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Editor: Kirsten McNeill

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RECENT DEVELOPMENTS

Katherine Cook

Commissioner appointed and Terms of Reference released for ALRC inquiry into incarceration rate of Indigenous Australians

On 10 February 2017, the Commonwealth Attorney-General and the Minister for Indigenous Affairs announced the appointment of Judge Matthew Myers AM of the Federal Circuit Court of Australia as Commissioner of the Australian Law Reform Commission (ALRC) inquiry into the incarceration rate of Indigenous Australians.

This is an important review to examine the factors leading to the over-representation of Indigenous Australians in our prison system and to consider reforms to the law to ameliorate this.

Aboriginal and Torres Strait Islander people make up 27 per cent of Australia's prison population, despite being only 3 per cent of Australia's national population.

Judge Myers has a wealth of knowledge and experience, including in Indigenous legal issues. He was appointed to the Federal Circuit Court in 2012 as Australia's first Indigenous Commonwealth judicial officer. He is a Judge in the Newcastle Registry of the Federal Circuit Court.

The Ministers thank Judge Myers for his willingness to serve the people of Australia through this important work. The Turnbull government acknowledges that this appointment creates a temporary vacancy in the Newcastle Registry of the Federal Circuit Court. This will be resolved in consultation with Chief Judge John Pascoe AC CVO.

In December 2016, the government released a consultation draft Terms of Reference for the inquiry. After wide consultation, including with state and territory governments and Indigenous communities and organisations, the Terms of Reference have now been finalised. The government thanks those who provided their views.

The ALRC will examine the laws, frameworks and institutions and broader contextual factors that lead to the disturbing over-representation of Aboriginal and Torres Strait Islander people in our prison system.

The ALRC will report to the government by 22 December 2017.

The government is committed to working with Indigenous Australians, state and territory governments, the legal profession and the wider community to develop solutions for this complex issue.

The Terms of Reference are available on the Attorney-General's Department website.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Commissioner-appointed-and-terms-of-reference-released-for-ALRC-inquiry-into-incarceration-rate-of-indigenous-australians.aspx>

Appointment of Aboriginal and Torres Strait Islander Social Justice Commissioner

On 9 February 2017, Ms June Oscar AO was appointed as Aboriginal and Torres Strait Islander Social Justice Commissioner in the Australian Human Rights Commission.

Ms Oscar is a Bunuba woman and community leader from the Central Kimberley region of Western Australia. She is currently the CEO of the Marninwarntikura Women's Resource Centre in Fitzroy Crossing.

Ms Oscar has an outstanding record as a determined, courageous and pragmatic advocate for the rights of Indigenous Australians. Her experience in Indigenous policy spans language revitalisation, native title, health, women's issues and, most notably, Foetal Alcohol Spectrum Disorder (FASD).

Ms Oscar was instrumental in the successful community-led campaign to restrict the sale of full-strength takeaway alcohol in the Fitzroy Valley. She also initiated a partnership to conduct the first study in Australian history on the prevalence of FASD.

Ms Oscar was appointed as an Officer of the Order of Australia in 2013 for distinguished service to the Indigenous community of Western Australia, particularly through health and social welfare programs, and was awarded the Menzies School of Health Research Medallion in 2014 for her work with FASD.

Ms Oscar's appointment demonstrates the fundamental role Indigenous women play in fostering social change at a community, national and international level. The Attorney-General is looking forward to the contribution Ms Oscar can make on important issues impacting on Indigenous women and children.

Ms Oscar will bring deep knowledge and experience in dealing with the problem of alcohol abuse in Indigenous communities and strategies to mitigate the effect of that abuse on women and children in particular.

The government looks forward to working closely with Ms Oscar and the contribution she will make to the work of the Commission.

Ms Oscar's appointment will be for five years beginning on 3 April 2017.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Appointment-of-aboriginal-and-torres-strait-islander-social-justice-commissioner.aspx>

INSLM's report on Certain Questioning and Detention Powers in Relation to Terrorism

On 8 February 2017, the Turnbull government tabled the report of the Independent National Security Legislation Monitor (INSLM), *Certain Questioning and Detention Powers in Relation to Terrorism*.

The INSLM has made a number of recommendations in relation to agencies' questioning and detention powers, including that:

- the legislation governing ASIO's compulsory questioning power be brought into line with the equivalent power available under the *Australian Crime Commission Act 2002* (Cth); and

- ASIO's questioning and detention power — which has never been sought, or used, by ASIO — be repealed or cease when the sunset date is reached.

The government is carefully considering the report's recommendations.

The government thanks the Hon Roger Gyles AO QC for his work. Mr Gyles made a significant contribution to the role, bringing years of experience across a range of legal fields to the complex challenges facing Australia's national security. The government will soon announce the new INSLM.

Independent oversight of our national security agencies is critical. The government will continue to ensure our national security agencies have the powers they need to keep Australians safe while protecting our freedoms.

The report is available on the INSLM website.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Inslms-report-on-certain-questioning-and-detention-powers-in-relation-to-terrorism.aspx>

The Commonwealth Ombudsman releases a report on the processing of asylum seekers who arrived in 2013 on a suspected illegal vessel

Commonwealth Ombudsman Mr Colin Neave has released an own-motion report on the Department of Immigration and Border Protection's processing of asylum seekers who arrived on the suspected illegal entry vessel *Lambeth* in 2013.

The Ombudsman's office first became aware of apparent discrepancies in the processing of these asylum seekers in information provided by the department, as part of the Ombudsman's obligation to report on people who have been in immigration detention for more than two years.

'There was a prolonged attempt by our office to have this clarified by the department. And while ultimately we were satisfied that the asylum seekers had been processed correctly, what emerged from this investigation was that there appeared to be no central integrated repository of all the relevant information about individual asylum seekers', Mr Neave said.

Not only did this impact on the department's ability to provide responses to the Ombudsman in a timely manner; it also meant that incorrect advice was given to the Ombudsman in relation to these asylum seekers and whether they were properly assessed as being offshore arrivals.

'This raises concerns that all relevant information was not available to officers of the department in a timely manner', Mr Neave said.

The department has accepted the Ombudsman's recommendations that it review the information it recorded for asylum seekers on the *Lambeth* and identify any shortcomings in its scope; and ensure all relevant information is readily available to departmental officers. The department also agreed that any learnings from this review would be applied to its systems more broadly.

<http://www.ombudsman.gov.au/news-and-media/media-releases/media-release-documents/commonwealth-ombudsman/2017/11-january-2017-ombudsman-releases-report-into-the-processing-of-asylum-seekers-who-arrived-in-2013-on-a-suspected-illegal-vessel>

The Victorian Government seeks special leave to appeal to the High Court

The Victorian Labor Government is seeking special leave to appeal the Court of Appeal's decision regarding the Victorian Ombudsman's jurisdiction to investigate a referral made by the Legislative Council.

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

The effect of the Court of Appeal decision is that either House of the Parliament, or any committee of the Parliament, could by a simple majority require the Ombudsman to conduct an investigation on any matter.

This could include requiring the Ombudsman to investigate the actions of private companies, non-government organisations or individuals.

If such a referral were made, the Ombudsman would then be required to prioritise that investigation over the day-to-day work of the Ombudsman's office, which deals with complaints by Victorians about government departments and agencies, local councils and statutory authorities.

The government maintains that such a reading of the *Ombudsman Act 1973* (Vic) fundamentally impairs the relationship between the Ombudsman and other integrity bodies and is contrary to the principal purpose of the Ombudsman's office laid out in the Act.

The government is also concerned that the Legislative Council's referral could be read as requiring the Ombudsman to investigate the conduct of Members of the Legislative Assembly, including those in a previous parliament.

The Supreme Court acknowledged that, where a referral or an investigation by the Ombudsman would breach longstanding principles of parliamentary privilege, it would be a matter for 'the other House' to assert the privilege.

In line with the Supreme Court's observation, the government intends to assert the Legislative Assembly's privilege in this matter when Parliament returns in February.

For balance, the government will also use the Parliament to seek to amend the Legislative Council's referral to include the use of members' staff budgets and entitlements by the Liberal Party, the National Party and the Greens Party.

The High Court consideration of this matter need not impede the Ombudsman from fulfilling her statutory obligations to report to the Parliament on the current referral forthwith.

The Ombudsman has been and remains free to conduct her investigation, and relevant Members of Parliament will continue to assist the Ombudsman, as has been the case with previous inquiries conducted by Victoria Police and the Parliament of Victoria, both of which have been concluded.

<http://www.premier.vic.gov.au/government-seeks-special-leave-to-appeal-to-the-high-court/>

Report on youth justice: Victorian Ombudsman

On 6 February 2017, the Victorian Ombudsman tabled a report on the state's youth justice facilities to give Parliament and the public an insight into recent events and to illustrate how the relevant oversight agencies are holding government to account.

Victorian Ombudsman Ms Deborah Glass said the report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville represents a continuation of the Ombudsman's longstanding concerns into youth justice.

'I welcome the government's review of youth justice, commissioned last year before the recent troubles, with its focus on long-term and joined-up solutions. The chorus of blame will not make us safer as we worry about youth crime.'

'Safety will lie in a system that makes it less likely these young people will be repeat offenders. It is neither in the interests of public safety nor the public purse for young people to become entrenched in a life of crime, cycling through youth justice centres into adult prisons to which all too often they return', said Ms Glass.

Youth justice has attracted considerable media and political attention in recent months amid a series of disturbances at the two previously existing juvenile justice facilities at Parkville and Malmsbury. Severe damage caused by young people during unrest at Parkville led the Victorian Government to gazette a new youth justice centre at the Grevillea Unit in Barwon prison.

The report identifies a shift in offending patterns by some young people held in juvenile justice facilities, with evidence from the Department of Health and Human Services describing the current cohort as 'more sophisticated, socially networked, calculated and callous offending, characterised by rapidly escalating levels of violence and disregard for authority and consequence'.

'My 2015 report into rehabilitation in prisons illustrated how ill-equipped the correctional system is to deal with young adult offenders. Victoria's dual track system must go on recognising that children — even dangerous children — are different from adults', said Ms Glass.

Another major theme emerging from Victorian Ombudsman inquiries — including visits to the three juvenile justice centres — is that extended lockdowns of young people are contributing to the tension that leads to disturbances.

'It is evident that this is affected by a toxic combination of staff shortages and increasing overcrowding. It is predictable that a regime of lockdowns for young people will create unrest, and equally predictable that more lockdowns will follow that unrest', said Ms Glass.

Former Ombudsman Mr George Brouwer tabled a report, *Whistleblowers Protection Act 2001: Investigation into Conditions at the Melbourne Youth Justice Precinct*, in 2010 that identified flaws within the Parkville facility.

'Among other things, the report noted design features such as a low roof-line allowing detainees to climb onto the roof and ill-placed staircases creating blind spots and posing a safety risk to detainees and staff', said Ms Glass.

While noting that there had been a substantial response to the previous Ombudsman's report, including the establishment of Parkville College, Ms Glass noted that the precinct itself still existed and young people were still able to climb onto the roof.

'The record is patchy — successive governments have failed to make the significant investment needed to address the long-term issues that are increasingly apparent.'

'There is no short-term fix to the serious problems affecting youth justice, which have their origins not only in ageing infrastructure but in the complex interplay of health and human services, education and the justice system.'

<https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Report-on-youth-justice-Victorian-Ombudsman>

Recent decisions

Errors of law versus errors of fact

Secretary, Department of Justice and Regulation v Zhanyu Zhong [2017] VSCA 18 (17 February 2017)

In 2009, the respondent decided he wanted to drive tourist buses for Chinese tourists. To do that he needed to be accredited to drive commercial passenger vehicles under the *Transport Act 1983* (Vic). He was also required to apply for a Working with Children Check under the *Working with Children Act 2005* (Vic).

In January 2009, the respondent made the necessary applications under the legislation. During the application processes, criminal record checks disclosed that he had been convicted of a serious criminal offence — inciting the murder of his ex de facto wife. Given the nature of the offence, the then Director of Public Transport was not permitted to accredit the respondent and the Secretary to the Department of Justice issued a negative notice under the Working with Children Act, meaning that he could not take up a position driving taxis or buses.

The respondent applied to the Victorian Civil and Administrative Tribunal for review of the decision by the Secretary and for an order directing the Director to accredit him. A Vice President of the Tribunal found in the respondent's favour primarily on the basis that the offences occurred 15 years ago; the respondent had maintained a clean record during the period; and there was no relevant link between his offending and child-related work. However, in making these findings, the Vice President also found that the respondent showed no remorse for his offending.

The Vice President ordered that the Taxi Services Commission (which has replaced the Director of Public Transport) issue driver accreditation to the respondent so that he may drive commercial passenger vehicles (which includes both buses and taxis). The Vice President also directed the Secretary to issue a working with children assessment notice to the respondent.

Both the Taxi Services Commission and the Secretary (the applicants) sought leave to appeal under s 148(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). Under that Act, an appeal may only be brought on a question of law and leave may be granted if the proposed appeal has a real prospect of success.

The applicants sought to rely on six proposed grounds of appeal that the Vice President made a 'jurisdictional error' in her findings and sought orders that the Tribunal's decision be set aside and substituted with orders that the respondent's applications be dismissed and that he be disqualified from making further applications for five years.

The Court found that the proposed grounds of appeal and the 'questions of law' do not satisfy the requirement specified in s 148(1) of an appeal in respect of questions of law. The proposed grounds were directed to errors of fact, not errors of law.

The applicants then sought to reformulate the grounds, contending that, among other things, the findings of the Vice President that there was no evidence of violence on the part of the respondent were not open on the evidence.

The Court held that, despite the respondent's lack of remorse, when other matters were considered it was open to the Vice President to find that the statutory criteria had been satisfied as to both whether there was an unjustifiable risk and whether it was in the public interest that he be accredited. It was clear that the Vice President was alert to the importance of a lack of remorse to determination of those criteria, but, as she stated, it is not the only relevant matter. In this case, the respondent had led a blemish-free life over many years and the circumstances of his crime were confined to a fraught personal relationship. It did not arise in a public work environment. Considered in that context, it was clearly open to the Vice President to find that both the risk and public interest criteria were satisfied.

The Court found that the applicants' proposed appeals had no real prospect of success. Despite counsel's attempt to reformulate the proposed grounds of appeal so that they raised questions of law, in substance the applicants' true complaint was that the Vice President failed to take into account some evidence or failed to give it the weight which they believe it should have been given. The findings that the Vice President made and with which the applicants cavil were all clearly open on the evidence; therefore, the application for leave to appeal should be refused.

Administrative law and horse racing at the Wagga Wagga Show — the appeal

Agricultural Societies Council of NSW v Christie [2016] NSWCA 331 (1 December 2016)

The applicant, Agricultural Societies Council of NSW Ltd (ASC), is a not-for-profit organisation providing services to member show societies. Those services included the drug testing of horses at shows and the conduct of disciplinary inquiries. ASC's Rules for Discipline in Horse Sections at Shows (the Rules) were formulated with respect to the undertaking of its disciplinary functions.

On 3 October 2014, Mr Christie (the respondent horse trainer) participated in the 150th Wagga Wagga Show. He rode Royalwood Black Swan to victory in the Galloway Champion Hack event. After Mr Christie's victory, the horse that he was riding was selected to undergo drug testing by Mr Capp, a director of ASC and its official present at the show. The testing revealed the presence of two prohibited substances. Ms Cullen, the horse's owner, later admitted that she alone had doped the horse.

An inquiry was initiated and on 24 March 2015 a disciplinary committee, constituting Mr Capp and three other directors of ASC, found the respondent had breached the ASC Rules by using prohibited substances. It imposed a 12-month suspension on the respondent. ASC has no contractual or other relationship with the respondent which enabled it to enforce the penalty.

The respondent sought urgent interlocutory injunctive relief and a final order setting aside or quashing the decision of the committee. In doing so, he did not rely on any contract between himself and the ASC or other private law right as the basis for the Court's jurisdiction to grant relief. Also, it was not said that ASC was exercising any statutory power or performing any governmental function.

The primary judge (Kunc J) found that the committee's decision was amenable to judicial review because it adversely affected the respondent's livelihood and reputation (*Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 (*AFL v Carlton*); *Mitchell v Royal New South Wales Canine Council Limited* (2001) 52 NSWLR 242 (*Mitchell*)). His Honour also found that there was apprehended bias on the part of Mr Capp which vitiated the committee's decision and ordered that the decision be quashed: *Christie v Agricultural Societies Council of NSW* [2015] NSWSC 1118.

ASC sought leave to appeal from those orders. ASC contended, among other things, that the decision of its committee was not amenable to relief in the nature of certiorari. It also contended that *Mitchell* and *AFL v Carlton* were cases in which the contractual relations between the parties gave rise to the private law right and therefore were not applicable, as no such relations exists in this case.

The Court found that the basis for the exercise of the Court's power to grant relief in the nature of certiorari arises where the decision-maker is exercising a public or statutory function (*Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393). Here the ASC was not exercising any statutory power or government regulatory function. Therefore, the primary judge erred in finding the ASC's decision was amenable to judicial review.

The Court also held that a Court's power to grant a remedy such as a declaration or injunction in relation to the decision of a private tribunal (like the ASC) is founded on the exercise of contractual or other private law rights recognised at law or in equity (*AFL v Carlton*; *Mitchell*). In this case, no such rights were relied on to justify the Court's intervention.

Finally, the Court found that Mr Capp's involvement in the circumstances leading to the decision to impose a penalty was not akin to that of prosecutor (compare *Isbester v Knox City Council* [2015] HCA 20). Mr Capp did not undertake investigations or oversee the prosecution of the charges and had no 'interest' in the process that might cause him to deviate from proper decision-making. On the contrary: Mr Capp's involvement was more fairly characterised as administrative or ministerial. Therefore, the primary judge erred in concluding that Mr Capp's involvement in the circumstances leading to the decision to impose a penalty on Mr Christie gave rise to any reasonable apprehension of bias on his part.

What types of tribunal decisions are reviewable by a court?

Chief of Navy v Angre [2016] FCAFC 171 (9 December 2016)

ABMT Angre applied to the Defence Force Discipline Appeal Tribunal for leave to appeal and an extension of time to appeal against convictions entered by a General Court Martial. The Tribunal was constituted by Tracey, Logan and Brereton JJ.

As part of those proceedings, the Tribunal, relying on s 23(1) of the *Defence Force Discipline Appeals Act 1955* (Cth) (the Appeals Act), granted AMBT Angre leave to adduce certain

evidence on the hearing of his appeal. The applicant objected to the Tribunal receiving that evidence.

The applicant filed an appeal in the Full Federal Court under s 52 of the Appeals Act in relation to the Tribunal's evidentiary ruling. Section 52 provides, among other things, that an appellant or the Chief of the Defence Force or a service chief may appeal to the Federal Court on a question of law involved in a decision of the Tribunal in respect of an appeal under the Appeals Act.

As a preliminary matter, the Court considered whether it had jurisdiction to hear the application.

The applicant contended, among other things, that the Explanatory Memorandum (EM) to the *Defence Force (Miscellaneous Provisions) Act 1982* (Cth), which inserted s 51 into the Appeals Act, stated that the relevant part would 'provide a wider access to the Federal Court including a right to appeal on questions of law' and s 52(1) provided the right to the appeal to the Federal Court 'from any decision of the Tribunal'. The applicant emphasised the use of the word 'any' in the EM.

The Court held that the principles in *Director-General of Social Services v Chaney* [1980] FCA 108 (*Chaney*) apply to s 52 of the Appeals Act — namely, that, like the Administrative Appeals Tribunal, an appeal from a decision of the Tribunal lies only from an effective decision or determination of the Tribunal. Ordinarily, such a decision will be a final, operative decision.

The Court stated that the point of the decision in *Chaney* is to avoid judicial review by way of an appeal *instanter* and as of right from non-determinative steps, determinations or decisions of the Tribunal. This reflects the undesirability of fragmenting proceedings in the Tribunal by the making of applications to the Federal Court seeking to challenge intermediate directions, determinations or decisions of the Tribunal (*Geographical Indications Committee v The Honourable Justice O'Connor* [2000] FCA 1877).

The Court opined that reliance on statements in extrinsic material, like an EM, cannot govern the construction of legislation, especially where those statements are not present in the legislation itself (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41).

STATUTORY POWERS AND CONSTITUTIONALLY PROTECTED FREEDOMS

Felicity Nagorcka and Gim Del Villar

It is sometimes said that Australia's *Constitution* does not protect rights. While that may be an exaggeration,[1] it is certainly true that, unlike many other constitutions, it does not contain an express bill of rights. However, Australia's *Constitution* does protect freedom of political communication, which is an 'indispensable incident'[2] of the system of responsible and representative government established by the *Constitution*. Legislation that would 'unduly burden' the freedom, the High Court has said, is invalid; it does not matter whether that legislation is Commonwealth, state or territory legislation. What is known as the 'implied freedom of political communication' (or simply the 'implied freedom') is therefore a restriction on legislative power throughout the nation. Whether legislation unduly burdens the freedom and is invalid is determined by reference to the test set out in *Lange v Australian Broadcasting Corporation*[3] (*Lange*), as recently modified in *McCloy v New South Wales*[4] (*McCloy*).

This article discusses the implications of this restriction on legislative power for decision-makers exercising statutory discretions. In particular, what is a decision-maker to do if they propose to make a decision that might burden communication on government or political matters?

Several recent cases in lower courts suggest that the answer to this question is that decision-makers must 'have regard to' the implied freedom in making their decisions. That answer is unsatisfactory, for it is unclear what decision-makers are meant to do — in particular, it is unclear whether they should try to apply the *McCloy* test directly.

Yet that answer has been held to follow from the joint reasons of five members of the High Court in *Wotton v Attorney-General (Qld)*[5] (*Wotton*). In this article we argue that the joint reasons in *Wotton* should not be interpreted as leading to that conclusion. In our view, the joint reasons in *Wotton* are capable of supporting a more sensible approach, whereby decision-makers will often not be required to have regard to the implied freedom in making their decisions.

At least in our view, much of the difficulty in this area stems from the lack of clarity in *Wotton* and in the subsequent High Court decision in *Attorney-General (SA) v Adelaide City Corporation*[6] (*Adelaide City*). We will begin by considering these two judgments and how they fit into what we see as a better conceptual framework. We will then go on to discuss some of the more recent decisions in lower courts.

Before launching into the substance of our article, however, it is worthwhile to set out briefly the *Lange/McCloy* test against which the validity of legislation is determined.

The first question is, and has always been: does the law effectively burden the freedom in its terms, operation or effect? If there is no burden, no further questions arise and the law is valid. However, it seems to be very easy for the courts to find a burden: any law that has the effect of curtailing or prohibiting political communication will burden the freedom.[7]

Before *McCloy*, the second question was: does the law have a legitimate end, and is it reasonably appropriate and adapted to serve that end in a manner compatible with our system of representative and responsible government?[8] If so, the law would be valid despite burdening political communication. This form of the second question was applied in all but one of the cases we will discuss. It was the law until the decision in *McCloy* in October 2015.

After *McCloy*, the second question is, in substance, addressed to the same matters. However, it now has two main stages. The first requires working out whether the purpose of the law and the means it adopts to achieve those purposes are compatible with representative government. The second stage requires formal 'proportionality' testing — a multi-part test looking at whether the law is 'suitable', 'necessary' and 'adequate in its balance'. Put differently, under the second stage the law must have a rational connection to the purpose of the provision; there must be no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom must be adequate.[9]

It is not necessary for the purposes of this article to examine in further detail the *McCloy* test. It is enough to notice that its application in any factual situation will not always be clear-cut and that the criterion of 'adequacy in its balance' in particular may produce differing assessments.

We turn now to the High Court cases.

The High Court cases

Wotton v Queensland

The facts in *Wotton* were these. Mr Wotton was an Aboriginal person who participated in a riot on Palm Island following the death, in police custody, of Mr Cameron Doomadgee. Mr Wotton was convicted of rioting and sentenced to six years' imprisonment with parole eligibility after two years. In February 2010, the Parole Board directed, pursuant to the *Corrective Services Act 2006* (Qld), that he be released on parole.

The Parole Board had power, under s 200(2) of the Act, to impose conditions on a prisoner's parole that it reasonably considered necessary to ensure the prisoner's good behaviour or stop the prisoner committing an offence. The board imposed conditions on Mr Wotton prohibiting him from:

- attending 'public meetings on Palm Island without the prior approval of a corrective services officer'; and
- receiving any 'direct or indirect payment or benefit' from the media.

These were called 'conditions (t) and (v)'.

Mr Wotton brought proceedings in the original jurisdiction of the High Court challenging the constitutional validity of s 200(2). He argued that, *to the extent it authorised conditions (t) and (v)*, s 200(2) impermissibly burdened the implied freedom of political communication. In the alternative, Mr Wotton also challenged the validity of conditions (t) and (v) as impermissibly burdening that freedom.

Mr Wotton also challenged the validity of s 132(1)(a) of the Corrective Services Act on the same ground. That section made it an offence for a person to 'interview a prisoner, or obtain a written or recorded statement from a prisoner'. Because of the aiding and abetting provision in the *Criminal Code*, it was also an offence for a prisoner to participate in an interview. However, s 132(1)(d) provided that a person did not commit an offence if they had the chief executive's written approval to carry out the activity. Both challenged provisions therefore involved statutory discretions. Both challenges failed.

The leading judgment was a joint judgment delivered by French CJ and Gummow, Hayne, Crennan and Bell JJ. Their Honours noted that, although the Corrective Services Act conferred discretionary powers in broad terms, those powers were constrained by the subject-matter, scope and purpose of the Act, and any applicable law. The applicable law would include the *Constitution*.[10] In this last respect, their Honours referred to what Brennan J had said in *Miller v TCN Channel Nine*[11] (*Miller*).[12] Justice Brennan had noted that a discretion granted in wide, general terms could not be exercised in a manner contrary to s 92 of the *Constitution* (which guarantees free trade between the states). His Honour quoted an earlier judgment of the Federal Court, in which he and St John J said:

> [W]here a discretion, *though granted in general terms*, can lawfully be exercised only if certain limits are observed, the grant of the discretionary power *is construed as confining the exercise of the discretion within those limits*. If the exercise of the discretion so qualified lies within the constitutional power and is judicially examinable, the provision conferring the discretion is valid.[13]

In other words, a statute which confers a general discretion must be construed in light of constitutional restrictions on legislative power, with the result that the power — irrespective of how broadly drafted — cannot be used in a way which would infringe such constitutional restrictions.

That concept — which is central to our discussion — is simple enough. It reflects not only longstanding principles of statutory interpretation but also provisions like s 9 of the *Acts Interpretation Act 1954* (Qld) (and its interstate equivalents). These provide that an Act is to be interpreted as operating 'to the full extent of, but not to exceed, Parliament's legislative power'.

The joint judgment then summarised and accepted submissions made by the Commonwealth Solicitor-General. The summary was to the following effect:

(1) Where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power.
(2) Whether a particular application of the statute is valid is not a question of constitutional law.
(3) Rather, the question is whether the repository of the power has complied with the statutory limits.[14]

These points may readily be accepted. The fourth point was this:

(4) If, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of that power *does not raise a constitutional question, as distinct from a question of the exercise of statutory power*.

The fourth point, however, did not explain what was involved in answering 'a question of the exercise of statutory power'. Does this phrase mean that, on a judicial review, only the traditional administrative law grounds need be considered and that the issues raised by the

Lange/McCloy test will be irrelevant? Or does it mean that the *McCloy* question must in substance be asked in relation to each exercise of power, but in form it is no longer a 'constitutional' question — it has become a 'question of the exercise of statutory power'? Both interpretations have been adopted by lower courts.[15]

In our view, the answer — and the conceptual framework which should govern this area — is this:

- Whether an exercise of statutory power is beyond power is *always* 'a question of the exercise of statutory power'. This follows from the principle explained by Brennan J in *Miller*.
- Where a statutory power does not need to be read down to ensure its validity as against the implied freedom, the statutory question will be answered by considering the traditional administrative law grounds and it will not be necessary to consider the constitutional issues. This is because a statutory power will only be valid without any need for reading down if it is otherwise *incapable* of authorising a decision which would infringe the implied freedom.
- Where a statutory power needs to be read down to ensure its validity, the question of whether a decision is within the statutory limits on the power may involve examining the issues raised by *Lange/McCloy*. That is because what is read out of the power is only that part of it which would otherwise authorise decisions which infringed the constitutional restriction. Working out whether the particular decision is inside or outside the power therefore inevitably involves considering whether the decision itself has unduly burdened free political communication.

The distinction between cases in which reading down is necessary and those in which it is not had been drawn by the Commonwealth Solicitor-General in his oral submissions (these submissions were, of course, adopted by the Court).[16] The distinction is alluded to in the joint judgment but not, we would respectfully suggest, with much clarity. Part of the confusion arises from the passage immediately following the fourth dot point mentioned above (which is expressly addressed to cases in which there is no need for reading down). It says:

> [If] the power or discretion be *susceptible* of exercise in accordance with the constitutional restriction upon legislative power, then the legislation conferring that power or discretion is effective in those terms. No question arises of severance or reading down of the legislation.[17]

With respect, however, these are exactly the circumstances in which a question of reading down arises. That is, where a power *can* be exercised in permissible ways but *can* also be exercised in impermissible ways then, in accordance with what Brennan J said in *Miller*, it should be read as effective to confer power to act only in a way that is constitutionally permissible. It is hard to see how this is anything but a process of 'reading down'. Further, if this process is not reading down then it is not clear what would constitute the 'reading down' referred to by the Court in the preceding paragraph.

More confusion on the topic of 'reading down' arises in *Wotton* because it is not clear whether their Honours thought it was necessary to read down the particular provisions in question.

Their joint judgment said, in relation to both provisions, that when exercising the relevant statutory powers the decision-makers would be bound to *have regard to* constitutional restraints upon legislative power, including the implied freedom of political communication, and that any decisions made would be subject to judicial review.[18]

It did not, however, explain *why* it would be necessary for those decision-makers to take into account the implied freedom. If it was because the provisions were in part invalid and needed to be read down, this was not explained. Indeed, the earlier part of the judgment seemed to suggest that no reading down was necessary.

In respect of s 200(2) (the power to impose conditions reasonably considered necessary to ensure good conduct and stop the parolee committing an offence), the explanation seemed to be that the words 'reasonably considers necessary', appearing in the subsection, imported an analysis 'akin' to that required by the second limb of the *Lange* test.[19] However, why this would require decision-makers to take into account the implied freedom, as distinct from requiring them merely to consider whether the conditions in question were necessary for the purposes of the power, was not made clear.

In respect of the discretion conferred by s 132(2)(d) (the power to approve a prisoner being interviewed), however, there were no express words which might have imported a proportionality analysis.[20] If it was necessary for a decision-maker to consider the implied freedom in the application of this section, it must, in our view, have been because it was necessary for the section to be read down to ensure its validity. However, nothing in the joint judgment makes that point, and some parts of it suggest the opposite.

The final point we would like to note about *Wotton* is this. One consequence of the principle discussed above was that the plaintiff's constitutional challenge could only properly be directed at legislation. The challenge to conditions (t) and (v) as impermissibly burdening the implied freedom failed: their Honours said that the conditions themselves could only be challenged by the commencement of proceedings under the *Judicial Review Act 1991* (Qld). Accordingly, the judges gave no consideration to whether those conditions infringed the freedom.

After *Wotton* it was clear that no statutory discretion could validly be exercised in a way that would exceed constitutional restrictions on legislative power. The consequences of that conclusion, however, remained in doubt.

Attorney-General (SA) v Adelaide City Corporation

Adelaide City involved a challenge to the validity of a by-law made by the City of Adelaide under the *Local Government Act 1999* (SA). The Act allowed by-laws to be made, amongst other things, 'for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants'. The relevant provisions of the by-law prohibited persons from 'preaching, canvassing or haranguing', or giving out material, on a road *without permission*.

The Corneloup brothers wished to preach in the Rundle Street Mall in Adelaide. They argued that the provisions of the by-law were:

(a) outside the by-law-making power; and

(b) an impermissible burden on free political communication.

The Full Court of the South Australian Supreme Court had held that, while the by-law was within the broad law-making power conferred on the City, it was nonetheless invalid because it infringed the implied freedom of political communication. Justice Kourakis (with whom other members of the Full Court agreed) stated:

> [T]he liberty to preach to fellow citizens in public places on political matters, as and when they arise, without seeking permission from an arm of government is fundamental to the maintenance of the constitutional system of responsible and democratic government.[21]

After *Wotton*, it seemed that the Full Court's conclusion could not have been right. The Solicitor-General for South Australia made submissions to that effect. He said:

> [T]he by-law-making power … does not authorise a by-law that impermissibly infringes the implied freedom. If a by-law does infringe the implied freedom it is, ultra vires, the by-law-making power. Further, where a by-law vests a discretion in a body or a person, the by-law does not authorise that person to exercise that power in a manner that would result in the infringement of the implied freedom.[22]

That submission seemed consistent with *Wotton*. It did not, however, address the question of whether or not the by-law itself, or the power pursuant to which it was made, needed to be read down before it could be held valid as against the implied freedom. Indeed, the South Australian submissions, in this respect closely based on *Wotton*, simply *assumed* that an exercise of the power to grant permission to preach would need to take into account the principle of free political communication.[23]

On the other hand, the Commonwealth's submissions put the question of 'reading down' at the beginning of the enquiry. Those submissions were to the effect that:

> A primary power to make delegated legislation may need to be read down so as not to authorise the enactment of delegated legislation that would infringe the constitutional limitation. This may result in the constitutional question coinciding with the statutory question. … On its proper construction, the by-law-making power does not need to be read down.[24]

The Commonwealth's written submissions made the point this way:

> The by-law-making power, on its proper construction, is sufficiently confined to comply with the constitutional limitation *without any need for reading down*. … A by-law that complies with the *statutory limits* [on the power] is therefore *necessarily reasonably appropriate and adapted to the attainment of constitutionally permissible ends*. No further constitutional question arises: a by-law meeting the statutory criteria for validity will be within the constitutionally permissible scope of the by-law-making power *even where the by-law operates to impose a burden upon communication about political or governmental matters*.[25]

But the Court did not approach the question of the by-law's validity in the way suggested by South Australia or the Commonwealth. Instead, the majority applied the constitutional test directly to the by-law.[26] It is not apparent from the majority's reasons why a *Wotton*-style approach was not taken.[27]

In applying the constitutional test directly to the by-law, however, their Honours encountered a second *Wotton*-style issue in the form of the discretion in the by-law to grant permission to preach et cetera. At least on one view (adopted in South Australia's submissions), the joint reasons in *Wotton* suggested that those exercising the discretionary power should 'take into account' the constitutional restriction. But no member of the Court reached that conclusion.

