CHALLENGING DECISIONS ABOUT FUNDING FOR UNIVERSITY RESEARCHERS IN COURT

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I Introduction

The university research environment is more complex now than it is has ever been. Not only has the subject matter of university research become more complicated, but the manner in which modern research is conducted is also more complex. While research has typically involved individuals working as part of a team, modern research problems are more frequently being addressed by multi-disciplinary teams and often with team members located in different countries.[1] University researchers also find themselves in a more complex funding environment. Universities compete fiercely for the funding of their research endeavours in a situation where research costs are increasing. The number of applications for grants from the main Federal government research funding bodies, the Australian Research Council (ARC) and the National Health and Medical Research Council (NHMRC) is high and still growing but the 'success rates are low and declining … funding is largely unchanged.'[2] University reputations are at stake when data on 'success and failure rates'[3] in the various schemes operated by these funding bodies, is published on their websites.

Researchers, their universities and their commercial partners, invest significant time and effort in preparing a detailed case in support of each funding application. This can be a major distraction from the research undertaking itself, and failure to obtain appropriate funding means this effort has been wasted.[4] However, this is not the only lost investment of researcher time and effort. The application processes of the major grant funding bodies rely on the contribution of researchers in the peer reviewing of the applications.[5] So the increase in applications also results in increasing demands made on university researchers who appraise the applications, both for scientific merit, and the appropriate level of funding, in light of the competing applications and the research funds available.

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1 Jason Borenstein and Adil Shamoo, 'Rethinking Authorship in the Era of Collaborative Research' (2005) 22(5) *Accountability in Research Policies and Quality Assurance* 267-283; Blaise Cronin, 'Hyperauthorship: A Postmodern Perversion or Evidence of a Structural Shift in Scholarly Communication Practices?' (2001) 52(7) *Journal of the American Society of Information Science and Technology* 558-569; K. Brad Wray, 'Scientific Authorship in the Age of Collaborative Research' (2006) 37(3) *Studies in History and Philosophy of Science 505-514.*

2 Ian Watt, 'Review of Research Policy and Funding Arrangements' (Report, Australian Government Department of Education and Training, 4 December 2015) 44-45. The NHMRC responded to the problem by announcing a restructuring of its research grant framework: Greg Hunt, 'Medical Research Reforms to Improve our Future Health' (Media Release, 25 May 2017) <http://www.greghunt.com.au/Home/LatestNews/tabid/133/ID/4266/Medical-research-reforms-to-improve-our-future-health.aspx>; Anne Kelso, 'A Fresh Approach to Research Funding', *The Australian* (Australia), 31 May 2017, 32.

3 Watt, above n 2, 45.

4 Fiona Wood, V. Lynn Meek and G Harman 'The Research Grant Application Process. Learning from Failure?' (1992) 24 (1) *Higher Education* 1-23, 11.

5 Watt, above n 2, 44

A more complicated research environment is attracting an increasing range of legal issues. This paper examines two cases illustrating this trend and explores the implications for researchers, universities and the main government research funding organisations supporting university research activities. It contributes to the literature on the increasing involvement of universities and their staff in legal disputes,[6] by extending the discussion to the further context of legal disputes about university research funding.

II Disputing Eligibility for a Research Grant

In the first case, a university researcher ('G') who was a biomedical scientist, challenged a decision about his eligibility to apply for a research fellowship from the ARC. The ARC is a Commonwealth agency operating under the *Australian Research Council Act 2001* (Cth) (ARC Act).[7] It is responsible for making recommendations in relation to the ARC Act's government-financed research programmes, administering the financial assistance provided under the ARC Act and advising the relevant Minister in relation to research matters.[8] The ARC administers the National Competitive Grants Programme, a scheme that provided funding of $906.2 million for new grants awarded in 2016-17.[9]

