

The aim of this paper is to provide an insight into the way the *Bail Act 2013* (NSW) may be interpreted and applied. This project will have a particular focus on the new "unacceptable risk" test.<sup>1</sup> Bail applications made with New South Wales are currently governed by the *Bail Act 1978* (NSW) which involves a complicated mixture of presumptions that for and against bail.<sup>2</sup> When a bail application is made under the *Bail Act 2013* (NSW) the court will be asked to consider what risk is attached to the applicant being on bail.<sup>3</sup> If the risk is considered to be unacceptable, and no conditions can be implemented to mitigate that risk, the court may refuse bail.<sup>4</sup> In order to gain an understanding into how the unacceptable risk test may be applied and interpreted this report will focus on two objectives:

1. What the phrase "unacceptable risk" might mean in the context of an application for bail under the *Bail Act 2013* (NSW)?
2. Who might bear the onus of persuading the court that there is an "unacceptable risk" as required by the *Bail Act 2013* (NSW)?

In order to achieve these objectives an exercise in statutory interpretation will be required. To assist this exercise support will be drawn from the way other jurisdictions dealt with questions of interpretation in pieces of legislation that deal with similar types of applications.<sup>5</sup>

---

**DISCLAIMER:** This paper was written in December 2013 and is provided for educational purposes only and is not designed, or intended, to be a substitute for legal advice.

<sup>1</sup> *Bail Act 2013* (NSW) s 17.

<sup>2</sup> See *Bail Act 1978* (NSW) s 6 – 9.

<sup>3</sup> *Bail Act 2013* (NSW) s 17.

<sup>4</sup> *Bail Act 2013* (NSW) s 20.

<sup>5</sup> For example, the phrase "unacceptable risk" is a feature of Victorian and Queensland bail law, see the *Bail Act 1977* (Vic) under s 4(3) and *Bail Act 1980* (Qld) under s 16(2) contain similar provision to s 17 of the *Bail Act 2013* (NSW). Other

This report is broken into three parts. Chapter one will look at bail as a concept. Looking at bail as a broad concept provides a context for the exercise in statutory interpretation to take place. Chapter two will look at the way applications for bail are currently being dealt with in New South Wales followed by a look at the new “unacceptable risk” test found in the *Bail Act 2013 (NSW)*. Chapter three contains the bulk of the research and it is within this chapter that the exercise in statutory interpretation will be developed and discussed. In this chapter an analysis of research found in relation to the term “unacceptable risk” will be provided. The bulk of the research into this area will be from Victoria and Queensland. Chapter three will be followed by some concluding remarks. This will include a brief summary of the research and how practitioners might expect the new *Bail Act 2013 (NSW)* to operate.

---

similar pieces of legislation such as, s 6A(4) *Bail Act 1982 (WA)*, s10 *Bail Act 1985 (SA)*, s 10 *Bail Act 1992 (ACT)* have a different test for bail so they won't provide much support for present purposes.

*Chapter One – The Past*

In this chapter the concept of bail will be looked at quite broadly. Having this background will assist with trying to understand the way the *Bail Act 2013 (NSW)* may operate. It is important to firstly understand what role bail plays within the criminal justice system. In a very basic breakdown the criminal justice system can be seen as involving four main parts. These parts include:

1. Parliament creating the law;
2. Police taking people who they suspect to have broken these laws before the Courts;
3. Courts applying the law and punishing those who have been found to have broken the law; and
4. Corrective Services, in some cases, administer the punishment handed down by the Courts.<sup>6</sup>

When a person is arrested and charged by the Police their right to be at liberty can be removed prior to the issue being resolved by a court. A person can however apply for bail which is considered to be a form of conditional liberty.<sup>7</sup> In some circumstances the conditional liberty may involve specific conditions that the person must comply with while on bail. While on bail a person is free to live their life as they see fit, sometimes within the limits of these specific conditions, as long as they make a promise that they will return the next time their matter is before the Court.<sup>8</sup> Failure to

---

<sup>6</sup> New South Wales Law Reform Commission, *Bail*, Report Number 133 (2012) 7-17.

<sup>7</sup> Donovan, B, *The Law of Bail: Practice, Procedure and Principles* (1<sup>st</sup> Ed. 1981) 19.

<sup>8</sup> *Ibid.*

do so may result in their arrest and the removal once again of their liberty. What then can the role of bail be seen to play within the criminal justice system?

One of the punishments for breaking the law is the removal of a person's right to be at liberty. A person's right to be a liberty can also be removed if they are suspected of breaking the law. The removal of a person's right to be at liberty can have a serious impact of a person, it is therefore important to constrain the way that the participants in the criminal justice system can affect that right. By constraining the way these powers are used public confidence in the criminal justice system can be maintained.<sup>9</sup> One of these constraints can be seen in the form of a grant of bail. By allowing a person to apply for bail fundamental principles of the criminal justice can also be protected. One of these fundamental principles is the right a person has to enjoy their own personal freedom.

In *Williams v The Queen* (1986) 161 CLR 278 the High Court described the right of personal freedom being a foundation of common law<sup>10</sup>:

*“The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.”<sup>11</sup>*

A grant of bail can be seen as a way of ensuring that those who need to be dealt with before a court of law do not have their right to be at liberty taken away while that process takes place.

---

<sup>9</sup> New South Wales Law Reform Commission, above n 5, 9.

<sup>10</sup> *Williams v The Queen* (1986) 161 CLR 278, 306 per Wilson and Dawson JJ.

<sup>11</sup> *Williams v The Queen* (1986) 161 CLR 278, 292 per Mason and Brennan JJ.

Bail can also be seen to ensure that the criminal justice system does not punish without due process. In *Chu Keng Lim v the Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 the High Court stated that:

*“Every citizen is ‘ruled by the law, and by the law alone’ and ‘may with us be punished for a breach of law, but he can be punished for nothing else.’”*<sup>12</sup>

A grant of bail makes sure that the criminal justice system is not seen as punishing people before they are given a chance to defend the allegations made against them.

By granting a person bail and making sure that this person is not punished arbitrarily, that is without a finding of guilt, the criminal justice system also protects the presumption of innocence. The presumption of innocence is a cornerstone of the criminal justice system and is best expressed in the case of *Woolmington v DPP* [1935] AC 462 where it was said that:

*“Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt.”*<sup>13</sup>

Granting a person bail maintains the presumption of innocence by allowing those who are charged with an offence to maintain as much of their freedom as an innocent person is entitled to and it also allows the community to see the person in that way.

The way that bail protects these fundamental principles should be at the forefront of any attempt to understand bail laws. The grant of bail is very important in maintaining public confidence in the criminal justice system. Equally important is the refusal to grant a person bail. Community members have a right to feel safe, by refusing those

---

<sup>12</sup> *Chu Kheng Lim v the Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27-8 per Brennan, Dean and Dawson JJ.

<sup>13</sup> *Woolmington v DPP* [1935] AC 462, 481-82.

who might be a danger to the community people will feel some confidence that the criminal justice system is protecting them. Refusing a person bail will also guarantee that they will be present at Court on the next occasion their matter is before the court.

The decision to grant a person bail is not an easy task. The difficulty that presents itself is the need for there to be a balance between the right of the individual to be at liberty and the protection of the community. Statistics show that in the Local Court nearly 34% of those remanded in custody before their matters were finalized did not receive a custodial sentence.<sup>14</sup> In his second reading speech the Attorney General summed up how the *Bail Act 2013* (NSW) is intended to approach the task by saying:

*“This test will focus bail decision-making on the identification and mitigation of unacceptable risk, which should result in decisions that better achieve the goals of protection of the community while appropriately safeguarding the rights of the accused person.”<sup>15</sup>*

Bail plays a vital role in maintaining an effective criminal justice system. It is therefore critical that those dealing with the applications for bail have an understanding of this role as it can shape the way that the *Bail Act 2013* (NSW) is interpreted and applied. The next chapter of this report will look at the way the *Bail Act 1978* (NSW)<sup>16</sup> is currently being applied followed by a look into the new “unacceptable risk” test found in the *Bail Act 2013* (NSW).

---

<sup>14</sup> New South Wales Law Reform Commission, above n 5, 71.

<sup>15</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 81 (G Smith, NSW Attorney General), 81.

<sup>16</sup> *Bail Act 1978* (NSW).

*Chapter Two – The Present*

Presently bail decisions in New South Wales are governed by the *Bail Act 1978* (NSW). On the 22 May 2013 the New South Wales Parliament passed *the Bail Act 2013* (NSW) which is set to replace the *Bail Act 1978* (NSW).<sup>17</sup> The *Bail Act 1978* (NSW) will not be replaced by the *Bail Act 2013* (NSW) until May 2014 to allow for “an education program and training campaign for police, legal practitioners and courts in regards to the new legislation.”<sup>18</sup> The Attorney General, Mr Greg Smith, announced that his government had “replaced a complicated system of presumptions with a risk-management test.... We have now eliminated inconsistencies and replaced [the *Bail Act 1978* (NSW)] with a modern, more consistent *Bail Act*.”<sup>19</sup> It is important to consider how the *Bail Act 2013* (NSW) will be applied in light of lessons learned through the courts application of the *Bail Act 1978* (NSW) as these lessons will be in some way applicable to the interpretation of the *Bail Act 2013* (NSW).

The *Bail Act 1978* (NSW) was for the first time a codification of the law in relation to bail. In his second reading speech the then Attorney General, Mr Frank Walker, stated that:

*“Existing bail provisions are currently contained in a large number of statutes, so the changes to be introduced by the cognate bill have the effect,*

---

<sup>17</sup> Jacobsen, G, "Media Release – Bail Act Passes Parliament" 22 May 2013.

<sup>18</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 81 (G Smith, NSW Attorney General), 82.

<sup>19</sup> Jacobsen, G, above n 11, 1. See also New South Wales Department of the Attorney General, "Bail Reform In NSW" Published by the Bureau of Crime Statistics and Research 1984, 79 where nearly 30 years ago the issue of presumptions was causing the Courts some concerns.