Instead, a majority of the Court construed the discretionary power in such a way that it would never be necessary for a decision-maker to consider the implied freedom. Although it is not entirely clear from their Honours' reasons, in our view this conclusion must have been reached because their Honours concluded that the by-law was valid without any need for reading down. For example, Hayne J said:

> It is necessary to construe the power to consent in a manner that gives due weight to the text, subject-matter and context of the whole provision in which it is found … [T]hose matters show unequivocally that the *only* purpose of the impugned provisions is to prevent obstruction of roads. It

> follows that the power to grant or withhold consent to engage in the prohibited activities *must be administered by reference to that consideration and none other*. On the proper construction of the impugned by-law, the concern of those who must decide whether to grant or withhold permission is confined to the practical question of whether the grant of permission will likely create an unacceptable obstruction of the road in question.
>
> Once that is understood, it is readily evident that the impugned provisions are reasonably appropriate and adapted to prevent obstruction of roads in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[28]

Likewise, Crennan and Kiefel JJ (with whom Bell J relevantly agreed[29]) said:

> Given that the discretion must be exercised conformably with the purposes of the by-law, it may be assumed that permission will be denied only where the activities in question cannot be accommodated having regard to the safety and convenience of road users.[30]

The corollary of the position taken in these passages is that it would not be necessary for decision-makers exercising the power to grant permission to take into account, or consider, the constitutional principle of the implied freedom. It would not be necessary because, once the power was properly construed and understood, any valid exercise of the power would properly accommodate the implied freedom. That would be so without undergoing any process of 'reading down'. In other words, while it was true that a decision to deny a permit might burden free political communication, the statute required that a permit could only be denied where doing so was necessary for the purpose of achieving a legitimate end. That is, a permit could only properly be denied where the activity in question would cause an 'unacceptable obstruction' of the road or could not be accommodated having regard to the safety and convenience of road users. A decision within the four corners of the statute would, therefore, be a decision that necessarily met the second limb of the *Lange* test.

In our view, the approach taken by the majority in *Adelaide City* to the power to grant permission to preach supports the conceptual framework we suggested earlier. Central to that framework is that one begins with the question of construing the primary statute and working out whether it is necessary to read it down to ensure its validity.

The judgment of Crennan and Kiefel JJ included some interesting observations about discretionary powers which expressly import 'proportionality' requirements. They said:

> [R]elevant to the legislation in *Wotton v Queensland* was what Brennan J had to say in *Miller v TCN Channel Nine Pty Ltd* respecting a discretionary power which, in its own terms, is so qualified as to confine the area for its exercise to constitutional requirements. In such a case, his Honour said, the power will be valid. In *Wotton v Queensland*, one of the statutory provisions conditioned the exercise of the discretion to what was reasonably necessary, thereby importing a requirement of proportionality into the exercise. This was considered to be an important factor in favour of validity.[31]

We can find nothing in Brennan J's judgment in *Miller* about discretionary powers qualified in their own terms to comply with constitutional requirements. Leaving that aside, what Crennan and Kiefel JJ seem to be suggesting is that, where a power contains words such as 'reasonably considers necessary' (like s 200(2) of the Corrective Services Act), this will import a proportionality test along the lines of that required by the second limb of the *Lange/McCloy* test. Therefore, they seem to suggest, such powers will comply with the constitutional test without being 'read down'.

Justices Crennan and Kiefel should not be read, in our view, as suggesting that such powers expressly require decision-makers to actually *apply* the second limb of the *Lange/McCloy* test. Rather, their point is that, assuming the purpose of such powers is legitimate, their proper exercise will necessarily result in a decision which is reasonably appropriate and

adapted (or proportionate) to a legitimate end. We will come back to this idea when we discuss some of the lower court decisions.

Finally, before leaving *Adelaide City*, it is worth noting briefly the completely different approach to the validity of the by-law taken by Heydon J in dissent. For his Honour, this case was all about the principle of legality. Justice Heydon described the principle of legality in these terms:

> [I]n the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental common law rights or freedoms. …[32]

The common law right of free speech was, his Honour said, a 'fundamental right or freedom falling within the scope of the principle of legality'.[33] His Honour acknowledged that this common law right was significantly wider than the constitutional principle of the implied freedom of political communication.

Applying that principle to the by-law-making power in the Local Government Act, Heydon J found the by-law to be outside the scope of the power. His Honour said that it could not be inferred from the form of the by-law-making power that the legislature appreciated the question of free speech or that it intended to permit by-laws of the kind challenged in the appeal. The words of the power were, he said, 'too general, ambiguous and uncertain to grant a power to make by-laws having the adverse effect on free speech of the challenged clauses'.[34]

Justice Heydon therefore 'read down' the by-law-making power in the Local Government Act but by reference to the principle of legality rather than the constitutional principle of the implied freedom of political communication.[35]

The only other judge to comment on the principle of legality in *Adelaide City* was French CJ. The Chief Justice agreed with Heydon J that the right to free speech is a common law value protected by the principle of legality.[36] However, his Honour concluded that, when *both* the by-law and the by-law making power were construed in accordance with the principle of legality, the by-law was within power.[37]

Subsequent decisions in lower courts

The issues canvassed in *Wotton* and *Adelaide City* have been encountered in lower courts numerous times since the judgments in those matters were delivered. These lower court cases demonstrate the surprisingly wide variety of contexts in which arguments about the implied freedom can arise; and the wide array of approaches to the question at hand. Today we will focus only on a few of the more interesting cases.

The New South Wales Court of Appeal handed down its decision in *The Age Co v Liu*[38] (*Liu*) six days prior to the decision in *Adelaide City.*

Ms Liu had commenced proceedings in defamation against three unknown defendants. She alleged that these persons had published material to *The Age* newspaper containing allegations that she had engaged in corrupt dealings with a federal politician. She sought orders pursuant to r 5.2 of the Uniform Civil Procedure Rules (NSW) for preliminary discovery from *The Age* and three journalists, to enable her to determine the identity of these persons. The trial judge made the order sought and the newspaper and the three journalists sought leave to appeal. The applicants argued, amongst other things, that *Lange* had the result that the discretion in r 5.2 could not validly be exercised to allow the discovery of a journalist's confidential sources of political information and that the order made by the trial

judge was beyond the power conferred by r 5.2 because 'it was not in conformity with the implied freedom of communication'.[39] This submission was rejected.

In a pellucid judgment, Bathurst CJ (with whom Beazley and McColl JJA agreed) began by construing r 5.2.[40] His Honour noted that there were preconditions on the exercise of the power[41] and that the information sought must be necessary for the purpose of commencing proceedings. Even where those matters were satisfied, however, the Court would exercise the power to make the order only when it is in the interests of justice to do so.[42]

With those matters in mind, Bathurst CJ easily came to the conclusion that, although the rule burdened the freedom, it was reasonably appropriate and adapted to serving a legitimate end (protecting persons from false and defamatory statements).[43] Because the rule was valid without any need for reading down,[44] there was no need for his Honour to consider whether the approach in *Wotton* would be applicable to a discretion conferred on a court.[45] That conclusion was sufficient for his Honour to dispose of the challenge to the validity of r 5.2 as well as the challenge to the trial judge's order.

In our opinion, the approach of Bathurst CJ supports the conceptual framework we have suggested above.

In *A v Independent Commission Against Corruption*[46] (*A v ICAC*) the applicant had been issued with a summons to produce documents under s 35 of the *Independent Commission Against Corruption Act 1988* (NSW). Amongst other things, the applicant argued that s 35 infringed the implied freedom of political communication insofar as it could be used to obtain access to a journalist's confidential sources.[47] That argument was rejected essentially on the basis that, although the section did burden the freedom, it was reasonably appropriate and adapted to the end of protecting, maintaining and strengthening the institutions of government itself.[48] The Court found that the provision was valid without being read down.[49]

Perhaps the more interesting aspect of this case is the judges' treatment of another submission put by the applicant. This was that the implied freedom operated as a 'mandatory consideration' to be taken into account by a commissioner in deciding whether to issue a summons under s 35. That submission would appear to draw support from the statements in *Wotton* that the decision-makers were to 'have regard to' the implied freedom. In *A v ICAC*, however, the Court rejected the submission as misconceived. Basten JA said:

> [T]here is an element of conceptual confusion in the suggestion that the constitutional limit on the scope of a power is a factor which must be taken into account by the authority in the course of exercising the power. The reason why the authority does not have the power cannot sensibly be described as a condition of its exercise.[50]

Similarly, Ward JA said:

> A limitation on the exercise of the discretion to issue a summons pursuant to s 35(1) derived from the implied constitutional freedom of communication on governmental and political matters would be a limitation on the statutory power conferred on ICAC, not a mandatory relevant consideration in the exercise of that discretionary power (see *Wotton* at [22]).[51]

Both judges relied on *Wotton* to reach this conclusion. As a matter of principle, it seems correct: if the *Constitution* does not permit impermissible burdens on freedom of political communication, it is difficult to see why it would reduce the freedom simply to a relevant, or mandatory, consideration.

The two New South Wales cases demonstrate, in our view, the correct approach to the problem. That is, first construe the statute. If it is valid without being read down, that is the end of the matter.[52]

However, because 'reading down' was not required in either of the New South Wales cases, neither case had to consider the consequences of reading down or what a ground of review based on the implied freedom would look like.

However, there have been a number of cases in which litigants have taken up what might have seemed an invitation, in *Wotton*, to challenge directly the exercise of a statutory power on the ground that it infringes the implied freedom.

For example, in *AA v BB*,[53] Bell J considered arguments that an intervention order made under the *Family Violence Protection Act 2008* (Vic) was invalid because:

(a) 'the magistrate's discretion to make the order was invalid by reason of the implied freedom of political communication'; or
(b) alternatively, 'the enabling provisions of the *Family Violence Protection Act* were invalid by reason of the implied freedom of political communication'.[54]

The facts of the case were unusual in that the person protected by the intervention order was a candidate for election to the federal Parliament, and the intervention order prevented their former spouse, the appellant, from publishing 'any material about the protected person'. The former spouse wanted to ventilate such information in the context of an election and more generally.

Justice Bell approached the questions of validity in the way suggested by the appellant's submissions, with the result that his Honour applied the *Lange* test directly to the intervention order and the statutory provisions simultaneously. Both, his Honour concluded, were valid.[55]

His Honour's interpretation of *Wotton* is strikingly different from that adopted in the New South Wales Court of Appeal in *Liu* and *A v ICAC*. For example, in reaching the conclusion that the statutory provisions were valid, his Honour said:

> Turning to the enabling provisions of the *Family Violence Protection Act*, the analysis of the High Court in *Wotton* is directly applicable. The operation of the provisions must therefore be approached on the basis that, when *exercising the discretion to make an order and impose conditions, the magistrate must 'have regard to what [is] constitutionally permissible'*.[56]

The discretion to make the order, his Honour said, was required to be exercised 'in a manner which is reasonably appropriate and adapted' to the end of providing due protection of persons against family violence.[57]

The consequence of such an approach is evident in the approach Bell J took to determining the validity of the protection order itself. His Honour analysed it in detail to determine whether the restrictions it imposed on the appellant were 'proportionate' to the burden it imposed on free political communication.[58] As his Honour put it:

> The magistrate was required to weigh competing considerations in the balance. On the side of the appellant, the protected person was a candidate for election to federal Parliament and the appellant wished to make public comment about the suitability of the protected person to be elected to that office. That was important in terms of the implied constitutional freedom to communicate about government and political matters. But, on the other side, it was equally important to consider the need of the protected person for protection from family violence. The protected person did not lose an entitlement to protection from family violence of the appellant by virtue of that candidature. Both

> matters had to be balanced when determining whether to make an order and what the scope of the order should be. It has not been shown that the magistrate erred in law or exceeded his jurisdiction in performing this function in the present case.[59]

In our opinion, the approach taken by Bell J in *AA v BB* is flawed. So much becomes evident when one considers the terms of the discretion exercised by the magistrate to make the intervention order. Such an order could be made under s 74(1) of the Family Violence Protection Act 'if the court is satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to continue to do so or do so again'.[60]

When determining what conditions should be included in the order, under s 80(a) and (b) the court was to 'give paramount consideration to the safety of … the affected family member … and … any children'.

In our view, it should not have been difficult for Bell J to reach the conclusion that such a power was valid as against the implied freedom without any need to be read down. It seems reasonably obvious that *any* proper exercise of this power is going to be reasonably appropriate and adapted to a legitimate end and therefore pass the *Lange* test. For that reason, there should simply have been no occasion to consider whether the particular intervention order passed the second limb of the *Lange* test. Further, it is in our view unhelpful to suggest that a magistrate exercising a power such as this must in some way 'take into account' the implied freedom. Indeed, it is difficult to see how doing so would be compatible with the express terms of the statute.

An approach similar to that in *AA v BB* was adopted in *Tonkin v Queensland Parole Board*[61] (*Tonkin*). This case is of particular interest because it involves a challenge to a condition imposed on the applicant's parole under s 200(2) of the *Corrective Services Act 2006* (Qld), which was one of the provisions challenged in *Wotton*.

The applicant in *Tonkin* was convicted of manslaughter in 1974 and sentenced to life imprisonment. She was granted parole in 1991. In September 2013, she asked for the approval of the Parole Board to write a book. The book was to be about the difficulties she had faced in her life, and her response to them, which ultimately led to prison; and the troubling conditions she had experienced there.[62] The board subsequently amended the conditions on the applicant's parole to include conditions that she not publish any document connected with, or which described, her offence.[63]

The applicant challenged the validity of the condition on the basis that it exceeded the statutory power in s 200(2). She submitted that the condition impermissibly burdened her freedom of communication on government or political matters and was therefore outside power.[64]

The board submitted, essentially, that it was unnecessary to consider whether the condition itself impermissibly burdened free political communication. It said that 'a condition which serves the legitimate end of ensuring a parolee's good conduct or stopping a parolee from committing an offence' was authorised to impose a burden on freedom of communication under s 200(2).[65]

Justice Lyons rejected the board's submissions. His Honour considered that they amounted to an assertion that, because s 200(2) had been found to be valid in *Wotton*, a decision which infringed the implied freedom would be within the scope of that provision. His Honour said that result 'seems unlikely'.[66]

Indeed, such a result would tell powerfully against any submission which led to it. But this is not, we would suggest, the result of the board's proposition. Instead, we read their submissions as indicating that any decision within the scope of s 200(2) will necessarily be one which does not infringe the implied freedom.

Justice Lyons referred to *Wotton* in some detail. His Honour read the joint judgment in that case as holding that:

> [Where] a statute confers a power in terms which, if read literally might authorise its exercise both in ways which would be consistent with a constitutional limitation, and in ways which would not be, then the grant is to be construed as limited to authorising the exercise of the power in ways consistent with the constitutional limitation.[67]

That, we would suggest, is a correct understanding of *Wotton*. It supports the proposition, however, that some statutes, 'if read literally', will only authorise the exercise of power in ways that are compliant with the constitutional restriction. Our argument is that, in such cases, no further consideration of the implied freedom is necessary. But Lyons J did not consider whether s 200(2) might fall within such a category. His Honour simply concluded:

> [I]t seems to follow that a statute would not authorise an exercise of a power which would give the statute a range of operation exceeding the limits identified by *Lange* … In this case, it would follow that the provisions of the CS Act do not authorise a decision which impermissibly burdens freedom of communication on government and political matters. The impermissibility would arise if the decision is not reasonably appropriate and adapted to serve a legitimate end, in a manner compatible with the maintenance of the constitutionally prescribed system of Government.[68]

In other words, his Honour's view was that, because of the constitutional limitation, each individual exercise of power would be reviewable against the implied freedom.

Our argument is not that this reading of *Wotton* is not open. Instead, our argument is that it is preferable to read *Wotton* as first requiring consideration of whether the statute can be held valid *without any need for reading down*; and that, where reading down is not necessary, no further consideration of the implied freedom is necessary.

The final decision we want to mention is *Gaynor v Chief of the Defence Force (No 3)*[69] (*Gaynor*).

Mr Gaynor was a member of the Army Reserve and had previously served in the regular Army in Iraq and Afghanistan. In 2013, he made a series of statements on Twitter, on his website and in press releases. Amongst other things, the statements criticised the Defence Force position on uniformed participation in the Sydney Mardi Gras, sex-change operations for members, women serving in front-line combat roles, and Islam. The statements identified Mr Gaynor as a member of the Army Reserve. On 10 December 2013, the Chief of the Defence Force terminated Mr Gaynor's commission with the Army Reserve.

The termination decision was made pursuant to r 85 of the *Defence (Personnel) Regulations 2002* (Cth). That regulation provided that an officer's service in the Defence Force could be terminated for various reasons, including that the chief of the officer's service was satisfied 'that the retention of the officer [was] not in the interests of the Defence Force'.

The reasons for the termination decision explained that the decision-maker had formed that view because, amongst other things, Mr Gaynor's statements were disrespectful of other members and inconsistent with Defence Force standards and policies.[70] Importantly, Mr Gaynor had also had failed to stop making such statements when directed to do so.

Mr Gaynor commenced judicial review proceedings to challenge the termination decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Each of his arguments about why the decision should be set aside was rejected, save for his submission that the decision infringed the implied freedom of political communication.

Justice Buchanan approached that question as requiring an examination of the decision to terminate, to determine whether it 'exceeded the statutory authority under reg 85(4) of the Personnel Regulations because it was, in its effect, not reasonably appropriate and adapted to the legitimate end served by reg 85'.[71] His Honour then applied the test as set out in *McCloy* directly to the exercise of power. His Honour said that he accepted that there was a need for discipline, obedience to orders and adherence to standards in the Defence Force by its members. He accepted that termination of a commission was a 'suitable' response to infringement of those requirements.[72] He also said that such a response was 'necessary', in the sense that he 'could not conceive of another obvious and compelling means of achieving the objective in the face of conduct such as that of the applicant, which was defiant and intractable'.[73] He concluded, however, that the termination decision was not 'adequate in its balance' having regard to the fact that the applicant's conduct involved the expression of a political opinion by a member of the Army Reserve who was not on duty.[74]

The Chief of the Defence Force appealed, and the appeal against Buchanan J's decision was allowed on 8 March 2017.[75] In a unanimous decision, the Full Court (Perram, Mortimer and Gleeson JJ) accepted the appellant's submission that Buchanan J had erred in the 'level' at which he applied the *Lange* test: that is, he applied it to the termination decision when he should have applied it to reg 85. That error led him to consider whether Mr Gaynor's 'right' to freedom of communication was impermissibly impaired by the termination decision.[76] As the Full Court explained, however, that approach was contrary to High Court authority that the implied freedom is not a personal right.[77]

The Full Court went on to hold that reg 85 did not itself infringe the freedom. Their Honours held that, although it imposed a burden,[78] it met the second part of the test.[79] Although the scope of the power in reg 85 was wide, it was 'sufficiently confined by the objects and purpose of the statutory scheme' to be proportionate to the burden it placed on the implied freedom.[80]

While that interpretation suggested clearly that reg 85 was valid without being read down, the decision leaves open the possibility that it might be legitimate, for administrative law purposes, 'to descend to examine a particular exercise of power by reference to the implied freedom'.[81] Their Honours said:

> [A]n exercise of power which had the effect of unduly, or disproportionately, impairing the freedom of the community (and therefore, its individual members) to give and receive information and opinions on political matters would be an exercise of power beyond the authority conferred by reg 85. Describing the implied freedom as a relevant consideration (as Kiefel J did in Wotton) is one way of characterising the nature of the excess of power, although not the only way.[82]

Unfortunately, the Full Court did not explain why it might be necessary to consider whether the exercise of the power in reg 85 unduly impaired the implied freedom when the provision itself was valid; nor did the Full Court address the point made in *A v ICAC* that to treat the implied freedom as a relevant consideration was conceptually confused.

Conclusion

Perhaps apart from the decision of the Full Court in *Gaynor*, the approach taken in the last few cases we have mentioned suggests that, *whenever* an administrative decision might have some impact on free political communication, the decision will be directly reviewable for

its compliance with the *Lange/McCloy* test. It would follow that the decision could be set aside on the basis that it imposed a burden on political communication but was not 'suitable', 'necessary' or 'adequate in its balance'.

We have argued that this approach is only necessary when the statutory power in question must be read down in order to comply with the implied freedom. In *AA v BB, Tonkin* and *Gaynor* (at least at first instance), however, the critical first step of construing the statutory power in question to determine if it needed to be read down was not undertaken. Yet, absent a reading-down requirement, it is difficult to explain why the exercise of a valid power should attract review for compliance with the *Lange/McCloy* test.[83]

Even on our approach, however, there may well be circumstances in which a decision must be reviewed against that test. This will throw up a range of issues which are not addressed on the current case law. For example, what does it mean to say that a *decision* has impacted impermissibly on the implied freedom given that the implied freedom is a limit on *legislative* power and (it has been repeatedly said[84]) does not provide individuals with rights? A related question is this: since the extent of the burden on political communication is relevant to answering whether the burden imposed is 'undue' or 'impermissible',[85] how is the extent of the burden to be factored in when assessing if a decision that impacts on one individual's ability to communicate is valid?

One benefit of our approach is that such questions, which do not admit of simple answers, can be left for another day.

Endnotes

1 See, for example, *Constitution* ss 116, 117.
2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559.
3 (1997) 189 CLR 520.
4 (2015) 89 ALJR 857.
5 (2012) 246 CLR 1.
6 (2013) 249 CLR 1.
7 *Monis v The Queen* (2013) 249 CLR 92, [108] (Hayne J), [343] (Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, [71] (Hayne J), [105]–[108] (Crennan, Kiefel and Bell JJ).
8 See, for example, *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555–6 [94]–[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Attorney-General (Qld)* (2012) 246 CLR 1, [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
9 *McCloy v New South Wales* (2015) 89 ALJR 857, [2] (French CJ, Kiefel, Bell and Keane JJ).
10 (2012) 246 CLR 1, [9].
11 (1986) 161 CLR 556, 613–14.
12 (2012) 246 CLR 1, [10].
13 *Inglis v Moore (No 2)* (1979) 46 FLR 470, 476.
14 (2012) 246 CLR 1, [22].
15 Compare *Tonkin v Queensland Parole Board* [2015] QSC 334 and *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240.
16 (2012) 246 CLR 1, [22]–[23].
17 Ibid [23] (emphasis added).
18 Ibid [31], [32].
19 Ibid [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [91] (Kiefel J).
20 Ibid [31]; see also [88] (Kiefel J).
21 (2011) 110 SASR 334, [157].
22 [2012] HCATrans 233 (2 October 2012), 1313–7.
23 See Written Submissions of SA at [36]–[37].
24 Oral Outline on behalf of Cth A-G, [2], [3].
25 Written Submissions of Cth, [9] (emphasis added).
26 (2013) 249 CLR 1, [67]–[68] (French CJ), [137] (Hayne J), [209]–[216] (Crennan and Kiefel JJ), [224] (Bell J).
27 In *Muldoon v Melbourne City Council* [2013] FCA 994 at [133], North J suggested that the reasoning in *Wotton* was confined to administrative powers, whereas the implied freedom as a limit on legislative power applied to delegated and primary legislation. In our view, however, a distinction between administrative

powers and legislation is hard to maintain. A power to make delegated legislation, like a power to make an administrative decision, will be found in a statute which must be construed in accordance with constitutional restrictions on legislative power.

28 (2013) 249 CLR 1, [140] (emphasis added).
29 Ibid [224].
30 Ibid [219].
31 Ibid [215].
32 Ibid [148].
33 Ibid [151].
34 Ibid [158].
35 Ibid [160]–[161]. Justice Heydon's approach is similar to that adopted by the Full Federal Court in *Evans v New South Wales* (2008) 168 FCR 576. In that case, the Full Federal Court (French, Branson and Stone JJ) found that an Act, construed in accordance with the principle of legality, did not authorise a regulation which prohibited conduct which would 'cause annoyance' to participants in World Youth Day.
36 (2013) 249 CLR 1, [43]–[44].
37 Ibid [46].
38 (2013) 82 NSWLR 268.
39 Ibid [5].
40 Ibid [85].
41 The rule only applied if it appeared to the Court that the applicant, having made reasonable inquiries, was unable to ascertain the identity or whereabouts of a person ('the person concerned') for the purpose of commencing proceedings against the person, and some person other than the applicant might have information, or might have or have had possession of a document or thing, that tended to assist in ascertaining the identity or whereabouts of the person concerned.
42 (2013) 82 NSWLR 268, [89].
43 Ibid [99].
44 Ibid [100]: 'It follows from what I have said that there is no need to read down the rule or otherwise limit the discretion conferred on the Court to achieve its constitutional validity.'
45 Ibid [90].
46 (2014) 88 NSWLR 240.
47 Ibid [64].
48 Ibid [68]. His Honour noted, among other things, that s 35 did not impose a direct burden on political communication; that investigative powers such as s 35 were commonplace; and that there were protections on the use of the information obtained.
49 Ibid [70].
50 Ibid [56]–[57] (Basten JA), [149] (Ward JA); Bathurst CJ agreeing at [7].
51 Ibid [149].
52 For a case that is consistent with this approach, see *Hogan v Hinch* (2011) 243 CLR 506, [98] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (accepting that the burden upon political communication in any particular case would vary and depend upon the scope of the orders which the court makes under s 42(1) of *Serious Sex Offenders Monitoring Act 2005* (Vic), but finding the section valid).
53 (2013) 296 ALR 353.
54 Ibid [9], [107].
55 Ibid [134]–[135].
56 Ibid [135] (emphasis added).
57 Ibid [135].
58 Ibid [135].
59 Ibid [130].
60 For the text, see ibid [85]–[86].
61 [2015] QSC 334.
62 Ibid [7].
63 Ibid [11].
64 Ibid [24].
65 Ibid [26].
66 Ibid [45].
67 Ibid [40]–[41].
68 Ibid [41].
69 [2015] FCA 1370.
70 Ibid [160].
71 Ibid [279].
72 Ibid [282].
73 Ibid [283].
74 Ibid [284], [287].
75 *Chief of the Defence Force v Gaynor* [2017] FCAFC 41.
76 Ibid [47].
77 Ibid [48], [63].

78 Ibid [105].
79 Ibid [107]–[111].
80 Ibid [112].
81 Ibid [80].
82 Ibid.
83 Any suggestion that focusing on the exercise of the power avoids the problem of trying to determine the validity of the legislation in a factual vacuum is, in our view, mistaken. The High Court has been able to determine whether a law impermissibly burdens the implied freedom even where the plaintiffs have not claimed that they intended to engage in political communication: see *Tajjour v New South Wales* (2014) 254 CLR 508.
84 *Unions NSW v New South Wales* (2013) 252 CLR 530, [30], [36] (French, Hayne, Crennan, Kiefel and Bell JJ), [109]–[111] (Keane J); *McCloy* (2015) 89 ALJR 857, [30] (French CJ, Kiefel, Bell and Keane JJ).
85 *Monis v The Queen* (2013) 249 CLR 92, [343] (Crennan, Kiefel and Bell JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, [40] (French, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 89 ALJR 857, [86] (French CJ, Kiefel, Bell and Keane JJ).

COMMONWEALTH OMBUDSMAN: IMPROVING PUBLIC ADMINISTRATION THROUGH OVERSIGHT

Richard Glenn*

The recent expansion of the Commonwealth Ombudsman's responsibilities to include the oversight of new metadata laws highlights the increasing importance of oversight as a function for public accountability. The Commonwealth Ombudsman works to safeguard citizens from government actions which could adversely affect them. In doing so, it plays an increasing role in monitoring the use of intrusive and coercive powers by law enforcement and other agencies. As expected, the public will not (or at least, should not) be aware of the use of these powers. As you cannot complain about something you are not aware of, people affected by the use of these powers are unlikely to do so. Enforcement agencies must be accountable in their use of these powers. Proper oversight is therefore crucial.

This article provides an overview of the new metadata oversight function and how this ties in with the future vision for the office. The article will consider what level of assurance the Ombudsman can give the public that metadata is being used as the legislation intended; how early engagement with stakeholders has helped the office to 'hit the ground running' with the new metadata regime; how best-practice sharing contributes to the overall improvement of public administration; whether operating in a spirit of cooperation and collaboration with agencies will enhance procedural fairness as well as the agency's response to inspection results; and, as public expectations of government grow, how an oversight function can add value to an agency's system of checks and balances rather than just ensure compliance.

The Commonwealth Ombudsman's role and purpose

I like to think of Ombudsmen as the arms and legs of the administrative law system. We sit at the interface between the law, good public administration and just plain old 'fairness'. It is a volume business — we deal with thousands upon thousands of matters. It is also essentially an intelligence business — we learn about what is going right and wrong with public administration by listening to complaints and directly inspecting the activities of agencies.

The focus of this article is on the Commonwealth Ombudsman's role in improving public administration through oversight, looking particularly at oversight of covert law enforcement.

The Commonwealth Ombudsman works hard to achieve its purpose, which is to:

- provide assurance that the organisations we oversight act with integrity; and
- influence systemic improvement in public administration in Australia and the region.

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We do this in a number of ways, the most obvious of which is our complaint-handling role. Our aim is to resolve complaints people have against Australian Government departments and agencies impartially, informally and quickly.

We do this through consultation and negotiation. If necessary, we can highlight administrative deficiencies by making formal recommendations in public reports and to the most senior levels of government.

Our complaint-handling role is generally reactive and is heavily reliant on members of the public complaining about issues as they arise. But, in public administration, as in the rest of society, change is the only constant. As a consequence, the way we achieve our purpose has evolved from pure complaint-handling and now embraces many different functions.

A number of factors drive this. First**,** the nature of complaints is changing. The immediacy of social media (Twitter, Facebook, You Tube, Instagram) and mobile devices means that complaining is easier now than ever before. People can complain on multiple platforms, to multiple audiences and in the heat of the moment. The complexity of complaints that come through our door is increasing and this leads us to spend much more time investigating systemic problems.

Secondly, there is greater recognition that the Ombudsmen and like bodies form part of the public sector integrity system. For example, the Commonwealth Ombudsman now performs a key role in overseeing the Public Interest Disclosure Scheme, which came into operation in January 2014. The scheme encourages public officials to disclose suspected wrongdoing in the Commonwealth public sector.

Thirdly, there is an increasing need for parliamentary and public assurance regarding the use of powers by public agencies — in particular, law enforcement agencies. Law enforcement is operating in an increasingly globalised society with constant new and emerging threats and technologies. Terrorism is one of those threats. The number of terrorism investigations doubled between 2014–15 and the previous year; the age of terrorism suspects is dropping; calls to the National Security Hotline peaked last year; and police themselves have recently become the target choice for extremist attacks.

As a response, we have seen a broadening of the coercive and intrusive powers of law enforcement agencies. This, of course, raises the question of proper oversight for the use of these powers. The Commonwealth Ombudsman plays a significant role in this area.

The nominal complainant

In most cases, the public will not (or at least, should not) be aware of the use of these powers. And, of course, you cannot complain about something you are not aware of. The very premise of 'policing by consent' is therefore challenged when certain police operations are essentially hidden from public view. It is not sufficient to invite law enforcement bodies to demonstrate the legitimacy of their own operations. External oversight is a necessary precondition to providing assurance to the Parliament and the public of the lawful use of coercive and intrusive powers.

That is where the Commonwealth Ombudsman comes in. When looking at our work in the law enforcement area, we asked ourselves how we could adapt our traditional, reactive, extremely transparent process in this very different domain. The answer was that, for a body like the Ombudsman to make a difference in this area, we need to stand in the shoes of the nominal complainant — that is, we need to ask the questions a complainant might ask. We need to make ourselves familiar with the sorts of issues a complainant might raise. But we

also need to go further — we need to engage in detail with the operation of the agencies so that we can reflect on more than mere compliance and drive best practice.

Before I describe how we do that, I will first outline the types of law enforcement activity we look at and the scale of the task.

Law enforcement powers

The Commonwealth Ombudsman is responsible for overseeing 20 law enforcement agencies and their use of certain covert and intrusive powers. In 2014–15, we performed more than 50 inspections on the use of these powers and produced more than 40 reports to inspected agencies as well as statutory reports to ministers and the Parliament. The function is rapidly expanding — both because use of the powers is increasing and because new powers are being introduced.

Below are some examples of the regimes we currently oversee.

Controlled operations

Part IAB of the *Crimes Act 1914* (Cth) permits certain law enforcement agencies to conduct controlled operations. Controlled operations can be broadly described as covert operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence. It is part of our role to provide assurance that agencies are approving and conducting controlled operations as Parliament intended and, if they are not, hold the agencies accountable to the Minister and the public.

For one of the major law enforcement agencies we oversee, there was a 160 per cent rise in the number of authorisations granted to perform controlled operations in the three-year period between 2012–13 and 2014–15. For another, there was a 60 per cent rise over the same period.

Surveillance devices

We also perform the independent oversight mechanism provided for in the *Surveillance Devices Act 2004* (Cth). The use of surveillance devices — including listening, optical and tracking devices — is one of the most intrusive covert powers afforded to law enforcement agencies.

The Surveillance Devices Act establishes procedures for law enforcement officers to obtain warrants and authorisations for the use and installation of surveillance devices that may be used in relation to criminal investigations and the location and safe recovery of children.

For one of the major law enforcement agencies we oversee, there was a 60 per cent rise in the number of surveillance device warrants issued in the three years between 2012–13 and 2014–15.

Telecommunications interception

The Commonwealth Ombudsman also performs the oversight function in relation to telecommunications interceptions. Interception warrants can only be obtained for serious offences, such as murder, kidnapping and serious drug offences.

For two major law enforcement agencies, warrants that were granted for telecommunications interceptions rose by 34 per cent and 48 per cent between 2012–13 and 2014–15, so we are seeing a significant rise in the use of existing powers. We are also seeing a broadening of powers and our oversight responsibilities.

Data retention

On 13 October 2015, new Commonwealth laws came into effect requiring telecommunication carriers and service providers to retain certain data — known as 'metadata' — for a mandatory two-year period. That data is accessible by law enforcement agencies in certain circumstances.

The Commonwealth Government's data retention reforms further expanded our role to include the oversight of law enforcement agencies' access to metadata.

International experience

These are issues that are being addressed around the world. The balancing of the rights of the individual with the need for law enforcement to respond to new technologies and threats is an almost universal policy and political challenge.