In 2009, G was unsuccessful when he applied under the ARC Future Fellowship ('FF') scheme. G was then associated with the University of Tasmania and the FF application was made through that university. The following year, G, now at the University of Western Australia, applied again under the FF scheme but failed to gain a fellowship. In 2012, G approached the Federal Court seeking judicial review of the ARC's decisions to reject his FF applications. The matter was referred to a registrar for mediation[10] and ultimately settled. A deed of settlement was entered into between G and the Commonwealth in December 2012, after which G discontinued his review action in the Federal Court.[11]

In February 2013, now with the University of Canberra, G applied under the FF scheme for a third time. Ordinarily, under the scheme funding rules, G would have been ineligible to apply. Under s 53(1)(d) of the ARC Act, a funding proposal must not be approved by the Minister for Education and Training under s 51(1), or recommended by the chief executive officer (CEO) of the ARC to the Minister for approval under s 52(1), unless among other matters, the eligibility criteria in the scheme funding rules are satisfied. Scheme funding rules are prepared by the ARC under s 59 of the ARC Act and approved by the Minister under s 60. According to the scheme rules for 2013, G would have been ineligible to apply because he had submitted two earlier applications in the funding rounds between 2009 and 2013 (Clause 9.1.2 of the Funding Rules). However, under the terms of the 2012 Deed of Settlement, the ARC gave an undertaking that any application for FF funding in which G was named as chief investigator, would not be regarded as invalid on the ground that G had 'reached or exceeded the maximum

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6 Astor Hilary, 'Improving Dispute Resolution in Australian Universities: Options for the Future' (2005) 27(1) *Journal of Higher Education Policy and Management* 49-65; Astor Hilary, 'Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation' (2008) 19(3) *Australian Dispute Resolution Journal* 156-169; Kamvounias Patty and Varnham Sally, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34 (1) *Melbourne University Law Review* 140-180.

7 It was originally established under the *Employment, Education and Training Act 1988* (Cth): Australian National Audit Office, *The Australian Research Council's Management of Research Grants*, Audit Report No 38, 2005-06, 29.

8 *Australian Research Council Act 2001* (Cth) s 3.

9 Australian Research Council, *Annual Report* 2016-17, 23.

10 *Ghanem v Australian Research Council (No 2)* [2015] FCA 434 [64].

11 *Ghanem v Australian Research Council* [2014] FCAFC 132 [2].

number of applications'.[12] In November 2013, G was notified that his 2013 FF application was unsuccessful. In that year, only one in every six of the 1,236 applications received funding.[13] G's proposal was ranked 442 out of the 500 applications that fell within the scope of the Physical, Mathematical and Information Sciences and Engineering selection panel.[14]

In December 2013, G requested a statement of reasons from the ARC as to why his application had been unsuccessful. The request was made under s 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act').[15] The ARC provided G with a statement of reasons in January 2014.

G then applied to the Federal Court under s 5(1) of the ADJR Act, for judicial review of the decisions of the ARC and the Minister in relation to his 2013 FF application. G appeared in person in the court proceedings. He argued that the procedures required under the ARC Act had not been followed because: under the rules G was ineligible to apply, the decision made was an 'improper exercise of the power' conferred by the ARC Act, there was an error of law, there was no material to justify the decision, the decision was 'otherwise contrary to law,' and it was made in bad faith.[16] G claimed the recommendation by the ARC's CEO to the Minister about the funding of G's proposal, was not in the proper form because it did not include a statement of reasons as is required under s 52(3)(d) of the ARC Act, and the Commonwealth Grant Guidelines. In relation to the claim of bad faith, G asserted that he had withdrawn his 2012 application to the Federal Court 'in good faith' and on the basis his 2013 FF application would be treated fairly, but he alleged that two of the assessors of his 2013 application deliberately reduced their scores so that his application was bound to be unsuccessful.[17] Among the remedies G sought was for the assessment of his 2013 proposal to be reconsidered, or for it to be reconsidered as part of the then current 2014 FF funding round.

