COVERT POLICING AND COERCED CONFESSIONS: AUSTRALIA NEEDS A NEW TEST FOR THE ADMISSIBILITY OF 'MR BIG CONFESSIONS'

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In 2007, the High Court examined the use of the so-called 'Mr Big Method' in Australia. The Mr Big Method is a covert policing method where police officers establish a fictitious criminal enterprise. The aim of this operation is to induce a confession from a suspect. To achieve this, undercover officers groom the suspect into becoming a member of their 'gang'. The undercover officers offer inducements such as money and fictitious job opportunities, causing the suspect to believe that a membership of the 'gang' would provide safety and a financially secure future. Although the High Court permitted the use of this method, concerns have been raised by scholars and foreign courts over the last decade. This article will discuss the Mr Big Method, criticisms of this method and its application in Australia. It is argued that the admissibility of these confessions should be subject to a new test to minimise the risk of coerced confessions and consequential wrongful convictions.

I INTRODUCTION

On 4 August 2002, Nelson Lloyd Hart drove his two daughters to a beach near Gander, Canada. The two three-year-olds fell into the water. Nelson could not swim, so he jumped in his car to seek help. Tragically, the girls drowned. There were no witnesses, and the Royal Canadian Mounted Police ('RCMP') suspected Nelson of killing his daughters.

At the time, Nelson struggled with mental health issues and suffered from a gambling addiction. He was socially isolated and only left his house accompanied by his wife. Nelson faced financial hardship and relied on social assistance and food banks to survive.

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The RCMP began surveillance to uncover Nelson's habits, financial situation, activities, and, most importantly, his vulnerabilities. Using their findings, the RCMP launched a targeted operation, establishing a fake business enterprise made up of undercover police officers.

The undercover operation commenced in February 2005. An undercover officer befriended Nelson and, in the initial days of contact, Nelson received hundreds of Canadian dollars for work he had done for the 'enterprise', was given a hotel stay, had domestic flights paid for, and was provided with a work phone. In the first month, Nelson was paid 3,060CAD plus undisclosed amounts of cash, received multiple hotel stays, meals and a flight, and was gifted a mobile phone. Undercover officers also gave him money to enable him to gamble in casinos.

Three weeks into the operation, Nelson was confronted with the illegal aspects of the business and his new 'friends' started posing as fake 'gang members'. Soon after, he was asked to participate in (fake and staged) criminal activities. At all times, Nelson believed these were illegal activities and, considering the financial incentives, he participated.

For three months, Nelson was paid thousands of Canadian dollars for his legal and (fictitious) illegal work for the enterprise. He was told that a 'big job' was coming and that the 'gang' members wanted to involve him. He was confronted with (fake) diamond smuggling scenarios and was shown large amounts of money used for horse betting. There was only one thing Nelson needed to do to become part of the 'big deal': he had to convince 'Mr Big', the fictitious crime boss, that he was worthy of becoming a gang member.

Mr Big told Nelson that he knew 'heat' was coming from the RCMP regarding the suspicion that Nelson killed his daughters. Mr Big confronted Nelson three times about this. After two inconsistent stories, Nelson confessed to killing his daughters.[1] He was arrested and eventually convicted of murder.[2]

Although Nelson's story may sound like a plot from a movie, the method used to obtain his confession is a well-established undercover policing technique. Since its development in the early 1970s, the so-called 'Mr Big Method' ('the method') has led to confessions in hundreds of Canadian cases.[3] The method is a systematically organised operation where undercover operatives create staged scenarios to secure a confession. The method involves identifying the vulnerabilities of their targets and developing a strategy aimed at exploiting those vulnerabilities, with the ultimate goal of securing a confession from the suspect.[4] The case of Nelson Hart, represented in open vignette above, exemplifies common features of these operations, which often involve payments of money, hotel accommodations and other incentives to entice the suspect into joining a criminal enterprise. After

1 For a detailed overview of the facts of this case, see Nelson Lloyd Hart, 'Factum of the Respondent', Submission in *R v Hart*, 35049, 30 August 2013, [7]–[42].

2 *R v Hart* [2014] 2 SCR 544, 565 [39] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ) ('*Hart*').

3 'Undercover Operations: BC RCMP', *Royal Canadian Mounted Police* (Web Page, 9 September 2024) <https://rcmp.ca/en/bc/police-services/undercover-operations> ('RCMP Undercover Operations').

4 Adriana Poloz, 'Motive to Lie: A Critical Look at the "Mr Big" Investigative Technique' (2015) 19(2) *Canadian Criminal Law Review* 231, 232.

weeks or even months of such operations, the suspect often confesses to 'Mr Big' (hereinafter referred to as 'Mr Big Confessions').[5] Despite its controversial nature, this method has been successful in securing convictions globally.

The method has been controversial from the outset due to its inadequate protection of the fundamental rights of its targets.[6] This Canadian invention has gained popularity among police forces in Australia, New Zealand and the Netherlands.[7] However, Mr Big operations create tensions with protecting a suspect's fundamental rights, such as the right to silence and the privilege against self-incrimination, as the use of this method increases the risk of involuntary and potentially false confessions.[8]

These concerns have led to a shift in judicial attitudes towards the admissibility of Mr Big Confessions in foreign courts. The case of Nelson Hart, outlined above, became a landmark case restricting their admissibility in Canada.[9] In the same vein, Dutch[10] and New Zealand[11] courts have critically evaluated the psychological pressure exerted during these operations and their conflict with fundamental rights.

The method has been used by Australian police forces for almost three decades and has recently been the subject of public debate addressing the legal, ethical and psychological concerns surrounding its use.[12]

This article argues that Australia's law governing the admissibility of Mr Big Confessions is out of step with international developments and inadequately addresses the risk of coerced and potentially false confessions.

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5 See *Hart* (n 2) 556–9 [1]–[9] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ) for an overview of the Mr Big Method.

6 Most recently addressed in the Australian context by Lisanne Adam and Celine van Golde: see Lisanne Adam and Celine van Golde, 'Is It Time to Move On from "Mr Big"? Scenario Evidence and the Risk of Unreliable Confessions' (2024) 49(2) *Alternative Law Journal* 134, 141 ('Is It Time to Move On?').

7 Ibid 136 n 29. The Royal Canadian Mounted Police also reports that this method is used in other European 'counties' [sic] and South Africa but there is no publicly available information about this: see 'RCMP Undercover Operations' (n 3).

8 See Adam and van Golde, 'Is It Time to Move On?' (n 6); Brendon Murphy and John Anderson, 'Confessions to Mr Big: A New Rule of Evidence?' (2016) 20(1) *International Journal of Evidence and Proof* 29, 42–7.

9 *Hart* (n 2).

10 Hoge Raad der Nederlanden [Supreme Court of the Netherlands], 18/00565, 17 December 2019 reported in (2019) ECLI:NL:HR:2019:1982 ('Case No 18/00565'); Hoge Raad der Nederlanden [Supreme Court of the Netherlands], 18/01298, 17 December 2019 reported in (2019) ECLI:NL:HR:2019:1983 ('Case No 18/01298'). These cases will be discussed in detail in Part III(C) below.

11 *R v Wichman* [2016] 1 NZLR 753 ('*Wichman*'); *Lyttle v The Queen* [2021] NZCA 46 ('*Lyttle*'). The case of *Wichman* (n 11) will be discussed in detail in Part III(D) below.

12 Adam and van Golde, 'Is It Time to Move On?' (n 6) 134; Michele Ruyters and Jarryd Bartle, 'Who's Watching Mr Big: Scenario Operations and Induced Confessions' (2024) 36(3) *Current Issues in Criminal Justice* 318; Alicia Bridges, Ayla Darling and Dan Harrison, 'On a Secret Recording, Mr Big Promises to Make Problems with the Law Go Away. But First, He Wants the Truth about a Murder' *ABC News* (online, 20 October 2024) <https://www.abc.net.au/news/2024-10-20/mr-big-how-glenn-weaven-was-convicted-of-mary-cook-murder/104485604>; Naomi Neilson, 'Where to Draw the Line under "Mr Big"', *Lawyers Weekly* (online, 23 September 2024) <https://www.lawyersweekly.com.au/biglaw/40619-where-to-draw-the-line-under-mr-big>; Alicia Bridges, Ayla Darling and Dan Harrison, 'Australian Police Have Used the Mr Big Technique to Put Killers behind Bars: But Some Say the Method Is "Inherently Dangerous"', *ABC News* (online, 28 October 2024) <https://www.abc.net.au/news/2024-10-28/calls-for-safeguards-on-australian-use-of-mr-big-technique/104523694>.

This article will argue that the use of the method targets suspects' vulnerabilities, increases the risk of coerced confessions and does not align with human rights protections.

Part II will outline what the method is. Part III will discuss international developments concerning restrictions on the use of scenario evidence and the admissibility of Mr Big Confessions. Parts IV and V will outline the law governing the admissibility of Mr Big Confessions in Australia. Part VI will examine why the current law offers insufficient safeguards against coerced and unreliable confessions. Lastly, addressing these inadequacies, Part VII proposes a new test to assess the admissibility of Mr Big Confessions.

II MR BIG OPERATIONS

In 1972, the RCMP launched an innovative undercover program for homicide investigations.[13] This undercover training program trained police officers in a new approach to undercover policing. By the late 1980s, the RCMP began employing the undercover method, commonly known as the 'Mr Big Method'. The objective of Mr Big operations is to uncover the 'truth' that can resolve unsolved homicide cases.[14] By 2008, the RCMP used this method in over 350 cases.[15] In the cases where the Mr Big operation led to a charge, 95% resulted in a conviction.[16]

A Mr Big operation has a distinct methodology. During these operations, covert police officers create a fictitious criminal enterprise. This enterprise is entirely fabricated and has no connections to any existing criminal organisation.

By operating in their fictitious criminal organisation, the undercover police officers groom the suspect into becoming a member of their fictitious criminal organisation. Through various scenarios, the undercover police officers aim to gain the suspect's trust by offering fictitious jobs, money, gifts and other incentives to convince the suspect that they want to join their 'gang'.[17] Once the desire for membership has been established, an undercover officer emphasises that honesty, trust and loyalty are vital criteria for becoming a member of their gang. The ultimate decision-maker in determining whether a person is worthy to become a member is 'Mr Big', who is an undercover police interrogator.[18]

The suspect is introduced to Mr Big, who 'tests' their loyalty and honesty. During this meeting, the suspect is confronted with the fact that they are being investigated for a crime. Mr Big tells the suspect that they obtained this information through connections with 'corrupt police officers'. The suspect is then asked to confess to that crime. Mr Big reiterates that 'honesty' is vital, and that his gang can help

13 'RCMP Undercover Operations' (n 3).

14 Ibid. The RCMP reports that, in 75% of their Mr Big operations, the suspect is either charged or cleared.

15 Ibid; *Hart* (n 2) 570 [56] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ).

16 'RCMP Undercover Operations' (n 3).

17 Justice Susan Glazebrook, 'Mr Big Operations: Innovative Investigative Technique or Threat to Justice?' (Speech, Judicial Colloquium Hong Kong, 23 September 2015) 1–2.

18 Steven M Smith, Veronica Stinson and Marc W Patry, 'High-Risk Interrogation: Using the "Mr Big Technique" to Elicit Confessions' (2010) 34(1) *Law and Human Behavior* 34, 34.

the suspect in avoiding prosecution and subsequent punishment for their crimes through the gang's connections to 'corrupt' police officers. With the financial and social belonging incentives and the possibility of evading prosecution, the suspect often confesses to committing the most serious crime(s). At times, in addition to the confession, the suspect then leads the undercover officers to the place where the victim is buried.[19]

If there is sufficient evidence to corroborate the confession, the suspect is charged with murder and their confession is used against them.

Mr Big promises suspects a secure future, offering financial stability and a reliable network of acquaintances. However, the pending prosecution against the suspect is the only barrier to this future. To overcome it, the suspect needs to confess to a crime.

During Mr Big operations, it is plausible that a suspect makes a false confession.[20] This could be due to a desire to impress Mr Big and gain the advantages offered.[21] Beyond these incentives, suspects might also fear Mr Big's reaction if they do not comply with his demands.[22] Additionally, there is the fear of prosecution, which suspects believe Mr Big can alleviate by 'sorting it out'. At trial, jurors hear this so-called 'scenario evidence' to provide context to the confession.[23]

From a legal perspective, during such covert operations suspects do not receive the same fundamental protections as they would during a custodial interview. The general protections in most jurisdictions stipulate that, in a custodial interview, a suspect receives the advice about the right to silence and right to a lawyer.[24] Undercover police officers are not required to administer a caution, suspects are not advised on their right to consult with a lawyer,[25] and deception is used to elicit these confessions.[26]

From both a psychological and human rights perspective, Mr Big operations raise ethical, psychological and legal concerns. These issues have been addressed in foreign courts, which will be discussed in the next Part.

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19 In Australia, this happened in *R v Cowan; Ex parte A-G (Qld)* [2016] 1 Qd R 433 ('*Cowan Appeal*') and *Deacon v The Queen* [2019] NTCCA 21 ('*Deacon*').

20 Murphy and Anderson (n 8) 42. It has to be noted that in some cases where a suspect confessed to Mr Big it was raised that these confessions were obtained through violent or oppressive conduct. This argument has ultimately been unsuccessful because these appellants have 'free choice whether to stay or leave': *Deacon* (n 19) [65] (Grant CJ, Southwood J and Riley AJ). See at [58]–[76]; *R v Kilincer [No 2]* [2021] NSWSC 829, [131]–[170] (Johnson J) ('*Kilincer [No 2]*'); *Weaven v The Queen* [2018] VSCA 127, [24]–[27] (Priest JA) ('*Weaven Appeal*'); *R v Rumsby* [2023] NSWSC 229, [148]–[179] (RA Hulme AJ) ('*Rumsby*').

21 Timothy E Moore, Peter Copeland and Regina A Schuller, 'Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the "Mr Big" Strategy' (2009) 55(3) *Criminal Law Quarterly* 348, 353.

22 Ibid 381.

23 *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275, 278 [8]–[9] (Winneke P, Ormiston and Vincent JJA).

24 See Part VI for a discussion about these protections in Australian context.

25 The restricted access to legal representation raises fair trial concerns: *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

26 As was noted by Adam and van Golde, 'Is It Time to Move On?' (n 6) 136–41.

III NOTABLE INTERNATIONAL DEVELOPMENTS

In countries where the method is allowed to be used, there is a notable trend of courts increasingly recognising the risk of coerced and potentially false confessions. This recognition has led to further restrictions on the admissibility of Mr Big Confessions in Canada and the Netherlands. While some courts are limiting the admissibility of Mr Big Confessions based on human rights principles, others are consulting psychological theory to evaluate the risk of coerced and false confessions. While in some countries the use of this method is permitted, in others, courts are likely to exclude Mr Big Confessions from evidence. This Part will discuss developments in England and Wales, Canada, the Netherlands and New Zealand.