In the United Kingdom, for example, the Law Reform Commission has been asked to review legal issues surrounding the state's right to access communications data and an individual's right to privacy and freedom of expression. There, telecommunications data can be accessed by seven national agencies, 52 police forces, 12 other law enforcement agencies, 474 local authorities and 110 other public authorities. Under current arrangements, the UK's Interception of Communications Commissioner's Office is solely responsible for keeping under review the interception of communications and the acquisition and disclosure of communications data by intelligence agencies, police forces and other public authorities. The office reports to the Prime Minister on a half-yearly basis.

Our approach

In Australia, as far as law enforcement agencies are concerned, the task falls to the Commonwealth Ombudsman.

What does our office do to provide assurance about the proper use of law enforcement powers? How do we stand in the shoes of the nominal complainant? The answer falls into two parts. The first part goes to the technical understanding and skill of our excellent law enforcement inspections staff. They know their stuff and can ask the questions that a complainant might ask if they had the chance. They can be aggrieved on behalf of society that intrusive powers have been exercised and demand to be shown how their exercise was lawful.

The second part goes to approach — understanding the drivers of law enforcement activity, encouraging strong relationships that facilitate self-reporting of problems, and engaging the leadership of law enforcement bodies so that the agencies' commitment to providing assurance to the Parliament and the public starts at the top. We conduct inspections, engage with agencies, audit relevant records, and test agencies' processes and systems. To do this, we need a certain level of expertise in each area to provide the assurance that a reasonable person would expect.

We have developed a set of inspection methodologies based on legislative requirements and best-practice standards in auditing. We form our compliance assessments based on the records made available by law enforcement agencies at inspections, through discussions with relevant teams, through processes we observe and information staff provide in response to any identified issues.

The increased use of these powers in recent years means the sheer number of records to examine is greater now than ever before. In 2014–15, the Australian Federal Police alone had more than 27 000 approved historic authorisations for metadata. Clearly, the sheer capacity of metadata records means we cannot inspect everything.

This has led to a shift in the way we conduct our inspections by placing more emphasis on gaining a thorough understanding of agencies' policies and processes. We invest heavily in building strong and productive working relationships with the agencies we oversee so that we can encourage compliance throughout the process, not just in our inspection reports.

The recent expansion of our responsibilities to include the oversight of new metadata laws is a useful example of this. In performing this function, our role is to provide fair, accurate and independent assurance to Parliament and the public about access to metadata by government agencies under the law.

But what level of assurance can the Ombudsman give the public that metadata is being used as the legislation intended? In our first year of metadata inspections, we spent our time getting to know each agency's policies and processes. Following these initial metadata inspections, each agency will be provided with a 'health check' report outlining the strength of their policies and processes. These reports will detail key areas within an agency's compliance framework — for example, the leadership and planning the agency has demonstrated to achieve compliance; the support that the agency has put in place to achieve compliance with the Act; and operating procedures that have been considered to meet compliance obligations. These reports will be consolidated and provided to the Commonwealth Attorney-General for tabling in Parliament.

Our future reports and inspections will use these 'health checks' as a baseline for assessing the future compliance of agencies and should give a clear indication of how well agencies are complying with the Act.

Another key component has been early engagement with agencies. In all of our inspection regimes we aim to communicate with an agency early and often. For example, even before the new metadata retention laws took effect, we conducted a series of forums and invited all the agencies we would oversee to come and discuss any challenges regarding compliance with the Act and explain how our oversight function would work. These forums had a very high attendance rate of nearly 100 per cent, indicating the willingness of agencies to comply. Not only did agencies attend these forums; they were also engaged, responsive and appreciative. Agencies wanted to comply from the start. By engaging early, they knew we were fundamental to that process.

Another key feature of our oversight process is the sharing of learning and best practice. We believe that sharing of best practices is critical to continuous improvement in public administration. As an oversight body we have a unique opportunity to identify the best methods of doing something, share that across agencies and bring all agencies up to the highest level of performance.

We also make sure we have the insight needed to determine when best practice may not be applicable due to the differences in the operating environments of agencies, and we balance

these with the best practices it can employ. We do not prescribe a 'one size fits all' approach to achieving compliance; rather, we adopt a principles-based approach to our oversight. This means we provide consistent inspection criteria for each agency, but we appreciate the different contexts and environments in which the agencies we oversee operate.

While we must ensure a minimal compliance standard is met, we also seek to understand any mitigating factors when compliance is not met. We encourage and provide recognition when agencies self-disclose issues.

The principle here is to acknowledge that mistakes do happen; however, the way that an agency responds is crucial to providing public assurance. We would be much more concerned about a system involving humans that does not reflect the existence of human error — there can be such a thing as appearing 'too perfect'.

Also, of course, we aim to provide procedural fairness. Agencies are given the opportunity to comment on our reports before they are finalised and are given prior notice of our inspection criteria. We report on our inspections objectively. We reflect dispassionately on the facts provided and report positive results and actions as well as any adverse findings.

Measuring success

The effectiveness of this approach is evident in the receptive and positive responses we receive from agencies when we have raised issues or made suggestions in our inspection reports. However, developing other metrics to demonstrate success is more challenging. Is finding a breach of the law an example of successful oversight or is it better not to find any breaches because oversight has driven a culture of meaningful compliance? I will leave the detail of those evaluation questions to another day.

What I can say with confidence is that our approach to oversight provides assurance to the Parliament and the public because:

- we are on the ground looking at activities that are 'behind the veil' for the rest of the community;
- our approach encourages a culture of meaningful compliance by agencies;
- our analysis suggests that mistakes are just that — mistakes — and agencies are keen to remedy them; and
- our reports introduce an element of transparency into what is necessarily a secretive area.

That is how the Commonwealth Ombudsman makes a difference through oversight.

STRIKING THE RIGHT BALANCE: FOI AND THE CONTEMPORARY WORLD OF GOVERNMENT PRACTICE

Bill Lane and Eleanor Dickens*

Thirty years or so following the initial enactment of freedom of information (FOI) legislation in Australia, there was an emerging consensus that the original model was in need of a major overhaul.

The initiative for change was taken by the Queensland Government in 2007 with the establishment of the FOI Independent Review Panel, which was charged with undertaking a comprehensive examination of Queensland's FOI legislation. The Panel's report, *The Right to Information — Reviewing Queensland's Freedom of Information Act*, provided a fundamental reappraisal of the core concepts of FOI and urged a more proactive approach to the release of government information. The subsequent enactment of the *Right to Information Act 2009* (Qld) (in tandem with the *Information Privacy Act 2009* (Qld)) epitomised the emergence of 'FOI Mark II' in Australia with its shift from the old 'pull' model to a new 'push' model. Similar legislative reforms were subsequently enacted by the Commonwealth and in New South Wales, Tasmania and, to a lesser extent, Victoria.

Despite these reforms, challenges implicit in striking the right balance between the goal of greater access and the need to ensure protection of key interests remain. This article examines some of the challenges — in particular, those stemming from an evolved government landscape epitomised by corporatisation, public–private infrastructure development and government-led investment and incentive projects as well as challenges resulting from changes in the workplace environment of government officials and personnel — in particular, those resulting from advances in information technology.

Many of these challenges are ones that have been considered in the past, such as corporatisation. Others, specifically those challenges that have been triggered by changing practices in the workplace, are likely to continue to present challenges as rapid technological advancement drives further change to workplace practices.

The challenge for FOI will be to consider the scope and capacity of FOI frameworks, including the FOI Mark II model, to deal with these challenges. This article considers the extent to which current FOI regimes provide an adequate response to these challenges.

Background

The introduction of FOI in Australia marked a fundamental shift in thinking about government-held information and official secrecy. The traditional perception that governments 'owned' official information[1] had begun to give way in the face of an increasing

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acceptance of the view that governments hold information on behalf of their citizens and should therefore ensure that individuals have adequate means of accessing it — a view consistent with liberal democratic values of transparency and accountability.

Yet, in the years following its inception, FOI began to face a number of challenges. Some derived from criticisms about its waning effectiveness as a means of enhancing open and transparent government. For instance, studies described a propensity by some agencies to develop an 'FOI resistant culture' by the adoption of strategies designed to thwart FOI requests perceived as likely to result in adverse publicity for the agency or portfolio Minister.[2] In a related way, perceptions arose that the 'conclusive certificate' mechanism was being overused, thus proving another instance of negative FOI practice.[3]

However, challenges of a different nature also emerged. Many derived from what can be described as a fundamental alteration of the government landscape. This was evident, for instance, in the extension of government outsourcing into traditional or 'core' government functions. Activities such as operating prisons or providing social welfare services were being placed in the hands of private service providers. In fact, outsourcing gave rise to patterns of FOI use not necessarily consistent with FOI's underlying philosophy — for example, FOI became a useful tool for business organisations seeking to access commercial information held by government agencies about their rivals, such as in the area of government tendering.[4]

As well as outsourcing, it also became more common for governments to discharge their functions by creating autonomous corporatised entities designed, for instance, to pursue government business activities, to manage and deliver public utilities (water, gas and electricity) or to act as management vehicles for administering public–private infrastructure projects.[5]

Practices such as outsourcing and corporatisation diminish the reach of FOI. In the absence of specific legislative or contractual arrangements,[6] documents held solely by private sector entities in outsourced arrangements with government are not generally accessible under FOI.[7] In the case of corporatised government entities, it became common practice legislatively to shield them from FOI if they were not otherwise beyond its reach due to the manner of their creation. The prevailing view was that commercially related activities conducted by such entities were inconsistent with the idea of FOI.

As a result of these challenges, and in the 30 years or so following the initial enactment of Australian FOI legislation, a consensus began to emerge that the original FOI model was in need of a major overhaul. The initiative for reform was taken by the Queensland Government in 2007 with the establishment of the FOI Independent Review Panel, charged with undertaking a comprehensive examination of that state's FOI legislation. The panel's report, *The Right to Information — Reviewing Queensland's Freedom of Information Act* (the Solomon report) constituted a fundamental reappraisal of the core concepts of FOI in the context of the emerging and broader debate about the need for governments to adopt a more proactive approach to the release of government information.

The subsequent enactment of the *Right to Information Act 2009* (Qld) (RTI Act (Qld)), in tandem with the *Information Privacy Act 2009* (Qld) (IP Act (Qld)) epitomised 'FOI Mark II' with its shift from the old 'pull' model of Australian FOI legislation to a new 'push' model. Similar reforms were legislated in New South Wales with the introduction of the *Government Information (Public Access) Act* (GIPA Act (NSW)); in Tasmania with the *Right to Information Act 2009* (Tas) (RTI Act (Tas)) and at the Commonwealth level with amendments in 2010 to the *Freedom of Information Act 1982* (Cth) (FOI Act (Cth)).

Despite the changes wrought by these reforms, challenges remain. Many of them are due to the ever-shifting nature of the government landscape, referred to earlier. The corporatisation of government entities and government ventures involving private sector partnerships and outsourcing have reached new levels — for example, by government agencies specifically establishing corporate vehicles to carry out specific projects but chairing these corporate vehicles with persons employed by or elected to the authorising agency. Under these arrangements, a new series of questions has been raised not in relation to whether these entities themselves are subject to FOI regimes but in relation to whether documents of these entities, when in the hands of agency employees or representatives, come within the ambit of FOI regimes.

Other challenges have arisen due to evolving workplace practices, especially concerning the way agencies and government officials go about their daily operations. Rapid advances in digital technology have significantly altered the workplace environment — as evidenced, for instance, in the increased use of smart phones, social media devices and flexible work arrangements.

Against this background, it is once again appropriate to consider whether existing FOI regimes, including those modelled along the FOI Mark II framework, are capable of dealing with these changes and challenges. In other words, are existing FOI regimes capable of appropriately meeting these challenges? In order to highlight this question, the article selects some key developments in FOI case law. The developments chosen for attention are those concerning the reach of FOI in areas involving corporatisation, changed and evolving workplace practices (the use of email, smart phones and other social media devices) and big data analytics.

Corporatised government entities as vehicles for government functions

FOI is built on liberal democratic values of government transparency and accountability — in other words, FOI is about access to government information. Although consideration is sometimes given as to whether FOI should be extended to the private sector,[8] the right of access in current Australian FOI statutes remains confined to documents which government agencies and ministers hold or have a right to access. This right of access is usually expressed in formal terms as a right of access to 'documents of an agency' and 'official documents of a Minister'.[9]

At its most basic, this essentially means documents held by government departments, statutory authorities and bodies established by government (usually by statute) for public purposes. More particularly, FOI regimes may use various legislative formulae to define which entities are subject to FOI. At one end of the spectrum is the 'exclusive listing approach', where the statute expressly and exclusively lists the particular entities.[10] At the other end is the 'criteria-based approach', which involves the application of a statutory term to the entity in question.[11]

In jurisdictions which adopt a criteria-based approach, difficult and contentious issues can arise, especially given the increasing practice of governments to deploy autonomous corporatised entities to engage, for instance, in government business or commercial operations or to manage public–private ventures.[12]

This is well illustrated in the case of the RTI Act (Qld), where, despite adoption of key Solomon report recommendations extending the right of access in the new regime to 'government owned corporations',[13] certain corporations established by the government as special purpose vehicles to pursue public–private ventures were determined by the

Queensland Supreme Court in *Davis v City North Infrastructure*[14] (*Davis*) to be immune from the application of the RTI Act (Qld).

By way of explanation, the right of access to documents in the RTI Act (Qld) is expressed to include those held by held by a 'public authority'. In accordance with the criteria-based approach enshrined in the RTI Act (Qld), the term 'public authority' is then defined as an entity either 'established for a public purpose by an Act' or 'established by government under an Act for a public purpose'.

In *Davis*, the respondent company (CNI) was created under the auspices of the Office of the Coordinator General of Queensland as one of a number of special purpose vehicles (SPVs) to manage major government infrastructure projects. In order for it to be subject to the RTI Act (Qld), it was necessary to show that it was 'established under an Act' (a Queensland statute).[15]

However, as the Supreme Court ruled,[16] whilst its existence was planned, enabled and organised by officials acting in accordance with Queensland legislation, CNI was not, in fact, established under a Queensland statute; it was incorporated and registered under a Commonwealth statute — the *Corporations Act 2001* (Cth). It therefore fell outside the FOI regime established by the RTI Act (Qld).

What made the ruling in *Davis* somewhat contentious was the fact that the evidence revealed that, in the lead-up to the enactment of the RTI Act (Qld), the Queensland Government had expressly accepted a Solomon report recommendation to extend the right of access to government business organisations and to remove an immunity they previously enjoyed under the repealed *Freedom of Information Act 1992* (Qld).[17] However, as a close examination of the final text of the statute revealed, only a qualified version of the recommendation was adopted.

Although 'government owned corporations' (GOCs) were now expressly subject to the regime, this extension applied only to those particular entities specifically defined and prepared for incorporation under the *Government Owned Corporations Act 1993* (Qld) as GOCs — that is, irrespective of the fact that such entities were ultimately incorporated under the *Corporations Act 2001* (Cth). In other words, although GOCs were subject to the RTI Act (Qld), CNI was not a GOC because the *Government Owned Corporations Act 1993* (Qld) had not been utilised to establish it, the government preferring instead to bypass this process in proceeding directly to incorporate it under the *Corporations Act 2001* (Cth).[18]

New models and arrangements for corporatisation and public–private ventures

As stated earlier, the FOI right of access is confined to documents which are held by government agencies or ministers or which they are legally entitled to access. For the most part, FOI statutes refer to documents in the 'possession' of or 'held' by government.

The legislative language used to denote possession may vary between jurisdictions, but it ultimately means both actual (physical) as well as constructive possession. Some FOI statutes expressly require government agencies to take contractual measures to ensure that they are in possession of certain documents held by private sector entities with which they have dealings.[19]

The concept of possession has given rise to a number of difficulties in the context of government agency dealings with private sector entities or organisations not themselves directly subject to FOI. Emerging case law exhibits various approaches taken in determining whether or not the FOI right of access extends to entities not otherwise directly subject to the

legislation. These approaches include by way of contract law, the law of principal and agent, and principles relating to corporate personality.

As detailed earlier, the corporatisation of government entities and government ventures involving private sector partnerships and even outsourcing have reached new levels, with government agencies specifically establishing corporate vehicles to carry out specific projects and chairing these corporate vehicles with persons employed by or elected to the authorising agency. Under these arrangements, while the broader issue of whether these entities should themselves be subject to FOI regimes remains relevant, the difficulties in bringing these entities into the FOI regime have triggered a new series of questions about whether documents of these entities, when in the hands of agency employees or representatives, come within the ambit of FOI regimes.

These questions have been considered to date in Queensland in several decisions of the Queensland Office of the Information Commission (QOIC) through legal frameworks including contract law, the law of principal and agent, and principles relating to corporate personality.

The first real consideration of this 'secondary' round of issues arose in the context of the law concerning principal and agent in the decision of the QOIC in *Maurice Blackburn Lawyers and Department of Transport and Main Roads; City North Infrastructure Pty Ltd (Third Party)*.[20]

In that case, the applicant sought RTI Act (Qld) access from the Department of Transport and Main Roads to documents referred to in a deed providing for the construction of state infrastructure projects. The deed was entered into between the Department (an 'agency' under the RTI Act (Qld) determined as representing the State of Queensland) and a separate entity, City North Infrastructure Pty Ltd (CNI) — a wholly owned and funded state government company established to manage the projects on behalf of the state and provide ongoing management services concerning contracts awarded for the projects. Clauses in the deed provided for the state to appoint a person as its representative for any purpose under the deed and for such person to act at all times as the agent of the state and subject to the direction of the state. Pursuant to these provisions, the Chief Executive Officer (CEO) of CNI was appointed as the state's representative.

On the basis of this arrangement, it was determined that the CEO of CNI was an agent of the state for the purposes of the deed — with the consequence that any documents brought into existence by the agent in that capacity belonged to the state as principal. In other words, the state, as principal, had a present legal entitlement to documents received by the CEO as agent when the CEO was fulfilling his responsibilities as the state's representative under the deed. Accordingly, and even though such documents might be physically held by CNI, it was determined that the agency (the Department) had a present legal entitlement to the relevant documents.

The issue arose in a different context in the decision of the QOIC in *Queensland Newspapers Pty Ltd and Ipswich City Council*.[21] This case concerned the relationship between Ipswich City Council — an 'agency' within the meaning of s 14 of the RTI Act (Qld) and therefore subject to the RTI Act (Qld) — and Ipswich City Properties Pty Ltd (ICP) — a council-owned company incorporated under the *Corporations Act 2001* (Cth). The council was the sole beneficial shareholder of ICP, and all of ICP's directors were elected council representatives or senior council employees.

The arrangements between the council and ICP were such that ICP leased premises from the council and established and maintained a separate document management system.

Therefore, in these circumstances, the documents could not be said to be in the actual 'physical possession' of council and therefore subject to the RTI Act (Qld). The only legal basis then under which ICP documents would be subject to the RTI Act (Qld) would be if ICP documents could be said to be in the possession of the council by some other means of possession, including through council officers who were members of the ICP or by the application of several legal principals.

The applicant requested access from the council to documents relating to the overseas travel arrangements of ICP directors. Access to some of the requested documents was rejected, in reliance on ss 47(3)(a) and 52(1)(a) of the RTI Act (Qld) — that is, on the basis that no such documents existed or could be found in the council's information management and storage system. The basis of this response was that, whilst ICP might hold such documents, ICP was a separate legal entity from the council, operating from separate licensed premises, with its own separate information management and storage systems and a separate server for documents such as emails.

Given that the council was the sole beneficial shareholder of ICP and that all of ICP's directors were elected council representatives or senior council employees, the applicant argued that ICP was, alternatively, 'under the control of' the council or the agent or alter ego of the council and that this was sufficient to establish that the council did have a present legal entitlement to the requested documents.

On external review, the QOIC first concluded (at [37] and [64]) that there was nothing in ICP's constitution or the applicable law (in particular, the *Corporations Act 2001* (Cth)) which gave the council a direct right of access to ICP documents. Secondly, the QOIC concluded (at [27]) that the possibility that the council, as sole shareholder, may be able to take possession of ICP documents by way of a shareholder resolution was not immediate enough to constitute a present legal entitlement to the documents as explained in *Re Price and Nominal Defendant*.[22]

That left for consideration the applicant's principal and broader argument that the factual circumstances warranted a 'piercing or lifting of the corporate veil' separating the council from ICP so as to allow a conclusion that council did, in fact, have a present legal entitlement to the documents. Again, the applicant pointed to the fact that the council was the sole beneficial shareholder of ICP and that all of ICP's directors were elected council representatives or senior council employees.

However, this argument was rejected. As the QOIC observed, an examination of relevant authorities demonstrates that 'piercing the corporate veil' is regarded as a significant step in the face of long-settled principles of corporate law concerning the concept of corporate personhood. Moreover, the relevant case law revealed considerable judicial uncertainty concerning the exact circumstances considered appropriate to warrant 'lifting the veil' or to similarly justify invoking the 'alter ego' concept.

In those circumstances, the absence of any judicial or authoritative tribunal decisions dealing with 'lifting the veil' in a context that was sufficiently similar to the fact situation here was particularly telling. Accordingly, the QOIC felt bound to observe the 'notion of corporate personhood' for ICP, with the result that ICP documents could not be regarded as council documents.

Finally, the applicant sought to complement their 'alter ego / piercing the veil' argument with the assertion that this would produce a just and fair result, given that the RTI Act (Qld) refers to taking account of factors favouring disclosure in the public interest. However, as the QOIC explained, public interest factors are only relevant in determining whether 'a document of an

agency' should be released. They have no bearing on the threshold issue of whether or not a requested document is, in fact, 'a document of an agency'.

The end result in this decision was that a body which was established by the council and drew its membership from the council was considered to be outside the scope of the RTI Act (Qld). Therefore, in the circumstances, a body established and controlled by a government agency under the current RTI Act (Qld) is considered to be an entity to which the accountability framework established under the RTI Act (Qld) does not apply. Furthermore, in the absence of legislative amendment, and while judicial uncertainty remains in many of these areas, this will continue to be the current position in respect of an entity such as ICP.

Changes in the workplace environment: smart phones and flexible work arrangements

The changing nature of the workplace environment and, in particular, the way in which work is undertaken is posing questions and presenting challenges for FOI. In a similar way in which the creation and use of emails 15 to 20 years ago changed the manner in which work was undertaken and subsequently required legal conceptual and definitional change to concepts such as 'document', the use of smart phones and the integration of these technologies into daily working and personal life is requiring a reconsideration of what is considered to be work-related information and personal information.

Likewise, the pressure to meet deadlines and work out of office hours combined with the push towards flexible working arrangements has also triggered an increasing reliance on personal email systems and servers and has triggered concerns about the capacity of this reliance and these arrangements to capture an agency's corporate knowledge. But, in an FOI context, the next logical concern is the capacity of FOI to apply to documents created and stored under these arrangements.

The other key challenge for FOI in this area is that the technological advances that are driving the changes are rapid and intense, and they are likely, in the future, to continue at a level of intensity and impact not yet considered. Therefore, the challenge for FOI in this context is whether it has the capacity to deal with these challenges not only now but also in the future.

Against this background, there have been several recent decisions from the QOIC in Queensland where issues such as these have been considered.

Smart phones and the public–private divide

In two recent decisions, the QOIC considered the issue of whether documents, in the form of photographs and other documents, which were 'personal mementos' and captured by public officials in a personal capacity, should be disclosed, in the public interest, because these images where captured and stored on agency-funded ICT infrastructure.

While these decisions confirm that there is no doubt that these documents were subject to the RTI Act (Qld), the real question was whether the public interest, as reflected in the exemptions established under the RTI Act (Qld), required the release of these documents.

These two decisions both concerned similar factual circumstances and involved the Ipswich City Council and the issue of whether documents (in the form of photos and other documents) taken on council-issued smart phones and subsequently stored on council ICT infrastructure should be disclosed.

In *Queensland Newspapers Pty Ltd and Ipswich City Council*[23] and *Queensland Newspapers Pty Ltd and Ipswich City Council; Third Party*[24] (collectively, the Decisions), the applicant applied to Ipswich City Council seeking access under the RTI Act (Qld) to photographs and other documents relating to the mayor's and other councillors' overseas travel to London and continental Europe in 2012 funded by a company which council owned and effectively operated and controlled.

The council located several documents responsive to each of the applications. As the responsive documents had been, in some manner, either captured or stored and/or circulated on council ICT infrastructure, there was no issue as to whether the documents were documents of council and in this capacity subject to the RTI Act (Qld). The key issue was whether the documents triggered any of the exemptions established under the RTI Act (Qld) and should be released.

On both applications, the applicant made submissions that the release of the documents was in the public interest on the basis that disclosure:

(a) would assist in enhancing council's accountability, enable ratepayers to scrutinise the spending of public funds and cross-reference with other available information about the trip in question; and

(b) would assist in boosting transparency of an elected official by providing the public [with] information about how money is being spent by a [ratepayer] funded company.

The applicant also argued that the position of mayor had a large overlap between personal time and work time; and that the mayor was essentially 'never off duty' and therefore the photographs were taken in an official or work capacity and could not be considered as 'personal' or 'private information'. Further, the applicant also argued that any privacy attaching to the documents, specifically the photographs, was reduced, as the photographs were emailed between councillors using council email addresses.

To counter these submissions, the council made a number of submissions over the course of the external review processes, including that:

(a) although there was no question that the photos were documents of the council and therefore subject to the RTI Act (Qld) and responsive to both the applications, the photographs were mementos taken during the personal spare time of the mayor whilst on the trip and therefore were not taken in an official or work related capacity;
(b) public sector policies, including those of the council, expressly authorise their representatives and employees to use public sector ICT-related infrastructure or devices for limited personal use;
(c) although the mayor and councillors were public officials, these officers still had an expectation of privacy surrounding non-work or non-official activities even when details of these activities had been captured and stored on council ICT infrastructure; and
(d) given that the photographs were non-official photos, there was no public interest, including accountability and transparency related public interest, in the disclosure of the photographs. Furthermore, in the absence of public interest factors supporting non-disclosure, there was an insufficient basis to disclose the personal information of the mayor and councillors in the documents and photos.

In determining these external review processes, the QOIC decided that the public interest, through the application of the Public Interest Test Exemption established under s 49 and sch 4 of the RTI Act (Qld), favoured the non-disclosure of the documents and photos.

In making this determination, the QOIC:

(a) found that the photographs conveyed no or very limited information capable of addressing the submissions and questions of the applicant. It was considered, on the face of the photographs, that they were unlikely to facilitate the type of public oversight, debate and enlightenment envisaged by the applicant. Whilst the disclosure of the photographs could be said to further the public interest concerning the accountability and transparency of the council, informed public debate or effective oversight of the expenditure of public funds, it could only do so in a limited capacity and therefore the QOIC afforded a low weight to the public interest in considering the factors favouring non-disclosure;
(b) on consideration of the images in the photographs themselves, held that the photographs were unable to identify anything to suggest that they recorded activities subject to the overlap of personal and work activities in the manner suggested by the applicant;
(c) held that the material in the photographs was sufficient to support a finding that the photographs were personal mementos and that the photos were not work-related or connected to the official duties and responsibilities of the mayor or councillors; and
(d) recognised that there were policies and procedures in operation at the council which enabled officers and representatives to have access to council ICT infrastructure and services for limited personal use. In this instance, it was satisfied that the transmission of the documents and photographs using council email addresses fell within the limited personal/private use permitted by the relevant policy and code.

The final decision of the QOIC in both of these matters was that the public interest protecting the release of personal information and privacy outweighed any public interest factors favouring disclosure identified by the applicant; therefore, it upheld the council's decision not to release the photographs.

While it can be said that the previous approach to the issue of whether the personal information of public officials and public sector officers and employees can be disclosed has been found to be very much in favour of the position that such information can be disclosed, these decisions from the QOIC indicate a softening of this position and recognition that these officers can have personal information and privacy related concerns that can be protected.

In our view, this slight change in position will become more and more significant as devices such as smart phones, be they work or personal devices, become more and more integrated into life and work and the distinction between these two spheres becomes increasingly blurred.

Flexible work arrangements and other matters

As detailed previously, issues such as the 24-hour workplace and the pressure to meet deadlines and work out of office hours combined with the push towards flexible working arrangements has also triggered an increasing reliance on personal email systems and servers and has triggered concerns about the capacity of this reliance and these arrangements to capture an agency's corporate knowledge. In an FOI context, the next logical concern is the capacity of FOI to apply to documents created and stored under these arrangements.

In this context, FOI legislation generally provides for access to documents in the possession or under the control of an agency officer which relate to the officer's 'official capacity.' As the case law illustrates, this has given rise to a number of questions — some relating to whether

a document in the possession or under the control of an agency official is a document that is held 'in the officer's official capacity'.

Considering these issues requires an examination of s 12(b) of the RTI Act (Qld). Section 12(b) of the RTI Act (Qld) is the second leg of the inclusive definition of what is meant by a document of an agency that is 'in the possession or under the control of' an agency. It provides that it will include a document in the possession or under the control of an agency officer provided it relates to officer's 'official capacity'. Section 12 of the RTI Act (Qld) provides:

> **12 Meaning of document of an agency**
>
> In this Act, document, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency, and includes —
>
> (a) a document to which the agency is entitled to access; and
>
> (b) a document in the possession, or under the control, of an officer of the agency in the officer's official capacity.

In light of the broad rulings that a document in the (physical) 'possession' of the agency or 'under the control of'[25] an agency will constitute a 'document of the agency', it is not immediately clear what s 12(b) of the RTI Act (Qld) adds, unless it is meant to include agency-related documents which are offsite or not physically located in the agency but which are, nonetheless, in the possession or control of an agency officer 'in the officer's official capacity'.

At the very least, questions of interpretation remain as to whether a document in the possession or under the control of an agency official is a document that is held 'in the officer's official capacity'.

In *Tol & The University of Queensland*,[26] it was determined that entries on a website which was maintained by an agency officer (including during agency working hours) were not documents held by the officer in his 'official capacity' in terms of s 12(1)(b) of the RTI Act (Qld) and were therefore not documents 'in the possession or under the control of the agency'. It was not disputed that the University of Queensland (UQ) was an 'agency' for the purposes of s 14 of the RTI Act (Qld) and that it was in possession of documents relating to the first part of the applicant's RTI request.

However, the second part of the applicant's request sought access to entries on a website set up to discuss the science of global warming. The website had been established and was maintained by a UQ staff member in his capacity as a member of a group called Skeptical Science Forum (SkS Forum). The staff member (the 'officer of the agency') was an academic employed by UQ in its Global Change Institute and, in his UQ profile, he identified himself publicly in both capacities. The applicant argued that the SkS Forum website entries were therefore documents held by an officer of the agency 'in the officer's official capacity' because the academic, in maintaining the website, did so, partly during work hours, by presenting himself as an employee or officer of UQ.

However, the Acting Assistant Information Commissioner ruled that the website entries did not comprise documents received or created by the officer acting in his 'official capacity' within the meaning of s 12 of the RTI Act (Qld). They were therefore not 'documents of an agency' such that there was no right of access to them under the IP Act (Qld) or RTI Act (Qld). The decision was based on determining the following facts:

(i) UQ did not create or maintain the SkS Forum or the website;
(ii) income from donations to the site did not enter UQ's bank account;
(iii) the website did not bear the UQ logo; and
(iv) the officer's claim of copyright over the website was not disputed by UQ.

In other words, the officer's involvement with the website and forum was in his personal capacity. It was also accepted that university academic staff frequently work outside of usual business hours and collaborate on projects with other academics. On that basis, the fact that the officer maintained the website during working hours did not, in itself, mean that he did this on behalf of UQ.

Older cases from other jurisdictions may provide some additional guidance concerning the ambit of s 12(b) of the RTI Act (Qld). However, caution is necessary, bearing in mind existing rulings on s 12 of the RTI Act (Qld) concerning the separate wording 'in the possession of' and 'under the control of', especially rulings which establish that 'in the possession of' an agency means simple physical possession by the agency.

The decision in *Re Mann and Capital Territory Health Commission (No 2)*,[27] concerning the FOI Act (Cth), stated, for instance, that documents in the possession of agency employees, even if they are physically kept within the agency, are not 'documents of an agency' if they do not relate to the performance of the agency's functions.

Also, in *Re Healy and Australian National University*,[28] the Administrative Appeals Tribunal held that, if the requested documents were not created by officers of an agency as part of their official duties, they were not 'documents of an agency'. And in *Re Horesh and Ministry of Education*[29] it was held that notes of a meeting, taken on behalf of a school principal by another person, did not constitute a document 'in the possession of' the ministry insofar as the existence and purpose of the notes was personal to the principal — that is, they were not brought into existence for any administrative purpose and were not physically located on the school premises. This case was followed in *Re Hoser and Victoria Police (No 2)*,[30] where it was held that a taped conversation recorded by a police officer to protect himself against the possibility of subsequent allegations being made against him was a document held by the police officer personally and did not enter Victoria Police records.

Where then does this leave s 12(1)(b) of the RTI Act (Qld) in considering whether emails and other documents created or circulated using personal ICT infrastructure such as personal smart phones, email accounts and computers?

On one view, it could be said that any document in the possession or under the control of an officer in an official capacity will comprise a document of the agency subject to the operation of the RTI Act (Qld) even if the document in question is held or stored on non-agency, private ICT infrastructure such as a personal email account or hard drive. The basis of this position is that the personal email account or hard drive would be said to be under the 'control' of the relevant officer.

The decision of the Western Australian Information Commissioner in *Re Swift and Shire of Busselton*,[31] considering similar definitional provisions as that prescribed under s 12 of the RTI Act (Qld), found as follows:

> I do not accept that the definition 'documents of an agency' in the FOI Act requires both possession by an officer of an agency, in his or her official capacity as such an officer, as well as control of those documents by the agency. Rather, in my view, the definition plainly states that a document of an agency includes a document that is in the possession or under the control of an officer of the agency in his or her official capacity. it is the act of possession of a document or the power of control over a

> document by an officer acting in an official capacity, which brings a document within the purview of the FOI Act.
>
> ... as far as the FOI Act is concerned, I do not consider that the deciding factor is where a document might be held or filed by an elected member ... In my view, the question involves determining the capacity in which documents are held by elected officials.

Further support for this position is found in the Western Australian Information Commission decision in *Re Leighton and Shire of Kalamunda*,[32] which dealt with facts very similar to those in this review. In this decision, the Information Commissioner was satisfied that emails received by an elected councillor in the performance by the councillor of his official duties would be documents subject to the operation of the *Freedom of Information Act 1992* (WA) (FOI Act (WA)), regardless of the fact that they had been received via a private email address.