The Minister and the ARC responded to G's application by seeking an order for summary judgment.[18] They argued there was 'no reasonable prospect'[19] of G's claims succeeding. The application for summary dismissal was successful at first instance in the Federal Court. Justice Foster accepted the respondents' arguments that if G was not eligible for FF funding, his case was frivolous and bound to fail because 'no meaningful relief' could be granted, and if G was eligible, G's first claim failed.[20] The Federal Court found there was no evidence to support G's allegation that a professor, with whom he had been in dispute while at the University of Tasmania, had interfered in the application process in such a way that two assessors scored his proposal so it was bound to fail. The Federal Court considered that the reasons given in the Minister's Briefing Note from the ARC, complied with the legislative requirement that a statement of reasons set out why the proposal is or is not recommended by the ARC for approval of the Minister. The Federal Court's view was that there was no real prospect that the remedies sought by G would be granted (inclusion in the 2014 funding round), or be useful (an order setting aside the 2013 decision of the Minister).[21]

G once again appealed, this time to the Full Federal Court, and he was successful in part.[22] The Full Federal Court found that G's claims, although inadequately pleaded, could have been

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12 Ibid.
13 *Ghanem v Australian Research Council* [2014] FCA 473 [37].
14 Ibid [37], [40].
15 Ibid [19].
16 Ibid [3].
17 Ibid [6].
18 *Federal Court Act 1976* (Cth), s 31A and *Federal Court Rules 2011* (Cth), r 26.01.
19 *Ghanem v Australian Research Council* [2014] FCA 473 [50].
20 Ibid [59] – [60].
21 Ibid [74] – [76].
22 *Ghanem v Australian Research Council* [2014] FCAFC 132.

construed as a claim that not only was the decision to refuse FF funding invalid, but G's FF application was also invalid and if so, it was null and void. Should G's FF application be found to be invalid, there was a potential remedy available. If the 2015 FF funding rules (not yet determined at the time of the appeal) were equivalent to the 2013 rules in relation to ineligibility, because of two previous applications in the relevant period, the invalidity of the 2013 application would mean that G was free to apply in 2015.[23] In the Federal Court's view, summary dismissal under s 31A of the *Federal Court of Australia Act 1976* (Cth) should not occur where there are inadequate pleadings unless they disclose 'there is no reasonable cause of action.'[24] In the circumstances, it was not appropriate for the Federal Court to grant summary dismissal of G's claims. The Appeal Court accepted that G's actions in challenging the validity of his 2013 FF application were 'opportunistic,' especially when at the same time he was arguing the ARC should have recommended the research proposal to the Minister. However the Appeal Court also considered that opportunism 'is no necessary bar to success in litigation.'[25] The Appeal Court rejected G's other claims as the judge at first instance had carefully considered the issues, and there were no grounds for doubting the correctness of that decision.

G was granted leave to amend his pleadings to include the claim that his 2013 FF application was invalid, and the matter was returned to the Federal Court. However G's amended claims were ultimately rejected. The Federal Court found that a FF proposal not fulfilling the eligibility criteria under the legislative scheme established by the ARC Act, including the funding rules made under the Act, was not void but merely ineligible and therefore could not be approved by the Minister.[26] The Federal Court agreed with the Minister's argument and the ARC that clause 9.2.3 of the 2013 funding rules gave the ARC's CEO a discretionary power to decide whether or not a proposal that does not meet the eligibility criteria, should nevertheless be recommended to the Minister.[27] The ARC's CEO could also recommend against the funding of G's non-compliant proposal. It was also open to the Minister to decide not to approve G's funding proposal. The Federal Court added that it was 'not disposed' to grant relief 'in any event' where the applicant had sought to 'take advantage of the type of technicality raised by [G] in the present case in circumstances where he has so clearly waived or acquiesced in his [2013] funding proposal going forward.'[28] The Federal Court was of the view that even if its findings were wrong, without any evidence that G had developed an FF proposal to submit in the 2015 funding round, and that the University of Canberra (the university to receive and administer the funds to be used by G for his research) would support the application, there was no 'proper foundation' for the grant of relief.[29] G's claims were dismissed with costs.

