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Incorporating the 2017 National Lecture on  
Administrative Law by Peter Hanks,  
Barrister of Owen Dixon Chambers West, Melbourne.

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## ADMINISTRATIVE LAW AND WELFARE RIGHTS: A 40-YEAR STORY FROM *GREEN V DANIELS* TO 'ROBOT DEBT RECOVERY'

*Peter Hanks\**

I want to ask a simple question: can administrative law (through its principles and processes) be deployed to vindicate the rights of the members of our community who, from time to time, depend on social security payments for their income? How can administrative law ensure that those rights are not ignored or overridden by politicians, senior officials and decision-makers driven by concern about 'welfare cheats' or demands for expenditure savings — in outlays on transfer payments and in the employment costs involved in administering those payments?

To attempt to answer that question, I will look at two episodes, 40 years apart, where the department responsible for administering social security payments adopted initiatives designed to achieve those ends — initiatives that arguably twisted or ignored the requirements of the governing legislation.

The first initiative was adopted by the Department of Social Services in 1976–77 and was aimed at a common scapegoat: young people — in this case, 'school leavers', who were alleged to be engaged as a class in abusing their entitlement to unemployment benefits.

The second initiative was adopted by the Department of Human Services (DHS) in 2016–17 and was aimed at another favourite scapegoat: social security 'cheats' — people who, it was alleged, had received social security payments beyond their entitlements.<sup>1</sup>

In the first example, the Department's initiative (denying unemployment benefits to all school leavers for up to three months) was found, in a judicial review proceeding brought in the High Court, to flout the Department's obligation to administer the governing legislation — s 107 of the *Social Security Act 1947* (Cth).

The second example is still being played out. It involves assuming that data from the Australian Taxation Office (ATO) on 'customers' taxable income is a reliable gauge for the income test under the *Social Security Act 1991* (Cth) and demanding that 'customers' prove that the assumed hypothetical debt (based on the ATO data) is incorrect.<sup>2</sup>

On the (as yet untested) assumption that the second example also represents a failure by the department to administer the governing legislation — especially ss 1222A and 1223 of the *Social Security Act 1991* (Cth) — my question is: can administrative law protect the interests of the so-called 'customers' who are being told they have to prove that they do not have an assumed hypothetical debt to the Commonwealth? What are the possible mechanisms for vindicating those interests; and how effective are those mechanisms likely to be?

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\* *Peter Hanks is a barrister of Owen Dixon Chambers West, Melbourne. This is an edited version of the National Lecture on Administrative Law presented at the Australian Institute of Administrative Law National Conference, Canberra, ACT, 21 July 2017.*

## **1976–1977: School leavers and unemployment benefits**

In 1976, the Director-General of Social Services, the permanent head of the department that administered the *Social Services Act 1947*, issued new instructions to officers making decisions under s 107 of that Act, which prescribed the conditions of qualification for unemployment benefits (the predecessor of Newstart allowance).

### ***The legislative framework***

The qualifications fixed by paras (a) and (b) of s 107 were objective and simple: a minimum age of 16, a maximum age of 60 or 65 and Australian residence. Section 107(c) fixed a subjective qualification: that the person satisfy the Director-General of three things — namely, that the person:

- (i) is unemployed ...
- (ii) is capable of undertaking, and is willing to undertake, work which, in the opinion of the Director-General, is suitable to be undertaken by that person; and
- (iii) has taken reasonable steps to obtain such work ...

### ***The Government's policy***

The new instructions were, in short, that young people leaving secondary school at the end of the 1976 school year could not qualify for unemployment benefits until after the commencement of the next school year. That instruction was expressed in the 'Unemployment and Sickness Benefit Manual'.<sup>3</sup> After asserting that, in the past, school leaver claimants had been paid unemployment benefits but had later resumed their studies, and had therefore received benefits to which they were not entitled, the manual continued:

As a general rule, therefore, people who leave school and register for employment within 28 days prior to the end of the school year, or at any time during the long vacation, will not be in a position, until the end of the school vacation, to satisfy the conditions of eligibility for unemployment benefit which require the claimant to be unemployed and to have taken reasonable steps to obtain work.

### ***The case of one school leaver — Karen Green***

Karen Green was one of thousands of young people who left school at the end of 1976. Karen, who was 16 and had completed year 10, lived in Hobart — an area where a high proportion of young people were unemployed. After registering with the Commonwealth Employment Service (CES) for assistance in finding work on 25 November 1976, Karen returned to the CES on 20 December 1976 and was told no jobs were available and she could not receive unemployment benefit because school leavers in Tasmania would not receive that benefit until 22 February 1977 — the day when the new school year was due to start in Tasmania.

Karen looked for work in December, January and February without success. As she had been instructed, Karen returned to the CES on 22 February 1977 and was told there were no job vacancies. Soon afterwards, Karen received her first unemployment benefit cheque, calculated from 22 February 1977.

### ***The litigation***

Meanwhile, on 24 December 1976, Karen had issued a writ in the original jurisdiction of the High Court against the Director-General, seeking declaratory relief and invoking that Court's jurisdiction under s 75(iii) of the *Constitution*, her matter being one in which a person being

sued on behalf of the Commonwealth, the Director-General, was a party. The writ was issued in the Melbourne Registry and the matter was heard by Stephen J.

To us in 2017, the choice of the High Court may seem exotic, but I ask you to remember (or for many of you to imagine) late 1976:

- The Federal Court was not to open its doors until 1 February 1977. In any event, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) had not been enacted. There was no s 39B in the *Judiciary Act 1903* (Cth): s 39B, in its original constrained form (mirroring s 75(v) of the *Constitution*), was added to the Judiciary Act in 1983.<sup>4</sup>
- The Administrative Appeals Tribunal (AAT) had commenced operating on 1 July 1976 but had no jurisdiction to review decisions made under the Social Services Act until 1 April 1980, when the Schedule to the *Administrative Appeals Tribunal Act 1975* (Cth) was amended<sup>5</sup> to allow an application to the AAT for review of a decision of the Director-General affirming, varying or annulling a decision of an officer under the Social Services Act if that decision had been reviewed by the Social Security Appeals Tribunal. (The review process was a triumph of elaboration: three levels of decision-making and review stood between each applicant and access to the AAT.)

### **The result — Green v Daniels**

Returning to our narrative: on 15 April 1977, in a lucid and compelling judgment,<sup>6</sup> Stephen J found that Karen Green (together with very many others) had ‘been dealt with in accordance with a general administrative rule intended for just such an ordinary case as hers’.<sup>7</sup> Justice Stephen acknowledged that the Director-General could, ‘in the interests of good and consistent administration’, provide guidelines for the benefit of delegates, indicating what the Director-General regarded as sufficient to justify the state of satisfaction required by s 107(c) of the Social Services Act, but the Director-General would act unlawfully if the instructions were ‘inconsistent with a proper observance of the statutory criteria’.<sup>8</sup>

The effect of the Director-General’s instructions was, Stephen J said, that:

[The two criteria in s 107(c)(i) and (iii)] have had superimposed upon them a requirement which prevents them from being satisfied by any school leaver during the school holidays, a period of about three months, and which, in effect, renders them inoperative during that period.<sup>9</sup>

Justice Stephen said that, in the case of school leavers, the status of being ‘unemployed’ depended on the former student leaving school with the intention of not returning but entering the workforce and beginning to seek employment. Although ascertaining the school leaver’s intention might pose a difficulty, the Director-General had chosen to resolve that difficulty by waiting until the outcome revealed itself at the end of the school holidays, which would ensure that the Director-General was not deceived. However, the Director-General had adopted that approach at the cost of being wrong in the case of all those applicants who had truthfully told him that they had ended their school days — whether they persisted in that intention or changed their minds and returned to school.<sup>10</sup>

His Honour said of the Director-General’s approach:

Any method which produced erroneous results of this magnitude is clearly unacceptable as a means open to the Director-General in satisfying himself as to the subject matter of s 107(c)(i).<sup>11</sup>

Justice Stephen accepted that there was ‘considerable scope for the giving of instructions by the Director-General to his delegates as to what is involved in “reasonable steps”’ — the



criterion in s 107(c)(iii) — but the Director-General was not entitled ‘to impose a quite arbitrary time of almost three months before this criterion is to be regarded as having been complied with’.<sup>12</sup> Moreover, his Honour said:

it cannot be proper to impose such a period in the case of one class of applicants, those who leave school within twenty-eight days of the end of the school year, while imposing upon no other class of applicant any such requirement relating to a minimum period of job-seeking.<sup>13</sup>

Because Karen Green’s claim for unemployment benefit had not been considered in the way that s 107 contemplated it should be, she was entitled to some relief:<sup>14</sup> not the declaration sought on her behalf that she was qualified for the benefit — because that qualification remained for determination by the Director-General or his delegates in the light of s 107(c)<sup>15</sup> — but a declaration that the Director-General’s delegate ought to have applied his mind to Karen’s eligibility for unemployment benefit, testing it by reference to s 107(c) and ‘not ... distracted from his task by the requirement laid down in the Manual’.<sup>16</sup>

### **Evaluating Green v Daniels**

The result in *Green v Daniels*, and Stephen J’s reasoning, neatly illustrated the strengths and limitations of judicial review as a means of vindicating the interests of individuals against those whose job is to administer the law.