*wherever possible, of placing all the law relating to the granting of bail ... in one statute.*<sup>20</sup>

Over the years the bail has long been a tool for political manipulation as a way to try and appease the public outcry that has resulted from some quite public crimes.<sup>21</sup> For example the *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW) created a presumption against bail for those offence committed in the course of a riot.<sup>22</sup> This piece of legislation was created in response to the “Cronulla Riots.” The Premier at the time, Morris Iemma, stated that this legislation came about because of his government's concern that:

*“Louts and criminals have effectively declared war on our society and we are not going to let them undermine our way of life.... It is unacceptable that such thugs and morons are automatically granted bail, just to be given the chance to wreak further havoc. This bill will help shut that revolving door by creating a presumption against bail for riot...”*<sup>23</sup>

The result of using the *Bail Act 1978* (NSW) in this was has been the development of what is considered a complex and difficult piece of legislation, involving a number of presumptions for and against bail. Since 1979 the *Bail Act 1978* (NSW) has been amended eight-five times.<sup>24</sup> Twenty-eight of the amendments have related to the presumptions attached to specific offences.<sup>25</sup> In 2007 the then Attorney General, John Hatzistergos remarked that the amendments had given New South Wales “the

---

<sup>20</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 December 1978, 2013 (F Walker, NSW Attorney General) 2013 see also New South Wales Department of the Attorney General, "Bail Reform In NSW" Published by the Bureau of Crime Statistics and Research 1984, 3 - 5.

<sup>21</sup> Pheeny, D “Do you reckon I’m gunna get bail?” *Indigenous Law Bulletin* May / June 2012, ILB Volume 7, Issue 30, 3-4.

<sup>22</sup> *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW).

<sup>23</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 December 2005, 1 (M Iemma, NSW Premier) 1-2.

<sup>24</sup> New South Wales Law Reform Commission, above n 5, 29.

<sup>25</sup> New South Wales Law Reform Commission, above n 5, 28.



toughest bail laws in the Australia.”<sup>26</sup> This is consistent with the research conducted by Alex Steel. In his paper he notes that New South Wales has passed the most punitive amendments to their bail legislation compared with any other jurisdictions in Australia.<sup>27</sup>

The case of *R v Kissner*<sup>28</sup> sums up the way the presumptions in the *Bail Act 1978* (NSW) are applied, in this case Hunt CJ said:

*“The Bail Act makes a number of different provisions in relation to how courts are to approach an application for bail, depending on the nature of the offence with which the applicant has been charged:*

- a) Section 10 permits a court to dispense with the requirement of bail, in what would appear to be any case.*
- b) Where the applicant has been charged with certain minor offences..., section 8 provides that he is entitled to be granted bail except in certain circumstances where, for example, he has previously failed to comply with bail undertakings or conditions....*
- c) Where the applicant has been charged with any other offence except those referred to in the next two categories, section 9 provides that he is entitled to bail unless the court is satisfied that any criteria stated in section 32 justifies bail being refused. This is referred to the presumption in favor of bail.*
- d) Where the applicant has been charged with certain more serious offences, section 9 removes that presumption and there is left no presumption either way. The act makes no reference to onus of proof in such a situation.... In relation to applications for bail in this present category by persons not yet convicted, therefore, there is in my view an onus of the Crown. The onus on the Crown in relation to this category is necessarily less onerous than it is in relation to the previous category.*
- e) Where the applicant has been charged with certain more serious drug offences, section 8 A provides that he “... is not to be granted bail unless [he] satisfies the court that bail should not be refused. This is referred to as the presumption against bail.... The presumption against bail expressed in section 8A imposes a difficult task upon an applicant to which the section applies. Its effect is not merely to place an onus upon the applicant*

---

<sup>26</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2670 (J Hatzistergos, NSW Attorney General) 2670.

<sup>27</sup> See Steel, A "Bail in Australia: Legislative Introduction and Amendment Since 1970" (Paper presented at ANZ Critical Criminology Proceedings, Monash University, 8 and 9 July 2009) 233-4, where a punitive amendment is consider by Steel as one which restricts a person's right to bail.

<sup>28</sup> *R v Kissner* (Unreported, NSW Supreme Court, Hunt CJ at CL, 17 January 1992).

*to establish his entitlement to bail. He must satisfy the court that bail should not be refused.*<sup>29</sup>

In summary, when there is a presumption in favor of bail, or there is no presumption at all, the *Bail Act 1978* (NSW) places an onus of the Crown to show why the refusal of bail is justified. When there is a presumption against bail the applicant has the onus of showing the court why bail should be granted.<sup>30</sup> It is important to have an understanding of how the onus of proof issue has been dealt with in the past as the *Bail Act 2013* (NSW) is silent on the issue.

The *Bail Act 2013* (NSW) has removed these presumptions and the focus becomes the “unacceptable risk” test.<sup>31</sup> Section 20 (1) of the *Bail Act 2013* (NSW) states that:

*A bail authority may refuse bail for an offence only if the bail authority is satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions.*<sup>32</sup>

The question the bail authority must then ask is what is an unacceptable risk?<sup>33</sup> The concept of risk outside of the law is quite broad. When a person considers the risk of

---

<sup>29</sup> *R v Kissner* (Unreported, NSW Supreme Court, Hunt CJ at CL, 17 January 1992), 4.

<sup>30</sup> See Schaudin, S & Goodwin, M “Supreme Court Bail Applications” paper presented at the Legal Aid Commission of New South Wales Criminal Law Conference 2007, 6 – 9, Roles, V “Bail Refresher” paper presented in August 2011 accessed electronically at <[http://www.criminalcle.net.au/main/page\\_cle\\_pages\\_bail.html](http://www.criminalcle.net.au/main/page_cle_pages_bail.html)> on 17 August 2013, 3 – 6 and Snowball, L , Roth, L and Weatherburn, D “Bail Presumptions and Risk of Bail Refusal: an analysis of the NSW bail act” NSW Bureau of Crime Statistics and Research Brief Paper no. 49, July 2010, 3 – 4 for further information about the presumptions under the *Bail Act 1978* (NSW).

<sup>31</sup> *Bail Act 2013* (NSW) s 20(1).

<sup>32</sup> *Bail Act 2013* (NSW) s 20(1).

something occurring what they are doing is looking at the probability of an event occurring and multiplying that probability by the potential damage the event might cause.<sup>34</sup> If the figure that results from this multiplication is considered too high then a person may decide not to take that risk. By placing the term *unacceptable* in front of the word *risk* the *Bail Act 2013 (NSW)* is effectively giving the bail authority something to quantify and measure the risk the applicant poses. This is essential as there is always going to be some risk of an event occurring. When the risk reaches a level that is considered by the bail authority to be unacceptable, bail may be refused. If the risk doesn't reach that level then bail cannot be refused. The "unacceptable risk" test can therefore be seen as containing two parts. The court must first consider whether the accused poses a risk. If a risk is identified the court will then look at whether or not that risk is at such a level to make it unacceptable.

Under section 17 the *Bail Act 2013 (NSW)* the bail authority is allowed to consider one of four risks.<sup>35</sup> Section 17 states that:

*For the purposes of this Act, an "unacceptable risk" is an unacceptable risk that an accused person, if released from custody, will:*

- a) fail to appear at any proceedings for the offence, or*
- b) commit a serious offence, or*
- c) endanger the safety of victims, individuals or the community, or*
- d) interfere with witnesses or evidence.<sup>36</sup>*

Section 17 then goes on to give the bail authority an exhaustive list of factors that can be considered when the level of risk is considered.<sup>37</sup> These factors are the equivalent

---

<sup>33</sup> Note a bail authority is defined in the *Bail Act 2013 (NSW)* under section 4 as "a police officer, an authorised justice or a court."

<sup>34</sup> Unknown, "Risk" Stanford Encyclopedia of Philosophy, published 13 March 2007 accessed electronically at < <http://plato.stanford.edu/entries/risk/> > on the 28 September 2013.

<sup>35</sup> *Bail Act 2013 (NSW)* s 17.

<sup>36</sup> *Bail Act 2013 (NSW)* s 17(2).

to section 32 of the *Bail Act 1978* (NSW).<sup>38</sup> When a bail authority considers whether or not an applicant for bail poses an unacceptable risk, as defined by section 17, the risks that the bail authority are allowed to take into account are limited to those found in section 17.<sup>39</sup> The bail authority cannot consider any other risks. A bail authority is also limited to considering the further factors in section 17 when the question of whether or not the risk is unacceptable is raised.<sup>40</sup>

There is no doubt surrounding what risks a bail authority can consider on an application for bail. The difficulty that the *Bail Act 2013* (NSW) creates is the ambiguity involved in trying to work out what is considered to be unacceptable. The *Bail Act 2013* (NSW) is also silent on the issue as to who bears the onus of persuading the court that the risk is unacceptable. In the next chapter of this paper principles of statutory interpretation will be used in order to try and obtain some insight into what the term may mean as well as looking into who might bear the onus of proving that the risk is unacceptable.

---

<sup>37</sup> *Bail Act 2013* (NSW) s 17(3).

<sup>38</sup> *Bail Act 1978* (NSW) s 32.

<sup>39</sup> *Bail Act 2013* (NSW) s 17(2).

<sup>40</sup> *Bail Act 2013* (NSW) s 17(3).

*Chapter Three - The Future*

The focus of this chapter is how the *Bail Act 2013* (NSW) is likely to be interpreted and applied within the New South Wales judicial system. As mentioned previously the phrase “unacceptable risk” is of most interest. Unfortunately the phrase "unacceptable risk", as found in section 17 of the *Bail Act 2013* (NSW), is ambiguous and vague as to what it actually requires a bail authority to find in order to make a risk unacceptable. The *Bail Act 2013* (NSW) is also silent on the issue of who bears the onus of proof in relation to the unacceptable risk required to refuse an application for bail. To work out these issues an exercise in statutory interpretation is required. The process of statutory interpretation completed in this research project will begin with a look at what the intended purpose of the *Bail Act 2013* (NSW) may be. How other jurisdictions have dealt with similar issue in related legislation will then be discussed in order to support the way that "unacceptable risk" could be interpreted by applying the purposive approach.<sup>41</sup>

The exercise of statutory interpretation has historically been found to involve one of two methods. The first was the literal approach.<sup>42</sup> This approach involved looking at the meaning of the words found in the Act and applying their meaning literally regardless of the intended purpose of the Act and any potential outcome of the literal

---

<sup>41</sup> This approach to statutory interpretation has been endorsed by a number of texts including Hall, K and Macken, C *Legislation and Statutory Interpretation* (2<sup>nd</sup> Ed. 2009) 72 –100 and Pearce, D and Geddes, R, *Statutory Interpretation in Australia* (6<sup>th</sup> Ed. 2006) 27-9, 100. See also Kirby, M "Statutory Interpretation: the meaning of meaning" paper presented at RMIT University Symposium on Statutory Interpretation 13 August 2009, 4 – 5.