While this position may be sustainable while the person in question is an employee or is still an officer of the relevant agency, this position may be difficult to continue to be sustained where the officer or employee in question is no longer connected to the agency. Equally, it will be difficult to assert this position where the email account or server or other ICT-related infrastructure is not under the control of the employee or officer in question.

In these circumstances, while the RTI Act (Qld) and other similar FOI regimes will be able to deal with a situation where the email account or other ICT-related infrastructure is under the control of the relevant employee or officer, it will be difficult where the officer or employee is no longer engaged or associated with the relevant agency.

Big data, big data analytics and information as an asset

One final example of the future challenges for FOI is presented by the increased use by government of 'big data' and 'big data analytics' and the increasing recognition that the information and data held by governments is an asset and in this capacity has financial value.

While there has been considerable discussion of big data and big data analytics in the context of Australia's various information privacy regimes, there has been little or no consideration of what challenges these mechanisms present to FOI.

We consider that there are several challenges presented by these mechanisms, including the following:

(a) Assuming that big data and analytic analysis results are considered to be public records and are retained by agencies, how would FOI deal with an application to access this information and data, given the size and volume of this kind of data?
(b) Could standard FOI procedural processes deal with an FOI application or this kind of information?
(c) Should the data and information be proactively released under 'open government' style initiatives?
(d) Who should bear the cost of such a process, especially if the data was being accessed for commercial purposes?
(e) Would it be necessary to introduce a measure in FOI to ensure that applicants seeking access for commercial purposes be subject to a varied regime?

Overall, these are just some of the few issues that big data and big data analytics present to FOI. To date, there has been little or no discussion about these mechanisms in an FOI context, but, again, these mechanisms present issues that will need to be considered in any

modernisation process or review that is to be applied, even if the end result of such consideration is that no amendments to existing regimes are required.

Conclusions

In this article, we have sought to raise several issues concerning the capacity of FOI to deal with a changed and ever-evolving government operational landscape. The authors' consideration of these issues is by no means exhaustive, and a range of further issues and changes, adopting this theme, could have equally been raised.

What is clear from this preliminary review of this issue is that FOI appears to have continuing issues in dealing with practices such as corporatisation. These appear to be issues where legislative change will be required in order to change the current FOI schemes to apply to these types of entities and processes.

On the other hand, it appears that, at least in the context of the RTI Act (Qld), there is a level of flexibility incorporated into the statute which allows issues generated by changes to agency work practices to be considered and dealt with under the RTI Act (Qld) processes in most circumstances.

Looking forward, however, the key challenge for FOI will be to ensure that this flexibility remains to allow FOI to deal with further change and evolution in these areas into the future.

Endnotes

1 *Osland v Secretary, Department of Justice* [2008] HCA 37, [60] (Kirby J).

2 Described initially in a Canadian study — see A Roberts, 'Administrative Discretion and the Access to Information Act: "Internal Law" and Open Government' (2002) 42 *Canadian Public Administration* 174. Roberts provided an account of what he described as 'contentious issues management' in government agencies in Canada. Similar practices in Australia were described in a report by the Commonwealth Ombudsman, which examined practices in 22 government agencies: Commonwealth Ombudsman, *Scrutinising Government, Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, Report No 02/2006 (March 2006) [7.2]. See also the NSW Ombudsman, *Annual Report 2001–2002*, p 73, which referred to 'differential handling' of FOI requests. Similar concerns were also expressed in Queensland Public Hospitals Commission of Inquiry, *Report of the Commission of Inquiry into Bundaberg Hospital* (1996), which criticised FOI practices by Queensland Department of Health officials said to be specifically designed to thwart FOI disclosure of documents recording surgery waiting times in public hospitals. See generally the discussion in R Snell, 'Contentious Issues Management — The Dry Rot in FOI Practice?' (2002) *FOI Review* 62.

3 Although now removed from most Australian FOI statutes, the mechanism remains in the *Freedom of Information Act 1982* (Vic) (FOI Act (Vic)) ss 28(4), 29A(2); *Freedom of Information Act 1992* (WA) (FOI Act (WA)) ss 36–38; *Information Act* (NT) ss 59–62; *Freedom of Information Act 1982* (ACT) (FOI Act (ACT)) s 37A(2).

4 This was well illustrated, for instance, by the decision in *Re Wanless Wastecorp and Caboolture Shire Council* (2003) 6 QAR 242.

5 For an early account of the modern beginnings of 'contractualisation' of public administration, see M Freedland, 'Government by Contract and Public Law' [1994] *Public Law* 86.

6 See, for instance, *Freedom of Information Act 1982* (Cth) (FOI Act (Cth)) s 6C; *Government Information (Public Access) Act* (NSW) (GIPA Act (NSW)) s 121. The issue was initially highlighted in a joint ALRC/ARC report in 1995, which recommended that governments should make adequate provision for access rights when a government service is contracted out. The report considered a number of options, ranging from the wholesale extension of FOI legislation to the private sector to mechanisms for ensuring information access rights are inserted in contracts between the government agency and the service provider. See Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982* Report No 40 (1995), rec 99.

7 Generally speaking, the FOI right of access is limited to documents in the possession of government. In the absence of specific legislative or contractual arrangements, documents physically held by a private service provider relevant to the performance of government agency function might still be accessible from the agency where the relevant FOI legislation provides a sufficiently extended meaning of 'possession'.

8 From time to time, consideration has been given to whether or not FOI should be extended to the private sector. See, for example, Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report No 77, ARC Report No 40 (1995) Ch 2. See also Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *Freedom of Information in Queensland*, Discussion Paper No 1 (2000) p 4.
9 See, for instance, FOI Act (Cth), s 15. In some jurisdictions, several pieces of legislation may need to be consulted to determine the issue, as has been the case in New Zealand under the *Official Information Act 1982* (NZ) (NZOIA) and the *Local Government Official Information and Meetings Act 1987* (NZ).
10 FOI Act (Cth); NZ OIA; Canadian *Access to Information Act*, RSC 1985, c A-1.
11 See, for example, RTI Act (Qld) ss14–16.
12 See, for example, *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285; *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376; *Re Orr and Bond University* (1998) 4 QAR 129; *Re Barker and World Firefighters Games, Brisbane* (2001) 6 QAR 151.
13 RTI Act (Qld) s14(d). See also *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285; *Re McPhillimy and Gold Coast Motor Events Co* (1996) 3 QAR 376; *Re Orr and Bond University* (1998) 4 QAR 129; *Re Barker and World Firefighters Games, Brisbane* (2001) 6 QAR 151.
14 [2011] QSC 285.
15 The right of access established by s 23 of the RTI Act (Qld) encompasses documents held by a 'public authority' (s 14) where (for present purposes) 'public authority' means an entity either 'established for a public purpose by an Act' (s 16(1)(a)(i)) or 'established by government under an Act for a public purpose, whether or not the public purpose is stated in the Act' (s 16(1)(a)(ii)).
16 The Supreme Court in *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285 affirmed the correctness of the decision by the Queensland Civil and Administrative Tribunal (QCAT) in *City North Infrastructure Pty Ltd v Information Commissioner* [2010] QCATA 60, which, in turn, had overturned the decision of the Information Commissioner in *Re Davis v City North Infrastructure Pty Ltd* (Decision No 220004, Office of the Information Commissioner, 31 March 2010) that CNI was 'established *under an Act*' (s 16(1)(a)(ii)) because its formation required the Treasurer's consent under s 44 of the *Financial Administration and Audit Act 1977* (Qld).
17 For a detailed account, see W Lane, 'State-owned Corporations and the Reach of the RTI Act (Qld) — *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285' (2011) 31 *Queensland Lawyer* 239.
18 For a detailed account, see Lane, ibid.
19 See, for example, GIPA Act (NSW) s 121.
20 [2014] QICmr 6 (25 February 2014).
21 [2015] QICmr 12 (26 November 2015).
22 (1999) 5 QAR 80.
23 [2016] QICmr 13.
24 [2015] QICmr 12.
25 See, for example, *Re Price and Nominal Defendant* (1999) 5 QAR 80; *Office of the Premier v The Herald and Weekly Times Ltd* [2013] VSCA 79, [63], [71].
26 [2015] QICmr 4.
27 (1983) 5 ALN N261.
28 Unreported, AAT, 23 May 1985.
29 (1986) 1 VAR 143.
30 (1990) 4 VAR 259.
31 [2003] WAlCmr 7.
32 [2009] WAICmr 1.

HOLDING REGULATORS TO ACCOUNT IN NEW SOUTH WALES POLLUTION LAW: PART 2 — THE LIMITS OF JUDICIAL REVIEW AND CIVIL ENFORCEMENT

Sarah Wright*

Merits review, judicial review and civil enforcement proceedings offer a means to hold regulators to account for the decisions they have made. Judgments in these matters can also provide guidance in order to foster better decision-making in the future. Merits review can test the quality of a regulator's decision.[1] It aims to ensure that a decision is the 'correct or preferable' one.[2] Both judicial review and civil enforcement proceedings taken against regulators seek to ensure accountability. Their very purpose is to challenge whether a decision-maker has acted in accordance with the law. In the previous edition of this journal, part 1 of this series of two articles examined the ability of merits review to hold regulators to account for decisions made under the main piece of New South Wales (NSW) pollution legislation — the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act).[3] This part of the article examines the role that judicial review and civil enforcement have played in the accountability of NSW pollution regulators.

Part 1 of these articles contains detailed background to the decision-makers under the POEO Act and their powers. To recap briefly: the NSW Environment Protection Authority (EPA) regulates activities with the highest potential environmental impacts in terms of pollution as well as activities of the state and public authorities.[4] It does so mainly through licensing, but, in addition, it may use notice powers such as clean-up notices and prevention notices.[5] Local councils are the other main regulators and can manage pollution using POEO Act notice powers.[6]

Part 1 concluded that there has been little accountability of the EPA for POEO Act licensing decisions through merits review. There are no third-party appeal rights, and judgments could only be found in relation to one licensee merit appeal matter that actually proceeded to a final hearing. This also meant there was scarce material in previous merits review cases to guide the exercise of the EPA's licensing powers and promote better decision-making. In contrast, the judgments in 13 merit appeals against notices issued by local councils demonstrated the important role this type of proceeding can play. These decisions contained a number of principles which clarified the scope and limits of the notice powers, providing accountability and a body of jurisprudence that can guide future decisions.

This article begins by explaining the judicial review and civil enforcement jurisdiction of the Land and Environment Court of New South Wales (the LEC), which provides a 'one-stop shop' for all environmental and planning matters in the state.[7] It then considers the limitations of these types of proceedings before examining the extent to which judicial review

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and civil enforcement have been able to hold regulators to account in NSW pollution law. As there is a lack of decisions in this area, particular emphasis is placed on undertaking a qualitative review of the substance of the judgments.

The judicial review and civil enforcement jurisdiction of the LEC

The LEC has exclusive jurisdiction in relation to judicial review of POEO Act decisions, such as licensing decisions made by the EPA or the issue of a clean-up notice by the authority or a local council.[8] A collateral challenge on judicial review grounds may also be mounted as part of other proceedings. For example, in a prosecution for failure to comply with a clean-up notice, a challenge may be raised regarding failure to afford procedural fairness in issuing the notice.[9] As there is no right to a merit appeal in respect of a clean-up notice, judicial review provides a mechanism to contest such a notice.

The POEO Act, like many NSW environmental laws, provides open standing for civil enforcement of the legislation. Section 252(1) provides that '[a]ny person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations'. It is not necessary to establish that the person's rights have been infringed.[10] The LEC has wide powers to make 'such orders as it thinks fit'.[11] Section 252 of the POEO Act 'embodies … the important public interest of upholding environmental legislation'.[12] This open standing provision allows environmental groups and members of the public to ensure that the law is followed by decision-makers and other persons that have obligations under the Act. When making orders for relief in public interest matters, the Court's role extends beyond providing remedies between the parties to considering the broader interests of the community in light of the legislative regime.[13]

In broad terms civil enforcement proceedings may be used where either a 'polluter' or decision-maker is in breach of the POEO Act. Such proceedings may be of the following 'types':

Actions against citizens:

- A regulator, such as the EPA or local council, may seek to enforce the legislation where a person fails to comply. For example, a person might illegally dump waste or fail to comply with their licence conditions.
- Any person, such as a concerned member of the public, may seek to enforce a breach of the legislation committed by another citizen — for example, if a company fails to obtain a licence or breaches their licence conditions. In some circumstances the 'citizen' against whom proceedings are taken may be a government body, such as a council that holds a licence in relation to a sewage treatment plant (STP) that it operates.

Actions against regulators:

- A person against whom a decision is made may lodge a case arguing that the regulator breached the legislation when making a decision.
- Any person, such as a concerned citizen, may bring proceedings in relation to a regulator's decision arguing a breach of the POEO Act.

In the latter two circumstances, the grounds in civil enforcement proceedings may resemble traditional judicial review proceedings.[14] For example, a person against whom a decision is made may argue that the government breached the legislation by failing to provide an opportunity to make submissions before making a decision.[15] This may constitute a failure to

afford procedural fairness. A concerned citizen may argue that the EPA breached the legislation by failing to take into account a relevant consideration when granting a licence.[16] Additionally, civil enforcement by one citizen against another has the potential to raise deficiencies in the way that a regulator has exercised their power, such as the conditions imposed (or not imposed) on a licence[17] or the failure to take regulatory action where it may be required. Such proceedings can also provide confirmation that a regulator was justified in exercising their powers in a particular way or not exercising their powers at all.[18] Relevant cases from the last three categories identified above are considered below.

Judicial review and civil enforcement proceedings in the LEC are determined by a judge. The judge may be assisted by a commissioner, but it is only the judge who may adjudicate on the matter.[19] The commissioner only provides assistance and advice to the court.[20]

Limitations of judicial review and civil enforcement proceedings

Before considering the extent to which judicial review and civil enforcement proceedings have contributed to regulatory accountability, it is useful first to consider some of their limitations. Often it is ordinary citizens and environmental groups who seek to take such actions and there are many barriers that these types of litigants may face, even in relation to civil enforcement where open standing has been granted. Most obviously, this includes the expense involved in litigation, in terms of both an applicant's legal costs and any prospective costs order should the proceedings be unsuccessful.[21] The general rule in these types of proceedings is that costs follow the event.[22] Furthermore, there is the possibility that a security for costs order may be made. Where a citizen wishes to enforce the public interest rather than the protection of their own interests — such as amenity or business interests — they may be less willing to risk the potential costs involved.[23] Such costs 'can be exorbitant' and have a 'deadening effect' on prospective litigation.[24] As Preston J noted, 'the public lacks the financial resources to plead effectively on the environment's behalf'.[25] Similarly, Pain J stated that:

> Typically in public interest environmental litigation, disparity in the parties' financial resources results as non-profit organisations or highly motivated individuals of limited means pursue cases in which complex legal issues arise, with the possibility of expensive expert evidence. Respondents are generally comparatively well-resourced government ministers or departments and companies undertaking development. While an applicant's lawyers and expert witnesses in civil enforcement or judicial review proceedings may act for a reduced fee, or on condition that cost recovery occurs only if proceedings are successful, the applicant may have difficulties raising funds to pay a costs order against him or her, particularly where there are two respondents.[26]

Costs can therefore act as a disincentive to bringing proceedings, particularly those that seek to uphold the public interest. As Toohey and D'Arcy recognised in what is now an oft-quoted statement, '[t]here is little point in opening the doors to the courts if litigants cannot afford to come in'.[27]

There are cost provisions which can help to facilitate public interest litigation. This includes the power to make a protective cost order which sets the maximum amount of costs recoverable.[28] This order can be sought early in proceedings,[29] allowing a party to better ascertain the costs involved and determine whether to proceed with the litigation. The LEC can also decline to award costs against an unsuccessful applicant in public interest proceedings or refuse to make a security for costs order.[30] These powers are, however, discretionary. They will not automatically be exercised in favour of an applicant simply because the proceedings are found to have been taken in the public interest.[31] Additionally, while an applicant can seek to reduce their own costs through self-representation, there are obvious disadvantages to this approach. Successfully arguing a judicial review or civil enforcement proceeding may require an understanding of complex legal principles. It may be

difficult for a layperson to make meaningful submissions, even if they have extensive experience in arguing such disputes.[32]

An obvious limitation of judicial review is its sheer nature in comparison with merits review. Judicial review precludes a reconsideration of a development or project on its merits. The courts are at pains to emphasise that is an area into which a judge in judicial review will not tread. The court is confined to determining whether the decision-maker acted within the limits of the law, rather than re-exercising the discretion of the decision-maker and substituting a new decision.[33] Accordingly, in order to challenge a decision on judicial review grounds, some legal error must be shown, such as a failure to consider a relevant consideration or failure to afford procedural fairness. McGrath describes judicial review proceedings vividly as 'like trying to fight the development in a straight-jacket'.[34] He stated:

> Judicial review is seldom a cause of action that addresses the main complaint made against approval of a poor development. Most public interest litigants concerned about approval of a development wish to challenge the merits of the decision — that a decision was wrong and the proposed development should have been refused because of its environmental impacts. Judicial review may, however, be the only avenue to challenge the decision. For such cases judicial review is like trying to fight the development in a straight-jacket — the public interest litigant wants to say, 'the development is a bad idea and shouldn't be allowed', but the judicial review process prevents this issue being raised. Instead, litigants are forced to try to find some procedural error in the decision-making process to challenge or simply concede that they cannot challenge the decision at all.[35]

Similar constraints apply in civil enforcement proceedings, with a litigant being required to demonstrate that there has been a statutory breach.

Even if a judicial review or civil enforcement action can be successfully made out, relief is not automatic but, rather, discretionary. Furthermore, if the relief granted has the effect of overturning a decision, the regulator may then remake the decision in a legal manner. This may nevertheless result in the same substantive outcome as the original decision.[36] The victory for the applicant may therefore be short-lived. As Millar noted in the context of planning law, these 'proceedings often do no more than delay the inevitable approval of a development'.[37]

A further complication arises in relation to licensing decisions regarding state significant development and state significant infrastructure[38] given that the EPA is required to grant a licence which must be substantially consistent with the development consent until the first licence review.[39] Arguably, this makes it harder to challenge a licensing decision to begin with, but even if a licence is invalidated the EPA would have no choice but to grant a further licence.

Accountability through judicial review and civil enforcement proceedings

This section analyses POEO Act judicial review and civil enforcement proceedings to determine the impact of these matters on regulatory accountability and better decision-making. Given the lack of cases, particular emphasis is placed on a qualitative analysis of the substance of the judgments.

The EPA and local councils are required to keep a POEO Act public register and record in it the LEC civil cases they have been involved in.[40] While the EPA's POEO Act public register (the Public Register) is available electronically on its website,[41] there is no central electronic register for local councils and their public registers are generally not available on their websites. Accordingly, figures on the total number of civil enforcement and judicial review proceedings *commenced* under the POEO Act were not obtained. General statistics across all environment and planning matters on civil enforcement and judicial review, which

together comprise Class 4 of the LEC's jurisdiction, show that in 2014 a total of 135 matters were finalised.[42] Further statistics in relation to those matters are as follows:

> In 2014, Class 4 matters were **11%** of the Court's finalised caseload.
>
> Of the Class 4 matters finalised in 2014:
>
> **58%** were civil enforcement proceedings initiated by local councils.
> **30%** involved judicial review proceedings.
> **12%** were other matters.
>
> In 2014, **67%** of Class 4 matters were finalised by alternative dispute resolution processes and negotiated settlement, without the need for a court hearing.[43]

The vast majority of Class 4 matters are therefore civil enforcement proceedings by the government. This has been the consistent trend since the LEC's inception, although the proportion of non-government actions has increased.[44] The amount of challenges to decisions made under the POEO Act which proceed to a finalised hearing is likely to be relatively low each year given the high settlement rate.

A search was conducted for written judgments relating to POEO Act civil enforcement and judicial review matters in the LEC and New South Wales Court of Appeal (NSWCA) using the NSW Caselaw website.[45] The Public Register was also examined to identify civil proceedings involving the EPA, although all of these matters were also referred to in a judgment of some form. Table 1 below sets out the matters for which a written judgment could be located in relation to some aspect of the case, even though the matter may not have proceeded to a final hearing. A total of 28 matters were located, with some having multiple judgments.

Type of legal proceedings	No. of matters
Civil enforcement by regulators (EPA or local council) of a citizen's legal obligations	12 (Local councils = 7; EPA = 5)
Civil enforcement by a citizen, enforcing another citizen's legal obligations	7
Challenge to government decision by person against whom a decision was made — civil enforcement or judicial review	7 (Local councils = 4; EPA = 3)
Challenge to government decision by a third party — civil enforcement or judicial review	2 (Local councils = 0; EPA = 2)
	Total = 28

Table 1. Number of cases for civil enforcement and judicial review matters under the POEO Act where a written judgment was published.[46]

The majority of the matters were in relation to civil enforcement of a citizen's legal obligations by either a regulator (n=12) or another citizen (n=7). The remaining nine matters involved a civil enforcement or judicial review challenge to a government decision. Seven of these were by a person against whom a power was exercised, namely a notice recipient, and two were by a third party. Further analysis of the last three categories identified in Table 1 follows.

Challenges by a person against whom the decision was made

The seven challenges to government decisions by a person against whom a decision was made included five challenges to clean-up notices. Four of these were collateral challenges to the validity of a clean-up notice in a prosecution for failure to comply with the notice.[47] The other two matters were judicial review challenges to notices issued in the exercise of POEO Act investigation powers in relation to offences under other legislation.[48]

Combined with the merit appeal judgments on prevention notices and noise control notices (discussed in Part 1 of this article), proceedings challenging clean-up notices make up the most significant, or at least largest, body of case law on POEO Act decision-making powers. These matters have held regulators to account for their decisions, at least in the sense of providing individual justice to the notice recipient. For example, in *Liverpool City Council v Cauchi*[49] (*Cauchi*) the defendants in a prosecution for failure to comply with a clean-up notice successfully mounted a collateral challenge to the validity of the notice. The prosecution was dismissed. The LEC held that the Council was required to afford the defendants procedural fairness before issuing the notice but had failed to do so.[50] *Cauchi*

and later decisions of the LEC have provided regulators with guidance in determining the content of the duty to afford procedural fairness in a particular case.[51]

Challenges to government decisions by a third party

The two challenges to government decisions by third parties related to the exercise of the EPA's licensing variation power. In *Weston Aluminium Pty Ltd v Environment Protection Authority (No 2)*[52] (*Weston*) and, on appeal to the NSWCA*, Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd*,[53] Weston Aluminium Pty Ltd (Weston) challenged the validity of a licence variation granted by the EPA to Alcoa Australia Rolled Products Pty Ltd (Alcoa). The proceedings were not brought for environmental protection reasons but, rather, it appears, to protect a business interest. Weston processed aluminium dross, a by-product of aluminium, at a facility located in Cessnock, NSW. It had previously received aluminium dross from Alcoa's aluminium smelter in Victoria. Alcoa sought and obtained a licence variation to allow it to process the Victorian dross at its own aluminium processing plant in Yennora, NSW.[54]

Weston argued the licence variation had been issued in breach of the POEO Act. The case involved the interpretation of Alcoa's licence and the scope of the licence variation powers in the POEO Act. The EPA filed a submitting appearance[55] and, therefore, did not take part in the proceedings. By the time the proceedings reached the NSWCA, the legislation had been amended to clarify the scope of the variation power in order to address the legal issue identified by the LEC.[56] While the NSWCA reframed the legal question that should have been posed,[57] the Court's decision nevertheless derived a simple proposition: 'the addition of a new scheduled activity to an existing licence cannot be done by way of variation if the effect is to permit the licensing of the activity absent the grant of a necessary development consent'.[58] There is little else that can be taken from the judgment in terms of guiding the exercise of the EPA's licensing powers, except perhaps that some of Alcoa's licence conditions could have been better drafted.[59]

A comment made by Pain J in the LEC in *Weston* is, however, of interest as it highlights the complete lack of decisions regarding the interpretation of licensing powers and licence conditions under the POEO Act. Her Honour stated:

> The Court has not been provided with any cases which have considered the appropriate interpretation of environment protection licences issued under the POEO Act and is unaware of any. This case therefore raises the fundamental issue of what is the appropriate approach to take to such statutory instruments. Is the case law applicable to development consents … also applicable to the construction of licences under the POEO Act?[60]

It is noted that the question raised by her Honour above did not need to be dealt with on appeal given the way the matter progressed. The point is that, as Pain J recognised, there is little guidance in the case law regarding licensing matters. As the first of these two articles discussed, only one licensing merit appeal has proceeded to a contested hearing in the 17 years since the POEO Act commenced. There is little civil case law on the exercise of licensing powers generally, as these two articles demonstrate.

The second third-party challenge to a government POEO Act decision was *Donnelly v Delta Gold Pty Ltd*[61] (*Donnelly*). The applicant contested a licence variation granted by the EPA to the fourth respondent, Timbarra Gold Mines Pty Ltd, regarding a goldmine. The variation allowed treated mining waste water to be spray irrigated over a total area of 18 hectares.[62] The applicant was described as 'an authorised representative of the Wahlabul/Malerah Bandjalung Aboriginal Communities and has claimed, pursuant to the *Native Title Act 1993* to be a traditional custodian of the land and waters' where the goldmine was located.[63] The proceedings were brought to protect Indigenous cultural heritage and the environment and

were later found to have been taken in the public interest.[64] The applicant challenged the licence variation on two main grounds. First, it was alleged that the EPA had breached s 58(6) of the POEO Act. That section requires the authority to call for and consider public submissions in circumstances where a licence variation:

(a) 'will authorise a significant increase in the environmental impact' of the licensed activity; and
(b) there has been no public consultation under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) regarding the variation.

There had been no public consultation under either the EP&A Act or POEO Act. The issue was whether the licence variation authorised a significant increase in environmental impact and, therefore, whether the EPA was required to invite and consider public submissions.[65] Justice Bignold held that the question posed by s 58(6)(a) regarding whether the licence authorised a significant increase in environmental impact was a jurisdictional fact which the LEC was required to determine for itself.[66] After considering all the evidence, his Honour held that the environmental impact authorised by the licence variation was insignificant.[67]

The second major argument was that the EPA had 'failed to consider the impact of the Variation upon "aboriginal relics" within the meaning of the [*National Parks and Wildlife Act 1974* (NSW)]'.[68] This argument was rejected on the evidence.

Despite the applicant in *Donnelly* being unsuccessful, Bignold J commented on the important nature of the case in a later judgment on costs.[69] His Honour stated that '[c]ertainly a number of important provisions of [the POEO Act] were judicially considered for the first time'.[70] This included the s 58 licence variation power and the civil enforcement provision in s 252 of the POEO Act.[71] The case had also highlighted 'serious omissions and deficiencies in the expert material that had been submitted to, and acted upon by, the [EPA] in granting the Licence Variation'.[72] In this respect, Bignold J noted that 'the Respondents, to a fairly significant degree can be said to have brought the proceedings upon themselves'.[73] The matter was important in terms of accountability. While the applicant may have lost, the fact that the decision regarding 'significant increase in environmental impact' was held to be a jurisdictional fact means that the EPA is likely to be more careful in making this determination because the LEC can reconsider the issue. Additionally, the case highlighted the importance of making decisions based on adequate expert evidence — hopefully leading to greater scrutiny of an applicant's documents by the authority in the future. Nevertheless, the impact of the decision was limited given its narrow focus on the licensing variation provision as its main concern. Indeed, as the only challenges to government decisions by third parties have related to licence variations, the scope of judicial consideration of the exercise of the EPA's powers in these matters has been extremely narrow.

Civil enforcement: citizen v citizen

Seven of the cases located were civil enforcement matters brought by a citizen against another citizen to enforce that person's obligations under the POEO Act. Four of those cases were brought by a neighbour of the party alleged to be in breach of the legislation. The purpose behind bringing those proceedings was largely to protect the amenity or property interests of the neighbour rather than a general concern to protect the environment in the public interest.[74] One further matter was brought for the purpose of protecting Indigenous cultural heritage.[75] There was little within these judgments in terms of principles that could be used to guide the future exercise of regulatory powers under the POEO Act. For example, in *McCallum v Sandercock (No 2)*,[76] Pepper J stated, in the context of discussing whether the proceedings were brought in the public interest for the purposes of costs, that '[o]n a fair reading of the [principal judgment in the proceedings] it does not, in my view, contribute in

any material way to the proper understanding, development or administration of the law with respect to the Act'.[77]

However, in one matter it was acknowledged that the EPA was justified in refraining from exercising its enforcement powers where a breach had occurred. In accountability terms, this essentially confirmed that the authority had used its powers in a proper manner. In *Moore v Cowra Shire Council*[78] the LEC found that a Council-operated STP had breached s 120 of the POEO Act (pollution of waters).[79] However, in the exercise of its discretion the Court decided not to grant relief.[80] The EPA was aware of problems with the STP and numerous licence breaches yet did not take any enforcement action.[81] Justice Sheahan accepted that the Council and the EPA were doing their best to manage pollution from a 'severely overloaded' STP while waiting for a new plant to be built.[82]

Two of the civil enforcement matters brought by one citizen against another are of particular interest in terms of environmental protection. One especially illustrates the important role that such proceedings can play in improving regulatory decision-making and ensuring government accountability. In *Blue Mountains Conservation Society Inc v Delta Electricity*,[83] the plaintiff environmental group brought civil enforcement proceedings alleging that the defendant had breached s 120 of the POEO Act by causing water pollution.[84] A defence is provided to persons who pollute waters in circumstances where the pollution was permitted by a POEO Act licence.[85] Delta Electricity, a state government corporation, operated Wallerawang Power Station in the Blue Mountains. It was alleged that, over a period of two years, a number of specified pollutants were discharged into Coxs River (as part of wastewater discharged from the power station) that were not permitted under the defendant's licence. They included 'salt, copper, zinc, aluminium, boron, fluoride and arsenic'.[86] Delta Electricity denied that it was emitting pollutants in breach of s 120.[87] The issue in terms of whether the licence authorised such discharges was that it required the monitoring of certain substances but did not set a maximum discharge limit. As Johnson noted, 'the litigation was a test case. In particular, the case raised questions about the construction of environment protection licences, and whether conditions requiring the monitoring of pollutants constituted an implied authority to pollute'.[88]

The Blue Mountains Conservation Society Inc (BMCS) was of the view 'that the ongoing degradation of water quality in the Coxs River was an important environmental issue that needed to be addressed'.[89] BCMS had written to the Department of Environment and Conservation (DECC), which then incorporated the EPA, before commencing proceedings and asked the department to take enforcement action regarding water pollution. DECC indicated it would not prosecute.[90] BMCS therefore took proceedings against Delta Electricity.[91] The proceedings were brought in the public interest[92] and, as Beazley JA noted in the NSWCA, in doing so BMCS was 'seeking to support the rule of law'.[93] The case was significant because:

> [It] was the first case under the [POEO] Act using the open standing provisions of s 252 of that Act seeking, in civil proceedings, a declaration and orders requiring a holder of an environment protection licence to cease polluting waters in contravention of the [POEO] Act.[94]

The matter was the subject of a number of preliminary decisions regarding a protective costs order,[95] security for costs[96] and a motion to strike out the proceedings.[97] While BCMS's case survived these preliminary judgments, the matter settled without a final hearing.[98] The parties agreed that the proceedings would be discontinued on the basis of certain conditions. This included that Delta Electricity admitted to polluting waters in breach of the POEO Act, except regarding salt; furthermore, that it would apply to the EPA 'to vary its licence to specify maximum concentration levels for copper, zinc, aluminium, boron, fluoride, arsenic, salt and nickel'.[99]

Johnson was critical of the fact that the EPA had not taken enforcement action given its responsibilities as a regulator under the POEO Act.[100] She stated that '[t]he case highlights significant gaps and deficiencies in the administration of pollution laws in NSW, raising serious questions about the role of the government in the enforcement of its own pollution laws'.[101] The case is therefore notable, as it allowed an environmental group acting in the public interest to enforce the law when the regulator had not done so. In the circumstances it played a role in government accountability rather than just the accountability of the licensee.

The other civil enforcement case brought against a licensee by a citizen was not successful. In *Macquarie Generation v Hodgson*,[102] the NSWCA summarily dismissed proceedings alleging that Macquarie Generation, which operated Bayswater Power Station located at Muswellbrook in NSW, had breached s 115(1) of the POEO Act. That section makes it an offence to 'wilfully or negligently [dispose] of waste in a manner that harms or is likely to harm the environment'. The alleged waste was CO_2. It is a defence to the s 115(1) offence if a person has lawful authority to dispose of the waste, such as by way of a licence.[103] Section 64(1) makes it an offence to breach a condition of a licence. Macquarie Generation held a POEO Act licence to operate the power station. There were no provisions in the licence which expressly limited the amount of CO_2 that could be emitted or the amount of electricity that could be generated or coal burnt.[104] Hodgson argued that:

> [T]he authority conferred by the licence was subject to an 'implied' or 'common law' limitation or condition preventing Macquarie emitting CO_2 in excess of the level it could achieve by exercising 'reasonable regard and care for the interests of other persons and/or the environment'. It was alleged that this level had been exceeded giving rise to offences under s 64(1).[105]

If such an implied term was upheld and the level deemed permissible under that term was exceeded, the defence of lawful authority to a s 115(1) breach would not be available. It would, however, need to be established, among other things, that CO_2 constituted 'waste' in order to make out a breach of s 115(1).

Applying contract law principles to the statutory licence, the NSWCA rejected that a term limiting the amount of CO_2 emitted should be implied:

> It is not necessary to imply any condition to make it effective, and the condition relied on would contradict the licence.
>
> On the other hand it was necessary to imply a term permitting Macquarie to emit CO_2 because a licence to burn coal would otherwise be ineffective.[106]

An argument that a condition should be implied in the licence that limits the amount of coal consumed per year was also rejected.[107] Accordingly, the alleged breaches of ss 64(1) and 115(1) could not be made out.

While the case was clearly brought for environmental protection reasons — aiming to limit the amount of CO_2 that Macquarie Generation could emit — the decision of the NSWCA had the opposite effect. The judgment implied a term allowing an unlimited amount of CO_2 to be released. In the course of the NSWCA's decision, CO_2 was described as 'colourless, odourless and inert'.[108] As Gardner and Lee note, 'there was no trial of the evidence about whether the CO_2 emissions were harmful to the environment and whether [Macquarie Generation] could reasonably have reduced those emissions'.[109] It would have been interesting to see whether the NSWCA would have reached the same conclusion if a more blatantly 'harmful' substance, such as arsenic or heavy metals, was the pollutant in question.