As to strengths, the case shows how judicial review can secure the rule of law — the fundamental proposition that statutory powers and functions must be exercised within the parameters prescribed by the relevant statute, with those parameters determined by the courts.<sup>17</sup> Justice Brennan put the point this way, in a passage quoted by Gleeson CJ in *Plaintiff S157 v The Commonwealth*:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.<sup>18</sup>

In line with that conception, Stephen J found that the Director-General had rendered s 107(c)(i) and (iii) of the Social Services Act inoperative during a three-month period, suspended the criteria prescribed by those subparagraphs and applied an erroneous test in determining that Karen Green was ineligible for unemployment benefits until 22 February 1977. The consequence was that the Director-General’s delegates had failed to administer the Social Services Act because they had been distracted from that task by the Director-General’s directions.<sup>19</sup>

We can also see that *Green v Daniels* demonstrated the capacity of judicial review to deliver a relatively quick and clear correction of unlawful executive action: the case commenced with the filing of a writ on 24 December 1976, was heard between 4 and 9 March 1977<sup>20</sup> and was decided on 15 April 1977. The judgment was identified by Stephen J as having direct implications for ‘very many other school leavers’,<sup>21</sup> because Karen Green and ‘very many others’ had ‘been dealt with in accordance with a general administrative rule’.<sup>22</sup> The declarations, although framed by reference to Karen Green’s claim for unemployment benefits, put an end to any assertion that the general administrative rule was lawful.

As to limitations, the case amply demonstrated that judicial review can only deal with the lawfulness of the exercise of power or the performance of functions: it cannot deal with the merits of that exercise or performance. Justice Brennan, again, put the limitation in the following way in *Attorney-General (NSW) v Quin*:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality,<sup>23</sup> are for the repository of the relevant power and, subject to political control, for the repository alone.

In line with that conception, Stephen J said that he could not declare Karen Green entitled to unemployment benefits during the period when the Director-General's delegates had excluded her from that entitlement by following the Director-General's unlawful instructions: that course was not open, Stephen J said, because:

[It is] to the Director-General or his delegates that [s 107(c)(i) and (iii) of the Social Services Act] assigns the task of attaining satisfaction and the Court should not seek to usurp that function.<sup>24</sup>

But that limitation (the court determines whether power has been exercised lawfully, not whether the result of that exercise is correct) is also a source of the strategic power of judicial review. Because the court does not, in general, focus on the outcome of the exercise of power in a particular case,<sup>25</sup> its conclusion on the lawfulness of that exercise can have consequences that transcend the particular case before the court — as happened in *Green v Daniels*.

### 1976–1997: The new age of review of executive action

The AAT, which had been recommended by the Kerr Committee, commenced operating from 1 July 1976 and quickly accumulated a list of specific review jurisdictions. The AAT followed a model that had been set by the Taxation Boards of Review and other tribunals. Its function was to be administrative, to review decisions within its jurisdiction on the merits, not merely to decide whether the decision under review was infected by error but to make the correct or preferable decision on the material before the AAT.<sup>26</sup>

As I have already noted, the AAT was eventually given jurisdiction to review decisions made under the *Social Services Act 1947* from 1 April 1980 — after review of the primary decision by the Social Security Appeals Tribunal and the Director-General. The AAT quickly demonstrated its capacity to review those decisions by reference to both fact and law, to receive new evidence, to consider and criticise departmental policies and to replace the decisions under review with its own decisions on the merits despite attempts<sup>27</sup> by the Director-General to constrain that review jurisdiction, as in cases such as *Director-General of Social Services v Chaney*,<sup>28</sup> *Director-General of Social Services v Hangan*<sup>29</sup> and *Director-General of Social Services v Hales*.<sup>30</sup>

The Commonwealth Ombudsman, another element in the package of reforms recommended by the Kerr Committee and endorsed by the Bland Committee, was established by the *Ombudsman Act 1976* (Cth). The first Ombudsman, Professor Jack Richardson, commenced operating on 1 July 1977. The Ombudsman Act defined the function of the Ombudsman in s 5: to investigate, either in response to a complaint or on the Ombudsman's own motion, action that relates to a matter of administration by a department or a prescribed authority.<sup>31</sup> The Ombudsman was authorised, by s 15, to report the relevant agency and its responsible Minister where, after investigation, the Ombudsman found that the action was affected by one or more of specified deficiencies, including that it appeared to have been contrary to law; was unreasonable, unjust, oppressive or improperly discriminatory; or was otherwise, in all the circumstances, wrong. (Those essential features remain part of the current Ombudsman Act.)

The Ombudsman's website explains the distinctive nature of the Ombudsman's function:

We consider and investigate complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government department or agency ...

We cannot override the decisions of the agencies we deal with, nor issue directions to their staff. Instead, we resolve disputes through consultation and negotiation, and if necessary, by making formal recommendations to the most senior levels of government.<sup>32</sup>

We also know that, at the Commonwealth level, remedies for individuals affected by official action have been expanded to include access to government information (under the *Freedom of Information Act 1982* (Cth)), a privacy right (under the *Privacy Act 1988* (Cth)) and protection from discrimination on various grounds (in the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth)). In turn, the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth) provide for review by the AAT of decisions made under those Acts. Decisions made under the discrimination legislation can be reviewed through the standard judicial review processes; and complaints of discrimination can be ventilated and resolved by the Federal Court through the processes established by div 2 of pt IIB of the *Australian Human Rights Commission Act 1986* (Cth).

In addition, the process of judicial review has been very much improved since 1977 (although we are entitled to ask whether the improved system could match the efficiency and focus that we saw in *Green v Daniels*; perhaps a skilled carpenter can create a masterpiece with the most basic tools):

- In 1977, the ADJR Act introduced a codified form of judicial review in the Federal Court, as recommended by the Kerr Committee, and endorsed by the Ellicott Committee.
- That was followed in 1983 by the addition<sup>33</sup> of s 39B(1) and, in 1997, by the addition<sup>34</sup> of s 39B(1A) to the *Judiciary Act 1903* (Cth), giving the Federal Court a wide judicial review jurisdiction in matters where relief is sought against an officer of the Commonwealth<sup>35</sup> and in matters arising under any law of the Commonwealth.<sup>36</sup>
- The second of those additions is the most expansive; and, for practical purposes, s 39B(1A) provides the broadest and most efficient foundation for invoking the judicial review jurisdiction of the Federal Court: it has none of the complexity (and potential traps) of the ADJR Act<sup>37</sup> or the limited range of s 39B(1).<sup>38</sup>
- However, one must admit that 40 years of litigation under the ADJR Act have demonstrated the ADJR Act's value as well as its limitations. In particular, the enforceable obligation to give reasons and simple 'error of law' as a ground of review add significantly to the efficacy of judicial review.
- Along with the improvements in the process of judicial review, the High Court's power to remit all or part of a matter commenced in that Court has been enlarged. In 1984, subs (2A) was added<sup>39</sup> to s 44 of the *Judiciary Act*, giving the High Court power to remit to the Federal Court all or part of 'a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party ... at any time pending in the High Court' so that, from 1984, the High Court has had the power to remit a matter such as *Green v Daniels* to the Federal Court.

### **2016–2017: Overcoming an inconvenient burden of proof to recover 'debts'**

In July 2016, Centrelink (a division of DHS) launched a new method for raising and recovering what Centrelink chose to describe as 'debts'. The scheme is described in detail in a report by the Acting Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, published in April 2017.<sup>40</sup>

**Step 1: Reading the legislation**

It is helpful, first, to consider the legislative framework for the recovery of debts arising under the *Social Security Act 1991* (Cth).<sup>41</sup> Typically, a debt might arise where a person receives a form of payment, such as parenting payment or Newstart allowance, for which the person is not qualified; or a debt might arise where a person receives a form of payment, for which the person is qualified, at a rate higher than the correct rate — because the person's other income was higher than recorded by Centrelink. The income test for Newstart is based on the individual's income (as defined in s 8 of the Act) during the relevant fortnight for which the allowance is paid.<sup>42</sup>

Section 1222A(a) provides that:

[An amount that has been paid by way of social security payment] is a debt due to the Commonwealth if, and only if ... a provision of this Act ... expressly provides that it is ...

The central provision for the purposes of s 1222A(a) is s 1223(1), which provides that, subject to the other subsections in s 1223:

if:

- (a) a social security payment is made; and
- (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;

the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

We need not look at the other subsections, apart from s 1223(1AB), which provides a non-exhaustive list of situations in which 'a person who obtained the benefit of a social security payment is taken not to have been entitled to obtain the benefit', including where:

- (a) the person for whose benefit the payment was intended to be made was not qualified to receive the payment;
- (b) the payment was not payable;
- (c) the payment was made as a result of a contravention of the social security law, a false statement or a misrepresentation ...