A England, Wales and *PACE*

In the United Kingdom ('UK'), Royal Commissions into improper police interrogation methods led to significant reforms of criminal procedure and police interviewing practices in the mid-1980s.[27] In 1978, the Royal Commission on Criminal Procedure, chaired by Sir Cyril Philips ('Philips Commission') was called to examine whether changes were needed in England and Wales concerning several key areas, including the powers and duties of the police in investigating criminal offences, the rights and duties of suspects and accused persons, the processes and responsibilities related to the prosecution of criminal offences, and other related aspects of criminal procedure and evidence.[28] The Commission was tasked with making recommendations based on its findings. Following the recommendations of the Philips Commission in 1981, the *Police and Criminal Evidence Act 1984* ('*PACE*') was enacted to regulate police powers in England and Wales.[29] With regards to the admissibility of confessions, section 76 of *PACE* states that a confession made by an accused can be used as evidence if it is relevant and not excluded by the court.[30] However, if it is alleged that the confession was obtained through oppression or in circumstances that could make it unreliable, the court must exclude it unless the prosecution can prove, beyond reasonable doubt, that it was not obtained in such a manner.[31] Section 78 allows for courts to exclude confessions that were obtained unfairly. These rules apply to confessions regardless of whether these confessions were made to a police officer or any other person.[32]

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27 United Kingdom, *The Royal Commission on Criminal Procedure: Report* (Cmnd 8092, 1981); United Kingdom, *The Royal Commission on Criminal Justice* (Cm 2263, 1993). For an overview of the change in police interview practices in the UK, see Lisanne Adam and Celine van Golde, 'Police Practice and False Confessions: A Search for the Implementation of Investigative Interviewing in Australia' (2020) 45(1) *Alternative Law Journal* 52, 55–6 ('Police Practice and False Confessions').

28 Leslie Moran, 'The Royal Commission on Criminal Procedure: First Principles' (1982) 4(1) *Liverpool Law Review* 84.

29 *Police and Criminal Evidence Act 1984* (UK).

30 Ibid s 76(1).

31 Ibid s 76(2).

32 Ibid s 82(1).

Considering the protections set out in *PACE*, it is unlikely that Mr Big Confessions would be admissible in England and Wales.[33]

The use of Mr Big operations was examined in the 2001 decision in *R v Bow Street Magistrates' Court; Ex parte Proulx*.[34] In this case, the Canadian Police, in collaboration with Kent Police Force and London Metropolitan Police, employed a Mr Big operation to obtain a confession in relation to a Canadian homicide investigation.[35] A few months after the victim was killed, the suspect left Canada and moved to England.[36] For several months, the suspect was paid money by the undercover operatives and eventually met 'Woody', the 'Mr Big' of the fictious criminal enterprise.[37] The suspect eventually confessed to Woody and the Canadian Government sought extradition to prosecute the suspect for murder.[38] Considering that this was a Canadian case, the Court found that it was up to a Canadian court to examine the issues of fairness and admissibility of this confession.[39] However, Mance LJ observed that, if this concerned an investigation in domestic context, section 78 of *PACE*, alongside common law principles,[40] would likely lead to the exclusion of this confession.[41]

B Canada's Change of '*Hart*'

The admissibility of Mr Big Confessions has been challenged in Canadian courts on its inconsistency with the Canadian common law voluntariness rule.[42] In *R v Hodgson*, the Supreme Court examined whether undercover operatives during a Mr Big operation were deemed a 'person in authority', which would determine whether the offered inducements and deception by these officers were permitted.[43] The Supreme Court concluded that undercover operatives are not a 'person in authority' and, therefore, the Canadian common law voluntariness rule does not apply during Mr Big operations.[44] In 2005, this conclusion was affirmed in *R v Grandinetti*.[45]

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33 As observed by the Supreme Court of New Zealand in *Wichman* (n 11) 777 [46] (Young, Arnold and O'Regan JJ).

34 [2001] 1 All ER 57 ('*Proulx*').

35 Ibid.

36 Ibid 61 [1]–[2] (Mance LJ).

37 Ibid 62–6 [3]–[19].

38 Ibid 61–2 [1]–[2], 69–70 [26]–[28].

39 Ibid 89 [86].

40 Most relevant are those set out in *R v Christou* [1992] QB 979, 991 (Taylor CJ, Boreham and Auld JJ), where the Court stated '[i]t would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the Code and with the effect of circumventing it'.

41 *Proulx* (n 34) 85 [75] (Mance LJ).

42 The Canadian common law voluntariness rule stipulates that 'no statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily': *Erven v The Queen* [1979] 1 SCR 926, 931 (Dickson J).

43 [1998] 2 SCR 449, 461–86 [14]–[52] (Lamer CJ, Gonthier, Cory, McLachlin, Iacobucci, Major and Binnie JJ).

44 Ibid.

45 [2005] 1 SCR 27 ('*Grandinetti Supreme Court Appeal*'). This view was adopted by the Australian High Court in *Tofilau v The Queen* (2007) 231 CLR 396, 406–7 [12]–[14] (Gleeson CJ) ('*Tofilau High Court Appeal*').

Over the last decade, the Canadian attitude toward the admissibility of Mr Big Confessions has shifted significantly, leading to the creation of a new test for the admissibility of Mr Big Confessions.[46] Despite the apparent popularity of the use of the method in Canada, the Canadian Supreme Court issued a strong statement about the method risking unreliable confessions and subsequent wrongful convictions.

This article started with the case of Nelson Lloyd Hart, who was convicted of the murder of his two daughters. Hart's case became a landmark decision for governing the admissibility of Mr Big Confessions in Canada. The Supreme Court of Canada handed down its decision in 2014.[47]

The fictitious criminal enterprise paid Hart over 15,000CAD for his 'work'.[48] When meeting Mr Big, Hart was told that joining the enterprise would secure his financial future.[49] Mr Big offered Hart a lucrative deal but stated that Hart's potential involvement in his daughters' deaths was a problem.[50] To participate, Hart needed to confess.[51] After being urged to tell the 'honest' story, Hart confessed to Mr Big.

At trial, Hart argued that he confessed out of fear of Mr Big and that the threatening and intimidating behaviour of the undercover police officers breached his fundamental rights.[52] The Supreme Court not only rejected the admissibility of Hart's confessions but also examined the use of the method as a whole.[53] It observed that Mr Big operations risk police misconduct and noted:

> Mr Big operations create a risk that the police will resort to unacceptable tactics in their pursuit of a confession. As mentioned, in conducting these operations, undercover officers often cultivate an aura of violence in order to stress the importance of trust and loyalty within the organization. This can involve – as it did in this case – threats or acts of violence perpetrated in the presence of the accused. In these circumstances, it is easy to see a risk that the police will go too far, resorting to tactics which may impact on the reliability of a confession, or in some instances amount to an abuse of process.[54]

Although it did not abolish the use of the method, Moldaver J,[55] on behalf of McLachlin CJ, LeBel, Abella and Wagner JJ and with Cromwell J agreeing,[56] created a new test for the admissibility of Mr Big Confessions.[57] According to this new test, the onus is on the Crown to establish that, on the balance of probabilities, the probative value of the confession outweighs the prejudicial effect on the accused.[58] The probative value of the confession depends on the reliability of the

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46 Developed in *Hart* (n 2) which will be discussed in Part III(C) below.
47 *Hart* (n 2).
48 Ibid 565 [38] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ).
49 Ibid 563 [31].
50 Ibid 564 [32]–[34].
51 Ibid.
52 Ibid 565–6 [40].
53 Ibid 574–9 [68]–[83]. The Court addressed their concerns about the risk of unreliable confessions, police misconduct and the prejudicial effect of Mr Big Confessions.
54 Ibid 577–8 [78].
55 Ibid 580–1 [84]–[89] (Cromwell J agreeing at 602 [152]).
56 Ibid 602 [152] (Cromwell J). Cf at 606–7 [167]–[168] (Karakatsanis J).
57 Ibid 580–1 [84]–[89] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ).
58 Ibid 580 [85].

confession, while the prejudicial effect refers to the inclusion of 'bad character' and scenario evidence. If the Crown cannot establish this, the Mr Big Confession should be excluded from evidence.[59]

While the creation of a common law test to restrict the admissibility of Canadian Mr Big Confessions appeared to offer greater protections against wrongful convictions, it does not mean that the use of the method was reduced. In this vein, Chris Hunt and Micah Rankin argue that the creation of this test did not eliminate the risk of coerced and false confessions and that Canada's approach to Mr Big should be more in line with the approach in England and Wales.[60] Five years after the decision in *R v Hart* ('*Hart*'), Adelina Iftene and Vanessa L Kinnear reported that Mr Big Confessions are still admitted into evidence in Canadian courts and assessed on the test set out in *Hart*.[61]

In addition to the unreliable confession considerations, the admission of scenario evidence (which provides context regarding how the Mr Big confession was obtained) has been found to have the potential to 'poison the jury'.[62] In the 2024 decision in *R v Amin*, the appellant was subject to a Mr Big operation when he advised an undercover officer how to kill someone and how to evade detection.[63] Although the appellant never confessed, the Crown successfully argued that this 'advice' was substantially similar to how the victim in the homicide investigation was killed.[64] This led to an inference of the identity of the killer and was admitted as similarity evidence.[65] The Court of Appeal for Ontario quashed the conviction because it was unfairly prejudicial to admit this evidence as the jury would construe this as bad character evidence.[66] In quashing the conviction, Tulloch CJO issued a strong statement and noted:

> I stress that the police, the Crown, and trial judges cannot evade the need to robustly assess *Hart*'s dangers simply because of tweaks to one or more features of the classic Mr Big operation. This operation shared many core features of the Mr Big operation in *Hart*. As in *Hart*, the undercover officers befriended the suspect, lured him into a fictitious organization of their own making that values honesty and loyalty, offered him financial opportunities and friendship through membership, and then held an interview-like meeting in which the organization's boss told the suspect that membership and opportunities in the organization were contingent on him confessing to the crime for which he was later charged. These features created a risk that the appellant would falsely confess.[67]

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59 Ibid.

60 Chris Hunt and Micah Rankin, '*R v Hart*: A New Common Law Confession Rule for Undercover Operations' (2014) 14(2) *Oxford University Commonwealth Law Journal* 321, 333–5. Hunt and Rankin argue that the Canadian legislature should closely evaluate mirroring the English and Welsh *PACE* protections for suspects during Mr Big operations.

61 Adelina Iftene and Vanessa L Kinnear, 'Mr Big and the New Common Law Confessions Rule: Five Years in Review' (2020) 43(3) *Manitoba Law Journal* 295, 336–40.

62 *R v Amin* [2024] 171 OR (3d) 561, 564 [1] (Tulloch CJO) ('*Amin*'). The risk of juror bias after reviewing scenario evidence and Mr Big Confessions will be discussed in more detail in Part VI(B)(1) below.

63 Ibid 565–6 [4].

64 Ibid.

65 Ibid.

66 Ibid 582–5 [65]–[75].

67 Ibid 587 [82].

In Canada, the *Charter of Rights and Freedoms* has become an important factor influencing the common law in decisions against the admissibility of these confessions and scenario evidence.[68] The enforcement of human rights was an important driver in the decision to further restrict the admissibility of Mr Big Confessions.[69]

C Improved Human Rights Protection in the Netherlands

In the Netherlands, Mr Big operations are legitimatised through its criminal procedure laws.[70] Article 126j of the *Wetboek van Strafvordering* (Netherlands) ('*Dutch Code of Criminal Procedure*') requires that undercover operations need to be assessed on a case-by-case basis for proportionality and subsidiarity.[71] The subsidiarity test involves a consideration of whether this invasive investigative method is reasonably necessary considering the nature of the offence.[72] The proportionality considerations assess the tactics used during this operation.[73] In addition to this, Dutch courts ought to assess the voluntariness of these confessions using the additional guidelines noted by the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] and European human rights law.[74]

Five years after the Canadian decision in *Hart*, the Hoge Raad overturned two convictions that relied upon the admission of Mr Big Confessions.[75] In 2019, the Hoge Raad ruled that it could not be determined whether the confessions by these two appellants were voluntary and not influenced by inducements. When considering whether the use of the method was proportional in these circumstances, the Hoge Raad determined that, considering these were homicide investigations, police officers are permitted to use such deceptive tactics.[76] Regarding subsidiarity, the Hoge Raad also concluded that this covert policing method was justified because it was unlikely that the appellants would have confessed to the crime during a custodial interview without being influenced by inducements.[77]

However, the Hoge Raad noted that there is no clear answer to the question of whether Mr Big operations should be permitted, but rather the answer depends on

68 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

69 *Hart* (n 2) 579 [82], 581 [87], 592 [121] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ), 606–7 [168]–[169] (Karakatsanis J).

70 *Wetboek van Strafvordering* [Code of Criminal Procedure] (Netherlands) art 126j ('*Dutch Criminal Code*').

71 Ibid. Police Powers in the Netherlands are assessed on the unwritten principles of subsidiarity and proportionality: see Case No 18/01298 (n 10) [5.6] for application in a case addressing the use of the Mr Big Method in the Netherlands.

72 See, eg, Rechtbank Amsterdam [District Court of Amsterdam], 13/650242-17, 2 March 2021 reported in (2021) ECLI:NL:RBAMS:2021:805, [5.3.3] ('Case No 13/650242-17') for application.

73 Ibid.

74 Case No 18/01298 (n 10) [5.6]–[5.7].

75 Ibid; Case No 18/00565 (n 10). For a discussion about these cases, see Peggy ter Vrugt, 'A Pragmatic Attitude: The Right to Silence in the Netherlands' (2021) 12(3) *New Journal of European Criminal Law* 389, 399–400.

76 Case No 18/01298 (n 10) [3.4].

77 Ibid.

the specific circumstances of the case.[78] The Hoge Raad concluded that, in these particular cases, the psychological pressure exerted on the suspects was to such an extent that it could not be determined that these confessions were voluntary.[79] In considering whether the voluntariness of the confessions has been affected to such an extent that the right to silence was breached, the Hoge Raad noted seven factors that should be considered, being: the course of the investigation; the attitude of the suspect during the proceedings; the level of pressure exerted on the suspect during the process; the involvement of law enforcement officers in influencing the content of the admissions; the duration and intensity of the process; the scope and frequency of contact that the suspect has had with undercover operatives; and the foreshadowed consequences (either positive or negative) if the suspect does not confess.[80] The Hoge Raad noted that, in considering these factors, if the judge considers the Mr Big operation violated the suspect's right to silence, the confession ought to be excluded.[81]

It is important to note that the Netherlands is bound by the European Charter of Human Rights and was guided by European Court of Human Rights case law on the right to silence and privilege against self-incrimination.[82]

Following the Hoge Raad's clarification of the principles underpinning these European human rights, the Rechtbank Amsterdam [District Court of Amsterdam] applied these new guidelines to a case involving a Mr Big operation in 2021.[83] In this case, the suspect suffered substance addiction and experienced financial hardship.[84] During the course of the operation, the suspect made a number of ambiguous admissions. To secure a clear confession, the undercover operatives placed the suspect in a room in a houseboat and confronted him with a pending intelligence investigation against him.[85] During this conversation, the undercover operatives stated that the promised business trip to Portugal would be cancelled if the suspect did not tell the 'truth'.[86] The Rechtbank found that this was a replica of a traditional police interview without the protections that a suspect would normally have in custody.[87]

78 Ibid [5.7].
79 Ibid [2].
80 Ibid [5.7]. These guidelines were affirmed by the Hoge Raad in Hoge Raad der Nederlanden [Supreme Court of the Netherlands], 22/02728, 12 December 2023 reported in (2023) ECLI:NL:HR:2023:1700, [4.2].
81 Case No 18/01298 (n 10) [5.2.3].
82 Ibid [3.3]–[3.4]. This included a consideration of *Allan v The United Kingdom* [2002] IX Eur Court Hr 41 ('*Allan*'), in which the European Court of Human Rights critically assessed the protection of the right to silence during covert operations. Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*'), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) was applied in the Dutch Mr Big cases.
83 Case No 13/650242-17 (n 72).
84 Ibid [5.3.5].
85 Ibid.
86 Ibid.
87 Ibid.