Final synopsis of accountability through judicial review and civil enforcement

The seven matters that have been brought by a person against whom a decision was made all related to a clean-up or investigation notice issued to that person. Together with the merit appeal decisions on prevention and noise control notices, these matters form the largest body of case law regarding challenges to the exercise of a regulator's powers under the POEO Act. They have been effective in providing guidance for future decision-making. The two challenges to government decisions by third parties were both about licence variations. One was initiated solely to protect business interests. The cases were extremely limited in terms of offering assistance in decision-making.

In proceedings where citizens sought to enforce another citizen's legal obligations, seven of the nine matters were concerned with protecting amenity and property interests rather than being brought in the public interest to protect the environment. This general pattern of fewer cases being brought to protect the public interest is consistent with the nature of cases taken under the EP&A Act by citizens.[110] Nevertheless, a substantial number of public interest matters have been brought in planning law for environmental protection purposes. In *Blue Mountains Conservation Society Inc v Delta Electricity*,[111] Pain J stated:

> The history of public interest litigation in this Court through the utilisation of third party standing provisions in virtually all the major environmental and planning legislation in NSW is reasonably extensive and commenced early in the life of the Court. Broad standing provisions enable the legislation to be tested and enforced through proceedings in the Court.[112]

However, while this may be the case for the EP&A Act and other environmental legislation, it certainly does not appear to be the case for the POEO Act. While there have been few civil cases taken under the POEO Act, the vast majority of proceedings that have been instituted were not taken in the public interest. Exceptionally few cases could be characterised in this way. This is of significant interest because these are precisely the cases which may have the biggest impact on the way in which decision-makers exercise their powers. The former Chief Judge of the LEC, Peter McClellan, noted the importance of such proceedings 'is both because of the issues raised and the impact of the decisions on the proper administration of environmental law'.[113] In the context of the EP&A Act, McClellan stated:

> The decisions have proved of fundamental importance in construing the legislation and defining the obligations of both the public and private sector under it. Without these proceedings it is almost certain that the quality of environmental assessment of major development projects, particularly those undertaken by government, would not have met the expectations of the legislature when the Act was passed.[114]

The low number of such proceedings under the POEO Act means that the legislation and decision-making under it have not received the same level of scrutiny by the LEC. In particular, there has been insufficient testing of licensing decisions through judicial review and civil enforcement. It is not being suggested that the EPA is making 'bad' decisions and that a flurry of legislation should ensue. The lack of cases does, however, mean that decision-making has not been tested and, consequently, the level of accountability is low. One possible explanation for the small number of cases in pollution law is that a potential litigant may have a number of decisions that they could contest in relation to a project. For example, a litigant may decide to challenge the development consent or approval, rather than the licence, whereby the whole project may collapse. Another possible reason for the lack of litigation is that the EPA may respond appropriately to community concern, such as by amending a licence or taking enforcement action when a citizen complains about pollution. This would negate the need for third-party litigation altogether. These issues were not, however, examined as part of this article, as they are difficult to assess on the available information.

Overall, however, it is clear that there has been scarce testing of the way in which the EPA has exercised its licensing powers. A greater level of scrutiny of licensing decision-making would clearly enhance accountability in this important area concerned with environmental protection and the reduction of risks to human health.

Endnotes

1 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 946.
2 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.
3 See Sarah Wright, 'Holding Regulators to Account in New South Wales Pollution Law: Part 1 — The Limits of Merits Review' (2016) 86 *AIAL Forum* 78.
4 *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) s 6; see 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) 379–81.
5 Wright, above n 4, 380.
6 POEO Act s 6; Wright, above n 4, 380.
7 Brian J Preston, 'Judicial Specialisation Through Environment Courts: A Case Study of the Land and Environment Court of New South Wales' (2012) 29 *Pace Environmental Law Review* 602, 604.
8 *Land and Environment Court Act 1979* (NSW) (LEC Act) s 20(2), (3).
9 See, for example, *Liverpool City Council v Cauchi* (2005) 145 LGERA 1.
10 POEO Act s 252(3).
11 Ibid s 252(6).
12 *Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* (2011) 81 NSWLR 407, [41] (Pepper J) citing *Meriton Apartments Pty Ltd v Sydney Water Corporation* (2004) 138 LGERA 383, [15].
13 Peter McClellan, 'Access to Justice in Environmental Law an Australian Perspective' (Paper presented at Commonwealth Law Conference 2005, London, 11–15 September 2005) 22 citing *F Hannan Pty Ltd v Electricity Commission of New South Wales* (1985) 66 LGRA 306, 313.
14 See Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 4th ed, 2016) 41.
15 For example, s 55 of the POEO Act provides that the EPA must not refuse to issue or transfer a licence unless it has notified the applicant, given reasons for its proposed decision, provided 'a reasonable opportunity to make submissions' and considered any submissions. It is recognised that such a challenge would be unlikely in relation to decisions for which a merit appeal is available.
16 For example, s 45 of the POEO Act, which contains a list of factors the EPA must take into account, so far as they are relevant, in making a licensing decision.
17 See Elaine Johnson, '*Blue Mountains Conservation Society v Delta Electricity*' [2011] (3) *National Environmental Law Review* 35.
18 See, for example, *Moore v Cowra Shire Council* [2009] NSWLEC 59.
19 LEC Act s 37(1), (3).
20 Ibid s 37(3).
21 Nicola Pain, 'Protective Costs Orders in Australia: Increasing Access to Courts by Capping Costs' (2014) 31 *Environmental and Planning Law Journal* 450, 450; see also McClellan, above n 13, 42.
22 *Uniform Civil Procedure Rules 2005* (NSW) r 42.1.
23 Brian Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6 *Journal of Environmental Law and Litigation* 39, 61.
24 Pain, above n 21, 450.
25 Preston, above n 23, 74.
26 Pain, above n 21, 451–2 (citations omitted).
27 John Toohey and Anthony D'Arcy, 'Environmental Law — Its Place in the System' in Robert John Fowler (ed), *Proceedings of the International Conference on Environmental Law. 14–18 June 1989, Sydney, Australia*, National Environmental Law Association of Australia and Law Association for the Asia and the Pacific, 1989, quoted in *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424, [195] (Basten JA, Macfarlan JA agreeing).
28 *Uniform Civil Procedure Rules 2005* (NSW) r 42.4(1).
29 Pain, above n 21, 451 n 7.
30 *Land and Environment Court Rules 2007* (NSW) r 4.2.
31 See Bates, above n 1*,* 931ff.
32 See the discussion of Bignold J in *Donnelly v Delta Gold Pty Ltd* (2001) 113 LGERA 34, [14]–[16]; *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44, [28]–[30].
33 See, for example, *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189 (Kitto J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1 (Mason J); *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042, [4].
34 Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 330.

35 Ibid; see also Chris McGrath, 'Myth Drives Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33 *Environmental and Planning Law Journal* 3, 6.
36 See, for example, *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 2)* (2016) 215 LGERA 157, [237].
37 Ilona Millar, *Objector Participation in Development Appeals*, Environmental Defender's Office NSW <http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/670/attachments/original/1381972457/yl_cle_objector_participation.pdf?1381972457> 17.
38 The concepts of state significant development and state significant infrastructure were explained in the first of these two articles: see Wright, above n 3, 81.
39 *Environmental Planning and Assessment Act 1979* (NSW) s 89K(1)(e), (2)(c), 115ZH(1)(e), (2)(c).
40 POEO Act s 308(2)(k).
41 The Public Register is available at <http://www.epa.nsw.gov.au/prpoeo/index.htm>.
42 Land and Environment Court of NSW, *The Land and Environment Court of NSW Annual Review 2014* (2015) 29.
43 Land and Environment Court of NSW, *Class 4: Judicial Review and Civil Enforcement* <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_4/class_4.aspx>.
44 See McClellan, above n 13, 24, 26.
45 The NSW Caselaw website can be accessed at <http://www.caselaw.nsw.gov.au>.
46 These cases were located by searching the written judgments available on NSW Caselaw <http://www.caselaw.nsw.gov.au>.
47 *Liverpool City Council v Cauchi* (2005) 145 LGERA 1; *Ryding v Kempsey Shire Council* [2008] NSWLEC 306; *Lismore City Council v Ihalainen* (2013) 198 LGERA 47; *Environment Protection Authority v Sydney Drum Machinery Pty Ltd (No 4)* [2016] NSWLEC 59; *Nati v Baulkham Hills Shire Council* (2002) 120 LGERA 301 (*Nati*). *Nati* was the only written judgment involving a challenge to a clean-up notice in civil proceedings.
48 *D'Anastasi v Environment Protection Authority* (2010) 181 LGERA 412, overturned on appeal: *D'Anastasi v Department of Environment, Climate Change and Water NSW* (2011) 81 NSWLR 82 (the EPA was previously part of the Department of Environment, Climate Change and Water). This matter involved a challenge to a notice to provide information and records issued under s 193 of the POEO Act. The matter related to an investigation regarding potential offences under pesticides legislation, to which the POEO Act investigation powers also apply: see POEO Act s 186(b1). *Southon v Beaumont* (2008) 69 NSWLR 716 involved a challenge to a notice issued under s 203 of the POEO Act requiring 'the applicant to attend at a specified time and place to answer questions': [1]. However, the investigation related to potential breaches of the *National Parks and Wildlife Act 1974* (NSW) (NP&W Act), in relation to which the POEO Act investigation powers can be used: NP&W Act s 156B.
49 *Liverpool City Council v Cauchi* (2005) 145 LGERA 1.
50 Ibid [35]–[37], [49]–[53].
51 See *Ryding v Kempsey Shire Council* [2008] NSWLEC 306; *Lismore City Council v Ihalainen* (2013) 198 LGERA 47; see also Alison Packham, 'Cleaning Up Pollution Fair and Square: The Duty to Afford Procedural Fairness in the Issue of Clean-up Notices in NSW' (2014) 19 *Local Government Law Journal* 87.
52 *Weston Aluminium Pty Ltd v Environment Protection Authority (No 2)* (2005) 144 LGERA 7.
53 *Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd* (2006) 148 LGERA 439.
54 Ibid [6]–[9].
55 A submitting appearance means that a respondent does not intend actively to take part in the proceedings and agrees to any orders made by the Court — usually except as to costs orders: see *Uniform Civil Procedure Rules 2005* (NSW) r 6.11. A government department may decide to file a submitting appearance in circumstances where another respondent is actively arguing the matter and the government sees no reason to take part in the proceedings.
56 *Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd* (2006) 148 LGERA 439, [71].
57 Ibid [79].
58 Ibid [82].
59 See, for example, *Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd* (2006) 148 LGERA 439, [67].
60 *Weston Aluminium Pty Ltd v Environment Protection Authority (No 2)* (2005) 144 LGERA 7, [29].
61 *Donnelly v Delta Gold Pty Ltd* (2001) 113 LGERA 34.
62 Ibid [2]–[3].
63 Ibid [1].
64 See *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44, [23], [25]–[27], [53].
65 *Donnelly v Delta Gold Pty Ltd* (2001) 113 LGERA 34, [24]–[25].
66 Ibid [70].
67 Ibid [252], [254].
68 Ibid [11].
69 *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44.
70 Ibid [28].
71 Ibid.
72 Ibid [33].

73 Ibid [50].
74 See *McCallum v Sandercock* (2011) 183 LGERA 399; *McCallum v Sandercock (No 2)* [2011] NSWLEC 203, [31]–[32]; *Meriton Apartments Pty Ltd v Sydney Water Corporation* (2004) 138 LGERA 383; *Sydney Water Corporation v Jeffman Pty Ltd* [2010] NSWLEC 132; *Moore v Cowra Shire Council* [2009] NSWLEC 59.
75 *Kennedy v Stockland Developments Pty Ltd (No 4)* [2012] NSWLEC 3.
76 *McCallum v Sandercock (No 2)* [2011] NSWLEC 203.
77 Ibid [38].
78 *Moore v Cowra Shire Council* [2009] NSWLEC 59.
79 Ibid [81].
80 Ibid [81]–[87].
81 Ibid [51]–[52], [63].
82 Ibid [71]–[75], [82].
83 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1.
84 Ibid [1]. See also the following related decisions: *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 193; *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424; *Delta Electricity v Blue Mountains Conservation Society Inc (security for costs)* [2010] NSWCA 264; *Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* (2011) 81 NSWLR 407.
85 POEO Act s 122.
86 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1 [1]–[2].
87 *Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* (2011) 81 NSWLR 407, [16].
88 Johnson, above n 17, 36.
89 *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424, [20].
90 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1, [12].
91 *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424, [20].
92 Ibid [209] (Basten JA, Macfarlan JA agreeing), [120]–[121] (Beazley JA).
93 Ibid [121] (Beazley JA).
94 Ibid [38] (Beazley JA).
95 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1; appealed *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424.
96 *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 193; appealed *Delta Electricity v Blue Mountains Conservation Society Inc (security for costs)* [2010] NSWCA 264.
97 *Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* (2011) 81 NSWLR 407.
98 Johnson, above n 17, 36.
99 Ibid.
100 Ibid 35–7.
101 Ibid 35.
102 *Macquarie Generation v Hodgson* (2011) 186 LGERA 311.
103 POEO Act s 115(2).
104 *Macquarie Generation v Hodgson* (2011) 186 LGERA 311, [7]–[8].
105 Ibid [16]; see also *Gray v Macquarie Generation* [2010] NSWLEC 34, [8]. The proceedings in the LEC had been taken by Peter Gray and Naomi Hodgson. Mr Gray died before judgment was delivered in the NSWCA and the proceedings were continued in Ms Hodgson's name: *Macquarie Generation v Hodgson* (2011) 186 LGERA 311, [3], [19].
106 *Macquarie Generation v Hodgson* (2011) 186 LGERA 311, [65]–[66] (Handley AJA, Whealy and Meagher JJA agreeing).
107 Ibid [76]–[79].
108 Ibid [45].
109 Alex Gardner and Jessica Lee, 'Case Note: Macquarie Generation v Hodgson [2011] NSWCA 424' (2012) 27 *Australian Environment Review* 321, 321.
110 See McClellan, above n 13, 33.
111 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1.
112 Ibid [44].
113 McClellan, above n 13, 33.
114 Ibid 33–4.

THE INTERSECTIONALITY OF DOMESTIC AND GLOBAL ACCOUNTABILITY: UNHCR AND AUSTRALIAN REFUGEE STATUS DETERMINATION

Niamh Kinchin

Implicit in the study of the 'global space' as a regulatory phenomenon is recognition of the fact that the 'national and international' are interconnected. Largely absent from the existing scholarship, however, is a question of how domestic accountability might influence accountability at the global level. In particular, the negative ramifications for domestic accountability caused by the failure of a State to support global accountability, by either not respecting its international law obligations or by undermining international institutions, have the potential to be a powerful stimulus for greater global and domestic accountability. Focusing on the practice of refugee status determination (RSD), this article suggests that a State's accountability concerns may be exploited as a kind of 'negative motivation' for increasing accountability at the global level and for greater domestic administrative justice.

The global accountability 'problem' that this article focuses upon is the lack of procedural protection in the RSD processes administered by United Nations High Commissioner for Refugees (UNHCR). The way that Australia's refugee policies have not only contributed to the significant workload of UNHCR but also helped concretise UNHCR's RSD standards as 'best practice' in certain circumstances will be examined in order to argue that Australian refugee policy has had negative ramifications for its domestic legal and political accountability. These negative ramifications may act as a catalyst for helping to increase the accountability of UNHCR's own RSD practices.

UNHCR and refugee status determination

RSD is the legal and/or administrative process that States or UNHCR use to determine whether an asylum seeker meets the criteria for international protection according to the definition of a 'refugee' outlined in art 1A(2) of the *Convention Relating to the Status of Refugees*[1] (Refugee Convention) and/or national or regional law. Contracting States have primary responsibility for RSD as part of their non-refoulement obligations under the Refugee Convention. Non-refoulement is the obligation to not expel or return a refugee to a country where his or her life or freedom would be threatened due to race, religion, nationality, membership of a particular social group or political opinion.[2] A State's obligation to determine refugee status stems from the need to provide fair and effective procedural safeguards against non-refoulement,[3] and each State's RSD procedures are determined by the way its domestic legislation and institutions have been designed to carry out its international protection obligations.

Whilst not an express duty under the *Statute of the Office of the United National High Commissioner for Refugees*[4] (the Statute), UNHCR conducts RSD as part of its core international protection mandate[5] and has identified RSD as one of its operational activities. In its 2000 UNHCR Note on International Protection, UNHCR states that 'undertaking determination of refugee status' in circumstances where the host State is not a signatory to the Refugee Convention or 'has not established the relevant procedures' is an 'operational activity to strengthen asylum'.[6]

Although responsibility for RSD lies with States, UNHCR has little choice but to conduct RSD in circumstances where States abdicate their protection duties — which primarily occurs where a State lacks the resources and capacity to carry out RSD — or where a host State is not a signatory to the Refugee Convention but hosts a large number of refugees within its territory. As an example of the former, UNHCR undertakes RSD in Kenya. Although Kenya is a signatory to the Refugee Convention, it hosts a large number of refugees and 'other people of concern' (615 112 as at the end of 2015[7]), which it does not possess adequate resources to process. An example of the latter is Jordan, which, although not a signatory to the Refugee Convention, hosted 689 053 'people of concern' by the end of 2015, which included 664 118 refugees and 24 935 asylum seekers.[8]

In 2015, UNHCR received 269 700 applications for asylum or refugee status, which comprised 11 per cent of applications worldwide. In the same period UNHCR made 91 800 substantive decisions, which made up 8 per cent of total substantive asylum decisions.[9] UNHCR's RSD applies to what are known as 'mandate refugees'. In contrast to RSD conducted by States, a mandate refugee is determined by the definition of a 'refugee' outlined in UNHCR's Statute. The definition of a refugee in UNHCR's Statute is similar but not identical to the Refugee Convention's definition of a refugee. A person who meets the criteria for a refugee in UNHCR's Statute will qualify for protection by UNHCR, regardless of whether or not he or she is within the territory of a party to the Refugee Convention and 1967 *Protocol Relating to the Status of Refugees* (the Protocol), or whether he or she has been recognised as a refugee under the Refugee Convention.

UNHCR develops procedural standards for State RSD practice through the creation and dissemination of its own policy documents[10] and input into the drafting processes of the Conclusions of its Executive Committee.[11] UNHCR does not, however, meet the same procedural standards in its RSD practice that it expects of States. The fact that no independent review is available for UNHCR's RSD outcomes continues to be a cause of particular concern. Writing in 1999, Michael Alexander's highly critical paper accused UNHCR of allowing its RSD procedures to operate with a lack of openness and accountability and for fostering resentment and suspicion towards it by asylum seekers and refugees.[12] One of Alexander's central arguments is that protections provided by domestic administrative law, such as merits review tribunals, judicial review, ombudsmen and freedom of information laws, had left UNHCR unacceptably behind.[13] Michael Kagan, a commentator on refugee issues who runs the US-based refugee advocacy group Asylum Access and established RSDwatch.org[14] to address what he saw as the accountability issues inherent in UNHCR RSD practice, undertook research on RSD practices in Egypt and Jordan in 2002.[15] In his findings, Kagan cited a number of procedural deficiencies in UNHCR's RSD in Cairo, including a failure to provide asylum seekers with specific written reasons for rejection, withholding of evidence from applicants, lack of in-person rehearings for rejections and a lack of transparency regarding 'standard operating procedure'.[16] Kagan ultimately argued that UNHCR should perform RSD only when it can enhance the protection provided to refugees by governments.[17]

In 2003, UNHCR produced a guidebook on procedural standards for RSD undertaken in UNHCR field offices. Whilst the procedural guide has undoubtedly brought about improvements to UNHCR's RSD processes through the clarification and the encouragement of consistency, procedural deficiencies remain. For instance, although different UNHCR Eligibility Officers (EO) carry out the initial RSD determination and the negative review, the review is conducted internally, meaning that it is neither an independent nor an impartial process. Further, access to information has been an ongoing issue. UNHCR did not initially allow applicants to view their interview transcripts and, whilst there have been some recent improvements with the introduction of the stipulation that UNHCR must share (to the extent possible) all medical, psychiatric and other expert reports as well as any other documents

submitted by or on behalf of the applicant, only legal representatives may access the transcript, which must occur on the UNHCR office premises and under supervision.[18] Procedural efficiency also remains a significant issue. Although it is clear that UNHCR appreciates the need for prompt procedures in both its own and State RSD processes,[19] whether UNHCR provides (or can provide) expeditious decision-making in practice is highly questionable. UNHCR has reported that its backlog had increased from 73 700 in 2003 to a historical high of 252 800 by 2013.[20]

Acknowledging the improvements in standards since the publication of the guide, a number of NGOs[21] expressed the following concerns in a letter to the High Commissioner for Refugees in 2006:

> Last year, we and other NGOs welcomed the publication of the Procedural Standards as a significant step forward in making UNHCR's RSD procedures more fair. But many of the Standards' most important elements, for instance on the need to give specific reasons for rejection, were made optional for UNHCR field offices. Some binding rules, for instance on the right to counsel, have still not been implemented at all UNHCR locations. Moreover, the Standards themselves contain gaps when compared to the guarantees of due process that UNHCR has advocated for governments. Most critically, they did not establish an independent appeals system, and did not end the widespread withholding of essential evidence from refugee applicants.[22]

The argument that binds the criticism is that implicit in UNHCR's ability to perform RSD is the requirement that it meet the same procedural standards expected of States, or that, by performing a role normally reserved for governments, UNHCR acquires the burden of living up to the same standard as States.[23] Certainly, this point may be disputed on both a practical and theoretical level. UNHCR may simply not have the resources to carry out RSD to the same standards expected of States. Further, RSD is ultimately the responsibility of signatory States as an implicit part of their protection obligations under the Refugee Convention.[24] However valid these objections, they do not detract from the fact that deficient UNCHR procedural standards have the potential detrimentally to affect the interests of refugees and compromise international protection.

For RSD to be consistent with international protection, one of its primary objectives must be respect for the principle of non-refoulement.[25] Non-refoulement is central to international protection and is relevant to human rights law. Non-refoulement was included in the Refugee Convention by art 33(1), which was based upon previous State practice and international agreements[26] and created a binding State obligation not to refoule refugees unless one of the national security or crime 'exception circumstances' in art 33(2) applies.[27] As RSD is the practical means through which a person becomes entitled to protection, it follows that *procedurally* sufficient RSD is a vital defence against the risk of refoulement. If RSD outcomes are substantively accurate, the risk of refoulement is significantly diminished.[28] The likelihood of substantive accuracy of RSD — being a correct determination based upon the Refugee Convention criteria and the circumstances of an individual application — is lessened if procedural standards are not in place to provide a system of checks and balances on the decision-making process. Procedural standards encourage stringent justification for findings on facts and lessen the likelihood of bias in the decision-making process. Most importantly, they provide a means for scrutiny in the form of review.

A race to the bottom: Australian refugee policies and UNHCR RSD

Adding to UNHCR's burden

A principal cause of the limited procedural protections in UNHCR's RSD is a lack of resources. UNHCR does not possess the same resources as many States, and the resources that it does have, which are largely determined by voluntary State contributions,

are increasingly thinly spread. An increase in asylum applications from developing countries, which are largely but not exclusively outside of Europe, has placed significant pressure on UNHCR's workload and capabilities.

In *The Implementation of UNHCR's Policy on Refugee Protection and Solutions in Urban Areas — Global Survey 2012*[29] (Urban Refugees Report), inadequate space in UNHCR offices and the high number of refugees awaiting determinations were identified as significant challenges to providing RSD. The report states that 'the number of asylum seekers approaching UNHCR offices far exceeds the capacity of offices to register them' and gives the example of Malaysia, where at that point UNHCR faced a backlog of an estimated 30 000 to 50 000 individuals awaiting registration.[30] By the end of 2013, that figure was reported to be 42 000.[31] In the *UNHCR Statistical Yearbook 2012*, the cause of the 'relative low' decision-making capacity of UNHCR[32] was stated to be the 'significant increase in the total number of individual asylum applications registered by UNHCR'.[33] The yearbook states:

> Despite a strengthening of UNHCR's decision-making capacity, mainly through improved staffing and efficiency in the agency's RSD procedures, the number of individual asylum applications registered consistently exceeded the number of individual asylum decisions issued, at times at a ratio of 2:1. As a result, UNHCR's RSD backlog increased from 73 700 in 2003 to a historical high of 146 800 in 2012.[34]

If a lack of sufficient resources (including staff and other facilities) contributes to delays in managing large RSD workloads, it is reasonable to assume that the implementation of procedural protections such as independent and impartial review will either exacerbate those delays or place demands on field offices that UNHCR offices may not have the resources to comply with. The Urban Refugee Report intimates that resource pressures have a detrimental effect on procedural protections in UNHCR's RSD practices. In particular, the report states that 'the scarcity of reliable interpreters also slow the process, in part because it is difficult to find appropriate interpreters without vested interests in refugee communities' and '[t]he pilot practice of writing reasoned notification letters specifying reasons for rejection has also absorbed staff time and slowed RSD in a few countries'.[35] The provision of competent interpreters and written reasons reflect due process principles of participation and transparency and are procedural standards that UNHCR expects of States in their own RSD practice.[36] If, as UNHCR claims, resource pressures negatively impact on its ability to provide procedural protections, it will be likely to be resistant to more resource-demanding procedural protections such as the provision of independent review.

Despite recognition by both the Australian media[37] and members of Parliament of UNHCR's financial burden and the need for increased funding,[38] Australia has made decisions under successive governments that have either increased or have had the potential to increase the pressure on UNHCR's resources. Although Australia was to fund the cost of processing and transportation related to the 2001 Pacific Solution[39] and undertake overall responsibility for processing, which involved the provision of some staff, Nauru requested UNHCR to assist in processing the claims of the asylum seekers. UNHCR agreed to the request because of the unique humanitarian nature of the situation[40] and processed 525 of the *MV Tampa* claims. Australia did not request the assistance of UNHCR directly, but, by negotiating an agreement with a nation with limited resources, with no refugee determination process in place and that was not (at the time) a signatory to the Refugee Convention,[41] the chances that Nauru would request the assistance of UNHCR were high. The practical ramification for UNHCR was the increased processing of RSD, which, despite being undertaken to assist Nauru, would not have been undertaken *but for* the actions of Australia.[42]

If it had been successfully implemented, the Malaysia Agreement[43] would also have had the practical effect of increasing the workload of UNHCR. Like Nauru in 2001, Malaysia is not a signatory to the Refugee Convention. Unlike Nauru, it already hosts a large number of

refugees, which calls for permanent assistance from UNHCR. Under the agreement signed by the Australian and Malaysian governments, all asylum seekers returned to Malaysia by Australia would have their applications assessed by UNHCR, not the Malaysian government.[44] In a submission prepared for the purpose of *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[45] (*Plaintiff M70*), the Department of Foreign Affairs and Trade answered the question 'Does Malaysia provide protection for persons seeking asylum, pending determination of their refugee status?' by stating:

> As a non-signatory to the Refugee Convention, Malaysia does not itself provide legal status to persons seeking asylum, but it does allow them to remain in Malaysia while the UNHCR undertakes all activities related to the reception, registration, documentation and status determination of asylum seekers and refugees.[46]

UNHCR's workload burden in Malaysia was already substantial. The figures quoted in UNHCR's 2010 Global Report indicate the sheer size of the 'refugee issue' in Malaysia at the time:

> In 2010, UNHCR registered almost 26 000 people, some 9500 of them through an innovative mobile registration programme, and conducted refugee status determination (RSD) for more than 23 200 applicants. The numbers of persons of concern in the country stood at over 80 600 refugees and approximately 11 130 asylum-seekers.[47]

It was noted at the time that UNHCR reported that it had 100 staff in its office in Kuala Lumpur.[48] By 2015 the 'population of concern' in Malaysia had risen to 270 621.[49]

Australia has contributed, or has made decisions that would potentially contribute, to UNHCR's workload by entering into an agreement to send asylum seekers to be processed in either a country where UNHCR already undertakes all RSD (that is, Malaysia) or a country that was likely to call upon UNHCR for assistance (that is, Nauru). According to the Australian Government, however, the problem was not adding to UNHCR's already substantial burden: 'the problem was that developed countries were spending all their money processing asylum seekers coming into the country without permission, rather than giving it to the UNHCR to process and care for refugees offshore.'[50]

'Living down' to UNHCR's RSD procedural standards

By choosing to process asylum seekers offshore according to UNHCR's procedural standards, by designating or declaring countries as suitable for offshore processing and by denying review for applications previously rejected by UNHCR, the Australian Government has reinforced the validity of processes that lack adequate procedural protections and has created the unequal treatment of asylum seekers based upon the physical location of a person's application for asylum.

Offshore processing undertaken by Australian officials in excised offshore areas and declared countries was originally formulated according to UNHCR's substantive and procedural standards. As part of its report, *Framework for Preventing Unlawful Entry into Australian Territory*, the Australian National Audit Office summarised the major features of the 2001 'post-*Tampa*' suite of legislation as including 'the possible detention and removal from those territories of unauthorised arrivals to "declared countries" where they have access to *refugee assessment processes modelled on the UNHCR's*, can be kept safe from persecution while these processes are undertaken, and that they receive continued protection if found to be refugees'.[51]

The Explanatory Memorandum to the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*,* which attempted to extend offshore processing to all asylum seekers who

arrived on the Australian mainland by boat, states that 'In the past, persons taken to declared countries for processing of refugee claims have had these assessed either by the United Nations High Commissioner for Refugees (UNHCR) or by trained Australian officers using a process modelled closely on that used by the UNHCR'.[52] Whilst the current Fast Track and Return (FTAR) process[53] has not been explicitly based on UNHCR's standards, simultaneous RSD models with different levels of procedural protection are by now firmly entrenched in the Australian asylum system.

Australia has also contributed to a validation of UNHCR's lower procedural standards through the Minister's ability to 'declare' or 'designate' a country as appropriate for RSD processing. Section 198A(3)(a) of the *Migration Act 1958* (since amended) gave the Minister power to declare that a specified country which met the following criteria was appropriate for offshore processing:

> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
>
> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
>
> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
>
> (iv) meets relevant human rights standards in providing that protection;[54]

Whilst providing for 'effective procedures', 'protections' and 'relevant human rights standards', nothing in this power compelled the Minister to ensure that the declared country was providing a comparable level of procedural protection that would be offered to the asylum seeker should he or she have his or her claim processed on the Australian mainland. After the High Court finding in *Plaintiff M70*, s 198A was replaced with sub-div B — Regional Processing. Section 198AB now provides that the Minister may designate a country to be a 'regional processing country' where 'the Minister thinks that it is in the national interest' to do so.[55] The Minister must have regard to whether or not the country has given Australia any assurances to the effect that:

> (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
>
> (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol.[56]

Whilst the amended provision makes clear reference to the Refugee Convention, the 1967 Protocol and non-refoulement, there remains no requirement for minimum procedural standards.

Finally, Australia and other States validate UNHCR's lower procedural standards through the system of UNHCR 'referred cases'. Each year UNHCR refers a given number of asylum seekers to Australia for resettlement. Australia generally accepts approximately 6000 refugees referred for resettlement each year, which in 2013–2104 comprised 47 per cent of Australia's humanitarian program.[57] These asylum seekers have been found by UNHCR to meet the criteria of a refugee under art 1A(2) of the Refugee Convention.[58] Australian officials do not reassess the validity of UNHCR's decisions, nor do they apply legislative criteria for determining whether that person meets the definition of a refugee outlined in the Refugee Convention.[59] Instead, legislative criteria are applied to determine whether that person should be offered a visa[60] based on the appropriateness of their resettlement in

Australia.[61] The effect of this process is that Australia absorbs the accountability deficiencies inherent in UNHCR's decision-making by accepting the validity of decisions made with lower procedural protections than in its own (onshore) processes. UNHCR's decisions become a part of Australia's administrative decision-making framework yet are at odds with comparable, domestic administrative decisions in regard to procedural standards.[62] Although participation in the resettlement program is a crucial element of Australia's asylum system, the practical ramification, beside the acceptance into the Australian legal framework of what would in other circumstances be unacceptable levels of procedural protection, is the implicit recognition and support of a system where the chances of mistake, and therefore refoulement, are increased through the lack of independent review.

In 2001, the then Minister for Immigration, the Hon Philip Ruddock MP, made the following comment in Parliament:

> The fact is that you have two forms of refugee conventions: the jurisprudential model in a place like Australia, which is much wider in its coverage; and a much more rigorously enforced refugee convention administered by decision makers who use the UNHCR handbook for decision making.[63]

UNHCR's processes may have been more 'rigorously enforced', but Mr Ruddock, who was also quoted as saying, 'There is one standard for the UNHCR, and there is another standard that elements of the UNHCR impose on developed countries and I don't think it can go on',[64] failed to mention that, the FTAR and offshore processes aside, the *procedural standards* within a jurisprudential model such as Australia's are far more 'rigorous' than those implemented by UNHCR. Whilst the emphasis on UNHCR's 'tougher standards' compared to Australia may appeal to a certain populist sentiment, it is clear that an underlying motivation for offshore processing, and now the FTAR process, was to remove procedural protection for asylum seekers — or, in other words, access to Australia's tribunals and courts.

The reasons that UNHCR's own RSD processes do not include adequate procedural protection are complex, but it cannot be claimed that UNHCR holds its own standards out as best practice for States to follow. UNHCR has met suggestions that it provide the same RSD standards as States by stating that it cannot be expected to parallel the procedures put in place by 'sophisticated and resource well-endowed governments'.[65] In its response to the proposed Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, UNHCR stated:

> However, it is seriously to be questioned, in UNHCR's view, whether Australia has chosen the correct model, given the qualitative differences between the processes of a state and an international organization, with the limits the latter entails, together with the fact that an organization, obviously, is not a state with capacity to provide for protection and solutions. Clearly the more appropriate model would be that of a State, in particular Australia itself.[66]

And:

> In the context of extraterritorial processing by Australia, given that Australia is a long-time signatory to the 1951 Convention and has in place its own procedures, these procedures should be applied.[67]

UNHCR's claims of lack of resources and staff have been criticised as being limited to a comparison with wealthy industrialised States rather than developing countries[68] and that 'generous' RSD procedures such as the provision of avenues for impartial review could be considered as a 'pull-factor', which may influence UNHCR RSD officers to be strict in their RSD processes[69] in order to avoid the possibility of providing an incentive for irregular movement.[70] However true, this does not detract from the fact that UNHCR's capacity for RSD is compromised by a lack of resources, and increased procedural protection will be likely to have the effect of slowing the process further.