<sup>42</sup> Hall, K and Macken, C, *Legislation and Statutory Interpretation* (2<sup>nd</sup> Ed. 2009) 83.

interpretation.<sup>43</sup> Perhaps because of the difficulty that the literal approach was causing a more modern approach to statutory interpretation, known as the purposive approach, has been preferred by the Courts.<sup>44</sup> For example, in *Mills v Meeking* (1990) 169 CLR 214 the High Court stated that:

*"the literal rule of construction... must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act."*<sup>45</sup>

The statutory equivalent to the common law purposive test is found within section 33 of the *Interpretation Act 1987* (NSW).<sup>46</sup> Section 33 states that:

*In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule ... shall be preferred to a construction that would not promote that purpose or object.*<sup>47</sup>

Fortunately the *Bail Act 2013* (NSW) contains within section 3 an outline of the purposes of the act. Section 3 states that:

- (1) The purpose of this Act is to provide a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions.*
- (2) A bail authority that makes a bail decision under this Act is to have regard to the presumption of innocence and the general right to be at liberty.*<sup>48</sup>

---

<sup>43</sup> *Ibid*, 73. See also *See Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) CLR 129 at 161-2.

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

<sup>45</sup> *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson JJ. See also *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404.

<sup>46</sup> *Interpretation Act 1987* (NSW) s 33.

<sup>47</sup> *Interpretation Act 1987* (NSW) s 33.

<sup>48</sup> *Bail Act 2013* (NSW) s 3.

Looking at the purpose of the *Bail Act 2013* (NSW), with particular notice of subsection two, the purposive approach to statutory interpretation can assist with working out who bears the onus of proof in relation to the unacceptable risk.<sup>49</sup> If one of the purposes of the *Bail Act 2013* (NSW) is to require those determining a bail application to have regard to not only the presumption of innocence but more importantly a person's "general right to be at liberty" it is highly likely that the party wishing to remove a person's general right to be at liberty will bear the onus of proving that the risk the person poses is unacceptable. As this will generally be the Crown, as they are the ones who will oppose an application for bail, the onus can be seen as falling on them.

This appears consistent with the language used in the *Bail Act 2013* (NSW). Section 20(1) of the *Bail Act 2013* (NSW) states that bail will be refused when the bail authority is satisfied there is an unacceptable risk.<sup>50</sup> It follows then that the starting point would be establishing an unacceptable risk exists. It wouldn't make sense, given the way this section is written, to place the onus on the party opposing the grant of bail to first establish the risks the applicant presents and then show why these risk are unacceptable within the limits of section 17.<sup>51</sup> There has to be some threshold met by the party opposing bail to first establish that there are risks that could be considered unacceptable before the applicant has to address the bail authority.

---

<sup>49</sup> *Bail Act 2013* (NSW) s 3(2).

<sup>50</sup> *Bail Act 2013* (NSW) s 20.

<sup>51</sup> *Bail Act 2013* (NSW) s 17.

Applying the purposive test to the ambiguity surrounding term "unacceptable", in the context of evaluating the risk factors found in section 17, is a little more difficult.<sup>52</sup> It appears as though the purposive test alone cannot remove the uncertainty that exists. However, what it does show is that when a bail authority considers whether or not a risk is unacceptable they must have regard to a person's right to be at liberty.<sup>53</sup> As discussed above the court places this right at an extremely high level within our society.<sup>54</sup> When the unacceptable risk test is applied, in order to remove that right, the risk that the accused may pose should be at a level that is high enough to remove that right to be at liberty. What that level actually is would need to be considered on a case by case basis, but it should be at a level where some justification for removing their right to be at liberty can be made.

When a court considers that the terms of an Act are ambiguous the *Interpretation Act 1987* (NSW) also allows a court to consider further extrinsic material in order to determine the purpose of the legislation as intended by parliament.<sup>55</sup> Under section 34 (2) (e) a court may refer to an explanatory note in order to gain some assistance.<sup>56</sup> Unfortunately the explanatory note to the *Bail Act 2013* (NSW) does not contain any information that may assist present purposes.<sup>57</sup> Under section 34 (2) (f) the court can also look at the Second Reading speech made in relation to this act.<sup>58</sup> Like the explanatory note the second reading speech contains little useful information in

---

<sup>52</sup> *Bail Act 2013* (NSW) s 17.

<sup>53</sup> *Bail Act 2013* (NSW) s 3.

<sup>54</sup> See above extracts from the case of *Williams v The Queen* (1986) 161 CLR 278.

<sup>55</sup> *Interpretation Act 1987* (NSW) s 34.

<sup>56</sup> *Interpretation Act 1987* (NSW) s 34(2)(e).

<sup>57</sup> Explanatory Memorandum, *Bail Bill 2013* (NSW).

<sup>58</sup> *Interpretation Act 1987* (NSW) s 34(2)(f).



relation to what the term unacceptable might mean and who might bear the onus of proof.<sup>59</sup>

Further to the material mentioned above a court may consider how other jurisdictions have dealt with interpreting similar terms in related legislation. This is known as the *in pari material* principle.<sup>60</sup> The Tasmanian case of *Danzinger v Hydro Electric Commn* [1961] Tas SR 20 provides authority for the fact that when an act is being interpreted, a similar act from another jurisdiction can be consulted in order to interpret the act in question.<sup>61</sup> How then have other jurisdictions dealt with the interpretation of similar issues? As mentioned above Queensland and Victoria used the term unacceptable risk in their bail acts. The term unacceptable risk is also found in the Queensland and New South Wales legislation that deals with the continued detention of high risk offenders. The first jurisdiction that will be looked at is Victoria.

In Victoria applications for bail are made under the *Bail Act 1977* (Vic) and the starting point for the application for bail is that any person accused of an offence is entitled to bail.<sup>62</sup> However where this right is abrogated by the act section 4 (2) contains three tests that apply to the decision to grant bail.<sup>63</sup> The first test applies to offences listed in section 4 (2) (a) - (aa), this section states that bail will be refused

---

<sup>59</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 81 (G Smith, NSW Attorney General).

<sup>60</sup> Pearce, D and Geddes, R, *Statutory Interpretation in Australia* (6<sup>th</sup> Ed. 2006) 100-1 see also Hall, K and Macken, C, *Legislation and Statutory Interpretation* (2<sup>nd</sup> Ed. 2009) 88.

<sup>61</sup> *Danzinger v Hydro Electric Commn* [1961] Tas SR 20 at 24 per Crisp J referred to in Pearce, D and Geddes, R, *Statutory Interpretation in Australia* (6<sup>th</sup> Ed. 2006) 100.

<sup>62</sup> *Bail Act 1977* (Vic) s 4(1).

<sup>63</sup> *Bail Act 1977* (Vic) s 4(2).

"unless the court is satisfied that exceptional circumstances exist which justify the grant of bail."<sup>64</sup> The second test applies to the offences listed in section 4 (4) (a) - (d) "the court shall refuse bail unless the accused shows cause why his detention in custody is not justified and in any such case where the court grants bail."<sup>65</sup> Both of these two tests place an onus on the accused to show why his or her detention is not justified.<sup>66</sup> The third test contained in the *Bail Act 1977* (Vic) is slightly different from the first two and it is quite similar to section 17 of the *Bail Act 2013* (NSW).<sup>67</sup> The third test is found within section 4 (2) (d) (i), this section states that the court can refuse bail if it is satisfied that:

*"that there is an **unacceptable risk** that the accused if released on bail would-  
fail to surrender himself into custody in answer to his bail;  
commit an offence whilst on bail;  
endanger the safety or welfare of members of the public; or  
interfere with witnesses or otherwise obstruct the course of justice  
whether in relation to himself or any other person"*<sup>68</sup>

A very important part of the above test is the term "unacceptable risk." How then does the *Bail Act 1977* (Vic) explain what the term "unacceptable risk" means? The *Bail Act 1977* (Vic), like its New South Wales counterpart, is silent on this issue. The *Bail Act 1977* (Vic) does provide a list of factors to be considered in section 4 (3) which are to assist in the assessment of the risk.<sup>69</sup> Case law on how the Victorian courts have dealt with the concept of "unacceptable risk" may be useful with the interpretation of the new test found in the *Bail Act 2013* (NSW).

---

<sup>64</sup> *Bail Act 1977* (Vic) s 4(2) (a) - (aa).

<sup>65</sup> *Bail Act 1977* (Vic) s 4(4) (a) - (d).

<sup>66</sup> *Re Kazem Hamad* [2010] VSC 585, [5] in relation to the "just cause" test found in *Bail Act 1977* (Vic) s 4(4) (a) - (d) and *Memery v The Queen* [2000] VSC 495, [5] in relation to the "exceptional" test found in *Bail Act 1977* (Vic) s 4(2) (a) - (aa).

<sup>67</sup> *Bail Act 2013* (NSW) s 17.

<sup>68</sup> *Bail Act 1977* (Vic) s 4 (2)(d)(i). Note emphasis and formatting added.

<sup>69</sup> *Bail Act 1977* (Vic) s 4 (3).