This, in conjunction with the financial incentives, led to the conclusion that the right to silence was breached[88] and the Rechtbank ordered an acquittal.[89]

The Hoge Raad's clarification of the right to silence in light of European Human Rights law has led to a stricter regulation of the admissibility of Mr Big Confessions in the Netherlands. This is a great step towards protection against coerced confessions and consequential wrongful convictions.

D Increased Recognition of Psychological Coercion in New Zealand

Closer to home, New Zealand Police commenced employing Mr Big operations since around 2005.[90] Although not all decisions are reported, by 2015, the New Zealand Court of Appeal noted that the Mr Big Technique had been employed on five other occasions.[91]

One of the first times that the Court of Appeal of New Zealand examined the use of the method was in the 2007 decision in *R v Cameron* ('*Cameron*').[92] In *Cameron*, the appellant was convicted of murder and admitted to 'Tony', the fictitious Mr Big, that he shot the victim and left the body in the forest.[93] The Court of Appeal found that the circumstances under which these admissions were made were not inherently coercive.[94] The Court noted that it was clear to the appellant that he could leave the conversation at any time and that the truthfulness of the admissions was emphasised rather than pressure to make a confession.[95] On appeal, the Court of Appeal considered the corroboration of the admissions and confirmed that the confession was reliable.[96]

In the 2015 decision of *R v Wichman*, the New Zealand Supreme Court considered the reliability of a Mr Big confession.[97] In this case, the respondent confessed to Mr Big that he had assaulted his infant daughter.[98] During 21 scenarios, the respondent was paid a sum of 2,600NZD for the work he had done for the enterprise.[99] The respondent was increasingly involved in fake drug trafficking scenarios and knew that 'honesty' was vital for membership of the 'gang'.[100] The New Zealand Court of Appeal excluded the Mr Big Confession, noting that it was an 'evasion' of the rules on police interrogation that ought to protect suspects

88 Based on the *European Convention on Human Rights* (n 82) art 6; *Dutch Criminal Code* (n 70) art 29(1).
89 Case No 13/650242-17 (n 72) [5.3.5], [7]. This decision was overturned by the Gerechtshof [Court of Appeal], 23-00552-21, 20 July 2022 reported in (2022) ECLI:NL:GHAMS:2022:2083, [9.3.7], [17]. The Court of Appeal found the confessions by the respondent reliable.
90 *Wichman* (n 11) 779 [51] (Young J for Young, Arnold and O'Regan JJ); *Lyttle* (n 11) [84] (Collins J for the Court).
91 *Wichman* (n 11) 779 [51] (Young J for Young, Arnold and O'Regan JJ).
92 [2007] NZCA 564.
93 Ibid [15] (France J for France, Hansen and Heath JJ).
94 Ibid [62].
95 Ibid.
96 *R v Cameron* [2009] NZCA 87, [36]–[37] (Hammond J for Young P, Hammond and Robertson JJ).
97 *Wichman* (n 11).
98 Ibid 763 [1] (Young J for Young, Arnold and O'Regan JJ).
99 Ibid 764–5 [9].
100 Ibid 763 [1], 764–5 [9].

against improper investigative techniques.[101] The Court of Appeal noted that the appellant was young, had a limited income and that he felt in a 'safe place' in the gang, making him vulnerable for psychological pressure to confess to Mr Big. The Court excluded the confession and associated evidence due to the confession being improperly obtained.[102] This decision was appealed by the Crown.

The New Zealand Supreme Court provided a thorough examination of the use of the method informed by psychological theory.[103] The Court concluded that an assessment of reliability and improper conduct is to be done on a case-by-case basis.[104] Whilst noting the Canadian developments, the Court recognised that the psychological pressure employed during Mr Big operations can elicit psychologically coerced and potentially false confessions.[105] The Court recognised that targets of Mr Big operations do have an incentive to lie and, considering psychological theory on suggestibility and impaired self-control, these operations can risk false confessions.[106] In allowing the appeal, the Court noted that the respondent had alternative options during his meeting with Mr Big. The Court stated that the respondent could have denied killing his daughter and could have asked Mr Big's assistance with the prosecution.[107] The Court therefore concluded that this confession was reliable.[108]

The thorough consideration of psychological theory in the Court's reasoning in New Zealand is an important recognition of the risks of unreliable confessions induced during Mr Big operations.

Psychological theory was also applied in examining the reliability of a Mr Big confession in the 2021 decision in *R v Lyttle*, marking the first time a conviction relying on a Mr Big Confession was quashed in New Zealand.[109]

E Increased Protection against Wrongful Convictions by Foreign Courts

The decisions of foreign courts discussed in this Part represents significant progress in minimising the risk of wrongful convictions resulting from Mr Big Confessions. There is a clear trend towards increased recognition of the impact of psychological coercion on the voluntariness of these confessions.[110] Additionally, a

101 *M v R* [2015] 2 NZLR 137, 155 [80] (Miller J for Randerson, White and Miller JJ) ('*M v R*'), cited in *Wichman* (n 11) 781 [58], 797 [108] (Young J for Young, Arnold and O'Regan JJ).

102 *M v R* (n 101) 151 [64], 152 [66], 157 [86] (Miller J for Randerson, White and Miller JJ).

103 *Wichman* (n 11) 786–93 [74]–[92] (Young J for Young, Arnold and O'Regan JJ).

104 Ibid 799 [119].

105 Ibid 786–7 [74].

106 Ibid 790–2 [86]–[89].

107 Ibid.

108 Ibid 793–4 [92]–[97].

109 *Lyttle* (n 11). At the time of writing, the High Court of New Zealand imposed suppression orders on this case pursuant to section 202 of the *Criminal Procedure Act 2011* (NZ), preventing me from discussing it in detail. See *Lyttle v The Queen* [2022] NZSC 83 for further detail.

110 *Hart* (n 2) 570–1 [57] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ); *Wichman* (n 11) 786–93 [74]–[92] (Young J for Young, Arnold and O'Regan JJ).

thorough interpretation of human rights principles has led to stronger protection of the right to silence and the privilege against self-incrimination during Mr Big operations.[111]

While the decisions by the Canadian and Dutch Supreme Courts may appear to discourage the use of the method, it is important to note that its use is still permitted in these countries. The Dutch subsidiary and proportionality considerations of Mr Big operations is an important first step to assess the legitimacy of these operations.[112] However, these safeguards with regard to Mr Big operations are not embedded in the common law in Australia and New Zealand.

With regards to the admissibility of Mr Big Confessions, the Canadian Supreme Court has imposed additional limitations on the admissibility of Mr Big Confessions, while the Dutch Supreme Court has refined the definition of voluntariness and highlighted numerous important factors to consider when examining the voluntariness of Mr Big Confessions.[113] The judicial focus on psychological theory has heightened the recognition of the risk of coerced and potentially false confessions during Mr Big operations in New Zealand.

Despite these developments, Australian courts continue to adhere to the precedent set by the High Court in 2007, which allows for the use of Mr Big operations and the admissibility of Mr Big Confessions. The current Australian law governing Mr Big operations will be discussed in the next Part.

IV THE AUSTRALIAN LAW GOVERNING COVERT OPERATIONS

Police impropriety and police misconduct are an unfortunate part of Australian legal history, having been an issue in Australia in the mid-20th century, and have been subject to scrutiny in Australian courts. In *McDermott v The King* ('*McDermott*'), Dixon J emphasised measuring impropriety against standards of fairness.[114] In *R v Lee*, the High Court noted that fairness allows excluding a confession if police impropriety makes it unfair to rely on it.[115] An exercise of the public policy discretion leads to the exclusion of confessions if police conduct defies societal expectations.[116]

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111 *Hart* (n 2) 565–6 [40], 592 [121] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ), 606 [168], 612 [183]–[184] (Karakatsanis J).

112 *Dutch Criminal Code* (n 70) art 126j; *Allan* (n 82) [44]; Case No 18/01298 (n 10).

113 Case No 18/01298 (n 10); Case No 18/00565 (n 10) [5.2.2]. The Canadian Supreme Court has not addressed voluntariness directly because the voluntariness rule was and is not applicable to Mr Big operations given the suspect is unaware that the undercover police officers are in fact police officers: see *Hart* (n 2) 546–7.

114 (1948) 76 CLR 501, 513 ('*McDermott*').

115 (1950) 82 CLR 133, 149–50 (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ) ('*Lee*').

116 *Bunning v Cross* (1978) 141 CLR 54, 75 (Stephen and Aickin JJ) ('*Bunning*'); *Cleland v The Queen* (1982) 151 CLR 1 ('*Cleland*'); *Foster v The Queen* (1993) 67 ALJR 550 ('*Foster*'). The public policy discretion is now embodied in evidence statutes nationwide and subject to a more stringent test in *Uniform Evidence Law* ('*UEL*') jurisdictions: see *Evidence Act 2011* (ACT) s 138; *Evidence Act 1995* (NSW) s 138; *Evidence (National Uniform Legislation) Act 2011* (NT) s 138; *Evidence Act 2001* (Tas) s 138 ('*Tas Evidence Act*'); *Evidence Act 2008* (Vic) s 138. In this article, a reference to the *UEL* (n 116) is

In the 1993 decision handed down in *Foster v The Queen* ('*Foster*'), the High Court strongly condemned police misconduct tainting the voluntariness of confessions.[117] In *Foster*, the appellant was convicted of maliciously setting fire to a school.[118] The appellant's signed confession was the only evidence against him.[119] The appellant challenged the voluntariness of his confession arguing that it was obtained through police threats and coercion.[120] The Court noted the impropriety and determined that this was an important consideration in determining the reliability of the confession.[121] With regard to the voluntariness of confessions, Brennan J noted:

> [V]oluntariness is not an abstract concept. Voluntariness is proved or not proved by reference to a factual situation, and the complexion of that situation is coloured by the facts which are relevant to voluntariness. Where the exercise of a discretion to admit or exclude a confession turns, as it often does, on facts which are in contest and which are relevant to voluntariness, it is artificial and misleading to approach the exercise of the discretion by adopting a concession that the confession was voluntarily made.[122]

Brennan J highlighted the complexity of the common law voluntariness rule, which the Australian Law Reform Commission ('ALRC') recognised to be presenting great difficulty in defining the applicable standard.[123] Although common law voluntariness considerations are still relevant in some jurisdictions,[124] most Australian jurisdictions have replaced the common law voluntariness rule with the reliability requirement, following the introduction of the uniform evidence laws, to provide clearer guidance on what constitutes the voluntariness of admissions.[125]

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a reference to the corresponding section(s) in each Act unless otherwise stated. In Western Australia ('WA'), the Court can exclude evidence on public policy grounds if the admission of the evidence has an undesirable effect: *Criminal Investigation Act 2006* (WA) ss 154, 155(2) ('*WA Investigation Act*'). In Queensland and South Australia ('SA'), courts have a general discretion to exclude evidence, which is informed by the common law: *Evidence Act 1977* (Qld) s 130 ('*Qld Evidence Act*'); *Evidence Act 1929* (SA) s 34KD(2) ('*SA Evidence Act*').

117 *Foster* (n 116).

118 Ibid 551 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

119 Ibid.

120 Ibid 551–2, 555–6.

121 Ibid 557.

122 Ibid 558.

123 See Australian Law Reform Commission, *Evidence* (Interim Report No 26, 1985) 200–5 [371]–[379] ('*ALRC Interim Report*') for discussion.

124 See *Criminal Law Amendment Act 1894* (Qld) s 10 ('*Qld Criminal Amendment Act*'). In WA and SA, the common law voluntariness rules are still applied in the courts when considering the voluntariness of admissions.

125 The ALRC noted the ambiguity of the common law voluntariness rule, taking account of a number of High Court decisions, including in *Foster* (n 116). In response to the ALRC's criticism, the *UEL* (n 116) now includes reliability and oppression considerations rather than the voluntariness rule: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence* (ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, December 2005) 325, 349 ('*Uniform Evidence Law Report*').

Following the High Court decisions and enacted evidence statutes, police officers or investigative officials cannot make statements inducing suspects to believe confessing would benefit them.[126] Any inducement affecting confession voluntariness can render it unreliable or improperly obtained.[127] These developments restrict how police obtain confessions to minimise the risk of exclusion from evidence.

When custodial investigation powers are insufficient to obtain a confession, covert operations can aid investigations.[128] Undercover operatives, not deemed 'persons in authority' or 'investigative officials', are not bound by many rules, allowing them more flexibility during covert operations.[129] Although this may appear to lead to more flexibility in employing pressure or other trickery, undercover operations have been subject to close judicial scrutiny.

Undercover operations, such as Mr Big operations, stand in tension with the protection of fundamental rights, including the right to silence and the privilege against self-incrimination.

A Regulation of Covert Operations

The Mr Big method is a type of covert operation that requires significant effort from law enforcement to organise and execute. Such undercover operations require extensive resources, including trained police officers and meticulous preparation.[130] Generally, the approval process of undercover operations can also be lengthy, with robust procedures in place to authorise the employment of such operations.[131] The

126 *UEL* (n 116) s 138; *WA Investigation Act* (n 116) s 155; *Cleland* (n 116) 15 (Murphy J). Queensland and SA do not specifically mention the public policy discretion in their evidence statutes but have general discretions that are guided by the common law. Any false statement made by a police officer can lead to the conclusion that the evidence was improperly obtained on public policy grounds.

127 *McDermott* (n 114) 511 (Dixon J); *Lee* (n 115); *Collins v The Queen* (1980) 31 ALR 257, 272 (Muirhead J); *Qld Criminal Amendment Act* (n 124) s 10.

128 As was noted by Simon Bronitt, 'The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe' (2004) 33(1) *Common Law World Review* 35, 36. Bronitt observed a shift from traditional policing methods to covert policing methods due to the limited restrictions on police powers during covert operations.

129 *Tofilau High Court Appeal* (n 45); *R v Cowan* (2013) 237 A Crim R 388, 397 [32] (Atkinson J) ('*Cowan Pre-Trial Application*'). The *UEL* (n 116) dictionary defines 'investigating official' to mean: (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior); or (b) a person appointed by or under an Australian law (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences.

130 Arguably, these are also costly operations. However, as Ruyters and Bartle note, the costs of running these operations is not publicly available: Ruyters and Bartle (n 12) 323–4.