III Disputing Suspension of Research Funding

The second case concerned a researcher ('E') challenging the suspension of his funding by the NHMRC after an allegation of misconduct was brought against him at his university. The NHMRC, originally established in 1936, now operates under the *National Health and Medical Research Council Act 1992* (Cth) ('NHMRC Act').[30] Its role is to:

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23 Ibid [16].
24 Ibid [19].
25 Ibid [18].
26 *Ghanem v Australian Research Council (No 2)* [2015] FCA 434 [80].
27 Ibid [85].
28 Ibid [90].
29 *Ghanem v Australian Research Council (No 2)* [2015] FCA 434 [92] – [93].
30 Australian National Audit Office, *Administration of Grants by the National Health and Medical Research Council*, Audit Report No 7, 2009-10, 41

> … pursue activities designed to … raise the standard of individual and public health throughout Australia … foster the development of consistent health standards between the various States and Territories …medical research and training and public health research and training throughout Australia … and consideration of ethical issues relating to health.[31]

The NHMRC administers the Medical Research Endowment Account used to fund 'priority driven, strategic research and researcher initiated research.'[32] In 2016-17, the NHMRC approved new research grants worth $809.9 million.[33]

At the time of the legal proceedings, E was a neuroscientist employed by the University of Queensland. On 11 December 2001 E was granted the RD Wright Fellowship, a Career Development Award (CDA) funded by the NHMRC. The award gave funding of $400,000 over five years (2002-2006), with $80,000 paid each year.[34] The next day, the Commonwealth entered into a Deed of Agreement with the university in respect of research funding, including that to be used in E's CDA. The NHMRC grant was made to the university rather than to E directly, but it was to be used to fund research to be undertaken by E.

Unfortunately, several disputes arose between E and the university. These included disputes about his level of remuneration, the reimbursement of expenses and the removal of equipment from the university campus.[35] The two parties commenced legal proceedings against one another.[36] In August 2006, just over four months prior to the end of the term of E's CDA, the university suspended E without pay while it investigated allegations of misconduct/serious misconduct made against him. The allegations concerned the 'unauthorised removal of equipment' from the university campus in May 2006 and E's absence from the campus since that time.[37] The university notified the NHMRC about these matters on 28 August. On 7 September 2006 the NHMRC advised the university that it had decided to suspend further payment under the CDA in accordance with the terms of the Deed of Agreement, pending the outcome of the misconduct investigation. The suspension of the CDA by the NHMRC meant the final payment of $22,500 was not made to the university.[38]

The university terminated E's employment in May 2007.[39] The NHMRC wrote to the university seeking information about the outcome of the misconduct investigation.[40] It was notified by the university on 30 March 2011 that E's conduct had been found to constitute misconduct and serious misconduct and that his employment contract had been terminated.[41]

E initiated proceedings against the NHMRC and the Commonwealth and in this and the subsequent proceedings, he appeared in person. Some initial confusion was caused by a change to the NHMRC's legal status. From 1 July 2006 the NHMRC was no longer a statutory corporation. It became an administrative agency of the Commonwealth.[42] This meant the NHMRC no longer had a legal personality separate from the Commonwealth. E then commenced proceedings against the NHMRC and the Commonwealth in the High Court in September 2011 alleging

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31 *National Health and Medical Research Council Act 1992* (Cth) s 3.
32 Watt above n 2, chapter 3.
33 National Health and Medical Research Council, *Annual Report 2016-2017*, p 8.
34 *Elston v Commonwealth of Australia* [2013] FCA 108 [20].
35 *Elston v Commonwealth of Australia* (2014) 222 FCR 429, 432.
36 Ibid.
37 Ibid 432.
38 Ibid 443.
39 Ibid 433.
40 Ibid. The National Health and Medical Research Council wrote to the University of Queensland on two occasions seeking information about the outcome of the investigation: Ibid 443.
41 Ibid 433.
42 *National Health and Medical Research Council Amendment Act 2006* (Cth).