In *R v Hapeta* [2012] VSC 387, Robson J said that "the relevant test [he] must consider refers to an unacceptable risk, not merely a risk."<sup>70</sup> Further to this, in the case of *Steven Mustica v Director of Public Prosecutions* [2006] VSC 441 the Victorian Supreme Court, when discussing the risk of flight, said that "[i]n order to find that there is an unacceptable risk", something beyond mere speculation or suspicion must be established."<sup>71</sup> We are then left considering what makes a risk unacceptable. In *Haidy v DPP* [2004] VSC 247 the Supreme Court of Victoria discussed how a court might form the view as to what level of risk is unacceptable.<sup>72</sup> Redlich J made the following comments:

*"Bail when granted is not risk free. Williamson v DPP (Q'ld).*

*As the offender's liberty is at stake, a tenuous suspicion or fear of the worst possibility if the offender is released will not be sufficient. Dunstan v DPP; Williamson v DPP (Q'ld).*

*It is not necessary that the prosecution establish that the occurrence of the event constituting the risk is more probable than not. There are recognised conceptual difficulties associated with applying the civil standard of proof to future events. Davies v Taylor; Patterson v BTR Engineering (Aust) Ltd. To require that the risk be proved to a particular standard would deprive the test of its necessary flexibility. **What must be established is that there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable.** Hence the possibility an offender may commit like offences has been viewed as sufficient to satisfy a court that there is an unacceptable risk. R v Phung; MacBain v Director of Public Prosecutions.*

*Such an approach is consistent with the view adopted by the Full Court of the Federal Court in Dunstan v DPP. The Federal Court was concerned with s.22(1)(c) Bail Act (ACT) 1992 which required the court to have regard to "the likelihood of the person committing an offence while released on bail". The assessment of the risk though expressed in different terms to the Bail Act*

---

<sup>70</sup> *R v Hapeta* [2012] VSC 387, [21] per Robson J.

<sup>71</sup> *Steven Mustica v Director of Public Prosecutions* [2006] VSC 441, [59].

<sup>72</sup> *Haidy v DPP* [2004] VSC 247.

1997 is to the same effect. Gyles J with whom Whitlam and Madgwick JJ agreed said:

*"In my view, it is wrong to approach the issue under s.8(2) and s.22(1)(c) on the basis of the elimination of risk. The correct question to ask is whether the prosecution has satisfied the Court that on the evidence before it there is a real likelihood of the applicant committing an offence while released on bail, although in this connection, likelihood does not mean more likely than not (see the explanation by Deane J in Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union [1979] FCA 85; (1979) 42 FLR 331 at 346-8, 27 ALR 367 at 380-382."*<sup>73</sup>

Applying these remarks to the *Bail Act 2013* (NSW) it will be important for a bail authority to understand firstly that with every bail application there is going to be some risk. Redlich J seems to suggest that a risk can become unacceptable if firstly the risk is considered to have a sufficient likelihood of occurring.<sup>74</sup> However, in saying this *Haidy* makes it clear that there are conceptual difficulties with trying to place a particular standard of proof to the "unacceptable risk" test as we are dealing with events that may or may not occur.<sup>75</sup> Courts can then be seen as having some discretion as to what standard they require.

When a Court is satisfied that a risk has been identified the unacceptable risk test is not complete. *Haidy v DPP* [2004] VSC 247 goes on to support this proposition by saying:

*"To assess whether the risk is unacceptable the court is required to have regard to the matters set out in s.4(3) of the Act and all other relevant matters. Some of those matters may not bear upon the degree of risk. The degree of likelihood of the occurrence of the event may be only one factor which bears upon whether the risk is unacceptable. Thus the time which will elapse before*

---

<sup>73</sup> *Haidy v DPP* [2004] VSC 247 at [14]-[17] per Redlich J. Note, emphasis added.

<sup>74</sup> *Haidy v DPP* [2004] VSC 247, [16].

<sup>75</sup> *Ibid.*

*the offender's trial has been held to be a factor which may bear upon whether the risk is unacceptable. Mokbel v DPP (No. 2; Skura; Application for Bail; Mokbel v DPP (No. 3). As Kellam J was to say in Mokbel (No. 3):*

*"The issue of detention by reason of unacceptable risk is an issue which must be balanced with the likelihood the allegations against an accused man then brought before a court in the near future. The question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is, although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay."*

*His Honour's view accords with the common law position explained in R v Martin and with the broad principle that public interest considerations may lead to bail being granted though the risk is relatively high or refused though the risk be minimal. R v Wakefield.*"<sup>76</sup>

Applying these remarks to the way the unacceptable risk test might operate within New South Wales, the unacceptable risk test can be considered as having two parts. The first part involves a bail authority being satisfied that there is a risk of the accused doing one of the things mentioned in section 17 (2).<sup>77</sup> If the bail authority is satisfied that there is a particular likelihood of a risk occurring then the bail authority will move onto the second part of the test, which is the balancing exercise mentioned above.<sup>78</sup> This exercise would involve looking at the other risk factors identified, as well as the factors set in section 17 (3) *Bail Act 2013* (NSW), in order to determine if the risk is unacceptable.<sup>79</sup> Perhaps one of the better examples of this point is the case of *Re Magee* [2009] VSC 384.<sup>80</sup>

---

<sup>76</sup> *Haidy v DPP* [2004] VSC 247, [18] – [19].

<sup>77</sup> *Bail Act 2013* (NSW) s 17(2).

<sup>78</sup> *Haidy v DPP* [2004] VSC 247, [18].

<sup>79</sup> *Bail Act 2013* (NSW) s 17(3).

<sup>80</sup> *Re Magee* [2009] VSC 384.

Mr Magee was bail refused for a graffiti type offence.<sup>81</sup> The allegation was that Mr Magee painted over an advertisement in a tram shelter causing approximately \$340 worth of damage. There was an inference, from Mr Magee's criminal record and perhaps his conduct, that he posed a very high risk of re-offending. The risk of re-offending is one of the considerations mentioned in section 4 (2) (d) (i) of the *Bail Act 1977 (Vic)*.<sup>82</sup> The question the Victorian Supreme Court then went on to consider was whether or not the applicant posed an "unacceptable risk" in the terms of the *Bail Act 1977 (Vic)*.<sup>83</sup>

At paragraph eighteen, the Court started the balancing exercise with the fact that the risk of re-offending was a real one and that is was "neither farfetched nor fanciful."<sup>84</sup> The Court then went on to consider whether or not the other factors listed in the *Bail Act 1977 (Vic)* could make the risk the applicant posed while at liberty unacceptable. The court considered the following:

1. The risk attached to re-offending was on the low side of criminal activity.<sup>85</sup>  
This was a consideration under section 4 (3) (a).<sup>86</sup>
2. That it was unlikely that the accused would serve a period of imprisonment if found guilty.<sup>87</sup> This consideration goes towards the risk of the accused failing to appear. While the likely penalty is not expressly mentioned in section 4 (3)

---

<sup>81</sup> *Re Magee* [2009] VSC 384, [3].

<sup>82</sup> *Bail Act 1977 (Vic)* s 4 (2) (d) (i).

<sup>83</sup> *Re Magee* [2009] VSC 384, [15] – [26].

<sup>84</sup> *Re Magee* [2009] VSC 384, [18].

<sup>85</sup> *Re Magee* [2009] VSC 384, [19].

<sup>86</sup> *Bail Act 1977 (Vic)* s 4 (3) (a).

<sup>87</sup> *Re Magee* [2009] VSC 384, [20].

the section allows to the court to take into account "*all matters appearing to be relevant*".<sup>88</sup>

3. That there was no suggestion of the accused being a flight risk.<sup>89</sup> Risk of flight relates to the risk of failing to appear found in section 4 (2) (d) (i).<sup>90</sup>
4. There was no apparent risk that the accused would endanger the safety or welfare of members of the public.<sup>91 92</sup>
5. And finally, the court considered that where there is a risk that an offence of a minor nature will be committed the court should not punish the accused, for an offence that may or may not occur, by refusing him bail. If he was to re-offend the criminal justice system has ways to punish him for that re-offending.<sup>93</sup>

After balancing the above factors with the risk of re-offending the court found that the refusal of bail in this case was not warranted. The court said that:

*"[a] citizen should not be detained arbitrarily because there is a real risk of him committing a further offence of a relatively minor nature; one that the criminal law will punish if committed."*<sup>94</sup>

What this means for those applying for bail in New South Wales when the *Bail Act 2013* (NSW) comes into force is that is that even if one of the risk factors identified in section 17 (2) is found to have a likelihood of occurring, this risk must be balanced against the other risk factors in section 17 (2) and 17 (3) before the risk can be

---

<sup>88</sup> *Bail Act 1977* (Vic) s 4 (3).

<sup>89</sup> *Re Magee* [2009] VSC 384, [21].

<sup>90</sup> *Bail Act 1977* (Vic) s 4 (2) (d) (i).

<sup>91</sup> *Re Magee* [2009] VSC 384, [22].

<sup>92</sup> *Bail Act 1977* (Vic) s 4 (2) (d) (i).

<sup>93</sup> *Re Magee* [2009] VSC 384, [24].

<sup>94</sup> *Re Magee* [2009] VSC 384, [24].

considered unacceptable.<sup>95</sup> The unacceptable risk test, as applied by the Victorian courts, has been shown to involve two steps:

1. identification of the risk that has a sufficient likelihood of occurring;<sup>96</sup> and
2. a balancing exercise between the risk factors to determine if the risk identified is unacceptable.<sup>97</sup>

One further question in relation to the balancing exercise is whether each risk factor is considered equally or do some of the risks carry more weight than the others? The *Bail Act 2013* (NSW) and the *Bail Act 1977* (Vic) do not specifically address this question, however the Victorian courts have stated that the risk of failing to appear is the primary risk factor to be considered. In the case of *Bail Application by Michael Paterson* [2006] VSC 268 where the unacceptable risk test was discussed, the Victorian Supreme Court said that:

*“There is always a risk ... that the accused person may fail to attend court.... It is that risk which is the primary risk to be considered in any application. That has been recognized throughout the history of the law relating to bail for hundreds of years. That is the primary consideration.”*<sup>98</sup>

*Paterson* was affirmed in *Re Metekingi* [2012] VSC 366 where the Court said that:

*“The authorities establish that the primary question relevant to the grant of bail is whether the person will meet the conditions of bail and attend for trial”*<sup>99</sup>

---

<sup>95</sup> *Bail Act 2013* (NSW) 17(2) – (3).

<sup>96</sup> *Haidy v DPP* [2004] VSC 247, [14] – [17]. *Re Magee* [2009] VSC 384, [18].

<sup>97</sup> *Haidy v DPP* [2004] VSC 247, [18] – [19]. *Re Magee* [2009] VSC 384, [15] – [26].