Returning to s 1223(1), it is plain from paragraph (b) that an absence of an entitlement to obtain the benefit of a payment is a precondition to a debt being created, and we are reminded emphatically by s 1222A(a) that a debt to the Commonwealth can *only* arise pursuant to an express provision of the Social Security Act (even if we had forgotten that clear legal authority would be required before an individual becomes a debtor).

So we can also see that the existence of a debt to the Commonwealth is something to be established by the Commonwealth as the entity which asserts the existence of the debt: the Social Security Act cannot be read as requiring that a person who has received a social security payment establish that there is no debt — indeed, s 1222A(a) and s 1223(1) deny any such possibility.

We should also note that s 8 of the *Social Security Administration Act 1999* (Cth) directs the Secretary, '[i]n administering the social security law ... to have regard to ... (f) the need to apply government policy in accordance with the law'.

### ***The new 'debt' recovery process***

Against that background (which could hardly be described as arcane), DHS launched what the Acting Ombudsman described as the 'online compliance intervention (OCI) system for raising and recovering debts'. The Acting Ombudsman went on to describe the OCI system:

The OCI matches the earnings recorded on a customer's Centrelink record with historical employer-reported income data from the Australian Taxation Office (ATO). Parts of the debt raising process previously done manually by compliance officers within DHS are now done using this automated process. Customers are asked to confirm or update their income using the online system. If the customer does not engage with DHS either online or in person, or if there are gaps in the information provided by the customer, the system will fill the gaps with a fortnightly income figure derived from the ATO income data for the relevant employment period ('averaged' data).<sup>43</sup>

The OCI system, then, starts with ATO records of income paid to social security recipients, applied through an automated process, and then requires recipients (described as 'customers') to confirm or update their income. If a recipient does not provide complete information, the recipient's income will be taken from the ATO data and a 'debt' calculated accordingly.

The sample first letter included in the Acting Ombudsman's report,<sup>44</sup> dated August 2016, informed the addressee that the amount of income recorded by the ATO 'is different to the amount you told us' and asked the addressee 'to confirm your employment income information ... online' within 20 days; otherwise Centrelink would 'update your details using the enclosed employment income information' — that is, the ATO data.

According to another sample letter included in the Acting Ombudsman's report,<sup>45</sup> also dated August 2016, the process concluded with a decision that the addressee had a debt, including a 10 per cent recovery fee.<sup>46</sup>

The nature of the process undertaken by Centrelink between those two letters is described in the Acting Ombudsman's report.<sup>47</sup> If the addressee did not go online to attempt to enter income information, 'the OCI apportioned the ATO earnings information evenly over the period the employer told the ATO the customer worked for them, to calculate any debt' and generated a debt notice. If the addressee went online and supplied income information, the OCI (that is, an automated program), and possibly a compliance officer, assessed the evidence to decide the outcome — debt or no debt — and the OCI generated any debt notice.

The first of the 'main efficiencies' said to be gained by the OCI system was described in the Acting Ombudsman's report as 'gained by':

DHS no longer using its information gathering powers [under sections 63, 192 and 195 *Social Security (Administration) Act 1999*] to request information directly from third parties, such as employers. Under the OCI, it is now the customer's responsibility to provide this information ...<sup>48</sup>

### ***Problems with the OCI process***

Putting aside the adequacy of the process where an addressee went online in response to Centrelink's letter, there are major concerns with the process where the addressee did not go online. (In this context, I will limit my comments to an employee who had been paid Newstart allowance — where the income test under s 1068 of the *Social Security Act 1991* (Cth) uses the recipient's income in the particular fortnight of payment of the allowance.)

First, the process was built on the premise that the onus lay on the social security recipient to prove that Centrelink's assumption as to the recipient's income was not correct — whereas the Social Security Act makes the existence of a debt dependent on the Commonwealth establishing the receipt of amounts to which the recipient was not entitled.

Secondly, the process used the ATO earnings information, spread evenly over the period of employment (a period of up to 12 months), despite the social security income test using income received in each fortnight<sup>49</sup> and despite the ATO earnings information using an income definition that differs from the definition in the Social Security Act.<sup>50</sup> The Acting Ombudsman's report highlighted the implications of that difference:

Under the Social Security Act, a fortnightly income test is applied to determine a daily rate of payment, generally paid in fortnightly instalments. A person's entitlement in any given fortnight will therefore be assessed on the income they earned, derived or received that fortnight. This is different to the tax system (including family payments) which is concerned with assessing annual income. ATO data normally provides an aggregate annual employment income figure and does not provide the detail required to accurately assess fortnightly social security entitlements.<sup>51</sup>

### ***The Ombudsman's report's recommendations and its omissions***

The Acting Ombudsman proposed, and DHS accepted, a series of changes to the OCI system. The report recommended improvements in DHS's systems and communications;<sup>52</sup> better training for DHS staff and adequate support for people who are not 'digital ready';<sup>53</sup> and that DHS improve its planning for an implementation of new programs such as the OCI — which the report, tellingly, identified as having 'effectively shifted complex fact finding and data entry functions from the department to the individual'.<sup>54</sup>

I say 'tellingly' for two reasons:

- First, the report's few words focus on the radical change to 'debt' recovery involved in the OCI. From a relatively labour-intensive process, in which staff collected information about social security recipients (often using compulsive powers) and compared that information with the information previously used to calculate and pay benefits, in order to determine whether there had been an overpayment,<sup>55</sup> DHS moved to a mostly automated system, which created the presumption of a debt on the basis of dubious information and then demanded that the individual social security recipient displace that presumption. That is, the OCI is revealed as an innovation designed to collect money from individuals (alleged to be debtors of the Commonwealth) with minimum expenditure on the part of DHS: fewer workers and more money recovered will provide a dramatic 'efficiency dividend'.
- Secondly, there is no suggestion in the report that the radical shift of functions imposed by DHS's adoption of the OCI (that is, a shift of functions from DHS to the individual) might lack support in, and possibly contradict the requirements of, the Social Security Act. Perhaps the most striking thing about the report (at least to someone who starts with the simple edict: 'read the Act!') is what it fails to say: although the report offers the disclaimer, 'This report does not comment on the policy rationale behind the OCI process',<sup>56</sup> the report says nothing about the legislative context in which the OCI operates; it does not offer any comment on the question whether a debt *can* be created presumptively; and it does not ask whether DHS *can* shift the function of complex fact-finding to the individual and require the individual to disprove the existence of a debt.

**After February 2017**

Despite (or perhaps because of) the improvements recommended in the report, the OCI system remained fundamentally unchanged at the end of the Acting Ombudsman's investigation. The report summarises the changes made to the original system in the course of the investigation: they include changes to the letters sent to 'customers', improved on-screen communication by those 'customers' with the OCI and an increase in interventions by Centrelink staff.<sup>57</sup>

From February 2017, the initial letter from Centrelink starts with the disclaimer 'This is not a debt letter' but requires the addressee to confirm or update information from the ATO about the addressee's income and warns:

if you don't confirm or update the information within 28 days, we may apply the employment dates and income from the ATO to your record. This may result in a debt you will need to repay.<sup>58</sup>

A reminder letter confirms those essential elements: it, too, is said to be 'not a debt letter', but failure to confirm or update the ATO-derived information 'may result in a debt you will need to repay'.<sup>59</sup> Where the addressee does not contact Centrelink or the online OCI, a notice of decision letter now reads:

Because we did not hear from you, we have applied the ATO employment dates and income included with this letter to your record.

This has resulted in a debt of \$[total debt for this assessment] ...

This is a notice of decision under social security law.<sup>60</sup>

Whatever the terms used in the letters, the OCI remains a system in which DHS uses information from the ATO to create a presumed (even if hypothetical) social security debt, tells social security recipients that they need to prove that the presumed hypothetical debt is wrong and, in the absence of that proof, proceeds to raise a debt based on the ATO information. The OCI system adopts that approach, rather than undertaking (through the compulsive information-gathering powers available to DHS) to collect information from employers, banks or social security recipients themselves.

The appearance of the OCI system placing a reverse onus on social security recipients was raised before the Senate Community Affairs References Committee on 18 May 2017.<sup>61</sup> In its report, published on 21 June 2017, the majority of that committee said:

The committee is concerned that the department has placed the onus on the individual to demonstrate that a purported debt does not exist ... The committee notes that no other party is entitled in law to assert that a debt exists and require the other party to disprove it ...<sup>62</sup>

Although that observation comes close to identifying a problem with the OCI system, it does not locate that problem in s 1222A(a) and s 1223(1) of the Social Security Act.