'breach of contract, breach of a duty of care and defamation.'[43] He sought damages for lost 'personnel' and 'research' support, as well as salary and superannuation contributions, and for defamation arising from the suspension of the CDA. In response, the Commonwealth sought various orders, including transfer of the matter to the Federal Court.

In March 2012 the High Court ordered the matter be remitted to the Federal Court.[44] The Commonwealth applied to strike out E's pleadings or alternatively it sought summary judgment in its favour. The Federal Court ordered the striking out of the NHMRC as the second respondent, because it was an agency of the Commonwealth and as now constituted was 'not a body capable of being sued in its own right.'[45] E argued the suspension by the NHMRC of the CDA funding constituted a breach of the 2001 Deed of Agreement between the Commonwealth and the university. The Federal Court ordered the striking out of this claim. As E was not a party to the Deed of Agreement, he could not sue on it. However, the Federal Court indicated that E could bring a claim if he was able to establish that he was a third party beneficiary of promises made in the Deed of Agreement and therefore fell within s 55 of the *Property Law Act 1974* (Qld).[46] The Federal Court's view was that the NHMRC had contractual power under the Deed of Agreement to suspend payment of the award. An argument might be brought that the NHMRC was not lawfully exercising that power, for instance there might be evidence it made its decision without giving E an opportunity to be heard, and that opportunity might be established as a contractual obligation; but E did not plead these arguments.[47]

The claim based on a breach of a duty of care owed by the NMHRC to E, was also struck out because E's pleadings had failed to give details of the existence of the duty and the circumstances of the alleged breach. The Court considered an argument might be brought that a duty of care existed based on the objects of the relevant legislation, and the framework under which an applicant such as E applied for the award and was named in the grant documents; but E did not plead these arguments.[48] E's defamation claim was also found not to have been sufficiently pleaded so it was struck out.[49] Despite the considerable failings in his pleadings, the Court granted E leave to file and serve an amended statement of claim.

E sought leave to appeal the decision to strike out the pleadings, to the Full Federal Court. His main argument was that the NHMRC should not have been removed as a respondent in the proceedings. Greenwood J dismissed E's application. He found no error had been made by the Court in relation to its finding that the NHMRC, as an agency of the Commonwealth, did not have independent legal personality and was not capable of being sued.[50] E filed amended statements of claim in March and April 2013. In response, the Commonwealth once again applied for orders striking out the pleadings and for summary judgment. Logan J in the Federal Court made orders striking out both amended statements of claim, but he also took the unusual step of ordering that pleadings be dispensed with and the matter go to trial, on these four issues:

(a) Was the contract made by deed on 12 December 2001 between the respondent, the Commonwealth of Australia, and the University of Queensland (the Contract) a contract which, for the purposes of section 55 of the *Property Law Act 1974* (Qld), was a contract for the benefit of a third party, namely the applicant?

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43 *Elston v Commonwealth of Australia* (2014) 222 FCR 429, 433.
44 *Elston v Commonwealth of Australia* [2012] HCA Trans 076.
45 *Elston v Commonwealth of Australia* [2013] FCA 108 [10].
46 Ibid [34].
47 Ibid [37].
48 Ibid [41].
49 Ibid [43] – [44].
50 *Elston v Commonwealth of Australia* (2013) 212 FCR 77.

(b) In any event, even if the Contract was not one of that kind, was the respondent obliged to afford the applicant natural justice to the extent of affording him an opportunity to be heard prior to exercising its power of suspension of the award found in clause 14 of the Contract?
(c) If the respondent was so obliged, did the respondent afford natural justice to the applicant prior to making its suspension decision on 7 September 2006?
(d) If it did not, what damages flow from any such failure?[51]