<sup>98</sup> *Bail Application by Michael Paterson* [2006] VSC 268, [29].

<sup>99</sup> *Re Metekingi* [2012] VSC 366, [22].



The way the Victorian courts describe the risk of the accused failing to attend court as being a primary consideration can be applicable to bail applications made in New South Wales. Similar comments were made in the Australian Capital Territory case of *Burton v R* (1974) 3 ACTR 77 where it was held that “the fundamental consideration when bail is in question is whether the accused person will attend at his trial.”<sup>100</sup> For those making bail applications the balancing exercise described above could be done with this in mind. If a bail application contains conditions which can satisfy the court that the accused will turn up to court then this might balance against other perceived risks and persuade the court that the risk is not unacceptable.

Victorian case law in relation to the unacceptable risk test also explores the issue of who bears the onus of proof. In the case of *Bail Application by Michael Paterson* [2006] VSC 268 the Court stated that:

“... [T]he structure of s.4 places an onus upon the prosecution to satisfy the Court that there is an unacceptable risk. ...[I]f there is an unacceptable risk because of some particular circumstances, then the onus is on the prosecution to place evidence before the Court to establish what is the risk in the grant of bail that constitutes an unacceptable risk.”<sup>101</sup>

This idea that the prosecution bears the onus of proving that the risk is unacceptable is also confirmed in a number of other cases.<sup>102</sup>

---

<sup>100</sup> *Burton v R* (1974) 3 ACTR 77, 78.

<sup>101</sup> *Bail Application by Michael Paterson* [2006] VSC 268, [36].

<sup>102</sup> See for example *IMO bail application O’Hea* [2005] VSC 126 at [12], *Re Mergin Kelmendi* [2008] VSC 31 at [14], *Re MDT* [2010] VSC 28 at [5], *Re Aps* [2009] VSC 588 at [7], *Memery v The Queen* [2000] VSC 495 at [6], *DPP v Harika* [2001] VSC 237 at [45].

When the *Bail Act 2013* (NSW) comes into force bail applications can be opposed under section 17.<sup>103</sup> Given the experience in Victoria it appears it will be appropriate for courts in New South Wales to start with the prosecution making submissions to the court about what risk the applicant poses under section 17(2) followed by why this risk is unacceptable. Once the prosecution makes submissions on what makes the risk unacceptable courts will then likely turn to the applicant and ask for their submissions on the matter of risk. If the Court is persuaded that an unacceptable risk exists then the applicant may suggest conditions that could reduce the risk.<sup>104</sup> For prosecutors it will be important to keep in mind that they are likely to bear the onus of proving firstly what risk they perceived as being present followed by what makes the risk unacceptable. Failure to do so may give the court reason to grant the application for bail without even hearing from the applicant.

In Victoria the issue of the onus of proof was initially met with some difficulty due to the fact that part of section 4 of the *Bail Act 1977* (Vic) creates a situation where, depending on the offence the applicant is charged with, the applicant may have to show why their detention is not justified.<sup>105</sup> This is more commonly known as the “show cause” test. While the *Bail Act 2013* (NSW) does not include a “show cause” test it is important to see how this test has evolved in Victoria as it may be incorporated in the *Bail Act 2013* (NSW) in the future. Bail laws have always been shaped to suit the political needs of governments, it is likely that the *Bail Act 2013* (NSW) will be no different.

---

<sup>103</sup> *Bail Act 2013* (NSW) s 17.

<sup>104</sup> *Bail Act 2013* (NSW) s 20.

<sup>105</sup> *Bail Act 1977* (Vic) s (2) and 4(4)(d).

The “show cause” test found in section 4(4) of the *Bail Act 1977* (Vic), was in the past considered to be a two part test in relation to who held the onus of proof.<sup>106</sup> In a “show cause” situation it was thought that the onus was first placed on the applicant to show to the court why their detention wasn’t justified. If the accused completed this step it was thought that the second step of the test took place where the onus would shift and the prosecution would then prove that there was an unacceptable risk that would allow the court to refuse bail. The leading case in relation to the issue is the case of *Re Fred Joseph Asmar* [2005] VSC 487.<sup>107</sup>

In *Asmar* the court specifically looked at the relationship between the “unacceptable risk” and the “show cause” tests found in the *Bail Act 1977* (Vic). Maxwell P looked firstly at the way the issue was dealt with in *DPP v Harika* [2001] VSC 237.<sup>108</sup> In *Harika* the two step process mentioned above was used and stated as being the appropriate way of dealing with a show cause application.<sup>109</sup> Maxwell P in *Asmar* felt that the way that this two part test shifted the onus was incorrect, he went on to say that when there is a “show cause” application to be made under section s(4) of the *Bail Act 1977* (Vic):

*“the question is whether the application has satisfied the Court that his/her detention in custody is not justified. That question will be answered in the affirmative or negative. If answered in the affirmative, bail should be granted. If answered in the negative, bail must be refused. There is no second step.”*<sup>110</sup>

---

<sup>106</sup> *DPP v Harika* [2001] VSC 237, [43] – [45].

<sup>107</sup> *Re Fred Joseph Asmar* [2005] VSC 487, this case has been affirmed in a number of recent decision including *Re RS* [2013] VSC 350 and *Re Conci* [2013] VSC 368.

<sup>108</sup> *Re Fred Joseph Asmar* [2005] VSC 487, [8] – [9].

<sup>109</sup> *DPP v Harika* [2001] VSC 237, [43] – [45].

<sup>110</sup> *Re Fred Joseph Asmar* [2005] VSC 487, [11].

Maxwell P stated that the unacceptable risk factors could be used to show why the applicants detention was or was not justified but the onus of proof in a show cause test was always on the applicant, there is no shifting of onus.<sup>111</sup>

Like Victoria, Queensland also has an "unacceptable risk" test within the *Bail Act 1980 (QLD)*.<sup>112</sup> The test is stated in the following terms:

*(1) Notwithstanding this Act, a court or police officer authorised by this Act to grant bail shall refuse to grant bail to a defendant if the court or police officer is satisfied—*

- (a) that there is an unacceptable risk that the defendant if released on bail—*
  - (i) would fail to appear and surrender into custody; or*
  - (ii) would while released on bail—*
    - (A) commit an offence; or*
    - (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or*
    - (C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else; or*
  - (b) that the defendant should remain in custody for the defendant's own protection.*<sup>113</sup>

To assist the court with making the determination as to whether or not a risk is unacceptable the *Bail Act 1980 (QLD)* provides, within section 16 (2) a non-exhaustive list of factors that the court can consider.<sup>114</sup> It should also be noted that the *Bail Act 1980 (QLD)* contains a "just cause" situation, similar to that mentioned above, for a number of offences listed in section 16(3).<sup>115</sup> How then have the Queensland Courts interpreted and applied their "unacceptable risk" test?

---

<sup>111</sup> *Re Fred Joseph Asmar* [2005] VSC 487, [17].

<sup>112</sup> *Bail Act 1980 (QLD)* s 16.

<sup>113</sup> *Bail Act 1980 (QLD)* s 16(1).

<sup>114</sup> *Bail Act 1980 (QLD)* s 16(2).

<sup>115</sup> *Bail Act 1980 (QLD)* s 16(3).

A starting point for the Queensland jurisprudence is the case of *Lacey v DPP* [2007] QSC 291.<sup>116</sup> In *Lacey* the Supreme Court of Queensland had the following to say about the concept of "unacceptable risk":

*"Before I turn to the prosecution case brought against the applicants and their personal circumstances, I should set out what appear to be the guiding principles in relation to applications of this sort. I commence with the observations of Thomas JA in Williamson v DPP [1999] QCA 356 where, at [21], his Honour said:*

*"No grant of bail is risk-free. The grant of bail however is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects. This does not depend on the so called presumption of innocence which has little relevance in an exercise which includes forming provisional assessments upon very limited material of the strength of the Crown case and of the defendant's character. Recognising that there is always some risk of misconduct when an accused person or for that matter any person, is free in society, one moves to consideration of the concept of unacceptable risk."*<sup>117</sup>

This idea that Bail applications should not be determined on the elimination of risk was also considered in the Australian Capital Territory case of *Dunstan v Director of Public Prosecutions* (199) 92 FCR 168, in this case Madgwick J said that:

*"It is a wrong approach to deny a person bail in an effort to eliminate the risk that such a person might commit offences if free to do so. There is no legislative warrant for preventative detention based on a fear that the worst possibility will come to pass. The question posed by the Bail Act is whether the court is satisfied that any risk is sufficient to justify the court denying the accused person a legal right..."*<sup>118</sup>

---

<sup>116</sup> *Lacey v DPP* [2007] QSC 291.

<sup>117</sup> *Lacey v DPP* [2007] QSC 291, [5].

<sup>118</sup> *Dunstan v Director of Public Prosecutions* (199) 92 FCR 168, 174 per Madgwick J. This case was cited with approval in *IMO bail application Blundell* [2008] ACTSC 138, [6] and *Collins v the Queen* [2003] ACTCA 17, [28].

The views expressed above in *Lacey*<sup>119</sup> are consistent with the Victorian cases such as *Haidy*.<sup>120</sup> What this shows is that the unacceptable risk test is not about removing all risk that the applicant may pose. The test is about identifying the risk and then balancing that risk against the other factors in order to determine whether or not that risk is unacceptable.

In a another case involving Mr Lacey the Supreme Court provides authority for the fact that, like Victoria, the Queensland “unacceptable risk” test does involve a balancing exercise.<sup>121</sup> The case of *Lacey v DPP* [2007] QCA 413 provides some specific insight into the way that the length of delay before trial may be balanced against the risk factors in section, the Court said that:

*“The length of delay, the reasons for that delay and the strength of the Crown case will always be matters of degree which must be balanced to arrive at a decision as to whether bail should be granted. ... The strength of a Crown case and the consequent risks of flight or interference with Crown witnesses do not diminish as the length of time to trial increases. On the other hand, in a case in which it is demonstrated that the time in custody on remand will likely exceed any custodial sentence which might be imposed after conviction, the relative importance of time may very well be regarded by the judge as outweighing the other relevant factors. The essence of the exercise of the judge’s discretion is to balance competing considerations and to weigh the relative importance which the different factors bear in the context of the decision which needs to be made. That exercise of discretion is not an empirical exercise; there are no bright lines drawn to determine conclusively when one important factor outweighs another.”*<sup>122</sup>

---

<sup>119</sup> *Lacey v DPP* [2007] QSC 291.