The DHS Secretary maintained (in evidence to the Senate committee) that there has been no change in the assessment of income and calculation of debts; that 'Initial letters are not debt letters'; and that 'No assumptions about debt are made'. However, as the Acting Ombudsman found, the OCI system *has* changed the system for calculating debts by 'effectively shift[ing] complex fact finding and data entry functions from the department to the individual'<sup>63</sup> and proceeds on the assumption that ATO data, unless contradicted or explained by a social security recipient, will support the raising of a debt based on a

presumed overpayment — where, as the Acting Ombudsman also found, the ATO data does not fit with the social security income test.<sup>64</sup>

To my mind, again, there is at least a possibility that the OCI system proceeds on a basis, and adopts a series of steps, that contradicts the requirements of s 1222A(a) and s 1223(1) of the Social Security Act.

### ***Administrative law remedies?***

For the moment, I ask that you accept that it is possible that the OCI system does not measure up against those provisions. On that premise, what are the administrative law remedies that could protect the interests of the social security recipients who are being pursued by the OCI system? There are at least two ways in which those are likely to be affected by the use of the OCI system: to administrative lawyers, the most obvious way is by the making of a decision, at the end of the process, to raise and recover a debt to the Commonwealth, but the early stages of the process are likely to have a substantial effect on the targeted social security recipients, as the Acting Ombudsman's Report noted,<sup>65</sup> and one can properly ask: why should anyone be subjected to the pressure and distress inherent in the OCI system if that system contradicts the terms of the Social Security Act?

Of course, exploring potential administrative law remedies for arguably unlawful administrative action is itself speculative. Perhaps the exploration is not as speculative as the OCI system itself, but it is nevertheless speculative, because the exact dimensions of the individual case that may end up framing a challenge to the OCI system are unknown at this stage. Leaving those uncertainties aside for now, what are the possibilities?

Apart from the Ombudsman Act, administrative law remedies are designed to review and correct decisions of public agencies rather than communications between those agencies and members of the community.

### ***Review by the AAT***

Obviously, once DHS (through Centrelink) proceeds to the point of issuing a notice of decision letter,<sup>66</sup> the social security recipient can seek review of that decision in the AAT. The AAT can then examine all the material in the possession of DHS (relevant to the decision to raise the debt) and resolve the full range of issues that affect the decision under review: the statutory foundation for the decision (in particular, what provision of the social security law expressly provides that there may be a debt due to the Commonwealth) and the factual foundation for the decision (typically, the level of the social security recipient's income in each of the relevant fortnights).

It is unlikely that AAT review would set aside the decision to raise the debt on the simple ground that the steps taken by DHS had reversed the burden of proof — because the review will concentrate on whether the decision to raise the debt is the correct or preferable decision and any ultimate decision to set aside the decision to raise the debt is likely to reflect the AAT's factual assessment of the applicant's level of income in each of the applicable fortnights of payment (of Newstart allowance or other social security payment). Although the AAT could well find that, taking into account all the material before the AAT, the existence of a debt as required by s 1222A of the Social Security Act is not established, it is not likely that such a decision would focus on any underlying deficiency in the OCI system or would provide the opportunity to determine whether that system is consistent with the legislative provisions that control the existence of debts due to the Commonwealth.



*The Ombudsman*

At the commencement of the OCI process, where there is no ‘decision’ capable of supporting an application for review to the AAT, the Ombudsman Act could provide a form of review that would address the question whether the OCI system, as administered by DHS, is consistent with the critical legislative provisions. The steps taken by DHS in writing the initial<sup>67</sup> and reminder<sup>68</sup> letters are plainly within the Ombudsman’s remit: they relate to a matter of administration.<sup>69</sup> And the question whether the substance of those letters (particularly, the warning that failure to respond ‘may result in a debt you will need to repay’) is either ‘contrary to law’ or ‘wrong’<sup>70</sup> would allow the Ombudsman to test and answer the fundamental question whether the OCI process matches, or ignores, the constraints in the Social Security Act.

However, the report published by the Commonwealth Ombudsman’s Office in April 2017 offers little reassurance that the investigation and report processes of that office can deal with that fundamental question: as I have already noted,<sup>71</sup> Report No 2/2017 says nothing about the legislative context in which the OCI operates. It is, of course, possible that the Acting Ombudsman thought about that issue and actually came to a conclusion; however, if the Acting Ombudsman did that, there is not the least hint in Report No 2/2017 that he did; nor is there anything in Report No 2/2017 that would allow the reader to understand what the claimed legal basis for the OCI system might be or to critique that basis. The report’s failure to identify the legislative foundation (or to consider whether that foundation was absent) remains a serious weakness of Report No 2/2017.

*Judicial review*

What of the potential of judicial review to interrogate the legitimacy of the OCI system? As with AAT review, review by the Federal Court under s 5 of the ADJR Act must wait on DHS actually making a decision to raise a debt. However, s 6 of the ADJR Act can provide the basis to challenge the process inherent in the OCS system before any decision is made — because the steps taken by DHS<sup>72</sup> amount to conduct in which a person is engaging for the purpose of making a decision to which the ADJR Act applies (that is, a decision of an administrative character made under an enactment) — namely, a decision to raise a debt due to the Commonwealth under the Social Security Act.

The grounds on which an order of review in respect of that conduct could include that ‘the enactment in pursuance of which the decision is proposed to be made does not authorize the making of the proposed decision’<sup>73</sup> and that ‘an error of law ... is likely to be committed in the making of the proposed decision’.<sup>74</sup>

If one of the prescribed grounds of review is made out, the Federal Court (or the Federal Circuit Court) could make an order declaring the rights of the parties (the applicant and the respondent) in respect of any matter to which the conduct relates — such as a declaration<sup>75</sup> that the ATO data and the inaction of the applicant (the social security recipient) to engage with the OCI cannot provide a basis for raising a debt due to the Commonwealth under the Social Security Act.<sup>76</sup> Alternatively, the Court could direct the respondent (the DHS Secretary) to refrain<sup>77</sup> from purporting to raise a debt due to the Commonwealth on the basis of the ATO data and the inaction of the applicant.

Substantially similar relief could be sought in a proceeding that invokes the Federal Court’s jurisdiction under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) — the ‘matter’ (or controversy) being one ‘arising under [a law] made by the Parliament’, the Social Security Act. That jurisdiction will arise where, in order to resolve the controversy between the parties (the ‘matter’), the Court must determine whether a law made by the Parliament (here, the Social

Security Act) confers a right asserted by one of the parties — here, the right asserted by DHS to raise a debt due to the Commonwealth on the basis of ATO data and a failure by the applicant to engage with DHS.<sup>78</sup> Declaratory relief could be granted pursuant to the Federal Court’s power under s 21 of the *Federal Court of Australia Act 1976* (Cth), there being a real controversy between any recipient of the initial and reminder letters and the DHS Secretary about an issue that is likely (indeed, almost certain) to arise in the future.<sup>79</sup>

I suggest that the critical question presented by the OCI system is a question of law: does DHS have the legal authority to proceed to the raising of a debt by using the OCI system? Judicial review, ‘the enforcement of the rule of law over executive action’,<sup>80</sup> is the ideal means of answering that question.

In the context of the attempt by DHS to assert the existence of debts based on ATO data and the failure of the putative debtor to displace a presumption founded on that data, a carefully crafted declaration (if made by the Federal Court in the exercise of its jurisdiction under s 6 of the ADJR Act or its jurisdiction under s 39B(1A)(c) of the Judiciary Act) would provide a definitive ruling on the legitimacy of the OCI system. That is, judicial review could produce a definitive ruling on a precise question of law in the way that it did 40 years ago in *Green v Daniels*.