131 Most commonly, undercover operations are classified as 'controlled operations' and are subject to approval from police superintendents or Chief Police Commissioners: see *Crimes Act 1914* (Cth) s 15GH ('*Cth Crimes Act*'); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 5 ('*NSW Controlled Operations Act*'); *Police (Special Investigative and Other Powers) Act 2015* (NT) s 10 ('*NT Investigative Powers Act*'); *Police Powers and Responsibilities Act 2000* (Qld) s 224 ('*Qld Police Powers Act*'); *Criminal Law (Undercover Operations) Act 1995* (SA) s 3 ('*SA Undercover Operations Act*'); *Police Powers (Controlled Operations) Act 2006* (Tas) s 9 ('*Tas Controlled Operations Act*'); *Crimes (Controlled Operations) Act 2004* (Vic) s 12 ('*Vic Controlled Operations Act*'); *Criminal Investigation (Covert Powers) Act 2012* (WA) s 10 ('*WA Covert Powers Act*'). These operations are also subject to further conduct rules regulated by statute in response to common law developments such as *Ridgeway v The Queen* (1995) 184 CLR 19 ('*Ridgeway*'). Mr Big operations are not classified as 'controlled operations'

objective of an undercover operation is to obtain evidence or identify potential perpetrators.[132] These operations are usually employed if the custodial investigative methods provide insufficient powers to gather sufficient evidence.

Covert operations frequently involve deception to elicit confessions. In custodial investigations, deceptive conduct by police officers can lead to evidence being excluded on public policy or fairness grounds.[133] However, during an undercover operation, these rights are not always adequately protected, and deceptive or entrapping conduct by undercover officers has therefore been subject to judicial review.

In 1995, the High Court handed down a landmark decision on the regulation of conduct of undercover operatives. In *Ridgeway v The Queen* ('*Ridgeway*'), the High Court examined the use of entrapment methods by undercover officers to induce a confession.[134] In *Ridgeway*, the High Court allowed an appeal against a conviction for possession of heroin. The appellant was involved in the illegal importation of the heroin, but it was part of a controlled operation involving the Australian Federal Police and the Malaysian Police. Although the High Court dismissed entrapment as a defence, it held that there is a discretion for the trial judge to reject admissible evidence if it was illegally or improperly obtained by law enforcement officials.[135] Thus, entrapment to commit an offence orchestrated by law enforcement is not a defence, but it raises a question: can an accused person argue that they were tricked into confessing to another crime?

One year after the decision in *Ridgeway*, the Queensland Court Appeal addressed this question and used the High Court's interpretation to assess whether trickery and deceit during undercover operations should be permitted. In *R v O'Neill* ('*O'Neill*'), Fitzgerald P noted that the use of deception by law enforcement officials can lead to trickery in waiving the right to silence and making admissions.[136] This is due to the fact that suspects, who are subject to a covert police operation, do not know that they are speaking with undercover police officers. Consequently, suspects are unaware that they *should* exercise their right to silence. While in minority, Fitzgerald P noted that there is a tension between incriminating admissions obtained by trickery

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because they do not involve actual controlled criminal activities. As Ruyters and Bartle (n 12) observe, Mr Big operations do not require the same approval processes as other undercover operations, affecting the oversight and adequate regulation of Mr Big operations.

132 *Cth Crimes Act* (n 131) s 15GH; *NSW Controlled Operations Act* (n 131) s 3; *NT Investigative Powers Act* (n 131) s 8; *Qld Police Powers Act* (n 131) s 224(1); *SA Undercover Operations Act* (n 131) s 3; *Tas Controlled Operations Act* (n 131) s 3(a); *Vic Controlled Operations Act* (n 131) s 6; *WA Covert Powers Act* (n 131) s 3.

133 *UEL* (n 116) ss 90, 138; *Bunning* (n 116) 75 (Stephen and Aickin JJ); *R v Ireland* (1970) 126 CLR 321, 335 (Barwick CJ, McTiernan J agreeing at 336, Windeyer J agreeing at 336, Owen J agreeing at 336, Walsh J agreeing at 336).

134 *Ridgeway* (n 131).

135 Ibid 45–9 (Brennan J).

136 *R v O'Neill* (1996) 2 Qd R 326, 422 ('*O'Neill*'). Notably, this decision was handed down five years after the findings of the Fitzgerald Inquiry were released addressing police misconduct in Queensland. See Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry Pursuant to Orders in Council* (Report, 3 July 1989) <https://www.ccc.qld.gov.au/publications/fitzgerald-inquiry-report>.

and the reliability of those admissions.[137] In *O'Neill*, the appellant confessed to a police informer whom she believed was her friend.[138] Fitzgerald P observed that the appellant was deliberately tricked into confessing and that using her admissions against her would be unfair. However, as noted, Fitzgerald P was in the minority in condemning this use of trickery.[139]

1 Right to Silence: Swaffield, Pavic and Tofilau

Not long after Fitzgerald P made these remarks, the High Court considered two appeals to determine the admissibility of confessions obtained through covert police interviews.[140] The case of *R v Swaffield* ('*Swaffield*') involved an appeal from two appellants (Swaffield and Pavic) who confessed to third parties arguing that their confession was involuntary.[141] Swaffield made admissions to an undercover police officer who posed as a buyer of illegal drugs. Swaffield confessed to his involvement in arson.[142] These admissions were made two years after Swaffield was released during the committal hearing with respect to charges in relation to these property offences.[143]

Pavic, after exercising his right to consult with his solicitor, chose not to answer police questions in relation to a homicide investigation.[144] After Pavic's release, a witness, equipped with a microphone, engaged him in a conversation. In this conversation, the witness truthfully mentioned that the police had found the witness' clothing stained with blood. Subsequently, Pavic made admissions.[145] The trial judge and Court of Appeal did not exclude Pavic's admissions.

In this landmark case, the High Court pondered an important question addressing the fairness of admitting the confessions. To address this question in both cases, it first evaluated whether a voluntary confession that was obtained improperly or illegally by a witness (in this case, undercover police officer or a civilian witness) should be admitted and, second, it evaluated whether it was fair to admit a confession if the confessing individual had previously exercised their right to silence.[146] These questions were addressed by considering the appeals of Swaffield and Pavic.

The High Court ruled Pavic's admissions admissible. Brennan CJ, along with Toohey, Gaudron and Gummow JJ, determined that there was no illegality in obtaining these admissions because the witness was not acting as an agent of the state. The police did not arrange the meeting with Pavic; it was the witness who arranged this meeting.[147] On the other hand, the Queensland Court of Appeal concluded that

137 *O'Neill* (n 136) 330–1.
138 Ibid 422.
139 Ibid 422.
140 *R v Swaffield* (1998) 192 CLR 159.
141 Ibid 165–7 [1]–[7] (Brennan CJ).
142 Ibid 165 [2].
143 Ibid.
144 Ibid 166 [5].
145 Ibid 166–7 [5]–[7].
146 Ibid 167 [8]–[9].
147 Ibid 203–4 [100] (Toohey, Gaudron and Gummow JJ).

Swaffield's right to silence was violated to such an extent that it would be unfair to admit his statements into evidence. The High Court upheld this decision.

If an accused has previously exercised their right to silence and is later influenced by persistence during covert operations, any resulting confessions should be excluded due to improper conduct. These cases further demonstrate that the identity of the confessor, that is whether the confessor is an agent of the State, is a factor in assessing the voluntariness of the admissions. In *Swaffield*, the confessor was an undercover police officer, and the Queensland Police organised the undercover operation. In contrast, in *Pavic*, the confessor was a civilian witness collaborating with the police who had organised the meeting with the appellant.

Andrew Palmer observed that the decision in *Swaffield* did not provide clear guidance as to what constitutes impropriety in this context, leaving it to courts' interpretation.[148] After analysing the application of the exercise of public policy discretion in post-*Swaffield* cases,[149] Palmer observed that incriminating statements would only be excluded from evidence if they were actively or persistently induced.[150] Palmer noted that the most apparent form of such inducement would be questioning in an interrogative manner.[151] In addition to this, Palmer observed that courts considered manipulation in this context as well.[152]

Post-*Swaffield*, cases indicated that a person exercising their right to silence before making incriminating admissions is an important consideration for the courts. However, it is not in itself a decisive factor for excluding these statements.[153]

A year after the publication of Palmer's analysis of cases post-*Swaffield*, Palmer examined the application of the public policy discretion in Victorian Courts with respect to confessions induced during Mr Big operations.[154] In *R v Tofilau*, the Victorian Supreme Court refused to exclude admissions that were elicited during a Mr Big operation.[155] The appellant argued that he was tricked into confessing due to the false belief that he would receive $10,000 if he were to become member of the 'gang', affecting the voluntariness of his confession.[156] The Court rejected this argument and concluded that this confession was voluntary and did not exercise

148 Andrew Palmer, 'Applying *Swaffield*: Covertly Obtained Statements and the Public Policy Discretion' (2004) 28(4) *Criminal Law Journal* 217, 217–18 ('Applying *Swaffield*').

149 Being: *R v B* [2000] QCA 19; *Vale v R* (2001) 120 A Crim R 322, 336 (Malcolm CJ, Ipp J agreeing at 337, Wallwork J agreeing at 337); *R v Heaney* (1998) 4 VR 636 ('*Heaney*'); *R v Juric* (2002) 4 VR 411; *R v Deed* [2002] SASC 151; *Binning v Lehman* (2002) 133 A Crim R 294; *R v Nguyen* [1999] VSC 420; *R v Ince* [1999] VSC 418; *R v Chimirri* (2002) 136 A Crim R 381; *R v Dewhirst* (2001) 122 A Crim R 403 ('*Dewhirst*'); *R v Roba* (2000) 110 A Crim R 245 ('*Roba*'); *R v M* (2002) 135 A Crim R 324; *R v Carter* (2000) 1 VR 175; *R v Lewis* (2000) 1 VR 290; *R v Franklin* [1998] VSC 217; *R v Hartwick [No 1]* [2002] VSC 422; *R v Brookes* [2000] QCA 19.

150 Palmer, 'Applying *Swaffield*' (n 148) 219.

151 Ibid.

152 Ibid. This was considered in *Heaney* (n 149) and *Roba* (n 149).

153 Palmer, 'Applying *Swaffield*' (n 148) 223–4. Palmer observed this based on the decisions in *Dewhirst* (n 149); *R v Liew* (1999) 3 SCR 227; *Roba* (n 149) and *R v Jones* [2001] TASSC 121.

154 Andrew Palmer, 'Applying *Swaffield* Part II: Fake Gangs and Induced Confessions' (2005) 29(2) *Criminal Law Journal* 111 ('Applying *Swaffield* Part II').

155 (2003) 13 VR 1, 4–5 [10] (Osborn J) ('*Tofilau Admissibility Ruling*').

156 Ibid 4–5 [10], 15 [48].

their discretion to exclude.[157] In this vein, Osborn J noted that '[t]his was not a case of the serpent's beguiling or of a trap for the unwary innocent as opposed to a trap for the unwary criminal'.[158]

Considering this notion, the Court observed that the Crown did not engage in unlawful or improper trickery to obtain this confession.[159] When considering trickery, it must be assessed whether the trickery affected the right to silence, impacting the voluntariness and reliability of these confessions.[160] If a suspect had previously exercised their right to silence, it clearly indicates an unwillingness to cooperate with law enforcement. Subsequent trickery, such as engaging with undercover operatives, offering inducements and exerting pressure over time to make a confession to 'Mr Big', can affect the voluntariness of these admissions.

Unlike in *Swaffield*, the appellant in *R v Tofilau* had not previously exercised his right to silence, which, Palmer observed, may have influenced the outcome of his case.[161] As this case concerned a murder charge, Palmer raised concerns about the admission of the confession and concluded:

> Trial courts have thus endorsed a very elaborate method of eliciting a confession, namely by using covert operatives to induct a suspect membership of a fake criminal gang, as part of which process they may be induced to confess to prior criminality. Although the suspects in these cases had not previously exercised their right to silence, these cases, along with the actual result in *Pavic*, do raise the possibility that if the crime is serious enough, and the evidence important enough, it may be acceptable for investigators to circumvent or undermine the rights of suspects, including the right to silence.[162]

Palmer made an important point. Tofilau and Pavic were convicted of homicide offences, while Swaffield was accused of property offences and arson. It appeared that the probative value of the confession outweighed the prejudicial effect in both Tofilau's and Pavic's cases. The public interest in homicide convictions is greater than the public interest in the conviction of lesser offences. The seriousness of homicide offences therefore plays an important part in the balancing exercise of the courts when examining to exclude a confession.

2 Tofilau and Public Policy Considerations

It is notable that, in *R v Tofilau*, Osborn J utilised the Canadian-invented 'community shock test', which puts a strong focus on societal expectations of law

157 Ibid 27 [91].

158 Ibid 24 [82], citing *R v Bernath* (1997) 1 VR 271, 277 (Callaway JA).

159 *Tofilau Admissibility Ruling* (n 155) 26–7 [89] (Osborn J), citing the Canadian 'community shock' test formulated in *R v Unger* (1993) 83 CCC (3d) 228, 248–9 [68]–[72] (Manitoba Court of Appeal). In *R v Collins* [1987] 1 SCR 265 ('*Collins*'), Lamer J noted that 'dirty' tricks by law enforcement, which shock the community, can undermine the administration of justice. It was noted that, confessions obtained through such tactics, should not be admissible on voluntariness grounds: at 287 [52].

160 *Tofilau Admissibility Ruling* (n 155) 26–7 [89] (Osborn J).

161 Palmer, 'Applying *Swaffield* Part II' (n 154) 115. Although, in later Mr Big cases an accused's previous exercise of their right to silence during a police interview did not affect the admissibility of the confession.

162 Ibid 115.

enforcement.[163] In this vein, public policy considerations inform our acceptance of particular police conduct. In *Bunning v Cross*, Stephen and Aickin JJ formulated factors that are relevant for determining whether improperly or illegally obtained evidence should be excluded on public policy grounds.[164] These factors include a consideration of the nature of the offence that weighs in favour of admission.[165] In addition to the seriousness of the offences, this confession had high probative value and was unlikely to be obtained without the alleged improper or deceptive conduct.[166] The public interest in convicting an offender factors heavily into this assessment.[167] As cases involving Mr Big operations are often employed in homicide investigations, this public interest in convicting the offender weighs heavily into these public policy considerations. Without these confessions, it is unlikely that these cases would result in a conviction, which weighs in favour of admission.[168] The more serious the offence, the more likely that the public would approve the use of improper and deceptive methods to elicit confessions. In considering these three cases, Palmer expressed concerns about how the severity of the offences influences the decision to admit confessions induced by trickery, deceit and inducements into evidence.[169] He noted that the decision in *R v Tofilau* demonstrates that, if the crime is sufficiently serious, undercover operations are acceptable to undermine the fundamental rights of suspects.[170]

The case of *R v Tofilau* was appealed and ultimately landed in the High Court.[171] The High Court was tasked with examining the legitimacy of the method in light of the protection of fundamental rights of suspects. Their analysis on the legitimacy and use of the method will be discussed in the next Part.