<sup>120</sup> *Haidy v DPP* [2004] VSC 247.

<sup>121</sup> *Lacey v DPP* [2007] QCA 413.

<sup>122</sup> *Lacey v DPP* [2007] QCA 413, [13]. This case has been affirmed in *AP v DPP* [2008] QSC 236, [32].

There are a number of Queensland cases involving appeals against decisions to refuse bail. These cases are particularly interesting as they provide an insight into the way superior Queensland courts feel the unacceptable risk test should be applied as well as the way refusals may be appealed. In the case of *SICA v Director of Public Prosecutions* [2010] QCA 18,<sup>123</sup> Chesterman JA made some interesting comments about the “unacceptable risk” test, His Honour said that the test is:

*“an assessment of risk according to an imprecise standard. The notion of “unacceptable risk”, while not devoid of content, is not “capable of yielding” a precise “degree of definition.”... The character of the assessment required under s16, coupled with its discretionary nature, makes the judgment particularly unsusceptible to the appellate process. The scope for demonstrating error of the kind required by House is necessary limited. The discretion has to be exercised within very broad parameters.... The weighing of the evidence to determine whether the risk was unacceptable cannot be assailed in the absence of error, fact or law...”<sup>124</sup>*

In *Keys v DPP (Qld)* [2009] QCA 220 the Supreme Court described an appeal against the refusal of bail as being one which was a challenge against the exercise of judicial discretion.<sup>125</sup> The Court went further to say that to be successful with the appeal the appellant needed to establish an error as described in *House v the King* (1936) 55 CLR 499<sup>126</sup>.<sup>127</sup>

---

<sup>123</sup> *SICA v Director of Public Prosecutions* [2010] QCA 18.

<sup>124</sup> *SICA v Director of Public Prosecutions* [2010] QCA 18, 274.

<sup>125</sup> *Keys v DPP (Qld)* [2009] QCA 220.

<sup>126</sup> *House v the King* (1936) 55 CLR 499 the error was described by Starke J in the following way: "It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

<sup>127</sup> *Keys v DPP (Qld)* [2009] QCA 220, [22].

In a more recent case of *Director of Public Prosecutions (Cth) v Dang* [2013] QCA

32 the Supreme Court affirmed this reasoning and stated that:

*“An appellant who challenges the exercise of discretion in a bail application has significant hurdles to clear before the decision below will be disturbed. In order to succeed, an appellant must establish a relevant error of law, or a misunderstanding or pertinent facts, or show that the discretion was exercised in the way that was so unreasonable as to in itself amount to an error of law or misunderstanding of fact.”*<sup>128</sup>

What the Supreme Court of Queensland identified in *Keys*, *SICA* and *Dang* is that the concept of unacceptable risk contains a large amount of judicial discretion and there are difficulties in trying to precisely define what an unacceptable risk is.<sup>129</sup> When the *Bail Act 2013* (NSW) is to be implemented it will be important to keep the discretionary nature of the unacceptable risk test in mind. While the court will have a great deal of discretion to determine what makes a risk unacceptable they will have to do so within the boundaries of section 17.<sup>130</sup> Section 17 only allows the court to consider four risk factors.<sup>131</sup> In assessing whether or not these risk factors are unacceptable section 17 provides an exhaustive list of factors that the court can consider.<sup>132</sup> If the assessment of unacceptable risk involves the consideration of other risks or factors not found in section 17 the court may be making an error of law.<sup>133</sup> An error of law may allow an aggrieved party to challenge the decision in a higher court.

---

<sup>128</sup> *Director of Public Prosecutions (Cth) v Dang* [2013] QCA 32, [2].

<sup>129</sup> *Keys v DPP (Qld)* [2009] QCA 220 and *SICA v Director of public Prosecutions* [2010] QCA 18 have both been affirmed in *Fisher v Director of Public Prosecutions (Qld)* [2011] QCA 54.

<sup>130</sup> *Bail Act 2013* (NSW) s 17.

<sup>131</sup> *Bail Act 2013* (NSW) s 17 (2).

<sup>132</sup> *Bail Act 2013* (NSW) s 17 (3).

<sup>133</sup> *Keys v DPP (Qld)* [2009] QCA 220, [22].



The term unacceptable risk is also found within the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).<sup>134</sup> Under section 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) if there is an unacceptable risk that a prisoner will commit a serious sexual offence when they are released from custody the court can order that their detention be continued or that they undergo a period of supervision when they are released into the community.<sup>135</sup> The way the courts have dealt with the interpretation of the term "unacceptable risk", in the context of the continued detention or supervision of dangerous sex offenders, may be useful for dealing with its interpretation in the *Bail Act 2013* (NSW).

When an application to have an offenders detention continued past their sentence term, or that they undergo supervision when they are released, is made the court will look at the offender's risk of re-offending. In *A-G (Qld) v DGK* [2011] QSC 73 the Supreme Court of Queensland said that the process involved:

*"an assessment of the relative risk of the prisoner committing another sexual offence and then a consideration of what order is required to avoid an "unacceptable risk", as the term is used in section 13."*<sup>136</sup>

The assessment that the court described above is quite similar to that which is required under section 17 of the *Bail Act 2013* (NSW) in relation to the risk of re-offending.<sup>137</sup> In *A-G v DGK* [2011] the court went on to say:

*"...[T]he consideration of what level of risk is unacceptable is ... a matter for judicial determination, requiring a value judgment which balances the need for community protection with the rights of an individual who has fully served the term of imprisonment which a court has judged appropriate."*<sup>138</sup>

---

<sup>134</sup> *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

<sup>135</sup> *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13.

<sup>136</sup> *A-G (Qld) v DGK* [2011] QSC 73, [28].

<sup>137</sup> *Bail Act 2013* (NSW) s 17.

<sup>138</sup> *A-G (Qld) v DGK* [2011] QSC 73, [28].

The assessment process was similarly described in the case of *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268 where the court said:

*“The A-G must prove more than a risk or re-offending.... As was also observed in Francis, a supervision order need not be risk free.... But the assessment of what level of risk is unacceptable ... is a matter for judicial determination, requiring a value judgment as to what risk should be accepted against the serious alternative of the deprivation of a person’s liberty.”*<sup>139</sup>

Like the Queensland and Victorian cases dealing with bail these cases again affirm the notion that it is improper to try and eliminate all risk and that the test involves a exercise in balancing competing considerations in order to determine whether or not a risk is unacceptable.

New South Wales also contains similar provisions in the *Crimes (High Risk Offenders) Act 2006* (NSW).<sup>140</sup> Section 5B of the *Crimes (High Risk Offenders) Act 2006* (NSW) was amended to include the following:

*(1) An offender can be made the subject of a high risk sex offender extended supervision order or a high risk sex offender continuing detention order as provided for by this Act if and only if the offender is a high risk sex offender.*

*(2) An offender is a "high risk sex offender" if the offender is a sex offender and the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision.*<sup>141</sup>

---

<sup>139</sup> *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268, [29].

This was affirmed in *A-G (QLD) v Edwards* [2007] QSC 396, [3].

<sup>140</sup> *Crimes (High Risk Offenders) Act 2006* (NSW).

<sup>141</sup> *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B. A similar provision is found within section 5E of the which deals with high risk violence offenders.

The case of *State of New South Wales v Thomas (Preliminary)* [2011] NSWSC 118 was one of the first cases to look into what the unacceptable risk test meant in the context of continued detention and supervision orders.<sup>142</sup> In this case Hulme J drew on the objects of the act as set out in section 3 of the *Crimes (High Risk Offenders) Act 2006* (NSW) when he considered what the term unacceptable risk meant.<sup>143</sup> His Honour approached the issue in the following way:

*"One matter that should be borne in mind in considering the new "unacceptable risk" test is the objects of the Act set out in s 3 of the Act. That section is in the following terms:*

*(1) The primary object of this Act is to provide for the extended supervision and continuing detention of serious sex offenders so as to ensure the safety and protection of the community.*

*(2) Another object of this Act is to encourage serious sex offenders to undertake rehabilitation.*

*Whilst bearing in mind the second of those two objects, I would regard the test in s 9(2) as being satisfied if there is a risk that the person will commit a serious sex offence which is present to a sufficient degree so that the safety and protection of the community cannot be ensured unless an order is made."<sup>144</sup>*

The way that Hulme J went about interpreting section 9(2) of the *Crimes (High Risk Offenders) Act 2006* (NSW) an example of the way the court can look at the objects of an act and apply the “purposive” approach to statutory interpretation.

---

<sup>142</sup> *State of New South Wales v Thomas (Preliminary)* [2011] NSWSC 118. It should be noted that at the time of this case the "unacceptable risk" test was found within s 9(2) of the *Crimes (High Risk Offenders) Act 2006* (NSW).

<sup>143</sup> *State of New South Wales v Thomas (Preliminary)* [2011] NSWSC 118, [19] – [20].

<sup>144</sup> *State of New South Wales v Thomas (Preliminary)* [2011] NSWSC 118, [19] – [20].

Shortly after *Thomas* the Supreme Court of New South Wales has had further opportunity to look at the unacceptable risk test found in *Crimes (High Risk Offenders) Act 2006* (NSW) in the case of *State of New South Wales v Richard John Darrego* [2011] NSWSC 360.<sup>145</sup> In *Darrego* McCallum J approached the task by looking at the way the High Court dealt with the concept of “material risk” found in medical negligence cases in the case of *Rosenbery v Percival* [2001] HCA 18.<sup>146</sup>

In *Rosenbery v Percival*, Gummow J “emphasized the importance, as a first task, of defining the risk in question.”<sup>147</sup> In medical negligence cases the risk identified is the risk of injury. Once the risk was identified the next step was to look at the likelihood of the injury occurring and the severity of the potential injury should it occur.<sup>148</sup> McCallum J in *Darrego* stated that it was useful to “analyse the risk posed by the offender of commission of a serious sex offence in the same way.”<sup>149</sup> Again we see a trend for risk to be dealt with first by identifying the risk and then balancing committing considerations against each other. What this also shows is the courts inclination to consider the way other jurisdictions have approached similar issues of statutory interpretation. This approach was also adopted in *State of New South Wales v Richardson* [2011] NSWSC 276.<sup>150</sup>

---

<sup>145</sup> *State of New South Wales v Richard John Darrego* [2011] NSWSC 360.