#### Endnotes

- 1 The preferred description by the initiative’s supporters of its aim was ‘ensuring the integrity of the welfare system’: Senate Community Affairs References Committee, *Design, Scope, Cost-benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (2017), Coalition Senators’ Dissenting Report (Senate Committee Dissent), para 1.2.
- 2 The initiative’s defenders deny that any assumption is made about debt or that the initiative has reversed the burden of proof onto recipients: Senate Committee Dissent, para 1.14, quoting the Secretary of the Department of Human Services. I maintain that the defenders are mistaken.
- 3 The terms in which the manual was expressed are set out in Stephen J’s reasons for judgment in *Green v Daniels* (1977) 13 ALR 1, 6; 51 ALJR 463, 466.
- 4 By the *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth).
- 5 By the *Administrative Appeals Tribunal (Social Services Act) Regulations 1980* (Cth) (No 62 of 1980).
- 6 *Green v Daniels* (1977) 13 ALR 1; 51 ALJR 463.
- 7 (1977) 13 ALR 1, 8; 51 ALJR 463, 467.
- 8 (1977) 13 ALR 1, 9; 51 ALJR 463, 467.
- 9 *Ibid.* The two criteria were that the person was ‘unemployed’ and had ‘taken reasonable steps to obtain such work’.
- 10 (1977) 13 ALR 1, 9; 51 ALJR 463, 467.
- 11 (1977) 13 ALR 1, 10; 51 ALJR 463, 467–8.
- 12 (1977) 13 ALR 1, 10; 51 ALJR 463, 468.
- 13 *Ibid.* Justice Stephen also criticised the premise of ‘abuse’ on which the new instructions were based: where a school leaver changed her or his intention and returned to school in the new school year, there was (until the change of intention) no abuse to be cured: *ibid.*
- 14 (1977) 13 ALR 1, 12; 51 ALJR 463, 469.
- 15 (1977) 13 ALR 1, 10; 51 ALJR 463, 470.
- 16 (1977) 13 ALR 1, 12; 51 ALJR 463, 469.
- 17 As Brennan J said in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37 (*Quin*), the question ‘what is the law’ that prescribes the limits and governs the exercise of power ‘must be answered by the court’.
- 18 The passage is from *Church of Scientology v Woodward* (1982) 154 CLR 25, 70, and is quoted by Gleeson CJ in *Plaintiff S157 of 2002 v The Commonwealth* (2003) 211 CLR 476, [31].
- 19 (1977) 13 ALR 1 at 12; 51 ALJR 463 at 469. Earlier, Stephen J had said if the Director-General issues instructions that ‘are inconsistent with a proper observance of the statutory criteria he acts unlawfully’: (1977) 13 ALR 1, 9; 51 ALJR 463, 467.
- 20 Karen Green was represented by Ken Gifford QC and Tony Hooper — two highly reputed local government and planning counsel; the defendant, Laurie Daniels, was represented by the current, and a future, Solicitor-General — Maurice Byers QC and Gavan Griffith.
- 21 (1977) 13 ALR 1, 7; 51 ALJR 463, 467.
- 22 (1977) 13 ALR 1, 8; 51 ALJR 463, 467.
- 23 (1990) 170 CLR 1, 35–6.
- 24 (1977) 13 ALR 1, 12; 51 ALJR 463, 468.

- 25 One exception, recognised by Brennan J in *Quin*, is where the court judges the exercise of power to have been so unreasonable that no reasonable repository of the power could have exercised the power in that way: (1990) 170 CLR 1, 36. Now, as we know, that quality may also be found where a decision involves ‘a disproportionate exercise of an administrative discretion’; or ‘lacks an evident and intelligible justification’: *Minister for Immigration v Li* (2013) 249 CLR 332, [30], [76].
- 26 *Drake v Minister for Immigration* (1977) 46 FLR 463, 419.
- 27 Plainly, the Director-General saw the cases as strategic: in the first case (*Chaney*), Chester Porter QC and Priscilla Fleming appeared for the Director-General (Michael McHugh QC and Charles Waterstreet appeared for Ms Chaney); in the second case (*Hangan*), GL Davies QC and IC Diehm appeared for the Director-General (Ms Hangan appeared in person); in the third case (*Hales*), Michael Black QC and Alan Myers appeared for the Director-General (Alastair Nicholson QC and Peter Vickery appeared for Ms Hales).
- 28 (1980) 47 FLR 80.
- 29 (1982) 70 FLR 212.
- 30 (1983) 78 FLR 373.
- 31 Under the current version of the *Ombudsman Act 1976* (Cth), the function remains essentially as it was in 1976 — with the addition of the possible function of performing functions under an arrangement made, with the consent of the Minister, to act as Ombudsman in accordance with the conditions of licences or authorities granted under an enactment: s 5(1)(c).
- 32 Commonwealth Ombudsman, *Office of the Commonwealth Ombudsman* <<http://www.ombudsman.gov.au/about/office-of-the-commonwealth-ombudsman>>.
- 33 By the *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth), s 3 and sch 1.
- 34 By the *Law and Justice Legislation Amendment Act 1997* (Cth), s 3 and sch 11.
- 35 That is, a person appointed to an office created by a law of the Commonwealth, including (for example) a judge of the Federal Court, a Commonwealth minister, a Commonwealth public servant or a member of the Fair Work Commission.
- 36 That is, where it is necessary for the Court to determine whether the law of the Commonwealth confers the rights or the protection that one of the parties claims in the proceeding: *Transport Workers Union v Lee* (1998) 84 FCR 60, 65–6.
- 37 Which requires a ‘decision’, made or contemplated, ‘under an enactment’, being a decision ‘of an administrative character’, and is subject to a substantial number of specified exceptions.
- 38 The jurisdiction is only available against a natural person who holds an office created by a law of the Commonwealth; it is not available against a body corporate: *Broken Hill Proprietary Co Ltd v National Companies and Securities Commission* (1986) 61 ALJR 124, 127; *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 500.
- 39 By the *Statute Law (Miscellaneous Provisions) Act (No 1) 1984* (Cth).
- 40 Commonwealth Ombudsman, *Centrelink’s Automated Debt Raising and Recovery System*, Report No 02/2017 (2017) <[http://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf](http://www.ombudsman.gov.au/_data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf)>.
- 41 Something that the Acting Ombudsman did not include in Report No 2/2017.
- 42 See *Social Security Act 1991* (Cth), s 1068, Module G.
- 43 Commonwealth Ombudsman, above n 40, p 1.
- 44 *Ibid*, pp 54–5.
- 45 *Ibid*, p 61.
- 46 The recovery fee is prescribed by s 1228B of the *Social Security Act 1991* (Cth).
- 47 Commonwealth Ombudsman, above n 40, pp 34–5.
- 48 *Ibid*, p 5.
- 49 It is obvious that, given the high level of casual and part-time employment in Australia, many employees do not enjoy constant levels of fortnightly income.
- 50 The Commonwealth Ombudsman’s Report No 2/2017 explores those mismatches: Commonwealth Ombudsman, above n 40, pp 41–3. Some of the problems are addressed if the social security recipient enters her or his income data online (see p 41); but they are not addressed where the social security recipient does not do that, compounding the likely errors in the calculation of a ‘debt’.
- 51 Commonwealth Ombudsman, above n 40, p 42.
- 52 *Ibid*, pp 9–10, 11–14, 19–20.
- 53 *Ibid*, pp 15–19. The report does not attribute the term ‘digital ready’ to DHS. Perhaps the Acting Ombudsman is the inventor.
- 54 Commonwealth Ombudsman, above n 40, p 23. However, the report did not consider whether that transfer of complex functions contradicted the applicable provisions of the Social Security Act.
- 55 Commonwealth Ombudsman, above n 40, p 31, notes that, before introduction of the OCI, the standard means of investigating a possible overpayment was to send formal notices under the *Social Security (Administration) Act 1999* (Cth), requiring the recipient to produce specified information.
- 56 Commonwealth Ombudsman, above n 40, p 4, para 1.3.
- 57 *Ibid*, pp 35–8.
- 58 *Ibid*, p 63.
- 59 *Ibid*, p 68.
- 60 *Ibid*, p 75.
- 61 Senate Community Affairs References Committee, above n 1, para 4.74.

- 62 Ibid, paras 4.76–4.77. In their dissenting report, the Coalition senators disputed that the OCI had reversed the burden of proof, relying on evidence from the DHS Secretary that ‘No debt is raised until we have attempted to contact a person and give them the opportunity to explain differences’: Senate Committee Dissent, para 1.14.  
However, to my mind, that evidence glosses over the reality that DHS uses ATO data as the basis for inviting social security recipients to prove their actual income over an extended period; and, if a social security recipient does not or cannot do that, DHS carries through with its stated intention to raise a ‘debt’ based on the ATO data.
- 63 Commonwealth Ombudsman, above n 40, p 23.
- 64 Ibid, p 42.
- 65 Ibid, pp 11–22, recounts the experiences of several recipients in attempting to engage with the OCI system — experiences that were characterised by confusion and frustration.
- 66 As reproduced in Commonwealth Ombudsman, above n 40, p 75. See the text at n 60 above.
- 67 Commonwealth Ombudsman, above n 40, pp 63–4.
- 68 Ibid, pp 68–9.
- 69 *Ombudsman Act 1976* (Cth) s 5(1).
- 70 Ibid, s 15(1)(a)(i) and (v).
- 71 See text at n 56 above.
- 72 As described in the text at nn 58–60 above.
- 73 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 6(1)(d).
- 74 Ibid, s 6(1)(f).
- 75 Ibid, s 16(2)(a).
- 76 Despite the threat in the initial and reminder letters quoted in the text at n 58 and n 59 above.
- 77 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(2)(b).
- 78 *Transport Workers’ Union v Lee* (1988) 84 FCR 60, 65–7 (Black CJ, Ryan and Goldberg JJ).
- 79 See the succinct summary of the current state of the law on the availability of declaratory relief in *CGU Insurance Ltd v Blakeley* (2016) 327 ALR 564, 589 [102] (Nettle J).
- 80 As Brennan J put it in *Church of Scientology v Woodward* (1982) 154 CLR 25, 70, quoted by Gleeson CJ in *Plaintiff S157 of 2002 v The Commonwealth* (2003) 211 CLR 476, [31]. See the text at n 18 above.