When the parties came before Justice Rangiah in the Federal Court, E's claims were dismissed. In relation to the first issue, the Commonwealth decided not to dispute E's entitlement to enforce an obligation under s 55 of the *Property Law Act 1974* (Qld) but it argued there was in fact no contractual promise by the university to observe natural justice in relation to E. The second issue was whether the NHMRC owed E an obligation of natural justice so that he must be given an opportunity to be heard before a decision was made on suspension of the CDA, the obligation arising either under the NHMRC Act or as an implied term of the Deed of Agreement. The first question the Federal Court addressed was whether the NHMRC Act conferred a statutory power to award funds such that in its exercise, the NHMRC was obliged under the principle in *Annetts v McCann* (1990) 170 CLR 596 ('Annetts'), to observe natural justice for persons whose rights or interests would be prejudiced, for example as here by suspension of the payments. The answer to the question was no. The Federal Court found the power to suspend the CDA payments arose not under the NHMRC Act but under the Deed of Agreement, and so the principle in *Annetts* did not apply.[52] Another reason the principle did not apply was because the damage to the rights or interests that occurs from the exercise of the statutory power, must be direct, and this was not the case here. The damage to E's reputation and financial interests was not a direct result of the suspension of payments by the NHMRC.[53] E's further contention, that the suspension of the CDA resulted in his subsequent applications for funding to the NHMRC being rejected, was dismissed as there was insufficient evidence to establish the claim.[54]

The Federal Court went on to say if it was wrong in its view on the issue, it would still have refused relief under s 39B of the *Judiciary Act 1903* (Cth) and s 16(1) of the ADJR Act, on discretionary grounds because even if E had been given an opportunity to be heard, the result would not have changed. The university had decided E would not be paid during the investigation and it was not providing E with facilities for his research, so there was no reason for the NHMRC to continue making payments to the university. Any court orders setting aside the NHMRC decision to suspend payments and giving E an opportunity to be heard would be futile (*Stead v State Government Insurance Commission* (1986) 161 CLR 141).[55] The Federal Court also rejected E's argument there was an implied term in the Deed of Agreement requiring the Commonwealth to give E an opportunity to be heard, before it exercised its power to suspend the award.[56]

In light of the Federal Court's findings in relation the first two issues, the final two issues did not need to be addressed. However, the Federal Court commented on the question of damages. In the Federal Court's view, the loss or damages alleged by E, that is: loss of salary, failure to obtain other research grants, and family breakdown with its resultant legal and other expenses, were not caused by the NHMRC's exercise of power to suspend the CDA payments.[57] The

51 The decision of Logan J (on 9 September 2013) is unreported but the orders are outlined in the subsequent Federal Court decision of *Elston v Commonwealth of Australia* (2014) 222 FCR 429, 433.
52 Ibid 437.
53 Ibid 438.
54 Ibid 439.
55 Ibid 441.
56 Ibid 442.
57 Ibid 443.

Federal Court indicated that had E been successful in establishing a breach of a contractual obligation, it would have been prepared to grant nominal damages only.[58]

E appealed the decision to the Full Federal Court. The Commonwealth then applied for security for its costs of the appeal ($20,000) and for a stay of the appeal until security was given, and in default, a stay or the dismissal of the appeal. The Commonwealth alleged that E was impecunious and there was a risk he would be unable to meet any costs orders that might be made against him on the appeal. E's own evidence indicated he had been unable to find a salaried position since the suspension of the CDA funds.[59] Other relevant issues discussed by the Full Federal Court included problems with E's pleadings. Katzmann J ordered security for costs of $17,250 with leave given to the Commonwealth to apply for more security should this amount prove 'inadequate.'[60] The appeal was stayed until the security was provided.

E next applied to the High Court for special leave to appeal the decision ordering security of costs. The application was at first deemed abandoned under the High Court Rules dealing with the filing of a written case and other documents by an unrepresented litigant.[61] However, in December 2014, E was successful in having the application reinstated. There were questions about whether defamation remained a 'live issue' even though it was not included by Logan J in the four matters to be determined, and whether defamation was considered by the Federal Court when it made the order for security of costs.[62] E was directed to file further submissions on the issue of defamation. In April 2015 the High Court refused the application for special leave to appeal the order for security of costs. The further draft notice of appeal filed by E did not comply with the previous order of the High Court, the original Court hearing the application for security of costs had dealt with the matter of the defamation claim, and the application did not raise any principle for the High Court to determine.[63]

IV Lessons from Legal Disputes?