<sup>146</sup> *Rosenbery v Percival* [2001] HCA 18; (2001) 205 CLR 434 cited in *State of New South Wales v Richard John Darrego* [2011] NSWSC 360, [9] – [10].

<sup>147</sup> *Rosenbery v Percival* [2001] HCA 18; (2001) 205 CLR 434 at [69].

<sup>148</sup> *Rosenbery v Percival* [2001] HCA 18; (2001) 205 CLR 434 at [69].

<sup>149</sup> *State of New South Wales v Richard John Darrego* [2011] NSWSC 360, [10].

<sup>150</sup> *State of New South Wales v Richardson* [2011] NSWSC 276.

In *State of New South Wales v Richardson* [2011] Davies J considered the way other jurisdictions have dealt with the term unacceptable risk in their corresponding legislation in particular the Western Australian Courts.<sup>151</sup> Davies J looked firstly at the case of *Director of Public Prosecutions (WA) v Williams* (2007) 176 A Crim R 111 which stated that:

*“[A]n 'unacceptable risk' in the context of s 7(1) is a risk which is unacceptable having regard to a variety of considerations which may include the likelihood of the person offending, the type of sexual offence which the person is likely to commit (if that can be predicted) and the consequences of making a finding that an unacceptable risk exists. That is, the judge is required to consider whether, having regard to the likelihood of the person offending and the offence likely to be committed, the risk of that offending is so unacceptable that, notwithstanding that the person has already been punished for whatever offence they may have actually committed, it is necessary in the interests of the community to ensure that the person is subject to further control or detention.”*<sup>152</sup>

Davies J then went on to provide the following extract from *Director of Public Prosecutions (WA) v GTR* [2008] WASCA 187:

*“The word 'unacceptable' necessarily connotes a balancing exercise, requiring the court to have regard, amongst other things, for the nature of the risk (the commission of a serious sexual offence, with serious consequences for the victim) and the likelihood of the risk coming to fruition, on the one hand, and the serious consequences for the offender, on the other, if an order is made (either detention, without having committed an unpunished offence, or being required to undergo what might be an onerous supervision order). As John Fogarty points out, albeit in a rather different context (Unacceptable risk - A return to basics (2006) 20 AJFL 249, 252), the advantage of the phrase 'unacceptable risk' is that 'it is calibrated to the nature and degree of the risk, so that it can be adapted to the particular case.’”*<sup>153</sup>

---

<sup>151</sup> *State of New South Wales v Richardson* [2011] NSWSC 276, [27] – [30].

<sup>152</sup> *Director of Public Prosecutions (WA) v Williams* (2007) 176 A Crim R 111 as extracted in *State of New South Wales v Richardson* [2011] NSWSC 276, [28].

<sup>153</sup> *Director of Public Prosecutions (WA) v GTR* [2008] WASCA 187; (2008) 198 A Crim R 149 as extracted in *State of New South Wales v Richardson* [2011] NSWSC 276, [29].

Of particular importance is the last sentence in the above paragraph. In the *Bail Act 2013* (NSW) the use of the term “unacceptable” can therefore be seen as a way to give bail authorities the ability or flexibility to deal with each case of their merits. This was something noted above in the Victorian case of *Haidy*.<sup>154</sup> Bail authorities, while constrained by the types of risks identified in section 17 of the *Bail Act 2013* (NSW), will be able to exercise a large amount of discretion when applications for bail are made.<sup>155</sup>

Coming back to *State of New South Wales v Richardson* [2011] when Davies J had finished the analysis of the case law on the concept of unacceptable risk he provided his view on what the test actually meant, His Honour stated that:

*"[T]he notion that "unacceptable risk" involves a balancing exercise between the commission of a serious sexual offence and the likelihood of that risk coming to fruition on the one hand, and the serious consequences for the Defendant either because he will be detained beyond the period of his sentence although he has not committed any further offence or he will be subject to an onerous supervision order, on the other hand. It is because of that balancing exercise that it is open to the Court to be satisfied to a high degree of probability that there is an unacceptable risk but that the result of that finding (either a continuing detention order or a supervision order) may vary in a given situation."*<sup>156</sup>

The above extracts are useful for present purposes as they show how the courts might approach interpreting the “unacceptable risk” test when it comes into force early next year. What is continued in these types of cases is that the evaluation of risk involves the balancing of a number of relevant factors in order to determine if an identified risk is unacceptable.

---

<sup>154</sup> *Haidy v DPP* [2004] VSC 247 at [16].

<sup>155</sup> *Bail Act 2013* (NSW) s 17.

<sup>156</sup> *State of New South Wales v Richardson* [2011] NSWSC 276, [90].

*Concluding remarks*

When the *Bail Act 2013* (NSW) comes into force early next year the way applications for bail are made, opposed and considered will take on a different focus. The focus will be on the risk that the applicant poses if they are released on bail.<sup>157</sup> If the risk identified is considered unacceptable bail may be refused.<sup>158</sup> Under the *Bail Act 2013* bail authorities are only allowed to consider the following risks when an application for bail is made:

- a) the risk that the applicant will fail to appear at any proceedings for the offence, or
- b) the risk that the applicant will commit a serious offence, or
- c) the risk that the applicant will endanger the safety of victims, individuals or the community, or
- d) the risk that the applicant will interfere with witnesses or evidence.<sup>159</sup>

For those applying the above section, the *Bail Act 2013* (NSW) creates some difficulties in relation to how the "unacceptable risk" test will be applied in practice. The objective of this report was to look at these difficulties with a particular focus on the following:

1. What the phrase "unacceptable risk" might mean in the context of an application for bail under the *Bail Act 2013* (NSW)?
2. Who might bear the onus of persuading the court that there is an "unacceptable risk" as required by the *Bail Act 2013* (NSW)?

---

<sup>157</sup> *Bail Act 2013* (NSW) s 20(1).

<sup>158</sup> *Bail Act 2013* (NSW) s 20(1).

<sup>159</sup> *Bail Act 2013* (NSW) s 17(2).

Applying a purposive approach to the interpretation of the *Bail Act 2013* (NSW) to the second of the above objectives provides some support that the party seeking to refuse the applicant bail will bear the onus of persuading the bail authority that the risk is unacceptable.<sup>160</sup> The language within section 17 and 20 in combination with the purpose of the act, as outlined with section 3, supports this proposition.<sup>161</sup> This proposition is further supported by the experience in Victoria.<sup>162</sup>

The second difficulty that the *Bail Act 2013* (NSW) creates is the ambiguity surrounding what the "unacceptable risk" test requires a bail authority to find in order to refuse an applicant bail, this is referred to above as objective one. When an application for bail is made the assessment of the what the unacceptable risk is will likely involve two steps. The first is the identification of a risk.<sup>163</sup> This step does not provide much difficulty in its application as an argument could be run on almost every case that there is some risk involved with an applicant being at liberty. As long as the risk identified is mentioned in section 17 of the *Bail Act 2013* (NSW) the decision should be able to withstand scrutiny from superior courts on this front.<sup>164</sup> It

---

<sup>160</sup> For an example of the purposive approach being applied see *State of New South Wales v Thomas (Preliminary)* [2001] NSWSC 118, [19] – [20].

<sup>161</sup> *Bail Act 2013* (NSW) s 3, 17 and 20. This point is explored in more detail at page 15.

<sup>162</sup> *IMO bail application O’Hea* [2005] VSC 126 at [12], *Re Mergin Kelmendi* [2008] VSC 31 at [14], *Re MDT* [2010] VSC 28 at [5], *Re Aps* [2009] VSC 588 at [7], *Memery v The Queen* [2000] VSC 495 at [6], *DPP v Harika* [2001] VSC 237 at [45].

<sup>163</sup> *Haidy v DPP* [2004] VSC 247, [16], *Steven Mustica v Director of Public Prosecutions* [2006] VSC 44, [59], *Lacey v DPP* [2007] QSC 29, [5], *State of New South Wales v Richard John Darrego* [2011] NSWSC 360, [10], *Rosenbery v Percical* [2001] HCA 18; (2001) 205 CLR 434, 69

<sup>164</sup> *Bail Act 2013* (NSW) s 17(2).



appears that the party opposing bail will also have to show that the likelihood of a risk occurring is more than a mere suspicion.<sup>165</sup>

The second step, and perhaps the more difficult step to understand, is the balancing exercise that will be required in order to determine whether or not the risk identified is unacceptable.<sup>166</sup> If a risk mentioned in section 17(2) is identified as having some likelihood of occurring then the bail authority will then look at whether or not the risk is unacceptable. The bail authority will be able to consider various factors as listed with section 17(3) of the *Bail Act 2013* (NSW) when they consider whether or not the risk is unacceptable. Aside from these factors the *Bail Act 2013* (NSW) does not provide any guidance as to what the term unacceptable risk might mean.

Applying a purposive approach to interpreting this issue would suggest that for a risk to become unacceptable it would need to be at quite a high level as it has the serious consequence of removing a person's "general right to be a liberty".<sup>167</sup> It could also be suggested that by providing a number of competing considerations within section 17 a balancing exercise was intended as the appropriate way for the bail authority to apply the unacceptable risk test.<sup>168</sup> Case law in other jurisdictions dealing with related types

---

<sup>165</sup> See *Steven Mustica v Director of Public Prosecutions* [2006] VSC 441, [59] and *Haidy v DPP* [2004] VSC 247, [16].

<sup>166</sup> *Haidy v DPP* [2004] VSC 247, [18], *Re Magee* [2009] VSC 384, [15] – [26], *Lacey v DPP* [2007] QCA 413, [13], *Rosenbery v Percical* [2001] HCA 18; (2001) 205 CLR 434, [69], *State of New South Wales v Richardson* [2011] NSWSC 276, [27] – [30] and [90].