V MR BIG IN THE HIGH COURT

Tofilau became one of the four appellants who appealed the admissibility of their Mr Big Confession to the High Court (along with Marks, Hill and Clarke). *Tofilau v The Queen* marked the first and only time the High Court evaluated the use of the method in Australia. Despite attempts to prevent publishing details about

163 *Tofilau Admissibility Ruling* (n 155) 26–7 [89]–[90]; *Collins* (n 159) 287 (Lamer J).

164 *Bunning* (n 116) 78–81. The public policy discretion is now embodied in *UEL* (n 116) s 138; *WA Investigation Act* (n 116) s 155(2). Queensland and SA have general discretions to exclude evidence which can include a consideration of public policy: *Qld Evidence Act* (n 116) s 130; *SA Evidence Act* (n 116) s 34KD(2).

165 *Bunning* (n 116) 78–81 (Stephen and Aickin JJ).

166 This is a factor that can be taken into consideration when determining whether the discretion to exclude should be exercised: see *Kadir v The Queen* (2020) 267 CLR 109, 135 [42] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) ('*Kadir*').

167 *R v Dalley* (2002) 132 A Crim R 169, 171–2 [1]–[7] (Spigelman CJ).

168 For discussion, see *Kadir* (n 166) 126–7 [17]–[19], 135 [42] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

169 Palmer, 'Applying *Swaffield* Part II' (n 154) 115.

170 Ibid.

171 *Tofilau High Court Appeal* (n 45).

the method's use, the High Court ruled that it was in the public interest to disclose the use of this method and its detailed methodology.[172]

The 2007 decision of *Tofilau v The Queen* involved appeals from four appellants who were convicted of murder and made confessions as a result of separate Mr Big operations.[173] All four men argued that their confessions were involuntary because they were induced by the false hope of becoming part of the fictitious criminal enterprise.[174] The High Court examined the arguments that these confessions were involuntary and whether they were obtained by improper conduct and against public policy.[175] Following Dixon J's definition of voluntariness in *McDermott*, the Court evaluated whether these Mr Big Confessions were a result of 'duress, intimidation, persistent importunity, or sustained or undue insistence or pressure'.[176] While the Court recognised that these appellants were subjected to 'powerful psychological pressure' during these Mr Big operations, these confessions were deemed voluntary and admissible.[177]

Gummow and Hayne JJ noted that the severity of the compulsion should be considered when assessing whether a person's will has been overborne and, consequently, whether their confessions were involuntary and unreliable.[178] They observed that the overbearing of the will, as was described by Dixon J in *McDermott*, should be distinguished from fear of prejudice or hope of advantage. Fear of prejudice and hope of advantage were considered as inducements, while the overbearing of the will is limited to circumstances such as duress.[179]

Gummow and Hayne JJ concluded that none of the appellants appeared to be under duress or compulsion and therefore their confessions to Mr Big were voluntary, reliable and admissible.[180] The majority further concluded that the prohibition of inducements did not apply in these cases. The prohibition to offer inducements is limited to 'persons in authority'. Gleeson CJ, with the majority agreeing, noted that any representation made by a person claiming that they could influence corrupt police officers does not make them a 'person in authority'.[181] The undercover officers were not deemed a 'person in authority' and, therefore, the inducements offered during Mr Big operations were permitted.[182]

Kirby J dissented by critically evaluating arguments for and against admission of these confessions.[183] While recognising that the severity of the crimes for which

172 *Re Chief Commissioner of Police (Vic)* (2005) 214 ALR 422.
173 *Tofilau High Court Appeal* (n 45).
174 Ibid 401 [2] (Gleeson CJ).
175 *Tofilau High Court Appeal* (n 45) 418–19 [54] (Gummow and Hayne JJ), relying on Dixon J's notion that confessions *should* be excluded if improperly procured by officers of police: *McDermott* (n 114) 515 (Dixon J).
176 *McDermott* (n 114) 511 (Dixon J); *Tofilau High Court Appeal* (n 45) 420–1 [60] (Gummow and Hayne JJ).
177 *Tofilau High Court Appeal* (n 45) 409 [19], 410 [22].
178 Ibid 420–1 [58]–[61] (Gummow and Hayne JJ).
179 Ibid 421 [61].
180 Ibid 421 [64], 426 [81], 427 [88], 429 [98], 432–3 [113]–[114].
181 Ibid 406–7 [13] (Gleeson CJ).
182 Ibid.
183 Ibid 441–6 [146]–[149].

the appellants were charged influenced the decision on whether the confessions were admissible, his Honour concluded that the reasons against admitting the confessions were more persuasive than the reasons in favour.[184] His Honour noted that admitting confessions obtained through the use of the method violates a suspect's right to silence and other international human rights principles.[185] His Honour further noted that the techniques employed by undercover officers have a coercive psychological impact on a suspect and deprive them of the fundamental rights they usually have when in custody.[186] Kirby J further observed that the use of the method exploits vulnerable suspects and manipulates them with false hope and fears.[187] Lastly, his Honour noted that the deception and trickery in these operations erode the trust in the integrity of law enforcement.[188] Kirby J stated that allowing these operations to continue is not in the public interest and expressed the following:

> Doubtless, 'community standards' may inform the content of the common law as expressed by the judges. However, in matters such as the present, it would be a mistake to enlist supposed 'community standards' to condone departure by police officers from the basic rights of those suspected of crimes. Often it is the judges alone who will safeguard those basic rights[189]

Kirby J further stated that to limit the definition of a 'person in authority', in his words, 'makes no sense' if the prohibition of inducements is aimed to discourage officials from unfairly exploiting a suspect's vulnerabilities to induce a confession.[190] His Honour observed that this limitation unfairly restricts the inducement rule and stated:

> To impose a requirement that the suspect must be *aware* that the person making the inducement is, himself or herself, a person in authority (as distinct from one able to pull the levers of authority) restricts the operation of the rule in an unnecessarily artificial way. Even more clearly, to limit the rule to cases where the person in authority operates, or is believed to operate, *lawfully* is quite unrealistic.[191]

Kirby J interpreted the inducement rule as relevant to *any* inducement that can influence the decision of a suspect to make a confession, whether it was a person holding lawful authority or not.

In considering the appeal, the Court used Canadian case law to guide their analysis. While the majority used the 2003 majority decision of the Alberta Court of Appeal in *R v Grandinetti* to justify that undercover operatives are not deemed a 'person in authority',[192] Kirby J supported the dissenting opinion of Conrad JA, who argued for a broader interpretation of a 'person in authority'.[193] Conrad JA

184 Ibid.
185 Ibid 443–6 [148].
186 Ibid.
187 Ibid.
188 Ibid 443–6 [148]–[149].
189 Ibid 463 [210].
190 Ibid 453 [176].
191 Ibid 453 [177].
192 This conclusion was affirmed by the Canadian Supreme Court in *Grandinetti Supreme Court Appeal* (n 45) 32–44 [14]–[53] (Abella J).
193 *R v Grandinetti* (2003) 339 AR 52, [159]–[160] (Conrad JA) ('*Grandinetti Court of Appeal*'), cited in *Grandinetti Supreme Court Appeal* (n 45) 37 [33] (Abella J); *Tofilau High Court Appeal* (n 45) 406–7 [12]–[14] (Gleeson CJ).

suggested that the test should be whether the accused *reasonably believed* that the person could influence the prosecution.[194] Kirby J argued that this notion aligns with the fairness considerations underpinning the voluntariness rule.[195]

Despite this strong dissenting opinion, the majority of the Court dismissed these appeals. However, the majority decision did not unconditionally endorse the use of the method.[196] Callinan, Heydon and Crennan JJ recognised that, while it is sometimes necessary to conduct such risky operations, they are stressful for undercover officers responding to, at times, dangerous situations.[197] This inherent danger in this way may lead to undercover officers acting in an 'irregular' manner.[198] However, the Justices found no concerning conduct in these four cases.[199]

A Post-*Tofilau* Criticism

The *Tofilau v The Queen* decision appears to distinguish *Swaffield* and *Pavic* in that the Court held that the voluntariness rule, which usually applies to custodial police interviews and, to some extent, to undercover operations, does not apply to the same extent during Mr Big operations. As Kirby J noted, various fundamental rights are undermined when a suspect becomes a target of a Mr Big operation.[200] However, these fundamental rights have been overridden by the public interest in resolving homicide investigations.

In this vein, Brendon Murphy and John Anderson noted that during Mr Big operations it is plausible that a suspect makes a false or involuntary confession due to fear of violence and the desire to become a member of the 'gang'.[201] They argued that the application of the voluntariness rule should include a consideration of the psychologically oppressive conduct of undercover officers, which often renders the Mr Big Confessions unreliable.[202]

Although the High Court recognised the risks of unreliable confessions in *Tofilau v The Queen*, it has been argued by Phelan that Australia's approach to the admissibility of Mr Big Confessions and protection against convictions based on unreliable confessions is weaker compared to regulations established in *Hart* in Canada.[203] Australian courts focus on factors like intimidation, threats or excessive pressure when examining the voluntariness and reliability of Mr Big Confessions.[204]

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194 *Grandinetti Court of Appeal* (n 193) [117]–[118].
195 *Tofilau High Court Appeal* (n 45) 455–6 [186]–[187].
196 Ibid 529–30 [416] (Callinan, Heydon and Crennan JJ).
197 Ibid.
198 Ibid.
199 Ibid.
200 Ibid 443 [148]. See also Palmer, 'Applying *Swaffield* Part II' (n 154) 115 for discussion.
201 See above n 20.
202 Murphy and Anderson (n 8) 43–4. This argument was raised in *Kilincer [No 2]* (n 20) [131]–[138] (Johnson J). The argument was ultimately unsuccessful as the Supreme Court did not consider the conduct of the undercover operatives 'oppressive'.
203 As was noted by Nathan Phelan, 'Importing a Canadian Creation: A Comparative Analysis of Evidentiary Rules Governing the Admissibility of Confessions to "Mr Big"' (2019) 42(3) *Manitoba Law Journal* 385, 389, referring to the test established in *Hart* (n 2). The Canadian regulation of Mr Big Confessions was discussed in Part II(B) above.
204 *McDermott* (n 114) 511 (Dixon J); *Tofilau High Court Appeal* (n 45) 420–1 [60] (Gummow and Hayne JJ).

If such factors were not present during the covert police interviews, the Mr Big Confession is deemed voluntary and admissible. In this vein, Celine van Golde and I point out the double standard in admitting Mr Big Confessions, especially considering the significant efforts by all actors in the criminal justice system over the last decades to minimise the risk of unreliable and involuntary confessions that could lead to wrongful convictions.[205] We note:

> Keeping these efforts and developments in mind, perhaps we should ask ourselves whether the use of the Mr Big method fits the ideal of a fair, transparent and just criminal justice system. If the use of deception, trickery and inducement are prohibited in custodial interviews, why should they be permitted during a Mr Big operation?[206]

In sum, the nature of undercover operations does not allow for the same kind of protections as a suspect had during the custodial investigation. However, the disregard of many protections, that should be safeguarded during these operations, is a concerning development. In addition to this, there is an apparent lack of oversight of these operations, considering their secretive nature.[207] Michele Ruyters and Jarryd Bartle note that the adequacy of internal governance and external oversight of these operations is unknown due to the secretive nature of these police operations.[208] Consequentially, what we know of 'Mr Big' in Australia is based on a handful of publicly available cases.[209]

B The Current Position in Australia

In addition to the rules in evidence statutes supplemented by the common law, the majority decision in *Tofilau v The Queen* sets precedent for the common law regulation of the admissibility of Mr Big Confessions. This means that 'Mr Big' is not deemed a 'person in authority' or 'investigative official', which means that the prohibition offering inducements does not apply.[210] Like in the Canadian, Dutch and New Zealand courts, Australian courts assess the admissibility of Mr Big Confessions on a case-by-case basis. The current consideration for courts assessing a Mr Big Confession is to either exclude it, or admit it and provide jury directions.

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205 Adam and van Golde, 'Is It Time to Move On?' (n 6) 136–7.

206 Ibid 141.

207 Ruyters and Bartle (n 12) 323–4, 330.

208 Ibid 324.

209 Being: *Deacon* (n 19); *Kamalasanan v The Queen* [2019] VSCA 180 ('*Kamalasanan*'); *Lauchlan v Western Australia* [2008] WASCA 227 ('*Lauchlan*'); *R v Clarke* [2004] VSC 11; *Cowan Pre-Trial Application* (n 129); *Cowan Appeal* (n 19); *R v Simmons [No 2]* (2015) 249 A Crim R 82 ('*Simmons*'); *R v Weaven [No 1]* [2011] VSC 442 ('*Weaven [No 1]*'); *Tofilau High Court Appeal* (n 45); *R v Jelicic* [2016] SASC 57 ('*Jelicic*'); *Rumsby* (n 20); *Kilincer [No 2]* (n 20); *Standage v Tasmania* (2017) 28 Tas R 184 ('*Standage*'); *R v Taylor* [2016] QSC 116 ('*Taylor*'); *R v Fesus [No 2]* [2015] NSWSC 1467; *R v Karakas [No 1]* [2009] VSC 480 ('*Karakas*'). All the appellants in these cases unsuccessfully challenged the admissibility of their confessions. Parts of the method were also employed in *Alhassan v The King* [2024] VSCA 233.

210 Cf *Tofilau High Court Appeal* (n 45) 451–3 [168]–[178] (Kirby J). *UEL* (n 116) Dictionary pt 1 (definition of 'investigating official'). Following *Tofilau High Court Appeal* (n 45), the *UEL* (n 116) now specifically excludes covert operatives from being 'investigating official[s]'.

1 Admissibility Considerations

The admissibility of Mr Big Confessions is subject to evidence statutes and the common law. In the uniform evidence law jurisdictions, the common law voluntariness test was abolished and replaced by reliability considerations.[211] In those jurisdictions, accused persons who confessed to Mr Big can raise that their confession is unreliable, or obtained through oppressive conduct.[212] Queensland, South Australian and Western Australian courts still apply the common law voluntariness test.

If the confession is deemed voluntary and reliable, appellants can request the court to exclude the confession on fairness[213] or public policy grounds.[214] Where inducements and violation of fundamental rights would usually lead to the exclusion of the confession,[215] the same standard is not applied to Mr Big Confessions. This is largely due to the fact that the undercover officers during a Mr Big operation are not deemed a person in authority or an 'investigating official'.[216] As such, any inducement during the Mr Big operation is not deemed to affect the voluntariness of the confession.[217]

Rather, if raised on appeal, courts assess whether the confession was influenced by violent, oppressive, inhumane or degrading treatment or threats.[218] Following the majority decision in *Tofilau v The Queen*, Australian courts allow for greater flexibilities when it comes to the use of improper tactics to induce confessions. If covert operatives exert oppressive pressure or threaten the suspect then, subject to discretion, the Mr Big Confession can be excluded.[219]

2 Jury Directions

An additional safeguard that was suggested in the Victorian Supreme Court by Callaway JA, with Buchanan and Vincent JJA in agreement, is that the jury should be instructed about the potential unreliability of Mr Big Confessions.[220] Although

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211 This followed from the ALRC's observation that the common law voluntariness test is technical and involuntariness due to psychological coercion was hard to establish: *Uniform Evidence Law Report* (n 125) 324–5. Reliability is found in sections 84–5 of the *UEL* (n 116). In WA, reliability is governed by the *Evidence Act 1995* (WA) s 85 ('*WA Evidence Act*'). In SA, there is a focus on credibility of out-of-court statements rather than reliability: see *SA Evidence Act* (n 116) s 34KD. Queensland has a statutory general discretion to exclude evidence on any ground: see *Qld Evidence Act* (n 116) s 130.