A number of implications can be drawn from these legal disputes for the various stakeholders in this area. The individual researchers in each case were unrepresented in complex court proceedings brought against Federal government agencies. While the courts will seek to ensure an unrepresented litigant is treated fairly, such a party can raise significant issues for a court and for the other legally-represented party. In both cases there were problems with the pleadings filed by the researchers. The inadequacy of the pleadings gave the other party a basis on which to bring an early application to strike out the claims and seek judgment in their favour. In both cases, courts were prepared, at least initially, to reject the application for summary dismissal and allow the researcher to amend their pleadings. The need to amend the pleadings created yet further difficulties, despite the fact that on some occasions it was apparent the court was doing its best to outline in a general fashion, the form the amendments should take. In E's case, the court went so far as to dispense with the pleadings and frame the issues in dispute between the parties. However this course of action itself created problems on appeal because E claimed the framing of the issues had omitted one of the grounds he had argued. Yet further difficulties with inadequate pleadings occurred when the unrepresented researcher sought to appeal court decisions and new pleadings needed to be lodged.

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58 Ibid.

59 *Elston v Commonwealth of Australia* [2014] FCA 704 [28], [61].

60 Ibid [79]. The court applied the considerations for the exercise of the court's discretion under s 56 *Federal Court Act 1976* (Cth) as summarised in *Dye v Commonwealth Securities Ltd* [2012] FCA 992. It was persuaded there was a 'substantial risk' Elston would not be able to satisfy an order for costs in the appeal: ibid [61].

61 *High Court Rules 2004* (Cth) r 41.10.4.1.

62 *Elston v Commonwealth of Australia* [2015] HCA Trans 297.

63 *Elston v Commonwealth of Australia* [2015] HCASL 52.

By questioning the decisions of grant funding bodies, the researchers in the two cases were assuming significant personal risk. G was concerned such action could adversely affect his prospects in obtaining future funding, and his academic career prospects more generally. It was not only the relationship with the grant funding organisation that was potentially put at risk. Also of concern to G were his relationships with other researchers who might become aware of the dispute. The sensitivities in this context were recognised by the grant funding body in that case. The evidence indicated the ARC had taken 'steps to ensure that knowledge of the 2012 proceedings' between the G and the ARC was 'strictly confined.'[64]

The personal risks assumed by a researcher in these circumstances go beyond their professional reputation and future research career. There will inevitably be a heavy personal toll resulting from the considerable time and financial resources that must be invested to engage in court proceedings. In E's case there was a claim of significant adverse effects on his family relationships. Personal finances may also be strained. Any litigation attracts the risk of adverse costs orders being made against the applicant and this would be a significant concern for a self-represented applicant facing respondents represented by solicitors and counsel. An order for security of costs appears to have discouraged E's appeal to the Full Federal Court.

The applicants were not the only researchers affected by the court proceedings. Questions raised about the conduct, funding and governance of university research inevitably involves examining the actions of other research academics who have taken part in the review of grant applications. Many of these academics will be experts in the same field as that of the applicant or in closely intersecting fields. Some may have a personal relationship with the applicant. In the first case, claims were made that researchers involved in the assessment of G's grant proposal had acted improperly, but there was insufficient evidence to establish those claims.

Although the universities were not directly involved in the two court proceedings, the cases raise a number of issues for universities generally, as they discussed matters relating to the administration of the grants by the universities. In the second case, one such matter was a consideration of the consequences for the grant when the university suspended and then terminated the researcher's employment. There was also mention of the role of university staff as selection panel members in the grant application process.

There are a number of implications for the main government grant funding bodies arising from these cases. They both involved a number of court proceedings over a considerable period. The grant funding bodies would have been required to invest considerable staff time in dealing with these matters. In the two disputes the grant funding bodies were represented by solicitors and counsel and they faced self-represented applicants. Early applications were made questioning the adequacy of the applicants' pleadings. However as discussed above, at the early stages of the litigation, the courts tended to provide the applicants with an opportunity to amend the pleadings rather than to dismiss the applications.