## VALE JOHN OMAN BALLARD

*Peter Sutherland*

The Australian Institute of Administrative Law notes with sadness the death of John Oman Ballard, a former Senior Member of the Commonwealth Administrative Appeals Tribunal, on 12 August 2017. John was also the author of the first edition of the book *Commonwealth Employees' Safety, Rehabilitation and Compensation Act 1988*, published by The Federation Press. This book is now in its 10<sup>th</sup> edition as the *Annotated Safety, Rehabilitation and Compensation Act 1988*, with John being an active co-author until the 8<sup>th</sup> edition, when his age started to tell against his involvement as a writer.

John was born in Bristol, where his father was a parson in a Methodist church. His mother's family, the Omans, came from the Orkney Islands near Scapa Flow. After some near misses in the Blitz, John went to Jesus College, Cambridge, for a term before being conscripted into the Royal Navy at age 19. He served in the Coastal Forces on a small wooden boat sitting off the D-day beaches and then sailed on motor gunboat 591 to Burma through the Suez Canal. Shortly after the end of the war in Europe, John's boat capsized in the Sittang River and he was left, naked and bootless, on the bank of the river with Japanese forces firmly holding the other bank. John went on survivor's leave to Darjeeling, where he acquired an interest in colonial administration.

After the war, John returned to Jesus College, where he studied law and later was admitted as a barrister of the Middle Temple, London. With his Australian-born wife, Jo, John was posted as a District Officer in Mwanza in Tanganyika, later transferring to the Legal Service as a resident magistrate. John continued his legal career with the Colonial Office in Cyprus and then North Borneo, where he worked on the formation of Malaysia as legal advisor to the North Borneo delegation. John often spoke in warm terms of the first Prime Minister of Malaysia, Tunku Abdul Rahman, whom he considered a first-rate politician and a 'real gentleman'.

In late 1963, John and his family moved to Canberra, where he was employed in the Department of Territories. He worked on the administration of the Northern Territory, Aboriginal affairs, independence for Papua New Guinea, and the possible resettlement of the people of Nauru from Fraser Island in Queensland, which proposal foundered on the issue of excision from Australia and the strong opposition of the Queensland Premier, Joh Bjelke Petersen. Under the Whitlam Government, John had responsibility for extradition of criminals to and from Australia, including the case of the Bartons in Brazil.

John was appointed as the Commonwealth Employees Compensation Tribunal, hearing appeals for compensation claims made by Commonwealth employees. At times, this Tribunal had a successful appeals rate in excess of 50 per cent — a consequence of the practice of the then Commissioner for Employees' Compensation of adhering to in-house guidelines which John often found did not comply with the relevant statute, the *Compensation (Commonwealth Government Employees) Act 1971*. The decisions of this Tribunal are reported in Volume 3 of the *Administrative Law Decisions (ALD)*, published by Butterworths (LexisNexis). When this Tribunal was amalgamated into the Administrative Appeals Tribunal, John was appointed as a Senior Member in the Canberra Registry. He mostly sat on compensation, social security and veterans' entitlements matters.

Soon after his retirement from the Administrative Appeals Tribunal at age 65, John wrote the first edition of his well-known annotation of Commonwealth employees' compensation law,

which I edited for publication by The Federation Press. We worked together on this book for the following 15 years through seven more editions.

John is survived by his four children and many grandchildren. Farewell John Ballard — a High Tory, a colleague and a good friend.

## RECENT DEVELOPMENTS

*Katherine Cook*

### **Appointments to the Commonwealth Administrative Appeals Tribunal**

On 28 June 2017, the Commonwealth Attorney-General announced the appointment of the Hon Justice David Thomas as President of the Administrative Appeals Tribunal (AAT). Justice Thomas has also been appointed as a judge of the Federal Court. His appointment is for seven years.

Justice Thomas has been a member of the Supreme Court of Queensland and President of the Queensland Civil and Administrative Tribunal (QCAT) since 2013.

Justice Thomas is President of the Royal National Agricultural and Industrial Association of Queensland and Deputy Chair of the Queensland Ballet.

<<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/SecondQuarter/Appointments-to-the-Administrative-Appeals-Tribunal.aspx>>

### **Royal Commission into the Protection and Detention of Children in the Northern Territory: Reporting date extended**

On 30 August 2017 the Commonwealth Attorney-General announced that the Commonwealth will recommend to his Excellency the Governor-General that the reporting date for the Royal Commission into the Protection and Detention of Children in the Northern Territory be extended until 17 November 2017.

The extension was at the request of the Royal Commission to ensure parties to the Royal Commission have sufficient time to respond to notices of adverse material.

The extension will be accommodated within the Royal Commission's existing budget. There will not be any additional hearings during this period.

<<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/ThirdQuarter/Royal-Commission-into-the-protection-and-detention-of-children-in-the-Northern-Territory-reporting-date-extended.aspx>>

### **NSW Ombudsman report: Review of police use of the Terrorism (Police Powers) Act 2002**

The NSW Ombudsman's office has completed its fourth review of the operation of the preventative detention and covert search warrant powers in pt 2A and pt 3 of the *Terrorism (Police Powers) Act 2002*.

The review period was 1 January 2014 to 31 December 2016. The Attorney-General tabled the Ombudsman's report on Tuesday 13 June 2017. This is the Ombudsman's last review of the operation of this Act. The Ombudsman's oversight functions in relation to police are being transferred to the newly-established Law Enforcement Conduct Commission. This includes the review functions under this Act.

During the review period, the pt 3 covert search warrant powers were not used.

In September 2014, the pt 2A preventative detention powers were used for the first and only time since the powers were introduced in 2005. The Ombudsman monitored their use and had discussion with police at that time about some practical implementation issues. However, this report does not make any formal recommendations because of amendments made to the Act in 2016 that inserted pt 2AA (Investigative detention powers). Previous Ombudsman reports have documented strong concerns of police that the preventative detention powers under pt 2A were operationally ineffective. Those concerns were addressed with the introduction of pt 2AA, effectively making the preventative detention powers redundant.

‘Since 2016 police have had new investigative detention powers under Part 2AA of the Terrorism (Police Powers) Act. These new expanded powers make the preventative detention powers in Part 2A redundant. Those preventative detention powers should therefore be allowed to expire in December 2018 in accordance with their sunset clause’, said the Acting Ombudsman, Professor John McMillan.

The Acting Ombudsman has also reported his concerns about the lack of oversight of the new pre-investigation detention powers.

‘In 2005, Parliament required the Ombudsman to scrutinise the use of the preventative detention and covert search warrant powers and report back every 3 years. This recognised the need for a robust system of independent oversight of the extraordinary powers that these are’, said the Acting Ombudsman.

‘Police now have the power to detain a person as young as 14 years old for up to 4 days without a warrant, and question them. It is surprising there was no provision for independent civilian oversight of a power of this nature. I recommend that the Minister consider giving the Law Enforcement Conduct Commission oversight over use of the investigative detention powers under Part 2AA. This will continue the proud tradition embedded in Ombudsman practice of ensuring public confidence in police is maintained by making sure police are acting in a fair and reasonable manner’, said the Acting Ombudsman.

<[https://www.ombo.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0007/45457/Media-release-Terrorism-Police-Powers-4th-report-tabled-13-June-2017.PDF](https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0007/45457/Media-release-Terrorism-Police-Powers-4th-report-tabled-13-June-2017.PDF)>

### **Full-time SACAT President appointed**

Crown Solicitor Ms Judy Hughes has been appointed as the new President of the South Australian Civil and Administrative Tribunal (SACAT) and as a Supreme Court judge.

Ms Hughes replaces former SACAT President, Justice Parker, who has made a significant contribution to SACAT’s establishment and initial three years of operation and who will continue as a full-time Supreme Court judge.

### **Background**

As Crown Solicitor, Ms Hughes has led an office of more than 280 employees delivering legal services to the state government. She has served in senior roles within the Crown Solicitor’s Office for over a decade, including as head of the Public Law Section, and was previously Deputy Commissioner of the Office of Consumer and Business Affairs.



Ms Hughes sits on the Board of Examiners for legal practitioners and has served on a number of government steering committees.

The role of president was established as a part-time position; however, a full-time president is now required to oversee the continued expansion of SACAT.

The extension of the position to full-time was funded within the 2017–18 state budget.

<<https://www.agd.sa.gov.au/newsroom/full-time-sacat-president-appointed>>

### **New guide paves way for better data privacy management**

The Office of the Australian Information Commissioner (OAIC) and CSIRO's Data61 have released a guide to assist organisations to de-identify their data effectively. The practical and accessible guide is for Australian organisations that handle personal information and are considering sharing or releasing it to meet their ethical responsibilities and legal obligations, such as those under the *Privacy Act 1988*.

'The interpretation and application of data has the potential to positively transform our lives and bring about great social and economic benefits. However, we need to remember that many of these data sets are made up of individuals' personal information. So when we think about releasing it we need to anticipate the risks to ensure we are protecting the rights of individuals', said Mr Timothy Pilgrim, Australian Information and Privacy Commissioner.

'Deciding whether data should be released or shared — and, if so, in what form — requires careful consideration. A range of factors needs to be considered, from ethical and legal obligations to technical data questions. Integrating the different perspectives on the topic of de-identification into a single, comprehensible framework is what this guide is all about.'