212 *UEL* (n 116) ss 84–5.

213 Ibid s 90; *WA Evidence Act* (n 211) s 112; *Qld Evidence Act* (n 116) ss 98, 130; *SA Evidence Act* (n 116) s 34KA.

214 *UEL* (n 116) s 138; *WA Investigation Act* (n 116) s 155. Queensland and SA have a general discretion to exclude evidence, which is informed by the common law: *Qld Evidence Act* (n 116) s 130; *SA Evidence Act* (n 116) s 34KD(2).

215 For an overview, see *Malgil v Western Australia* [2008] WASC 290, [4] (Murray J).

216 *UEL* (n 116) Dictionary pt 1 (definition of 'investigating official').

217 See for instance *Taylor* (n 209) [111]–[128] (Burns J); *Deacon* (n 19) [58]–[74] (Grant CJ, Southwood J and Riley AJ).

218 See *Deacon* (n 19) [58]–[76] (Grant CJ, Southwood J and Riley AJ); *Kilincer [No 2]* (n 20) [131]–[171] (Johnson J); *Weaven Appeal* (n 20) [24]–[27] (Priest JA); *Rumsby* (n 20) [148]–[179] (RA Hulme AJ); *Taylor* (n 209) [111]–[136] (Burns J).

219 See *Weaven [No 1]* (n 209) [26]–[35] (Weinberg JA) for discussion.

220 *R v Tofilau [No 2]* (2006) 13 VR 28, 32–3 [6]–[7] (Callaway JA) ('*Tofilau [No 2]*').

the High Court did not comment on the jury directions in such cases, there is some evidence that jurors are instructed about the potential incredibility of scenario evidence.[221] These instructions include a warning of the manipulative nature of this investigative technique which could potentially diminish the credibility of the confession. Further, jurors are reminded of the potential that a suspect can make a false statement if they perceive it to be beneficial and safe to do so.[222]

Although safeguards are in place to minimise the risk of admitting involuntary Mr Big Confessions, these protections are insufficient given our evolved understanding of the psychological reasons causing involuntary or false confessions. The next Part will discuss why these safeguards are insufficient to protect against coerced confessions risking wrongful convictions.

VI THE INADEQUACY OF CURRENT SAFEGUARDS

As discussed, courts can either exclude Mr Big Confessions or admit them with jury directions to minimise unfair prejudice. Unlike the growing scrutiny of the method in foreign courts, Australia's stance on the method has remained unchanged since 2007. The method has faced criticism echoing Kirby J's concerns in *Tofilau v The Queen*. Since Mr Big operations began in Australia, there have been concerns about the inadequate protection of vulnerable suspects subject to Mr Big operations.[223]

In *Tofilau v The Queen*, the High Court ruled that 'Mr Big' is not considered a 'person in authority'.[224] Consequently, deceptive tactics and inducements do not impact the reliability or voluntariness of Mr Big Confessions.[225] This stance is mirrored in evidence law,[226] meaning the prohibition of inducement does not apply to covert officers in Mr Big operations.[227]

Although the Court recognised that targets of Mr Big operations face 'powerful psychological pressure', it limited the assessment of involuntariness to 'threats' or 'duress'.[228] Despite the ALRC's emphasis on incorporating psychological theory in

221 See, eg, *Simmons* (n 209) 114–15 [131] (Hamill J); *Standage* (n 209) 194 [6] (Tennent J), quoting *Tasmania v Standage* [2013] TASSC 63, [156] (Estcourt J) ('*Standage Voir Dire*'); *Kilincer [No 2]* (n 20) [264] (Johnson J).

222 This warning was provided in a number of cases, including *Jelicic* (n 209) [108]–[114] (Peek J) and *Kilincer [No 2]* (n 20) [263]–[266] (Johnson J). The jury directions regarding scenario evidence were considered in detail in *Standage* (n 209) 194 [6] (Tennent J), quoting *Standage Voir Dire* (n 221) [156] (Estcourt J).

223 See, eg, *Tofilau High Court Appeal* (n 45) 463–4 [204] (Kirby J); Adam and van Golde, 'Is It Time to Move On?' (n 6).

224 *Tofilau High Court Appeal* (n 45) 406–7 [13] (Gleeson CJ).

225 Ibid 411–16 [30]–[45] (Gummow and Hayne JJ).

226 *UEL* (n 116) Dictionary pt 1 (definition of 'investigating official'). In Queensland, covert operatives are excluded from the prohibition of inducement rule outlined in *Qld Criminal Amendment Act* (n 124) s 10. See *Taylor* (n 209) [111] (Burns J) for a brief discussion. SA and WA follow the common law interpretation set out in *Tofilau High Court Appeal* (n 45).

227 See JD Heydon, *Cross on Evidence* (LexisNexis, 14th ed, 2023) 1362 for discussion.

228 *Tofilau High Court Appeal* (n 45) 409 [19], 410 [22] (Gleeson CJ).

interpreting evidence law,[229] the High Court has only minimally acknowledged the dangers of psychological coercion. The majority focused on the legal definition of voluntariness rather than the psychological risk of false confessions.

In contrast, the minority opinion addressed these dangers. Kirby J highlighted that the tactics used in Mr Big operations have an unacceptable psychological impact on suspects, affecting the voluntariness of their confessions.[230]

The current protections fall short in recognising the psychological reasons behind false and involuntary confessions. Factors like psychological coercion, fear, anxiety and peer pressure are not adequately addressed by current safeguards. Moreover, jury directions do not fully eliminate the risk of jury bias, which can have serious consequences. Canadian and New Zealand courts have thoroughly consulted psychological theory when assessing the reliability of Mr Big Confessions, offering a valuable lesson for Australia.[231]

The Australian approach provides insufficient protection and fails to adequately acknowledge the risk of coerced confessions. Part VI(A) will discuss the importance of recognising the psychological risks associated with involuntary and unreliable confessions. Part VI(B) will address the limitations of jury directions in reducing the risk of juror bias.

A Recognising the Risk of Involuntary and Unreliable Confessions

Mr Big operations pose a risk of involuntary and potentially false confessions.[232] This is partly because undercover officers offer significant incentives to secure a confession, which target and, arguably, exploit suspects' vulnerabilities.[233] Financial and social belonging incentives are particularly problematic for vulnerable suspects, as they may confess to gain these benefits rather than voluntarily admitting guilt. Additionally, the fear of impending prosecution and the mistaken belief that Mr Big can influence the investigation can create a false sense of security, leading to a confession.

1 Coercion and the Importance of Psychological Theory

The majority decision in *Tofilau v The Queen* provided a narrow interpretation of psychological coercion. The majority distinguished coercion that is inherently violent or oppressive with strategic psychological pressure.[234] While they acknowledged deceptive conduct, they did not recognise it as coercion that risks involuntary confessions as there were no direct threats or physical harm involved.[235]

229 *ALRC Interim Report* (n 123) 5 [8].
230 *Tofilau High Court Appeal* (n 45) 443 [148].
231 See, eg, *Hart* (n 2) 574–6 [69]–[72] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ); *Wichman* (n 11) 861 [393]–[394] (Glazebrook J).
232 Adam and van Golde, 'Is It Time to Move On?' (n 6) 137–8; Ruyters and Bartle (n 12) 330–1.
233 Poloz (n 4) 232–3.
234 *Tofilau High Court Appeal* (n 45) 408 [17], 409–10 [21] (Gleeson CJ), 413–22 [37]–[64] (Gummow and Hayne JJ).
235 Ibid 415–33 [47]–[116] (Gummow and Hayne JJ).

This decision inadequately recognises psychological coercion, which has been defined as 'methods that sequentially manipulate a suspect's perception of the situation, expectations for the future, and motivation to shift from denial to admission'.[236] Richard A Leo and Steven A Drizin note that the psychologically coercive interrogation involves a cumulative process where stress and isolation lead suspects to feel they have no option but to confess.[237] Techniques like intense questioning, accusations, cutting off denials and presenting fabricated or exaggerated evidence are used to break down a suspect's defences.[238] By progressively inducing a belief that the suspect has no choice but to cooperate or confess, the confession can be classified as psychologically coerced.[239]

The use of the method raises concerns about coercive techniques risking false confessions.[240] Nearly 20 years before *Tofilau v The Queen*, in its 1985 report on exploring the uniformity of evidence laws, the ALRC recognised that psychological coercion can exert illegitimate pressure to confess, affecting the reliability of confessions.[241] The ALRC noted that pressure, such as exploiting weaknesses, withholding information or manipulating the environment, can impact a person's rational choice, leading to involuntary confessions.[242] However, it acknowledged that challenging such confessions on voluntariness grounds poses difficulties.[243]

The reason for that is that coercion can be subtle in police interviews, making it hard to detect.[244] The Australian legislature and courts have increasingly recognised the subtle forms of coercion that affect rational decision-making. Patterns of isolation, intimidation and manipulation in intimate partner relationships are now acknowledged as coercive control, a criminal offence in many jurisdictions.[245] The general recognition of psychological coercion has also informed police procedures and questioning methods when interviewing suspects during a custodial interview.[246]

During a Mr Big operation, subtle but persuasive forms of promises or deceptive tactics can and have induced a false confession, including in situations where

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236 Richard A Leo and Steven A Drizin, 'The Three Errors: Pathways to False Confession and Wrongful Conviction' in G Daniel Lassiter and Christian A Meissner (eds), *Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations* (American Psychological Association, 2010) 9, 17, citing Richard J Ofshe and Richard A Leo, 'The Decision to Confess Falsely: Rational Choice and Irrational Action' (1997) 74(4) *Denver University Law Review* 979.

237 Leo and Drizin (n 236) 17–18.

238 Ibid.

239 Ibid 18.

240 Adam and van Golde, 'Is It Time to Move On?' (n 6); *Amin* (n 62) 573 [31]–[32] (Tulloch CJO).

241 *ALRC Interim Report* (n 123) 537 [965].

242 Ibid.

243 Ibid 100 [193].

244 Edwin D Driver, 'Confessions and the Social Psychology of Coercion' (1968) 82(1) *Harvard Law Review* 42, 61.

245 For an overview of these reforms and implications, see Kate Fitz-Gibbon et al, *The Criminalisation of Coercive Control: A National Study of Victim-Survivors* (Report No 24/20-21, 12 December 2024) 8–13 <https://doi.org/10.52922/crg77673>.

246 Adam and van Golde, 'Police Practice and False Confessions' (n 27) 52–9. Adam and van Golde discuss the change of questioning methods by Australian police forces in response to the growing recognition of involuntary and false confessions. Notably, a breach of internal police procedures can lead to the exclusion of a confession or record of interview: see *R v FE* [2013] NSWSC 1692.

such promises and tactics were used by undercover police officers.[247] Despite this increased awareness, the law governing Mr Big operations has not evolved with advancements in psychological research.

It is consequential from the majority decision in *Tofilau v The Queen* that psychological coercion is permitted to some extent during Mr Big operations, risking unreliable and potentially false confessions.[248] By allowing deceit, and inducement of fear and hope, psychologically coercive techniques are employed. Significant inducements, fear and peer pressure are recognised as forms of coercion that increase the risk of involuntary, unreliable and potentially false confessions.

2 Inducements and Unreliable Confessions

It is well-established in law that any inducement can affect the reliability of admissions and confessions.[249] Threats or inducements related to prosecuting an offence can compromise the reliability and admissibility of a confession.[250] If a causal link between the inducement and confession is proven, the confession is deemed involuntary and inadmissible.[251] The prohibition of inducements stems from the voluntariness rule, where any suggestion by a person in authority that a confession might influence prosecution undermines the free choice to confess.[252]

In Mr Big operations, two common types of inducements are offered. First, financial inducements: either actual or promised money. Second, the suggestion that 'Mr Big' can influence the criminal investigation and 'make it go away'. Psychological theory has long shown that such methods increase the risk of involuntary and false confessions. The reliability of Mr Big Confessions is questionable given the psychological vulnerabilities of the suspects targeted by this method, including financial hardship, compliance with authority and social pressure.

(a) Financial Inducements and Economic Adversity

Regardless of a suspect's economic situation, if there is an indication that they might be enticed by financial incentives, this strategy is used to elicit a confession. This is problematic because it blurs the line between confessions made voluntarily and those made in hopes of financial gain, which raises questions about their reliability.

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247 Saul M Kassin et al, 'Police-Induced Confessions: Risk Factors and Recommendations' (2010) 34(1) *Law and Human Behavior* 3, 23 <https://doi.org/10.1007/s10979-009-9188-6>. Kassin et al discuss the case of Kyle Unger who confessed to Mr Big in Canada. He was convicted in 1992 of sexual assault and murder. The charges against him were dropped. See *Unger v Canada (Minister of Justice)* (2005) 196 Man R (2d) 280.

248 See Adam and van Golde, 'Is It Time to Move On?' (n 6) for discussion.

249 *UEL* (n 116) s 85(3)(b)(ii); *Qld Criminal Amendment Act* (n 124) s 10. In Queensland, SA and WA, the common law test of voluntariness still operates.

250 See CR Williams, 'An Analysis of Discretionary Rejection in Relation to Confessions' (2008) 32(1) *Melbourne University Law Review* 302, 305–6 for discussion.

251 *McDermott* (n 114) 511 (Dixon J); *Cornelius v The King* (1936) 55 CLR 235, 245 (Dixon, Evatt and McTiernan JJ).

252 *McDermott* (n 114) 511 (Dixon J).

The connection between economic adversity and crime has been long recognised as a factor increasing the risk of offending.[253] Factors such as unemployment and financial hardship are commonly observed factors that increase the risk of criminal behaviour.[254] It is therefore a recognised concern that people from socio-economically disadvantaged backgrounds are overrepresented in our criminal justice system.[255]

There is a notable trend that Mr Big operations involve significant financial inducements. In *R v Jelicic* ('*Jelicic*'), for instance, the appellant desired to become a member of the criminal enterprise considering his estimated share of between $10,000 and $15,000 if his membership was approved by Mr Big.[256] The appellant came from a low socio-economic background, and in addition to the significant financial incentives, joining the 'gang' would provide him with a sense of social belonging.[257]

In *R v Simmons [No 2]*, the appellant was involved in 20 scenarios and was paid a total sum of $7,870 over a four-month period.[258] It was argued that the appellant used this money to feed his methamphetamine use.[259] However, the NSW Supreme Court concluded that it was nevertheless not unfair to admit the Mr Big confession.[260] In *R v Taylor* ('*Taylor*'), the applicant was unemployed and living out of his car.[261] This was exploited to create a financial incentive strategy by paying the applicant over a number of scenarios.[262]

Exploiting a suspect's vulnerabilities to craft a targeted strategy for inducing a confession is problematic. In cases of financial hardship or financial insecurity, offering money or promising a 'big payday' can entice a suspect to say or do anything to access these funds. This approach does not produce reliable and voluntary confessions; rather, it results in unreliable ones.