While not at the forefront of the court proceedings in the two cases, there are several issues forming the background to the disputes that have the potential to become more significant in future matters. One of these is the reliance by the grant funding bodies on university researchers (as well as researchers from industry and public sector research organisations) to provide peer review of the grant applications.[65] The NHMRC *Annual Report 2010-11* notes that the *Australian Code for the Responsible Conduct of Research* and the deeds of agreement made between it and the research institutions such as universities, 'place clear expectations on researchers to make

64 *Ghanem v Australian Research Council* [2014] FCA 473 [36].

65 Australian National Audit Office, *Australian Research Council's Management of Research Grants,* Audit Report No 38, 2005-06, 37; Australian National Audit Office, *Administration of Grants by the National Health and Medical Research Council*, Audit Report No 7, 2009-10, 16, 51.

themselves available for participation in the peer review of grants.'[66] In the first case, an unsuccessful grant applicant was questioning the bona fides of two grant assessors in the scoring of his proposal and there was an allegation that another university academic had interfered with these assessments. No evidence was found to establish these allegations and so the claims were dismissed.

Where grant funding bodies rely on peer review, there is potential for the opinions and comments of peer reviewers to be a matter considered in litigation brought by unsuccessful grant applicants. The risk of disclosure of the opinions and comments of peer reviewers of grant applications, has the potential to discourage researcher participation in reviews or at least lead the researchers to temper their peer review. The evidence in the first case indicated that under the FF 2013 funding rules, the applicant (in fact the university proposing to administer the funds) was provided with all external assessors' comments and given the opportunity to submit a rejoinder that was then to be considered 'alongside the assessors' comments and scores.'[67] The names of the particular assessors were not revealed in this process. However, in cases where specialists in a research field are few, there is potential for a reviewer to be identifiable, even without their name being revealed directly.

Another issue relevant to grant funding bodies highlighted in the second case is that the key relationship is between the grant funding body and the university rather than between the grant funding body and the individual researcher. The Australian National Audit Office in its report on the ARC's management of research grants referred to this as 'a decentralised model of grants management.'[68] The same is true for the NHMRC. For both funding bodies there is potential for confusion to be generated when disputes arise within this three cornered arrangement (grant funding body, university and researcher).

The need for timely and accurate communication between the three stakeholders in this arrangement is obvious. The evidence in the second case revealed administrative errors made by the NHMRC and these were relied upon by the researcher to support his legal arguments. One mistake was made in an internal NHMRC communication. An email referred to the allegations against E then being investigated by the university, as involving 'possible scientific misconduct' rather than 'misconduct/serious misconduct.' E claimed his reputation had been damaged by the suspension of payments by the NHMRC based on this incorrect interpretation of the nature of the allegations against him.[69] There were also problems caused by the NHMRC incorrectly characterising the allegations as research misconduct, in correspondence between the NHMRC and E. E claimed his financial interests had been prejudiced because the NHMRC's incorrect interpretation of the allegations would have led it to refuse to recommend future grant applications made by him.[70] Both claims were ultimately rejected by the courts.

V Conclusion

It is difficult to anticipate the effect of these complex court proceedings on the university research community and the likelihood that similar applications will be brought in the future. The applicants appear to be individuals with considerable determination and persistence, bearing in mind the lengthy legal processes engaged in and the risks to their professional and personal lives that bringing court proceedings entailed. In light of the growing complexity of the modern university research environment, it appears likely that similar conflicts and legal disputes will arise more frequently in the future.

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66 National Health and Medical Research Council, *Annual Report 2010-11*, 237.

67 *Ghanem v Australian Research Council* [2014] FCA 473 [20].

68 Australian National Audit Office, *The Australian Research Council's Management of Research Grants*, Audit Report No 38, 2005-06, 18.

69 *Elston v Commonwealth of Australia* (2014) 222 FCR 429, 437-8.

70 Ibid 439.