Dr Christine O'Keefe, the lead author of the guide and Research Scientist at Data61, explained: 'at CSIRO's Data61 we are a trusted advisor to government and industry organisations and we help them access the power of their data by applying deep science, engineering and design to derive insights from it and make it accessible to others without compromising privacy.'

'At present, there is no publicly available, comprehensive risk management guide in Australia to assist organisations with de-identification. That's why we have set out to create this standalone guide as an adaptation of the existing UK version, *the Anonymisation Decision-Making Framework* — and make it freely available.'

'The community is increasingly conscious of how their data is being used, as well as the risk of data breaches, which underlines how important it is to ensure that de-identification is carried out well', said Dr O'Keefe. The De-identification Decision-Making Framework focuses on assessing and managing re-identification risks within the context of the data release or share. It encourages organisations to think more broadly and consider the data release environment as well as the techniques and controls applied to the data.

Commissioner Pilgrim added, 'de-identification is one solution for sharing and releasing data while meeting legislative demands and community expectations. It is an exercise in risk management, rather than an exact science, and it's important that we strike the right balance between maintaining useful data and making sure it's safe'.

'The OAIC looks forward to engaging further with organisations and technical experts on de-identification', said Commissioner Pilgrim.

<<https://www.oaic.gov.au/media-and-speeches/media-releases/new-guide-paves-way-for-better-data-privacy-management>>

## Recent cases

### ***A privative clause by another name?***

*Graham v Minister for Immigration and Border Protection* [2017] HCA 33 (6 September 2017) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

Mr Graham (the plaintiff) and Mr Te Puia (the applicant), both citizens of New Zealand, had their subclass 444 visas cancelled by the Minister for Immigration and Border Protection (the Minister) on character grounds pursuant to s 501(3) of the *Migration Act 1958* (the Migration Act).

In making each decision, the Minister considered information purportedly protected from disclosure by s 503A of the Migration Act. Section 503A(2)(c) prevents the Minister from being required to divulge or communicate information from a gazetted agency to a court or a tribunal (among other bodies) when reviewing a purported exercise of power by the Minister under s 501, s 501A, s 501B or s 501C of the Migration Act, to which the information is relevant. A gazetted agency encompasses 'anybody, agency or organisation responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud, or security intelligence in, or in a part of Australia' (Migration Act, s 503A(9)).

Mr Graham brought proceedings in the High Court's original jurisdiction seeking writs of prohibition to prevent the Minister from acting on his decision to cancel his visa; and a writ of certiorari quashing the decision. Mr Te Puia sought that the Minister's decision be set aside.

Mr Graham contended, among other things, that s 503A(2) of the Migration Act was invalid because it required a federal court to exercise judicial power in a manner inconsistent with the essential character of judicial power. Further, he contended that s 503A(2) limited the right or ability of affected persons to seek relief under s 75(v) of the *Constitution* as to be inconsistent with the place of that provision in the constitutional structure.

The Minister contended, among other things, that, as a matter of policy, it may be accepted that admissible evidence should be withheld only if and to the extent that public interest requires it but that there is no constitutional principle which requires the courts to be the arbiter of that question.

The majority (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) held that inclusion of s 75(v) of the *Constitution* means that it is impossible for the Parliament to deprive the High Court (or another court exercising jurisdiction under s 77(i) or (iii) by reference to s 75(v)) of the ability to enforce the legislated limits of an officer's power.

The majority held that the question of whether a law transgresses that constitutional limitation is one of substance and degree; and to answer it requires an examination not only of the legal operation of the law but also of practical impact of the court's ability to exercise its jurisdiction.

The majority found that s 503A(2)(a) of the Migration Act imposes a blanket and inflexible limit on obtaining and receiving evidence relevant to the curial discernment of whether legislatively imposed conditions and constraints on the lawful exercise of powers conferred by that Act on the Minister. The practical effect is that it prevents the High Court (and the Federal Court) from obtaining information which, is relevant to the purported exercise of the Minister's power. As such, s 503A(2)(c) is invalid to the extent that it prevents the Minister from being required to communicate relevant information to the High Court when it is exercising its jurisdiction under s 75(v) of the *Constitution* to review the Minister's purported exercise under s 501, s 501A, s 501B or s 501C of the Migration Act.

The majority opined that the Minister's attempt to analogise the operation of s 503A(2) to the operation of the common law principle of public interest immunity was misplaced. Even outside of the context of judicial review of executive action, a court always had in reserve the power to enquire into the nature of the document for which protection was sought (*Robinson v State of South Australia* [No 2] [1931] AC 704 at 716).

The majority also held that the decisions of the Minister to cancel Mr Graham's and Mr Te Paui's visas were invalid. The Minister acted on a wrong construction of s 503A(2) and wrongly understood s 503A(2) to prevent him from being required to communicate certain information to a court engaged in judicial review of the impugned decisions.

***Finely balanced — procedural fairness and national security***

*El Ossman v Minister for Immigration and Border Protection* [2017] FCA 636 (6 June 2017) (Wigney J)

In July 2014 the applicant, a Lebanese citizen, applied for a combined Partner (Temp) (Class UK) and Partner (Residence) (Class BS) visa.

On 22 October 2014 the applicant attended the offices of the Department of Immigration and Border Protection (DIBP). There he was interviewed by officers from the Australian Security Intelligence Organisation (ASIO).

At no point during the three-hour interview did the ASIO officers specifically put to the applicant three issues: first, he used another name and a person using that name had been involved in politically motivated violence; second, there was information that the applicant had a close association with the late leader of Jund al-Sham; and, third, there was information that the applicant shared a close personal association with a former bodyguard for Australian Lebanese terrorist Haussam El Sabbagh ('three issues').

In August 2015, following that interview, ASIO furnished DIBP with an adverse security assessment in respect of the applicant. The assessment was that the applicant directly or indirectly posed a risk to security. ASIO assessed, among other things, that Mr El Ossman had been involved in politically motivated violence, maintained associations with numerous terrorist and extremist individuals and harboured an extremist ideology. ASIO recommended that the applicant's visa application be refused and that his bridging visa be cancelled. DIBP cancelled his visa and he was taken into immigration detention. The applicant's application for a substantive visa was also refused.

The applicant then challenged the adverse security assessment in the Federal Court. His primary contention was that the adverse security assessment was 'made in excess of jurisdiction'; specifically, that ASIO failed to afford him procedural fairness by failing to put the three issues to him.

The Court found that the issue that lies at the heart of this matter highlights the potential tension between the interests of national security and the requirements of procedural fairness in the context of making security assessments under the *Australian Security Intelligence Organisation Act 1979* (Cth).

The Court found that, in this case, there was no question that ASIO was required to afford the applicant procedural fairness: it was required to adopt a procedure that was reasonable in the circumstances to give the applicant, as a person whose interests were likely to be affected by ASIO's exercise of power, an opportunity to be heard.

In this case, the Court held that the critical question is whether the procedure adopted by ASIO was sufficient to ensure that the decision to make the adverse security assessment was made fairly, having regard to the legal framework within which the decision was made and the particular facts and circumstances of the case. The Court held that in this case the situation was finely balanced.

The Court found that the applicant was given no opportunity to respond to or make submissions concerning the three issues. The Court found that nothing was said to the applicant during the interview to indicate that ASIO possessed any information that might cause it to doubt any of his answers to the questions that were put to him. Also, nothing was said to the applicant to suggest that the interviewers had any doubts or concerns about the reliability or truthfulness of any of his answers or any reason for doubting his responses.

While the Court accepted that some of the information about the three issues was immune from disclosure because disclosure would have been prejudicial to national security, parts of the specific information were not immune because versions of the intelligence report and a statement of grounds, which included general information concerning each of the three issues, were produced to the applicant for the purposes of these proceedings.

The applicant was also given no further opportunity, by way of further interview or otherwise, to address the three issues. He was not contacted by ASIO during the period between the interview and the cancellation of his visa almost a year later.

The Court issued a writ of certiorari setting aside the adverse security assessment.

***Is a failure to notify litigants of changes in court fees a breach of procedural fairness?***

*DC v Secretary, Department of Family and Community Services & Ors* [2017] NSWCA 225 (8 September 2017) (Beazley P, White JA and Sackville AJA)

On 5 July 2013, by order of the Children's Court, DC's (the applicant's) nine-year-old son, C, was placed into the care of the Minister for Family and Community Services until he reaches 18 years of age. A care plan was also registered under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the Care Act), which provided that the applicant should have supervised contact with C for two hours two times per year according to C's wishes.

On 24 July 2013, the applicant filed an appeal against the Children's Court's orders in the District Court of New South Wales. C's mother also lodged a concurrent appeal.

On 1 August 2015, sch 1 of the *Civil Procedure Regulation 2012* (NSW), which prescribes the court fees, was amended. One of the consequences of the amendment was that daily hearing fees became payable in District Court proceedings that extended beyond the first day. The applicant was not advised of the changes.