(b) Fear, Anxiety and False Confessions

Another common feature of Mr Big operations is that police officers induce a suspect's fear of prosecution and foster the false belief that the only way to avoid this is by gaining Mr Big's assistance.[263] Such inducement of fear or anxiety increases the risk of involuntary and potentially false confessions.

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253 Don Weatherburn, Bronwyn Lind and Simon Ku, 'The Short-Run Effects of Economic Adversity on Property Crime: An Australian Case Study' (2001) 34(2) *Australian and New Zealand Journal of Criminology* 134, 134 <https://doi.org/10.1177/000486580103400203>.

254 Don Weatherburn and Kevin T Schnepel, 'Economic Adversity and Crime: Old Theories and New Evidence' (2015) 50(1) *Australian Journal of Social Issues* 89, 99–100 <https://doi.org/10.1002/j.1839-4655.2015.tb00336.x>.

255 Mirko Bagaric, 'Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing' (2015) 33(1) *Minnesota Journal of Law and Inequality* 1, 1.

256 *Jelicic* (n 209) [46], [56] (Peek J).

257 Ibid [98].

258 *Simmons* (n 209) 111–12 [115] (Hamill J).

259 Ibid 111 [113]–[114].

260 Ibid 115 [132]–[133].

261 *Taylor* (n 209) [20] (Burns J).

262 Ibid [20]–[59].

263 *Tofilau High Court Appeal* (n 45) 449–50 [165] (Kirby J).

Fear and anxiety are well-established factors that make a person more vulnerable to making false confessions.[264] Causing a suspect to believe they have no choice but to confess to avoid feared consequences is a form of psychological coercion that risks false confessions.[265] While every police interrogation induces some fear of prosecution, if a suspect perceives they have no choice but to confess, there is a real risk that they confess because they believe those fears can be alleviated by complying with the interrogator's demands.[266] Saul M Kassin and Lawrence S Wrightsman describe these types of false confessions as 'coerced-compliant' false confessions where a suspect confesses to escape an aversive situation and secure a favourable outcome.[267] Historically, such false confessions were induced through torturous interrogation methods, but Kassin and Wrightsman note they can also result from threats and promises.[268] Such coercive tactics used in Mr Big operations create a false belief that Mr Big can resolve all problems.

In *Taylor*, for instance, the applicant was advised that his car was bugged by Queensland Police and that he should constantly check for tracking devices.[269] The applicant was led to believe that other 'gang' members were sent overseas on false passports to evade prosecution for other crimes.[270] Relying on the statements that his murder suspicion could be 'sorted', the applicant made numerous admissions.[271] The applicant later claimed that he falsely confessed to obtain a secure protection against police harassment.[272] The applicant further claimed that he confessed out of fear for his life and for the lives of his family.[273] The Court was not persuaded by these arguments and stated that the covert operatives acted properly and fairly during this operation.[274] Furthermore, the Court observed that the applicant revealed information that would 'only be known to the killer of the deceased' and concluded that the confession was reliable.[275]

Similarly, in *Standage v Tasmania* ('*Standage*') the appellant was advised that the prosecution was building a strong case against him and that he needed the 'crime boss' and 'corrupt police officer' to evade prosecution.[276] In *R v Kilincer [No 2]* the accused was led to believe that 'Mr Big' could influence the homicide

264 Richard A Leo, 'False Confessions: Causes, Consequences, and Implications' (2009) 37(3) *Journal of the American Academy of Psychiatry and the Law* 332, 339. The vulnerability of targets of undercover policing is, at time of writing, addressed in the Undercover Policing Inquiry in England and Wales. See Bethan Loftus, Martina Feilzer and Benjamin Goold, 'Being Watched: The Aftermath of Covert Policing' (2024) 63(3) *Howard Journal of Crime and Justice* 245, 248–67 <https://doi.org/10.1111/hojo.12569>.

265 Leo (n 264) 334–5; Ofshe and Leo (n 236) 997. Ofshe and Leo refer to these types of coerced confessions as 'Stress-Compliant False Confessions'.

266 Adam and van Golde, 'Police Practice and False Confessions' (n 27) 54–5.

267 Saul M Kassin and Lawrence S Wrightsman, 'Confession Evidence' in Saul M Kassin and Lawrence S Wrightsman (eds), *The Psychology of Evidence and Trial Procedure* (Sage Publications, 1985) 67, 77.

268 Ibid.

269 *Taylor* (n 209) [35] (Burns J).

270 Ibid [38].

271 Ibid [53]–[54].

272 Ibid [93].

273 Ibid.

274 Ibid [134].

275 Ibid [136].

276 *Standage* (n 209) 202 [26] (Tennent J).

investigation against him.[277] During their meeting, the accused repeatedly denied any involvement in the crime.[278] 'Mr Big' told the accused that he looked 'pressured' and that Mr Big can take all those pressures away in a 'once in a lifetime' opportunity to come clean without any consequences.[279] Roughly two hours after their meeting began, the accused took a toilet break and, upon returning to the meeting, made detailed admissions about the murder.[280] After being arrested, the accused told the police that the admissions were involuntary and stated 'I only said that so they can help me, I didn't do anything, trust me, he just pushed and pushed'.[281] The Crown argued that the scenario evidence indicated that the appellant was pretending to cry when he made those admissions and that it was all an act.[282] The Court concluded that there was no violence, intimidation or threat used by undercover officers to induce the confession and did not exclude it.[283]

The false belief that the fictitious criminal organisation can resolve all issues is not limited to dealing with criminal charges. In *Kamalasanan v The Queen*, the covert police officer advised the appellant that the criminal investigation led to potential implications for his immigration status.[284] Shortly after the appellant was made aware of these 'visa implications', he made detailed admissions about the poison used to kill the victim.[285]

The targets of Mr Big operations often find themselves in a pressured situation where they are being informed that there is pending investigation against them or other pressing circumstances. The perceived belief that Mr Big can make those problems go away could lead to a perceived feeling of security. The confessions can be an act of desperation or fear affecting the reliability and voluntariness of these confessions. Psychological theory confirms that these types of confessions are at a high risk of being involuntary and potentially false.[286]

(c) Social Pressure to Confess

Another psychologically coercive feature of the Mr Big operation, risking involuntary confessions, is the exertion of social pressure or peer pressure to be 'honest, loyal and trustworthy'.[287] Suspects who are targeted by Mr Big operations are often exposed to numerous scenarios where fellow 'gang' members are exerting social pressure on them. The effects of peer pressure on the voluntariness

277 *Kilincer [No 2]* (n 20) [196] (Johnson J).
278 Ibid [72].
279 Ibid.
280 Ibid [73], [76].
281 Ibid [82].
282 Ibid [83].
283 Ibid [167].
284 *Kamalasanan* (n 209) [34] (Priest, Forrest and Weinberg JJA).
285 Ibid [35], [81].
286 Kassin and Wrightsman (n 267) 77; Adam and van Golde, 'Is It Time to Move On?' (n 6) 136–7.
287 See eg, *Rumsby* (n 20) [39] (RA Hulme AJ); *Kilincer [No 2]* (n 20) [72] (Johnson J).

and reliability of confessions should not be understated. Psychological theory has demonstrated that such peer pressure increases the risk of involuntary confessions.[288]

The undercover police officers during the Mr Big operation gradually exert pressure on the suspect. Although suspects may be free to leave at any time,[289] there are strong incentives for suspects to stay. What should be noted here are the concerns about social influence on rational decision making and abuse of power.

Social influence theory has been incorporated in police questioning methods. The influence of this theory has been found in the most well-known United States interrogation method: the Reid Interrogation technique.[290] During custodial interrogations, police officers confront the suspect, exerting guilt presumptive pressure and citing real or manufactured evidence.[291] Police officers then morally justify the crime and suggest that a confession seems to be the best option for the suspect.[292] Social psychological theory established that people are inherently social beings and susceptible to influence from others. During a police interview, such social pressure has been found to be an effective tactic used by police to elicit a confession.[293] Since the 1990s, Australian police forces have shifted from using such interrogative questioning methods to employing investigative interviewing methods to reduce the risk of coerced and potentially false confessions.[294] Interrogative questioning methods used in a custodial interview can be considered oppressive or improper if they lead to psychological pressure that induces a confession.[295]

Despite the shift from interrogation to investigative interviewing methods during custodial interviews, interrogative questioning methods are still being used during undercover operations. The social influence tactic, for instance, is commonly employed during Mr Big operations. Undercover operatives befriend the suspect and continuously attempt to influence their decision-making. The suspect is led to believe that joining the fictitious criminal enterprise is their best option to avoid prosecution and secure a financially stable future. Suspects become desperate

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288 Saul M Kassin and Gisli H Gudjonsson, 'The Psychology of Confessions: A Review of the Literature and Issues' (2004) 5(2) *Psychological Science in the Public Interest* 33, 55–9.

289 See eg, *Deacon* (n 19) [65] (Grant CJ, Southwood J and Riley AJ); *Cowan Pre-Trial Application* (n 129) 414 [129] (Atkinson J); *Taylor* (n 209) [43] (Burns J); *Lauchlan* (n 209) [77] (Buss and Miller JJA and Murray AJA). *Lauchlan* (n 209) provides an example of peer pressure exerted by covert operatives, where

> [d]espite the appearances and the carefully and deliberately induced belief that the actions portrayed in the various scenarios were either themselves criminal activities or part of the preparations for, or sequels to, serious criminal activities, no offences of any kind are actually committed … As these scenarios were enacted and progressed the 'target' was repeatedly told that the key to success for the criminal gang was 'honesty, loyalty and trust' between its members and that all the gang members were carefully checked and evaluated by the 'crime boss' who had access through corrupt police officers and other corrupt officials, to police information. The 'crime boss' had the capacity to make any past problems 'go away' if they posed any threat to the gang or individual members.

at [17] (Miller JA), quoting *Western Australia v Lauchlan* [2005] WASC 266, [12]–[14] (Heenan J).

290 Kassin and Gudjonsson (n 288) 42.

291 Gisli H Gudjonsson and John Pearse, 'Suspect Interviews and False Confessions' (2011) 20(1) *Current Directions in Psychological Science* 33, 34.

292 Kassin and Gudjonsson (n 288) 41–3.

293 Ibid 43–4.

294 Adam and van Golde, 'Police Practice and False Confessions' (n 27) 56–9.

295 See *Higgins v The Queen* [2007] NSWCCA 56, [26] (Hoeben J).

to join this fictitious enterprise, believing it will help them evade prosecution.[296] During some operations, suspects are led to believe that joining the 'gang' means becoming part of a 'family' that will protect them from prosecution.[297]

In the weeks or months leading up to the suspect's first meeting with 'Mr Big', they are influenced by the perception that gang membership will provide protection against prosecution, financial security and relief from loneliness. Some suspects consider the undercover operatives as friends and share personal issues with them, creating a perceived trusted relationship.[298] Given that Mr Big operations involve multiple covert operatives who befriend the suspect early in the investigation and exert influence over time, peer pressure builds to be 'honest, trustworthy and loyal', pressuring the suspect to confess to Mr Big. This exerted pressure increases the risk of involuntary and potentially false confessions.

B Admissibility of Mr Big Confessions and Its Influence on Jurors

The admissibility of Mr Big Confessions is unsuccessfully but consistently challenged on appeal in Australian courts for various reasons, including involuntariness, fairness, and situations where the confession was obtained illegally or improperly, affecting its reliability.[299] Additionally, some appellants request the court to use its general discretion to exclude evidence that would unfairly prejudice their case.[300] Excluding unreliable and involuntary confessions is an important tool to minimise the risk of wrongful convictions, the reason being that confessions and admissions are very persuasive for jurors.[301]

Presenting such prejudicial evidence to the jury may undermine fairness to the accused, which has been recognised by the High Court. The case of *Patel v The Queen* involved a manslaughter charge where the prosecution presented evidence criticising the appellant's surgical skills and post-operative care.[302] After it was established that the appellant performed those surgeries competently, the prosecution shifted its focus to the appellant's decision to perform these surgical procedures.[303] This made the evidence regarding surgical skills and post-operative care irrelevant which already had a prejudicial effect on the jury.[304] The High Court recognised this risk and noted that jury directions may not be sufficient to

296 See, eg, *Karakas* (n 209) [2], [58] (Lasry J).
297 *Rumsby* (n 20) [39]–[40] (RA Hulme AJ).
298 See, eg, *Jelicic* (n 209) [56] (Peek J).
299 See *Kilincer [No 2]* (n 20) [171]–[216] (Johnson J); *Deacon* (n 19) [27] (Grant CJ, Southwood J and Riley AJ); *Standage* (n 209) 198 [15] (Tennent J), 214 [70] (Wood J); *Rumsby* (n 20) [200]–[209] (RA Hulme AJ); *Taylor* (n 209) [136] (Burns J); *Jelicic* (n 209) [23], [74]–[87] (Peek J).
300 See, eg, *Kilincer [No 2]* (n 20) [92] (Johnson J); *Weaven Appeal* (n 20) [23] (Priest JA, Whelan JA agreeing at [1], Kyrou J agreeing at [77]); *Deacon* (n 19) [28] (Grant CJ, Southwood J and Riley AJ).
301 Saul M Kassin and Katherine Neumann, 'On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis' (1997) 21(5) *Law and Human Behavior* 469, 481–2. The persuasive impact of confession evidence on jurors will be discussed in further detail in Part VI(B)(1) below.
302 (2012) 247 CLR 531, 534–5 [2]–[3] (French CJ, Hayne, Kiefel and Bell JJ) ('*Patel*').
303 Ibid 535 [5].
304 Ibid 549 [62].

'overcome the prejudicial effects of the evidence, individually and collectively, upon the jury'.[305]

Considering the risk of prejudicing the jury, it is important that unreliable evidence is not presented to the jury. As previously noted, to overcome this prejudice, jury directions are encouraged to minimise the risk of bias if Mr Big Confessions are admitted and presented to the jury.[306] The risk of juror bias in relation to Mr Big Confessions concerns two aspects. First, confessions are highly prejudicial and persuasive for jurors. Second, scenario evidence can have an unfairly prejudicial effect.