Best practice is reflected not in UNHCR's own processes but in the standard-setting that UNHCR undertakes as part of its supervisory role.[71] For Australia, or any country, to either model its RSD processes on UNHCR's actual practice or to engage with UNHCR's resettlement program without questioning the low procedural standards that are integral to that process is to solidify those standards in its own asylum system.

Impacting on domestic accountability

The preceding section demonstrates how the asylum policies of Australia have contributed to an acceptance of UNHCR's procedural standards as a valid part of the international refugee system. Australia has effectively 'turned a blind eye' to the lack of accountability in UNHCR's RSD procedures because those standards support its policy of offshore processing. It may seem, therefore, that any discussion on how States such as Australia might support the development of greater accountability for UNHCR RSD may be futile. However, what if the same self-interest that drives implicit support for low UNHCR RSD procedural standards were to be used as a motivator to support an increase in those standards and, as an effect, have a positive outcome for domestic administrative justice? How might accountability mechanisms be designed to achieve such an aspiration?

Accountability mechanisms that present 'solutions' for global accountability deficiencies are largely presented as a choice between 'top-down' and 'bottom-up'. A 'top-down' or 'global' approach to accountability refers to mechanisms where the decision-making power is concentrated at the global level. Participation by States, individuals and other non-governmental groups occurs within a global forum, such as an independent review body or complaint mechanism.[72] Examples of top-down mechanisms include the World Bank Inspection Panel and the International Tribunal for the Law of the Sea. 'Bottom-up' or domestic approaches to accountability involve an extension of domestic institutions and other tools of domestic administrative law to international decision-making.[73] Bottom-up mechanisms are commonly understood as the direct application of domestic administrative law to international decision-making (for example, review of international decisions by domestic courts and tribunals), the implementation of procedural safeguards on the international component of domestic decisions, and the participation of domestic actors in international forums, such as delegations to treaty-based regimes.[74]

Top-down and bottom-up approaches to accountability are generally presented as alternatives to each other,[75] the implication being that the design of accountability mechanisms inevitably involves a choice between the global and domestic contexts.[76] Neither alternative, however, comes without obstacles to successful implementation. Top-down approaches to accountability will be likely to require legalisation[77] or formalisation, which some States (particularly powerful ones) might resist on the basis of national interest. The US failure to ratify the Rome Statute of the International Criminal Court provides a good example.[78] On the other hand, weaker States may be concerned about the dominance that more powerful States will inevitably have in a globally centralised mechanism that will depend on sufficient State funding to operate. Conversely, bottom-up mechanisms are challenged by the transposition of accountability mechanisms to the global context that are based upon diverse State ideas of democratic participation, jurisdiction and standing.[79]

Perhaps a different approach is warranted. Public identification of the impact that a failure to comply with international obligations or the willingness to undermine an international institution may have on a State's domestic accountability might assist in building mechanisms that link domestic accountability with international obligations in a way that will compel States to take action at both levels. If global accountability deficits can be reframed in terms of consequences for domestic accountability, increased responsiveness by States may follow. After all, States tend not to ignore accountability issues that impact on their

political role and the expectations of their constituencies. The following discussion explores how Australia's asylum policies discussed above have had negative ramifications for domestic legal and political accountability.

Legal accountability and executive power

If the impact of global accountability deficits on the legal accountability of a State can be identified publicly at an institutional level (that is, by domestic courts), governments may be encouraged to ensure that its rule and decision-making are compliant with the expectations of the community. It is argued that successive Australian governments have used executive power as a means to achieve 'border control' — and, thus, low procedural standards for offshore processing — in ways that could be perceived by the community as arbitrary and, therefore, unaccountable.

The executive power of the Commonwealth derives from two interconnected sources. The first source is the prerogative powers that were imported into Australian law from the UK, first by implication, then by statute.[80] The second source is s 61 of the Australian *Constitution*, which states that the executive power is vested in the Queen (and exercisable by the Governor-General as her representative) and extends to the maintenance and execution of the *Constitution* and to the laws of Australia.[81] Executive power enables the government, in limited circumstances, to make decisions without the legislative authority to do so.

Two major asylum-related policy decisions in recent years have been based upon executive rather than statutory power. In the first, the *Tampa* incident, the government relied upon its executive power in s 61 to justify its actions in refusing entry to, and then detaining, asylum seekers. Whilst the executive power was not used directly to create or set procedural standards for RSD, its effect was to establish the Australian offshore processing framework, to which low RSD procedural standards are integral. The validity of the government's actions were challenged and, although those actions were initially found to be an invalid use of power,[82] the Full Federal Court found that the government's actions were a valid exercise of s 61. In brief, the Court found that, without statutory extinguishment, the power inherent in s 61 extends 'to a power to prevent the entry of non-citizens' and:

> The power to determine who may come into Australia is so central to its sovereignty that ... the government of the nation would lack under the power conferred upon it directly by the *Constitution*, the ability to prevent people not part of the Australia community, from entering ...[83]

The finding by the Court that s 61 of the *Constitution* enabled the government to rely on executive power to prevent the entry into Australia of asylum seekers[84] has been controversial. The words 'extends to' and 'maintenance' in s 61 are not defined, which raises uncertainty as to whether they are limited to the powers derived from the prerogative or extend to any activity that is appropriate to a national government.[85] Justice French's finding that s 61 could not be 'treated as a species of the royal prerogative' and that executive power 'is a power conferred as part of a negotiated federal compact expressed in a written Constitution'[86] is a position that has received significant criticism.[87] The basis for the criticism, beside the assertion that French J's opinion was based on questionable legal authority,[88] is the implication that the Imperial Parliament, by conferring coercive powers in s 61, was conferring greater powers that it itself possessed[89] or that is denied to other Commonwealth countries, such as New Zealand or UK, which do not have an executive power similarly conferred by a Constitution.[90] Justice Black's opinion that it would be a strange circumstance if the 'at best doubtful' and historically long-unused power to exclude or expel should emerge in a strong modern form from s 61 of the *Constitution* by virtue of general conceptions of 'the national interest' and 'it is 350 years and a civil war too late for

the Queen's courts to broaden the prerogative'[91] is considered by many commentators to be the preferable interpretation of the scope of s 61.[92]

The second major executive power based policy decision occurred after the subsequent government dismantled the Pacific Solution and asylum seekers who arrived offshore (IMAs) were brought to Christmas Island to have their claims for asylum processed as Refugee Status Assessments (RSA), which was a non-statutory process. Whilst IMAs were entitled to independent migration review (IMR), this was performed by a private consultancy company (Wizard People Pty Ltd) via a contractual arrangement and not in accordance with the review procedures available on the mainland. After the review process was completed and a person was found to meet the criteria of a refugee, a submission was made to the Minister to consider using his or her discretion under s 46A(2) of the *Migration Act 1958*[93] to grant that person a visa. The justification for relying on executive rather than legislative power was that the process was undertaken outside the migration zone and therefore was not subject to legislative control. In addition, because RSA relied on executive power, the criteria used to make decisions were not those from the *Migration Act 1958*[94] but from UNHCR's own handbook on refugee status determination. Accordingly, the procedural safeguards put in place for RSA, whilst slightly higher than UNHCR's (that is, RSA allowed provided for limited independent review), did not accord the same kind of protection that would be available if the claims were processed on the mainland.

Plaintiff M61/2010 v Commonwealth of Australia; Plaintiff M69/2010 v Commonwealth of Australia[95] (*Plaintiff M61*) addressed the government's reliance on executive power to conduct RSA offshore. In that case, two Tamil asylum seekers who were subject to RSA and IMR challenged the validity of those procedures based upon a lack of procedural fairness in the process, the failure to apply migration legislation and Australian precedents in deciding claims and (Plaintiff M69 only) the invalidity of s 46A of the Migration Act based upon the Minister's unfettered and unreviewable discretion to decide whether or not to exercise the power to deny an application for a visa.[96] The High Court found that the power to conduct RSA and IMR, although intended to be non-statutory in nature and merely an 'executive power to inquire',[97] was linked to statutory power via the Minister's discretions in ss 46A and 195A of the Migration Act.[98] Although the Minister was not under an obligation to exercise his or her discretion, the fact that asylum seekers were no longer moved to declared countries for processing pursuant to s 198 meant that ss 46A and 195A were the only statutory powers available to ensure that Australia was meeting its international obligations under the Refugee Convention. Therefore, the Minister would have to consider ss 46A and 195A in every asylum claim if prolonged detention of offshore persons were to remain lawful. In other words, for detention to be lawful, some sort of 'statutory footing' was required.[99] Consequently, despite the RSA manual stating that officers were to be guided by migration legislation as a 'matter of policy' only, the assessment and review were made in consequence of a ministerial direction that was contingent on a decision whether to exercise legislative, and not executive, powers.

The use of executive power to justify a new, untested type of government action, as occurred in the *Tampa* incident, and the reliance on executive power to defend differentiated procedural RSD standards, raise serious questions about legal accountability. Where a government has a legislative mandate, it also has a legal accountability to abide by formal rules[100] and to account for its 'respect or lack of respect for legal requirements or legal rights through processes of administrative and judicial review, judged *in accordance with law*'.[101] Where executive power exists, it is imperative that there are limitations that curb over-reliance on that power in order to prevent arbitrariness in policy and decision-making.[102] As the Court in *Plaintiff M61* said:

> It is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive.[103]

The use of executive power is problematic because, although it is theoretically susceptible to judicial review,[104] its subject-matter will often make it non-justiciable.[105] The intention of s 75(v) of the *Constitution* is to provide for an entrenched minimum provision of judicial review, and it is difficult to support the proposition that that provision does not apply to decisions that affect fundamental rights and obligations. As the High Court stated in *Plaintiff S157/2002 v Commonwealth*:[106]

> Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness.[107]

'Fairness' in this context is not a reference to values of democratic aspiration; it is a reference to the ability of judicial review to ensure that decision-making is procedurally fair.

Regardless of the outcome of the cases, the identification of the potentially arbitrary use of executive power by the government has had practical ramifications for Australian asylum policy and legal accountability. Certainly there has been no improvement in the procedural standards of offshore RSD subsequent to the decisions (indeed, there has been a diminishment of procedural standards under the FTAR process), but recent asylum and refugee policy such as FTAR have been implemented via legislative power. Social attitudes expressed in public forums outside of the electoral process do not detract from the fact that, by relying on its legislative mandate and the parliamentary system, the executive government is now being *legally* accountable to its constituents.

Legal accountability and international obligations

Australia's willing engagement in bilateral and multilateral relations and its traditional readiness to ratify major human rights instruments[108] are indicative of its general commitment to respect its international law obligations. Despite its dualism, it is well established in Australian law that, unless there is parliamentary intention to the contrary, statutes are to be interpreted consistently with international law.[109] More particularly, where a statute is considered ambiguous, a construction that favours Australia's obligations under a treaty or convention should be favoured.[110] The ratification of an international treaty is, as Mason CJ and Deane J have declared, a 'positive statement of the executive government' to both Australia and the international community that it will 'act in accordance with the Convention'.[111] This commitment creates a community expectation that the executive will abide by the obligations that it has committed to. As Gaudron J stated in *Minister of State for Immigration and Ethnic Affairs v Teoh*:

> The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilized countries. And if there were any doubt whether that were so, ratification would tend to confirm the significance of the right within our society. Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect.[112]

Whilst international obligations must be balanced against domestic concerns, circumstances where both a failure to respect international obligations and a denial of human rights standards can be justified by the pressing concerns of domestic affairs must be treated as rare.[113]

Offshore processing and low RSD procedural standards have been argued to infringe Australia's international obligations.[114] For example, it has been claimed that Australia's reliance on offshore processing and detention without adequate procedural safeguards such as independent review creates a risk of 'constructive refoulement' through the increased

likelihood of processing errors;[115] that an inferior processing regime may qualify as imposing a penalty, which is prohibited under art 31(1) of the Refugee Convention;[116] and that, when art 16(1) of the Refugee Convention[117] is read together with art 14 of the *International Covenant on Civil and Political Rights*, 'it guarantees refugees a right of judicial appeal to challenge the legality of a decision determining their entitlement to protection'.[118]

The impact of a proposed offshore processing policy on Australia's human rights obligations was the focus of *Plaintiff M70*[119] — a case that challenged and ultimately succeeded in defeating the proposed Malaysia Agreement. Two Afghan asylum seekers, who had arrived on Christmas Island after being picked up from a boat from Indonesia, brought the case. The plaintiffs argued that the Malaysia Agreement was unenforceable because the declaration made by the Minister under s 198A(3) of the Migration Act that Malaysia was a 'safe country' was invalid. This was because:

(i) the four criteria set out in s 198A(3)(i)–(iv) are jurisdictional facts which did not exist; or

(ii) alternatively, they are facts of which the Minister had to be satisfied before making a declaration and he was not so satisfied because he misconstrued the criteria.[120]

The Court found the Malaysia Agreement to be invalid because Malaysia did not meet the standards stipulated in s 198A(3)(a)(i)–(iii), which was the only source of power which could authorise a person's removal to a third country. Whilst no view was expressed as to whether Malaysia 'met relevant human rights standards',[121] the Court did find that Malaysia could not be declared as providing effective procedures or protection because it had no established legal framework for refugee protection and was not a signatory to the Refugee Convention. Malaysia does not recognise the status of refugee, which means that, once registered by UNHCR, refugees are still considered unlawful under Malaysian law and may be prosecuted under s 6 of Malaysia's *Immigration Act 1959–1963*, which makes it an offence to enter Malaysia without a valid entry permit.[122] As Malaysia undertakes no activities relating to 'the reception, registration, documentation and status determination of asylum seekers and refugees'[123] itself, it could not be said that its domestic law expressly provided protections or that it was internationally obliged to do so.[124] Regardless of practical arrangements, without such legal guarantees it could not be said that Malaysia provided adequate protection for asylum seekers transferred under s 198A of the Migration Act.

Although the Court made no criticism of UNHCR's procedures, implicit in its decision is a contention that UNHCR's procedures are not in themselves sufficient to meet the obligation of non-refoulement required by art 33 of the Refugee Convention. Despite the Minister's argument that, by allowing UNHCR to carry out RSD, Malaysia was ensuring both 'effective procedures' and appropriate protections,[125] UNHCR's procedures were not considered effective if they were not accompanied by a legal obligation by the State in question. Considering that the Court found that s 198 of the Migration Act had to be read in light of Australia's international obligations, it follows that Australia will not meet its international obligations by relying on UNHCR's RSD procedures alone.

By finding that Malaysia's procedures must be effective in order to meet human rights standards, the Court implicitly exposed the weakness in UNHCR's RSD procedures by requiring something *more* from them — that is, an accompanying State legal obligation. Accordingly, the Australian Government is legally accountable to ensure that it is utilising RSD procedures that are 'effective' according to human rights standards and that it meets the community's expectations that it abide by its international obligations.

Political accountability and administrative justice

The procedural values of administrative justice in Australia are reflected in the existence of mechanisms for independent merits and judicial review, both of which have been denied or diminished by government policy decisions relating to asylum seekers. In particular, a fundamental principle of merits review is that it is *de novo*, meaning that a tribunal is not limited to the information before it but may take into consideration information that comes to light subsequent to the initial application for review.[126] Full merits review is not a characteristic of offshore processing in Nauru or Papua New Guinea, but the FTAR process removes effective merits review for a significant portion of asylum seekers who would have previously been entitled to it. Although the Immigration Assessment Authority (IAA) is an independent review body, it cannot accept or consider any information other than that which was presented at the time of the initial application.[127] The government has also variously attempted to deny or reduce the constitutionally entrenched minimum provision of judicial review[128] through the limitation of grounds of review and privative clauses.

The community expects that decisions that are made within the administrative and judicial context are legally correct and fair. Without adequate, independent review, the probability that factual and reasoning errors will be made, or at least not identified, in the decision-making process is increased significantly. Further, the diminishment or denial of review for administrative decision-making creates a tiered system of administrative justice, the fullness of procedural protections dependent on the physical location and nature of the applicant.

Administrative justice in Australia is also compromised through the system of UNHCR referred cases. Although the system is a crucial element of Australia's asylum obligations, it is characterised by the fact that the cases referred to Australia for resettlement are based upon decisions that lack adequate procedural safeguards. If a person who has had an application for refugee status rejected by UNHCR makes a second application for asylum in either Australia's onshore program or as an IMA, that person may be automatically denied review by either being sent to a regional processing centre or, if extended, being classified as an excluded fast-track review applicant. A person will not be eligible for IAA review if they are assessed to be an 'excluded fast track review applicant', which includes someone who has been refused protection in another country, including UNHCR. In other words, asylum seekers will be automatically denied full review based on a procedurally flawed process that is potentially factually incorrect.

This is not merely a theoretical concern. In the US case of *Al-Bedairy v Ashcroft*[129] the applicant was denied asylum based on the fact that he had not mentioned in his UNHCR resettlement registration form that he had been tortured. The applicant testified that he had imparted this information to his interpreter, who was not from the same country as him and of whose language (Arabic) he understood very little. The dissenting judge said that, when a lack of competent translation is arguably to blame and where Al-Bedairy's testimony regarding the persecution he and his family suffered was corroborated by other witnesses, his failure effectively to communicate that he was tortured prior to his immigration hearing does not constitute substantial evidence supporting the adverse credibility finding.[130] It is likely that an independent review of UNHCR's initial RSD determination would have picked up this inconsistency. A potentially flawed decision, or a decision that an asylum seeker has not had the opportunity to have independently reviewed, can provide the basis for a resettlement decision. If a person is incorrectly found by UNHCR not to be a refugee, that person will not be referred for resettlement. In Australia, if that person makes a subsequent application for asylum within Australia, he or she may be denied any kind of review precisely because UNHCR previously rejected the application, regardless of any procedural or substantive flaws in that decision.

It is true that community expectations may call for differentiated determination procedures for those asylum seekers who arrive in Australia by boat and those who arrive via different means, but can it be said that these expectations extend to an acceptance that 47 per cent of all humanitarian arrivals are decided through a procedurally insufficient process? Does the community accept that the expected values of administrative justice do not apply in full to applicants who have had a previous determination via a procedurally insufficient process? Political accountability means responsiveness to community expectations, and the community expects administrative justice.

Conclusion: reframing global accountability in terms of consequences for domestic accountability

UNHCR RSD has an 'accountability problem'. The insufficiency in its procedural standards not only denies applicants for refugee status a procedurally fair process but also the risk of non-refoulement is heightened due to the inability to independently review factual and legal errors. This, however, is a State problem. It is States who have responsibility for RSD as part of their international protection obligations and it should be States, especially those with sufficient resources, who must unite to find a solution.

Appealing to a State's diplomacy or even its international obligations may have limited success. Perhaps signatory States can be convinced that, as it is a part of their international protection obligations to ensure that asylum seekers receive adequate procedural protections and access to independent and impartial review,[131] a truly cooperative system would ensure all asylum seekers received that same level of protection. Or perhaps the self-interest that tends to drive States' increasingly restrictive asylum policies would prevail. Whilst UNHCR's mandate can be described as 'a living phenomenon evolving dynamically through subsequent General Assembly resolutions',[132] States' obligations are restricted to the legal boundaries of the Refugee Convention. That disconnect allows States to justify the increased confinement of their own responsibilities whilst encouraging the extension of UNHCR's.

The ability to appeal not to diplomacy and international cooperation but to the very things that keep an executive government in power has the potential to link global and domestic accountability problems in a way that creates a powerful motivator for States actively to address global accountability deficits. When the ramifications of a global accountability problem are linked with domestic legal and political accountability, governments will likely do one or both of the following things. First, they will find ways to respond to the domestic accountability deficits identified by the courts or through other means. That may not mean a direct improvement in procedural standards, but governments must respond to the accountability concerns raised. Secondly, the ramifications for domestic accountability may provide motivation for States to seek ways to address the global accountability deficit directly. For UNHCR RSD, that may mean that States will cooperate to remove the role of UNHCR in RSD or at least collaborate to build its capacity to undertake RSD both in terms of resources and procedure. Whatever the outcome, recognising that accountability may emerge not from altruism but from self-interest may, despite the cynicism inherent in that suggestion, be the best way to achieve actual and measurable accountability outcomes.

Endnotes

1 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (Refugee Convention) art 1A(2), read in conjunction with the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (Protocol).
2 Refugee Convention art 33(1).
3 Reinhard Marx, 'Non-refoulement, Access to Procedures and Responsibility for Determining Refugee Claims' (1995) 7 *International Journal of Refugee Law* 383, 392.
4 *Resolution on Statute of the High Commissioner for Refugees*, GA Res 428(V) UN GAOR, 5th sess, 325th plen mtg, UN Doc A/RES/428(v) (1950) (UNHCR Statute) annex (*Statute of the Office of the United National High Commissioner for Refugees*).
5 UNHCR's handbook, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate,* states that 'RSD pursuant to UNHCR's mandate is a core protection function': UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 20 November 2003 (UNHCR RSD Procedural Standards) Unit 1 Introduction, 1-1. Further, Michael Alexander states that 'UNHCR carries out this process [RSD] pursuant to the mandate given in its statute to provide international protection': Michael Alexander, 'Refugee Status Conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251, 251–2. See also Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *International Journal of Refugee Law* 1, 16.
6 *2000 UNHCR Note on International Protection* UN Doc A/AC.96/930, 8–9.
7 UNHCR, *Global Trends — Forced Displacement in 2015* (UNHCR, 2016) 58.
8 Ibid.
9 Ibid 37–43.
10 See, for example, UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005.
11 See, for example, ExCom Conclusion No 110 (LXI) — 2010 states that 'States and UNHCR, as applicable, ensure that refugee status determination and all other relevant procedures are accessible and designed to enable persons with disabilities to fully and fairly represent their claims with the necessary support': UNHCR, *Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR*, 12 October 2010, No 110 (LXI) — 2010, (j).
12 Alexander, above n 5, 256.
13 Ibid.
14 RSDWatch <http://www.rsdwatch.org/index.htm>.
15 Kagan, above n 5, 1.
16 Ibid 11–12.
17 Ibid 4.
18 UNHCR RSD Procedural Standards, Unit 2.7, 'Legal Representation in UNHCR RSD Procedures', February 2016, 7.
19 The UNHCR RSD Procedural Standards state that the undertaking of RSD in a timely and efficient manner is a core standard: Unit 1, 'Introduction', 1.2. UNHCR has also stated that it 'c) Recognized the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention': UNHCR, *Detention of Refugees and Asylum Seekers*, 13 October 1986, No 44 (XXXVII) — 1986.
20 UNHCR, *UNHCR Statistical Yearbook 2012* (12th ed, 2013) ch IV, 49. More recent figures not available.
21 Africa Middle East Refugee Assistance (AMERA), Asylum Access, Christian Action, Frontiers (Ruwad) Association, Helsinki Citizens Assembly Refugee Legal Aid Program, International Refugee Rights Initiative, Jesuit Refugee Service, Legal Resources Foundation, Refugee Consortium of Kenya, Refugee Law Project, West African Refugees and IDPs Network (WARIPNET).
22 'Re: Fairness in UNHCR's RSD Procedures' (2007) 19 *International Journal of Refugee Law* 161.
23 Kagan, above n 5, 22.
24 Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers, 2006) 467.
25 Paul Weis argues that the principle of non-refoulement imposes an obligation to grant at least 'temporary protection': Paul Weis, 'The International Protection of Refugees' (1954) 48 *American Journal of International Law* 193, 197. See also Reinhard Marx, above n 3, 383. Marx argues that, for States to identify their non-refoulement obligations, they must either determine RSD or examine circumstances in the third State to which they propose to transfer a refugee.
26 See the *Convention Relating to the International Status of Refugees*, 28 October 1933, CLIX LNTS 3663, art 3; the *Provisional Arrangement Concerning the Status of Refugees Coming From Germany*, 4 July 1936, 171 LNTS 75, art X; and the *Convention Concerning the Status of Refugees Coming From Germany*, 10 February 1938, CXCII LNTS 59, art 5.
27 Refugee Convention art 33(2):
The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

28 Mark Pallis argues that, when the rule of non-refoulement is combined with the 'guarantee of effective legal protection' — a general principle of law — the RSD obligation is created (that is, an obligation to conduct RSD in a manner which provides effective legal protection against the possibility of refoulement or denial or rights under the Refugee Convention): Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 *International Law and Politics* 869, 880.

29 UNHCR, *The Implementation of UNHCR's Policy on Refugee Protection and Solutions in Urban Areas — Global Survey 2012* (UNHCR, 2013) (Urban Refugees Report).

30 Ibid 18.

31 Michael Kagan, 'US Faces an RSD Crisis', RefLAW, University of Michigan Law School <http://www.reflaw.org/unhcr-faces-an-rsd-crisis/>.

32 UNHCR's 'decision-making capacity' (that is, how many substantive decisions it issues in relation to applications received) was 47 per cent in 2012, compared to 80 per cent for States: UNHCR, above n 20, ch IV, 49.

33 Ibid.

34 Ibid. Similar figures are not available in the 2013 or 2014 Statistical Yearbooks.

35 Ibid.

36 UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005, states 'Best State practice ensures that the reasons for not granting refugee status are, in fact and in law, stated in the decision'. ExCom Conclusion No 8 (XXVIII) — 1977 states, '(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned'.

37 'The UNHCR has only been able to raise $800 million of the $1 billion budget it needed for this year, which has meant that it has had to cut 900 field staff, so it is losing the capacity to work in countries like Afghanistan, Iran and Pakistan': Paul McGeough, 'Australia in the Dock over its Treatment of Refugees' *Sydney Morning Herald* (Sydney) 9 July 2001, 7. 'People would stop getting on boats and paying smugglers if we increased UNHCR's capacity to process refugees within, say, three months, and guaranteed resettlement in six months': Ben Saul, 'Processing Refugees: They Get the Hits, We Get the Myths' *The Age* (Melbourne) 12 March 2014.

38 'The UNHCR's annual budget in Indonesia is around $6 million. If the government and the opposition are serious about saving lives, why not support the UNHCR in providing a safe pathway to asylum for genuine refugees. … An immediate increase in UNHCR funding of at least $10 million from Australia would at least increase the capacity to assess asylum applications': Commonwealth, *Parliamentary Debates*, Senate, 16 August 2012, 5554 (Senator Scott Ludlam).

39 The 2001 *Tampa* incident prompted the government to subsequently enact a suite of legislation, which had the combined effect of excluding certain territories from the Australian migration zone (including Christmas Island, Ashmore and Cartier Islands, and the Cocos (Keeling) Islands), creating a new tiered visa scheme for asylum seekers engaged in 'secondary movement', allowing for 'unauthorised arrivals' to be detained and removed to 'declared countries' and limiting the grounds of judicial review. This was known as the 'Pacific Solution'.

40 UNHCR expressed concern that the maritime law rescue-at-sea tradition could be jeopardised. Evidence of Erika Feller, Director, International Protection, UNHCR (22 October 2003) United Kingdom, House of Lords, European Union Select Committee, Subcommittee F (Social Affairs, Education and Home Affairs) Inquiry into New Approaches to the Asylum Process <http://www.publications.parliament.uk/pa/ld/lduncorr/euf221O.pdf>.

41 Nauru became a signatory to the Refugee Convention and Protocol on 28 June 2011.

42 The following is an excerpt from an interview on ABC, 'Asylum Seekers Speak' *7.30 Report*, 24 September 2001:

MARISSA BANDHARANGSHI, UNHCR: The UNHCR's mandate is for the international protection of refugees. Where a country has the capacity to implement domestic screening procedures, then UNHCR's role would be more to monitor that that complies with international law.

Other countries do not have the local capacity to conduct refugee status determination and therefore UNHCR has a function to step in at that point.

In this case, given that Nauru does not at this time have the local capacity to screen these people and because they are not a signatory to the convention, then UNHCR has agreed to assist in that process.

BEN WILSON: But why would Australia send a group of asylum seekers to a country that has no capacity to process them?

MARISSA BANDHARANGSHI: Well Ben, you would have to ask the Australian authorities that. UNHCR can't second guess what the reasons for that are.

43 In 2011 then Prime Minister, the Hon Julia Gillard MP, announced plans for a 'refugee swap' agreement with Malaysia. Under the 'Malaysia Agreement' Australia would return refugees intercepted at sea to Malaysia for processing in exchange for taking a number of refugees who had already been found to have refugee status and were awaiting resettlement.

44 Australia–Malaysia Asylum Seeker Transfer Agreement, cl 10.2(a), states that Malaysia will provide transferees with the opportunity to have their asylum claims considered by the UNHCR and will 'respect the principle of non-refoulement'.

45 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (*Plaintiff M70*).

46 Ibid 131.

47 UNHCR, *Global Report 2010* 267.
48 UNHCR Malaysia Facebook page, accessed 5 July 2012.
49 UNHCR, *UNHCR Statistical Yearbook 2014*, 14th edition, 81.
50 Andrew Clennel, 'UN Should Fix Itself Before Criticising, says Ruddock', *Sydney Morning Herald* (Sydney) 10 July 2001.
51 Australian National Audit Office (ANAO), *Management Framework for Preventing Unlawful Entry into Australian Territory*, Audit Report No 57 (2001–2002) 80 (emphasis added).
52 Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Explanatory Memorandum, [56].
53 On 5 December 2014, the Parliament passed the *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, which introduced the 'Fast Tracked and Return' (FTAR) process. FTAR applies to all asylum seekers (now referred to as *Illegal* Maritime Arrivals) who arrived in Australia by boat on or after 13 August 2012 and before 1 January 2014, have not been taken to a regional processing centre and who the Minister for Immigration and Border Protection has allowed to make a valid protection visa application, which he or she must have lodged on or after 19 April 2015.
54 *Migration Act 1958* s 198A(3)(a).
55 Ibid s 198AB(2).
56 Ibid s 198AB(3).
57 There was a spike in numbers of referred refugees resettled in Australia in 2012–13. In 2015 the Abbott government announced an additional 12 000 places for Syrian refugees.
58 Article I(A)(2) of the Refugee Convention states that a well-founded fear of persecution may be due to being 'persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.
59 *Migration Act 1958* s 36(2).
60 Referred cases can be offered one of four different humanitarian visas, which are Refugee (visa subclass 200); In-Country Special Humanitarian (visa subclass 201); Emergency Rescue (visa subclass 203); and Woman at Risk (visa subclass 204).
61 *Migration Regulations 1994* (Cth), Sch 2, cl 201.222:
(a) the degree of persecution to which the applicant is subject in the applicant's home country; and
(b) the extent of the applicant's connection with Australia; and
(c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and
(d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.
62 Merits review via the Administrative Appeals Tribunal and limited judicial review or the FTAR process.
63 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2001, 31020 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).
64 M Christie, 'Australia blasts UN stance on illegal migration', Reuters, 21 February 2001.
65 Letter from Dennis McNamara (Director, Division of International Protection, UNHCR) to JRS Asia Pacific, 23 October 1997. Cited in Michael Alexander, 'Refugee Status Conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251, 284.
66 UNHCR, Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee, 22 May 2006, 6.
67 Ibid.
68 Ibid. RSDWatch, *ANALYSIS: The resource question in UNHCR RSD* <http://rsdwatch.wordpress.com/2010/05/17/analysis-the-resource-question-in-unhcr-rsd/>.
69 Ibid.
70 Kagan, above n 5, 21.
71 See, for example, UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005.
72 Duncan French and Richard Kirkman, 'Complaint and Grievance Mechanisms in International Law: One Piece of the Accountability Jigsaw?' (2009) 7 *New Zealand Yearbook of International Law* 179, 189–99.
73 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 (3&4) *Law and Contemporary Problems*, 15, 54.
74 Ibid 2; Richard B Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68 (3&4) *Law and Contemporary Problems* 63, 78.
75 Stewart, above n 74, 76–107.
76 Kingsbury, Krisch and Stewart, above n 73, 54–7.
77 Ibid 57.
78 Diane Orentlicher, 'Unilateral Multilateralism: United States Policy toward the International Criminal Court' (2004) 36 *Cornell International Law Journal* 415, 418–22.
79 Kingsbury, Krisch and Stewart, above n 73, 56.
80 *The Australian Courts Act 1828* (Imp).
81 Australian *Constitution* s 61.
82 *Victorian Council of Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452. The Court issued the writ of habeas corpus.
83 *Ruddock v Vardarlis* (2001) 110 FCR 491, 52.

84 Ibid.
85 George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 29.
86 *Ruddock v Vardarlis* (2001) 110 FCR 491, 49.
87 Winterton, above n 85; Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 281.
88 Winterton, above n 85. Winterton questions the reasoning of *Davis v Commonwealth* (1988) 166 CLR 79, which French J relied upon in coming his decision in the Tampa case. Although the Court in that case found that s 61 gave the Commonwealth the power to hold bicentennial celebrations, it did not examine its scope or justify its reasons sufficiently.
89 Sarah Joseph and Melissa Castan, *Federal Constitutional Law* (Lawbook Co, 3rd Edition, 2010) 157.
90 Zines, above n 87, 280.
91 *Ruddock v Vardarlis* (2001) 110 FCR 491, 12.
92 Joseph and Castan, above n 89, 157; Zines, above n 87, 281.
93 Section 46A(2) states:
(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (I) does not apply to an application by the person for a visa of a class specified in the determination.
94 Section 36(2)(a) states:
a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol;
95 *Plaintiff M61/2010 v Commonwealth of Australia; Plaintiff M69/2010 v Commonwealth of Australia* [2010] HCA 41 (*Plaintiff M61*).
96 Ibid 17.
97 Ibid 52.
98 Section 195A states:
Minister may grant detainee visa (whether or not on application)
(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).
99 Mary Crock and Daniel Ghezelbash, 'Due Process and the Rule of Law as Human Rights: the High Court and the "Offshore" Processing of Asylum Seekers' (2001) 18 *Australian Journal of Administrative Law* 101, 107.
100 Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 1, 17.
101 Jerry Mashaw, 'Structuring a "Dense Complexity"; Accountability and the Project of Administrative Law' (2005) *Issues in Legal Scholarship* l, 19 (emphasis added).
102 See *Haitian Refugee Center, Inc v Gracey* 600 F Supp 1396 (DDC 1985); *Haitian Refugee Center, Inc v Gracey* 809 F 2d 794 (DC Cir l987) for how US courts resisted executive discretion in the form of a Presidential Executive Order which attempted to challenge the Court's exclusive power to decide whether interdicted asylum seekers (from Haiti) could have access to onshore asylum processes.
103 *Plaintiff M61* [2010] HCA 41, 64.
104 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 409 (Lord Diplock).
105 See, for example, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, where prerogative power was found to be non-justiciable due to its subject-matter (international relations).
106 *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476 (*Plaintiff s157/2002*) 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
107 Ibid 513 [37] (Gleeson CJ).
108 For example, Australia has ratified the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) (ICCPR) and the *Universal Declaration of Human Rights* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
109 *Polites v The Commonwealth* [1945] HCA 3.
110 *Chu Kheng Lim v Minister for Immigration* (1992)176 CLR 1, 37.
111 *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20 (*Teoh*) 290.
112 Ibid 6.
113 In *Thomas v Mowbray* [2007] HCA 33, the Court justified the imposition of control orders on the basis of counter-terrorism. It is arguable that the use of control orders infringes basic rights protected by the ICCPR, such as art 19 (rights of freedom of expression) and art 12 (freedom of movement). See John Von Doussa QC, 'Reconciling Human Rights and Counter-Terrorism — A Crucial Challenge' (2006) 6 *James Cook University Law Review* 104, 114.
114 Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's Excised Territory' (2011) 23 *International Journal of Refugee Law* 583, 603. Angus Francis, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 *International Journal of Refugee Law* 273, 276. Tanya Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime' (2007) 13.1 *Australian Journal of Human Rights* 33, 41.

