (2010) 274 ALR 487

Minister for Immigration and Multicultural and Indigenous Affairs v Alam (2005) 219 ALR 629

Minister for Immigration and Multicultural Affairs v Jia (2001) 178 ALR 421

New South Wales v Commonwealth of Australia (2006) 231 ALR 1

Norman; Re Forest Enterprises Ltd v FEA Plantation Ltd (2011) 280 ALR 470

Nudd v R (2006) 225 ALR 161

Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA (No 4) (2009) 255 ALR 632

Pacific Air Freighters (Qld) Pty Ltd v Toller (2000) 171 ALR 519

Pacific Carriers Ltd v BNP Paribas (2004) 208 ALR 213

Patty v Commonwealth Bank of Australia (2000) 179 ALR 57

Pilmer v Duke Group Ltd (in liq) (2001) 180 ALR 249

Plaintiff M96A/2016 v Commonwealth of Australia (2017) 343 ALR 362

Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24

Primary Health Care Ltd v Commissioner of Taxation (2010) 267 ALR 648

QPSX Ltd v Ericsson Australia Pty Ltd (No 3) (2005) 219 ALR 1

Qualcast (Wolverhampton) Ltd v Haynes [1959] AC 743

R v Lavender (2005) 218 ALR 521

R v YZ (1999) 162 ALR 265

Repatriation Commission v Vietnam Veterans' Association of New South Wales Branch Inc (2000) 171 ALR 523

Roberts Petroleum Ltd v Bernard Kenny Ltd (In Liquidation) [1983] 2 A.C. 192

Rich v Harrington (2007) 245 ALR 106

Romero v Farstad Shipping (Indian Pacific) Pty Ltd (2014) 315 ALR 243

Rylands v Fletcher [1868] UKHL 1

Singh v Commonwealth of Australia (2004) 209 ALR 355

Smith v State Bank of NSW Ltd (2001) 188 ALR 729

Smits v Roach (2006) 228 ALR 262

Southcorp Brands Pty Ltd v Australia Rush Rich Winery Pty Ltd (2019) 369 ALR 299

SZOIN v Minister for Immigration and Citizenship (2011) 276 ALR 247

Termite Resources NL (in liq) v Meadows, Re Termite Resources NL (in liq) (No 2) (2019) 370 ALR 191

Tipperary Developments Pty Ltd v State of Western Australia AUSTRALIA (2009) 258 ALR 124

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 211 ALR 342

Town of Port Hedland v Hodder (No 2) (2012) 294 ALR 315

Trilogy Funds Management Ltd v Sullivan (No 2) (2015) 331 ALR 185

Universal Music Australia Pty Ltd v Sharman License Holdings Ltd (2005) 220 AL

Vairy v Wyong Shire Council (2005) 221 ALR 711

Vanguard Financial Planners Pty Ltd v Ale 354 ALR 711

Walker Re One.Tel Ltd (2009) 262 ALR 150

Work Health Authority v Outback Ballooning Pty Ltd (2019) 363 ALR 188

Wotton v State of Queensland (No 5) (2016) 352 ALR 146

Zentai v Republic of Hungary (2006) 235 ALR 313

### **C Legislation**

TBC

### **D Treaties**

TBC

### **E Others**

TBC

## Figures, tables, references.

Construals	Legal Systems									
	Australia	UK	Hungary	Slovakia	Brazil	Italy	Lithuania	Romania	Slovenia	Spain
Objective interpretation. The TEXT is interpreted objectively because:										
a. the court refers to its literal meaning	V	V	V		V		V			
b. the court refers to the intentions of the legislator	V	V	V				V		V	V
c. the court refers to a coherent theory of interpretation	V		V							
d. the court refers to an objective activity of interpretation	V		V	V	V	V				
e. the court refers to a logical and therefore an objective interpretation	V	V								
f. the court refers to an holistic interpretation that support an objective judicial interpretation	V		V							
Objective impartiality. The Court is engaging an ALLEGATION OF BIAS. The judge decision is/is not objective because:										
a. the court refers to the subjective impartiality of the judge	V	V	V	V						
b. the court refers to the objective impartiality of the judge	V			V				V	V	
c. the court refers to external objective criteria		V	V	V	V	V	V	V		V
d. the court references the activity of a third party (subjective bias)		V	V	V			V		V	
e. the court's decision is de facto unbiased			V	V		V		V	V	V
f. the court's decision considered all the facts of the case		V	V	V	V	V	V	V	V	V
g. the court's decision referred to the opinion of experts	V	V		V	V	V	V			V
h. the court's decision references legal rules and procedures	V			V		V		V		

Table one (Data integrated with The Objectivity of Judicial Decisions, Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2016)

In table one, the upper row indicates the name of the legal system. The first column on the left shows the most common construal related to the concept of *objectivity*. The significances are grouped into two large thematic macro-groups. The first group includes a list of reasons for qualifying a textual interpretation as *objective*. The second macro group separates the extracts from cases in which a court responds to an allegation of bias.

\*\*\* Other tables may be used in reference to the recommendations chapter and comparison chapter however these are yet to be determined and/or designed.