1 Unfair Prejudice, Scenario Evidence and Inadequacy of Jury Directions

Although jury directions are welcomed to minimise the risk of unfair prejudice, it has long been recognised that this does not eliminate the risk of jury bias entirely.[307] When confessions are being presented to the jury, the chances that the jury returns a guilty verdict increase. Confessions, whether obtained fairly or improperly, have a significant influence on juror decision making.[308] Even if jurors deem a confession involuntary and are instructed about the dangers of relying on this evidence, research has demonstrated that they can still return a guilty verdict.[309] Kassin and Holly Sukel explored the response of mock jurors to coerced confessions. Whilst simulating real juror conditions, the participants of their study (n=85) were presented with trial transcripts.[310] The participants were allocated into control groups and were presented with cases where no confession was made (n=17), cases including a voluntary low-pressure coerced confessions (n=34) and cases involving high-pressure coerced confessions (n=34).[311] Although the jurors in the confession control groups were instructed to disregard coerced confessions, the study demonstrated that, irrespective of the context under which the confession was made, the mere presence of a confession increased the likelihood of a conviction.[312] Despite receiving instructions to disregard the confession, 44% of the participants in the group that read the confession returned a guilty verdict.[313] In the control group that did not read the confession whilst evaluating the same evidence, the conviction rate was 19%.[314]

The concerns about the use of the method are not only centred around the jury hearing the confession itself. It must be kept in mind that the fact finder will

305 Ibid 562 [113].
306 As suggested by Callaway JA in *Tofilau [No 2]* (n 220) 32–3 [6]–[7].
307 *Patel* (n 302) 562 [113] (French CJ, Hayne, Kiefel and Bell JJ).
308 Saul M Kassin and Holly Sukel, 'Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule' (1997) 21(1) *Law and Human Behavior* 27.
309 Ibid 42–4.
310 Ibid 31.
311 Ibid.
312 Ibid 42–4.
313 Ibid 42.
314 Ibid.

also hear how the confession was obtained.[315] Although such scenario evidence is generally not admitted for tendency or coincidence purposes, the apparent tendency to engage in criminal activities is recognised to be persuasive for jurors.[316] Considering the risk of unfair prejudice, in *Jelicic* Peek J observed:

> I consider that the accused's blatant conduct clearly directed to earning money by participating in conduct which was positively (though erroneously) believed to be criminal offending undoubtedly amounted to 'discreditable conduct' within the meaning of s 34P of the *Evidence Act 1929*.[317]

In *Jelicic*, Peek J noted the Victorian Court of Appeal decision in *R v Tofilau [No 2]* and was satisfied that jury directions would be sufficient to protect the accused against such unfair prejudice.[318] In *R v Tofilau [No 2]*, Callaway JA noted that the jury should be informed that they should use scenario evidence for a limited purpose and ought to be instructed accordingly.[319] His Honour noted that the jury should be instructed that the evidence of the accused's involvement in other fictitious criminal activities, and their attitude towards it, is only to demonstrate the context in which the confession was made, not to imply that the accused is likely guilty of the charged crime. Furthermore, the jury should be informed that the tactics used in this investigation can reduce the reliability of the confession, that a person might lie if they think it is in their best interest and safe to do so, and that they should consider any explanations for the confession given by the defence.[320]

In this vein, Gary Edmond et al note that courts have devoted insufficient attention to the effectiveness of jury directions.[321] Jury directions do not remove juror bias and ultimately do not significantly reduce the risk of unfair prejudice.[322] Edmond et al observe that we should not present too much irrelevant or potentially unnecessarily prejudicial information to the jury to minimise the risk of unfair prejudice and subsequent wrongful convictions.[323] With regard to contextual information, they note: 'Exposure to contextual information can lead to overvaluing – or actually, double counting – evidence, especially where the trier of fact is required to consider information that was also available to investigators and experts.'[324]

Arguments from appellants that the trial judge erred not to exercise their discretion to exclude unfairly prejudicial scenario evidence have been unsuccessfully raised in

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315 CR Williams, 'An Analysis of Discretionary Rejection in Relation to Confessions' (2008) 32(1) *Melbourne University Law Review* 302, 327.

316 See, eg, *Jelicic* (n 209) [108] (Peek J).

317 Ibid.

318 Ibid [108], [113]–[114]; *Tofilau [No 2]* (n 220) 32 [5]–[6] (Callaway JA).

319 *Tofilau [No 2]* (n 220) 32 [5]–[6].

320 Ibid 32–3 [7]. In this vein, Ruyters and Bartle (n 12) 326, 329–30 note that additional scrutiny of Mr Big Confessions can be effectuated via jury directions and a specific warning about the risk of false confessions should be provided to the jury. However, Ruyters and Bartle note that thorough independent review processes of these operations should be prioritised to minimise the risk of false confessions and subsequent miscarriages of justice.

321 Gary Edmond et al, 'A Warning about Judicial Directions and Warnings' (2023) 44(1) *Adelaide Law Review* 194, 225.

322 Ibid.

323 Ibid 227–8.

324 Ibid 227.

Mr Big cases.[325] Noteworthy is the comprehensive analysis of Tennent J in *Standage*.[326] In evaluating the risk of unfair prejudice of scenario evidence, Tennent J provided a detailed analysis of the purpose of the discretion to exclude unfairly prejudicial evidence if this outweighs the probative value of the evidence.[327] In *Standage*, the scenario evidence contained details about the appellant's willingness to engage in organised crime, including illegal prostitution, money laundering, purchase and possession of illegal firearms, possession of a fake passport, police corruption, drug trafficking, illicit diamond sales and armoured truck robbery.[328] Counsel for the appellant argued that this scenario evidence contained bad character evidence and that, cumulatively, had unfairly prejudiced the jury.[329] Tennent J reiterated the importance of jury directions and observed that the trial judge had provided sufficiently detailed and 'carefully crafted' jury direction to minimise the risk of unfair prejudice.[330] Considering the high probative value of the scenario evidence and the assumed mitigated risk of unfair prejudice via jury directions, the Court did not exclude the scenario evidence.[331]

VII PROPOSED NEW TEST FOR ADMISSIBILITY OF MR BIG CONFESSIONS

The method remains a contentious issue across jurisdictions.[332] Notably, foreign courts have imposed further restrictions on the admissibility of Mr Big Confessions, which may deter law enforcement from using highly coercive techniques due to the risk of confessions being deemed inadmissible.

Foreign courts have put restrictions on the use of the method. In Canada, these restrictions were imposed via the common law.[333] In the Netherlands, the restriction on the admissibility of confessions was done through statutory interpretation in light of European human rights obligations. New Zealand courts have placed greater emphasis on the risk of psychological coercion, leading to the first overturned conviction involving a Mr Big operation in 2021.[334] Some of these developments in other jurisdictions have been noted but not followed by Australian courts.[335]

Despite noting these international developments, Australian courts continue to follow *Tofilau v The Queen* precedent and no additional safeguards have been

325 See, eg, *Weaven [No 1]* (n 209) [23] (Weinberg JA); *Jelicic* (n 209) [107]–[108], [114] (Peek J); *Kilincer [No 2]* (n 20) [253]–[262] (Johnson J); *Standage* (n 209) 188–95 [6], 213 [63] (Tennent J).

326 *Standage* (n 209) 187–213 [1]–[65].

327 Ibid 211–13 [53]–[62], balancing the probative value and the prejudicial effect pursuant to *Tas Evidence Act* (n 116) s 137.

328 *Standage* (n 209) 188–95 [6] (Tennent J).

329 Ibid 188–95 [6], 211–12 [55].

330 Ibid 212–13 [61].

331 Ibid 212–13 [60]–[65].

332 See, eg, Adam and van Golde, 'Is It Time to Move On?' (n 6); Ruyters and Bartle (n 12); Vrugt (n 75); Poloz (n 4); Glazebrook (n 17).

333 See *Hart* (n 2).

334 *Lyttle* (n 11).

335 See, eg, Peek J's consideration of the Canadian developments in *Jelicic* (n 209) [122]–[132].

put in place since 2007. Given our increasing understanding of how psychological coercion can lead to involuntary, unreliable and potentially false confessions, greater regulation is essential to minimise the risk of wrongful convictions. Although Australian courts are providing jury directions, the persuasive nature of scenario evidence and Mr Big Confessions for jurors reiterates the importance of ensuring that jurors only evaluate voluntary and reliable confessions.

A Greater Recognition of Psychological Coercion and Unreliable Confessions

The first step in minimising the risk of Mr Big Confessions eliciting wrongful convictions is to increase the recognition of psychological coercion and unreliable confessions.

In 1985, the ALRC highlighted an important point that deserves thorough consideration. In its Interim Report, the ALRC noted: 'The rules of evidence developed before the study of psychology began or have been developed since with little or no regard to such study. The law should be examined in the light of psychological learning.'[336]

Psychological research is crucial in interpreting our evidence laws and should guide law reform in this area. Considering the ALRC's notions on the importance of psychological research in the interpretation of the laws of evidence, it should be noted that our understanding of psychological coercion has evolved over the last few decades.[337]

In his dissenting remarks, Kirby J recognised the risks of psychological coercion.[338] Given that this decision was made over 17 years ago, our understanding of psychological coercion has since evolved. As discussed in this article, scholars and foreign courts have recognised the vulnerability of targets of Mr Big operations. The inducements offered to these suspects, the imbalanced power dynamics and the fear of prosecution make their confessions, at the very least, unreliable.

Despite the unreliability of these confessions, the method is also a very important tool to resolve cold cases. It is notable that these operations have led to the discovery of the remains of homicide victims.[339] Contrasting this with the exploitation of vulnerabilities, the use of the method presents a conundrum.[340]

At this stage, Australian courts have dismissed arguments of psychological coercion in Mr Big cases.[341] In contrast, foreign courts have acknowledged the dangers associated with psychological coercion during these operations and have implemented additional restrictions to minimise the risk of pressure, inducements and false promises leading to false or unreliable confessions.[342] These developments

336 *ALRC Interim Report* (n 123) 5 [8].
337 As was discussed in Part VI above.
338 *Tofilau High Court Appeal* (n 45) 443–6 [148].
339 *Deacon* (n 19); *Cowan Appeal* (n 19).
340 As pointed out by Adam and van Golde, 'Is It Time to Move On?' (n 6) 141.
341 See *Deacon* (n 19) [32]–[33], [49]–[50] (Grant CJ, Southwood J and Riley AJ); *Kilincer [No 2]* (n 20) [163]–[170] (Johnson J). See *Jelicic* (n 209) [69]–[70] (Peek J) for a consideration of psychological pressure.
342 *Wichman* (n 11) 786–93 [74]–[92] (Young, Arnold and O'Regan JJ); *Hart* (n 2).

and restrictions help create a more balanced power dynamic between undercover officers and suspects. Certain individuals, such as those experiencing financial hardship, homelessness or substance addiction, are particularly vulnerable to being induced to confess. However, these operations often exploit these vulnerabilities rather than protecting them.

To address the high risk of unreliable confessions, law enforcement officials should begin by critically evaluating the risks associated with these operations. This involves considering the vulnerabilities of the target and acknowledging the dangers of psychological coercion. Furthermore, psychological theory should guide the courts in assessing the reliability of confessions obtained through Mr Big operations.

B Methods for Regulating Mr Big Operations

In *Tofilau v The Queen*, Kirby J argued that any changes to police conduct should be legislated by Parliament, with appropriate checks and limits, rather than relying on common law to justify potentially coercive practices.[343] To reduce the risk of wrongful convictions caused by Mr Big Confessions, I therefore argue that the second step involves implementing stricter statutory regulations on their admissibility. Regulation of covert operations is an important tool to minimise the risk of police misconduct and subsequent coerced confessions. While regulation is key to preventing misconduct, it is also important to recognise the role of evidence laws in overseeing police investigations. In this vein, Clive Harfield identified three structures of governance of covert operations.[344] First, regulation can be achieved through statutes and case law. Second, external, auditable governance can help review the conduct of operatives during past operations. Lastly, internal management procedures can further regulate the behaviour of undercover operatives. However, as Harfield argued:

> Regulation of investigation is not the primary purpose of the laws of evidence. Nor can such laws effectively and consistently achieve regulation of investigation – even if they can certainly influence such regulation – because their strictures are applied at the discretion of the judge, many weeks (if not months or years) after the conduct that needed to be controlled.[345]

Regulating covert operations is undoubtedly important; however, if the terminology used is too broad, it may not adequately protect vulnerable suspects involved in these operations. When terms like 'impropriety', 'oppression', or 'coercion' are open to interpretation, these protections may fall short, as evidenced by the heavy reliance on the majority decision in *Tofilau v The Queen*.[346]

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343 *Tofilau High Court Appeal* (n 45) 461–3 [206]–[209].

344 Clive Harfield, 'The Governance of Covert Investigation' (2010) 34(1) *Melbourne University Law Review* 773, 801.

345 Ibid 781.

346 The argument that the conduct of undercover officers was psychologically oppressive was unsuccessfully raised in *Deacon* (n 19) [49]–[50], [63] (Grant CJ, Southwood J and Riley AJ); *Kilincer [No 2]* (n 20) [131]–[170] (Johnson J); *Rumsby* (n 20) [109]–[137] (RA Hulme AJ) and *Jelicic* (n 209) [35]–[39] (Peek J).

C A New Test for Admissibility of Mr Big Confessions

Currently, Australian courts rely on common law precedent and regulations within evidence statutes. To better safeguard against the admission of unreliable Mr Big Confessions that might lead to wrongful convictions, legislative intervention is necessary to guide the common law. Rather than focusing solely on criminal procedure rules, legislative reform should concentrate on the admissibility of Mr Big Confessions. In determining the admissibility of these confessions, greater attention must be given to whether they were unduly influenced by coercion, threats or promises. Additionally, courts should critically assess whether any inducements offered affected the reliability of these confessions. This assessment should include a thorough consideration of the accused's mental state, financial situation, and other factors that may make them more susceptible to inducements.

Beyond the existing considerations of reliability, a new test should be incorporated into evidence statutes to provide additional protection for suspects who confess during Mr Big operations after being induced by financial rewards and other incentives. While the precise formulation of such a test is a matter for Parliament, a possible version of this test could be:

> Where an accused has been subjected to a covert operation involving being recruited into a fictitious criminal enterprise to elicit a confession, any confession or admissions made by the accused during the course of this operation should be considered presumptively inadmissible.
>
> This presumption can be rebutted if the Crown can demonstrate, on the balance of probabilities, that the confession or admissions were made voluntarily and were not unduly influenced by inducements.[347]

The introduction of an additional two-step test into evidence statutes nationwide will further regulate the reliability of confessions and provide an extra safeguard by preventing actively induced unreliable confessions from being presented to the jury. This is an important second step in minimising juror bias and reducing the risk of wrongful convictions.

VIII CONCLUSION

As discussed in this article, psychological theory clearly indicates that Mr Big operations can lead to unreliable, involuntary and potentially false confessions, thereby increasing the risk of wrongful convictions. Our current laws on the admissibility of Mr Big Confessions are outdated and fail to adequately address this risk. Kirby J has expressed concerns about the coercive psychological tactics used during these operations, and a growing body of psychological literature supports this view.[348] We cannot ignore these concerns any longer. It is imperative to improve our

347 This definition is inspired by the two-step test formulated in *Hart* (n 2) 580 [85] (Moldaver J for McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ). Inducements are: financial gain, social belonging incentives and a subjective belief that the prosecution can be influenced by confessing.

348 *Tofilau High Court Appeal* (n 45) 443–6 [148].

criminal justice system by ensuring that undercover operations do not undermine the fundamental rights designed to protect society's most vulnerable individuals.

It is time to properly regulate Mr Big operations to protect individuals and maintain the integrity of our criminal justice system. Australia's law governing Mr Big Confessions should align with international developments and address the high risk of psychological coercion. While implementing these regulations would be a significant first step, further measures are essential to minimise the risk of unfair exploitation of suspects and the consequential coerced, and potentially false, confessions.