115 Susan Kneebone, 'The Pacific Plan: The Provision of Effective Protection' (2006) 18 *International Journal of Refugee Law* 696, 716.
116 Foster and Pobjoy, above n 114, 605. UNHCR, *Migration Amendment (Designated Unauthorised Arrivals) Bill, Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee*, 22 May 2006, 252–3.
117 A refugee shall have free access to the courts of law on the territory of all contracting States.
118 James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 647–56.
119 *Plaintiff M70* [2011] HCA 32.
120 Ibid 16.
121 Ibid 1.
122 Ibid 33. ·
123 Ibid 135.
124 Ibid 126.
125 Ibid.
126 *Shi v Migration Agents Registration Authority* [2008] HCA 31.
127 See Immigration Assessment Authority, *The Review Process* <http://www.iaa.gov.au/the-review-process/steps-in-a-review>.
128 *Plaintiff S157/2002* [2003] HCA 2.
129 121 Fed Appx 716, 2005 WL 289952.
130 Ibid.
131 'In our experience, the core elements of an effective system for determining refugee status are … (iii) an appeal to an authority different from and independent of that making the initial decision;': Erika Feller, Assistant High Commissioner — Protection, UNHCR, 'The Work of the Refugee Protection Division in the International Context', statement presented at the Immigration and Refugee Board, Refugee Protection Division National Training Seminar, Toronto, Canada, 28 January 2008, 4–5.
132 Volker Türk, 'UNHCR's Supervisory Responsibility' (2001) 14(1) *Revue Quebecoise de Droit International* 135, 142.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: AN ADMINISTRATIVE DECISION-MAKER'S PERSPECTIVE

Chris Wheeler*

I have been directly involved in the making of administrative decisions in the exercise of statutory discretionary powers for almost 40 years. This involvement has been both as a decision-maker in the first instance working for local and state government agencies in Victoria and New South Wales and as Deputy Ombudsman (and previously as an Ombudsman investigator and Local Government Inspector) reviewing the exercise of discretionary powers by public officials. In my review roles, I have been involved in assessing the conduct and decisions of thousands of state and local government officials exercising powers under hundreds of statutes. My investigations/decisions have also been the subject of several unsuccessful judicial review applications to the Supreme Court of New South Wales.[1]

While much has been written over the years about administrative law, it has invariably been written from the perspective of lawyers, not of the public officials bound to comply with that law.

Over time the courts in Australia have significantly broadened the scope of judicial review of administrative action from a narrow focus on good process to what more and more is in effect a review of the substance or merits of such action. From the perspective of an administrative decision-maker, this 'jurisdiction creep' has now reached the extent that few aspects of the exercise of statutory discretionary powers cannot, in one way or another, be brought within the scope of such review.

Such a broad interpretation of the scope of judicial review of administrative action exacerbates problems for administrative decision-makers that have long been hallmarks of the current system. These problems include:

- **Uncertainty:** Various legal rules laid down by the courts and the scope of administrative action that can be subject to judicial review are constantly changing and evolving over time through judgments handed down in numerous decisions scattered randomly amongst many hundreds of administrative law cases heard each year in the wide range of Australian federal, state and territory courts.
- **Variability:** As the application of many of the administrative law principles varies depending on the individual circumstances of the case, administrative decision-makers often have little certainty as to how a court might apply those principles in practice.
- **Complexity:** As administrative law judgments are written by lawyers for lawyers, not for the vast majority of administrative decision-makers who are required to comply with them, there is a widening gap in understanding between the rule-makers and those obliged to comply with the rules they make.

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- **Incomprehensibility:** The courts articulate the relevant legal principles in highly technical language that is often incomprehensible to the non-lawyers who make up the vast majority of administrative decision-makers.

While judgments now seldom include rules/principles of statutory interpretation expressed in Latin phrases, they commonly still include such technical terms as 'jurisdictional error', 'non-jurisdictional error', 'jurisdictional fact', 'ultra vires', 'procedural ultra vires', 'extended ultra vires', 'legal unreasonableness', 'obiter dicta', 'ratio decidendi', 'otiose', 'ex parte', 'certiorari', 'certiorari for error of law on the face of the record', 'certiorari for jurisdictional error', 'mandamus', 'the rule in … [add case name — for example, *Briginshaw*, *Browne v Dunn*, *Jones v Dunkel*]'.

Presumably the role of judicial review of administrative action is to protect the rule of law. Unfortunately, I would argue that in practice it is ad hoc, largely random (after all, cases are selected by applicants, not the courts) and reactive.

Even those administrative decision-makers who are legally trained can be expected to have difficulty keeping up with the scale and scope of administrative law decisions. Given the uncertainty, variability, complexity and incomprehensibility issues referred to above, I argue that judicial review by the courts does not achieve a proactive, systemic or comprehensive outcome in the performance of that role.

To help set the scene, in New South Wales there are over 1000 current Acts of Parliament, 600 statutory instruments and 300-plus planning instruments under which public officials make massive numbers of discretionary decisions. Only an infinitesimally small fraction of these decisions ever result in judicial review.[2] Further, while relatively few of the administrative review decisions that are handed down by the High Court, Federal Court and various state and territory Supreme Courts have significant implications for administrative decision-making, it is unrealistic to expect the vast majority of administrative decision-makers to have the time or expertise to identify which ones do and what those implications might be for the performance of their roles. In my experience few agencies have, or have ready access to, the systems and/or expertise required to perform this role on behalf of their staff in a rigorous and timely fashion.

The growing complexity of administrative law has significant implications for the practical implementation of the principles that are intended to guide those obliged to comply with them. This issue has been described as the tension between the 'accessibility' and 'reliability' of the law;[3] between making law more accessible to the general public by using everyday language and making the law more reliable by using precise technical language.

The scope of errors that could constitute jurisdictional error is commonly described in administrative law judgments using such terms as:

- identifying the wrong issue;
- asking the wrong question;
- ignoring relevant information;
- relying on irrelevant material; or
- denial of procedural fairness / natural justice, or practical injustice.

In practice, there is a far wider range of grounds which courts in Australia have identified as justifying judicial intervention to overturn administrative decisions or actions. While not purporting to be exhaustive, this article identifies and summarises 37 potential grounds, grouped under 11 categories:

(1) authority to act;
(2) application of the law;
(3) procedure to be followed;
(4) fettering discretion;
(5) reasonableness, including deficient reasoning and unreasonable outcome;
(6) sufficiency of evidence;
(7) uncertainty;
(8) conduct of the decision-maker (unfair treatment); and
(9) motivation of the decision-maker, including unauthorised purpose and bad faith.

Authority to act

(1) Outside jurisdiction: This would include circumstances where decisions were made or actions taken without lawful authority or did not comply with the applicable legal requirements — for example, decisions that:

(a) are based on a mistaken assertion or denial of the existence of jurisdiction;
(b) are based on a misapprehension or disregard of the nature or limits of the decision-maker's functions or powers;
(c) are wholly or partly outside the general area of the decision-maker's jurisdiction;[4] or
(d) are based on a mistaken belief that circumstances exist which authorise the making of the decision (commonly referred to as a 'jurisdictional fact').

Application of the law

(2) Incorrectly applying statutory requirements: This refers to decisions that are based on a misinterpretation of the applicable legal requirements or an incorrect application of those legal requirements to the facts found by the decision-maker.[5] This would include where an administrative decision-maker:

(a) identified a wrong issue, asked the wrong question or failed to address the question posed;[6]
(b) applied a wrong principle of law;[7]
(c) ignored relevant material or relied on irrelevant material in a way that affected the exercise of power;[8]
(d) breached a mandatory statutory procedure or obligation[9] (such as provisions imposing procedural fairness obligations,[10] mandatory time limits, obligations to consult prior to decisions being made or requiring the giving of reasons for a decision to be valid[11]); or
(e) was not authorised to make the decision (for example, due to the lack of a necessary delegation).

Procedure to be followed

(3) Practical injustice:[12] This would include decisions made or actions taken that impact upon or are likely to impact upon the rights or interests[13] of a person or entity likely to be adversely affected by the decision or action where:

(a) the person was not given **notice** of the issues in sufficient detail and at an appropriate time to be able to respond meaningfully (the notice requirement of the 'hearing rule' of procedural fairness);

(b) the person was not given an **opportunity to respond** to adverse material that is credible, relevant and significant to the decision to be made, including proposed comment, conclusions or recommendations (another limb of the 'hearing rule');
(c) the person was not given access to all information and documents relied on by the decision-maker (it has been held that in certain circumstances this can include un-redacted copies of all witness statements);[14]
(d) the person making the decision, undertaking an investigation or assessment etcetera denied the person or entity a fair hearing because he or she has not acted impartially in considering the matter (that is, prejudgment and closed mind) or there is a reasonable apprehension of bias on the part of that person[15] (the 'bias rule' of procedural fairness[16]); or
(e) the person making the decision misled a person or entity as to its intention or failed to adhere to a statement of intention given to a person or entity as to the procedure to be followed, and this resulted in unfairness — for example, because the person or entity did not have an opportunity to be heard in relation to how the process should proceed.[17]

Discretion

(4) Fettered discretion: This includes decisions that:

(a) were made under the instruction of another person or entity where the decision-maker feels bound to comply;[18]
(b) were made when acting on a 'purported' delegation which does not permit any discretion as to the decisions to be made (for example, only having the discretion to determine an application by granting consent);[19]
(c) were made under an unauthorised delegation of a discretionary power;[20]
(d) involve the inflexible application of a policy without regard to the merits of the particular situation;[21] or
(e) improperly fetter the future exercise of statutory discretions — that is, a decision-maker with discretionary powers cannot bind himself/herself/itself as to the manner in which those discretionary powers will be exercised in future, whether through a contract or a policy or guideline inflexibly applied.[22]

Reasonableness of decision-making

(5) Deficient reasoning: This includes decisions that:

(a) give disproportionate/excessive weight to some factor of little importance or any weight to an irrelevant factor or a factor of no importance;[23]
(b) give no consideration to a relevant factor the decision-maker is bound to consider or inadequate weight to a factor of great importance[24] (including a failure to deal with or make a finding on 'a substantial clearly articulated argument relying upon established facts'[25], 'ignoring relevant material [which] affects the tribunal's exercise or purported exercise of power');[26]
(c) are not based on a rational consideration of the evidence[27] or do not logically flow from the facts (that is, they are 'not based on a process of logical reasoning from proven facts or proper inferences therefrom'[28]);
(d) are based on reasoning that is illogical or irrational,[29] particularly where 'no rational or logical decision-maker could arrive [at the decision] on the same evidence'[30] or 'there was ... no evidence upon which the [decision-maker] could reach the conclusion'[31] or lack 'a basis in findings or inferences of facts supported on logical grounds');[32]

(e) lack an evident and intelligible justification[33] (for example, decisions that are not based on 'reasoning which is intelligible and reasonable and directed towards and related intelligibly to the purposes of the power');[34]
(f) are based on a mistake in respect of evidence or on a misunderstanding or misconstruing of a claim advanced by the applicant;[35] or
(g) are contrary to the overwhelming weight of the available evidence.[36]

(6) Unreasonable outcome: This includes decisions that:

(a) are patently unreasonable or illogical — that is, so unreasonable that no reasonable decision-maker could have reached them; on their face are illogical or irrational, including arbitrary, capricious, vague or fanciful (an aspect of what is commonly referred to as '*Wednesbury* unreasonableness'[37]); or
(b) are an obviously disproportionate response[38] — that is, lacking proportionality (while there is some debate on the topic, this would include 'taking a sledgehammer to crack a nut',[39] where a penalty imposed is far greater than is warranted in the circumstances).

Sufficiency of the evidence

(7) Insufficient evidence: This includes decisions that:

(a) are based on no probative evidence at all;[40]
(b) are based on a lack of probative evidence to the extent that they have no basis or are unjustifiable on, or are unsupported by, the available evidence[41] (for example, 'a decision which lacks an evident and intelligible justification',[42] 'decisions … so devoid of any plausible justification that no reasonable body of persons could have reached them'[43] or where there is no evidence to support a finding that is a critical step in reaching the ultimate conclusion[44]);
(c) are not supported by reasons that 'disclose any material by reference to which a rational decision-maker could have evaluated [certain evidence], no such material can be found in the record; and no other logical basis justifies the … finding'[45] (that is, the reasons do not adequately justify the result reached and the court inferring from a lack of good reasons that none exist);[46]
(d) are based on evidence that does not meet the applicable standard of proof;[47]
(e) are based on insufficient evidence due to inadequate inquiries, including decisions where there has been a failure to make reasonable attempts to obtain certain material that is obviously readily available and centrally relevant to the decision to be made (admittedly in limited circumstances).[48]

Certainty

(8) Uncertainty: This includes decisions that are uncertain in circumstances where the provision conferring power to make the decision, or impose a condition, requires that the decision or condition be certain[49] (for example, where the result of the exercise of a power to determine an application is uncertain due to a poorly drafted condition that must be complied with as a precondition of the consent).

Conduct of the decision-maker

(9) Unfair treatment: A display of disrespect for an affected person or entity can demonstrate apprehended bias on the part of a decision-maker. The fair treatment, and apparent fair treatment, of persons the subject of the exercise of state power (as

required by the rules of procedural fairness) obliges administrative decision-makers to recognise the dignity of such persons.[50]

Motivation of the decision-maker

(10) Unauthorised purpose: This includes decisions that are made for a purpose other than that for which the discretion exists[51] (for example, the use of powers for an ulterior purpose, such as financial advantage[52]).

(11) Bad faith: This includes decisions that are made in bad faith — that is, made with intended dishonesty, or recklessly or capriciously for an improper or irrelevant purpose, or arbitrarily exceeding power.[53]

A relatively recent expansion was the High Court's decision in *Minister for Immigration & Citizenship v Li*[54] (*Li*), in which the Court adopted (or clarified) a broader interpretation of what constitutes 'unreasonableness' in the legal sense (for example, by linking unreasonableness to rationality and logicality) than the narrower 'traditional' view that had been in place since the 1948 decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[55] (*Wednesbury*). In *Li* the High Court reiterated and/or expanded the scope of reasonableness to include:

- considering an irrelevant factor or not considering a relevant factor;
- giving disproportionate weight to a factor of little importance or giving inadequate weight to a factor of great importance;
- lacking evident or intelligible justification; and
- lacking proportionality.

Despite the often-repeated claim by the courts that the law does not concern itself with the merits of administrative action,[56] as the list highlights, over time the Australian courts have significantly broadened the scope of the grounds for judicial review of administrative action.

Highlighted by the decision in *Li*, it can be argued that this 'jurisdiction creep' has now reached the extent that there are few aspects of administrative decision-making (in the exercise of a statutory power) that could not, in one way or another, potentially be brought within the scope of judicial review.

So what is left? In my view, in practice not a lot.

To illustrate this point, there are two particular aspects of administrative action that the courts commonly state are the preserve of administrative decision-makers: fact-finding and the giving of weight to various factors; and making of findings as to credit/credibility.

However, in practice the courts commonly review these aspects by categorising what they are doing as reviewing points of law. This is achieved by breaking down the process into its component parts.

While the courts consistently emphasise that fact-finding is a matter for administrative decision-makers, they also make it clear that this is subject to the proviso that such assessments and weightings are reasonable in the circumstances. As the High Court said in *Li*,[57] the area of 'free discretion' of the decision-maker to make such assessments 'resides within the bounds of legal reasonableness'.[58] Various failures or errors that can occur in the process of fact-finding can be categorised as an 'error of law' if the cause of the mistake can be ascribed to at least one of a wide range of reasons.

Typical fact-finding related administrative errors that can occur at one stage or another in the course of an administrative process are failures to:

- ask the right question or address the question posed;
- look for relevant information;
- find relevant information due to inadequate inquiries;
- understand or appropriately interpret available information;
- properly assess the relevance or importance of available information; or
- properly explain the basis for a decision.

Error/failure/mistake	**Examples of potential grounds for judicial intervention include**
Failing to ask the right question or address the question posed	• Error of law.
Failing to look for relevant information or failing to find relevant information due to inadequate inquiries	• No probative evidence that proves or helps to prove key facts. • Lack of probative evidence to the extent that the decision has no basis on the available evidence. • Failure to make adequate inquiries, etc.
Failing to understand or appropriately to interpret the available information	• Deficient reasoning due to a failure rationally to consider probative evidence or decisions that do not logically flow from the facts. • Mistake in respect of key evidence or error of fact due to misunderstanding or misconstruing a claim raised. • Unreasonable outcomes due to *Wednesbury* unreasonableness (as expanded by the decision in *Li*), decisions not based on findings or inferences of fact supported by logical grounds, or an obviously disproportionate response, etc.

Failing properly to assess the relevance or importance of the available information	• Attention given to extraneous circumstances such as factors of little or no relevance. • Failure to properly assess the weight of evidence, eg by failing to consider or give appropriate weight to relevant factors or giving disproportionate or excessive weight to some factor of little importance or any weight at all to an irrelevant factor or a factor of no importance. • Contrary to the overwhelming weight of available evidence. • Evidence not meeting the applicable standard of proof, etc.
Failing properly to explain the basis for a decision	• No justification evident on the 'record', not disclosing any material by reference to which a rational decision-maker could have evaluated certain evidence, etc. • Lacking evident and intelligible justification.

The position has now been reached where, in practice, the scope of the available grounds for judicial review of administrative action (in the exercise of a statutory power) is potentially so broad that it is difficult to identify any significant fact-finding related error that could not potentially be identified as falling within at least one of them.

I like the description of the law/fact distinction in an article by Professor Mark Elliott, Reader in Public Law at the University of Cambridge in the United Kingdom, who argued that 'if the distinction between jurisdictional and non-jurisdictional errors of law is malleable, then that which distinguishes law from fact appears to be positively liquefied'.[59]

I found an even more colourful description of the distinction in a blog post by Alison Young, a Fellow of Hertford College, University of Oxford, who suggested that:

> [If] prizes were awarded to 'Distinctions in English law', then a good contender for the 'lifetime achievement' award would be the distinction between 'law' and 'fact'. Whilst adventurers have their Swiss Army knife, and the Dr has his sonic screwdriver, lawyers have the multi-purpose malleable 'law/fact' distinction which is just as capable of opening or closing avenues of review, or providing a deus ex machina[60] 'get out of jail free' card ...[61]

In relation to the making of findings as to credit/credibility, as McHugh J said in a 2000 High Court judgment, 'a finding on credibility … is the function of the primary decision-maker "par excellence"'.[62] However, if such a finding was, for example, not based on any evidence (that is, 'any evident or intelligible justification'[63]) or there was a failure to rationally consider the available evidence[64] then various grounds for judicial intervention could well be held to be available.

In my view it is all about categorisation. If a judge does not like a finding on credibility, he or she can break the assessment process into its component parts and, 'Bob's your uncle', it is all about legal reasonableness.

Recent judgments have been at pains to point out that there are circumstances where findings as to credibility by administrative decision-makers may found jurisdictional error.[65] For example, if a decision is based on the acceptance or rejection of the evidence of a particular party/witness, and that decision was based on an assessment as to whether a witness is to be believed or not, then the failure to give reasons for that finding may found jurisdictional error[66] and could lead a court to infer that the decision-maker 'had no good reason'.[67]

Further, where a decision is detrimental to a person's rights or interests and a significant basis for that decision was a finding about credibility, a failure to disclose to the person affected material on which such a finding was based may well be found to be a denial of procedural fairness.[68]

The current position now appears to be that where judges are minded to do so — for example, if they perceive serious problems with the merits or outcome of an administrative action — they are likely to be able to identify some procedural or evidentiary failure which can be categorised as falling within at least one of the recognised grounds of judicial review. The attitude of judges to the parties, the issues, the perceived fairness of the processes used and/or the outcomes of administrative action can have a significant bearing on how they categorise the issues arising in a case and apply relevant administrative law principles as well as their approach to statutory interpretation (should they identify ambiguity in applicable legislation).

In this context, the 'attitude' of judges might be influenced by their personal values or philosophy, or their reaction to the circumstances of the particular case. See, for example, the comments by Forest J in *K v Children's Court of Victoria and Federal Agent Mathew Court*:

> A reviewing court, when considering the reasonableness of an exercise of discretion, must assess the substantive decision, and arguably the decision-maker's reasoning process, in the context of the subject matter, scope and purpose of the legislation under which that discretion is conferred. *The temptation to verge into the merits is thus difficult to resist* ...[69]

It has been noted in several influential cases over the years[70] that, where judges regard an administrative decision as unreasonable, this may give rise to an inference that some other kind of jurisdictional error has been made. As far back as 1949, in a High Court judgment, Dixon J referred to the concept in the following terms:

> It is not necessary that [the presiding officer] should be sure of the precise particular in which [the administrative decision-maker] has gone wrong. It is enough that [the presiding officer] can see that in some way [the administrative decision-maker] must have failed in the discharge of his exact function according to law.[71]

Presiding officers are human beings. While their training and experience incline them towards rational and objective assessments of the evidence and applicable law, it is not realistic to assume that they can completely ignore or be unmoved or uninfluenced by other factors. For example:

- conscious influences might include their views about the conduct of or impact on a party; and
- possible unconscious influences[72] might be categorised as confirmation bias / belief bias, correspondence bias / fundamental attribution error, selective perception, selective exposure etcetera.

When hearing a case, a presiding officer may well take the view that a public official exercising discretionary powers has made a decision or acted in a way the presiding officer perceives to be unfair, unreasonable or otherwise improper. In such circumstances, if minded to do so, the presiding officer may well be able to identify some aspect of the surrounding procedures, reasoning or conduct that can be categorised as falling within one or more of the numerous (and ever-expanding) recognised grounds justifying a finding of jurisdictional error or breach of procedural fairness.

Would it only be a cynic who might argue that the writers of the movie *The Castle* got it right after all? If there is a will, the judge is likely to be able to find a way, so maybe it really can come down to 'the vibe'.

In relation to the role of the courts to review administrative action:

- the vast majority of administrative actions do not result in judicial review;
- the administrative actions that are reviewed are selected by applicants, not the courts; and
- judicial oversight of administrative action through reviews of individual cases is therefore in practice ad hoc, largely random and reactive.

If the role of the courts is intended to include proactive guidance for administrative decision-makers, given the uncertainty, variability, complexity and incomprehensibility issues referred to above, judicial review as currently practised by the courts is not 'fit for purpose' in relation to such a role.

Another factor that does not appear to have received any attention from the courts or administrative law commentators is the negative impact on administrative decision-makers of jurisdiction creep. Having a court decide that a public official's decision was 'unlawful' (which implies they were either incompetent or lacking in integrity) is a far worse outcome in terms of their reputation, or credibility etcetera than having a court or tribunal look at the merits of the same decision and decide that there is a more correct or preferable decision (which merely implies a difference of opinion).

Further, the outcome of a successful merits review application (where such a review is available) is generally largely the end of the matter for an administrative decision-maker, whereas the outcome of a successful judicial review is generally that the decision-maker and/or other public officials have to revisit the assessment and decision-making process.

To attempt to address these issues, I make a series of suggestions:

(1) It would greatly assist the public officials who make administrative decisions in the exercise of statutory powers if, when drafting administrative law related judgments, the courts:

   (a) indicate in the catchwords or headnote whether the judgment expresses a precedent/guideline/authoritative statement (or a departure from same); and
   (b) provide an explanation of the decision/principle that will be understandable to non-legally-trained administrative decision-makers (that is, in plain English using a minimum of technical terms).

(2) The legal obligations on administrative decision-makers have now been developed by the courts to a stage where consideration should be given by governments to their comprehensive, plain English codification in statutes in all jurisdictions[73] (with detailed

objects provisions giving clear guidance as to parliaments' intentions as to how they are to be interpreted and applied). Such comprehensive plain English statutory codes would bring together the relevant rules into one place, which could be easily referred to by administrative decision-makers to identify key changes over time.

(3) The courts need to find a more accurate way to explain the scope of the judicial review function than the standard claim that they do not review the merits of administrative decisions made in the exercise of statutory powers.

(4) Public officials need to be particularly careful to ensure that all aspects of their actions and decisions are not only lawful but can also be clearly shown to be fair and reasonable in the circumstances.

(5) When defending legal actions seeking to overturn administrative decisions, legal counsel should be alert to the reality that well-reasoned and otherwise compelling legal arguments alone may not be sufficient to ensure a favourable outcome should presiding officer(s) have concerns that the actions and/or decisions in question were not fair and reasonable in the circumstances.

Endnotes

1 See, for example, *Botany Council v The Ombudsman* [1995] NSWSC 38; *Botany Council v The Ombudsman* (1995) 37 NSWLR 357; *Ku-Ring-Gai Council v The Ombudsman* (Unreported, 30035/94, 3 July 1995); *'K' v NSW Ombudsman* [2000] NSWSC 771; *Ombudsman v Koopman* [2003] NSWCA 277.

2 Leaving aside immigration cases, in my experience most judicial review cases are brought by parties who have access to the considerable funds required to bring such proceedings, people prepared to risk all in the pursuit of a 'matter of principle', or self-litigators.

3 Lon Fuller, *The Morality of Law* (Yale University Press, New Haven CT, 1964).

4 See *Craig v South Australia* [1995] HCA 58 at [11], [12]; (1995) 184 CLR 163, 177–9; *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531, [71]–[73]; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 4th ed, 2009); and Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014).

5 A decision will not involve an error of law unless, but for the error, the decision would have been, or might have been, different: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33, 80; (1990) 170 CLR 321.

6 *Craig v South Australia, Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323, 351 [82].

7 *Chapman v Taylor* [2004] NSWCA 456, [33] (Hodgson LA; Beasley and Tobias JJA agreeing).

8 *Craig v South Australia, Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317, [19].

9 For example, where there is a statutory obligation to consider and determine an application, a failure to consider all claims expressly made, or misunderstanding or misinterpreting a claim leading to an error of fact, can constitute jurisdictional error: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263, [20]; *SZRRD v Minister for Immigration and Border Protection* [2015] FCA 577, 14–17.

10 See *Italiano v Carbone* [2005] NSWCA 177, [106] (Basten J) and [170] (Einstein J).

11 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56, 55; (2003) 216 CLR 212, [55]; *Drysdale v WorkCover WA* [2014] WASC 270, 58.

12 *Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 195 ALR 502.

13 A failure to afford procedural fairness may amount to an error of law: see, for example, *Prendergast v Western Murray irrigation Ltd* [2014] NSWCATAOP 69, [13]. This is not limited to decisions, recommendations or findings but can apply to reports of coroners, royal commissions, investigative agencies and investigators looking into disciplinary issues and the like that can 'substantially impact on the economic or reputational interest of particular individuals': Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 5th ed, 2013), [2.460], quoted by Basten JA in *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, [714].

14 An example of such a decision is the Supreme Court of Queensland decision in *Vega v Hoyle* [2015] QSC 111. In this regard, see also *Lohse v Arthur (No 3)* [2009] FCA 1118, [47]; and *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517, [157], [159].

15 In a recent case the High Court took the view that a reasonable apprehension of bias can arise where 'it might reasonably be apprehended that a person … would have an interest which could affect [his/her] proper decision-making': the majority in *Isbester v Knox City Council* [2015] HCA 20, [33] (*Isbester*). This can include an 'interest which would conflict with the objectivity required of a person deciding [the issue]'. This was an interest referred to by the majority in *Isbester* (quoting Isaacs J in *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243, 259) as an 'incompatibility' ([34]). The Court went further, noting that the application of the principle extended beyond just the decision-maker and referring to the High Court decision in *Stollery v Greyhound Racing Control Board* [1972] HCA 53; (1972) 128 CLR 509, 520 (*Stollery*),

where Menzies J referred to the 'long line of authority which establishes that a tribunal decision will be invalidated if "there is present some person who, in fairness, ought not to be there"': [37]. The Court went on to note that in *Stollery* their Honours held that 'the manager's mere presence was sufficient to invalidate the decision, either because he was an influential person or because his presence might inhibit and affect the deliberations of others': [37]. If on appeal actual or apprehended bias are established, the court will set aside the decision even if satisfied that the decision below was correct on the merits: see *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55; (2006) 229 CLR 577, 581 [2], 611 [117]; and *Antoun v The Queen* [2006] HCA 2; (2006) 224 ALR 51, 52 [2]–[3].

16 Bias is an element of the 'bad faith' ground of judicial review as well as being a rule of procedural fairness.

17 This formulation previously also referred to 'legitimate expectation'; however, in 2012 the High Court expressed the view that the expression should be disregarded: *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31, 65; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1, 9 [25], 12 [35], 34 [104]–[105]; and, more recently, *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105, [73]; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, [28]–[30]. In *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482, Martin CJ expressed the view that 'It is now established that legitimate expectations can, at best, only give rise to procedural rights, as compared to substantive rights': 145.

18 Commonly referred to as decisions 'made under dictation': see *R v Stepney Corporation* (1902) 1 KB 317; *Simms Motor Units Ltd v Minister of Labour and National Service* (1946) 2 All ER 201; cf *Evans v Donaldson* [1909] HCA 46; (1909) 9 CLR 140, 189; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 LR 177; and *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* [1977] HCA 71; (1977) 139 CLR 54.

19 *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116; *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450.

20 *Barnard v National Dock Labour Board* [1953] 1 All ER 1113.

21 See *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610; *Green v Daniels* (1977) 51 ALJR 463; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50, [52], quoting Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; (2003) 216 CLR 277, 287 [17].

22 Commonly referred to as the 'no fetter principle' and as an 'anticipatory fetter': see *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* [1977] HCA 71; 139 CLR 54; *Camberwell City Council v Camberwell Shopping Centre Pty Ltd* (1992) 76 LGRA 26: *Civil Aviation Safety Authority v Sydney Heli-Scenic Pty Limited* [2006] NSWCA 111.

23 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 72; (2013) 249 CLR 332; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 41, 30, 71.

24 *Acquista Investments Pty Ltd v The Urban Renewal Authority* [2014] SASC 206 at 565–8; *SZUZE v Minister for Immigration* [2015] FCCA 1767, [21]–[35]; *AEO15 v Minister for Immigration* [2016] FCCA 97, [42].

25 *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 26, [24], quoted in *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45, [32], [40].

26 *Buchwald v Minister for Immigration and Border Protection* [2016] FCA 101, [72]; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, [82] (McHugh, Gummow and Hayne JJ).

27 See, for example, the views of Finkelstein J in *Faustin Epeabaka v Minister for Immigration & Multicultural Affairs* [1997] FCA 1413; and *MZAGW v Minister For Immigration* [2015] FCCA 2857, [26], [28], [30]–[32].

28 *Duncan v ICAC, McGuigan v ICAC, Kinghorn v ICAC, Cascade Coal v ICAC* [2014] NSWSC 1018, 35(2).

29 Per views expressed by the majority in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 364. In *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, Bathurst CJ took the view that 'a decision on factual matters essential to the making of a finding by a decision-maker ... can be reviewed on the basis that the reasoning which led to the decision was irrational or illogical irrespective of whether the same conclusion could be reached by a process of reasoning which did not suffer from the same defect': [287].

30 Not every lapse in logic will give rise to jurisdictional error (*Minister for Immigration and Citizenship v SZMDS* [2010] 240 CLR 611, [130]–[131]) — for example, 'an error of fact based on a misunderstanding of evidence or even overlooking an item of evidence in considering an applicant's claims is not jurisdictional error, so long as the error ... does not mean that the [Tribunal] has not considered the applicant's claim', which in the circumstances in question would be a breach of a statutory obligation: *Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303. In *SZTJG v Minister for Immigration* [2015] FCCA 414, the Federal Circuit Court of Australia noted that '*Li* and *Sing* … do not stand for [the] … proposition … that unreasonableness, or for that matter 'illogicality' … in the context of fact finding, constitutes jurisdictional error': [83].

31 *ATI15 v Minister for Immigration* [2016] FCCA 8, [60].

32 *Re Minister for Immigration and Multi-Cultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59, [34]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32, [37]–[38]; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611, [130]–[131].

33 Per the majority in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 364–5 [76]; *DPP v Cartwright* [2015] VSCA 11, [33]–[34].

34 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, [25] (French CJ) quoting Denis James Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 140.

35 Referred to by the Full Court of Federal Court of Australia as an 'error of fact' that 'can constitute jurisdictional error': *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, [63].
36 *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611, [23], [24].
37 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See also *Minister for Immigration v Li* [2013] HCA 18, [24], [65]; (2013) 249 CLR 332.
38 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 74; (2013) 249 CLR 332.
39 For example, ibid 30 (French CJ).
40 Commonly referred to as the 'no-evidence rule' of procedural fairness: see *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473; *Duncan v ICAC, McGuigan v ICAC, Kinghorn v ICAC, Cascade Coal v ICAC* [2014] NSWSC 1018, 35(3); *Australian Broadcasting Tribunal v Bond* [1990] HCA 33;(1990) 170 CLR 321, 355–6; *SZNKV v Minister for Immigration and Citizenship* [2010] FCA 56, [36]–[38]; *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45, [69]–[70]; *SZAPC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 995, [57]; *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, [278].
41 See, for example, *Parramatta City Council v Pestell* [1972] HCA 59; (1972) 128 CLR 305, 323 (Menzies J); *Faustin Epeabaka v Minister for Immigration & Multicultural Affairs* [1997] FCA 1413; *SFGB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 231; (2003) 77 ALD 402, [19]–[20], [25]; *Australian Pork Ltd v Director of Animal & Plant Quarantine* [2005] FCA 671, 309–310; *SZNKV v Minister for Immigration and Citizenship* (2010) 118 ALD 232, [38]; *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; (2014) 254 CLR 28, [46].
42 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 76; (2013) 249 CLR 332.
43 *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768, 821.
44 *SFGB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 231; (2003) 77 ALD 402, [18]–[20]; *Applicant A227 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 567, [44]; *SZJRU v Minister for Immigration and Citizenship* [2009] FCA 315; (2009) 108 ALD 515, [53]–[54].
45 *Minister for Immigration and Citizenship v SZLSP* [2010] FCAFC 108, 72 (Kenny J); *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159 CLR 656, [7] (Gibbs CJ), referring to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1.
46 See, for example, *WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184; 75 ALD 630, [47]; *Minister for Immigration & Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431, [49]–[50]. However, 'inadequate reasons provided at the discretion of the decision-making body cannot impugn the validity of the decision itself': *Obeid v Independent Commission Against Corruption* [2015] NSWSC 1891, 49 (Davies J).
47 Administrative decision-makers are obliged to be reasonably satisfied as to the matters to be decided, which in the context of determining whether a fact does or does not exist is generally the civil standard, being the balance of probabilities. The appropriate degree of satisfaction is subject to the 'need for caution to be exercised in applying the standard of proof when asked to make findings of a serious nature': *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93, 99 (*Sullivan*). In *Sullivan* this was referred to as the 'rule of prudence' that should be applied by decision-makers who are not obliged to comply with the 'rule' in *Briginshaw* (*Briginshaw v Briginshaw* (1938) 60 CLR 336) because they are not bound by the rules of evidence: 115.
48 *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 259 ARR 429; (2009) 83 ALJR 1123: 'It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction'. See also *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 169–70.
49 *Television Corporation Ltd v Commonwealth* [1963] HCA 30; (1963) 109 CLR 59, 71. While there 'is no general principle of administrative law that the exercise of a statutory power must, in order to be valid, be final or certain', a condition 'will be invalid for lack of certainty or finality if it falls outside the class of conditions which the statute expressly or impliedly permits': *Community Action for Windsor Bridge Inc v NSW Roads and Maritime Services* [2015] NSWLEC 167, 48.
50 *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, 5.
51 Also referred to as 'improper purpose': see *R v Anderson; Ex parte Ipec-Air Pty Ltd* [1965] HCA 27, 10; (1965) 113 CLR 177 (quoting *Water Conservation and Irrigation Commission v Browning* [1947] HCA 21; (1947) 74 CLR 492, 496, 498, 499, 500, 504). The inference of improper purpose could be drawn if the evidence cannot be reconciled with the proper exercise of the power: *Golden v V'landys* [2015] NSWSC 1709, referring to *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649, 672.
52 *Municipal Council of Sydney v Campbell* [1925] AC 338.
53 *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35; (2007) 232 CLR 189.
54 [2013] HCA 18.
55 [1948] 1 KB 223.
56 For example, see the judgment of Brennan J in *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564.
57 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 66; (2013) 249 CLR 332.

58 See also the view expressed by Brennan CJ in *Kruger v Commonwealth ('Stolen Generation Case')* [1997] HCA 27; (1997) 190 CLR 1, 36: 'when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention'.

59 Mark Elliott, *Jurisdictional error and the law/fact distinction: Jones (by Caldwell) v First-Tier Tribunal* [2013] UKSC 19 (17 April 2013) Public Law for Everyone <http://publiclawforeveryone.com/2013/04/17/jurisdictional-error-and-the-lawfact-distinction-jones>.

60 This term is defined in Wikipedia as 'an unexpected power or event saving a seemingly hopeless situation, especially as a contrived plot device in a play or novel'. Current usage of the term has 'the negative connotation of an utterly improbable, illogical or baseless plot twist that drastically alters the situation': *Urban Dictionary*.

61 Alison Young, 'Fact/Law — A Flawed Distinction?' on *UK Constitutional Law Association Blog* (21 May 2013) <http://ukconstitutionallaw.org/2013/05/21/alison-l- young-factlaw-a-flawed-distinction/>.

62 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407, [67]; *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534, [20].

63 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 76; (2013) 249 CLR 332.

64 *Faustin Epeabaka v Minister for Immigration & Multicultural Affairs* [1997] FCA 1413; *Pochi and Minister for Immigration and Ethnic Affairs* [1997] AATA 64; (1997) 2 ALD 33, 41–2; *Minister of Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 4 ALD 139, 155–6; *Minister for Immigration and Citizenship v Li* [2013] HCA 18, 76; and *Sullivan v Civil Aviation Safety Authority* [2014] FCAF 93, [97].

65 See, for example, *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089, [16]–[23]; *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) FCR 99, 121; *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470, [37]; *WAGO v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 437, [54]; *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253, [31].

66 *SZSRV v Minister for Immigration and Border Protection* [2014] FCA 220, [23]; *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089, [16]–[23]; and *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317, [23].

67 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22; (1953) 88CLR 100; and *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159CLR 656, [7].

68 See, for example, *Nichols v Singleton Council (No 2)* [2011] NSWSC 1517.

69 [2015] VSC 645, [25] (emphasis added).

70 See, for example, *House v King* (1936) 55 CLR 499, 505; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360; *Wilson v State of Western Australia* [2010] WASCA 82, [2]; *Minister for Immigration and Citizenship v Li* [2013] HCA 18, [85]; *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, 115.

71 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360.

72 See, for example, confirmation bias / belief bias: correspondence bias / fundamental attribution error: selective perception; selective exposure theory; etc. In this regard, the results of the study involving eight parole judges in Israel, referred to by Daniel Kahneman, make fascinating reading: Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus and Giroux , 2011) 43–4.

73 Examples of attempts at codification of the natural justice hearing rule requirements include *Migration Act 1958* (Cth) div 4, pt 7; *Ombudsman Act 1974* (NSW) s 24; *Ombudsman Act 1976* (Cth) s 8; *National Vocational Education & Training Regulation Act 2011* (Cth) s 24.

PUBLIC INTEREST ADVOCACY IN THE AUSTRALIAN COMPETITION TRIBUNAL

Sophie Li*

In February 2016, the Australian Competition Tribunal delivered its decisions in the high-profile applications by the Public Interest Advocacy Centre (PIAC) and the New South Wales (NSW) and Australian Capital Territory (ACT) electricity distributors ActewAGL, Ausgrid, Endeavour Energy and Essential Energy (the latter three known collectively as Networks NSW) for review of the Australian Energy Regulator's (AER) determinations of the four distribution networks' regulated revenue for the five-year period spanning 2014 to 2019.

Eight gas and electricity utility operators across the national energy market with an interest or stake in the review outcome intervened in the appeals, as did the Commonwealth Minister for Energy, who intervened for the sole purpose of advancing points-of-law submissions on the application of the review regime.

The Tribunal heard eight appeals concurrently in its first major application of a merits review regime reconstructed in 2013 to deliver consumer-centric outcomes and the first appeals in Australia by a consumer advocate of a regulated utility's revenue determination. This article will focus on the six appeals (three by PIAC and three by Networks NSW) of the Australian Energy Regulator's determinations applying to the Networks NSW distributors.

Background

Controversy in recent years surrounding rising electricity prices and the alleged 'gold-plating' of NSW poles and wires led the AER to make a five-year determination in April 2015 (applying also to a transitional year commencing July 2014) reducing the revenue allowance of the state-owned NSW distributors by 28 to 33 per cent, with corresponding reductions of $106 to $313 per annum to the average NSW household electricity bill commencing July 2015.[1]

In May 2015, PIAC appealed the AER's decisions to the Australian Competition Tribunal claiming that the AER's reductions to network revenue did not go far enough and that an additional $2.3 billion in cuts was needed across the three NSW networks to make them efficient. Contemporaneously, the three NSW networks appealed the AER's decisions to the Tribunal and to the Federal Court. They argued that the extent of the proposed cuts went too far, compromising network safety and reliability. The Federal Court appeal was stayed pending the outcome of the application to the Tribunal.

In July 2015, the Tribunal granted all applicants leave to appeal. Hearings took place over three weeks in October 2015, and the Tribunal delivered its final decisions in February 2016.[2] The Tribunal found in favour of the AER in some matters and in favour of Networks NSW in others. Having assessed the interrelationship between constituent decisions and the

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complexities of each AER determination as a whole, the Tribunal remitted the AER's determinations to the AER to be remade in accordance with the Tribunal's rulings. In March 2016, the AER applied to the Federal Court for judicial review of the Tribunal's decisions.

With judicial review underway, each Networks NSW distributor entered into an enforceable undertaking to the AER to apply, as an interim arrangement commencing May 2016, the network charges resulting from the AER's final determinations and to continue to provide network services in accordance with the non-price terms and conditions of the AER's determinations as set aside by the Tribunal.

Appeals by a consumer advocate

PIAC's appeals were the first in Australia by a consumer advocate of a regulated utility's revenue determination. PIAC, established by the NSW Attorney-General in 1982, is a self-proclaimed 'independent, non-profit law and policy organisation, committed to social justice and addressing disadvantage'.[3] The significance of PIAC's appeals of the AER's Networks NSW regulatory determinations was not only for the combined $5.7 billion, or 22 to 24 per cent, of network revenue at stake (as contended by the networks) but also, appropriately, for the scale of the 'public interest' it set out to defend — being one which extended to all end users and consumers of services provided by regulated utilities.

The Tribunal made its determinations, for the first time, under a revised merits review regime — one which requires applicants to seek leave to apply for review and provides that a reviewable decision is to be displaced only if the Tribunal is satisfied that another decision is materially preferable in the long-term interests of the consumer.[4] Applicants for review must establish that a reviewable decision is affected by an error of fact, an incorrect exercise of discretion and/or unreasonableness, and a prima facie case that another decision is, or is likely to be, materially preferable.[5]

The Tribunal heard eight applications concurrently — three by PIAC, three by Networks NSW, one by ActewAGL and one by Jemena Gas Networks (NSW) Ltd. The submissions of the parties to the electricity appeals, particularly those relating to the AER's methodologies, were relevant to the Tribunal's determination of Jemena's appeal of its 2015–20 revenue determination[6] — the first by a regulated gas network under the revised regime, although PIAC was not a party to the Jemena proceedings.

PIAC's advocacy aimed to press network providers to operate efficiently both in the immediate future and in the longer term. Efficiency is a legislated objective in the National Electricity Law (NEL) underpinning the AER's decision-making and an economic benchmark, as reflected in the NEL's revenue and pricing principles,[7] for regulating monopoly infrastructure where competitive market dynamics cannot operate to affect price. The National Electricity Objective (NEO), as prescribed in the NEL, is to promote efficient investment in, and efficient operation and use of, electricity services for the long-term interests of consumers with respect to price, quality, safety, reliability and security of supply and the reliability, safety and security of the national electricity system.[8] One interpretation of the NEO, and its various elements as prescribed, is that efficient networks are more reliable service providers and deal better with network contingencies. Efficiency, accordingly, is not simply a measure of savings; it also imports notions of weighed outputs and deliverables.

The applicants' respective challenges

PIAC challenged the AER's determination of the operating expenditure (opex) and return on capital components of the legislative building block model. PIAC argued that the AER made errors of fact, exercised incorrect discretion and was unreasonable in its constituent decision

on opex and its application of the return on debt formula (feeding into the return on capital building block) and that the AER should have considered the interrelationship between return on debt and return on equity in determining the rate of return on the regulatory asset base. PIAC submitted that correction of the AER's errors on opex and return on debt would lead to a materially preferable decision with respect to the NEO.

Networks NSW appealed the AER's decisions on the opex allowance and returns on debt and equity, as well as constituent decisions of the AER on the X-factor (the real rate of revenue change over consecutive years), the Efficiency Benefit Sharing Scheme (EBBS) (incentivising efficiency gains in operating expenditure), and gamma (the value of imputation credit used to forecast corporate income tax). Individual network operators further appealed particular constituents of the AER's decisions as those constituents applied to them. For example, Ausgrid (and ActewAGL) appealed the AER's constituent decisions on metering classification (determining the type of regulatory control applicable to meters and the contestability of metering services) and the operation of the Service Target Performance Incentive Scheme (STPIS) (a scheme rewarding operators for low outage rates and duration).

The opex allowance and return on capital building blocks (discussed in detail below) together comprise more than 80 per cent of a NSW network's total revenue. Once a total revenue allowance is constructed using building blocks, networks manage their own budgets and are not constrained by individual building block decisions in their expenditure. To the extent that the networks' appeals of the remaining constituent decisions had a marginal revenue impact, they sought to clarify the operation of the National Electricity Rules (NER) made under the NEL, adopted in NSW as a schedule to the *National Electricity (New South Wales) Act 1997* (NSW).

In granting PIAC and the three networks leave to apply for review, the Tribunal said:

> They each complain of the same three decisions of the AER ... Networks NSW say the AER's … building blocks is [sic] far too low. PIAC says they are far too high. Those competing submissions did have two common points. First, that adherence to the prescribed requirements of the NEL and the NER is prima facie likely to result in a materially preferable NEO decision, and second that the economic consequences of the adjustments to the AER decision for which each contended were not simply a very substantial sum, but a sum which (either way) would detrimentally affect in a material way the long-term interests of consumers.[9]

The Tribunal determined that, collectively, the applicants established grounds for review in the AER's constituent decisions on the opex allowance, return on debt, and gamma. The applicants failed to establish a ground for review with respect to the EBSS, return on equity, and metering services (challenged by Ausgrid only). The Tribunal did not consider whether a ground for review was established with respect to the X-factor and the STPIS, as its determination to the opex appeal meant that constituent decisions on the X-factor and the STPIS needed to be remade in any event.

Considering the decision as a whole, the Tribunal determined to set aside the AER's determinations and remit them to the AER to be remade in accordance with the Tribunal's directions.

Operating expenditure

Operating expenditure typically comprises 25 to 30 per cent of a NSW distribution network's allowable revenue.

The NER provide that the AER must approve a network's proposed opex if satisfied that the proposed opex meets the 'opex criteria'.[10] The 'opex criteria' provide that opex must reasonably reflect the efficient costs and a realistic expectation of the demand forecast and cost inputs that a prudent operator would require to achieve the 'opex objectives'.[11] The 'opex objectives' are to meet and manage expected demand; comply with regulatory obligations; and maintain quality, reliability and security of supply and the reliability, security and safety of the distribution system, having regard to the benchmark opex that an efficient distributor would incur and other relevant factors.[12] If the AER is not satisfied that a network's proposed opex reasonably reflects the 'opex criteria', it is to estimate the network's required opex in making its regulatory determination.[13]

For the 2014–19 regulatory period, the AER rejected the opex proposed by all three NSW networks and estimated their required opex using the 'EI model' — a benchmarking model developed by Economic Insights Pty Ltd for the AER for this purpose. The EI model benchmarked the efficiencies of all 13 distribution networks in Australia against one another by assigning each distributor an efficiency rating between 0 and 1. The EI model was developed using economic benchmarking data from 13 Australian distributors, 18 New Zealand distributors and 37 Ontario distributors. Economic Insights explained that overseas comparators were included due to 'insufficient variation' in the domestic data not allowing for reliable estimates and robust comparisons and not in order to benchmark Australian distributors against their international counterparts.

The AER's draft determinations of November 2014 averaged the efficiency scores of the five distributors in the top quartile of benchmarked distributors, each with an efficiency rating greater than 0.75 (with the most efficient network — Victorian distributor CitiPower — scoring an efficiency rating of 0.95), to produce a target efficiency score of 0.86, which the NSW distributors, with efficiency ratings ranging 0.45 to 0.59, were to meet by their opex allowances as awarded. The resultant opex, calculated by this method, constituted a 23 to 39 per cent reduction to the opex proposed by the networks.

The AER made its final determinations in May 2015 — six months after its draft determinations — pursuant to a statutory process which provided for networks to submit revised regulatory proposals before final determinations are made. In its final determinations, the AER lowered its setting of the networks' efficiency target from 0.86 to 0.77, responding to various qualitative and quantitative arguments advanced by the networks' revised proposals on the impact of the proposed reduction to their opex. The revised efficiency target of 0.77 equates to the lowest of the efficiency scores of the distributors in the top quartile (that is, the efficiency target is now that of the fifth most efficient distributor rather than the average of the five most efficient distributors). In addition, the AER applied a positive adjustment of 11 to 12 per cent (notionally, a margin of error) to the benchmark base year opex to account for differences in the operating environment, as it did in the draft determination.

PIAC challenged the AER's final decision to lower the opex benchmark comparison point from 0.86 to 0.77 as one which artificially improved the networks' apparent relative efficiency and introduced quantitative bias into the revenue determinations. The AER's adjustments for operating environment factors, PIAC contended, were arbitrary and illogical and its reasoning circular. The AER's revised efficiency target reduced the networks' opex allowances by 17 to 30 per cent compared to corresponding reductions of 23 to 39 per cent to their opex as proposed in the AER's draft determination. PIAC contended a reversion to the AER's draft opex determination on the basis that the final determination's revision to the efficiency target involved an incorrect exercise of discretion and was unreasonable, with the result that the networks' allowed opex were substantially higher than the efficient opex requirements of a prudent operator. Its contention, if adopted, would have reduced the networks' opex allowances by $196 million to $365 million per distributor.[14]

The networks contended that the opex they incurred in the past were the best forecast of the opex they would require in the future. To this end, their submission targeted the AER's reliance on the EI model to benchmark relative efficiency. Networks NSW submitted that the model incorrectly relied on both Australian and overseas benchmarking data. It contended that Australian benchmarking data which the AER collected from regulated networks over eight years under its statutory information-gathering powers was unreliable for having been recorded inconsistently and for containing estimates and back-casting. The networks also argued that the EI model incorporated New Zealand and Ontario data, mainly because of the similar format of their presentation to the AER's data rather than because of any substantive comparability between regulated networks in those jurisdictions and Australia.

The networks contended that use of the EI model as the sole determinant of opex was contrary to 'sensible regulatory practice' and the experience of other jurisdictions. They argued that, even if use of the EI model were correct, which was an assumption in PIAC's submission, PIAC provided no evidence or reason to suggest that the average of the upper quartile was a more appropriate benchmark comparison point than the bottom of the upper quartile. Even if the AER's opex modelling were correct, the networks contended, the AER's failure to provide a transition period over which networks were to improve their efficiency further involved an incorrect exercise of discretion or constituted an unreasonable decision.

The Tribunal determined that the AER placed 'undue reliance' on the EI model in a way which failed to discharge its obligations under the NER: in a determination 'where economic benchmarking is being used for the first time to set opex allowances', the AER relied on the EI model despite acknowledging its 'limitations', 'imperfections and other uncertainties'.[15] The Tribunal held that the AER's approach to determining opex was erroneous. The nature of the AER's errors, the Tribunal continued, made it 'unnecessary to fully explore PIAC's contentions regarding opex':

> PIAC's contentions … were premised on the AER's primary approach being correct. The Tribunal has not accepted with respect to opex that to be the case.[16]

The Tribunal, after reviewing the remaining constituent decisions and each determination as a whole, set aside and remitted the AER's determinations with directions that it is to remake the constituent opex decision to include 'a broader range of modelling', 'benchmarking against Australian businesses', and 'a "bottom up" review of … forecast operating expenditure'. The Tribunal did not preclude reliance by the AER on international data, but it can be inferred from the Tribunal's rulings on the technical weaknesses of the EI model that any inclusion of overseas data in constructing Australian benchmarks must be substantively justified and apply sound actuarial adjustments.

Return on debt (return on capital)

Return on debt is a technical parameter which, together with return on equity, determines the rate of return on the regulatory asset base and the return on capital building block. Return on capital comprises about 50 to 75 per cent of a NSW network's total revenue.

PIAC challenged the commencement year for the introduction of the trailing average approach under a method proposed to the AER by the Queensland Treasury Corporation. Its submission, if adopted, would have reduced Networks NSW allowances by $288 million to $706 million per distributor.[17]

The Tribunal held that it was not necessary, for reasons similar to the opex challenge, to consider PIAC's submission on the commencement year for applying the return on debt formula. The Tribunal held that the AER's selection and characterisation of the benchmark

efficient entity under the legislated rate of return objective[18] should be that of a hypothetical efficient competitor in the market for the provision of standard control services (the core network services) with a similar degree of risk to the regulated network, rather than that of a single regulated competitor which is identical for all distributors. The Tribunal held that the AER's definition of the benchmark efficiency entity involved the wrong exercise of a discretion, and its decision on return on debt was unreasonable. As it determined to remit the decision to the AER to be remade, PIAC's various contentions on this topic were unnecessary for the Tribunal to consider.

Other constituent decisions and the Tribunal's directions

The Tribunal also determined that the AER was to remake its constituent decision on the cost of corporate income tax based on a gamma of 0.25, as contended for by the networks, instead of 0.40. A consequence of the AER's remaking of the opex constituent decision was that constituent decisions on the EBSS and STPIS were to be remade (even though no ground of review for them was established).

The Tribunal directed the AER to vary its final decisions in other respects as would be required in remaking the remitted decision in accordance with the Tribunal's directions.

Materially preferable decision

The NEL requires a reviewable decision found to be affected by error to be affirmed if the Tribunal is not satisfied that a materially preferable decision will, or will be likely to, result from a remittal.[19] The Tribunal was satisfied that setting aside the AER's decision and remitting the matter to the AER for a redetermination would, or would be likely to, result in a materially preferable decision with respect to the NEO.

The parties agreed with the AER's submission that 'materially preferable decision' — a term not defined in legislation — was to be given its ordinary meaning of 'considerably more suitable' or 'more suitable or desirable to an important degree'.[20] Beyond that, the question of how to construe and apply the requirement for a 'materially preferable decision' in the context of the merits review regime was one which the Minister and the networks differed upon. The Tribunal summarised:

> At a straightforward level, Networks NSW contends that correcting an error (as established by a ground of review being made out) will, or will be likely to, result in a materially preferable NEO decision. … Networks NSW says, the proper application of the building block methodology in the NER, with each building block determined in accordance with the NER, will promote the NEO.[21]

The submission of the Minister on 'error correction' said:

> It is not open to the Tribunal to conclude that a different decision would be 'materially preferable' in the requisite sense only because it would correct errors in the AER's original decision. … The Tribunal is required to assess the decision under review as a whole: error by the AER in the determination of one building block is a gateway to merits review remedies, but cannot of itself mean that there is a 'materially preferable' decision.[22]

Both parties noted s 71P(2b)(d)(i) of the NEL, which provides that the fact that a ground of review is established must not, in itself, determine the question of whether a materially preferable NEO decision exists.

The contention that error correction *is likely to* lead to a materially preferable NEO decision can be accommodated if one considers that the term 'is likely to' connotes a lower standard of satisfaction than 'will'.[23] The networks' submission misconstrued the regime to suppose

that, notwithstanding the prohibition in s 71P(2b)(d)(i), error correction *will* result in a 'materially preferable decision'. The Minister's supplementary submission, taking a considered view, replied that whether error correction will or will not meet the relevant threshold depends on the 'extent to which correction of one or more errors will contribute to the achievement of the NEO'.[24]

The Tribunal, adopting the Minister's submission, further clarified two points in the application of the regime:

(1) On the proper lens through which to view the presence of 'error' in the regime, '[t]he fact that (as may be accepted) the proper application of the NER … will promote the NEO does not mean that, where a step taken by the AER is, or is not, in full accordance with the building block methodology, the NEO is not being achieved. There may be other matters which the AER considered, and which may balance out any adverse consequences of such non-compliance … so as to [not] impair in a material way the NEO.'[25]
(2) On conceptualising elements of the NEO in attaining a 'materially preferable decision' and within the decision-making process overall, the Tribunal contemplated, with a degree of simplification, that 'the elements of the NEO — in the long-term interests of consumers — are potentially in conflict' and that evaluating attainment of the NEO involves 'some compromise' and a balancing act as between price on the one hand and reliable and secure service provision on the other.[26]

The Tribunal held, in remitting the matter to the AER:

> [I]n significant respects the AER … formed its decision on foundations that are not properly established. … [I]ts decisions have been reached on complex factual bases and/or the exercise of discretions giving rise to very significant outcomes which, by reason of the Tribunal's conclusions on the grounds of review, are not appropriate to support the ultimate decision of the AER.
>
> The Tribunal, in that light, is satisfied that it is appropriate to set aside the AER Networks NSW Final Decisions and to remit them to the AER under s 71P(2)(c) of the NEL.
>
> In that way, the AER will better identify the appropriate revenue during the current regulatory control period for those entities to achieve the level of quality, safety, reliability and security of supply of electricity and of the national electricity system in the long-term interests of consumers, and be in a better position then to also address the desirability of consumers not paying more than is necessary over the long term for those services.[27]

It stated:

> The Tribunal does not express any view about the 'correct' outcome, or the range of correct outcomes, following the AER's reconsideration.[28]

Commentary

'Materially preferable' should operate 'as a meaningful limitation on the availability of relief in these proceedings'.[29] It appears that the Tribunal, upon finding error and upon becoming satisfied that the extent of the error or the balance of the issues warranted the decisions to be remade, remitted the AER's determinations without conceptualising, in any meaningful detail, a 'materially preferable decision' or a range of such putative decisions.

The Minister's supplementary submission to the Tribunal stated that 'measuring whether a putative decision is a "materially preferable decision" necessarily involves a comparative exercise — as between the AER's decision, and one or more alternative putative decisions'.[30] The submission explained that this 'requires an assessment of *respective*

contributions'[31] to the NEO and that assessing a 'range of economically efficient outcomes' requires 'a broad balancing and evaluative exercise — not a granular, purist, mechanistic or formulaic approach, especially not one which focuses on constituent components in isolation'.[32]

The Tribunal stated with a level of generality that a materially preferable decision is one which would enable the AER to 'better identify the appropriate revenue'. One can infer from the Tribunal's reasons for judgment that a decision remade in accordance with its directions is one which the Tribunal considers would better enable identification of the appropriate revenue and be a materially preferable one, notwithstanding that the revenue outcome of such a decision cannot be known, or reasonably estimated, at the remittal stage.

The Tribunal also gave no explicit consideration to the materiality threshold in the requirement for a 'materially preferable decision'. Its repeated use of 'significant' in characterisations variously parsed below suggest that it viewed the materiality threshold as satisfied in the corresponding circumstances:

> [I]n *significant* respects the AER has formed its decision on foundations that are not properly established … giving rise to very *significant* outcomes …[33]

> There are obviously *significant* inter-relationships between elements of the building blocks … *[S]ignificant* building blocks are to be revisited …[34]

The Tribunal evidently assessed each determination as a whole and the interrelationship between constituent decisions in determining to set the determinations aside and remit the matter, satisfying an important tenet of the 2013 revisions to the regime.

Since a 'reviewable regulatory decision', and consequently a materially preferable decision, refers to all constituent components of the relevant decision and not just its final revenue output, a decision can be materially preferable to another simply for having been arrived at by a different means or reason. Therefore, any AER redetermination, if made in accordance with the Tribunal's directions, must be deemed a materially preferable one, even if it were to produce similar or identical revenue outputs to the initial revenue determination.

The merits review regime at present tolerates the presence of error up to a certain threshold (the materiality threshold) as long as the decision as a whole approximates a materially preferable one. As the Tribunal determined to set aside the AER's determinations, the limitations to the availability of relief imposed by the 'materially preferable decision' requirement has so far had no work to do. The Tribunal's decisions do not distinguish themselves, in this essential aspect, from pre-2013 Tribunal decisions in which error correction was an automatic relief upon the finding of error.

Consumer advocacy in the Tribunal's reviews — effective or not?

On both the constituent decisions challenged by PIAC — decisions on opex and return on debt — the Tribunal deemed it unnecessary fully to explore PIAC's contentions because, in both cases, the networks established fundamental error in the AER's approach, while PIAC's appeals were premised on the AER's basic approach being correct.[35] One might be justified, therefore, in concluding that, without PIAC's intervention in these matters, the Tribunal probably would have arrived at the same or a substantially similar outcome.

Nevertheless, PIAC's appeals in these proceedings were the first in Australia by a consumer advocate of a regulated utility's revenue determination. Revisions to the NEL in 2013 aimed to promote consumer intervention and participation in Tribunal reviews by limiting any cost

order against a small/medium user or consumer in favour of another party to the reasonable administrative costs of that other party.[36] The same revisions provide that a network must not include any costs that it 'incurs, or is forecast to incur, as a result of or incidental to a review' in its capital or operating expenditure or seek to recover that cost from end users via a cost pass-through.[37] Networks NSW, which reportedly incurred legal costs in the vicinity of $90 million[38] in its merits review applications to have the AER's determinations set aside, must meet its legal bill from the dividend it pays to the NSW Government as shareholder ($90 million is about eight per cent of the networks' combined $1.1 billion net profit in 2014–15[39]), while PIAC, describing the challenge as a David and Goliath battle, funded its challenge from its annual operating budget of $3 million.[40]

PIAC, already limiting its appeals to the major revenue drivers, attempted to distil its submission to the making of pointed legal arguments rather than detailed actuarial ones. But, as the review and the review framework are focused on assessing the precision of actuarial approximations of competitive market outcomes in the pricing of natural monopoly services, the strength of the networks' expert evidence cumulatively convinced the Tribunal of the extent of the AER's error. The Tribunal conceded:

> [F]or every competing argument there is a supporting expert or experts and … [the Tribunal must] look through the inevitable conflict and difference of views between experts, all advocating positions which they regard as being preferable … to determine whether an advocated materially preferable NEO decision is, indeed, materially preferable ...[41]

Consumer interveners' weak engagement with the Tribunal's evaluation of technical evidence emerges as a key limitation to their success in any future appeals.

Impending privatisation

It is fair to observe that Networks NSW's apparent success in these proceedings can be attributed, in part, to two circumstances which together realised appeals of the scale which transpired. The first is the Networks NSW cooperative arrangement, established in July 2012, which brought the three distributors under the governance of a single chief executive officer and a common board of directors. That arrangement facilitated the networks' joint appeal of the AER's determinations and the cohesiveness of the arguments they advanced in these proceedings. The second is the NSW Government's reported $90 million investment in these appeals to overturn the AER's cuts to network revenue — a measure directed in part towards preserving the value of the state's infrastructure for the government's impending asset sales.

Independently of the AER's and the Tribunal's regulatory determinations, the *Electricity Network Assets (Authorised Transactions) Act 2015* (NSW) commenced on 4 June 2015 for the 99-year lease of 49 per cent of the four NSW transmission and distribution networks. Under the proposed lease, 50.4 per cent of Ausgrid and Endeavour Energy will be privatised, with Essential Energy only to remain government-owned. The full lease of transmission service provider Transgrid in November 2015 netted the NSW Government $10.3 billion in revenue to the state budget. Although it is irrelevant to the Tribunal's determinations, the networks' revenue allowances directly impact on the sales bids they attract. The partial privatisation of two of the three distributors to separate buyers, once complete, will also dissolve the Networks NSW cooperative arrangement, meaning that any future merits appeals, even if conducted jointly, are unlikely to be of the scale of those recently witnessed.

Conclusion

PIAC's intervention in these proceedings achieved consumer presence in the first major application of a regime which focuses merits review on the long-term interests of consumers.

Endnotes

1 Australian Energy Regulator, 'AER Expects Final Decisions to Lower Electricity Bills for ACT and NSW Customers' (Media Release, 30 April 2015) <www.aer.gov.au>.
2 *Application by Public Interest Advocacy Service Ltd and Ausgrid Distribution* [2016] ACompT 1; *Application by Public Interest Advocacy Service Ltd and Endeavour Energy* [2016] ACompT 2; *Application by Public Interest Advocacy Service Ltd and Essential Energy* [2016] ACompT 3; *Application by ActewAGL Distribution* [2016] ACompT 4; and *Application by Jemena Gas Networks (NSW) Ltd* [2016] ACompT 5.
3 Public Interest Advocacy Centre, 'PIAC Objectives and Strategies', <www.piac.asn.au>.
4 See Sophie Li, 'Merits Review of Regulatory Determinations in the Economic Regulation of Energy Utility Infrastructure' (2016) 83 *AIAL Forum* 56, for details of how this revised regime operates or should operate in contra-distinction to its predecessor.
5 National Electricity Law ss 71C and 71E.
6 *Application by Jemena Gas Networks (NSW) Ltd* [2016] ACompT 5.
7 National Electricity Law s 7A.
8 Ibid s 7.
9 *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2, [20].
10 National Electricity Rules cl 6.5.6(c).
11 Ibid.
12 Ibid cl 6.5.6(a) and (e).
13 Ibid cl 6.5.6(d).
14 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [1208].
15 Ibid [495], [496] (applying concurrently to the PIAC – Endeavour Energy and PIAC – Essential Energy appeals).
16 Ibid [1207], [1210].
17 Ibid [1214].
18 National Electricity Rules cl 6.5.2(c).
19 National Electricity Law s 71P.
20 Submission of the Australian Energy Regulator in Matters 1–8 of 2015 in the Australian Competition Tribunal, 29 June 2015, [79].
21 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [1178].
22 Submission of the Commonwealth Minister for Industry and Science (from 21 September 2015, the Minister for Resources, Energy and Northern Australia) in Matters 1–8 of 2015 in the Australian Competition Tribunal, 2 September 2015 (Submission of the Minister), [33].
23 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [99].
24 Supplementary Submission of the Commonwealth Minister for Resources, Energy and Northern Australia (before 21 September 2015, the Minister for Industry and Science) in Matters 1–8 of 2015 in the Australian Competition Tribunal, 14 October 2015 (Supplementary Submission of the Minister), [2].
25 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [1179].
26 Ibid [1180]–[1181].
27 Ibid [1218]–[1220].
28 Ibid [1226].
29 Commonwealth Minister for Industry and Science, above n 22, [42].
30 Commonwealth Minister for Resources, Energy and Northern Australia, above n 24, [3].
31 Ibid [3(a)] (emphasis added).
32 Ibid [3(f)].
33 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [1218] (emphasis added).
34 Ibid [1221] (emphasis added).
35 Ibid [1210], [1214].
36 National Electricity Law s 71X(2).
37 Ibid s 71YA.
38 Katie Walsh, 'Electricity Giants Invest $90 million, 100,000 Pages in Battle Boon for Lawyers', *Australian Financial Review*, 10 September 2015.
39 Ausgrid, Endeavour Energy, and Essential Energy Annual Reports 2014–15, as tabled in the NSW Parliament, <www.parliament.nsw.gov.au>.
40 Nick Dole, 'NSW "Poles and Wires" Electricity Giants Challenge Ruling over Lower Prices', *ABC News*, 1 July 2015.
41 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [485].