<sup>167</sup> *Bail Act 2013* (NSW) s 3. See also *Williams v The Queen* (1986) 161 CLR 278 and *Chu Kheng Lim v the Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 as extracted above at page 4.

<sup>168</sup> *Bail Act 2013* (NSW) s 17(2) – (3).

of legislation supports this view that the way of determining whether a risk is unacceptable is to perform a balancing exercise.<sup>169</sup>

This balancing exercise takes into consideration the potential for one of the above risk factors to be committed against the potential impact that committing one of the above risks could have. There is some difficulty applying a standard of proof to whether or not a bail authority has been persuaded that the risk is unacceptable. The difficulty arises from the fact that we are dealing with events that are yet to happen. This balancing exercise will involve a great deal of discretion and will allow the bail authority to consider each application for bail on its merits.<sup>170</sup>

It is difficult to define what an unacceptable risk actually is, to attempt to do so would be impossible and against the apparent intention of Parliament. What we are left with is a general procedure for what a bail authority must consider when an application for bail is made. In any application for bail the issue left to be determined will be whether the risk identified is, after the balancing exercise has taken place, at a level that is considered unacceptable. The risk attached to each factor should be looked at by thinking about the likelihood of an event occurring in combination with the harm that the event could cause. Other competing consideration will then be balanced against

---

<sup>169</sup> See footnote 166.

<sup>170</sup> *SICA v Director of Public Prosecutions* [2010] QCA 18, 274, *Keys v DPP (Qld)* [2009] QCA 220, [22], *Director of Public Prosecutions (Cth) v Dang* [2013] QCA 32, [2], *A-G (Qld) v DGK* [2011] QSC 73, [28], *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268, [3], *Director of Public Prosecutions (WA) v GTR* [2008] WASCA 187; (2008) 198 A Crim R 149 as extracted in *State of New South Wales v Richardson* [2011] NSWSC 276, [29] and *Haidy v DPP* [2004] VSC 247, [16].

that risk in order to determine whether or not the risk of the applicant being on bail is unacceptable.

In summary, dealing with the objectives outlined above:

1. There is no concrete answer as to what an unacceptable risk is. However, there is some guidance into the way a bail authority should be going about the process and the factors that bail authorities are allowed to consider. In essence the unacceptable risk test involves a two part test of first identifying a risk and then balancing that identified risk against competing considerations in order to determine whether or not the risk is unacceptable.
2. It is likely that the party opposing bail will bear the onus of proof.

## **Bibliography**

### ***Books, Papers and Articles***

Donovan, B, *The Law of Bail: Practice, Procedure and Principles* (1<sup>st</sup> Ed. 1981).

Maher, D "Bail Bill 2013" PowerPoint presentation presented in June 2013 accessed electronically at < [http://www.criminalcle.net.au/main/page\\_cle\\_pages\\_bail.html](http://www.criminalcle.net.au/main/page_cle_pages_bail.html) > on 17 August 2013.

Hall, K and Macken, C, *Legislation and Statutory Interpretation* (2<sup>nd</sup> Ed. 2009).

Jacobsen, G "Media Release – Bail Act Passes Parliament" 22 May 2013.

Johnson, P "The New Bail Act" paper presented at the Legal Aid Commission of New South Wales Criminal Law Conference 2013.

Kirby, M "Statutory Interpretation: the menaing of meaning" paper presented at RMIT University Symposium on Statutory Interpretation 13 August 2009.

New South Wales Law Reform Commission, *Bail*, Report Number 133 (2012).

New South Wales Department of the Attorney General, "Bail Reform In NSW" Published by the Bureau of Crime Statistics and Research 1984.

New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 December 1978, 2013 (F Walker, NSW Attorney General).

New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 81 (G Smith, NSW Attorney General).

New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 December 2005, 1 (M Iemma, NSW Attorney General).

New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2670 (J Hatzistergos, NSW Attorney General).

Office of the Director of Public Prosecutions "Research Flyer No 15 – Bail Applications" 10 October 2008.

Pearce, D and Geddes, R, *Statutory Interpretation in Australia* (6<sup>th</sup> Ed. 2006).

Pheeny, D "Do you reckon I'm gunna get bail?" Indigenous Law Bulletin May / June 2012, ILB Volume 7, Issue 30.

Roles, V "Bail Refresher" paper presented in August 2011 accessed electronically at < [http://www.criminalcle.net.au/main/page\\_cle\\_pages\\_bail.html](http://www.criminalcle.net.au/main/page_cle_pages_bail.html) > on 17 August 2013.

Schaudin, S & Goodwin, M "Supreme Court Bail Applications" paper presented at the Legal Aid Commission of New South Wales Criminal Law Conference 2007.

Snowball, L , Roth, L and Weatherburn, D "Bail Presumptions and Risk of Bail Refusal: an analysis of the NSW bail act" NSW Bureau of Crime Statistics and Research Brief Paper no. 49, July 2010.

Steel, A "Bail in Australia: Legislative Introduction and Amendment Since 1970" (Paper presented at ANZ Critical Criminology Proceedings, Monash University, 8 and 9 July 2009)

Unknown, "Risk" Stanford Encyclopedia of Philosophy, published 13 March 2007 accessed electronically at < <http://plato.stanford.edu/entries/risk/> > on the 28 September 2013.

### **Case Law**

*A-G (Qld) v DGK* [2011] QSC 73

*A-G (QLD) v Edwards* [2007] QSC 396

*A-G (QLD) v Hadd* [2008] QSC 247

*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) CLR 129

*AP v DPP* [2008] QSC 236

*Attorney-General for the State of Queensland v Brown* [2012]

*Attorney-General for the State of Queensland v Hynds & Anor (No 3)* [2012] QSC 318

*Attorney-General for the State of Queensland v Inkerman* [2013] QSC 18

*Attorney-General for the State of Queensland v Larry* [2011] QAC 120

*Attorney-General for the State of Queensland v Oliver* [2009] QSC 34

*Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268

*Bail Application by Michael Paterson* [2006] VSC 268

*Barbaro v DPP & Anor* [2010] VSC 632

*Burton v R* (1974) 3 ACTR 77

*Chu Kheng Lim v the Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1

*Collins v the Queen* [2003] ACTCA 17

*Cokara v Director of Public Prosecutions (Queensland)* [2012] QCA 250

*Danzinger v Hydro Electric Commn* [1961] Tas SR 20

*Director of Public Prosecutions (Cth) v Dang* [2013] QCA 32

*Director of Public Prosecutions v Nguyen* [2000] VSC 452

*DPP v Basic* [2013] VSC 412

*DPP v Harika* [2001] VSC 237

*DPP v Hills & Ors (Ruling No 1)* [2010] VSC 609

*DPP v Jason Ghiller* [2000] VSC 435

*DPP v Peterson* [2006] VSC 199

*Dunstan v Director of Public Prosecutions* (1999) 92 FCR 168

*Fisher v Director of Public Prosecutions (Qld)* [2011] QCA 54

*Gardner Snr v DPP (QLD)* [2009] QCA 29

*Haidy v DPP* [2004] VSC 247

*Hocking v Attorney-General for the State of Queensland* [2012] QCA 65

*IMO bail application Blundell* [2008] ACTSC 138

*IMO bail application O'Hea* [2005] VSC 126

*Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404

*Keller v Parole Board* [2010] QSC 310

*Keys v DPP (Qld)* [2009] QCA 220

*Lacey v DPP* [2007] QSC 291

*Lacey v DPP* [2007] QCA 413

*Mae Loc Tran*, bail application [2008] VSC 191

*Memery v The Queen* [2000] VSC 495

*Mills v Meeking* (1990) 169 CLR 214

*R v A* (1968) 13 FLR 342

*R v Benporath* [2007] VSC 375

*R v Chouk* [2010] VSC 315

*R v Greenham* [1940] VLR 236

*R v Hapeta* [2012] VSC 387

*R v Hilton* (1987) 7 NSWLR 745

*R v Kissner* (Unreported, NSW Supreme Court, Hunt CJ at CL, 17 January 1992)

*R v Mahoney-Smith* [1967] 2 NSWLR 154

*R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325

*R v Walters* [1979] 2 NSWLR 284

*Re Aps* [2009] VSC 588

*Re Barban and Barban* [2007] VSC 335

*Re Conci* [2013] VSC 368

*Re Fred Joseph Asmar* [2005] VSC 487

*Re Jacob Polutele* [2011] VSC 109

*Re Kazem Hamad* [2010] VSC 585

*Re Magee* [2009] VSC 384

*Re MDT* [2010] VSC 28

*Re Mergin Kelmendi* [2008] VSC 31

*Re Metekingi* [2012] VSC 366

*Re RS* [2013] VSC 350

*Rosenbery v Percical* [2001] HCA 18; (2001) 205 CLR 434

*SICA v Director of Public Prosecutions* [2010] QCA 18

*State of New South Wales v Thomas (Preliminary)* [2001] NSWSC 118

*State of New South Wales v Richard John Darrego* [2011] NSWSC 360

*State of New South Wales v Green (Final)* [2013] NSWSC 1003

*State of New South Wales v Conway* [2011] NSWSC 588

*State of New South Wales v KAS* [2012] NSWSC 1139  
*State of New South Wales v Richardson* [2011] NSWSC 276  
*Steven Mustica v Director of Public Prosecutions* [2006] VSC 441

*Taylor v Director of Public Prosecutions (Qld)* [2009] QSC 131

*Weribone v Chief Executive, Department of Corrective Services* [2007] QSC 129  
*Williams v The Queen* (1986) 161 CLR 278  
*Woolmington v DPP* [1935] AC 462  
*Wotton v Director of Public Prosecutions* [2007] QSC 042

### ***Legislation***

*Bail Act 1977* (Vic)  
*Bail Act 1978* (NSW)  
*Bail Act 1980* (Qld)  
*Bail Act 1982* (WA)  
*Bail Act 1985* (SA)  
*Bail Act 1992* (ACT)  
*Bail Act 2013* (NSW)  
*Bail Bill 2013* (NSW)

*Crimes (High Risk Offenders) Act 2006* (NSW)

*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)

*Interpretation Act 1987* (NSW)

*Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW)