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Freedom of Information

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Editor: Kirsten McNeill

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TABLE OF CONTENTS

RECENT DEVELOPMENTS

Katherine Cook

Amendment to the Commonwealth Privacy Act to further protect de-identified data

On 28 September 2016, the Commonwealth Attorney-General announced that the *Privacy Act 1988* (Cth) will be amended to improve protections of anonymised datasets that are published by the Commonwealth Government.

The publication of major datasets is an important part of 21st century government, providing a great benefit to the community. It enables the government, policymakers, researchers and other interested persons to take full advantage of the opportunities that new technology creates to improve research and policy outcomes.

The ability to deliver better policies and to solve many of the great challenges of our time rests on the effective sharing and analysis of data. For this reason, the Coalition government has promoted the benefits of open government data, in accordance with the Australian Government Public Data Policy Statement, and published anonymised data on <data.gov.au>.

The Minister for Social Services, the Hon Christian Porter MP, recently drew attention to the benefits of research with anonymised data for identifying risks of long-term welfare dependency and to help break the cycle of dependency.

In a unanimous report, the Senate Select Committee on Health drew attention to the opportunities for research and policy design from the government's data holdings and recommended that open access to de-identified datasets should be the default position.

In accepting the benefits of the release of anonymised datasets, the government also recognises that the privacy of citizens is of paramount importance.

It is for that reason that there is a strict and standard government procedure to de-identify all government data that is published. Data that is released is anonymised so that the individuals who are the subject of that data cannot be identified.

However, with advances of technology, methods that were sufficient to de-identify data in the past may become susceptible to re-identification in the future.

The amendment to the Privacy Act will create a new criminal offence of re-identifying de-identified government data. It will also be an offence to counsel, procure, facilitate or encourage anyone to do this, and to publish or communicate any re-identified dataset.

The legislative change, which was introduced in the Spring sittings of Parliament, is to provide that these offences will take effect from 28 September 2016.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Amendment-to-the-Privacy-Act-to-further-protect-de-identified-data.aspx>

Appointment of Australian Information Commissioner and Privacy Commissioner

His Excellency the Governor-General of Australia, General the Hon Sir Peter Cosgrove AK MC (Ret'd), has appointed Mr Timothy Pilgrim PSM as Australian Information Commissioner and reappointed him as Australian Privacy Commissioner.

Mr Pilgrim has served as Australian Privacy Commissioner since July 2010 and has been acting as Australian Information Commissioner since July 2015. Mr Pilgrim's appointments as Acting Information Commissioner and Privacy Commissioner expire on 19 October 2016.

Mr Pilgrim has established a strong reputation in the business community for his considered approach to regulation and understanding of business needs. Mr Pilgrim has worked internationally to help Australia deal with global privacy challenges, particularly through building closer relationships with other privacy regulators.

Prior to his current roles, Mr Pilgrim served as Deputy Privacy Commissioner from 1998 to 2010. He has overseen the implementation of the most significant reforms to Australia's privacy laws since the *Privacy Act 1988* (Cth) was extended to the private sector in 2000.

As Acting Australian Information Commissioner, Mr Pilgrim provided the necessary continuity to allow the Office of the Australian Information Commissioner to build on its significant operational improvements, particularly its streamlined freedom of information functions.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Appointment-of-Australian-Information-Commissioner-and-Privacy-Commissioner.aspx>

Two Bills to bolster the fight against terrorism

On 15 September 2016, the Commonwealth Attorney-General introduced into Parliament two important counterterrorism Bills to ensure our laws are as strong and up-to-date as possible, to enable police and intelligence agencies to fight terrorism and to keep our community safe.

Counter-Terrorism Legislation Amendment Bill (No 1) 2016

Regrettably, children as young as 14 have been involved in terrorism-related activities. This Bill recognises this reality and the need for appropriate safeguards. It modernises the control order regime by:

- reducing the age, from 16 to 14, at which a person of security concern can have a control order placed on them;
- creating new targeted physical search, telecommunications interception and surveillance device regimes to help monitor those subject to control orders; and
- better protecting sensitive information in control order proceedings while ensuring appropriate safeguards, such as providing special advocates when needed.

To address the negative impacts of hate preachers, this Bill criminalises advocating genocide.

The legislation also implements all 21 recommendations of the bipartisan Parliamentary Joint Committee on Intelligence and Security, which reviewed an earlier version of the Bill.

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Since the national terrorism threat level was raised on 12 September 2014, 48 people have been charged as a result of 19 counterterrorism operations around Australia. A critical part of the federal government's role is managing terrorist offenders serving custodial sentences who continue to pose an unacceptable risk to the community after they are released from prison.

Most states and territories have already enacted post-sentence preventative detention schemes for dealing with high-risk sex or violent offenders, but until now there has been no such scheme for convicted terrorist offenders.

The Bill amends pt 5.3 of the *Criminal Code Act 1995* (Cth) to create a new regime to enable a Supreme Court, upon application by the Attorney-General, to make an order for the ongoing detention of high-risk terrorist offenders who are approaching the end of their custodial sentences and are about to be released into the community.

The court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptably high risk of committing a serious terrorism offence if released.

The Council of Australian Governments agreed in April that the Commonwealth should lead in creating this nationally consistent scheme. The state and territory Attorneys-General agreed in principle to the Commonwealth's draft Bill on 5 August 2016 and continued to work on this important initiative.

The states and territories are the Commonwealth's partners in tackling the threats of terrorism and the Attorney-General thanks them for their cooperation and support.

It is critical that governments work together to implement this scheme as early as possible.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Two-bills-to-bolster-the-fight-against-terrorism.aspx>

Legal advisory service for the Royal Commission into the Protection and Detention of Children in the Northern Territory

On 10 October 2016, the Commonwealth Attorney-General announced a free legal advisory service for people engaging with the Royal Commission into the Protection and Detention of Children in the Northern Territory.

Delivered by the North Australian Aboriginal Justice Agency (NAAJA), the Children in Care and Youth Detention Advice Service will receive $1.1 million from the Australian Government this financial year.

NAAJA is the largest legal provider in the Northern Territory and has a strong track record in providing culturally appropriate services.

This legal advisory service will provide:

- face-to-face and telephone advice for people seeking to engage with the Royal Commission;

- help in accessing legal financial assistance for people appearing as witnesses before the Royal Commission or attending interviews with the Royal Commission;
- referrals to solicitors for people needing ongoing legal representation; and
- community outreach and liaison services, including helping people to understand their legal rights and responsibilities when engaging with the Royal Commission.

The Australian Government is also providing financial assistance for legal representation of people:

- attending interviews with the Royal Commission; and
- appearing as witnesses before the Royal Commission when formal hearings commence later this year.

The Royal Commission was established in July 2016 to enable a swift inquiry into the treatment of children in detention facilities administered by the Government of the Northern Territory.

The funding announced today [that is, on 10 October 2016] is in addition to the $350 million announced in 2015 for Indigenous legal assistance services. The government has also struck a landmark five-year National Partnership Agreement to deliver over $1.3 billion for legal aid commissions and community legal centres.

More information on NAAJA is available at NAAJA website or by calling 08 8982 5110.

More information on legal financial assistance arrangements is available on the Attorney-General's Department website.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FourthQuarter/Legal-advisory-service-for-the-Royal-Commission-into-the-Protection-and-Detention-of-Children-in-the-Northern-Territory.aspx>

Victorian Government appeals Supreme Court decision

The Victorian Government has lodged an appeal against the Supreme Court's decision regarding the Ombudsman's jurisdiction to investigate a referral made by the Legislative Council.

The government is taking this action to protect the architecture of Victoria's integrity regime, particularly regarding the relationship between the Ombudsman and the Houses and committees of the Victorian Parliament.

The government is concerned that the recent Supreme Court decision has significant resource implications for the Ombudsman and will impact on the Ombudsman's ability to conduct investigations into other matters in accordance with the functions spelt out in the *Ombudsman Act 1973* (Vic).

The government is also concerned about the implications of the decision for the question of privilege as between the Houses.

If the decision stands unchallenged, there would appear to be no impediment to one House of the Parliament referring members of the other House to the Ombudsman with regard to any matter whatsoever.

The government is not seeking to obstruct the Ombudsman from commencing an investigation into the reference if and when she determines to do so.

<http://www.premier.vic.gov.au/government-appeals-supreme-court-decision/>

Recent decisions

Apprehended bias and horse racing

Golden v V'landys [2016] NSWCA 300 (4 November 2016)

The applicant, Mr Joseph Golden, was a professional racehorse trainer. The first respondent, Mr Peter V'landys, was the Chief Executive Officer of the second respondent, Racing New South Wales (RNSW).

On 10 May 2011, Mr Golden wrote a letter to RNSW accusing Mr V'landys of being corrupt and incompetent in handling the Commercial Horse Assistance Payment Scheme (CHAPS), which was established to compensate owners and trainers affected by the equine influenza virus.

After receiving Mr Golden's letter, Mr V'landys delegated his authority to the RNSW Licensing Committee to hold a show cause hearing in relation to Mr Golden as to why his trainer's licence should not be suspended. On 16 May 2011, Mr Golden was issued a show cause notice.

On 19 May 2011, Mr Golden wrote two letters to RNSW officials, the first accusing Mr V'landys of corruption and the second accusing two members of the Licensing Committee of corruption.

Between 23 and 25 May 2011, between 8 am and 10 am, Mr Golden stood on the southern end of Grafton Bridge with a placard that read 'RACING NSW CORRUPT CEO, ROBS TAX PAYERS'.

On 23 May 2011, Mr V'landys delegated to the Licensing Committee the authority to amend the show cause notice of 16 May 2011 to 'include any behaviour of Mr Golden between the date of my original delegation and the hearing of that show cause notice and to make a recommendation to me at the conclusion of the hearing'.

On 24 May 2011, Mr Golden was issued with an amended show cause notice, which included the comments in his 19 May letter and his behaviour on Grafton Bridge. Mr Golden was told that the hearing now extended to Mr Golden showing cause why he should not be warned off racecourses within RNSW's control.

On 30 May 2011, Mr Golden stood outside the office of Ms Jannelle Saffin, at that time the federal member for Page, in Grafton and held a placard reading, 'RACING NSW CORRUPT CEO ROBS TAXPAYERS' and 'CHAPS PUBLIC AUDIT REPORTS $200,000,000 MISAPPROPRIATION PUBLIC ENQUIRY NEEDED'.

A show cause hearing was held on 31 May 2011, and on 8 June 2011 Mr V'landys informed Mr Golden that his horse trainer's licence had been suspended for six months (the first decision).

On 8 June 2011, Mr V'landys and RNSW also instructed lawyers to write a letter of demand to Mr Golden concerning alleged defamation conveyed by the placards Mr Golden displayed on the bridge and outside Ms Saffin's office. This letter was sent on 10 June 2011. In that letter, only defamation proceedings on behalf of Mr V'landys (and not RNSW) were contemplated.

On 24 June 2011, a second show cause hearing was held by the Licensing Committee, the subject of which was Mr Golden's conduct in displaying the placards on the bridge and outside Ms Saffin's office. Mr V'landys approved the committee's recommendation that Mr Golden be 'warned off' all racetracks under the control of RNSW indefinitely (the second decision).

Mr Golden sought judicial review of Mr V'landys' decisions on the bases of, among other things, apprehended bias. The primary judge dismissed his challenge, concluding that Mr Golden had not been able to articulate a logical connection between, on the one hand, the circumstances that Mr V'landys had alleged that Mr Golden had defamed him and, on the other, the feared deviation by Mr V'landys from his obligation to decide the case on its merits.

On 7 September 2016, Mr Golden sought leave to appeal the primary judge's decision to the New South Wales Court of Appeal. This was granted. Mr Golden's appeal focused on the second decision to warn him off racecourses indefinitely. Mr Golden contended, among other things, that the primary judge should have found that the decision to warn Mr Golden off was affected by apprehended bias on Mr V'landys' part.

The Court held that the test for a reasonable apprehension of bias requires satisfaction of a double might test: whether a fair-minded observer might reasonably apprehend that a decision-maker might not apply an impartial mind to the question to be decided (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (*Ebner*)). There must also be a logical connection between the first matter and the feared deviation from the course of deciding the case on its merits (*Ebner*).

The Court found that, in this case, the relatively low threshold posed by the test in *Ebner* was satisfied by Mr V'landys exercising a power to decide an appropriate punishment for Mr Golden in circumstances where, at the same time, Mr V'landys was demanding through lawyers that Mr Golden pay him damages and costs for defamation for engaging in the same conduct as was the subject of the decision to warn him off.

Accepting that criticisms of institutions such as RNSW are often directed to the person seen to be leading the institution and that, as a general matter, Mr V'landys would readily be understood as being able to deal with these criticisms, the lawyers' letter to Mr Golden takes on a significance. Despite being, in general, able readily to cope with public criticism of a very emotional kind, Mr V'landys chose to retain private solicitors and threaten Mr Golden with defamation proceedings about the very matter that he was subsequently called upon to judge.

The Court opined that the logical connection test does not require proof of the existence of personal animus. To require such proof would tend to blur the distinction between apprehended bias and actual bias. In this case, the logical connection test was made out when Mr V'landys, through lawyers, personally threatened legal proceedings against Mr Golden, then proceeded to make a decision affecting Mr Golden's rights about that same conduct. As such, Mr V'landys' role in threatening legal proceedings against Mr Golden was 'incompatible' with making the decision to warn off Mr Golden (*Isbester v Knox City Council* (2015) 255 CLR 135).

Is general indifference to agent's fraudulent conduct enough?

Gill v Minister for Immigration and Border Protection [2016] FCAFC 142 (17 October 2016)

In June 2009, the appellant, a citizen of India, entered Australia on a student visa. On 3 May 2011, the appellant's migration agent, on his behalf, made an online application for a Skilled (Provisional) (Class VC) visa (the visa). It was fraudulently stated on the visa application form that the appellant had obtained a skills assessment from Trades Recognition Australia (TRA) and a reference number for that assessment was provided.

On 14 April 2012, the Minister's delegate refused to grant the appellant the visa. The delegate stated that TRA had confirmed that there was no skills assessment with the reference number stated in the visa application form. The appellant's visa application was refused on the basis of the Public Interest Criterion 4020 and the provision of false or misleading information concerning the visa applicants' respective skills.

On 9 May 2012, the appellant sought a review of the delegate's decision in the then Migration Review Tribunal. The Tribunal found that the migration agent had acted fraudulently by including information which was incorrect or misleading in his visa application and which had been fabricated by the migration agent and not the appellant. Before the Tribunal the appellant claimed that he had been the victim of fraudulent conduct by his former migration agent and that the agent had, without his knowledge, provided false information in his visa application, with the consequence that his visa application was invalid.

The appellant then brought judicial review proceedings in the Federal Circuit Court of Australia (the FCCA) in relation to the Tribunal's decisions. A central issue was whether the effect of the alleged agent's fraud meant that the visa application was not a valid visa application. The FCCA dismissed the appellant's application on the basis that relief should be withheld because of the appellant's 'indifference and imputed authority in the agent'.

The appellant then appealed to the Full Federal Court of Australia (the Full Court). The central issue was whether the primary judge erred in concluding that, because of the appellant's 'indifference' to his agent's fraudulent conduct and the 'general authority' he had given to his agent, he had to bear responsibility for that conduct.

The appellant submitted that, although the primary judge found that there was fraud by the agent, he was unable positively to find complicity or collusion by the appellant in that fraud. Therefore, the appellant contended that the primary judge's finding of 'general indifference' was an insufficient basis upon which to visit the agent's fraud on the appellant and that indifference as to honesty or dishonesty was required.

The Minister submitted that the FCCA's findings were open to it and supported its conclusion that the visa application was valid. The Minister emphasised that the FCCA had concerns about the appellant's evidence and credibility, having had the benefit of witnessing the appellant give evidence during cross-examination. Therefore, it was open to the Court to find that the appellant was indifferent to the nature and contents of his visa application and that he had given his agent general authority.

The Full Court (Kenny, Griffiths and Mortimer JJ) held that fraud can arise in a wide range of factual circumstances, such that it is undesirable to prescribe in general terms the scope for judicial review where there is third-party fraud (*SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35). Rather, it is critical to pay close attention to the circumstances in which the issue of fraud arises; and to the terms of any specific legislative provision which may be affected by the fraudulent conduct of a third party such as a migration agent.

The Full Court held that the primary judge erred in failing to address a question which was of central significance in the particular circumstances here — namely, whether the appellant's 'indifference' or imputed general authority to his agent extended to whether or not the agent's conduct in assisting the appellant to make his visa application went so far as to include unlawful or dishonest conduct. In the view of the Full Court, it is one thing to conclude, on the basis of relevant evidence, that a visa applicant, having retained the assistance of a migration agent, gives his or her general authority to that agent to do whatever is lawful and proper to achieve the visa applicant's objective of obtaining a particular visa; it is another to conclude that a visa applicant has placed such matters in the hands of a migration agent and is indifferent to whether the migration agent uses lawful or unlawful means to achieve the visa applicant's objective of obtaining a visa.

The Full Court found that there was no finding by the primary judge that the appellant's 'indifference' as to how his agent carried out his retainer to assist the appellant in obtaining a visa extended so far as to countenance or authorise the agent engaging in fraud or dishonesty.

The primary judge also found that it was not possible for him to make a positive finding that the appellant was complicit or colluded in the agent's fraud. Rather, the primary judge proceeded on the basis that his lesser findings relating to the appellant's 'indifference' and the general authority he gave to his agent meant that the appellant had to bear responsibility for the agent's fraudulent conduct.

In the view of the Full Court, this approach fails to recognise and give effect to the relevant distinction between an indifference as to how the migration agent acting lawfully and properly can achieve a visa applicant's desired outcome; and an indifference as to whether that outcome is achieved by the agent acting unlawfully or dishonestly. This distinction is equally important in the context of considering the legal significance of any general authority given to a migration agent by a visa applicant. In the Full Court's view, the primary judge erred in failing to recognise and give effect to the significance of this distinction and, for these reasons, the appeal should be allowed.

When can an administrative tribunal dispense with a matter without a hearing?

Sasterawan v Roads and Maritime Services [2016] NSWCATAD 142 (18 November 2016)

In May 2015, the respondent, Roads and Maritime Services (RMS), refused Mr Sasterawan a taxi driver authority under the *Passenger Transport Act 1990* (NSW) because he was 'not a person of good repute ... and a fit and proper person to be the driver of a taxi-cab'. That finding was primarily based on Mr Sasterawan's conviction in 2005 for offences under the *Crimes Act 1900* (NSW) for claiming moneys by fraudulently altering Cabcharge dockets (see *Sasterawan v Morris* [2010] NSWCCA 91).

In August 2015, Mr Sasterawan made an application to the New South Wales Civil and Administrative Tribunal (NCAT) for review of the decision made by RMS to refuse to grant him a taxi driver authority (the substantive application).

On 12 May 2016, NCAT appointed Dr Ainsworth to act as guardian ad litem for Mr Sasterawan based on medical evidence provided by Mr Sasterawan under s 45(4)(a) of the *Civil & Administrative Tribunal Act 2013* (NSW) (NCAT Act).

During those proceedings, it transpired that Mr Sasterawan had applied to the Supreme Court of New South Wales for various orders, including that the 2005 conviction be overturned. In light of Mr Sasterawan's application to the Supreme Court, after conferring

with him, the guardian ad litem decided to withdraw the substantive application. Mr Sasterawan opposed this, and on 9 August 2016 NCAT dismissed the application.

Mr Sasterawan then applied for an order under reg 9 of the *Civil and Administrative Tribunal Regulation 2013* (NSW) that a decision made on 9 August 2016 be set aside (the set aside application).

In submissions filed on 4 October 2016, the RMS urged NCAT to exercise its power to dispense with a hearing. The RMS contended, among other things, that the issues raised by the set aside application were neither factually nor legally complex. In addition, the RMS asserted that Mr Sasterawan would not suffer any prejudice if the set aside application was determined without a hearing.

In submissions filed on 26 September, 5 October and 7 October 2016, Mr Sasterawan canvassed many issues but not whether the set aside application should be determined on the papers. His guardian ad litem made no submissions on either issue.

NCAT found that a hearing is generally required for proceedings in NCAT (NCAT Act, s 50). An exception is where NCAT makes an order dispensing with a hearing (NCAT Act, s 50(1)(c)). NCAT may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material provided to NCAT (NCAT Act, s 50(2)). However, NCAT may not make an order dispensing with a hearing unless it has first afforded the parties an opportunity to make submissions about whether the hearing should be dispensed with and has taken any such submissions into account (NCAT Act, s 50(3)).

NCAT held that whether the issues for determination can be adequately determined in the absence of the parties requires consideration of, among other things, the nature and complexity of the issues to be determined and an assessment of the capacity of each party to address those issues in written submissions and material.

In this case, NCAT held that the issue for determination (whether the order sought by Mr Sasterawan to set aside the substantive application can be made) turns on two simple factual matters: whether the parties consented to the setting aside of the 9 August 2016 decision, and whether that decision was made in the absence of Mr Sasterawan. Given the narrow scope and simple nature of the issues to be determined, NCAT concluded that they could adequately be determined in the absence of the parties by considering their written submissions and the material provided. In reaching that view NCAT took into account that the submissions provided by Mr Sasterawan were silent about whether the set aside application should be heard on the papers.

Being satisfied that the issues can be determined adequately in the absence of the parties, NCAT considered whether the power to dispense with a hearing should be exercised.

NCAT found that the history of the proceedings reveals that Mr Sasterawan has a tendency in both oral and written submissions to agitate a great many issues largely irrelevant to the issue at hand. NCAT formed the view it was unlikely Mr Sasterawan would be able or willing to address the narrow issues raised by the set aside application if given the opportunity to make oral submissions. In NCAT's opinion, Mr Sasterawan would not be prejudiced if the set aside application was determined without a hearing. Further, dispensing with a hearing would facilitate the just, quick and cheap resolution of the real issues in dispute.

THE VALUE OF PROCEDURAL FAIRNESS IN MENTAL HEALTH REVIEW TRIBUNAL HEARINGS

Anina Johnson*

Imagine that, for some time, you have had a strange feeling that you are being watched. It is hard to put your finger on it. But you have a sense that some of the people that you pass in the street already know where you are going and what you are going to do. The TV presenters seem to be talking to you, and some of their comments seem to have a special meaning for you and your life. A few weeks ago, the correspondent on the evening news mentioned that financial markets were in meltdown and, the very next day, the ATM swallowed your card. You are sure that the news bulletin contained a warning especially for you.

At first, you were not too worried. But now the constant observation is starting to get sinister. You were sick the other week, and now you wonder if that might be because your food is being poisoned. So you stop eating unless you can see the packet of food being opened in front of you. Family meals with your parents have become tense, because you are not sure whose side they are on.

Eventually, your mother says that she will take you to your local hospital's emergency department to get some checks done. But, instead of doing blood tests, the young registrar talks to you about why you are worried about being poisoned and some of the other odd experiences you have been having. The next thing you know is that you are being admitted to the psychiatric unit of the hospital.

When you ask to leave, you are told that you are not allowed to go and that the hospital staff think you might have an illness called schizophrenia. But you are not mad. You do not hear voices. You do not see things that are not there. You are not a violent person. It is just that some odd things have been happening to you lately.

The Mental Health Review Tribunal of New South Wales

The Mental Health Review Tribunal of New South Wales (MHRT) makes orders which can have a significant impact on individual liberties. The MHRT can require that someone be detained in a mental health facility and receive compulsory mental health treatment, including (by special order) electro-convulsive therapy. It can order that someone living in the community be required to visit mental health professionals and take psychiatric medications.

The people who are potentially subject to the MHRT's orders are some of the most vulnerable participants in any court or tribunal process. They may still be experiencing symptoms of mental illness which are distressing and disorientating. They may be detained in confronting circumstances and with limited access to the internet or their own papers.

* *Anina Johnson is the Deputy President of the Mental Health Review Tribunal of New South Wales.* *This is an edited version of a paper presented at the Australian Institute of Administrative Law National Conference, Brisbane, Queensland, 21 July 2016.*

The case for their ongoing treatment is presented by professional staff who regularly appear before the MHRT. Yet the person who is potentially the subject of the MHRT's order rarely has the opportunity (or the financial means) to obtain an alternative 'expert' opinion. In about 20 per cent of cases, the person will not have access to a lawyer.

There are practical considerations too. The MHRT is a high-volume environment, with many matters on its list each day. As people wait for MHRT hearings, understandably, they can become stressed and agitated as the day goes on.[1] This increasing anxiety is likely to impact negatively on a person's ability to participate effectively in the MHRT hearing.

In New South Wales, the first hearing of the MHRT is usually conducted by a single legal member of the Tribunal (which reflects the fact that before 2010 it was the local magistrate who conducted these hearings). Subsequent hearings are conducted by a three-person panel, which comprises a lawyer, a psychiatrist and another suitably qualified person. The third member will have extensive experience in the area of mental health as a clinician, a carer for someone living with mental illness or a consumer of mental health treatment, or they may have a combination of these experiences.

The MHRT has a sound gender balance and includes people identifying as Aboriginal Australians as well as people from culturally and linguistically diverse backgrounds.

The values of procedural fairness

Much has been written about the purpose and value of procedural fairness. In his 2010 Sir Anthony Mason Lecture at the University of Melbourne, the Hon Robert French, Chief Justice of the High Court of Australia, said: 'Its origins and application raise an old-fashioned question: Is it about justice or is it about wisdom?'[2]

His Honour then posited several rationales for procedural fairness:

(1) That it is instrumental, that is to say, an aid to good decision-making.
(2) That it supports the rule of law by promoting public confidence in official decision-making.
(3) That it has a rhetorical or libertarian justification as a first principle of justice, a principle of constitutionalism.
(4) That it gives due respect to the dignity of individuals — the dignitarian rationale.
(5) By way of participatory or republican rationale — it is democracy's guarantee of the opportunity for all to play their part in the political process.[3]

Each of these justifications has a part to play in MHRT hearings. Being forcibly detained and required to receive psychiatric care is an imposition on a person's liberty and dignity. Whether those restraints are necessary should be decided by an independent, expert body. Public confidence in decisions of this nature demand that the hearing is fair and that the person whose liberty is at stake has the best opportunity possible to present their case.

Another way of thinking of the characteristics of procedural fairness in this context is by reference to the core values identified in the International Framework of Court Excellence: equality (before the law), fairness, impartiality, independence of decision-making, competence, integrity, transparency, accessibility, timeliness and certainty.[4]

As Richardson, Spencer and Wexler say, psychology and behavioural science show that the processes adopted by courts or tribunals are as important as their ultimate decision in driving satisfaction with the law and decisions made.[5] Procedural fairness for the MHRT is more than simply ensuring that particular administrative hurdles are jumped; it should lead the person who is the subject of the hearing to feel that they have been dealt with fairly.

Achieving procedural fairness in MHRT hearings

How does the MHRT work to achieve these lofty goals under the constraints of time pressures and resource limitations which are common to all tribunals?

Procedural fairness aligns with recovery

The primary focus of the hearing must be the person who potentially will be the subject of the MHRT's order. Allowing that person the opportunity to give their perspective on the evidence before the MHRT is key. It is vital that a person feels that they are an active participant and not merely an object which is being discussed.[6]

Carney et al aptly summed up the challenges in this area when they said:

> Consumers' ability to participate effectively in tribunal hearings depends on their capacity at the time, as well as their understanding of the tribunal's functions, their emotional state and the opportunity they are given to contribute.[7]

An important starting point is for one of the MHRT panellists (usually the lawyer) to explain in straightforward terms the purpose and procedure of the MHRT hearing. People should know what the MHRT's jurisdiction is and the criteria for exercising that jurisdiction. The MHRT will set out the order of events at a hearing so that the person concerned is reassured that they will have an opportunity to have their say and respond to anything said about them.

Some people who are detained in hospital involuntarily tell the MHRT that they accept that they are currently benefiting from hospital-based mental health treatment. However, they have concerns about the medication being prescribed, the ward in which they are detained or the fact that they have only limited leave. It is important to explain that the MHRT only has the power to make a decision that a person is detained in hospital (and the maximum length of that detention) or that they are discharged. The MHRT does not have jurisdiction over clinical issues.

Having said that, there is benefit in exploring other issues, even if they are outside the MHRT's jurisdiction. The MHRT offers an impartial and neutral environment in which these concerns can be raised, explored and heard. Ideally, of course, the same issues have also been explored with the treating clinicians. However, in a busy clinical world, there may not have been a chance to raise those issues or they may not have been listened to carefully. The MHRT hearing offers an opportunity to redress some of the power imbalances and to refocus the care being given to a person on their current and future concerns.

This approach is consistent with the principles of therapeutic jurisprudence in that it seeks to maximise the therapeutic consequences and minimise the anti-therapeutic consequences of the legal process.[8]

It is also consistent with recovery-oriented mental health practice. There are many definitions of what it means to adopt a 'recovery-oriented approach' to mental health care. The Australian Principles of Recovery Oriented Mental Health Practice state:

> ['Recovery' is] gaining and retaining hope, understanding of ones abilities and disabilities, engagement in an active life, personal autonomy, social identity, meaning and purpose in life, and a positive sense of self.[9]

The Principles also include the following quote:

> It is important to remember that recovery is not synonymous with cure. Recovery refers to both internal conditions experienced by persons who describe themselves as being in recovery — hope, healing, empowerment and connection — and external conditions that facilitate recovery — implementation of human rights, a positive culture of healing, and recovery-oriented services. (Jacobson and Greenley, 2001 p 482)[10]

The involvement of people in the development of their own recovery plans is now one of the general principles guiding care and treatment under the *Mental Health Act 2007* (NSW).[11] Allowing a person who is potentially being coerced into treatment the opportunity to talk about their hopes for the future in a public forum facilitates future conversations with treating clinicians, who will hopefully support those aspirations. It allows the person's own goals to be taken into account when prioritising the goals of treatment.

Involving people in their own hearings

Of course, some people in MHRT hearings struggle to express their views coherently. This may be because of ongoing symptoms of mental illness. The stress of the hearing itself can exacerbate existing experiences of mental illness so that people become overwhelmed.[12] If a person is hearing loud and distracting voices, it can be difficult to remain focused on what is said in MHRT hearings. Feelings of agitation and irritation can make it difficult for people to remain still and focused. Deep depression can take away the power of speech altogether.

Mental health medications and treatments can also significantly impact on a person's alertness and their ability to participate in a hearing. The MHRT is under a statutory obligation to enquire into this issue at all involuntary patient hearings.[13]

Where a person is struggling to express their views, the clinical input from the psychiatrist and other suitably qualified members of the MHRT is critical. My clinical colleagues have ways of asking questions which are simple, polite and focused and which are effective at assisting a person in mental distress to speak to the MHRT.[14] Sometimes it is simply a matter of giving a person the time to be able to gather their thoughts and respond. Patience is a crucial virtue.

This kind of engagement with a person is best achieved when the hearing is conducted face to face. About 50 per cent of the 17 000 annual hearings of the MHRT involve the members sitting across a table from the person concerned. These hearings take place across 36 mental health facilities in metropolitan and regional New South Wales. The immediacy of this face-to-face connection continues to be significantly better than a video connection, despite the improvement in video quality in recent years.

In 86 per cent of the MHRT's civil hearings, the person who was the subject of the hearing attended in person, by video or by phone. However, some hearings can and do proceed without the person present.[15] This is particularly the case where the application is for a renewal of a community treatment order. In those circumstances, the person is living in the community and is generally already receiving mental health care under a compulsory order from the MHRT. The MHRT will have written to the person to advise them of the hearing and expects their case manager to remind them of the hearing and encourage the person to attend. For a range of reasons, though, people may opt not to attend. However, the MHRT's usual practice is to attempt to contact the person by phone to allow them the opportunity of expressing their views if they wish to do so. People are often willing to be involved in a hearing if they are contacted in this way. This practice reinforces the MHRT's role as an independent arbiter and not a rubber stamp for clinical applications.

Of course, despite the MHRT's best efforts to explain its process clearly and to make that process as comfortable as possible, many people will still experience MHRT hearings as

distressing and anxiety provoking.[16] Access to legal representation offers another important way for a person's voice to be heard.

Legal representation before the MHRT is usually provided by Legal Aid NSW on a duty lawyer basis. A person can also engage a private legal representative. Representation was provided in 77 per cent of all hearings in the MHRT's civil jurisdiction.[17] The legal representatives before the MHRT will have had a private conference with the person concerned beforehand and had an opportunity to review their clinical file. Legal representatives are then able to convey their client's wishes to the MHRT, even if the client is too overwhelmed by the hearing to be able to communicate those concerns.

Sometimes the lawyer is able to suggest that particular friends or acquaintances might offer useful evidence. In addition, where reports canvass sensitive or traumatic issues, such as childhood trauma or recent experiences of acute mental ill health, the lawyer can indicate to the MHRT if there are any issues in dispute. This may mean that distressing matters do not need to be traversed publicly.

At the very least, a legal representative is an ally — a professional on the side of the person whose life is under scrutiny and whose presence helps to rebalance the inherent inequalities of appearing before the MHRT.

Public hearings

MHRT hearings are open to the public.[18] This is consistent with the principle of the open administration of justice, which allows for public and professional scrutiny of MHRT proceedings and offers a safeguard against abuse.[19] Sadly, the history of mental health care contains many stories of abuse,[20] making this safeguard an important one.

In practical terms, the MHRT almost never has general members of the public or 'court watchers' attend its hearings. The reasons for this are twofold. First, the MHRT does not provide any public lists of its hearings. Secondly, about 50 per cent of the MHRT's hearings are conducted inside mental health facilities.[21] The remaining 50 per cent of hearings are conducted by video link or phone from the MHRT's premises in suburban Sydney. As such, they are not readily accessible.

The lack of disinterested public observers is not inappropriate. The MHRT's proceedings are necessarily concerned with intensely personal matters relating to an individual's mental health, current living arrangements and personal background. There is no doubt that there is still a significant stigma attached to being diagnosed with a mental illness.[22] Sadly, this stigma is likely to be exacerbated if a person has been the subject of a compulsory order requiring them to accept mental health treatment. It is a stigma that can be felt keenly by the person concerned. [23] The *Mental Health Act 2007* (NSW) recognises this and makes it an offence to publicly identify by name anyone who has proceedings before the MHRT.[24]

However, the obligation to conduct public hearings does mean that family, friends and support people can attend an MHRT hearing if they wish and should not be excluded by the staff of the hospital where the hearing is held. It remains an important statutory protection.

Testing the evidence

Consistent with a therapeutic or recovery-based approach to its hearings, the MHRT adopts a courteous and respectful tone towards the person concerned, their family and the treating clinicians. Cross-examination of the person concerned in an attempt to elicit symptoms of mental illness is inappropriate.[25]

As in many tribunals, the rules of evidence do not apply to MHRT hearings. It is entitled to inform itself as it thinks fit.[26] Some of the evidence before the MHRT will be in the form of second-hand or third-hand hearsay. For example, evidence about what preceded an admission may be a brief report of a police officer who has decided to bring the person to a hospital. This report might be based on observations of people who raised the initial concerns about a person's conduct. The *Mental Health Act 2007* (NSW) also requires that a person be assessed at the hospital by two authorised personnel, one of whom must be a psychiatrist.[27] However, those observations are necessarily (and appropriately) coloured by the reports of what has occurred before they met an individual.

In the context of the relatively short MHRT hearing that is run largely on a duty list basis, it will rarely be possible to ascertain where the truth lies. But, if the MHRT is going to take into account that evidence, it is appropriate to offer the person concerned a chance to respond to the key points raised.

This can sometimes be a delicate process. People may not clearly remember the things they said and did at times of acute mental distress. Alternatively, it may be embarrassing to recall and discuss some of those experiences.

There are risks too with leaving alleged inaccuracies unchallenged. Reports of past behaviours can quickly be adopted as immutable facts and copied into each new report.[28] Past behaviours may be portrayed as ongoing issues rather than a historical matter.[29] By questioning the report writer about the source of their comments, the MHRT may reveal that the writer has added an unwarranted gloss to police reports or accepted hearsay reports as gospel truth. The MHRT file, if readily accessible, can be a useful way of trying to return to the original source material. If the file is not readily accessible, the MHRT can adjourn the hearing to allow for it to be obtained or make a note that it should be available if there is a subsequent hearing. If the report is found to be inaccurate, the MHRT can ask for a replacement report for its file, which should also have the effect of correcting the clinical record.

It may be unnecessary for the MHRT to make definitive findings of fact on issues of these kinds. Within an inpatient setting, with regular observations by experienced staff, clinicians are likely to be able to describe ongoing patterns of behaviour that indicate mental illness without requiring the MHRT to adjudicate on events that occurred many weeks (or months) before.

The MHRT needs to decide in each particular matter whether it is preferable to adopt a therapeutic approach (which may mean not attempting to untangle the hearsays of the past) or to try to reach a determination on the alleged inaccuracies in treating reports.

A variation on this difficulty occurs when those involved in the patient's day-to-day treatment are unavailable. The MHRT understands that the vagaries of hospital rosters and the vicissitudes of life mean that not all of the key players will be available for MHRT hearings. However, too often I have heard a person say: 'Listen, I only met this doctor this morning for 10 minutes. How does he know what I'm like?' When a person's liberty is at stake, it is important that the MHRT can question witnesses who are able to give careful, well-researched and considered evidence in relation to a person's current mental wellbeing and their likely future pathway with, and without, the proposed (compulsory) treatment.

Unless the relevant witnesses attend the MHRT's hearing, many of the considerable benefits of the MHRT's multidisciplinary panel are lost. Carney et al argue that the work of a mental health tribunal is necessarily embedded in a health and social context, which is why there is such value in members from those fields.[30] These members also add considerably to the

procedural fairness of MHRT hearings. As noted above, the person concerned is rarely in a position effectively to test the clinical evidence. The role of the clinicians on the MHRT panel is not to make a clinical judgment. But they can bring their clinical experience to bear on the evidence, test alternative treatment modalities and assess whether the evidence meets the statutory standards. This aids the MHRT's decision-making and provides the person concerned with a fairer hearing.

Finally, there is an important role that family and friends can play in the MHRT's hearings. The requirement to include family and friends in MHRT hearings was strengthened in recent amendments to the *Mental Health Act 2007* (NSW).[31] These amendments recognised that people close to a person are essential to supporting a person's recovery from illness and in discharge planning.[32]

The role of family and friends in a hearing can be a difficult one. Sometimes their support is welcomed. On other occasions, those closest to the person concerned are the most quickly attacked when that person's mental health deteriorates. Family and friends may also have been the instigators of the compulsory mental health treatment.

Family or friends should generally be invited to offer their thoughts at an MHRT hearing if they feel comfortable doing so. In my experience they often have valuable longitudinal information they can provide about the person's experiences of mental illness and recovery, which can significantly alter the trajectory of the decision-making process. Obtaining information of this kind is an important part of making a good and fair decision and, ultimately, maintaining trust in the MHRT's processes. However, it may also be seen by the person concerned as a betrayal. Pressure to provide information to the MHRT could fracture critical relationships.

Navigating this path is not easy. The MHRT has the option of conducting some or all of its proceedings in the absence of some of the parties to proceedings.[33] But taking the formal step of asking the person concerned to leave is likely only to increase that person's fears about what is being said in their absence.

Often a middle way can be achieved. The family may give subtle nods at comments made by the treating team before saying to the Tribunal, 'I have nothing I want to add'. The MHRT may be able to obtain some evidence by asking family members about the things that a person likes to do ordinarily (that is, when they are not unwell). Above all, the MHRT must not disrupt these important relationships by pressing for evidence unless it is critical to the MHRT's ultimate decision.

Fair decision-making

The vulnerability of people appearing before the MHRT, and the fact that many are already struggling with feelings of unease, distress or even paranoia, make it critical that the MHRT's processes *appear* fair. The transparency of the MHRT's processes is therefore a key factor in achieving a procedurally fair hearing. It is second only to ensuring that the person concerned has a proper opportunity to speak.

It is easy for the MHRT to be seen as a rubber stamp for clinical decision-making. A tiny proportion of the applications for involuntary treatment which were made to the MHRT in 2014–15 were refused.[34] However, it should not be presumed that the MHRT simply adopts, without question, the clinical team's recommendations. Carney et al suggest that an equally plausible explanation, and one I would endorse, is that clinical teams have already undertaken an internal triage in anticipation of the hearing and will only present those cases to the MHRT where they feel confident that their case is a strong one.[35] Certainly, my

experience is that, at any mental health facility, one or more people will have been discharged or given the option of remaining voluntarily in the 24 hours prior to an MHRT hearing.

The MHRT has other challenges to ensuring its processes continue to be transparent. Hearings take place in the same venues on a regular basis. The same panel members are likely to sit regularly at that venue. They will come to know the administrative staff and the treating clinicians, and have a certain familiarity with them. In addition, given professional contacts, it is possible that the lawyer appearing for the patient knows the legal member of the panel, or the treating psychiatrist may have worked closely with the MHRT's psychiatrist member. The MHRT must be diligent in ensuring that appropriate boundaries are maintained, not just in the hearing room itself but also anywhere on the grounds of the hospital.[36]

The final stage of any tribunal process is the decision-making process. Before reaching a decision it is important that the panel members take the time to discuss the matter privately amongst themselves. Only in rare cases will this will be unnecessary, and then only if the person concerned is not present or agrees to the MHRT's order.

At times, an adjournment may be necessary to ensure a fair decision.[37] In weighing up this issue, the MHRT bears in mind that an adjournment of an order detaining a person in hospital means that the person's legal detention remains on foot during the adjournment period.[38] In addition, the stress of Tribunal hearings for the person concerned, and their family, weighs against adjourning hearings unless it is essential to the fair determination of a matter.

The reasons, when finally delivered, need to convey the MHRT's decision without crushing the person or their hope for the future. The discussions amongst MHRT panel members before a decision is delivered can be used to help to craft the oral reasons for decision in a way that strikes an appropriate balance.

Formulaic repetitions of the statutory tests are not helpful. A brief summary of the key aspects of the evidence which have persuaded the MHRT to make the order should be included. It is appropriate that the MHRT acknowledge the person's own concerns so that they know that they were heard and understood, even if their view has not prevailed. Where possible, the MHRT can offer some praise for the person concerned and their steps towards recovery and some suggestion of optimism for the future.[39]

Conclusion

Serious mental illnesses can cause intense distress, as well as the disruption of the ordinary patterns of life. This distress can be compounded by being required to accept psychiatric treatment. The processes of the MHRT aim to offer a person in these circumstances the opportunity effectively to put forward their views about the need for compulsory mental health treatment. The MHRT hearing offers independent, expert, impartial scrutiny of these decisions and is the ultimate arbiter of whether compulsory treatment needs to continue. That in itself should offer reassurance to the person who is the subject of that decision.

Of course, we should not be too self-congratulatory. MHRT hearings will not alleviate the distress of mental illness. But the MHRT certainly endeavours not to make that distress more acute.

The power imbalances inherent in a Tribunal hearing mean that ensuring an impartial and transparent process is as important as the ultimate decision. The maxim that 'Not only must Justice be done; it must also be seen to be done' must be the MHRT's guidepost.

Endnotes

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27 *Mental Health Act 2007* (NSW) ss 27, 27A.
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34 In 2014–15, one per cent of patients at a mental health inquiry were discharged by the MHRT. At subsequent MHRT reviews of involuntary patients, 0.03 per cent of patients were discharged by the MHRT. The MHRT refused to make a Community Treatment Order in only 0.01 per cent of cases. See Mental Health Review Tribunal of New South Wales, above n 15.
35 Carney et al, above n 1, 91.
36 See also Freckleton, above n 16, 47.

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THE APPLICATION OF ADMINISTRATIVE LAW PRINCIPLES TO TECHNOLOGY-ASSISTED DECISION-MAKING

Katie Miller*

Last year, the National Public Radio of the United States produced an online calculator which predicted the likelihood of certain jobs being replaced by robots or technology.[1] The calculator is based on research by the University of Oxford,[2] and it has some good and bad news for the legal sector. On the bright side, lawyers are less than four per cent likely to be replaced entirely by robots. On the downside for those who aspire to judicial office, judges have a 40 per cent chance of being replaced by robots.

As with all of these online calculators, quizzes and other devices that make it easy to procrastinate, the calculator was far from comprehensive. Much to my chagrin, but hardly surprisingly, common roles in the administrative law world were not covered — roles such as complaints and integrity bodies, merits reviewers and first-instance administrative decision-makers. More's the pity, because, while robot judges grab all of the attention, they are still some way off from being a reality. Compare that to the position of administrative decision-makers: technology has been assisting and, in some instances, replacing decision-makers for over a decade now.[3]

Administrative law is concerned with the powers and functions of the state.[4] However, that law has developed in the context of state powers and functions exercised through human agents — ministers, secretaries and public servants. Technology presents the opportunity to exercise state powers and functions through a non-human agent.

This article applies administrative law principles to technology-assisted decision-making to explore whether technology-assisted decision-making is capable of achieving the same administrative law outcomes as human-only decision-making and to identify possible pitfalls and challenges to administrative law in its ability to regulate the exercise of state power. The article ends with some suggestions to governments that are designing, implementing and using technology-assisted decision-making to do so in a way that upholds and enhances the objectives of administrative law.

What is technology-assisted decision-making?

Like all good administrative decision-makers, I begin by defining the scope and limits of my function — namely, the parameters of my field of inquiry.

'Technology-assisted decision-making' is the label I use to describe the use of technology to assist a human decision-maker to make an administrative decision. I have considered both cognitive computing technology (such as IBM's Watson[5]) and traditional rule-based technology. 'Technology-assisted decision-making' encompasses some of the systems that have been described elsewhere as 'automated systems'[6] or 'expert systems'.[7]

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In its 2007 *Automated Assistance in Administrative Decision-Making: Better Practice Guide*, the Australian Government identified a 'hallmark' of an 'automated system' as 'its ability to examine a set of circumstances (data entered by the user) by applying "business rules" (modelled from legislation, agency policy or procedures) to "decide" dynamically what further information is required, or what choices or information to present to the user, or what conclusion is to be reached'.[8]

In its 2004 report *Automated Assistance in Administrative Decision Making*, the Administrative Review Council (ARC) found that expert systems could be used to:

- make a decision;
- recommend a decision to the human decision-maker;
- guide a user through relevant facts, legislation and policy, closing off irrelevant paths as they go; and
- provide a decision support system by providing commentary for the decision-maker (and, I would add, the user).[9]

My label of 'technology-*assisted* decision-making' implies that there is a human decision-maker whom the technology is assisting. As such, it does not include a system that actually makes the decision, which is included in the ARC's definition of 'expert system'. The application of administrative law principles to decisions made by technology requires closer consideration and raises difficult considerations about whether Parliament can authorise decision-making by a non-human agent[10] and the reviewability of such decisions. I leave these issues for another time and place.

I exclude from consideration the effect of big data on administrative decision-making. In this article, I have focused on technology which assists humans to make decisions, rather than technology which obtains information upon which a decision may be based. I have not considered the use of big data to make administrative decisions. I have no doubt that big data and the use of data-matching by government agencies will have a significant effect on administrative decision-making in the near future — but that too is a discussion for another day.

Who is using technology-assisted decision-making?

Technology-assisted decision-making has been used by a number of key federal agencies since as early as 2004, when the ARC report was published.[11] Most of us will have experienced some form of technology-assisted decision-making when engaging with Centrelink, the Australian Taxation Office or the Department of Immigration and Border Protection, whether it be in the form of eTax[12] (replaced this financial year with myTax[13]), a Medicare benefit claim through the Express Plus 'app'[14] or by using a SmartGate[15] when arriving in Australia.

The full extent of the use of technology-assisted decision-making is not clear and is a topic to which I will return later in this article. However, with both state and federal governments committing to 'digital transformations' of government services,[16] it is obvious that its use will only increase.

Applying administrative law principles

Which administrative law principles?

The definition of 'administrative law' and the objectives it seeks to achieve is contested and depends on 'what [we] want out of administrative law'.[17]

What I want out of administrative law are administrative decisions that are lawful, transparent and fair. This article will therefore ask whether technology-assisted decision-making promotes decisions that are lawful, transparent and fair by considering the traditional grounds of judicial review and components of administrative law relating to information, such as freedom of information (FOI) legislation and statements of reasons.

Does technology-assisted decision-making promote lawful decisions?

A lawful or authorised decision is one that is made by the right person and exercised within the limits of the relevant statute and legislative instruments.[18]

Who is the decision-maker?

Technology-assisted decision-making assumes a human decision-maker, who will need to be authorised to make the decision either by the statute conferring the decision-making power or function or through a delegation.

Technology-assisted decision-making will involve the 'shared performance of duties short of delegation'[19] — that is, the technological assistant will be '[doing] things which otherwise that person would have to do for [themselves]'.[20] This sharing of administrative functions may be authorised by the principle in *Carltona Ltd v Commissioners of Works*[21] (*Carltona*) in much the same way that that principle authorises public servants to perform routine, administrative tasks as agents of the repositories of powers.[22]

However, this would require extending the *Carltona* principle to public servants and departmental officers, who themselves may be delegates of the repository of power. The Land and Environment Court of New South Wales declined to so extend the principle in the context of human agents on the basis that the 'necessity imperative', which justifies the application of the principle to ministers, did not apply to the public servant in that case.[23]

Extending the *Carltona* principle to relieve public servants of routine or administrative functions by relying on technology assistance would involve an acknowledgment that, although it is not impossible for public servants to perform administrative functions personally, there is a limit on the executive's ability to hire more public servants to perform those functions. As such, the rationale for the *Carltona* principle would need to be extended to recognise efficiency as well as necessity.[24]

Courts will be more likely to so extend the *Carltona* principle if technology-assisted decision-making preserves 'accepted accountability structures'.[25] These structures may be challenged if technology is used to unbundle a decision-making process, such that separate people or systems are responsible for different parts of a decision-making process, and the decision-maker then denies responsibility for the actions taken by the technological assistant. In the circumstances, who or what is accountable for those actions? The need to avoid administrative 'black boxes'[26] which are immune from review or accountability may provide a basis for extending the *Carltona* principle to public servants in the context of technology-assisted decision-making to ensure that actions of technology assistants are attributable to a human decision-maker who can be held accountable.

Finding the limits of the power

In making an administrative decision, a decision-maker undertakes two cognitive tasks:

(1) identifying the scope and limits of the decision-making power in the individual circumstances; and
(2) evaluating the available information relevant to the criteria for the decision.

Identifying the limits of power

In respect of the first task, technology can assist by identifying:

- the correct question(s) for the decision-maker to determine, including the relevant decision-making criteria and any relevant or irrelevant considerations;
- whether any procedures or matters which are necessary preconditions to the exercise of the power have been met or exist;
- whether there exists any evidence in respect of each of the matters on which the decision-maker must be satisfied; and
- particular issues which require the decision-maker's consideration and evaluation.

By way of example, technology could assist in assessing the validity of an application made under an Act by:

- identifying the preconditions for a valid application, such as the group of permitted applicants, the form of the application, any fee required to be submitted with the application, any matters required to be addressed by the application and the time for making an application;[27]
- assessing whether those preconditions have been met; and
- identifying matters which the human decision-maker needs to consider further, such as a discretion to accept an otherwise invalid application[28] or a step required to be taken before rejecting the application.[29]

There are many other possible examples, limited only by the technological resources available to an agency. The possibilities are increased if an agency has access to cognitive computing, which is not limited to a binary assessment of compliance and can assess the extent of compliance in respect of qualitative or discretionary criteria.

In this respect, technology-assisted decision-making promotes lawful decisions because it ensures that decision-makers understand and act within the limits of their powers. These forms of assistance can also assist in the transparency of the decision because, once such matters have been identified to the decision-maker, they can be conveyed to the person affected by the decision.

Technology can also assist decision-makers with soft law, such as policy. Additional considerations are required to ensure that the technology assistance does not lead to the inflexible application of policy.

As with hard law, technology could assist in identifying the factors relevant to the policy and whether those factors are present on the facts. As such, the technology could apply the policy to the facts.

However, to ensure that soft law does not become hard through 'slavishly follow[ing] a policy and disregard[ing] the particular circumstances of a case',[30] the human decision-maker

should consider separately the question of whether the policy *should* apply in the individual circumstances of the case. To assist the human decision-maker to do so, the technological assistant should identify to the decision-maker that the guidance relates to policy, not law, and prompt the decision-maker to consider whether there are any reasons why the policy should not be followed in the specific matter.

Evaluating the limits of power

I anticipate that people will more readily accept technology assistance in identifying the limits and scope of a decision-making function and will require more persuasion about the appropriateness of technology assistance evaluating the information relevant to those limits and scope. Limits involve hard lines, which are either crossed or not, and the task of identifying those limits therefore conforms with our perception of the strength of technology — that is, applying rules with binary answers. In contrast, people may be more sceptical of technology's ability to assist in the cognitive tasks of evaluating the available information relevant to each criteria for a decision and synthesising that into an overall decision.

Nevertheless, I suggest that technology has a role to play in assisting the evaluative task. In addition to identifying the relevant questions and criteria, technology could extract and produce information relevant to those questions and criteria. Such information could be produced in formats with which we are familiar, such as a brief to the decision-maker (similar to those prepared by human public servants for human decision-makers); or new formats, such as guided decision-making 'apps' that select and filter the information that a decision-maker considers depending on their answers to a series of question. Such assistance would promote lawful decisions by ensuring that the decision-maker has all relevant information available to them, while preserving the ultimate evaluation for the human decision-maker.

Although technology assistance can *promote* lawful decisions, it cannot guarantee them. There is still plenty of scope for a fallible human decision-maker to get it wrong by, for example, drawing unreasonable inferences from the information produced, bringing a biased mind to the decision, or failing to follow the (lawful) guidance produced by the technology assistant. The risk that a human decision-maker will, despite technological assistance, make an unlawful decision is the inevitable consequence of relying on a human decision-maker. The more we limit the scope for the human decision-maker to bring their own mind to an issue or decision, the more we approach the domain of technology replacing the decision-maker.

Technology can assist in mitigating the risk of flawed consideration of the relevant information. For example, big data presents opportunities to identify trends and outliers in administrative decision-making, which could be used by decision-makers to reflect on the reasonableness of their decisions before finalising them.

I conclude that technology-assisted decision-making *can* promote lawful decisions. The question then is: *will* it? To answer this question, I turn to the principle of transparency.

Does technology-assisted decision-making promote transparent decisions?

The doctrine of the separation of powers means that it is for the courts, and not the executive, to determine whether a decision has been lawfully made.[31] An assertion by the executive that the decision was lawfully made will not make it so.

Applying this reasoning to technology-assisted decision-making, it is not enough for the executive to claim that it is using, or will use, technology in a way that promotes lawful

decisions. There must be information available upon which the courts, integrity bodies and the public can assess this question for themselves. Put another way: you may say that technology has assisted you to make a lawful decision, but how do I know that?

Transparency in administrative decision-making is advanced through statements of reasons, review (judicial and merits), and proactive and reactive release of information through FOI legislation and requirements to produce annual reports.

Statements of reasons

Statements of reasons can both enhance and diminish transparency in technology-assisted decision-making. On the one hand, statements of reasons are an opportunity to disclose the existence of the technological assistance. On the other hand, technology can become the pinnacle of 'institutionalised processes for producing reasons',[32] which fail to disclose the actual reasons for the decision.[33]

Disclosing the existence of technology assistance

A statement of reasons should generally identify who made the decision.[34] In technology-assisted decision-making, where the ultimate decision-maker is human, should the statement of reasons identify both the human decision-maker and the fact that that decision-maker was assisted by technology?

In my view, such assistance should be disclosed so that the person affected and a reviewer may understand properly the decision and the reasons for it.

The rationale and strength of any technological assistance that extends beyond static commentary on legislative provisions is that it relieves the human decision-maker of part of the cognitive task of making the decision. Technology-assisted decision-making scaffolds or frames a decision-maker's consideration of the relevant issues, thereby ensuring that the right ones are considered and the irrelevant ones are not. It is therefore artificial to say that the decision reached by the human decision-maker is theirs alone; rather, it is a decision based on, or augmented by, the technological assistance provided by the technology.

Failing to disclose the technology assistant may constitute a form of misleading by omission. Unless told otherwise, most people would assume that a decision is made by the human decision-maker and that the findings in the statement of reasons were in fact made by the human decision-maker. As will be discussed below, the way in which a decision is challenged and reviewed may be affected by the existence of technological assistance. As such, it is necessary for the statement of reasons to disclose the existence of the technology assistance if the person affected is to be given a genuine opportunity to decide whether and how to challenge that decision.[35]

It may also be appropriate for a statement of reasons to disclose any findings, recommendations or conclusions offered by the technological assistant and adopted by the human decision-maker. The need for such disclosure will depend on the extent to which the human decision-maker considers and discloses the reasoning of the technological assistant,[36] as opposed to merely adopting the suggested finding.

Disclosing the existence of technology assistance also provides an opportunity for agencies to build public confidence in their decisions and decision-making processes. For example, persons affected by decisions may have greater confidence in them and be less likely to challenge them if they know that technology has assisted the decision-maker to consider the necessary questions and the information relevant to those questions.

I also recommend that statements of reasons identify the version of the technology, program or application used (for example, eTax version 2.1) and the date of that version. Agencies should publish registers of the technology used in decision-making, including the versions, dates of versions and a description of the changes incorporated in each version. This information will assist persons affected by, and reviewers of, decisions to assess the likelihood that the technological assistant incorporated all relevant legislative and policy changes.

My position that a statement of reasons *should* disclose technology assistance is strengthened by considering the contrary question: why *shouldn't* a statement of reasons disclose technology assistance?

Given that technology assistance is permissible and, in some instances, may even be desirable, it is unlikely that a decision will be successfully challenged on the fact of technology assistance alone. To the extent that disclosure leads to an increase in challenges because people do not trust the technology assistance then the problem is not one of disclosure but one of public confidence in technology-assisted decision-making. This problem will not be resolved by being secretive about the use of technology assistance; rather, the opposite is likely. Disclosure and transparency are important, if not necessary, for building public confidence in, and acceptance of, technology-assisted decision-making.

Furthermore, technological assistance is likely to increase the ease of disclosing findings of fact, the information on which those findings are based and the reasoning process. The technological assistant will need to have identified these matters to the human decision-maker. It is not an onerous task for the human decision-maker or the technological assistant to record these matters in a statement of reasons.

Better decisions — or just harder to challenge?

The use of template or standard paragraphs in decisions has already given rise to a concern that such templates 'cloak the decision with the appearance of conformity with the law when the decision is infected by [error]'.[37] The use of technology assistance in the preparation of statements of reasons may produce a similar concern that technology will provide a facade of accuracy and objectivity that masks flawed decisions. This concern is essentially one that technology assistance will not lead to decisions that are *in fact* better but will merely enhance the *appearance* of a lawfully made decision.

This concern can be mitigated if agencies ensure that they do not utilise technology assistance only for the task of preparing statements of reasons. Technological guidance and assistance will be of greater utility before a decision is made than afterwards. Technology assistance should be designed to produce an audit trail which can be used to develop a statement of reasons, either by the human decision-maker or by another technological assistant.

Review of technology-assisted decisions

Technology-assisted decision-making presents challenges for both judicial and merits review. The challenges for judicial review are largely matters of evidence and efficiency. The challenges for merits review are more significant and may even raise questions about the utility and purpose of merits review.

Merits review

On one view, technology assistance at first instance will have little effect on the merits review function, especially since the reviewer is not bound by the original decision.[38] Although the reviewer stands in the shoes of the original decision-maker and has the same powers, functions and discretions as the original decision-maker, the reviewer may inform themselves as they see fit.[39] As such, they would not be bound to take into account any findings, recommendations or conclusions offered by the technology assistant or relied upon by the human decision-maker at first instance.

Where technology has assisted the decision-maker at first instance, a question arises as to the extent to which it would be desirable for a merits reviewer to utilise the same technology assistance. Technology assistance provides the opportunity to improve the quality and accuracy of decisions while reducing the cost of making them. There seems to be little reason to provide these benefits to the first-instance decision-maker only and rely on the fallibility of human decision-making alone on review. Yet, if the same technology is used by both the first-instance decision-maker and the merits reviewer, does the scope for reaching a different view on what is the 'correct or preferable decision' diminish? In essence, does technology assistance reduce the need for, and utility of, merits review?

Another alternative is that merits review bodies could develop their own technology to assist in decision-making. This may be an attractive option for high-volume jurisdictions such as the Victorian Civil and Administrative Tribunal. However, this alternative may lead to different technology assistance on the same statutory functions and powers. The efficiency of such an approach appears doubtful.

The effect of technology-assisted decision-making on merits review is something that deserves further consideration by observers, commentators, agencies and merits reviewers. When developing technology assistance, agencies should look beyond their own organisations and consult with the bodies that may be called upon to review the merits of decisions made with the assistance of that technology.

Judicial review

Technology-assisted decisions are *capable* of being judicially reviewed. Such review may be more difficult and expensive because of the need to engage with, and understand, what the technology is doing.

When reviewing any administrative decision, a court essentially considers the following fundamental questions:

- What did the statute require?
- Was that in fact what occurred in this decision?

This comparison of what was required and what was in fact done will still be possible, even where technology has been used to assist the decision-maker.

However, as anyone who has acted for a party to a judicial review proceeding knows, such proceedings are rarely determined in as neat and simplistic a fashion. Often, it is necessary to consider in great detail (but, of course, not with an eye attuned to error) the procedure adopted by the decision-maker and their reasoning process. The statement of reasons is ordinarily the primary evidence of such matters. Yet a statement of reasons may not be sufficient to identify an error in technology-assisted decisions.

It is at this point that technology-assisted decision-making begins to look a bit more complicated than the human-only variety. Where some of the procedure or reasoning process has been embedded in technology, understanding what was done and why may require a court to look underneath the graphical user interface (GUI) and peer at the code beneath. At this point, most lawyers will start to feel somewhat squeamish.

Considering how a technology program or 'app' has been coded to assist a decision-maker may require additional evidence, including evidence from expert witnesses. It is likely that such additional evidence would have consequences for the length and expense of judicial review proceedings.

The following example illustrates the evidentiary issue. Consider a technology 'app' that guides a decision-maker through a statutory test, including consideration of any interpretation provided by case law. The human decision-maker would be relieved of the need to consider independently the interpretation of the statutory test. Such consideration has been done by another person long ago when the technology was coded. If the statutory test was misconstrued when the technology was developed then that misconstruction could taint any decision made with the assistance of the technology. Revealing such an error may require, at worst, consideration of the code or programming of the technology or, at least, consideration of the business rules used to instruct the programmer who developed the code. Most judicial officers and lawyers would be unlikely to be able to comprehend code without the assistance of an expert witness.

Freedom of information

Transparency in decision-making can also be achieved through FOI legislation. In addition to the right to obtain information pursuant to a request, most FOI statutes require agencies to publish information regarding policies, procedures and guides used in administrative decision-making.[40]

On one view, this obligation does not extend to technology used to assist decision-making, as the technology is simply the digital form of the rules prescribed by statute, regulations and policy. If the source of the rules is published (which they generally are) then it would not be necessary to publish their digital format.

The other view is that the obligation does extend to technological assistants, on the basis that technological assistants are greater than the sum of the legislation, regulations and policy upon which they are based. As such, technological assistants may constitute guidance that is separate from, and additional to, the guidance found in the constituent policies and other instruments.

Even if the obligation does not apply, it would be open to individuals to request information about the technological assistants, especially the business rules used to develop the code and possibly the code itself. Given the broad definitions of 'document' found in FOI legislation,[41] it is likely that both the business rules and the code itself would be 'documents' for FOI purposes.

The question then is whether agencies would seek to rely on any exemptions in respect of the business rules or code of the technological assistant.

Early indications are that they may. For example, in *Cordover and Australian Electoral Commission*[42] (*Cordover*), the Administrative Appeals Tribunal upheld the Australian Electoral Commission's (AEC) refusal to release the code of a computer program which is used to read and count Senate ballot papers in which the vote is recorded below the line.

The AEC successfully claimed that the code was a 'trade secret' on the basis that the same code and program were used for the AEC's fee-for-service functions, such as conducting elections for private organisations.[43]

It is unlikely that agencies engaged in administrative decision-making will face the same tension as the AEC between its fee-for-service functions and its public functions, in part because of the nature of most agencies' ordinary functions. As such, the precedential value of *Cordover* may be limited to its specific facts.

Alternatively, it may be a sign of things to come. Although the trade secrets exemption may not be available in respect of the source code of technological assistants to other agencies, there are other exemptions that could be pursued. For example, an agency may seek to rely on exemptions relating to the deliberative processes of agencies by claiming that the code or business rules on which the code is based constitute 'opinions, advice or recommendations' to a decision-maker and that disclosure would be contrary to the public interest.[44]

The issue of who benefits from technology-assisted decision-making is explored further by considering whether it promotes decisions that are fair.

Does technology-assisted decision-making promote fair decisions?

Technology-assisted decision-making presents some challenges to the actual and perceived fairness of decisions and, as such, the public's acceptance of this form of decision-making. In particular, who should have access to technology used to assist decision-makers; and are decisions made with the assistance of technology sufficiently independent?

Access to the technology

It is now recognised that public sector information is a public resource. As that information becomes more complex and voluminous, the value in public sector information (and, indeed, any information) is not just the information itself but also efficient means of accessing and understanding it.[45]

Technology assistance provides a more efficient means of accessing and understanding information relevant to administrative decision-making. Agencies and decision-makers are not the only parties to benefit from this information. Citizens can also benefit from accessing this information to understand efficiently their rights and responsibilities.

Technology assistance has the potential to exacerbate or ameliorate the natural information asymmetries that exist between government and citizen. If access to technology assistance is limited to agencies, the asymmetries will be exacerbated, while extending access broadly will reduce those asymmetries. Increasing information asymmetries would be inconsistent with the general trend in administrative law since the 1970s to provide more access to public sector information.[46]

In addition to principles of fairness, open public sector information and democracy, there are economic reasons for providing equal access to technology assistance to agencies and citizens alike. Just as government uses technology assistance to reduce the cost of each administrative decision made, so too will the citizen seek to reduce the cost of each interaction with government. The resources saved can be employed by government and citizen alike in more economically productive activities.

The form in which the technology assistance is provided may be different for the citizen and public servant — in particular, it is not necessary to provide citizens with access to software

used internally within an agency. However, the business rules used to develop a technological assistant for decision-makers can equally be employed to develop an externally facing or citizen-facing 'app', such as a self-assessment tool. Such tools already exist on several agencies' websites, including those of the Australian Taxation Office[47] and the Department of Human Services.[48]

There are opportunities to enhance and improve the format, quality and usability of the guidance provided by citizen tools. In particular, tools which provide an answer, but not the reasoning, can have limited utility; in essence, the 'what' is provided, but not the 'why'. Similarly, as decision-makers already know, guidance provided in large PDF documents are not as helpful as dynamic guidance which shows only the information that is relevant to the user's circumstances and changes based on answers given to previous questions. Ideally, agencies should provide to citizens guidance of a similar format, quality and usability as that given to decision-makers.

There may be operational reasons why agencies will seek to maintain information asymmetries and not share the technology assistance provided to decision-makers. This is most likely to arise in agencies with regulatory and enforcement functions in respect of the investigative methods use to discharge those functions. Such information is already protected to ensure that the effectiveness of those methods is not diminished.[49]

Independence and transparency of decision-making

Public acceptance of government decision-making depends on, amongst other things, the independence of a decision-maker and whether decisions are made in public or private.[50] If it is not designed well, technology assistance could undermine or reverse some of the confidence in administrative decision-making that has been built over the years.

Technology-assisted decision-making must confront and deal with the inevitable perception that technology will be less independent than a human being. Since technology must be created, maintained and operated by someone (that is, an agency), it is often thought of as subordinate to or controlled by that person. Indeed, the alternative is generally undesirable — that is, a machine that escapes its programming and wreaks havoc on human society.

In administrative law, an uncontrollable assistant or decision-maker is undesirable given that decision-makers have limits on their statutory functions and powers and they must stay within those limits. Yet, within those limits, human decision-makers must bring their own minds to the decision, independently of their supervisors within the agency.[51] How can a technological assistant programmed by an agency be independent of that agency?

On one view, in the context of technology-*assisted* decision-making, it is not necessary for the technology to be independent, because it is not making the decision. As long as the human decision-maker brings an independent mind to the decision, independence is achieved. However, this view relies on the artifice that, in technology-assisted decision-making, the guidance provided by the technological assistant and the decision made by the human are separate and independent.

As discussed earlier, technology assistance augments and shapes the human decision-making process. One of the possible strengths or benefits of technology-assisted decision-making is that technology navigates a human decision-maker to the 'correct or preferable decision'. However, this also raises the concern that what is 'correct or preferable' will be determined by the agency when it programs the technology rather than by the human decision-maker when they consider a particular decision.

Agencies may not agree that this concern is reasonable or rational, but that does not mean that it does not exist. Ignoring the concern will not address it in the minds of persons affected by decisions or the public. If the concern goes unaddressed then it will affect public confidence in decisions made with the assistance of technology.

Concerns about the independence, integrity and accuracy of technology assistance can be managed with transparency, not just in the individual decision but also in the management of technology-assisted decision-making generally. In particular, an agency should be transparent about the extent to which it is using technology-assisted decision-making. It can do so in the context of individual decisions by, as I have suggested, disclosing the technology assistance in statements of reasons.

Agencies can also publish information about the use of technology assistance on their websites and in their annual reports. Agencies already publish information about the services that citizens can use online. However, such information is generally limited to functional guidance about how the citizen engages with the online service. There is little information about what happens to the information once submitted by the citizen and, in particular, if the online service is integrated with technology assistance 'behind the scenes'. Publishing such information will allow public debate and scrutiny of technology-assisted decision-making to ensure that it is being used in a way that enhances, rather than undermines, the quality and integrity of administrative decision-making. Failing to do so will breed resentment and suspicion about 'black boxes'[52] being created by government.

Conclusion and suggestions for success

My conclusion is that technology *can* promote lawful and fair decisions — if it is designed to do so. However, whether technology in fact results in lawful and fair decisions depends on transparency about technology-assisted decision-making — the fact of its use; how it is used, designed and updated; and who has access to it. Without this transparency, technology-assisted decision-making could undermine public confidence in administrative decision-making or make it difficult and/or expensive to review administrative decisions.

Like all technology, technology-assisted decision-making presents enormous opportunities to improve our current practices. To increase the prospects of technology-assisted decision-making promoting, rather than undermining, administrative law principles, I suggest that agencies consider the following matters when developing, using or reviewing technology assisted decision making:

(1) *Be clear about why you are using technology-assisted decision-making.* The objectives of efficiency and reducing costs are valid ones, but they are not the only considerations relevant to administrative decision-making and should not be pursued at the expense of the objectives of lawful, fair and transparent decisions. As with all technology projects, designing a technological assistant to provide lawful, fair and transparent decisions will be more efficient than trying to retrofit the system later or defending the system in a court proceeding.

(2) *Be clear about who will benefit from technology-assisted decision-making.* Administrative decision-makers may be the end users of technology assistance, but they are not the end users of the government activity.[53] Design technology assistance so that it assists both decision-maker and the person affected — in terms of understanding the information relevant to a particular decision and the reasons why a particular decision was made.

(3) *Be transparent about your use of technology-assisted decision-making.* Let the public know that your agency is using technology-assisted decision-making and publish information about the applications used (including the relevant versions). Agencies should be proactive by publishing information on their websites, in their annual reports and in statements of reasons. Just as government draws on the expertise of the legal community before implementing significant law reform, agencies should consider drawing on the expertise of the 'tech' community by releasing the code for new technological assistants and exposing it to testing and scrutiny of people other than courts.[54]

(4) *Build your technology assistance so it can be reviewed.* At some stage, someone will want to review the technological assistant — it is just a part of being in government. Agencies should design technological assistants so they can be reviewed by Ombudsman, merits reviewers and judicial reviewers.[55] Just as policy manuals use footnotes to reference the source of particular guidance, agencies should brief code-makers and programmers to annotate the code for the technological assistant to reference the source material, such as statutes, regulations or policy. Ensure that there is always a human in the agency who understands what the technology does and how it works. The surest way to lose control of technology is to adopt a 'set and forget' mentality. Just like human decision-makers, technological assistants need support and updating, especially following legislative changes or significant cases. If the technological assistant is ever scrutinised by a court, it may be necessary to lead evidence from a human about how the technology works.

Ensuring that technology-assisted decision-making promotes lawful, transparent and fair decisions will build public confidence and support for the use of technology in decision-making. Such confidence is necessary if government is to take the additional step of technology *making* decisions. But I leave that discussion for a future time.

Endnotes

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JURISDICTIONAL ERROR SINCE CRAIG

Kristen Walker QC*

I have been asked to address the topic 'jurisdictional error since *Craig*'. That is a daunting task — it is a very large topic, *Craig v South Australia*[1] (*Craig*) having been decided in 1995. Much has happened in the field since then. It could be the subject of a PhD — or a single sentence. I think if I had to pick a sentence it would be 'It's all about the statute'.

What is the significance of *Craig*?

Craig is often the starting point in discussions of jurisdictional error. But it is not and cannot be the end point. If we are considering 'jurisdictional error since *Craig*' then, of course, we need to understand what happened in *Craig.* Why is *Craig* our starting point? What did *Craig* say about jurisdictional error and why is it so significant?

Craig concerned a decision of the District Court of South Australia (an inferior court) to stay criminal proceedings based on the principle in *Dietrich v The Queen*[2] (*Dietrich*). It thus seems an unlikely foundation or starting point for understanding jurisdictional error more generally in the context of administrative decisions.

The Crown sought certiorari in relation to the stay and the South Australian Supreme Court concluded that the judge had made a jurisdictional error. The matter went on appeal to the High Court, which concluded that the trial judge had made no jurisdictional error or error of law on the face of the record.

In reaching that conclusion, the Court unanimously made various observations about the nature of jurisdictional error in the context of administrative bodies in contrast to inferior courts. It is those remarks that have proved influential in the development of jurisdictional error.

Craig also marks the point at which Australian administrative law diverged so fundamentally from UK administrative law in deciding not to apply *Anisminic Ltd v Foreign Compensation Commission*[3] (*Anisminic*) to an inferior court or to accept that the distinction between jurisdictional error and non-jurisdictional error should be abolished.

The key remarks about jurisdictional error in *Craig* were as follows (and are worth quoting in full):

> In considering what constitutes 'jurisdictional error', it is necessary to distinguish between, on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ.
>
> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. … [C]onstitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to

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> confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
>
> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.[4]

From these passages I argue that *Craig* has two particularly important aspects:

(1) It reminds us that the nature of jurisdictional error may be different as between inferior courts on the one hand, and tribunals on the other.
(2) It tells us something about the scope of what constitutes a jurisdictional error for each type of body.

In particular, the articulation in *Craig* of the kinds of errors that are jurisdictional in nature when committed by an administrative body, rather than a court, has come to be seen as the starting point for identifying those errors said to be jurisdictional in nature. But, as later decisions have made clear, the list in *Craig* is not exhaustive and the categories of jurisdictional error are not closed.

In this article I will discuss four developments since *Craig*:

(a) the constitutionalisation of review for jurisdictional error;
(b) the nature of jurisdictional error;
(c) the consequences of jurisdictional error; and
(d) the differences in this area of law between administrative bodies and courts.

Constitutionalisation of judicial review

Judicial review for jurisdictional error is now constitutionally entrenched in Australia. At the federal level this occurs as a consequence of s 75(v) of the *Constitution*. The constitutional entrenchment of review of federal administrative decisions on the basis of jurisdictional error was recognised in *Plaintiff S157/2002 v Commonwealth*,[5] where the High Court held that a privative clause was ineffective to prevent review by the High Court for jurisdictional error. This is now well established and I will not discuss this development in detail.

At state level it was long thought that state privative clauses were able to exclude juridical review more effectively than federal privative clauses given the lack of a strict separation of powers (although state privative clauses remained liable to be read down by the courts).[6] However, in 2010, the High Court decided *Kirk v Industrial Relations Commission of New South Wales*[7] (*Kirk*). *Kirk* is one of the most significant post-*Craig* developments in relation to jurisdictional error.

Kirk concerned the conduct and outcome of a trial in the Industrial Relations Commission of New South Wales (IRC). Mr Kirk was convicted of certain offences after a trial at which he was called by the Crown to give evidence. The relevant legislation designated the IRC a 'superior court of record' and contained a privative clause purporting to protect its decisions from review. The High Court held, nonetheless, that the IRC had committed a jurisdictional error and set aside its decision. Of particular relevance was the approach the Court adopted to the privative clause. In summary, it held as follows:[8]

(1) The Supreme Courts of the states are expressly referred to in ch III of the *Constitution*. It is beyond the legislative power of a state to alter the character of its Supreme Court such that it ceases to meet the constitutional description. As a consequence, certain defining characteristics of Supreme Courts cannot be removed by the states.
(2) A defining characteristic of state Supreme Courts (ascertained by reference to the powers of those courts prior to federation) is the power to confine inferior courts and tribunals within the limits of their authority by granting prohibition, mandamus and certiorari on grounds of jurisdictional error.
(3) A state privative clause that purports to remove the Supreme Court's authority to grant relief on the ground of jurisdictional error is beyond power because it purports to remove a defining characteristic of the Supreme Court of the state.
(4) If a court has limited powers and authority to decide issues of an identified kind, a privative clause does not negate those limits on that court's authority. This is so even in relation to review of a statutory court styled a 'superior court of record'. Thus *all* state courts are subject to Supreme Court supervision and the legislature cannot avoid that supervision by providing that a court is a superior court.
(5) Although *Kirk* concerned a court, its principles were expressed to apply also to Supreme Court supervision of executive decision-making.

In light of these conclusions, the joint judgment pointed to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context.[9] Thus jurisdictional error is now fundamental to the judicial review powers of the Supreme Courts in the same way that it has been fundamental to the High Court and other federal courts. Thus it becomes important to understand what a jurisdictional error is, how we can identify one in the wild, and what the consequences of finding a jurisdictional error are.

Development of grounds that constitute jurisdictional error

One can see in the quotation from *Craig* above that certain kinds of error have been identified as jurisdictional in nature for administrative bodies:

(a) identifying a wrong issue;
(b) asking the wrong question;
(c) ignoring relevant material;
(d) relying on irrelevant material;
(e) *in some cases*, making an erroneous finding or reaching a mistaken conclusion:
  (i) making an erroneous finding could encompass mistakes as to jurisdictional facts;
  (ii) and also perhaps a no-evidence ground of review, either generally or perhaps in relation to 'critical facts' — the authorities are mixed (and there is some suggestion in obiter remarks in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[10] that this would be so only in relation to jurisdictional facts);
  (iii) reaching a mistaken conclusion could encompass legal unreasonableness — a concept developed recently in *Minister for Immigration and Citizenship v Li*[11] (*Li*).

In *Craig* itself, although not in the quoted passages, the Court also identified two other forms of error that can form the basis for issuing a writ of certiorari and would now be understood to involve (or lead to) jurisdictional error:

(a) failure to observe some applicable requirement of procedural fairness;[12] and
(b) fraud.

To these categories one might now add, for administrative bodies:

(a) irrationality or illogicality, to the extent that they are regarded as different from unreasonableness and noting the debate on that question;
(b) mistaken denial of jurisdiction;
(c) failure to deal with an integer of a claim;
(d) bad faith;
(e) improper purpose; and
(f) acting under dictation / inflexible application of policy.

Some of these are perhaps refinements of 'asking the wrong question' or 'identifying a wrong issue' — but they are now often considered as standalone grounds of review.

It may also be noted that anterior decision or error, even by a person other than the decision-maker, can lead to a jurisdictional error on the part of the decision-maker. This was most recently seen in a decision of the High Court in *Wei v Minister for Immigration and Border Protection*.[13] In that case a university had failed to upload data about a student to a departmental computer system, in breach of a statutory obligation to do so. The Minister's delegate cancelled the plaintiff's student visa because he was not satisfied that the plaintiff was enrolled in a course. A majority of the High Court held that the university's breach of its statutory duty caused the delegate to make a jurisdictional error.

But there must remain, of course, some errors that are not jurisdictional in nature. Below are two examples of legal errors that may be non-jurisdictional:

(1) A real example is a failure to comply with a statutory provision requiring the decision-maker to give reasons. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*,[14] concerning a decision to cancel a visa and a statutory obligation to give reasons for such a decision, the High Court held that a breach of the requirement to give reasons was not a jurisdictional error in relation to the cancellation decision. Mandamus would lie to enforce the duty to give reasons — but certiorari did not lie in relation to the cancellation decision.
(2) A hypothetical example is one I have drawn from an article by Jeremy Kirk:[15] a statute provides that a body can make a decision if it advertises its proposed decision in a newspaper for at least 14 days prior to the decision being confirmed. The body misunderstands the meaning of '14 days' and includes the day the decision is made as opposed to 14 clear days. This is a legal error. But it may not be a jurisdictional error (depending upon the particular statute and context).

And, of course, there are errors of fact. Generally, errors of fact are not jurisdictional in nature and decision-makers are 'authorised to go wrong' — at least in relation to non-jurisdictional facts and subject to the no-evidence ground.

If an error is jurisdictional then it can be said that the body has failed to exercise the jurisdiction conferred on it — either by actually declining to make a decision or constructively, where in a factual sense a decision is made but an error means that the body failed to exercise the jurisdiction conferred on it. Many of the jurisdictional errors from *Craig*

and later cases reflect the concept of 'constructive failure to exercise jurisdiction' — 'when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form'.[16]

But the High Court has made it clear that any list — whether it be the list in *Craig* or a longer one developed incrementally through judicial decision-making — is not exhaustive.[17] As the joint judgment in *Kirk* observed, 'It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error. … The reasoning in *Craig* … is not to be seen as providing a rigid taxonomy of jurisdictional error'.[18]

It is apparent in the cases decided since *Craig* that all the 'grounds' of administrative review are directed to ascertaining whether the decision-maker has exercised the jurisdiction conferred by the statute. That is, the better way to understand jurisdictional error as it has developed since *Craig*, at least in the context of a decision authorised by statute, is as a label or conclusion in relation to an error that involves a breach of some statutory requirement, where Parliament intended that breach would give rise to invalidity. (I note, but put to one side, the conundrum of non-statutory decisions and what kinds of error might be jurisdictional error for such decisions — non-statutory decisions are rare and are not the focus of my article).

This concept is neatly encapsulated in the following statement by McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf*:

> What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.[19]

This understanding of jurisdictional error puts the statutory context front and centre — one can only determine whether a decision-maker has made an error, and whether any error is jurisdictional, by construing the statute that conferred the power so as to understand the limits of that power. Thus statutory construction is the key to most administrative law and to identifying jurisdictional error.

This was already recognised in relation to some of the traditional *Craig* grounds — for example, relevant and irrelevant considerations:

(1) What is relevant or irrelevant is determined by reference to the statute, not simply logic or the views of the judge.[20]
(2) Whether procedural fairness is required, and if so what it requires, is understood to be a matter of statutory construction, albeit with a starting point that decisions that affect rights and interests require procedural fairness and clear words are required to exclude procedural fairness for such decisions.
(3) The issues to be identified and the question to be asked and answered will be determined by the statutory provisions understood in context.
(4) Whether facts are jurisdictional will be determined by a process of statutory construction.
(5) Improper purpose will be determined by reference to the statute, including its objects and purposes.
(6) Parliament is presumed to intend powers to be exercised reasonably — so the ground of unreasonableness is tethered to the statute and what is unreasonable is determined by reference to the statute. As the joint judgment put it in *Li*:

> The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.[21]

And so on, for each of the traditional, *Craig* and post-*Craig* errors.

But that is not to say that the traditional grounds should be abandoned. I consider them to be useful analytical tools. In this regard, I agree with Perry J of the Federal Court,[22] who has said (extrajudicially) that the traditional grounds can also affect the process of statutory construction. That is, they provide guidance as to the kinds of issues to be addressed in construction. For example:

(1) If the statute is being construed to determine whether procedural fairness is required then clear words of necessary intendment would be required to exclude it.
(2) If the statute is being construed to determine what matters the statute requires the decision-maker to consider then attention will be focused on whether any such matters are express; and whether any such matters might be implied from the text, context and purpose of the legislation.

But the traditional grounds are not to be regarded as freestanding requirements that must always be complied with by all decision-makers.

Ultimately, a finding of jurisdictional error is a conclusion that the decision-maker has failed to comply with an essential precondition to or limit on the valid exercise of power.[23] It is an error that leads to invalidity. That is determined by reference to the statute. Of course, this leaves room — one might say considerable room — for the courts to determine which preconditions or limits are essential and lead to invalidity and which are not and do not.

I note in passing that discussions of this kind often refer to *Project Blue Sky Inc v Australian Broadcasting Authority*[24] (*Project Blue Sky*), decided in 1998 (not long after *Craig*). That case is certainly of assistance in the task of statutory construction with which we are concerned, but, interestingly, the judgments did not use the phrase 'jurisdictional error'.

The consequences of jurisdictional error

If a purported decision is affected by jurisdictional error, it is regarded as no decision at all. It is a nullity. The principal current authority for this statement is *Minister for Immigration and Multicultural Affairs v Bhardwaj* [25] (*Bhardwaj*), although there are other authorities to that effect. [26]

In *Bhardwaj* the IRC purported to make a decision in relation to Mr Bhardwaj in September, when he failed to attend a hearing. The IRC had been notified that he was unable to attend, but this notice had not reached the particular member constituting the IRC. After it realised what had occurred the IRC held a hearing and in October it made a different decision in relation to Mr Bhardwaj. The High Court held that the September decision was affected by jurisdictional error; thus the IRC was not *functus officio* when it made the October decision. As a consequence, in law the October decision was the IRC's *only* decision.

In *Bhardwaj*, Gaudron and Gummow JJ (McHugh J generally agreeing) said this:

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. *A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.* …[27]

There is some debate as to whether this reflects a majority approach to the consequence of jurisdictional error — in my view it does, but it must be read in light of what preceded it and what followed it. In particular, attention must be given to the following passages from the reasons of Gaudron and Gummow JJ:

> [O]nly if the general law so requires or the Act impliedly so directs, are decisions involving jurisdictional error to be treated as effective unless and until set aside.
>
> …
>
> There being no provision of the Act which, in terms, purports to give any legal effect to decisions of the Tribunal which involve jurisdictional error, … it is necessary to consider whether, nevertheless, the Act should be construed as impliedly having that effect.[28]

Similar remarks were made by Gleeson CJ[29] and by Hayne J.[30]

That is, notwithstanding the general proposition that a decision affected by jurisdictional error is no decision at all, a majority of the judgments in *Bhardwaj* contemplated a situation in which a purported decision which is affected by jurisdictional error may be treated as having some legal effect until it is set aside.

This is because a statutory regime may impose legal consequences on the *fact* that a (purported) decision was made, as opposed to the making of a valid decision. As Perry J has put it, 'the bare fact that a decision has been made may provide the factum' upon which another decision may be made, or consequences may flow, which does have legal effect on rights and liabilities.[31]

This understanding of *Bhardwaj* was reflected in the Full Federal Court decision in *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*, where Gray and Downes JJ said this:

> *Bhardwaj* cannot be taken to be authority for a *universal proposition* that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever. All that it shows is that *the legal and factual consequences of the decision, if any, will depend upon the particular statute*.[32]

This approach avoids some of the problems associated with an absolute theory of invalidity, which would appear to leave people free to ignore a decision affected by jurisdictional error, even before such error has been determined by a court.

This approach — that is, a second exercise in statutory construction, after jurisdictional error has been found, to see if nonetheless the infected decision has some legal consequences — has, however, been said to undermine the conclusion that an error is jurisdictional in nature.[33] It has been suggested that a conclusion that a purported decision has some effect really means the error in question was not jurisdictional.

I do not think that this criticism is correct. That is, the existence of jurisdictional error permits a court to set aside a decision — but, at least until the decision is set aside, it is open to Parliament to give the fact of the making of the decision some legal consequences. Of course, however, a purported decision could only have some legal effect if the relevant Act provided for it to do so.

If a purported decision is affected by jurisdictional error, it will therefore be necessary to determine whether, despite the jurisdictional error, the Act under which it was made requires that it be given (some) legal effect until set aside.

This line of reasoning also raises questions about the application of the doctrine of *functus officio* in relation to decisions infected by jurisdictional error — and the power of a tribunal that would otherwise be *functus officio* to remake its decision in the absence of any court order quashing its first (infected) decision. That is, if an administrative body thinks it made a jurisdictional error, can it treat its own decision as a nullity and proceed to decide again?

In that regard, the statement of Gleeson CJ in *Bhardwaj* is of assistance, again directing us to consider whether or not the statute provides for a decision to be remade:

> The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration. And the statutory scheme, including the conferring and limitation of rights of review on appeal, may evince an intention inconsistent with a capacity for self-correction. … The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by statute? What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal may revisit the exercise of its powers …?[34]

A useful illustration is the registration of a person as a medical practitioner under the law regulating health practitioners:[35]

(1) If a person is not registered, it is a criminal offence for them to hold themselves out as a medical practitioner.
(2) If a person was registered but the Medical Board had made a jurisdictional error in doing so, the decision is, on the *Bhardwaj* approach, legally a nullity and could arguably be ignored or remade or be quashed on judicial review.
(3) But I would argue that while the person was purportedly registered they committed no offence by holding themselves out as a medical practitioner (assuming no fraud on their part).
(4) And, I would suggest, if the registration decision was quashed for jurisdictional error, that would not mean that the person had previously committed a criminal offence — that is, the registration decision can have legal consequences even though it has been quashed.
(5) This conclusion is reached through a process of statutory construction and, of course, turns on particular features of the statutory scheme for registration of medical practitioners.

Differences between administrative bodies, inferior courts and superior courts

Differences in the tests

The second paragraph in the passage from *Craig* quoted above suggests that inferior courts, although they are subject to review for jurisdictional error, nonetheless have jurisdiction to go wrong — so that the kinds of errors that are jurisdictional for administrative bodies are not jurisdictional for inferior courts. For example, taking into account irrelevant considerations or failing to consider relevant considerations may not constitute a jurisdictional error.

However, some parts of the joint judgment in *Kirk* suggested that the distinction between courts and administrative bodies was unhelpful:[36]

(1) Such a distinction may be unhelpful at state level because it can be difficult, in some cases, to distinguish between an administrative tribunal and a court. In the absence of a strict separation of powers, administrative and judicial functions may be mixed

together in the one body at state level and a body may be called a tribunal and yet be a court.

(2) Because inferior courts are amenable to certiorari, it is difficult to say that they can 'authoritatively' decide questions of law — and questions of their own jurisdiction — in the way that a superior court can.

Nonetheless, *Craig* clearly articulated a difference in the notion of jurisdictional error as between inferior courts and tribunals, and other parts of the joint judgment in *Kirk* referred to and relied upon the distinction as articulated in *Craig* — and the differences in the kinds of error that are jurisdictional. That is, the High Court did not clearly depart from the distinction drawn in *Craig*; indeed, it appeared to apply it, although it may be that the differences are fewer than was previously thought.

The consequences of jurisdictional error for courts

The question of the *consequences* of a jurisdictional error is an area where there may be thought to be some difference in the outcome as between superior courts, inferior courts and administrative bodies.

In *Kirk* the joint judgment acknowledged the tension between two important principles — finality, on the one hand; and the need to compel inferior tribunals to observe the law, on the other. These pull in different directions. And, in the context of criminal trials, and judicial proceedings more generally, the doctrine of *functus officio* is well established — once a judgment is entered it cannot, generally, be recalled and revisited (although there are, of course, some statutory exceptions to this.)

In *DPP v Edwards*[37] (*Edwards*) the Victorian Court of Appeal split on the question of the consequences of a jurisdictional error committed by an inferior court. In *Edwards* the County Court made a sentencing order that, on any view, it had no power to make. It had misunderstood the scope of its power. But it had sentenced the offender and the sentence had passed into the record. The Court then purported to set aside the first sentence and impose a fresh sentence. Could it do so or was it *functus officio*?

Chief Justice Warren held that the County Court was not *functus officio* and could correct its error. Her Honour addressed three key questions:

(1) Was the County Court's error jurisdictional in nature? She held that it was. The Court had 'misconceived the extent of its powers', to use the language of *Craig*.

(2) If it was, at common law does an order of an inferior court affected by jurisdictional error nonetheless have sufficient legal effect to trigger the *functus* doctrine? Her Honour held that it did not, relying on the reasoning of Gaudron, Gummow, McHugh and Hayne JJ in *Bhardwaj* but with reference to the particular circumstances of inferior courts.

This was because inferior court orders made in excess of jurisdiction generally lack legal effect — in contrast to orders of a superior court, which have legal effect unless and until set aside. This distinction between the effect of the orders of inferior and superior courts is reflected in numerous High Court cases.

One example was *Pelechowski v The Registrar, Court of Appeal*,[38] where a majority of the High Court held that an injunction purportedly granted by the District Court of New South Wales was a nullity and it was not a contempt to breach it. The majority

quoted from *Attorney-General (NSW) v Mayas Pty Ltd*[39] — a decision of the New South Wales Court of Appeal:

> If an inferior tribunal exercising judicial power has no authority to make an order of the kind in question, the failure to obey it cannot be a contempt. *Such an order is a nullity. Any person may disregard it.* Different considerations arise, however, if the order is of a kind within the tribunal's power but which was improperly made. In that class of case, the order is good until it is set aside by a superior tribunal. While it exists it must be obeyed.[40]

I note, too, that this contrast between orders of an inferior court and orders of a superior court was reiterated by Gageler J in *New South Wales v Kable*,[41] decided after *Edwards*:

> There is, however, a critical distinction between a superior court and an inferior court concerning the authority belonging to a judicial order that is made without jurisdiction. A judicial order of an inferior court made without jurisdiction has no legal force as an order of that court. One consequence is that failure to obey the order cannot be a contempt of court. Another is that the order may be challenged collaterally … In contrast:
>
> 'It is settled by the highest authority that the decision of a superior court, even if in excess of jurisdiction, is at the worst voidable, and is valid unless and until it is set aside'.[42]

(3) If at common law the Court was not *functus officio*, had the Parliament altered the position so as to give the purported order sufficient legal effect to attract the operation of the *functus* doctrine? Her Honour concluded that there had been no statutory alteration of the common law position that would give some legal effect to a County Court order vitiated by jurisdictional error.

Thus Warren CJ held that the original sentence was a nullity and it was open to the County Court to re-sentence the offender.

In contrast, Weinberg and Williams JJ held that the County Court could not impose a fresh sentence — it was *functus officio* and the fact it had made a jurisdictional error in the first sentence did not affect the operation of the *functus* doctrine. In this regard they overruled the 1972 decision of the Court of Appeal in *R v Bratolli*.[43]

Somewhat curiously, Weinberg and Williams JJ relied upon the judgments of Gleeson CJ and Kirby J in *Bhardwaj* in preference to the joint judgment of Gaudron and Gummow JJ (and McHugh J agreeing). Chief Justice Gleeson and Justice Kirby do not constitute a majority; in fact, Kirby J was in dissent.

Although there are differences in the reasoning between the majority and the minority, and their approach to the doctrine articulated in *Bhardwaj*, to some extent the difference in outcome stems from the different views taken about the question of statutory construction. That is, a different view was taken about whether the applicable statutory regimes evinced a legislative intention that a sentence of the County Court should have legal effect until set aside, even if infected by jurisdictional error. This is, of course, a question on which reasonable minds might differ.

Further, there are persuasive policy arguments on both sides of this case. On the one hand, there is obvious force in the proposition that, once made, a judicial order, whether of a superior or an inferior court, should not be treated as a nullity, for that would allow a person subject to such an order simply to ignore it. Could a person sentenced to a term of imprisonment simply leave the prison and not be guilty of escaping custody?[44] This approach also leads to uncertainty for those subject to orders or charged with carrying them out.

On the other hand, to recognise a power of self-correction where a court realises it has made a jurisdictional error has practical benefits in removing the need for a formal appeal or judicial review. It is a power that would be exercised by judges, judicially, and there is some merit in permitting that course. This has been recognised in other states that have clear statutory provisions dealing with the correction of error by inferior courts. Indeed, the *Sentencing Act 1991* (Vic) has now been amended to give the courts of Victoria the same power.[45]

Conclusion

Although jurisdictional error is at the heart of Australian administrative law, there are some aspects of administrative law where jurisdictional error is not required, and it is worth bearing these in mind. The first is statutory review for non-jurisdictional error, such as review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The second is the availability of injunctive and declaratory relief in the absence of jurisdictional error.

In this regard there is, in my view, an under-explored and under-utilised proposition in *Project Blue Sky* that, although the programming standard at issue in that case was not invalid, nonetheless declaratory or injunctive relief may be available to preclude the decision-maker acting unlawfully in the future:

> Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. … A person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.[46]

And in fact the Court made a declaration that the standard was unlawfully made.

Other examples are *Ainsworth v Criminal Justice Commission*[47] and *Plaintiff M61/2010E v Commonwealth*[48] — two cases where the High Court held that certiorari was not available but granted declaratory relief.

I want to finish with a passage from *Kirk*, quoting Professor Jaffe:

> denominating some questions as 'jurisdictional' is almost entirely functional: it is used to validate review when review is felt to be necessary ... If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified.[49]

Returning to the idea of jurisdictional error summed up in one sentence, perhaps the one sentence is not 'It's all about the statute' but, rather, 'How bad was the error?'.

Endnotes

1 (1995) 184 CLR 163.
2 *Dietrich v The Queen* (1992) 177 *CLR* 292.
3 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
4 (1995) 184 CLR 163, 176, 179–80 (emphasis added).
5 (2003) 211 CLR 476.
6 See, for example, *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, where Gummow and Gaudron JJ stated that 'provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle'.
7 (2010) 239 CLR 531.
8 Ibid [55].
9 Ibid [100].

10 (2004) 207 ALR 12.
11 (2013) 249 CLR 332.
12 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351, 374 (Mason J); see also the discussion in *Kirk* (2010) 239 CLR 531, [76], [106]–[107].
13 [2015] HCA 51.
14 (2003) 216 CLR 212.
15 Jeremy Kirk, 'The Concept of Jurisdictional Error' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 11, 13.
16 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [51].
17 Ibid [82].
18 (2010) 239 CLR 531, [71]–[73].
19 (2001) 206 CLR 323, [82].
20 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
21 (2013) 249 CLR 332, [66].
22 Melissa Perry, 'The Riddle of Jurisdictional Error: Comment on Article by O'Donnell' (2007) 28 *Australian Bar Review* 236.
23 Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139, 152.
24 (1998) 194 CLR 355.
25 (2002) 209 CLR 597.
26 See *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 242–3 (Rich, Dixon and McTiernan JJ); *Posner v Collector for Inter-State Destitute Persons (Vict)* (1946) 74 CLR 461, 483 (Dixon J); *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473, 483 (Gibbs J); *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338, 349–50 (Wilson, Deane and Gaudron JJ); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–15 [51] (Gaudron and Gummow JJ). See also *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420.
27 (2002) 209 CLR 597, 614–15 [51] (emphasis added; citations omitted).
28 Ibid 614–15 [50], [54].
29 Ibid 614–15 [51].
30 Ibid 604–5 [12]–[13] (Gleeson CJ); 647 [153] (Hayne J).
31 Perry, above n 22, 341.
32 (2003) 145 FCR 1, [42] (emphasis added).
33 See, for example, Stephen Forrest, 'The Physics of Jurisdictional Error' (2014) 25 *Public Law Review* 21, 29.
34 (2002) 209 CLR 597 at [8].
35 This kind of statutory context (though not this particular fact scenario) was dealt with by Nettle JA in *Kabourakis v Medical Practitioners Board* [2006] VSCA 301 — although in that case there was no jurisdictional error. His Honour's reasoning is, as would be expected, instructive.
36 (2010) 239 CLR 531, [69]–[70]; see also discussion in Leeming, above n 23, 141–2.
37 [2012] VSCA 293.
38 (1999) 198 CLR 435.
39 (1988) 14 NSWLR 342.
40 Ibid 357 (McHugh JA).
41 (2013) 298 ALR 144, [56].
42 Ibid, quoting *Cameron v Cole* (1944) 68 CLR 571, [59].
43 [1971] VR 446.
44 An example given in *Edwards* [2012] VSCA 293, [225].
45 See s 104B.
46 (1998) 194 CLR 355, [100].
47 (1992) 175 CLR 564.
48 (2010) 243 CLR 319.
49 At [64].

THE CONCEPT OF THE 'SAME IN SUBSTANCE': WHAT DOES THE PERRETT JUDGMENT MEAN FOR PARLIAMENTARY SCRUTINY?

Ivan Powell*

In 2015 an action was brought in the Federal Court to challenge the validity of a legislative instrument — the *Family Law (Fees) Amendment (2015 Measures No 1) Regulation 2015* (Cth), which set the rate of certain Family Court fees (*Perrett v Attorney General of the Commonwealth of Australia*[1] (*Perrett*)).

The validity of the instrument was challenged on the basis that it was 'the same in substance' as a previously disallowed instrument and had been remade within six months of that disallowance, contrary to s 48 of the *Legislative Instruments Act 2003* (Cth) (LIA).[2] However, the application was dismissed on the basis that s 48 'should be construed as requiring that, in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure'.[3] A subsequent appeal of the decision was discontinued on 5 February 2016.[4]

In a number of material respects, the Federal Court's interpretation of the concept of 'the same in substance' may be regarded as in conflict with the earlier and authoritative decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)*[5] (*Women's Employment Case*). *Perrett* therefore raises issues central to the Senate Standing Committee on Regulations and Ordinances' (the R&O committee) scrutiny of delegated legislation raising 'same in substance' questions, as well as to the broader concepts of parliamentary sovereignty and accountability which inform the work of Senate committees.

This article explores the parliamentary and legislative history of the 'same in substance' concept, the tensions between *Perrett* and existing High Court authority, and the way in which the Senate and the R&O committee could seek to respond to the implications of the *Perrett* decision in examining 'same in substance' issues in future. More generally, the article demonstrates the persistent tension between parliamentary oversight of the exercise of legislative power by executive governments and the way in which parliamentary scrutiny principles interact with legal standards and requirements.

Nature of executive law-making

An understanding of the implications of *Perrett* must necessarily be underpinned by an appreciation of both the nature of executive law-making via delegated legislation and the way in which the Commonwealth Parliament maintains a level of control over the exercise of its legislative power by the executive.

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The justifications for the use of delegated legislation are well rehearsed and include that its use reduces pressure on the Parliament's time and allows for technical and unforeseen matters to be dealt with appropriately and expeditiously.[6] Accordingly, Acts of the Commonwealth routinely delegate the Parliament's legislative power to ministers and other office holders, who may make instruments of delegated legislation that become enforceable as the law of Australia without needing the approval of the Parliament. The delegation of legislative power may be expressed broadly, as in the case of general regulation- and rule-making powers; or relatively constrained, as in the case of Acts which allow for specific matters to be determined (an example would be, as in the case of the *Perrett* instrument, an Act providing that the executive may set fees for the provision of particular services).

According to *Odgers' Australian Senate Practice* (*Odgers'*), up to half of the body of Commonwealth law comprises delegated legislation,[7] and this ubiquity underscores the fact that its use is both well accepted and largely unremarked as a feature of modern legislative practice. However, from a parliamentary perspective, it is important to maintain an appreciation that executive-made law is, in a fundamental sense, inherently undemocratic. As *Odgers'* states:

> [The use of delegated legislation] … has the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government.[8]

Odgers' goes on to note, however, that the Parliament's primacy as the legislature is effectively preserved via a system of control based on the power of either House of Parliament to disallow (that is, to veto) instruments of executive-made law.[9]

Parliamentary control of executive law-making

Historical context

At the Commonwealth level, the establishment and development of an effective system of parliamentary control of executive law-making occurred early in the life of the new Commonwealth Parliament. In contrast to the present-day unconcern with the delegation of the Parliament's legislative power to the executive, the broader context of the era was one in which significant debates occurred about the consequences of delegated legislation for parliamentary supremacy and democratic accountability. As noted by Dennis Pearce and Stephen Argument, the exercise of legislative power by the executive (that is, the Crown) in fact 'underlay much of the disputation between the English Parliament and the Crown in the seventeenth century' and, with the ascendancy of the Parliament, led to a 'quiescent period of legislative activity on the part of the executive that lasted until the nineteenth century'.[10]

However, by the early years of the Commonwealth Parliament, and in the decade preceding the establishment of the R&O committee in 1932, the greater use of delegated legislation had seen 'public and parliamentary concern' leading to consideration of 'parliamentary procedures to ensure that the exercise of regulation-making power became an active subject of parliamentary scrutiny and liable to a measure of control'.[11] This was underlined by parallel developments in the UK during that period, which included the publication by the Lord Chief Justice of England, Lord Hewart, of a work on the dangers of delegated legislation, entitled *The new despotism* — a title which unsubtly conveys the undemocratic character of executive-made law; and the resulting inquiry into ministers' powers by the Donoughmore Committee on the Powers of Ministers, whose report provided both a significant technical exposition of the nature and justification for the use of delegated legislation and recommendations intended to provide a framework for its use and oversight by the (UK) Parliament.

As recounted in *Odgers'*, at this time in Australia the Senate, coincidentally, had established a select committee to inquire into the matter of establishing standing committees of the Senate on 'statutory rules and ordinances'.[12] The report of the select committee recommended the establishment of the R&O committee, which was duly established in accordance with a resolution of the Senate following the election of 1931.[13]

Prohibition on making regulations the 'same in substance' as disallowed regulations

The establishment of the R&O committee complemented an earlier innovation of the Senate that had also reflected the general appreciation of the problems of delegated legislation and the concomitant need for direct parliamentary control of such legislation. This was the inclusion in the *Acts Interpretation Act 1904* (Cth) (AIA) of the requirements for the gazettal and tabling of instruments of delegated legislation and, critically, the provisions providing for their disallowance by the Parliament.[14] The ability to disallow instruments of delegated legislation has since been, and remains, the key controlling feature of the Commonwealth Parliament's oversight of executive-made law.

For the R&O committee, the ability to recommend that the Parliament disallow any instruments of delegated legislation that offend its scrutiny principles has been and remains a well-established practice that has ensured that its expressions of concern about delegated legislation have a persuasive character. Indeed, in the roughly 85 years of the R&O committee's existence, the Senate has not failed to act on a recommendation of the R&O committee to disallow an instrument of delegated legislation.[15]

However, at the time of, and in the background to, the Senate select committee's consideration of the need for a committee specifically to oversee delegated legislation, a significant controversy unfolded that threatened the efficacy of the Parliament's disallowance power. As recounted by *Odgers'*, the Senate's disallowance of regulations made by the Scullin government under the *Transport Workers Act 1928* (Cth) was frustrated by the prompt remaking of the regulations and the refusal of the Senate's petition to the Governor-General not to approve the remade regulations on the basis that they were the same in substance as the disallowed regulations.[16] This petition was no doubt necessary given the absence of a statutory prohibition at that time.

Clearly, the ability of the executive to avoid disallowance by simply remaking disallowed regulations represented a significant hollowing out of the disallowance power and, in 1932, the Parliament acted promptly to restore the efficacy of the disallowance provisions of the AIA. The amendment prohibited remaking of disallowed regulations within six months of disallowance or the making of new regulations 'substantially similar', unless their introduction was preceded by a motion rescinding the earlier disallowance.[17] These provisions and the related provisions for parliamentary control were retained in the LIA, which was enacted in 2005 effectively to consolidate and reform the legal framework governing the making and operation of Commonwealth delegated legislation.

A refinement that, similarly, sought to preserve the efficacy of the disallowance provisions was introduced in 1937, following observations by a member of the House of Representatives that a motion for disallowance effectively could be circumvented if it was simply left unresolved at the conclusion of the disallowance period.[18] To avoid this, a provision was inserted in the AIA to provide that, in the event of any such unresolved notice, the regulations would be deemed to have been disallowed.[19] *Odgers'* notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.[20]

The introduction of the same in substance prohibition, and other provisions to preserve the efficacy of the disallowance power, thus must be recognised as critical elements of the

Parliament's control and oversight of executive-made law via disallowance. More generally, the evolution of the procedural and legal architecture of committee scrutiny coupled with the disallowance power reveals the inherent tension of the delegation of the Parliament's legislative power to the executive and the potential for the diminution of the Parliament's democratic and sovereign nature where the executive is able effectively to circumvent the Parliament's control of delegated legislation.

Judicial consideration of the 'same in substance' concept

The Women's Employment Case

As the preceding account shows, the same in substance prohibition has existed on a statutory footing since its inclusion in the AIA in 1904. As described in Pearce and Argument, the principal judicial consideration of the 'same in substance' concept since that time occurred in the High Court's judgment in the *Women's Employment Case*.[21] In this case, a declaration from the court was sought that regulations made under the *Women's Employment Act 1942* (Cth) were invalid because they were the same in substance as previously disallowed regulations, in contravention of s 49 of the AIA (in which the same in substance prohibition was then contained).

The Court heard two views as to the correct interpretation of the same in substance provisions. First, it was argued that it prevented only the remaking of regulations that, while having a different legal form or expression, were *identical* in substance or legal effect to a disallowed regulation. Secondly, it was argued that it prevented the remaking of regulations that, regardless of form, had a substantially the same, although *not the identical*, legal effect as a disallowed regulation.

In the most extensive consideration of the interpretation of the provision, by Latham CJ, his Honour clearly preferred the second view in finding that:

> in order to give any practical effect to the section, it should be construed … [as meaning that it] prevents the re-enactment by action of the Governor-General, within six months of disallowance, of any regulation which is *substantially the same as the disallowed regulation in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation*.[22]

Similarly, McTiernan J stated:

> a new regulation would be the 'same in substance' as a disallowed regulation if, *irrespective of form or expression, it were so much like the disallowed regulation in its general legal operation* that it could be fairly said to be the same law as the disallowed regulation.[23]

The brief consideration of the question by Rich J stated that 'in making the necessary comparison [to determine whether a regulation was the same in substance as a previous one] *form should be disregarded*'.[24]

Justice Williams stated that the provision required 'the court to *go behind the mere form of the regulations and ascertain their real purpose and effect*'.[25]

These statements regarding the interpretation of the provision appeared consistent with one another, as well as with Latham CJ's identification of the principle of the same in substance prohibition as being to ensure that 'no Government can exercise a legislative power against an objection of either House'. The focus on the substantive or general legal operation was therefore necessary to ensure that the prohibition could not, in practice, be circumvented by the making of minor changes to the legal effect of a disallowed regulation:

> The adoption of this view prevents the result that a variation in the new regulation which is real, *but quite immaterial in relation to the substantial object of the legislation*, would exclude the application of s 49.[26]

For the same reason, Latham CJ stated that, where a new set of regulations covered the same issues as were included in a disallowed set of regulations but also included new material, the new regulations would still offend the same in substance prohibition and therefore be of no effect.[27]

Further, Latham CJ noted that the court 'should not hesitate to give the fullest operation and effect' to s 49. While the question of whether a new regulation was the same in substance as a disallowed regulation would often be a 'question of degree, upon which opinions may reasonably differ', in the event of a court finding a regulation to be invalid, the Parliament retained the power to rescind the earlier disallowance resolution to allow the making of the later regulation. His Honour stated:

> No decision of the court that one regulation is the same in substance as another regulation can prevent the disallowing House from giving effect to a contrary opinion if it wishes to do so.[28]

Chief Justice Latham's focus on the substance or legal effect of the remade regulation, and his willingness to give the same in substance provision its 'fullest operation and effect', was particularly apparent in relation to his finding that a regulation which provided that, notwithstanding the disallowance of one of the previous regulations by the Parliament, 'decisions preserved by or given under that previous regulation should continue to have full force and effect'.[29] Chief Justice Latham held:

> So far as this [later regulation] … operated in relation to these decisions, it operated in defiance of the disallowance, because it preserved in full future operation everything that had been preserved by or done by virtue of the disallowed regulation. Thus it was in the whole of its operation the same in substance, that is, in legal operation, as the disallowed rule.[30]

The Perrett case

A straightforward reading of the judgments in the *Women's Employment Case* suggests that a majority of the Court interpreted the same in substance provision as rendering invalid a regulation that produces substantially the same result as a disallowed regulation, even though its legal effect might include immaterial differences (or possibly even new matters) in comparison to the disallowed regulation. By interpreting the operation of the provision in this way, the Court ensured that its practical effect was congruent with its animating principle of ensuring that the executive cannot exercise its delegated legislative power against the express objection of the Parliament.

This understanding of the judgments in the *Women's Employment Case* was apparent in the R&O committee's inquiries in relation to the instrument the subject of the challenge in the recent Federal Court judgment of Dowsett J in *Perrett*.[31] In this case, the government had sought to increase by regulation (the first regulation) a number of family law fees from 1 July 2015. The regulation would:[32]

- increase the full divorce fee in the Federal Circuit Court from $845 to $1195 (a $350 increase);
- increase the fee for consent orders from $155 to $235 (an $80 increase);
- increase the fee for issuing subpoenas from $55 to $120 (a $65 increase);
- increase all other existing family law fee categories (except for the reduced divorce fee) by an average of 10 per cent; and
- introduce a new fee of $120 for the filing of amended applications.

Following the disallowance of the first regulation by the Senate on 25 June 2015, on 9 July 2015 the Attorney-General made the *Family Law (Fees) Amendment (2015 Measures No 1) Regulation 2015* (Cth) (the second regulation) to:

- increase the full divorce fee in the Federal Circuit Court from $845 to $1200 (a $355 increase) and in the Family Court from $1195 to $1200 (a $5 increase);
- increase the fee for consent orders from $155 to $240 (an $85 increase);
- increase the fee for issuing subpoenas from $55 to $125 (a $70 increase);
- increase all other existing family law fee categories (except for the reduced divorce fee) by an average of 11 per cent; and
- introduce a new fee of $125 for the filing of amended applications.

The Explanatory Statement for the second instrument, noting the disallowance of the first intrument, stated that the 'Government will reintroduce those family law fee increases under the [second] Regulation with an additional $5 increase'.[33]

In September 2015, the R&O committee's report on the second regulation drew attention to the comparative quantum of the increases introduced by the two regulations (with the reintroduced fees being increased by $5 relative to the earlier increases); the characterisation of the fees as having been reintroduced following the earlier disallowance; and the remarks of Latham CJ[34] in the *Women's Employment Case*, referred to above.[35] The R&O committee thus cited the significant similarity in the effect of the instruments as the relevant context for seeking the view of the Attorney-General as to whether the second instrument was, for the purposes of s 48 of the LIA, the same in substance as the first regulation and therefore of no effect.

However, the R&O committee's report also noted the substance of the *Perrett* judgment in the Federal Court, which had been handed down on 13 August 2015. The case involved an application to declare the second regulation as being in breach of s 48 of the LIA on the basis that it was the same in substance as the first regulation. However, Dowsett J had dismissed the application on the basis that s 48 'should be construed as requiring that, *in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure*'.[36]

The R&O committee expressed the view that Dowsett J's interpretation of the same in substance prohibition, by requiring the second regulation to have been identical to the first regulation, appeared to differ in 'material respects' from the higher authority of the High Court's *Women's Employment Case* insofar as the R&O committee had understood the judgments in that case to have collectively held that the provision prevented the remaking of an instrument producing 'substantially the same, though not in all respects', legal effect as a previously disallowed instrument.

However, and perhaps unsurprisingly, the Attorney-General's response to the R&O committee's inquiries in relation to the second regulation did not seek to address the apparent contradictions of the two judgments but instead focused on *Perrett* as the 'current binding judical authority' on the interpretation of the same in substance prohibition:

> The current binding judicial authority on this issue is the decision of the Federal Court of Australia in *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834. In that matter, the Federal Court held that the second instrument was not the 'same in substance' as the first instrument. As indicated by the committee, in making this finding his Honour Justice Dowsett concluded that s 48 of the *Legislative Instruments Act 2003* should be construed as requiring that, for a legislative instrument to be invalid it must be, in substance or legal effect, identical to the previously disallowed measure (at [29]).[37]

In addition, the Attorney-General referred to aspects of Dowsett J's reasoning in support of the conclusion that the second instrument was not made in breach of the same in substance prohibition:

> In reaching this conclusion, his Honour found that the 'same in substance' is not merely 'substantially similar'. Rather, section 48 requires 'virtual identity (or sameness) between the objects of comparison' (at [29]). In *Victorian Chamber of Manufacturers v Commonwealth (Women's Employment Regulations)* [1943] HCA 32; (1943) 67 CLR 347, Latham CJ distinguished between 'substance and detail — between essential characteristics and immaterial features'. In applying this principle, Justice Dowsett stated that it is difficult to accept that any increase in fee could be described as 'detail' or an 'immaterial feature' of the measure. Rather, the amount of a fee or the proposed increase is at the heart of each measure (at [22]) …[38]

The Attorney-General also noted that the *Perrett* judgment was at that time the subject of an appeal; however, the appeal did not proceed and was ultimately withdrawn.[39]

The reasoning in *Perrett*

Substance, form and immaterial differences

While it is not the purpose of this article to provide a very detailed analysis of the reasoning in *Perrett*, some analysis of Dowsett J's judgment is necessary to highlight the difficulty in understanding it as correctly applying the authoritative principles enunciated in the *Women's Employment Case*.

The first element of Dowsett J's substantive reasoning on the question of the same in substance issue proceeded on the basis of a consideration of the judgments in the *Women's Employment Case* and, specifically, the statements of Latham CJ and McTiernan, Williams and Rich JJ, reproduced above. It was suggested that those judgments were consistent in rejecting an approach that required an instrument to be identical in substance to a disallowed instrument and preferring an approach which eschewed form as a relevant consideration in favour of assessing whether its general legal effect was substantially the same as that of a disallowed instrument (though not identical in terms of immaterial respects or perhaps even the inclusion of additional material).

However, Dowsett J regarded three members of the court (Rich, McTiernan and Williams JJ) as in fact preferring the first approach — that is, as understanding s 49 of the AIA as essentially distinguishing between substance (legal effect) and form (legal expression) and requiring that an offending instrument be 'identical in substance with a disallowed regulation'.[40] Justice Dowsett's reasoning in reaching this conclusion was somewhat elusive but appeared to turn on the characterisation of statements rejecting the relevance of form as amounting to conclusions that identical legal effect was required for the purposes of the same in substance prohibition. For example, noting Rich J's comment that 'in making the necessary comparison form should be disregarded', Dowsett J concluded that 'his Honour adopted the first of the [approaches suggested]' (that is, the requirement for identical legal effect).[41]

Similarly, Dowsett J considered McTiernan J's statement that a new regulation 'would be the same in substance if, irrespective of form or expression, it were *so much like* the disallowed regulation in its general legal operation that it *could be fairly said* to be the same law as the disallowed regulation'.[42] Notwithstanding that McTiernan J's language, which is emphasised in the quote above, appeared to fall well short of a requirement for identical legal effect, Dowsett J summarily concluded:

> Superficially, this statement might appear to be somewhat equivocal. However, in my view, it is closer to the position adopted by Rich J [that an offending instrument must be identical in its legal effect] …[43]

Justice Dowsett also cited Williams J's statements that the provision required a contextual analysis of the two instruments in question, in which the court should 'go behind the mere form of the regulations and ascertain their *real purpose and effect*'.[44] However, rather than considering the extent to which questions of 'real purpose and effect' might allow for some differences in legal effect, Dowsett J concluded that, simply because Williams J's judgment had in places distinguished between the substance and form of the new regulation (disregarding form as relevant), his Honour had also found in favour of the first approach (requiring identical legal effect).

Justice Dowsett's reasoning thus led to the characterisation of Latham CJ's judgment as a minority view on the question of the correct interpretation of the same in substance prohibition. However, even in this regard, and as highlighted by the Attorney-General's response to the R&O committee, Dowsett J rejected that Latham CJ's emphasis on distinguishing between substance and detail — between essential characteristics and immaterial features — was substantively different from a distinction between form and substance, at least in cases where the legal effect of the instruments was to impose fees. Justice Dowsett stated:

> [Latham CJ's distinction between] essential characteristics and immaterial features … [may go] beyond that between form and substance, but if so, not by much, at least for present purposes. I find it difficult, in considering the First and Second Regulations, both of which impose fees, to accept that any increase in a fee … can be described as 'detail' or an 'immaterial feature' of the measure in question. The amount of the fee … is at the heart of each measure.[45]

Definition of 'the same in substance'

The second element of Dowsett J's judgment was a definitional analysis of the term 'the same in substance', which, as the term was not defined in the LIA, centred on the common meaning of the expression as rendered in dictionary definitions, including the *Oxford English Dictionary* (2nd ed) and the *Macquarie Dictionary* (5th ed). As Dowsett J characterised the applicants (and Latham CJ) as 'tacitly' treating the term 'the same in substance' as meaning 'substantially similar', the thrust of this exercise was to determine whether there was a difference in the meaning of the two terms (that is, 'same' and 'similar'). If any such difference were to exist, the meaning of the actual phrase in the legislation would necessarily prevail.[46]

This starting point appears problematic as, first, it unnecessarily changed Latham CJ's formulation (that is, 'substantially the *same*', though not in 'immaterial' respects) to the phrase 'substantially *similar*', which reduced the concept of 'sameness' to 'similar-ness' and removed from all consideration the question of the materiality or nature and quality of any differences in the legal effect of an impugned instrument. Therefore, Dowsett J's finding that the term 'substantially similar' was not coextensive with the term 'the same in substance', while correct, did not appear squarely to address the substance of Latham CJ's approach.

In addition to this problematic paraphrasing, Dowsett J's survey of the dictionary definitions of the component words making up the phrase 'the same in substance' was, unfortunately, incomplete. Justice Dowsett's analysis commenced with a survey of possible definitions for a number of isolated terms, including 'in substance', 'substantial', 'substance' and the 'same'. However, while his Honour reasonably and clearly concluded that the term 'same' means 'identical', he did not clearly identify which of a number of possible definitions of the terms 'in substance' and 'substance' was correct for the interpretation of s 48 of the LIA. While one can infer from Dowsett J's ultimate conclusion that he preferred a restrictive definition of 'in substance' — perhaps best understood as meaning the 'actual' or 'real' 'matter of a thing'[47] — it is not clear why this meaning was preferred over definitions suggesting that, for example, 'substance' means the 'essential' character of a thing 'that is such *in the main*; real

or true *for the most part*'. As definitions of this flavour clearly reflect a common usage that accommodates Latham CJ's formulation (that is, 'substantially the *same*', though not in 'immaterial' respects), Dowsett J's definitional analysis may in fact be taken as drawing into question his own conclusion that the same in substance prohibition requires that, in order to be invalid, a legislative instrument must be *identical* in its legal operation to a previously disallowed instrument.

Full operation and effect

The third and final substantive element of Dowsett J's judgment regarding the same in substance prohibition involved his consideration of the need for the court, as Latham CJ suggested, to give the provision its 'fullest operation and effect' because any finding by the court could not, in effect, bind the Parliament if it wished to 'give effect to a contrary opinion'.[48] Justice Dowsett noted:

> The task conferred upon the Court by s 48 concerns the intersection of the legislative, executive and judicial functions. Whilst it may be true, as Latham CJ said, that the Court should not hesitate to give the fullest operation and effect to legislation of this kind, the courts generally seek to avoid involvement in matters of political judgment. Disputes about whether a $5 increase in a fee is an essential characteristic or an immaterial feature, or as to whether the result of such increase is substantial or otherwise, may lead to such involvement.[49]

While Dowsett J's concern for the court avoiding involvement in political questions is understandable, the brevity of his reasoning is again problematic. This is particularly because it does not address the key element of ultimate parliamentary control that was emphasised by Latham CJ, the presence of which ensures that any factual finding by a court that an instrument is the same in substance as a disallowed instrument is unlikely to have the character of a political judgment.

Justice Dowsett's caution over the potential for involvement in political judgments also sits uncomfortably with his own statement that it was difficult for any increase in a fee to be described as an 'immaterial feature' of an instrument because 'the proposed increase is at the heart of each measure'.[50] To the extent that this finding amounted to a determination of fact regarding the materiality of the additional increases in the second regulation, it appears less as a political judgment than one concerning, in the words of Latham CJ, a 'question of degree, upon which opinions may reasonably differ'.[51]

Implications of *Perrett* for the work of the R&O committee

Effectiveness of the same in substance provisions

The tensions between the judgments in the *Women's Employment Case* and *Perrett* have significant implications for the work of the R&O committee in examining same in substance issues into the future. While matters raising the same in substance questions have come before the R&O committee relatively infrequently, its longstanding approach, in accordance with the *Women's Employment Case*, has consistently focused on the general substance or legal effect of a remade instrument, notwithstanding that the instrument is not identical to a previously disallowed instrument.

For example, in August 2015, prior to its consideration of the instrument the subject of *Perrett*, the R&O committee examined the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth), which introduced a new visa criterion for protection visas (Subclass 866) to provide that such visas could not be granted to Unauthorised Maritime Arrivals. This regulation followed the disallowance of an earlier regulation that had reintroduced temporary protection visas, which included conditions that an Unauthorised

Maritime Arrival could only be granted a temporary protection visa and could not access the protection visa (Subclass 866). Drawing attention to the same general legal effect of the two regulations, the R&O committee sought the view of the then Minister for Immigration and Border Protection as to whether the later instrument was the same in substance as the disallowed regulation.[52]

Following *Perrett*, however, the R&O committee may find it more difficult to pursue same in substance matters in cases such as this and *Perrett*, where the legal operation of an instrument is not identical to a previously disallowed instrument. Indeed, the Attorney-General's response to the R&O committee regarding the second regulation demonstrates that the requirement for identical legal effect curtails any substantive consideration of whether the legal effect of an instrument circumvents the disallowance of an earlier instrument, thereby potentially allowing the government to exercise its delegated legislative power, in the words of Latham CJ, 'against an objection of either House'.[53] As noted above, Latham CJ's judgment in the *Women's Employment Case* directly contemplated the consequences of the requirement of identical legal operation for the efficacy of the same in substance prohibition — in particular, noting that the inclusion of immaterial differences in a new instrument would be sufficient to avoid being in breach. Similarly, Latham CJ noted that the inclusion of additional matters in a previously disallowed instrument would also be sufficient to escape the same in substance prohibition and to render the provision, in practical terms, 'a complete futility'.[54]

Future approach of the R&O committee

The very real risk that the requirement for identical legal effect in the application of the same in substance prohibition could undermine the intent and purpose of s 48 of the LIA is one that the R&O committee will need to consider carefully in any future cases in which such matters arise, particularly if the executive is inclined to adopt the more restrictive interpretation of Dowsett J in any future dialogue with the R&O committee. In this regard, the R&O committee's concluding remarks on the second regulation appear to indicate that, while it will remain cognisant of legal interpretations of the same in substance prohibition, it will also continue to bring a broader range of factors to its assessments:

> The committee's examination of any 'same in substance' issues in the future will continue to take into account relevant jurisprudence on this question, as well as the broader concepts of parliamentary sovereignty and accountability which inform the application of the R&O committee's scrutiny principles.[55]

The R&O committee's reference to 'the broader concepts of parliamentary sovereignty and accountability' which inform its scrutiny principles would suggest that it retains its appreciation of the critical role that the same in substance prohibition has in ensuring the effectiveness of the disallowance power and thus in preserving the Parliament's oversight and control of the exercise of its delegated legislative powers by the executive. In this regard, it is useful to consider how the present legislative regime for delegated legislation has been informed by the work of the R&O committee in the past, and particularly the way in which it interacts with the R&O committee's scrutiny principles (as contained in Senate Standing Order 23).[56]

Interaction of the R&O committee's scrutiny principles with legal standards

With the enactment of the LIA in 2005, the provisions governing disallowance and related provisions such as the same in substance prohibition were moved from the AIA and included in the LIA as part of a comprehensive regime for the making and oversight of delegated legislation. The legislative codification of the architecture for the making and disallowance of legislative instruments in the LIA was a significant innovation, particularly because it also

placed many of the informal or conventional standards and requirements previously enforced by the R&O committee onto a legislative basis for the first time. This included, for example, the requirements for the provision of Explanatory Statements with legislative instruments and the need to provide specific information regarding the conduct of consultation in relation to the making of an instrument.[57]

The practical effect of this was to transform what were previously the R&O committee's conventional expectations around the making of legislative instruments into legal requirements, now falling within the scope of the R&O committee's first scrutiny principle, which requires that instruments of delegated legislation are made 'in accordance with statute'. The R&O committee has since assessed instruments for conformity with these legal requirements of the LIA, rather than as its expectations per se. The accommodation of the legal requirements of the LIA within the R&O committee's scrutiny principles reflects a practical concern for ensuring that, as far as possible, legislation proponents are presented with a consistent and well-understood set of scrutiny standards in negotiating the passage of instruments through the scrutiny process. However, notwithstanding the practical benefits and outcomes of the codification of so many of the R&O committee's requirements and standards via the LIA (now the *Legislation Act 2003* (Cth)), it is important to note that its mandate ultimately derives not from statute but from the principles outlined under Senate Standing Order 23. In accordance with the separation of powers, the R&O committee's duty is not merely to ensure that instruments are in conformity with relevant legal requirements but also to ensure that its scrutiny principles are not breached by instruments of delegated legislation.

A critical and sometimes overlooked consequence of this application of the separation of powers doctrine to understanding the R&O committee's work is that, while the concept of legality is strongly relevant to the R&O committee's scrutiny principles (that of ensuring that instruments are 'in accordance with statute'), mere conformity with applicable legal requirements may not, of itself, ensure that an instrument does not breach one or more of the R&O committee's scrutiny principles under the Senate Standing Orders. The R&O committee has therefore occasionally found the need to remind legislation proponents that the standards derived from its scrutiny principles are essentially distinct from the legal requirements or standards arising from such statutes as the LIA and the AIA.[58]

Legal authority versus scrutiny principles

The essential distinction that the R&O committee makes between conformity with legal requirements and the primary consideration of ensuring that instruments of delegated legislation do not offend its scrutiny principles may suggest that the R&O committee's approach to same in substance matters in future will be guided by the types of purposive considerations that were apparent in the judgments of the *Women's Employment Case*. In this respect, Latham CJ's exposition of the manner in which a requirement for identical legal effect hollows or renders ineffective the same in substance provisions appears to speak directly to the R&O committee's past application of its scrutiny principles to ensure effective parliamentary control of the exercise of its delegated legislative power. Similarly, this concern for parliamentary control echoes the historical development of the disallowance power and related measures to ensure its effectiveness, in which procedural innovations were introduced to prevent the actual or potential circumvention of disallowance by a willing executive.

In contrast, the judgment in *Perrett* — the difficulties of reconciling its reasoning with the authoritative High Court *Women's Employment Case* judgment aside — did not address the consequences of its conclusion that the same in substance prohibition requires identical legal effect. Given that these consequences could include that the same in substance

prohibition may be avoided through the introduction of minor, immaterial differences to a new instrument having the same legal effect as a disallowed instrument, it is suggested that the R&O committee will have limited scope to adopt this restrictive approach in service of its fundamental scrutiny principles.

In the event that the executive henceforth prefers *Perrett* as the correct application of the *Women's Employment Case*, there may be a need for the R&O committee to pursue future dialogue on same in substance matters in the context of its scrutiny principles rather than in a legal context in which the provision is, in practical terms, 'a complete futility'. Applying such an approach, for example, to the circumstances of *Perrett* could see the R&O committee undertaking a factual assessment of whether a $5 increase, on top of large fee increases previously introduced and disallowed, was immaterial taking into account such things as the relative difference between the amounts and the expected difference in revenue gained over defined periods. If the R&O committee were to regard it as immaterial, the fact of the earlier disallowance would enable it to conclude that the second regulation contained matter 'more appropriate for parliamentary enactment', in breach of its fourth scrutiny principle, and to make its recommendations accordingly.

Conclusion

In the fourth edition to their seminal work on delegated legislation in Australia, Pearce and Argument state that, as at the time of publication, only the Commonwealth, the Australian Capital Territory, the Northern Territory and Tasmania include provisions preventing the making of an instrument the same in substance as a previously disallowed instrument.[59]

However, the relevance of the implications of *Perrett* flow beyond just those jurisdictions which have enacted same in substance prohibitions. As the historical tensions around the delegation of the Parliament's powers to the executive demonstrate, such delegation involves an inherent and persistent tension between the need for parliaments to retain effective control of their legislative power and the desire of executive governments to exercise such powers to the fullest possible extent in implementing their policies and legislative programs. *Perrett* is a demonstration that, notwithstanding the widespread use and acceptance of the delegation of parliaments' legislative powers to the executive, there is a continued need for parliaments to oversee the exercise of legislative power by executive governments and to ensure that the necessary legal and procedural bulwarks are in place to ensure that such oversight is and remains effective.

Perrett is also instructive of the character of technical legislative scrutiny undertaken by parliamentary scrutiny committees and the interplay of legal standards with scrutiny principles. All such committees include the consideration of legal standards and requirements in their assessments of whether instruments of delegated legislation are validly and properly made, and such standards often provide a consistent and accessible benchmark that is easily referable to the scrutiny principles which are the foundation of the work of scrutiny committees. For example, human rights and administrative law standards may act as ready proxies for scrutiny principles and also provide substantial bodies of jurisprudence that can be drawn upon in service of scrutiny principles. However, *Perrett* is a reminder that, where legal standards or principles are unable to serve those deeper principles of parliamentary sovereignty and accountability, scrutiny committees must ultimately draw upon their scrutiny principles in a way that ensures and maintains effective oversight of the exercise of delegated legislative power by the executive.

In this light, while the *Perrett* judgment has cast significant doubt on the correct interpretation of the same in substance provisions, a legal resolution in the form of a further, definitive judgment of a court is not necessary for the R&O committee to be able to continue

adequately to consider any same in substance matters that arise in future. This is because it is open to the R&O committee to draw upon the lessons of history and its own scrutiny principles to interpret the same in substance prohibition in a way that preserves the effectiveness of the disallowance power which is so critical an element of the Parliament's oversight of delegated legislation.

Endnotes

1 [2015] FCA 834.
2 On 5 March 2016, the *Legislative Instruments Act 2003* (Cth) (LIA) became the *Legislation Act 2003* (Cth) (LA) due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015* (Cth). References in this article are to the LIA, which was the relevant Act for the purposes of this paper. Section 48 of the LA retained the same in substance prohibition under discussion in this article.
3 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, 29.
4 *Ting Wei v George Henry Brandis, Attorney-General of the Commonwealth of Australia* (QUD757/2015).
5 [1943] HCA 21; (1943) 67 CLR 347.
6 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 6–9.
7 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 416.
8 Ibid 413.
9 Ibid 416.
10 Pearce and Argument, above n 6, 5.
11 Evans and Laing, above n 7, 416.
12 Ibid 417.
13 Ibid.
14 Ibid 416.
15 Ibid 424.
16 Ibid 417. See also Pearce and Argument, above n 6, 205.
17 Evans and Laing, above n 7, 418.
18 Ibid.
19 Ibid.
20 Ibid 421.
21 [1943] HCA 21; (1943) 67 CLR 347.
22 Ibid 364 (emphasis added).
23 Ibid 389 (emphasis added).
24 Ibid 377 (emphasis added).
25 Ibid 405–6 (emphasis added).
26 Ibid 364 (emphasis added).
27 Pearce and Argument, above n 6, 206.
28 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 364.
29 Ibid 374.
30 Ibid.
31 [2015] FCA 834.
32 The full title of the instrument was the *Federal Courts Legislation Amendment (Fees) Regulation 2015* (Cth).
33 Explanatory Statement, *Family Law (Fees) Amendment (2015 Measures No 1) Regulation 2015* (Cth) 1.
34 [1943] HCA 21; (1943) 67 CLR 347, 364.
35 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 10 of 2015, 10 September 2015, 2–5.
36 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, 29 (emphasis added).
37 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 2 of 2016, 24 February 2016, 43–4 (the Attorney-General's letter is reproduced in full in Appendix 1).
38 Ibid 44.
39 The Attorney-General's response is reproduced in full in Senate Standing Committee on Regulations and Ordinances, above n 37, Appendix 1 (Correspondence).
40 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [18].
41 Ibid [19].
42 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 389 (emphasis added).
43 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [20].
44 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 405–6 (emphasis added).
45 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [22].

46 Ibid [23].
47 Ibid.
48 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 364.
49 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [29].
50 Ibid [22].
51 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 363.
52 The Minister's response to the R&O committee, while stating that the instrument was made in 'full cognisance' of s 48 of the LIA and that legal advice had been received in connection with the making of the instrument, did not in fact state that the instrument was regarded as not being the same in substance as the disallowed regulation. The Minister declined the R&O committee's request to receive a copy of the legal advice received. Following the disallowance of the second regulation, the R&O committee concluded its examination of the issue without it or the Minister having expressed a view as to whether the regulation should be regarded as being the same in substance as the previously disallowed regulation: see Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 9 of 2015, 19 August 2015, 15–16.
53 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 364.
54 Ibid 361.
55 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 2 of 2016, 24 February 2016, 46.
56 Under Senate Standing Order 23, the R&O committee is required to scrutinise disallowable legislative instruments to ensure that (a) they are in accordance with statute; (b) they do not trespass unduly on personal rights and liberties; (c) they do not unduly make the rights and liberties of citizens dependent upon administrative decisions not subject to review of their merits by a judicial or other independent tribunal; and (d) they do not contain matters more appropriate for parliamentary enactment.
57 See, for example, Pearce and Argument, above n 6, 96 (at 4.6), which notes that 'early steps in relation to the preparation of … [explanatory] material, in the Commonwealth jurisdiction, were largely to address the requirements of the … committee'.
58 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 1 of 2016, 3 February 2016, Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2015 [F2015L01665], 57–60. The R&O committee stated that its requirements are separate from the legal standards of the LIA and noted that, 'while the committee generally seeks to conduct its scrutiny of delegated legislation to accord with, or augment, the provisions of the LIA, the fundamental principle underpinning the committee's expectations is that of ensuring that it is able to effectively scrutinise instruments with reference to the four matters outlined in Senate Standing Order 23' (at 60).
59 Pearce and Argument, above n 6, 204.

ILLOGICALITY BY ANY OTHER NAME: THE HIGH COURT'S DECISION IN FTZK AND HOW TO USE IT

James Forsaith*

FTZK v Minister for Immigration and Border Protection[1] (*FTZK*) is a decision of the High Court, delivered just over a year ago. I think it is one of those cases where it is hard to believe that the Court really meant what it said. I will explain my perplexity by arguing that *FTZK* is a missed opportunity to settle jurisprudence on reasons and rationality in administrative decision-making and then ask whether the High Court has gone too far in its rejection of 'rigid taxonomies' in the grounds of judicial review.[2]

Who is FTZK?

FTZK is a Chinese national who entered Australia in 1997 on a temporary business visa.[3]

Later that year, Chinese authorities arrested two men on charges of kidnapping and murder of a 15-year-old boy. The two men apparently gave statements implicating FTZK. A warrant was issued for FTZK's arrest. The warrant and statements were provided to Australian authorities in support of his extradition. His co-accused were executed.[4]

Meanwhile, FTZK applied for a protection visa[5] — that is, he claimed to be a refugee. His claim fell to be assessed by reference to s 36 of the *Migration Act 1958* (Cth), which provides for protection visas for non-citizens 'in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention'.[6] It is in this context that he was assigned the acronym 'FTZK'.

FTZK's claim was refused by a delegate of the Minister, whose decision the Administrative Appeals Tribunal (the AAT) affirmed. FTZK then disappeared into the community for four years until he was apprehended and taken into immigration detention.[7]

FTZK then succeeded on judicial review of the AAT's decision.[8]

On remitter, the Refugee Review Tribunal (the RRT) made another jurisdictional error and the matter was again remitted.[9] This time, the RRT decided that FTZK was entitled to a protection visa subject to the question of whether art 1F of the United Nations *Convention Relating to the Status of Refugees*[10] (the Convention) applied. Lacking the jurisdiction to determine this,[11] the RRT remitted the matter to the Minister for further consideration.[12]

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Article 1F of the Convention provides:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that … he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee …

There being no issue that murder is a 'serious non-political crime',[13] the only issue was whether there were 'serious reasons for considering' that FTZK was responsible.[14] The Minister's delegate found that art 1F applied.[15] FTZK again sought review in the AAT.[16]

The AAT's decision

The AAT affirmed the decision under review, giving four reasons in as many paragraphs:

> First I have taken into account the allegations contained in the documents provided by the government of China …
>
> Secondly, on the basis of the evidence of the Applicant I am satisfied that he left China shortly after the crimes were committed and that he provided false information to the Australian authorities in order to obtain a visa to do so …
>
> Thirdly, I am satisfied that the Applicant was evasive when giving evidence as to his religious affiliations in Australia and China and I am satisfied that he was not detained and tortured in China as he alleges …
>
> Fourthly, I have taken into account also that the Applicant attempted to escape from detention in 2004, shortly after his application for a long term business visa was refused …[17]

Whereas the first of these reasons is based on direct evidence, the remainder are based on indirect or circumstantial evidence. Their relevance would appear to be via what is commonly referred to as 'consciousness of guilt reasoning'.[18]

The AAT then remarked:

> The conclusion I have reached is based on the totality of the evidence … it is the combination of factors which gives rise to reasons of sufficient seriousness to satisfy art 1F …[19]

Argument on review

FTZK applied for judicial review. His application was heard by a Full Federal Court.[20] He argued, in essence:[21]

- that the AAT's *reasons* contain no 'consciousness of guilt' findings;
- therefore, no such findings were made;
- therefore, reasons 2, 3, and 4 were based on material that was not *probative*;
- therefore, they were 'irrelevant considerations';
- the AAT took them into account;
- this affected the outcome; and
- therefore, the AAT fell into jurisdictional error.

The emphasised words each carry considerable jurisprudence,[22] which might have been determinative of FTZK's argument. Before we examine this jurisprudence, it is worth digressing to consider the broader 'framework of rationality' of which they are both part.

A framework of rationality

In *Minister for Immigration and Citizenship v Li*[23] (*Li*), French CJ spoke of a 'framework of rationality' that implicitly attends statutory grants of power.[24] It is required by the 'rules of reason' and includes, but is not limited to, an implicit command to exercise statutory discretions reasonably.[25]

An essential component of this framework of rationality must be a requirement to reason logically. There is, of course, nothing novel in this. For example, in *Minister of Immigration and Ethnic Affairs v Pochi*[26] (*Pochi*), Deane J said:

> There would be little point in the requirements of natural justice aimed at ensuring a fair hearing by such a tribunal if, in the outcome, the decision-maker remained free to make an arbitrary decision. … I respectfully agree with the conclusion of Diplock LJ that it is an ordinary requirement of natural justice that a person bound to act judicially 'base his decision' upon material which tends logically to show the existence or nonexistence of facts relevant to the issue to be determined.[27]

Whereas Deane J saw logicality as an incident of natural justice, in *Hill v Green*[28] Spigelman CJ saw it as a presumption of statutory interpretation:

> In my opinion, where a statute or regulation makes provision for an administrative decision in terms which do not confer an unfettered discretion on the decision-maker, the courts should approach the construction of the statute or regulation with a presumption that the parliament or the author of the regulation intended the decision-maker to reach a decision by a process of logical reasoning and the contrary interpretation would require clear and unambiguous words.[29]

What does his Honour mean by 'a process of logical reasoning'? I think these words connote basic concepts of evidence and proof which, stripped of their formal rules, are no less relevant to administrative decision-makers than they are to courts. As such, we may have regard to the basic tenets of logicality as pronounced in the latter context.

Evidence

With regard to evidence, the obvious starting point is the Uniform Evidence Law.[30] Admissibility depends on relevance, which in turn depends on rationality:

> **55 Relevant evidence**
>
> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. …
>
> **56 Relevant evidence to be admissible**
>
> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> (2) Evidence that is not relevant in the proceeding is not admissible.

Further, where the Uniform Evidence Law considers relevance as a matter of degree, it employs the concept of 'probative value':

> ***probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue …[31]

The word 'rational' is not defined in the legislation and is not squarely tackled in any case. However, the drafters of the Uniform Evidence Law had emphatically endorsed a body of

'rationalist' evidence law literature,[32] which essentially says that A is probative of B if it can be *deduced* from A that B is more likely than it otherwise would have been.[33]

Proof

Proof is all about how we reason from evidence.[34] We do so directly where a 'primary' finding of fact is a 'fact in issue' in the proceedings. Otherwise, where we must make further 'intermediate' findings, we reason circumstantially. In this context, it is common to speak of 'chains' of inferences.

It takes only one illogical inference to break a chain of inferences, with the result that it no longer contributes to proving a fact in issue. If no other chains support the fact in issue, the proof collapses. Otherwise, it is merely weakened.

In *FTZK*, as we have already seen, there were four parallel chains supporting the AAT's finding of 'serious reasons'. In such cases, it is often impossible to tell which, if any, of the chains are critical. But the AAT's remark that no one factor would suffice to constitute 'serious reasons' made it possible to debase its decision by attacking three of its four reasons. This is what FTZK set about doing.

Against this background, let us consider the two areas of jurisprudence that would appear to be most relevant to FTZK's arguments on judicial review.

Reasons

The cornerstone of FTZK's case was that the AAT's reasons contained no reference to 'consciousness of guilt'. This directs attention to the AAT's obligation to give reasons.

Section 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) provides, relevantly:

> (1) … the Tribunal … shall make a decision in writing …
>
> (2) … the Tribunal shall give reasons either orally or in writing for its decision …
>
> (2B) Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

From these obligations fall three questions:

(1) What standard is required?
(2) What are the consequences if the AAT falls short of that standard?
(3) How does one know whether this has happened — that is, how does one tell apart:
    (a) irrational reasoning that is exposed by adequate reasons; and
    (b) rational reasoning that is obscured by inadequate reasons?

The standard required

In 2006, French J (as his Honour then was) said of s 43:

> The obligations set out in s 43 are not necessarily discharged by merely setting out findings on material questions of fact, referring to the evidence on which those findings are based and then stating a conclusion. … the Tribunal will have discharged its duty under s 43 if its reasons disclose its findings

> of fact, the evidence on which they were based and the logical process by which it moved from those findings to the result in the case.[35]

More recently, in *Wingfoot Australia Partners Pty Ltd v Kocak*[36] (*Wingfoot*), the High Court said:

> The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law.[37]

Consequences

On the question of what follows from inadequate reasons, the High Court said:

> A Medical Panel which in fact gives reasons that are inadequate to meet the standard required … fails to comply with the legal duty imposed on it by s 68(2) and thereby makes an error of law. Inadequacy of reasons will therefore inevitably be an error of law on the face of the record of the Medical Panel and certiorari will therefore be available …[38]

There is no federal equivalent to s 10 of the *Administrative Law Act 1978* (Vic), which operated in *Wingfoot* to expand the 'record' of the decision to include any statement of reasons.[39] That this may affect the availability of certiorari on judicial review is no matter where, as in s 44 of the AAT Act, there is the alternative of an appeal on a question of law. *FTZK*, however, concerned a decision made under the Migration Act, which contains not only a privative clause[40] but also an express abrogation of s 44.[41]

Migration applicants must therefore show jurisdictional error.[42] This gives rise to the question of whether a failure to give reasons goes to jurisdiction.

This is a question of statutory interpretation, and the answer is probably 'no'.[43] This puts applicants in the same position as in *Re Minister for Immigration and Multicultural Affairs; Ex parte Palme*[44] (*Palme*), where the High Court said:

> Failure to provide reasons may also be reviewed in this Court and compliance by the Minister with the statutory duty may be ordered. The reasons then provided may furnish grounds for prohibition under s 75(v) in respect of the visa cancellation decision. But what is not provided for is for a prosecutor, as in this case, to bypass that earlier step utilising mandamus, and to impeach the visa cancellation decision itself for want of discharge of the duty to provide reasons.[45]

Palme is not a case that applicants tend to invoke. They probably do not suppose that the AAT will respond to judicial scrutiny by producing a set of reasons that discloses jurisdictional error.[46]

Instead, they argue that the AAT's reasons are a true reflection of its actual process of reasoning. Indeed, in *FTZK*:

> Mr Nash summarised the applicant's position by saying that the Tribunal had clearly and fully set out its reasons and those reasons disclosed that it had taken into account 'matters not probative and therefore irrelevant and ha[d] misconstrued its function'.[47]

This squarely takes us back to the question posed earlier: how to tell apart irrational reasoning that is exposed by adequate reasons; and rational reasoning that is obscured by inadequate reasons.

Where lies the error?

Applicants contending that the error lies in the reasoning often invoke statutory commands to record 'findings on material questions of fact'. These are found throughout the Migration Act and the broader Commonwealth statute book.[48]

This well-worn path follows *Minister for Immigration and Multicultural Affairs v Yusuf*[49] (*Yusuf*), in which the High Court was called upon to interpret a similar obligation in s 430 of the Migration Act, viz:

> Where the Tribunal makes its decision on a review (other than an oral decision), the Tribunal must make a written statement that:
> (a) sets out the decision of the Tribunal on the review; and
> (b) sets out the reasons for the decision; and
> (c) sets out the findings on any material questions of fact; and
> (d) refers to the evidence or any other material on which the findings of fact were based …

Chief Justice Gleeson said:

> When the Tribunal prepares a written statement of its reasons for decision in a given case, that statement will have been prepared by the Tribunal, and will be understood by a reader, including a judge reviewing the Tribunal's decision, in the light of the statutory requirements contained in s 430. The Tribunal is required, in setting out its reasons for decision, to set out 'the findings on any material questions of fact'. If it does not set out a finding on some question of fact, that will indicate that it made no finding on the matter; and that, in turn, may indicate that the Tribunal did not consider the matter to be material.[50]

The plurality said:

> The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review …[51]

Justice Gaudron said:

> if in its written statement setting out its decision, the Tribunal fails to refer to or fails to make findings with respect to a relevant matter, it is to be assumed, consistently with the clear directive in s 430 of the Act, that the Tribunal has not regarded that question as material. And depending on the matter in issue and the context in which it arises, that may or may not disclose reviewable error.[52]

All of their Honours emphasised the obligation to state 'findings on material questions of fact'. For Gaudron J, this *demands* an inference that anything not mentioned was in fact not material. For Gleeson CJ and the plurality, it supports — perhaps even compels — such an inference. But it is a matter for the court, in all the circumstances, whether to draw it.

At this point, we might recall that to not draw a *Yusuf* inference is to take the approach of the High Court in *Wingfoot* and *Palme* by:

(a) finding that the obligation to give reasons has not been fulfilled;[53] and
(b) asking what follows from this.

These are polar opposite approaches. The choice between them can affect the answer to the question of whether the decision is affected by reviewable error. Yet neither in *Yusuf* nor subsequently has the High Court given any guidance as to when each approach is to be applied. What, then, are practitioners and other courts to do when faced with a decision that appears to be amenable to either approach?

Before turning to *FTZK*, let us consider, as a comparator, the Full Federal Court case of *Minister for Immigration and Citizenship v SZLSP*[54] (*SZLSP*). In that case, the applicant claimed that he would be persecuted as a Falun Gong practitioner if he returned to China. The RRT tested this claim by asking the applicant a series of questions about Falun Gong. It later concluded that '[h]e answered none of them correctly'.[55] However, it did not set out in its reasons what the questions were, what the applicant's answers were or what it understood the correct answers to be. Also, it did not identify the textbook that it used to test the applicant.

Justice Kenny clearly identified the choice between two competing inferences:

> Had there been any 'evidence or … other material' on which the Tribunal's finding regarding the first respondent's knowledge was based, the Tribunal, aware of its obligations under s 430(1)(d), would presumably have referred to it. The inference arises that the Tribunal's decision was not based on findings or inferences of fact grounded upon probative material and logical grounds. The question is whether the Court should draw this inference, or the contrary inference that the Tribunal's finding was logically based on probative material to which it has not referred in the reasons.[56]

Her Honour noted that, unlike *Ex Parte Palme*, which involved 'a complete failure to give reasons', '[t]he Tribunal here *has* provided a written statement of reasons which to all appearances complies with s 430'.[57] Her Honour concluded:

> the choice here is between an inference that material to which the Tribunal did not refer *and which does not appear in the record* was not part of the material on which the Tribunal based its finding … and an inference that unidentified material, not mentioned in the Tribunal's written statement *and not in the record*, provided a basis for the Tribunal's finding. Having regard to s 430, the first inference is self-evidently stronger than the second …[58]

The emphasised references to the 'record' are interesting, for they take her Honour away from a strict *Yusuf* inference and some way towards the uncontroversial proposition that it is an error of law to make a finding of fact for which there is no evidence.[59]

Turning to *FTZK*, s 43(2B) of the AAT Act, which bound the AAT, contained an equivalent obligation to s 430 of the Migration Act. But *FTZK* was in a different category in that there was no doubt about the evidence base. There was clearly material before the AAT that was capable of supporting consciousness of guilt reasoning. Indeed, there had been argument before the AAT as to whether such reasoning was to be preferred.[60]

The majority, comprising Gray and Dodds-Streeton JJ, focused on what the evidence was objectively capable of showing:

> On an objective basis, all of the findings of fact stated in [70]–[72] of the Tribunal's reasons for decision are capable of showing that the applicant fled China shortly after the criminal offences had been committed, and took steps to ensure that he would not be sent back to China. The Tribunal clearly regarded these facts as demonstrating the applicant's consciousness of his guilt of the criminal offences and desire to escape from the consequences of his criminal conduct. It was unnecessary for the Tribunal to express this link in order to make it exist.
>
> …
>
> The Tribunal's failure expressly to state the basis of the relevance of factors it took into consideration thus did not rob them of objective relevance.[61]

Their Honours concluded:

> the Tribunal implicitly recognised and found that the factors in [70], [71] and [72] were relevant as evidence of flight and consciousness of guilt. The Tribunal's observations at [69]–[73] can bear no other logical construction.[62]

This is the very antithesis of a *Yusuf* inference.

We may contrast their Honours' judgment with that of Kerr J, dissenting. His Honour, like Kenny and Rares JJ in *SZLSP*, recognised the need to choose between competing inferences:

> one cannot construe what the High Court said in *Yusuf* as elevating, to a fixed rule of law, the proposition that a reviewing court must always conclude that any matter not mentioned by a tribunal was not considered by it to be material. The way a decision is expressed, read fairly and in context, will sometimes show that a tribunal has made a particular finding despite there being no mention of it in its reasons.[63]

His Honour noted the Minister's submission that he should take the latter approach in light of what had transpired before the AAT.[64] But, for his Honour, that context cut the other way:

> If the Tribunal's findings had been responsive to that dispute one would have expected the learned Deputy President to have said something about those contentions and to have stated his conclusion.[65]

His Honour concluded:

> the Court cannot place weight on mere speculation. Nothing in the text, form, structure or context of the learned Deputy President's reasons provides sufficient justification for this Court to infer that the Tribunal made findings adverse to the applicant that it did not express. There is no reason to suppose that the Tribunal did other than hear the extensive argument pressed on behalf of the Minister that such findings should be made but refrained from making them.[66]

It is difficult to imagine an approach more diametrically opposed to that of the majority.

The Full Federal Court also split (albeit the other way) in *SZLSP*, where Buchannan J, in dissent, found that the AAT had failed in its obligation to give reasons.[67]

What is splitting the Court? Whether to draw a *Yusuf* inference is a matter of degree, impression and empirical judgment. But a contributing factor must surely be the lack of guidance from the High Court as to when it is appropriate to do so.

Irrationality

Before we look at what the High Court did in *FTZK*, let us see what followed from the *Yusuf* inferences drawn by the majority in *SZLSP* and by Kerr J in *FTZK*. In particular, was there jurisdictional error and, if so, of what species?

A useful starting point is the decision of Mason CJ in *Australian Broadcasting Tribunal v Bond*[68] (*Bond*):

> in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v Maryborough Mining Warden*.
>
> But it is said that '[t]here is no error of law simply in making a wrong finding of fact': *Waterford v The Commonwealth*, per Brennan J. Similarly, Menzies J observed in *Reg v District Court; Ex parte White*:
>
> > 'Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law.'
>
> Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.[69]

This classic statement, in apprehension of what is commonly referred to as 'merits review', directs attention to the evidence base rather than actual reasoning.[70] It is a view which survives today courtesy of the decision of Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS*[71] (*SZMDS*).

SZMDS was yet another refugee case where there appeared to be a step missing in the AAT's written statement of reasons. The applicant argued that it was a jurisdictional error, on a question of jurisdictional fact, to engage in a process of reasoning that was 'irrational, illogical and not based on findings or inferences of fact supported by logical grounds'.[72] The context for this was s 65 of the Migration Act, which requires the Minister to grant a visa if 'satisfied' that the applicant meets all of the requirements, some of which are themselves expressed in terms of the Minister's satisfaction.

The applicant invoked a line of authority in which Gummow J was the common thread.[73] Sitting as Acting Chief Justice, his Honour combined with Kiefel J carefully to distinguish *Bond* as an *Administrative Decisions (Judicial Review) Act 1977* (Cth) case that was not concerned with jurisdictional fact finding:

> the first respondent does not assert any general ground of jurisdictional error of the kind disfavoured by Mason CJ where there were alleged deficiencies in what might be called 'intra-mural' fact finding by the decision-maker in the course of the exercise of the jurisdiction to make a decision. The apprehensions respecting 'merits review' assume that there was jurisdiction to embark upon determination of the merits. But the same degree of caution as to the scope of judicial review does not apply when the issue is whether the jurisdictional threshold has been crossed.[74]

SZMDS would have cemented illogicality as a ground of jurisdictional fact review were it not for Crennan and Bell JJ, who held:

> 'illogicality' or 'irrationality' sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision-maker could arrive on the same evidence.[75]

This conclusion appears to be indistinguishable from that of Mason CJ in *Bond*,[76] with the result that illogicality is not a 'ground' of judicial review so much as a waypoint to a finding of 'no evidence'. Focus shifts away from the AAT's reasoning towards the evidence that was before it — in particular, is this evidence base known and, if so, can it support the impugned conclusion?

Let us now turn to consider *SZLSP* and *FTZK*.

In *SZLSP* Kenny J, having drawn a *Yusuf* inference, went on to find that:

> On the face of the Tribunal's written statement, the Tribunal's conclusion that the first respondent's answers were not correct was not grounded in probative material and logical grounds.[77]

This involved, as part of the *Yusuf* inference, a refusal to entertain the argument — which, by definition, could not be refuted — that it was possible to reason logically from the (unknown) evidence base to the AAT's conclusions.[78]

FTZK was altogether different. As already discussed, there were four independent strands of reasoning. The first of these — the direct evidence of alleged eyewitnesses — required no intermediate findings of fact to realise its probative value. As such, it was clearly possible to reason logically from the evidence base to the AAT's decision, with the result that the judgment of Crennan and Bell JJ in *SZMDS* stood in the applicant's way.[79]

Justice Kerr dealt with this by accepting the applicant's argument that things 'lacking any probative value' were 'irrelevant considerations' that the AAT was bound not to consider.

Putting to one side the question of whether this involves an unorthodox view of irrelevant considerations,[80] it is one which necessarily captures *all* illogicality within the concept of irrelevant considerations, for a chain of inferences that includes something that is 'not probative' is, by definition, illogical reasoning.[81] As such, his Honour's judgment appears to provide a total way around *SZMDS*.

SZMDS had in fact been invoked in *FTZK* — not by the applicant but, defensively, by the Minister.[82] Justice Kerr thus acknowledged both the ground and the debate that had 'raged' as to its availability and scope.[83] But his Honour abstained from the debate, saying:

> Decisions of administrative tribunals are frequently challenged on overlapping grounds. Arguments for illogicality can overlap with those put forward to establish that a decision-maker took into account irrelevant considerations. But each of those grounds is premised on different intellectual footings. Perhaps aware of the *SZMDS* debate and wishing to avoid its complexities, Mr Nash QC, for the applicant, did not rely on illogicality or irrationality as grounds to seek review.
>
> Mr Nash confined his criticism of the Tribunal to the proposition that its reasons disclosed that it had taken into account irrelevant considerations and submitted that it had thereby misconstrued its function. The Court is required to deal with what the applicant asserted, not what he did not.[84]

The High Court decision in *FTZK*

Before turning to the High Court, it is worth taking a moment to recapitulate. The applicant in *FTZK* argued that, absent certain findings in its *reasons*, the AAT must have relied, in its *reasoning*, on matters lacking in probative value. This called for the Court to engage (as Kerr J did) with the question of whether it was appropriate to draw a *Yusuf* inference and, if so, to examine critically the AAT's reasoning in light of this inference.

The High Court, across three separate judgments, did neither of these things. However, as a prelude to this critique, let us recall the 'framework of rationality' said by French CJ, in *Li*, to attend administrative decision-making generally.

The rationality requirement

In *FTZK*, four judges derived their rationality requirement not from any general framework but from the instant statute, by reference to art 1F. According to French CJ and Gageler J:

> The requirement that there be 'reasons for considering' that an applicant for refuge has committed such a crime indicates that there must be material before the receiving state which provides a rational foundation for that inference. The question for the decision-maker, and in this case the AAT, was whether the material before it met that requirement. To answer that question in the affirmative the AAT had to demonstrate a logical pathway from the material to the requisite inference.[85]

Their Honours went on to conclude that 'the AAT's process of reasoning did not comply with the logical framework imposed on its decision-making by art 1F(b)'.[86]

Justices Crennan and Bell took the same approach:

> undoubtedly the language of art 1F(b) and the scope and purpose of the Act obliged the tribunal not to rely on irrelevant considerations when considering whether there were 'serious reasons for considering' that the appellant (who qualified for protection under art 1A(2)) had committed the alleged crimes before entering Australia.[87]

It is, with respect, no doubt true that art 1F demands reliance on probative material. But, unless there are some administrate decision-makers who properly operate outside the 'framework of rationality', it is hardly necessary so to derive such a requirement.

The reasoning

All three judgments turned on the view that there was an alternative, innocent explanation for the facts as found by the AAT. According to French CJ and Gageler J:

> No [rational] connection was made or was able to be implied from the balance of the AAT's findings with respect to the conduct of the appellant in leaving China when he did, making false statements in support of his visa applications, or giving testimony to the AAT, which it did not accept, about his religious affiliations and fear of persecution if he returned to China. Those findings are consistent with the appellant having the purpose of leaving China and living in Australia. Whether or not they evidence a consciousness of guilt of the alleged offences was not the subject of any explicit finding by the AAT. Nor … is a finding on the part of the AAT that they evidence consciousness of guilt so apparent that the finding should be implied.[88]

Justice Hayne made a similar remark:

> As already indicated, none of the three other factors relied on by the tribunal could, in the circumstances of this case, logically support the conclusion which the tribunal reached. Each of those factors was as consistent with the appellant's innocence of the crimes alleged as it was with his guilt. Each could support the conclusion which the tribunal reached only if, considered separately or in conjunction with other matters, the appellant, by that conduct, impliedly admitted guilt of the crimes alleged. But once it is recognised that the appellant was found to have a well-founded fear of persecution for a convention reason, [the factors] are as readily explained by his desire to escape from China for innocent reasons as they would be by a desire to run away from the scene of a crime.[89]

Justices Crennan and Bell also identified an 'equally probable explanation':

> Here, the tribunal took into account (and treated as determinative) the timing of the appellant's departure from the PRC, lies told by the appellant both to obtain a visa and to obtain protection under the Convention, and the appellant's conduct in escaping from detention and living in Australia unlawfully. An equally probable explanation for all of these matters is a desire on the part of the appellant to live in Australia. That desire is not unique to the appellant, particularly as he has been found to fall within art 1A(2) of the Convention. A correct application of art 1F(b) to the facts required the tribunal to ask of the evidence before it whether that evidence was probative of 'serious reasons for considering' that the appellant had committed one or more of the alleged crimes.[90]

From this common base, their Honours simply concluded that the AAT misunderstood its statutory task.[91] Justice Hayne was most emphatic:

> The reasoning of the tribunal reveals error of law. None of the second, third or fourth factors identified by the tribunal could support a conclusion that there were 'serious reasons for considering' that the appellant had committed the crimes alleged against him. They could not support that conclusion because, in the circumstances of this case, none of those three factors was logically probative of the appellant's commission of the alleged crimes. Reliance upon those factors shows that the tribunal must have misconstrued the expression 'serious reasons for considering'.[92]

Inherent in these conclusions are a *Yusuf* inference (that is, that findings not mentioned were in fact not made) and a further inference that the AAT misunderstood its task.

Ironically, however, neither inference was stated, let alone explained.

The Yusuf inference

As we have seen, failure to disclose a 'logical path' does not necessarily mean flawed reasoning. To borrow a turn of phrase from *FTZK* itself, a gap in the logical path is, prima

facie, 'as consistent' with flawed *reasons* as it is with flawed *reasoning*. The outcome of the case thus turned critically on whether to draw a *Yusuf* inference or instead infer, as in *Wingfoot*, that the AAT had failed in its duty to record its 'actual path of reasoning'.

Justice Kerr recognised this below, as did Kenny and Rares JJ in *SZLSP*. Their Honours all explained their choice at some length.

It is unclear why the High Court did not consider it necessary to identify, let alone explain, its preferred inference.[93] In the result, lower courts remain without clear guidance on when it is appropriate to draw a *Yusuf* inference.

The further inference that the AAT misunderstood its task

Having determined (apparently via a *Yusuf* inference) that the AAT's decision lacked a 'logical pathway' because it relied upon matters that were 'not probative', the further inference that it misunderstood its task appeared (in all three judgments) to follow as a matter of course.

It is worth reflecting on how extraordinary this is. In essence, the High Court concluded that the AAT reasoned illogically because it failed to realise that its statutory task required it not to do this. That is another way of saying that it interpreted its statutory task as permitting it to reason arbitrarily.

This is an almost unreal inference. Yet the High Court draws it absent any further indicia and without giving any indication as to why. This is despite the availability of what would seem to be a far more likely inference: that the AAT simply messed up.

This is, of course, what the Minister urged, noting that such want of logic would not go to jurisdiction. In written submissions, he put it thus:

> Even if the Tribunal erroneously treated some facts that were not probative as being relevant to its task … that would not indicate that the Tribunal asked itself the wrong question. It would show only that the Tribunal may have reached an incorrect answer to the right question.[94]

Of course, the only reason that this would not go to jurisdiction is *SZMDS* and, in particular, the joint judgment of Crennan and Bell JJ. Yet this case was not cited by the High Court or even by the parties in argument. Its absence was conspicuous on two levels. First, as the latest word from the High Court on the illogicality ground of judicial review, it begged consideration given that allegations of illogicality lay at the heart of FTZK's argument. Secondly, its absence from argument was all the stronger given that it had been invoked by the Minister below and then discussed at some length by Kerr J. It is as if *SZMDS* was the elephant in the room: FTZK saying nothing out of fear that it would be applied; and the Minister saying nothing out of fear, perhaps, that it would be revisited.[95]

In particular, we might have expected some reference to *SZMDS* in the joint judgment of Crennan and Bell JJ. It was, after all, their Honours who, in that case, denied illogicality an existence independent from the 'no evidence' ground of judicial review. Yet in *FTZK* their Honours effectively blessed a freestanding logicality requirement by concluding that reliance on non-probative material shows a misunderstanding of the statutory task.

Moreover, in so doing, their Honours quoted from Kerr J below as follows:

> For a reviewing court to imply or infer critical findings of fact, not expressed in the decision-maker's reasons, would … 'turn on its head the fundamental relationship between administrative decision-makers and Chapter III courts exercising the power of judicial review'.[96]

But, in the quoted passage, Kerr J was dealing with the Minister's reliance upon *SZMDS* by, in effect, doubting that it really stands for what Crennan and Bell JJ had said. Thus, in the preceding paragraph, his Honour said:

> It is not to be supposed that the Minister was submitting that, provided this Court were to be satisfied that the Tribunal had before it evidence we might think was capable of supporting the conclusion the Tribunal had reached, the reasons actually given by the Tribunal can be ignored.[97]

Justice Rares made a similar remark in *SZLSP*. Referring to the RRT's statutory obligation to set out the evidence upon which its findings on material questions of fact were based,[98] his Honour said:

> It would be an inversion of the express requirement of the Parliament for this material to be identified, if the Court excused its omission by seeking to glean from the transcript some basis to uphold the decision that the tribunal did not begin to articulate. That would be to adopt a merits review.[99]

Conclusions

FTZK was an ideal case to shed light on the difficult question of when to draw a *Yusuf* inference. Instead, the High Court stoked other difficult questions: what to infer from illogicality, and why?

FTZK's argument that the AAT relied on material that was not probative was just another way of complaining about the logic of the decision. As such, the High Court might have called a spade a spade and dealt with its own judgment in *SZMDS*.

Against this, it might be said that *SZMDS* was not raised in argument. But it is still the law. It hardly needed to be drawn to the High Court's attention and, in any event, it was there in the judgment of Kerr J below.

It might also be said (and, indeed, was said by Kerr J) that different grounds of judicial review can overlap.[100] So much can be readily accepted in principle, but the principle should not be uncritically applied to a given case. In particular, where grounds overlap, they should either produce the same result or, if they produce different results, do so for an identifiable reason. This is, first and foremost, because decision-makers need to be able to know whether they are within jurisdiction.

More generally, we might call for sensible limits on the High Court's rejection, in *Kirk v Industrial Court (NSW)*,[101] of 'rigid taxonomies'. It is one thing to embrace the concept of new, evolving and overlapping grounds by saying that it is 'neither necessary nor possible to mark the metes and bounds of jurisdictional error'.[102] It is quite another thing to tolerate — indeed, to foster — uncertainty as to what follows from particular circumstances, especially from such a general conclusion as illogicality.

Where a court (whether or not by drawing a *Yusuf* inference) concludes that a decision-maker reasoned illogically, it needs to know how to approach the question of what follows. In *FTZK*, the High Court did not explain its surprising conclusion that the AAT's want of logic reflected a misunderstanding of its statutory task. This leaves the law in a state of uncertainty whenever a decision-maker is found to have reasoned illogically from material that was capable of supporting the conclusion reached. What is the court to do, especially if

FTZK and *SZMDS* are invoked on opposite sides of argument: apply *FTZK* as the newer decision or confine it to its facts and revert to *SZMDS*?

Such uncertainty in the law necessarily carries with it unpredictability for would-be applicants who are already aggrieved by an illogical decision. This is in no-one's interests.

Epilogue: How to use *FTZK*

As we have seen, shorn of language such as 'no logical pathway' and 'not probative', the point of departure in *FTZK*, for the conclusion that the AAT misunderstood its statutory task, was illogicality *simpliciter*.[103] In theory, then, the case should have broad applicability. However, to be sure, applicants should refer not merely to illogicality but to the absence of an intermediate finding of fact. This should be 'critical' in the sense that, without it, there is no longer a 'logical pathway' to a fact in issue.

Then it remains only to argue that the decision-maker 'must' have misunderstood their statutory task. This last link is, of course, hardly intuitive.[104] This may be why *FTZK* has not often been invoked. Indeed, it seems most often to be invoked as an adjunct to *Li* in arguing legal unreasonableness.[105]

Surprisingly,[106] the purest *FTZK* argument to date appears to have come from the Minister, in *Minister for Immigration and Border Protection v Farag*.[107]

Mr Farag applied for a protection visa while he was on a student visa. This application had not been determined when his student visa expired, causing him to become an unlawful non-citizen. He was ultimately granted a protection visa and, later, he applied for citizenship.[108] On this application, his period as an unlawful non-citizen was a problem. But there was a discretion, in cases of 'administrative error', to treat it as a period in which he was a lawful non-citizen.[109] The AAT exercised this discretion because the Department had sent Mr Farag a letter containing misleading information, with the result that Mr Farag had not 'taken additional steps by way of representations' to avoid this outcome.[110]

The Minister, invoking *FTZK*, argued that the AAT had failed to make any findings about what Mr Farag might have done to avoid becoming an unlawful non-citizen had he not been misinformed by the Department's letter. This gap in its reasoning showed that it had misunderstood its statutory task.[111]

Justice Robertson rejected this argument on the facts but added that, in any event, 'the reasoning in *FTZK* turned on the meaning of art 1F(b) of the Refugees Convention, especially the words: "there are serious reasons for considering"'.[112] It is not clear whether, in so distinguishing *FTZK*, his Honour was suggesting that the source of the rationality requirement matters or, rather, denying logicality a place in the framework of rationality.

Endnotes

1 (2014) 310 ALR 1.
2 See *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 574 [73] (French CJ; Gummow, Hayne, Crennan, Kiefel and Bell JJ).
3 *FTZK v Minister for Immigration and Citizenship* [2012] AATA 312 (*FTZK* — AAT), [1]; *FTZK v Minister for Immigration and Citizenship* (2013) 211 FCR 158 (*FTZK* — FFC), 173 [62] (Kerr J); *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1 (*FTZK* — HC), 16 [58] (Crennan and Bell JJ).
4 *FTZK* — AAT [6]; *FTZK* — FFC 173 [60]–[61], [63] (Kerr J); *FTZK* — HC 16 [59] (Crennan and Bell JJ).
5 *FTZK* — FFC 173 [64] (Kerr J); *FTZK* — HC 16 [60] (Crennan and Bell JJ).
6 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A.

7 *FTZK* — FFC 173 [64]–[67] (Kerr J); *FTZK* — HC 16 [60] (Crennan and Bell JJ).
8 See *FTZK* — HC 16 [61] (Crennan and Bell JJ); *FTZK* — FFC 173 [69]–[71] (Kerr J).
9 *FTZK* — HC 16 [61] (Crennan and Bell JJ).
10 *FTZK* — FFC 174 [72] (Kerr J); *FTZK* — HC 16 [61] (Crennan and Bell JJ).
11 See *Migration Act 1958* (Cth) s 500(1)(c)(i).
12 *FTZK* — HC 16 [61] (Crennan and Bell JJ).
13 *FTZK* — AAT [8]; *FTZK* — HC 21 [78] (Crennan and Bell JJ).
14 *FTZK* — AAT [7].
15 *FTZK* — AAT [2]; *FTZK* — FFC 174 [75] (Kerr J); *FTZK* — HC 17 [62] (Crennan and Bell JJ).
16 *FTZK* — FFC 174 [76] (Kerr J); *FTZK* — HC 17 [62] (Crennan and Bell JJ).
17 *FTZK* — AAT [69]–[72].
18 See *FTZK* — FFC 170 [44] (Gray and Dodds-Streeton JJ).
19 *FTZK* — AAT [73].
20 Discussed in *FTZK* — FFC 165–66 [22]–[27] (Gray and Dodds-Streeton JJ).
21 See *FTZK* — FFC 160 [1], 164 [19] (Gray and Dodds-Streeton JJ, referring to the argument that the AAT had regard to 'irrelevant considerations'), 172 [56]–[57], 177–78 [104]–[109] (Kerr J).
22 So do the words 'irrelevant considerations', but this is beyond the scope of this article.
23 (2013) 249 CLR 332.
24 Ibid 350 [26].
25 Ibid.
26 (1980) 44 FLR 41
27 Ibid 66–7. His Honour made similar remarks in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366.
28 (1999) 48 NSWLR 161.
29 Ibid 174–5 [72].
30 The Uniform Evidence Law has now been enacted, with variations which are not presently relevant, as: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (Norfolk Island); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); and *Evidence (National Uniform Legislation) Act 2011* (NT).
31 See s 3(1) and the definition in the Dictionary at the end of each of the above enactments.
32 Australian Law Reform Commission, *Evidence (Interim)* [1985] ALRC 26, ch 11, 'Relevance'.
33 On the rationalist school see William Twining, *Rethinking Evidence* (Cambridge University Press, 2nd ed, 2006) 35–98.
34 See generally Andrew Palmer, *Proof and the Preparation of Trials* (Law Book Company, 1st ed, 2003).
35 *Secretary, DEWR v Homewood* (2006) 91 ALD 103, 111 [40]. Incidentally — on the assumption that an obligation to give reasons attends, and does not rise higher than, an obligation to give a reasoned decision — this passage suggests that logicality is indeed central to his Honour's 'framework of rationality'.
36 (2013) 252 CLR 480.
37 Ibid 501 [55] (the Court).
38 Ibid 493 [28] (the Court).
39 *Wingfoot* concerned the reasons of a Medical Panel for an opinion given under s 68 of the *Accident Compensation Act 1985* (Vic).
40 Section 474.
41 Section 483.
42 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
43 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 [68]–[70] (McHugh J). That case concerned s 430(1) of the Migration Act. His Honour considered, at [70], that the words '[w]here the tribunal makes its decision' presuppose that the AAT has already made a decision. If anything, this same presupposition is even stronger in s 43(2B) of the AAT Act. See also *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362, 387–8 [84]–[85] (Rares J).
44 (2003) 216 CLR 212.
45 Ibid 226 [48] (Gleeson CJ, Gummow and Heydon JJ); see also 228 [57] (McHugh J).
46 In *Re Minister for Immigration and Multicultural Affairs; Ex Parte Palme* (2003) 216 CLR 212, the plurality (at 224 [41]) described this as a 'prudent apprehension'.
47 *FTZK* — FFC 177–8 [109] (Kerr J).
48 See eg *Migration Act 1958* (Cth) ss 368(1), 430(1), 501G; *Administrative Appeals Tribunal Act 1975* (Cth) ss 37(1), 43(2B); *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(1); *Acts Interpretation Act 1901* (Cth) s 25D.
49 (2001) 206 CLR 323.
50 Ibid 330–1 [5]. At 332 [10], his Honour acknowledged that '[t]here may be cases where it is proper to conclude that the Tribunal has not set out all its findings' but gave no indication as to what these might be.
51 Ibid 346 [69] (McHugh, Gummow and Hayne JJ).
52 Ibid 338 [37].
53 The different results in *Wingfoot* and *Palme* show that this is just the beginning of the inquiry.
54 (2010) 187 FCR 362.
55 Ibid 366 [7].

56 Ibid 378 [50]. See also 386 [80] ff (Rares J).
57 Ibid 381 [59].
58 Ibid 381 [60] (emphasis added).
59 See eg Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, discussed below.
60 *FTZK* — FFC, 183–5 [146]–[153] (Kerr J).
61 Ibid 171 [45], [47].
62 Ibid [49].
63 Ibid 183 [145].
64 Ibid, 183–4 [146].
65 Ibid 184 [151].
66 Ibid 185 [158].
67 *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362, 396 [114]. His Honour went on to say that this defect did not go to jurisdiction: 396 [115]–[116].
68 (1990) 170 CLR 321.
69 Ibid 355–6 (citations omitted).
70 But see below, n 85.
71 (2010) 240 CLR 611.
72 Ibid 614.
73 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 71–3 [53]–[60]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, 20–1 [37]–[38].
74 (2010) 240 CLR 611, 624 [38] (Gummow ACJ and Kiefel J).
75 Ibid 647–8 [130].
76 Albeit that their Honours did not cite *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 despite referring to it elsewhere. Indeed, their Honours cited no authority specifically in support of their conclusion at [130].
77 *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362, 384–5 [72].
78 Ibid 384 [69]. Her Honour specifically had regard to *SZMDS*, including the judgment of Crennan and Bell JJ at [130], albeit without attempting to extract a ratio or reconcile the different judgments.
79 By the time *FTZK* was argued, the Full Federal Court in *SZOOR v Minister for Immigration and Citizenship* (2012) 202 FCR 1, [3], [16] (Rares J) and [85] (McKerracher J), had read the (arguably neutral) decision of Heydon J in *SZMDS* as forming a majority together with Crennan and Bell JJ.
80 See *FTZK* — HC, 13 [41]–[42] (Hayne J); cf 9 [19] (French CJ and Gageler J).
81 The inverse is not necessarily true (at least not if 'probative' has its Uniform Evidence Law meaning), for it is always possible to reason illogically from information that is *capable* of forming part of a logical proof.
82 *FTZK* — FFC 179 [115]–[116] (Kerr J).
83 Ibid 180 [122].
84 Ibid 180 [123]–[124].
85 *FTZK* — HC 7 [13].
86 Ibid 9 [19].
87 Ibid 25 [94].
88 Ibid 9 [18].
89 Ibid 12–13 [39].
90 Ibid 24 [91].
91 Ibid per French CJ and Gageler J at 5 [6] ('a failure on the part of the AAT to ask itself the question which Art 1F(b) required') and 9 [19] ('The AAT did not respond to the question it was required to ask'); Hayne J at 10 [25], 11 [31] and 13 [42]; and Crennan and Bell JJ at 25 [97] ('the tribunal misconstrued its functions and powers under art 1F(b)').
92 Ibid 11 [31].
93 Crennan and Bell JJ refer to this aspect of *Yusuf* but without (explicit) application: see *FTZK* — HC 24 [90].
94 Minister for Immigration and Citizenship, 'Appellant's Submissions', Submission in *Minister for Immigration and Citizenship v FTZK*, M143 of 2013, 13 December 2013, [20].
95 This is, to be sure, nothing more than conjecture.
96 *FTZK* — HC [67], citing Kerr J, *FTZK* — FFC at [118].
97 *FTZK* — FFC [117].
98 Section 430(1)(d).
99 (2010) 187 FCR 362, [95]. Similarly, in *Kaur v Minister for Immigration and Border Protection* (2014) 141 ALD 619, 645–6 [110], Mortimer J said that where reasons have been given 'it is the justification given in the reasons, and the intelligibility of the exercise of power as explained in the reasons, which the supervising court should examine' and 'for a supervising court to engage in finding and applying facts and reaching its own conclusions about how and why, through a different reasoning process, the exercise of power could be justified is tantamount to a re-exercise of the power by the supervising court'. See also *Kocak v Wingfoot Australia Partners Pty Ltd* (2012) 25 VR 324, 346 [63] (the Court).
100 *FTZK* — FFC 180 [123]. See also *FTZK* — HC 9 [19] (French CJ and Gageler J), 23 [85] (Crennan and Bell JJ). Similar remarks abound. See eg *Yusuf* (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ).
101 (2010) 239 CLR 531.

102 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573–4 [71], [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
103 This goes further than Gummow ACJ and Kiefel J in *SZMDS*, who (as discussed above) would have limited the illogicality ground to jurisdictional fact review.
104 An identical conclusion was urged in *SZLSP* in respect of the AAT's reference to the unidentified textbook. Buchannan J said ((2010) 187 FCR 362, 394 [109]) that the link between this and 'the conclusion that the wrong question had been asked' was 'elusive'.
105 For example, *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83, [52] (Flick, Griffiths and Perry JJ); *Berryman v Minister for Immigration and Border Protection* [2015] FCA 616, [35] (Flick J); *Angkawijaya v Minister for Immigration and Border Protection* [2015] FCCA 450, [44] (Judge Driver).
106 The argument, had it succeeded, would have established *FTZK* as a powerful precedent for applicants.
107 [2015] FCA 646; see at [48]–[49].
108 The relevant facts are set out at [2015] FCA 646, [8]–[16].
109 *Citizenship Act 2007* (Cth) s 22(4A). See [2015] FCA 646, [17].
110 [2015] FCA 646, [21]–[26].
111 Ibid [48].
112 Ibid [49].

HOLDING REGULATORS TO ACCOUNT IN NEW SOUTH WALES POLLUTION LAW: PART 1 – THE LIMITS OF MERITS REVIEW

Sarah Wright*

Decisions made by pollution regulators may impact upon the natural environment, which in turn may have ramifications for many people. Their determinations affect the ecological systems that humans depend upon to survive and for their quality of life — the air we breathe, the water we use and the land that we live on. The consequences may extend beyond the present generation to future generations as well. Once environmental damage has occurred it can be a very lengthy, difficult and often costly process to undertake remediation, assuming it is feasible at all. Some decisions may result in harm so catastrophic that it cannot be reversed.[1]

The need for regulatory accountability

A fundamental premise underlying administrative law is that governments must be accountable for their actions. Accountability of pollution regulators is crucial given the wide-ranging and long-lasting impact their decisions can have on the environment and human health. While legislation should provide guidance for executive decision-making, it is imperative that accountability mechanisms such as merits and judicial review are available to ensure compliance with the law, particularly in relation to the exercise of discretionary powers.[2] As Bird recognised, there is a need for accountably given the 'fairly extraordinary powers' that regulators are responsible for exercising.[3]

This article is the first of two related articles which examine the extent to which administrative law mechanisms can be, and have been, utilised to ensure the accountability of regulators for decisions made under the core piece of New South Wales pollution legislation — the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act). This article considers the ability of merits review to hold regulators to account. A forthcoming article examines the impact of judicial review and civil enforcement on government accountability in pollution law.

Accountability is being referred to in the sense of ensuring that, by scrutiny through the courts, regulators are acting in accordance with the law and also, given the purpose of merits review, to ensure that the 'correct or preferable' decision is being made.[4] But furthermore, as a regulatory system is only considered to be effective if it is achieving its objectives,[5] accountability encompasses whether regulatory powers are being exercised 'effectively' — that is, whether decisions are being made to further the objects of the POEO Act. The 'paramount' purpose of the legislation is environmental protection: the avoidance or reduction of pollution to protect the environment and human health from harm.[6] This also represents the mandate of the New South Wales Environment Protection Authority (EPA).[7]

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Given the importance of the legislative objectives, scrutiny by the courts is also essential to ensure better decision-making. Regulators, such as the EPA, make decisions about high-risk activities which must be properly controlled given their potential environmental and health impacts. It is noted that the aim of this article is not to argue that the EPA or other regulators are doing a 'bad job', although it must be accepted that regulators are not 'perfect … like most organisations, they could always do a better job'.[8] The purpose of the two articles is to explore the extent to which administrative law mechanisms have the potential to, and have been utilised to, test the job regulators are doing in order to hold them accountable.

As a result of (i) the broad social purpose of environmental protection reflected in the objects and provisions of the POEO Act, (ii) the wide reach of environmental decisions, and (iii) the lack of the environment's ability to represent itself, often it is environmental groups or community members (that is, 'third parties') who wish to hold the government to account. Public participation has been an important tenet underlying environmental law since the late 1970s and is reflected in the objects of the POEO Act.[9] Gunningham and Grabosky have recognised the valuable role that the community and public interest groups can perform as surrogate regulators.[10] Furthermore, they can undertake a 'watchdog role' regarding the implementation of legislation by agencies.[11] As Mossop stated:

> citizen suits create a form of accountability that has been lacking from the process of government administration. Why is this so? It is because citizen suits empower ordinary citizens to enforce the law, so that environmental decision-making is government by the rule of law and not the rule of bureaucrats and Ministers.
>
> The reason why this is so significant is that environmental law is an area where there are clearly conflicting aims that either have not, or cannot, be reconciled. These are: the goals of environmental protection, and the goals of a western, capitalist, resource-intensive society … [R]egulatory agencies governing pollution and resource management must deal with [these 'opposing goals'] every day. It is here that tensions are strongest and it is here that the need for accountability is greatest if the public values expressed by parliament are to be vindicated.[12]

A further theme underlying these two articles is therefore the extent to which third parties seeking to protect the environment in the public interest are provided with rights to participate in and challenge decisions under the POEO Act and also the extent to which they have contested such decisions.

This article begins by introducing the decision-makers under the POEO Act and the main powers that they exercise — namely, licensing and issuing notices. The limited rights of third parties to participate before a decision is made are examined given that public participation at this stage can help to ensure accountability and that a better decision is made. Next, the potential for merits review to hold pollution regulators to account is considered. The impact of an absence of third-party appeal rights is examined. A quantitative and qualitative review of merit appeals under the POEO Act is then conducted using material contained in the EPA's POEO Act public register (the Public Register), litigation statistics and written judgments. Searches were conducted in June–July 2016. It is concluded that, while there is a body of case law to guide future decision-making in issuing notices, limited case law exists in relation to the exercise of licensing powers. Merits review is not available for third parties and there have been few challenges by licensees regarding licensing decisions, resulting in limited accountability of the EPA through this type of proceeding.

POEO Act decision-makers and their main powers

The main bodies with regulatory responsibilities under the POEO Act are the EPA and local councils. The POEO Act is based on a 'one site, one regulator' principle: one regulator, known as the 'appropriate regulatory authority' (ARA), is responsible for all the pollution

issues at a particular premises.[13] Accordingly, a number of powers can generally only be exercised by the ARA, such as issuing environment protection licences or clean-up or prevention notices.[14] The EPA is the ARA for activities requiring a licence which have a higher potential to pollute, as well as 'activities carried on by the State or a public authority'.[15] Activities requiring a licence are those listed in sch 1 of the POEO Act[16] and any other activity that pollutes waters.[17] Only the EPA can make licensing decisions and take regulatory action regarding licensed premises.[18] As I have noted:

> Licences are the primary tool used by the EPA for controlling pollution from licensed activities … Notices can also be used by the EPA to initiate pollution control in relation to licensed activities, eg clean-up notices. However, for systemic pollution issues, the EPA is more likely to impose or vary a licence condition.[19]

Local councils are generally responsible for all other activities in their local government area that do not require a licence[20] and they have a significant enforcement role under the POEO Act.[21] The main way that local councils can manage pollution is by issuing notices — namely, clean-up, prevention and noise control notices.[22] The powers exercised by regulators are discussed in more detail in the following section.

Decision-making under the POEO Act

Licensing decisions

Licensing is a discretionary process. When the EPA makes a licensing decision, there is a list of factors that must be taken into consideration if they are of relevance.[23] This list includes:

- the actual or likely pollution resulting from the activity and its environmental impact;[24]
- 'the practical measures that could be taken to prevent, control, abate or mitigate that pollution, and to protect the environment from harm as a result of that pollution';[25]
- any environmental impact statement (EIS) or species impact statement that has been prepared for the purposes of obtaining development approval under planning legislation;[26]
- in relation to an application for the issue, variation, transfer or surrender of a licence, any public submissions that have been received;[27] and
- the EPA's objectives, which, as discussed, focus on protection and enhancement of the environment and the reduction of risks to the environment and human health.[28]

The weight to be given to each relevant consideration is generally a matter for the EPA as the decision-maker.[29] Once a licence has been issued, it 'remains in force until it is suspended, revoked or surrendered'.[30] It may be varied at any time, either upon application by the licensee or on the EPA's initiative.[31] Licences are reviewed at least every five years.[32]

Public participation in licensing

This section considers public participation rights before a licensing decision is made. As licensing is a discretionary process, targeted public participation can help to ensure that the EPA is fully apprised of the relevant matters before making a determination.[33] This can lead to better decision-making, providing accountability. The inappropriate exercise of discretion can have negative environmental and human health consequences.[34] If better decisions are made to begin with, this negates the need to overturn a 'bad' decision through the courts.

One of the objects of the POEO Act objects is 'to provide increased opportunities for public involvement and participation in environment protection'.[35] Despite this, the public has

limited rights of participation in licensing decisions. There is no provision requiring the EPA to call for submissions regarding new licence applications. However, it cannot grant or vary a licence unless, where required, development consent or approval has been obtained under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).[36] In making a licensing decision, the EPA must consider any public submissions it has received, including those made under the EP&A Act.[37]

It is necessary to explain the public submission provisions in the EP&A Act in order to understand when submissions may be received by the EPA. Developments requiring a licence under the POEO Act generally constitute either 'designated development', 'State significant development' (SSD) or 'State significant infrastructure' (SSI) under the EP&A Act. Designated development is essentially a list of developments that require submission of an EIS because of their potential to impact on the environment.[38] SSD and SSI are declared by the *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) or by order of the Minister in the *New South Wales Government Gazette*.[39] They are major projects that are determined by the Minister or, by delegation, the Planning Assessment Commission (PAC) rather than a local council.[40] SSD and SSI also require an EIS.[41] Examples of SSD are mining, quarries and sewage treatment plants over specified thresholds.[42] Examples of SSI are certain ports and wharfs.[43]

Development applications for designated development or SSD and their accompanying documentation, including the EIS, must be publicly exhibited.[44] If a licence under the POEO Act is required, this must be specified in the development application.[45] Any member of the public can make submissions in relation to the development application.[46] The EIS for SSI must be publicly exhibited, and public submissions may be made 'concerning the matter'.[47]

Submissions made under the EP&A Act could object to the development based on pollution issues, such as dust, odour, noise or water pollution. Where designated development requires a POEO Act licence and is dealt with through the integrated development provisions of the EP&A Act (essentially a process for streamlining the assessment of projects that require development consent and specified approvals under other legislation), the consent authority is required to forward public submissions to the EPA.[48] Similarly, in relation to SSI, the Secretary of the Department of Planning and Environment (DPE) must forward any submissions received 'or a report of the issues raised in those submissions' to the EPA.[49] There is no equivalent statutory requirement in relation to SSD, but any public submissions, and the applicant's response, must be made publicly available on the DPE's website.[50]

Where submissions made under the EP&A Act have been received by the EPA, they must be taken into account by the authority in determining a licensing application.[51] A member of the public who has made submissions under the EP&A Act should be aware from the publicly exhibited development application or EIS that a POEO Act licence is required.[52] However, there is no targeted request for submissions regarding the conditions that should be imposed on a licence by the EPA or whether a licence should be granted at all. The call for submissions is made in the context of the development application or project approval required under the EP&A Act. For example, the public notice in relation to designated development and SSD is required to state that 'any person … may make written submissions to the consent authority [or Minister for SSD] *concerning the development application*'.[53] There is nothing to draw to a person's attention that they could also make submissions in relation to a POEO Act licence, because those submissions will, where required, be forwarded to the EPA. Submissions under the EP&A Act, even if they address pollution, are likely to concentrate on relevant considerations under planning law rather than being targeted to matters the EPA must consider in making a licensing decision.[54] As Millar noted, the starting point for making an effective submission is to identify the relevant considerations for the decision-maker under the legislation.[55] If community members are

unaware that they can make submissions in relation to licensing issues, they will not accurately target the relevant matters the EPA must consider. The adequacy of the public participation process regarding licensing is examined below after the provisions relating to licence variation and review are considered.

If it is proposed that a licence be varied, the EPA is only required to 'invite and consider public submissions' in the following limited circumstance:

> (a) the variation of a licence will authorise a significant increase in the environmental impact of the activity authorised or controlled by the licence; and
> (b) the proposed variation has not, for any reason, been the subject of environmental assessment and public consultation under the *Environmental Planning and Assessment Act 1979* …[56]

The EPA is required to review a licence every five years.[57] The review must be publicly notified,[58] but there is no requirement to call for public submissions.[59] The statutory requirement to consider public submissions only applies to a 'licence application',[60] meaning 'an application for the issue, transfer, variation or surrender of a licence'.[61] Lyster et al argue that any submissions made in relation to a licence review will nevertheless be a relevant consideration for the EPA.[62] Indeed, there would seem little point in publicly advertising a licence review if the submissions that were received were not considered.

It is clear that there are limited public participation rights in relation to licensing decisions under the POEO Act. The main opportunity to participate is provided under planning law rather than pollution law. In the green paper for the Protection of the Environment Operations Bill 1996 (NSW) (POEO Bill), the government, while recognising the importance of public participation in terms of better decision-making, stated that the rationale for limiting such rights (and third-party appeal rights, discussed below) under the POEO Act was as follows:

> The Government … believes it is important that these participatory processes do not unduly delay development consent and/or create bureaucratic bottlenecks. A development proposal should only have to go through the public consultation process once, rather than at both the land use planning and environment protection licensing stages …
>
> [The POEO Act] uses the planning legislation as the mechanism to provide for public participation and appeal on environment protection issues.
>
> The close correlation between the Schedule of EPA-licensed activities and the list of designated developments under Schedule 3 of the EP&A Act regulations will mean that licensed activities will generally require an EIS and therefore will be the subject of public participation. Coupled with provisions to ensure consideration of environment protection issues at the development consent stage, this system will ensure that pollution control issues are subject to meaningful public participation and third-party appeals.[63]

This statement, however, does not seek to grapple with other issues raised by the government in the same document. It stated:

> [There is a need for separate approvals for a project under both the EP&A Act and POEO Act] in order to ensure transparency and accountability. Although the two processes are related, both the purpose of the authorisations and the considerations involved in determining an application are sufficiently different under [the] different legislation …[64]

The Land and Environment Court of New South Wales (LEC) has also recognised that, while the planning regime under the EP&A Act and pollution control under the POEO Act are complementary, they are two separate schemes with different requirements.[65] The matters to be taken into consideration in determining a development application or application for SSI vary from those for licensing decisions.[66] Furthermore, the objectives of the legislation

are different. The EP&A Act is widely recognised as having objectives aimed at both the promotion of development and environmental protection, which are often conflicting and result in one (generally, development) being prioritised over the other.[67] The POEO Act's objects also recognise the necessity for development by reference to 'the need to maintain ecologically sustainable development'.[68] However, the LEC has stated that '[t]he objects reveal that the *central mischief* to which the [POEO Act] is directed is to avoid, or at the very least, reduce pollution in order to prevent harm to human safety and the natural environment'.[69] That is, environmental protection is the 'paramount' purpose of the POEO Act.[70]

A greater level of public participation under the POEO Act could be provided by requiring the public notification of a development application under the EP&A Act which also requires a licence (or licence variation) under the POEO Act to state that submissions may also be made in relation to the licence. This would ensure public participation is directed at the relevant considerations under both the licensing and planning processes without causing any further delay in assessment. Such participation would arguably lead to better decision-making under the POEO Act and greater levels of transparency and accountability of the EPA.

Furthermore, targeted participation is critical for SSD and SSI. This is because the consent or approval under the EP&A Act — which is granted by the planning Minister, not a specialised pollution regulator such as the EPA — can dictate the maximum parameters for pollution control that can be contained in a POEO Act licence. This arises because the EP&A Act provides that a licence under the POEO Act *must* be granted for SSD or SSI and that the licence must be 'substantially consistent' with the consent or approval granted under the EP&A Act until the first licence review.[71] It is therefore essential that any public submissions under the EP&A Act address the appropriate conditions that should be imposed through a POEO Act licence.

Notice powers

There are a number of different types of notices that ARAs can issue under the POEO Act. Clean-up notices can be issued where a pollution incident has occurred. They allow ARAs to direct owners, occupiers or polluters to take clean-up action.[72] A prevention notice can be issued if an ARA 'reasonably suspects that an activity has been or is being carried on in an environmentally unsatisfactory manner'.[73] It can require an occupier and/or the person carrying on the activity to take specified action 'to ensure that the activity is carried on in future in an environmentally satisfactory manner'.[74] 'Environmentally unsatisfactory manner' is defined to include where an activity is carried on in breach of the Act or is likely to cause a pollution incident.[75] A noise control notice can be issued by an ARA to limit the noise being emitted by an activity or article at a premises, either by controlling the times the noise can be emitted or the level of noise.[76] The Minister also has power to issue a prohibition notice, on the recommendation of the EPA, to shut down an activity in specified circumstances.[77] Various other powers, such as investigation powers, are provided to regulatory authorities.

Merit appeals, accountability and better decision-making

This section examines the extent to which merits review is able to hold POEO Act regulators to account for their decisions, including the potential for such proceedings to guide better decision-making. First, the nature of and procedure of appeals in pollution law are considered. Given there is no common law right to merits review,[78] the appeal rights that have been provided under the POEO Act are discussed. Importantly, the lack of third-party rights is critically examined. Secondly, this section undertakes quantitative and qualitative

analysis of merit appeals by licensees and notice recipients to determine the impact of such matters on accountability and future decision-making.

The nature of and right to take merit appeals

Nature of and procedure in merit appeals

Appeals under the POEO Act (and EP&A Act) can only be taken in the LEC.[79] The LEC is a superior court of record,[80] with equivalent status to the Supreme Court of New South Wales. It has exclusive jurisdiction in relation to planning and environment cases, making it a 'one-stop shop' for all such matters.[81] The LEC has jurisdiction in relation to merit appeals, as well as judicial review, civil enforcement and criminal prosecutions.[82] Its merits jurisdiction is akin to work that would usually be conducted by a tribunal.

Merits review proceedings in the LEC are presided over by a commissioner or a judge, two or more commissioners or a judge sitting with a commissioner. Commissioners hear the majority of appeals, with judges generally being involved in more complex or controversial matters.[83] Commissioners must have expertise in one of a number of specified areas, such as town planning or environmental science, or as a lawyer.[84]

A merit appeal to the LEC provides the applicant with an opportunity to have the decision considered afresh.[85] The Court has 'all the functions and discretions' of the original decision-maker.[86] Merits review proceedings are 'conducted with as little formality and technicality' as is appropriate and 'the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits'.[87] In POEO Act appeals, the LEC's decision is 'final and binding on the appellant and the person or body whose decision or notice is the subject of the appeal'.[88]

The LEC has various alternative dispute resolution (ADR) procedures available to encourage agreement before a matter is adjudicated. For example, this includes participating in a conciliation conference,[89] mediation[90] or neutral evaluation[91] or referral to a referee.[92] Parties must participate in these ADR mechanisms in good faith.[93]

The right to a merit appeal under the POEO Act

Merit appeals can be taken in the LEC by the licence-holder or licensing applicant in relation to EPA licensing decisions such as refusal of a licence, imposition of conditions on a new or varied licence, refusal of a licence transfer or the suspension or revocation of a licence.[94] In addition, appeal rights are provided to the recipient of a prevention notice,[95] a noise control notice,[96] and a notice issued by the EPA to a waste transporter requiring a GPS tracking device to be installed on a waste transportation vehicle.[97] All appeals must be lodged in the LEC within 21 days.[98] There is no right of appeal against a clean-up notice or prohibition notice, or in relation to the exercise of investigation powers, such as a notice to provide information or records.[99]

The lack of merit appeal rights for third parties

The POEO Act does not give third parties merit appeal rights. In this respect, as Handley AJA noted in *Macquarie Generation v Hodgson*,[100] '[t]he [POEO] Act does not provide for third parties to participate'.[101] This is in contrast to the determination of development applications under planning law, where an appeal right is provided to third parties in limited circumstances. Under the EP&A Act a person who made a written submission objecting to a designated development may appeal against a decision by a

consent authority to grant consent.[102] This appeal right extends to SSD that would otherwise have been designated development if it had not been so declared.[103] There is no third-party appeal right in relation to SSI. As originally drafted, the list of designated developments quite closely matched the activities that require a licence under the POEO Act.[104] As such, for those activities that require a licence under the POEO Act, there may be a right of third-party merit appeal for objectors regarding the development consent but not in relation to the licence.

Section 39A of the *Land and Environment Court Act 1979* (NSW) (LEC Act) also gives the LEC power to join a third person as a party to certain planning law merit appeals brought by either the developer or a third-party objector. A person may be joined as a party if they can raise issues that would not otherwise be 'likely to be sufficiently addressed' or it is in either the public interest or 'the interests of justice'.[105] There is no equivalent statutory right provided for pollution law. However, it is noted that, in an appeal against a POEO Act prevention notice, the LEC did join an owners corporation of a strata building as an intervener in circumstances where that party was directly impacted on by the decision.[106] The intervener was allowed to 'adduce evidence, cross-examine witnesses and make submissions in the proceedings'.[107] Such options for third parties to participate are only possible where a licensee actually lodges an appeal against a licensing decision. As discussed below, few appeals have been lodged.

What is apparent from the legislative provisions is that there are no statutory rights afforded to third parties regarding the bringing of, or participation in, merits review under the POEO Act. The only persons given rights to hold the government to account through merit appeals are polluters — either licensees or notice recipients. Such persons are extremely unlikely to challenge the licence or notice on the grounds that its requirements are not stringent enough in terms of environmental protection. On the contrary: they are likely to argue that the requirements are too onerous for economic or other reasons. Accordingly, POEO Act merits reviews are focused on providing individual justice to the licensee or notice recipient. The lack of third-party appeal rights means there is no recognition through the statutory scheme of merit appeals of the wider purpose of ensuring accountability in terms of environmental protection — the paramount purpose of the POEO Act.[108] As the Independent Commission Against Corruption noted in the context of planning law, 'limited availability of third party appeal rights … means that an important check on executive government is absent'.[109]

It is not suggested that third-party merits review should be available for all POEO Act decisions. It has been suggested as appropriate for the grant or variation of a licence.[110] As the Environmental Defender's Office (NSW)[111] (EDO NSW) has noted, '[t]he lack of formal [public] consultation procedures in relation to decisions on EPA licence applications is compounded by the lack of [third-party] appeal rights in relation to licensing decisions'.[112] As discussed below, it is difficult to determine the exact number of licence applications each year and, therefore, the potential number of decisions open to appeal. However, it appears that an average of at least 90 new licences have been granted per year in the 10-year period since 1 July 2006.[113] It is very unlikely that the 'floodgates would open' if third-party merits review rights were provided. This has not been the case under the EP&A Act, where third-party objector appeals have represented a very small proportion of development application appeals, with a low number of cases each year.[114] In relation to licence variations, there is an average of 263 applications each year.[115] A number of these are likely to be minor variations. If a third-party appeal right were provided in relation to licence variations, it may be appropriate to limit that right to those applications which have a higher potential for environmental impact. Encapsulating all variations, even if only of a minor or technical nature, would not be appropriate or necessary.

The rationale for limited public participation and third-party appeals for POEO Act licensing was discussed above in relation to participation rights before a licensing decision is made. The government's argument was that, as activities which require a POEO Act licence will generally undergo public participation in relation to development consent, 'environmental protection issues' raised by the community could be considered at that stage and appeal rights were only to be provided in relation to development consents.[116] This rationale was problematic to begin with given the different objects and relevant considerations under the two pieces of legislation, as discussed. It is now even more questionable given amendments to the EP&A Act which removed third-party merit appeals in circumstances where PAC holds a public hearing before a development application is determined.[117] The Minister for Planning or the Secretary of the DPE can request PAC to review any development and hold a public hearing.[118] PAC must provide a report to the Minister setting out its findings and recommendations as well as a 'summary of any submissions received'.[119] As EDO NSW noted, third-party 'merits review is extinguished by the holding of a public hearing that has no decision-making power over the determination outcome'.[120] PAC can only go on to determine a development application which has been subject to a public hearing if it is one of the SSD or SSI development matters for which the Minister for Planning has delegated decision-making power.[121]

Since PAC was established in 2008 it has undertaken 38 public hearings.[122] Twenty-nine of those (76 per cent) were in relation to resource projects, such as mines.[123] In fact, Smith stated that PAC public hearings are essentially 'routine' for mines.[124] Third-party merit appeal rights in planning law have therefore been lost in relation to a number of major projects that have the potential to impact negatively on the environment in terms of pollution. The lack of oversight by the LEC through third-party appeals in planning law means that government accountability for such decisions has been significantly reduced.[125]

Furthermore, as discussed, a licence under the POEO Act *must* be granted for SSD or SSI: the EPA has no discretion to refuse a licence.[126] That licence must be 'substantially consistent' with the EP&A Act development consent or approval until the first licence review.[127] The Minister for Planning or PAC where the decision-making power is delegated, rather than the EPA as the specialised pollution regulator, therefore gets the final say on whether a licence should actually be issued and the parameters for pollution control. As Bird noted:

> Governments create independent regulatory bodies primarily to ensure that decisions are made by those with expertise and independence. Governments have decided that it is in the public interest if certain decisions are made by those who possess specialist expertise.[128]

The government has seen fit to invest the EPA with the power to make licensing decisions which set appropriate levels of pollution to protect the environment and human health. Yet it has taken away control from the EPA in the very situation where the final decision on pollution control should be made by those with the greatest level of expertise — namely, projects with the highest potential for environmental impact. This is highly concerning given (i) the reduction in third-party merit appeals available in planning law where a public hearing has been undertaken by PAC, and (ii) the absence of third-party appeals in pollution licensing. As the Australian Panel of Experts on Environmental Law has noted:

> Decision-making about large, controversial and high impact proposals is precisely when good governance arguably requires greater scrutiny and public participation, not less, and access to justice including rights to seek the review of decisions ought not to be constrained or excluded.[129]

These issues are further compounded by the 'negotiated nature of licensing'.[130] That is, the terms of a licence are negotiated between the EPA and licensee. It has been acknowledged by the New South Wales Court of Appeal that licence conditions 'may reflect a compromise

between what is desirable and what is practicable'.[131] This is particularly the case given that economic considerations regarding the affordability of pollution control mechanisms must be balanced with the need to protect the environment.[132] Furthermore, the EPA 'is, in the exercise of its functions, subject to the control and direction of the Minister'[133] and the Minister may take over the EPA's licensing functions in a particular matter.[134] This makes licensing functions vulnerable to political concerns and may result in less environmentally sound decisions being made.[135] In the absence of third-party merit appeals and meaningful public participation in pollution law, there is a clear lack of accountability in terms of testing the adequacy of negotiated licensing provisions to protect the environment and human health. As Mossop stated:

> This is not to say that negotiation and bargaining should not be part of environmental regulation but simply that where this is a closed process, citizen suits are an important mechanism for keeping that process lawful and ensuring that the gap between public perception and the reality of government regulation is minimised.[136]

Furthermore, when regulatory powers which are discretionary in nature remain unchecked, there is greater potential for regulatory capture.[137] However, there is no suggestion that this has occurred.

Figg conducted a review of third-party merit appeal rights available in relation to planning law decisions throughout the different states and territories in Australia.[138] She concluded that third-party merit appeal rights can result in enhanced decision-making and environmental outcomes.[139] Figg stated:

> The main benefits [of third-party appeal rights] can be summarised as including: greater information becoming available to decision-makers [particularly through 'local knowledge']; increased public confidence in decision-making; and additional scrutiny being applied to decisions.[140]

Figg concluded such appeals can result in greater levels of transparency and accountability in decision-making and may result in stricter environmental conditions being imposed.[141] Similarly, the EDO NSW has stated:

> there are clear benefits to allowing third party merits review in relation to major projects in NSW. These benefits relate to improving the consistency, quality and accountability of decision-making in environmental matters. In particular, merits review has facilitated the development of an environmental jurisprudence, enabled better outcomes through conditions, provides scrutiny of decisions and fosters natural justice and fairness. Better environmental and social outcomes and decisions based on ecologically sustainable development is the result.[142]

Due to the current lack of independent scrutiny of licensing decisions under the POEO Act, including through licensee appeals (discussed below), third-party merit appeals would certainly provide a greater level of accountability.

Accountability through merit appeals by licensees and notice recipients

Given the absence of third-party appeal rights in pollution law, this section explores merit appeals brought by licensees or notice recipients. The purpose is to examine the extent of accountability, particularly regarding adequate environmental protection, through these types of proceedings.

Rate of licensing appeals

Merit appeals and other civil proceedings in Classes 1–3 of the LEC's jurisdiction represented approximately 82 per cent of the Court's case load in 2010–2014.[143] The most prevalent merit appeals in the LEC are in relation to development applications under

planning law.[144] Appeals in pollution law matters represent a very small percentage of merits cases. Between 2010 and 2014 an average of 611 'environmental planning and protection appeals' (Class 1 of the LEC's jurisdiction) were lodged annually in the LEC.[145] Since the POEO Act commenced operation on 1 July 1999, there has been a total of 61 POEO Act licensing appeals in the LEC. Twenty-eight of those were related appeals by Sydney Water Corporation, which holds multiple licences. Another two matters were linked.[146] Essentially, this leaves 32 separate appeals, or an average of 1.9 licensing related merit appeals per year. This represents 0.3 per cent of the LEC's annual merits case load for environmental planning and protection appeals (Class 1).

The number of licensing appeals will naturally be much lower than the number for development applications given the smaller number of licensing decisions being made each year. For example, in 2008–09 there was a total of 87 056 development applications under the EP&A Act.[147] It was difficult to determine the number of licensing applications made each year using the Public Register.[148] Of licences that are currently in force, an average of 90 have been issued per year over the 10-year period since 1 July 2006. During that period an average of approximately 435 other licensing applications have been made each year for a licence variation, transfer or surrender.[149] The majority of applications were for licence variations: 60.6 per cent overall, with an average of 263 per year.[150] The remainder of applications were for licence transfer (15.0 per cent) or licence surrender (24.4 per cent). Given that licence terms are negotiated, it is to be expected that there will be few appeals in relation to licensing decisions.[151]

Licensing appeal outcomes

Table 1 sets out the outcome of merit appeals against EPA licensing decisions in the LEC derived from data contained in the Public Register and written judgments published on NSW Caselaw. It was difficult to ascertain the exact outcome in a number of matters. First, the Public Register did not record sufficient information to determine what happened in the case. This is despite the fact that the results of EPA civil proceedings are supposed to be recorded in the Public Register.[152] For example, in a number of matters the Public Register simply listed the proceedings as 'completed', with no information as to the actual result, including whether the case was settled, dismissed or determined by the LEC. Secondly, there were generally no written judgments for the vast majority of matters: published decisions could only be located for five matters.[153] It was therefore difficult to obtain a complete picture of the outcome of proceedings.

Outcome	Number of matters	Percentage of matters	Number of matters with written judgment
Proceedings discontinued	39	63.9	0
Completed — application dismissed, outcome unclear	3	4.9	0
Completed — outcome unclear	5	8.2	0
Completed — application allowed in part – outcome unclear	6	9.8	0
Completed — consent orders made	7	11.5	4
Determined by court after hearing	1	1.6	1
Total	61	100	5

Table 1. Outcome of merit appeals in the LEC against EPA licensing decisions under the POEO Act[154]

A high percentage of proceedings (63.9 per cent, n=39) were discontinued. Twenty-eight of those were the related Sydney Water Corporation appeals, with 11 other discontinuances recorded. A number of discontinuances may be explained by the short (21-day) licensing appeal period.[155] That is, an appeal may be lodged simply to preserve the appeal right, with the party then either deciding not to press the matter or reaching an agreement with the EPA. The reasons for discontinuance are, however, unknown.

There was a record of consent orders being made in 11.5 per cent of proceedings (n=7) and orders being made after a formal hearing and adjudication in 1.6 per cent of matters (n=1). The outcome of the remaining 22.9 per cent (n=14) of cases that were not discontinued was unclear. It is possible that a number of the matters were settled by consent orders. Some further proceedings may have been determined after an adjudicated hearing with an *ex tempore* unpublished judgment being delivered. These possibilities could not be determined on the information available.

McGrath conducted a review of the number of reviews/appeals in planning decisions in the 2008–09 financial year. In New South Wales in that year there were 87 056 development applications (DAs), 1132 reviews/appeals to the LEC (1.3 per cent of DAs) and 397 contested planning decisions (0.5 per cent of DAs).[156] In comparison, based on the figures discussed above, in each financial year since 1 July 2006 there has been on average a total of 525 licences issued and applications for variation, transfer or surrender of a licence.[157] An average of 1.9 licensing merit appeals are lodged in the LEC each year. A negligible number of matters proceed to a contested hearing, with only one matter found to have done so in the 17 years since the POEO Act commenced.[158] Again, the low appeal rates and lack of adjudicated hearings for licensing can probably be explained by the negotiated nature of licensing.

Licensing appeals: analysis of results

The small number of licensing appeals and dearth of contested hearings, combined with a low number of written decisions, are of significant interest from an accountability perspective. Judgments made by commissioners in merit appeals have been published online since September 2003.[159] There were written decisions in relation to only five licensing appeals.[160] Few judgments would be expected if the matters have been discontinued or settled by the

parties. Indeed, there were only 15 matters where there was no reference to the matter being either discontinued or settled by consent orders. In all of those cases except one, the outcome was unclear. There is no criticism being made of the LEC or EPA regarding the low number of written judgments, particularly given that the government is expected to be a model litigant by 'endeavouring to avoid litigation, wherever possible' and to have regard to the need 'to facilitate the just, quick and cheap resolution of the real issues in civil proceedings' under the *Civil Procedure Act 2005* (NSW).[161] The issue being considered relates solely to the accountability of the EPA as a regulator regarding licensing decisions in a context where conditions are negotiated. While it is noted that when making consent orders the Court does not act as a 'rubber stamp',[162] there is obviously less examination of a government decision than where a matter is fully litigated and the evidence heard and assessed.

In the five matters where judgments were available, three decisions simply recorded the agreement reached between the EPA and licensee as a result of a conciliation conference.[163] One decision was interlocutory in nature, adjudicating upon an application to stay a licence suspension until final judgment was delivered.[164] Two judgments regarding the same matter involved determination of an appeal against the deemed refusal of a licence transfer.[165] These cases demonstrate the important role that merit appeals can play, not only in terms of providing individual justice to a (prospective) licensee but also, more importantly, regarding clarification of the matters the EPA can consider in exercising its licensing powers in order to ensure environmental protection. For example, in *Always Recycling Pty Ltd v Environment Protection Authority*[166] (*Always Recycling*), the appeal involved the deemed refusal of a licence transfer of a waste storage and processing facility. Commissioner Pearson discussed the scope of the power to impose conditions on a licence transfer.[167] This included reaching a conclusion that the past management of the premises by the current licensee, being a company which had the same director as the proposed licence transferee, was relevant to (i) determining whether the licence transfer should be approved, and (ii) setting the licence conditions that could be imposed on the transfer regarding future management of the site.[168]

Furthermore, the penalty notices and regulatory action taken by the EPA against the current licensee was relevant to the consideration of the past management of the premises.[169] Commissioner Pearson also highlighted the need for the licence to be consistent with the development approval under the EP&A Act. It was discovered as part of the proceedings that the licence authorised waste stockpiles at heights greater than that permitted by the development approval.[170] There were also differences in the stated types of waste that could be received at the premises under the development approval and licence.[171] The licence was to be amended accordingly.

As mentioned, *Always Recycling* was the only written judgment located on the final adjudication of a licensing merit appeal. As such, there is no established body of case law in licensing appeals. While it is recognised that a decision on the facts in one merit appeal does not bind a decision-maker in another matter,[172] determinations can provide a useful source of guidance in the exercise of legislative powers, including in relation to the interpretation of statutory provisions. This is demonstrated by *Always Recycling*. With thousands of decisions being made in planning merit appeals since the LEC's inception, much greater headway has been made in that area in guiding and improving the decision-making of consent authorities. As Bates noted:

> Environmental issues figure prominently in planning appeals, and in fact some of the most significant court cases have been merits based. The first time that any court has applied the precautionary principle to deny an application for development, for example, was in a merits appeal.[173]

Indeed, many important decisions on ecologically sustainable development have been merit appeals.[174] As EDO NSW notes, such cases 'have forged a body of law which is globally influential'.[175] Preston and Smith stated that:

> The benefits of merits review include:
>
> - enhancing the quality of the reasons for decisions;
> - providing a forum for full and open consideration of issues of major importance;
> - increasing the accountability of decision-makers;
> - clarifying the meaning of legislation;
> - ensuring adherence to legislative principles and objects by administrative decision-makers;
> - focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and
> - highlighting problems that should be addressed by law reform.
>
> All the benefits of merits review identified above involve improving the consistency, quality and accountability of decision-making.[176]

Furthermore, as EDO NSW recognised, 'the court process itself — the playing out of an adversarial process where evidence is tested and scrutinised under oath — has facilitated better environmental outcomes through the imposition of conditions'.[177] Such cases have led to more stringent environmental requirements and provided guidance for the types of conditions that should be considered in similar matters.[178]

The lack of third-party appeal rights combined with a virtual absence of case law on merits review against EPA licensing decisions means that the broader accountability of the authority through merit appeals is low. The rationale behind an appeal by a third party would most likely be to argue either that a licence should be refused or that stricter conditions should be imposed.[179] While merit appeals may have provided a source of accountability for individual licensees, they have not provided for broader accountability of the EPA to the public for licensing decisions. In particular, they have provided neither a mechanism to determine if the conditions imposed by the EPA are stringent enough to protect human health and the environment nor a body of case law to guide the exercise of the authority's licensing powers. Therefore, while the LEC has been given a supervisory jurisdiction over the EPA's licensing decisions,[180] its role in practice has been very limited. The Court's oversight role is very important in a context where licensing conditions are negotiated.

Merit appeals by notice recipients

As discussed, the main way the EPA regulates licensed premises is through licence conditions,[181] so it would be expected that the number of notices issued by the authority may be low. Since the POEO Act commenced, the EPA has issued 192 prevention notices — an average of 11.3 per year.[182] No noise control notices have been issued by the EPA.[183] The EPA does not have to record notices requiring the installation of a GPS tracking device on a waste transportation vehicle on the Public Register, so no figures were obtained. The Public Register recorded three appeals against prevention notices issued by the EPA. Two matters were listed as discontinued and the other as 'completed', with no further explanatory information. There were no written judgments found for EPA-issued prevention notices.

As discussed, for local councils, notices are the main mechanism to regulate pollution under the POEO Act.[184] Local councils are likely to use prevention notices and noise control notices where the pollution issue has not been adequately controlled through a development consent, or there is no development consent in force because a landowner has existing use rights.[185] There is no central database recording POEO Act notices issued by local councils. As ARAs, local councils are required to maintain a POEO Act Public Register containing

details of each prevention, clean-up and noise control notice issued and the results of civil LEC proceedings in which the council is involved.[186] However, there is no requirement for ARAs to maintain their Public Registers in electronic form[187] and they are generally not available on council websites. Therefore, to determine the impact of merit appeals by notice recipients, written judgments of the LEC were searched. As shown in Table 2 below, a total of 13 written judgments were found — 10 in relation to prevention notices and four in relation to noise control notices (one judgment was in relation to both a prevention and a noise control notice).

Type of merit appeal	Number of notices with written judgment
Prevention notice	10
Noise control notice	4
	Total = 13*

Table 2. Number of written LEC judgments in merit appeals of POEO Act notices

* All judgments related to notices issued by local councils. One judgment was in relation to both a prevention notice and a noise control notice.[188]

Again, the body of case law regarding POEO Act notices is significantly smaller than for development application merit appeals under the EP&A Act. This would be expected as, despite the figures for council-issued POEO Act notices being unavailable, it can safely be assumed the number of development applications determined is much higher. It is noted that local councils also have notice powers available to them under the EP&A Act and the *Local Government Act 1993* (NSW) that are capable of addressing some pollution issues, such as illegal waste storage.[189] Councils may therefore opt to use these tools instead of POEO Act instruments.

The written judgments on POEO Act notices have largely been about issues relating to residential amenity rather than protection of the natural environment per se. The noise control notices and four of the prevention notices concerned the impact of noise from businesses, barking dogs and a school swimming pool on residential neighbours.[190] Two of the prevention notices related to odour impacts from businesses on residential neighbours.[191] Another two prevention notices related to sewage discharges from faulty residential sewerage systems.[192] One prevention notice related to the storage of waste.[193] There was only one matter where a prevention notice was issued because the council held 'significant concerns about likely environmental harm'.[194] This case involved the unauthorised filling of a residential property, with the council arguing that possible harm may arise 'from contaminated material, leaching of pollution into the natural watercourses and the destruction of mature trees due to placement of filling in close proximity to their trunks and root systems'.[195]

While the available judgments have largely related to amenity issues, a number of matters demonstrate the important contribution merit appeals can make to clarifying the scope of a decision-maker's powers and the legislative provisions, and ultimately holding regulators to account. This is particularly the case given that questions of law can be referred to a judge for determination before a merits hearing[196] and also that judges have determined multiple notice appeals. For example, in *Udy v Hornsby Shire Council*,[197] Jagot J resolved a number of legal points regarding the scope of prevention notices and confirmed the broad nature of such powers in a manner favourable to regulators. This included that a prevention notice is not limited to regulating economic or businesses activities but extends to private activities.[198] Such notices are not limited to ongoing activities; they may address a 'one-off' activity and may require activities to cease altogether.[199]

In *Cobreloa Sporting Club and Ethnical Club Ltd v Fairfield City Council*,[200] the applicant operated a club pursuant to existing use rights. The club was the subject of noise complaints by local residents and, in response, the council issued a prevention notice. Justice Talbot commented that:

> The original direction made by the council was dramatic. It might have been described as draconian in that it effectively precluded any activities within the premises and would have resulted in total curtailment of the club's activities at the site.[201]

His Honour sought to find a 'happy medium' between the feasible operation of the club and the amenity of its residential neighbours in order to impose 'reasonable conditions' on the prevention notice.[202]

The decisions regarding appeals against POEO Act notices demonstrate the important role that merit appeals can play in terms of government accountability. They have provided individual justice to notice recipients — for example, by balancing the business interests of the recipient against the impacts of that activity on the broader community. The cases have also fostered accountability by confirming the limits on government power when issuing such notices. The guidance provided in the judgments should lead to better decision-making in the future. Notably, while a number of cases relate to amenity impacts, they nevertheless have a much broader impact by their confirmation of the wide manner in which notice powers can be used to protect the environment, including the community. These matters also illustrate the critical role that merit appeals could play in licensing decisions, where there is an absence of case law to guide decision-making and ensure accountability.

Conclusion

The EPA and local councils have an important role as pollution regulators given the potential wide-ranging and long-lasting impact of their decisions on the environment and human health. It is essential that they can be held accountable — particularly the EPA, which regulates activities that have a higher potential for environmental harm. This article sought to examine the extent to which regulators can be, and have been, held accountable for POEO Act decisions through merits review.

The largest body of case law regarding POEO Act merits review has been in relation to notices. The decisions have allowed the notice recipients to hold the government to account. They have also contained useful principles to guide future decision-making and demonstrate the useful oversight role that the LEC can play. In contrast, there is a much lower level of accountability for licensing. While one of the POEO Act objectives is to 'provide increased opportunities for public involvement and participation in environment protection',[203] there was a conscious decision to limit public participation in licensing decisions when the Act was drafted. Given the lack of specific requirements to call for submissions in relation to licensing decisions and the absence of third-party merit appeals in pollution law, there is a low level of accountability to the public regarding the impact of licensing decisions on the environment and human health. With third-party appeal rights being whittled away under planning law, there is a general lack of accountability under planning and pollution law in relation to larger projects.

Only licensees have a statutory right to hold the EPA to account for licensing decisions through merits review. They are very unlikely to appeal a decision on the basis that more stringent environmental conditions should be imposed. Few licensing appeals have been taken by licensees under the POEO Act, with only one published judgment on the final adjudication of a matter found. This most likely arises due to the negotiated nature of licensing. However, the paucity of appeals and case law means there is little to guide the

EPA in decision-making and there is a lack of broader accountability to the public, as licensing decisions have not been rigorously tested through the mechanisms of a contested hearing. To increase accountability, further consideration needs to be given to providing for targeted participation in licensing decisions and allowing third-party merit appeal rights. As EDO NSW has argued, consideration also needs to be given to reinstating third-party merit appeal rights in planning law for major projects.[204]

Endnotes

1 Brian J Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6 *Journal of Environmental Law and Litigation* 39, 75.
2 Brian J Preston, 'Enforcement of Environment and Planning Laws in New South Wales' (2011) 16 *Local Government Law Journal* 72, 72, citing Preston, above n 1, 42.
3 Joanna Bird, 'Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 *Melbourne University Law Review* 739, 741–2.
4 See Brian J Preston, 'The Adequacy of the Law in Satisfying Society's Expectations for Major Projects' (2015) 32 *Environmental and Planning Law Journal* 182, 200.
5 See, for example, Christopher McGrath, *How to Evaluate the Effectiveness of an Environmental Legal System* (PhD Thesis, Queensland University of Technology, 2007) 16; Environment Agency (UK), *Effectiveness of Regulation: Literature Review and Analysis* (Environment Agency, 2011), 11, citing Environment Agency, *Tender Specification* (2010); Australian National Audit Office, *Program Evaluation in the Australian Public Service*, Audit Report No 3, 1997–98 (1997) 3; Australian Panel of Experts on Environmental Law, *A New Generation of Environmental Laws* (2015), The Next Generation of Australia's Environmental Laws, 13 <http://apeel.org.au/>.
6 *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98, [105]; *EPA v Unomedical Pty Ltd (No 3)* (2010) 79 NSWLR 236, [188]; *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) s 3(a), (d).
7 See *Protection of the Environment Administration Act 1991* (NSW) (POEA Act) s 6(1); Legislative Council General Purpose Standing Committee No 5, Parliament of New South Wales, *The Performance of the NSW Environment Protection Authority* (2015) 13. The main objects of the POEO Act contained in s 3(a) and (d) are very similar to the objectives of the EPA: see POEA Act s 6(1).
8 Bird, above n 3, 771.
9 See POEO Act s 3(b). Public participation has been reflected in the provisions of environmental legislation in New South Wales since the late 1970s, particularly since the introduction of planning reforms in that era through the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).
10 Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998) 15, 93.
11 Ibid 96.
12 David Mossop, 'Citizen Suits — Tools for Improving Compliance with Environmental Laws' in Neil Gunningham, Jennifer Norberry and Sandra McKillop (eds), *Environmental Crime: Proceedings of a Conference Held 1–3 September 1993, Hobart* (Australian Institute of Criminology, 1995) 1.
13 See POEO Act s 6; Sarah Wright, 'Pollution Control and Waste Disposal' in Peter Williams (ed), *The Environmental Law Handbook: Planning and Land Use in NSW* (Thomson Reuters, 6th ed, 2016) 380.
14 POEO Act ss 91(1), 96(2). It is noted that the EPA can issue a clean-up notice in an emergency situation in relation to any pollution incident, including circumstances where it is not the ARA: POEO Act s 91(2).
15 Ibid s 6; see Wright, above n 13, 379–81.
16 POEO Act ss 5, 47(1), 48(2), 49(2).
17 A licence is required for any activity that will pollute waters, even if it is not otherwise listed in sch 1: see POEO Act ss 43(d), 120, 122.
18 Ibid s 6.
19 Wright, above n 13, 380.
20 POEO Act s 6; Wright, above n 13, 379.
21 Tom Howard, 'Prosecution of Environmental and Planning Offences in NSW — How Local Councils and Other Prosecuting Authorities Can Meet the Enforcement Challenge' (2001) 6 *Local Government Law Journal* 136, 136.
22 Wright, above n 13, 380; POEO Act ss 91(1), 96(2), 264(2).
23 POEO Act s 45.
24 Ibid s 45(c).
25 Ibid s 45(d).
26 Ibid s 45(i), (j).
27 Ibid s 45(l), Dictionary.
28 Ibid s 45(b). The EPA's objectives are set out in s 6(1) of the POEA Act.
29 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).

30 POEO Act s 77.
31 Ibid s 58(3), (4).
32 Ibid s 78(1).
33 See Madeleine Figg, 'Protecting Third Party Rights of Appeal, Protecting the Environment: A Tasmanian Case Study' (2014) 31 *Environmental and Planning Law Journal* 210, 212.
34 See Hannes Schoombee and Lee McIntosh, *Watching Over the Watch-Dogs: Regulatory Theory and Practice, with Particular Reference to Environmental Regulation* (Environmental Defender's Office Western Australia, October 2002) 1 <http://www.edowa.org.au/files/articles/8_Watchdogs.pdf>.
35 POEO Act s 3(b).
36 Ibid s 50(2). This includes both development consent required under pt 4 of the EP&A Act and an approval for State significant infrastructure under pt 5.1 of the EP&A Act: POEO Act s 50(4). The provision does not apply where the licence is varied at the EPA's initiative: POEO Act s 50(2).
37 POEO Act s 45(l).
38 Designated development is declared by the regulations or an environmental planning instrument: see EP&A Act ss 77A, 78A(8)(a); *Environmental Planning and Assessment Regulation 2000* (NSW) (EP&A Reg) cl 4(1), sch 3 pt 1; Peter Williams, 'Development' in Williams (ed), above n 13, 171.
39 See EP&A Act ss 89C(2), (3), 115U(2), (4); *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) cls 8, 14–16, schs 1–5.
40 EP&A Act ss 89D(1), 115W. SSD requires development consent under pt 4 of the EP&A Act. SSI is determined under pt 5.1 of the EP&A Act. The Department of Planning and Environment website notes that:

> The Planning Assessment Commission has a delegation to make decisions on State significant development and modification applications and modifications submitted by a private proponent, where:
>
> - there have been 25 or more objections to the application
> - the local council has objected, or
> - there has been a reportable political donation in connection with the application, or to a previous related application.

NSW Department of Planning and Environment, 'Delegated Decisions' (9 March 2016) <http://www.planning.nsw.gov.au/en/Assess-and-Regulate/Development-Assessment/Systems/Delegated-Decisions>.
41 EP&A Act ss 78A(8A), 115Y(2).
42 *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) cl 8(1), sch 1.
43 Ibid cl 14, sch 3.
44 EP&A Act ss 79(1)(a), 89F(1)(a).
45 EP&A Reg cl 50(1)(a), sch 1, cl 1(g).
46 EP&A Act ss 79(5), 89F(3).
47 Ibid s 115Z(3), (4).
48 EP&A Reg cl 69.
49 EP&A Act s 115Z(5)(b).
50 EP&A Reg cl 85B(c), (g).
51 POEO Act s 45(l).
52 See EP&A Reg sch 1, cl 1(1)(g); sch 2, cls 2, 7(1)(d)(v).
53 Ibid cls 78(1)(f)(i), 85(f)(i) (emphasis added).
54 Environmental Defender's Office (NSW), *Clearing the Air: Opportunities for Improved Regulation of Pollution in New South Wales* (Nature Conservation Council of NSW, 2012) 26 n 121.
55 Ilona Millar, *Objector Participation in Development Appeals*, EDO NSW, 5 <http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/670/attachments/original/1381972457/yl_cle_objector_participation.pdf?1381972457>.
56 POEO Act s 58(6).
57 Ibid s 78(1).
58 Ibid s 78(2).
59 Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 4th ed, 2016) 581.
60 POEO Act s 45(l).
61 Ibid Dictionary.
62 Lyster et al, above n 59, 581.
63 NSW Government, 'Protection of the Environment Operations Bill 1996: Public Discussion Paper' (Green Paper, Environment Protection Authority, December 1996) (POEO Green Paper) 18–19.
64 Ibid 16.
65 *Blacktown City Council v Wilkie* (2001) 119 LGERA 255, 275 (Pearlman CJ).
66 See EP&A Act ss 79C, 89H, 115ZB(2); POEO Act s 45.
67 This was recognised in the second reading speech for the EP&A Act itself: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1979, 3045–6 (Bill Haigh).
68 POEO Act s 3(a); see *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98, [105].
69 *EPA v Unomedical Pty Ltd (No 3)* (2010) 79 NSWLR 236, [188] (emphasis added).
70 *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98, [105].
71 EP&A Act ss 89K(1)(e), (2)(c), 115ZH(1)(e), (2)(c).

72 POEO Act s 91(1).
73 Ibid s 96(1).
74 Ibid s 96(2).
75 Ibid s 95.
76 Ibid s 264(2).
77 Ibid s 101.
78 Lyster et al, above n 59, 38.
79 See POEO Act ss 287–290.
80 *Land and Environment Court Act 1979* (NSW) (LEC Act) s 5(1).
81 Brian J Preston, 'Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales' (2008) 25 *Environmental and Planning Law Journal* 385, 387.
82 See LEC Act pt 3 div 1.
83 Ibid s 34C.
84 Ibid s 12(2), (2AA). There is no requirement, however, for commissioners to have legal qualifications.
85 Ibid s 39(3).
86 Ibid s 39(2).
87 Ibid s 38.
88 POEO Act s 292(2). In *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council* (2007) 71 NSWLR 230 the New South Wales Court of Appeal noted that there is a 'tension between s 292(2) [of the POEO Act] and s 39(5)' of the LEC Act, as the latter provides that the LEC's decision on appeal is 'deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal'. The former provides the decision is 'final and binding' on the original decision-maker. The Court stated that this differentiated merit appeals under the POEO Act from appeals regarding development applications under ss 97 and 98 of the EP&A Act — namely, the LEC cannot be said to 'stand in the shoes' of the decision-maker in relation to POEO Act merit appeals; the LEC is not 'equated with the original administrative decision-maker': [15]–[16], [75]–[79], [145]–[146], [149], [155] (Spigelman CJ, Mason P, Beazley, Giles and Ipp JJA agreeing).
89 LEC Act s 34.
90 *Civil Procedure Act 2005* (NSW) s 26; see Land and Environment Court of NSW, *Mediation* <http://www.lec.justice.nsw.gov.au/Pages/resolving_disputes/mediation.aspx>.
91 *Land and Environment Court Rules 2007* (NSW) r 6.2; see Land and Environment Court of NSW, *Neutral Evaluation* (4 May 2015) <http://www.lec.justice.nsw.gov.au/Pages/resolving_disputes/neutral_evaluation.aspx>.
92 *Uniform Civil Procedure Rules 2005* (NSW) r 20.14(1).
93 LEC Act s 34(1A); *Civil Procedure Act 2005* (NSW) s 27; *Land and Environment Court Rules 2007* (NSW) r 6.2(4); *Uniform Civil Procedure Rules 2005* (NSW) r 20.20(6).
94 POEO Act ss 287–288.
95 Ibid s 289(1).
96 Ibid s 290(1)(a).
97 The power requiring such a device to be installed is contained in s 144AC of the POEO Act. The appeal right is contained in s 289A.
98 Ibid ss 287–290.
99 See POEO Act ch 7 in relation to investigation powers.
100 (2011) 186 LGERA 311.
101 Ibid [53].
102 EP&A Act s 98(1).
103 Ibid s 98(4).
104 Wright, above n 13, 381.
105 LEC Act s 39A.
106 In *Thaina Town (On Goulburn) Pty Ltd v Council of the City of Sydney* [2006] NSWLEC 624 the lessee of a restaurant within a strata title building that had been served with a prevention notice under the POEO Act in relation to odours, cooking grease and oil being emitted from an exhaust system appealed against the notice. The LEC granted leave for the owners corporation of the building in which the restaurant was situated to intervene in the proceedings: [2]. While the reasons for allowing the owners corporation to intervene were not stated in the final judgment, the owners corporation was directly impacted on by the LEC's decision. First, Commissioner Brown held that the relevant equipment was owned and managed by the owners corporation rather than the restaurant, such that the restaurant was neither the 'occupier' for the purposes of issuing a prevention notice nor the person carrying on the activity: at [17], [23]–[28]. This meant the owners corporation would be a proper recipient of any prevention notice as such a notice can only be issued to the occupier or the person carrying on the activity. Secondly, occupants of the building were being affected by odours from the exhaust system: [5], [11].
107 *Thaina Town (On Goulburn) Pty Ltd v Council of the City of Sydney* [2006] NSWLEC 624, [2].
108 *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98, [105].
109 Independent Commission Against Corruption (NSW), *Anti-Corruption Safeguards and the NSW Planning System*, ICAC Report (February 2012) 22.
110 Environmental Defender's Office (NSW), above n 54, 7, 26.

111 EDO NSW, formerly known as the Environmental Defender's Office, is a specialist environmental and planning law community legal centre: see <http://www.edonsw.org.au/>.
112 Environmental Defender's Office (NSW), above n 54, 26.
113 Figures are based on information contained in the Public Register, available at <http://www.epa.nsw.gov.au/publicregister/index.htm>.
114 In 1995 Stein stated that the number of third-party objector appeals under s 98 of the EP&A Act constituted one to two per cent of all applications made in Class 1 of the LEC's jurisdiction: Paul Stein, 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law' (1996) 13 *Environmental and Planning Law Journal* 179, 184. While the current figures for s 98 appeals are unknown, based on information regarding the other types of proceedings lodged in Class 1 it would appear that the number of third-party merit appeals remains low. The LEC website notes that in 2014 the percentage of matters in Class 1 of the LEC's jurisdiction was as follows: EP&A Act s 97, appeals by developers — 62 per cent; s 96, applications for modification of a development consent — 18 per cent; appeal against council orders or deemed refusal of a building certificate — eight per cent; all other Class 1 matters — for example, costs, appeals against other notices — 12 per cent: Land and Environment Court of NSW, *Class 1: Environmental Planning and Protection Appeals* (14 January 2016) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_1/class_1.aspx>. Third-party objector appeals under the EP&A Act would fall within this last category, so they are likely to represent only a small percentage of overall matters.
115 Data is derived from the Public Register.
116 NSW Government, above n 63, 18–19.
117 EP&A Act s 98(5).
118 Ibid s 23D(1)(b).
119 EP&A Reg cl 268V(1), (2).
120 Environmental Defender's Office (NSW), *Merits Review in Planning in NSW* (Report, July 2016) 6.
121 See n 40 above in relation to the matters for which PAC has been delegated power.
122 Environmental Defender's Office (NSW), above n 120, 6–7.
123 Ibid; Planning Assessment Commission, *Projects* <http://www.pac.nsw.gov.au/Projects>.
124 Jeff Smith, 'Community Legal Rights to Protect the Environment being Eroded' (2014) 58(3) *Nature New South Wales* 24, 24.
125 See Environmental Defender's Office (NSW), above n 120.
126 EP&A Act ss 89K(1)(e), 115ZH(1)(e); Environmental Defender's Office (NSW), above n 54, 16.
127 EP&A Act ss 89K(1)(e), (2)(c), 115ZH(1)(e), (2)(c).
128 Bird, above n 3, 743 (citations omitted).
129 Australian Panel of Experts on Environmental Law, above n 5, 25.
130 Wright, above n 13, 422.
131 *Macquarie Generation v Hodgson* (2011) 186 LGERA 311, [55] (Handley AJA, Whealy and Meagher JJA agreeing).
132 See POEO Act s 45. In *Brown v Environment Protection Authority [No 2]* (1992) 78 LGERA 119, 137, Pearlman CJ held that the EPA was entitled to consider the best available technology economically achievable (BATEA) in exercising its licensing powers under the predecessor licensing provisions to the POEO Act, the *Pollution Control Act 1970* (NSW) s 17D.
133 POEA Act s 13(1). Certain functions of the EPA are excluded from ministerial control: s 13(2). However, licensing is not listed as one of them.
134 Ibid s 13A(2).
135 See Figg, above n 33, 213, citing an environmental lawyer from Victoria who was interviewed as part of Figg's study.
136 Mossop, above n 12, 7.
137 See Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000) 238.
138 Figg, above n 33.
139 Ibid 210.
140 Ibid 212.
141 Ibid 216, 221; see also Millar, above n 55, 9–10.
142 Environmental Defender's Office (NSW), above n 120, 3.
143 Derived from data for registrations in Classes 1–3 of the LEC's jurisdiction for the years 2010–2014 as contained in Land and Environment Court of NSW, *The Land and Environment Court of NSW Annual Review 2014* (2015) 29–30. Classes 1–3 of the LEC's jurisdiction incorporates the Court's merits review functions. There are also some other civil proceedings falling within those classes, such as disputes between neighbours regarding trees: LEC Act ss 17–19.
144 See Land and Environment Court of NSW, above n 143, 31; Land and Environment Court of NSW, above n 114.
145 Figure derived from data contained in Land and Environment Court of NSW, above n 143, 29.
146 Figures are derived from a search of civil proceedings contained on the Public Register and published judgments contained on NSW Caselaw <http://www.caselaw.nsw.gov.au>.
147 See Chris McGrath, 'Myth Drives Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33 *Environmental and Planning Law Journal* 3, 10.

148 When searching for new licence applications on the Public Register, only licence applications with a status of 'pending' appear rather than a list of all licence applications made. A total of 2596 environment protection licences were listed as being 'issued' under the POEO Act, which seems to mean 'in force'. When searching for licences the drop-down search box for 'licence status' gives options of searching for 'revoked', 'issued', 'suspended', 'no longer in force' and 'surrendered'. A cross-sample of licences listed as 'no longer in force' could not be found in the 'issued' licences, indicating that a licence listed as 'issued' only refers to those in force. Licences, once issued, remain in force unless suspended, revoked or surrendered: POEO Act s 77(1).
149 These figures are derived from a search of the Public Register.
150 It is noted these figures also do not include variations initiated by the EPA rather than the licensee.
151 Wright, above n 13, 422.
152 Section 308(2)(k) of the POEO Act requires the Public Register to record 'the results of civil proceedings' in the LEC involving the EPA. 'Result' is defined to mean 'that which results; the outcome, consequence, or effect': Susan Butler (ed), *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers, 2009) 1074. Simply recording that a matter has been 'completed' does not actually record the 'result' of the proceedings.
153 *Centennial Newstan Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1463; *Renewed Metal Technologies Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1216; *Hi-Quality Waste Management Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1175; *Truegain Pty Ltd v NSW Environment Protection Authority* [2008] NSWLEC 278; *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1170; *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1220.
154 Data has been sourced from the public register. In order to determine the outcome of a matter the information regarding the results of civil proceedings in the Public Register was initially consulted. In order to obtain further information about the matter or to try to determine the outcome of a case where this was not clearly stated on the Public Register, other information on the Public Register was also searched. For example, where consent orders have been made by the LEC regarding the variation of licence conditions, the EPA has then issued a further notice varying the licence conditions. The background information in the notice may refer to the consent orders made by the Court which assisted to determine the outcome in proceedings where there is no written judgment available. It was necessary to search this additional information as for a number of matters the Public Register simply lists the matter as 'completed' or 'completed … application allowed in part' without giving any indication of the substantive outcome. Information regarding whether a written judgment has been published in a matter was sourced by searching the NSW Caselaw website: <http://www.caselaw.nsw.gov.au>. Three additional merits review matters were found on NSW Caselaw that were not recorded in the list of civil matters on the public register: *Centennial Newstan Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1463; *Renewed Metal Technologies Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1216; *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1170; *Always Recycling Pty Ltd v Environment Protection Authority (No 2)* [2012] NSWLEC 1220.
155 POEO Act s 287(1).
156 McGrath, above n 147, 10.
157 Figures are based on information contained in the Public Register.
158 Ibid.
159 John Roseth, 'Planning Principles and Consistency of Decisions' (Paper presented at NSW Law Society Local Government and Planning Law Seminar, 15 February 2005) 1 <http://www.lec.justice.nsw.gov.au/Documents/speech_15feb05_roseth.pdf>.
160 *Centennial Newstan Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1463; *Renewed Metal Technologies Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1216; *Hi-Quality Waste Management Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1175; *Truegain Pty Ltd v NSW Environment Protection Authority* [2008] NSWLEC 278; *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1170; *Always Recycling Pty Ltd v Environment Protection Authority (No 2)* [2012] NSWLEC 1220.
161 NSW Government, *Model Litigant Policy for Civil Litigation* (29 June 2016) [2.1], [3.2] <http://arp.nsw.gov.au/sites/default/files/Model%20Litigant%20Policy%20for%20Civil%20Litigation.pdf>; see also *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424, [213] (Basten JA, Macfarlan JA agreeing).
162 Stein, above n 114, 183.
163 *Centennial Newstan Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1463; *Renewed Metal Technologies Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1216; *Hi-Quality Waste Management Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1175.
164 *Truegain Pty Ltd v NSW Environment Protection Authority* [2008] NSWLEC 278, [1]–[4].
165 *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1170; *Always Recycling Pty Ltd v Environment Protection Authority (No 2)* [2012] NSWLEC 1220.
166 [2012] NSWLEC 1170.
167 Ibid [25], [64]–[66].
168 Ibid [25], [66].
169 Ibid [67].
170 Ibid [69].

171 *Always Recycling Pty Ltd v Environment Protection Authority (No 2)* [2012] NSWLEC 1220, [21].
172 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 947; Tim Moore, 'The Relevance of the Court's Planning Principles to the DA Process' (Paper presented at Dealing with DAs in 2009, Sydney, 21 May 2009) 1 <http://www.lec.justice.nsw.gov.au/Documents/neerg_21_may_2009_paper.pdf>.
173 Bates, above n 172, 404, citing *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270.
174 Peter Biscoe, 'Ecologically Sustainable Development in New South Wales' (Paper presented at 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil, 2 June 2007) 27–8; Environmental Defender's Office (NSW), above n 120, 10.
175 Environmental Defender's Office (NSW), above n 120, 10.
176 Brian Preston and Jeff Smith, 'Legislation Needed for an Effective Court' in Nature Conservation Council of NSW (ed), *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979–1999: Conference Proceedings* (Nature Conservation Council of NSW, 1999) 107.
177 Environmental Defender's Office (NSW), above n 120, 13.
178 Ibid 13–15.
179 Bates, above n 172, 947.
180 Wright, above n 13, 422.
181 Ibid 380.
182 Based on a search of the Public Register.
183 Ibid.
184 Wright, above n 13, 380.
185 See EP&A Act pt 4 div 10.
186 POEO Act s 308(2)(h), (k).
187 Ibid s 308(3).
188 Judgments were located via NSW Caselaw <http://www.caselaw.nsw.gov.au>.
189 See EP&A Act s 121B; *Local Government Act 1993* (NSW) s 124; *Gerondal v Eurobodalla Shire Council* [2010] NSWLEC 1217, [31]; see also *Udy v Hornsby Shire Council* [2007] NSWLEC 242, [17].
190 *Martin v Campbelltown City Council* [2000] NSWLEC 228 (noise control notice — noise regarding poultry collection at a business premises); *Sumar Produce Pty Ltd v Griffith City Council* [2000] NSWLEC 27; *Sumar Produce Pty Ltd v Griffith City Council* [2000] NSWLEC 72; *Sumar Produce Pty Ltd v Griffith City Council* [2000] NSWLEC 104 (noise control notice — noise from a frost control fan on an agricultural premises); *Trustees of the Christian Brothers (Waverly College) v Waverly Council* [2004] NSWLEC 210 (noise control notice — noise from a school swimming pool); *Shearers Road Freight Pty Ltd v Canterbury City Council* [2006] NSWLEC 290 (noise control notice and prevention notice — noise from a milk warehousing and distributing centre); *Webber v Parramatta City Council* [2014] NSWLEC 1065 (prevention notice — movement of horses from stables); *Cobreloa Sporting Club and Ethnical Club Ltd v Fairfield City Council* [2007] NSWLEC 54 (prevention notice — noise from a club); *Rogers v Clarence Valley Council* [2013] NSWLEC 194 (prevention notice — noise from barking dogs at an animal shelter).
191 *Thaina Town (On Goulburn) Pty Ltd v Council of the City of Sydney* [2006] NSWLEC 624; *Cantarella Bros Pty Ltd v City of Ryde Council* (2003) 131 LGERA 190.
192 *Owners Strata Plan 10897 v Woollahra Municipal Council* [2004] NSWLEC 5; *Hall v Marrickville Council* [2013] NSWLEC 1235.
193 *Gerondal v Eurobodalla Shire Council* [2010] NSWLEC 1217; *Gerondal v Eurobodalla Shire Council* [2011] NSWLEC 77.
194 *Udy v Hornsby Shire Council* [2007] NSWLEC 614, [2].
195 Ibid [2].
196 See *Uniform Civil Procedure Rules 2005* (NSW) r 28.2.
197 [2007] NSWLEC 242.
198 Ibid [9].
199 Ibid [11], [15]; POEO Act s 96(3)(d).
200 [2007] NSWLEC 54.
201 Ibid [5].
202 Ibid [19]–[21].
203 POEO Act s 3(b).
204 Environmental Defender's Office (NSW), above n 120.