The applicant later became aware of his liability to pay daily hearing fees, and he applied to the primary judge to waive the fees. The primary judge informed the applicant that only a Registrar of the District Court had the power to determine an application for waiver of fees. The applicant indicated he wished to withdraw from the hearing. He was advised by the primary judge that, if he did so, C's care plan would remain the same. The applicant subsequently withdrew from the proceedings and his appeal was dismissed.

After the hearing of the mother's concurrent appeal, the primary judge dismissed her appeal; set aside the orders of 5 July 2013; and made fresh care orders under the Care Act. The primary judge also approved an addendum to C's care plan, which provided that 'there be contact between C and his father for two hours two times per year during school holidays subject to C's wishes and supervised by Community Services or an authorised person'. The effect of the addendum was that the applicant was no longer able to visit C on his birthday.

Eleven months after the primary judge's decision, the applicant filed a summons for judicial review of the orders of the primary judge in the New South Wales Court of Appeal.

The applicant contended that, among other things, he was denied procedural fairness by not having been advised earlier that daily hearing fees were payable.

Justice White opined that the obligation to provide procedural fairness is an obligation of the court and not only the judge hearing a proceeding. The core obligations of procedural fairness are that the proceeding be heard by an impartial judge and that the parties be given a fair opportunity to be heard. The extent to which a self-represented litigant must be advised of the practice and procedure of the court for the purpose of ensuring a fair trial will depend upon the circumstance of the case (*Hamod v New South Wales* [2011] NSWCA 375 at [313] per Beazley JA).

Justice White found that there was a fine distinction between a self-represented litigant's right to be informed of matters of practice and procedure such as are necessary for him to be able to conduct a fair trial and his right to be informed of matters relevant to a decision as to whether to persist with an appeal or to take steps outside the hearing of the appeal to seek relief from the financial burden of hearing fees. This is a real distinction in deciding whether the District Court committed jurisdictional error by not affording the applicant procedural fairness.

President Beazley and Sackville AJA held that, while it is desirable for parties to be informed of the processes involved in the litigation, there was no obligation on the Court, including the registry, to advise affected litigants that daily hearing fees had been introduced. Further, this failure did not mean that the applicant was denied information necessary for him to be able to conduct a fair trial.

## ACCESS TO ADMINISTRATIVE JUSTICE

*Justice John Griffiths\**

The overarching theme in this year's AIAL National Administrative Law Conference is the important topic of access to administrative law justice. The topic has many facets. I will focus on a selected few:

- enhancing access to justice by using online processes in administrative tribunals and courts;
- legitimacy and certainty as core values in judicial review;
- the importance of tribunal independence; and
- the need for the Administrative Review Council (ARC) to be revived.

### **Enhancing access to justice by using online processes in administrative tribunals and courts**

Greater use could be made of online and digital technology to enhance access to administrative justice. That should also produce cost savings when governments are understandably concerned about expenditure.

The use of digital technology in dispute resolution is not confined to tribunals and courts. As will be discussed in this conference, government departments and agencies are themselves embracing online technology, including in automated decision-making using coded logic and data-matching to make, or assist in making, decisions. This has given rise to some widely publicised concerns.<sup>1</sup>

eBay has demonstrated the attractions of such technology to resolve civil disputes quickly and economically. Each year 60 million disagreements among traders on eBay are resolved using online dispute resolution (ODR). There are two stages. The first involves parties being encouraged to resolve non-payment or product quality disputes by online negotiation. The second stage is available when the first fails to produce a resolution. After the parties present their respective positions in a discussion area, an eBay staff member makes a binding determination under eBay's Money Back Guarantee. The process operates under strict time frames.

Professor Richard Susskind, IT advisor to the Lord Chief Justice of England and Wales, says that there are four problems with the current system for resolving disputes in courts, which highlight why courts should explore emerging digital possibilities:

- it is costly for users;
- it takes a long time to resolve disputes;

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\* *Justice Griffiths is a Judge of the Federal Court of Australia. This article is an edited version of a keynote address to the Australian Institute of Administrative Law National Conference, Canberra, 20 July 2017. Justice Griffiths acknowledges with gratitude the valuable research undertaken by his associate, Ms Emma Boland.*

- it is largely unintelligible to the public; and
- it is out of step with the internet society.

Speaking in Melbourne in May 2016, Professor Susskind said that the expense, anxiety and time taken in traditional court proceedings are often disproportionate to the value of the disputes in issue. There is a massive unmet legal need because people are not entering the system in view of its expense, their lack of understanding of it and also because it is out of step with contemporary internet society.

Key features of our judicial system are open justice and procedural fairness. But we need to think about how these core values can be met without the cost and formality of traditional court hearings. We need to explore how transparency and public accountability can be achieved by greater use of technology in suitable cases, including by electronic court files and court portals which can be accessed by parties and, in the case of some of the material, interested persons.

Of course, not all disputes are suitable for processing, let alone resolution, by digital technology. There is a need, for example, to accommodate the many people who are not able, for whatever reason, to take advantage of digital technology. But administrative law disputes appear to me to be a leading candidate for using online processes and for determination more often by hearings on the papers. That is because, at the judicial review level at least, there are frequently no significant disputed facts, there is no need to cross-examine witnesses and legal arguments can usually be presented as, or more, efficiently in writing than orally. That is so, for example, where issues of statutory construction are prominent, which is normally the case in an administrative law dispute. And in an era where there is an increasing number of litigants in person, who often seem overwhelmed by a formal court setting, many may prefer to have their cases conducted by online technology. This would more closely reflect the way in which many people now conduct their daily lives with extensive use of the internet. It is premature to impose these procedures on an unwilling party, but the option ought to be available for the parties to consider and agree upon. Naturally, effective data protection and security of information procedures must be in place.

The ability to initiate complaints about public administrative action by online application is now available at some tiers in Australia. For several years now, complaints to the Commonwealth Ombudsman can be lodged online. This option is obviously attractive in the age of the internet. In 2015–2016, 38 per cent of complaints were lodged electronically, compared with 23 per cent in 2011–2012. It remains the case, however, that the majority of complaints to the Ombudsman are still made by telephone (58 per cent in 2015–2016 compared with 70 per cent in 2011–2012).

The extent to which digital technology can be used varies widely across federal and state administrative review mechanisms. For example, in the New South Wales Civil and Administrative Tribunal (NCAT), some but not all applications can be made online. It is not possible, for example, to use that technology to lodge appeal applications. Also, there is no capacity to submit attachments online even where an application for review has been lodged online. NCAT is apparently working on changes to its systems to enable this to occur.

The New South Wales Government has introduced an online service which enables legal practitioners and registrars to manage and process call-overs online and without any physical attendance in the courtroom. The Online Registry website is accessible by registered legal practitioners and enables them to access case management services in the Local, District and Supreme Courts, as well as in the Land and Environment Court. Practitioners have the capacity to send messages to a registrar. All such contacts are

transparent to other parties. Each participating court has published a practice note relating to the Online Court. Lawyers who are registered can make interlocutory applications online, such as for an adjournment or for case directions, rather than having to appear in person. Subpoenaed documents can also be produced electronically in civil cases.

Earlier this month, the Chief Justice of the Supreme Court of New South Wales commented on how allowing documents to be filed online had helped drive down the cost of litigation in New South Wales courts. Chief Justice Bathurst forecast that there will be an increasing emphasis on harnessing technology, but he added that, while there may be fewer appearances in court, he strongly doubted that cases would ever be determined by a mathematical algorithm. That is because 'law always involves the human element' (an element which is often lost or at least marginalised in administrative decision-making processes).

Online applications can be made in the Administrative Appeals Tribunal (AAT). AAT hearings are normally held in person, but telephones and video-conferencing are frequently used. In 2015–2016, hearings by telephone or video-link were used in 2 300 directions hearings, 435 interlocutory hearings and almost 10 000 final hearings, primarily in the Social Services and Child Support Division.<sup>2</sup> Video-links are commonly used in many Australian courts, usually to conduct interlocutory hearings and to take evidence in appropriate cases. For several years now, some special leave applications in the High Court are conducted by video-link.

Greater use of electronic communications seems to be occurring in the new Immigration Assessment Authority (IAA), which, from 1 July 2015, has become a separate office within the AAT's Migration and Refugee Division (see pt 7AA of the *Migration Act 1958* (Cth)). Its role is to conduct speedy reviews of fast-track reviewable decisions (that is, 'asylum legacy cases', involving adverse protection visa decisions of the Minister or a delegate to a fast-track applicant, being applicants who are unauthorised maritime arrivals who entered Australia between 13 August 2012 and 31 December 2013, have not been taken to an offshore processing country and have been permitted by the Minister to make a protection visa application). Apparently there are 24 000 such people.<sup>3</sup>

The Department of Immigration automatically refers fast-track reviewable decisions to the IAA. The referrals are made electronically and are accompanied by certain materials which are relevant to the review. The IAA undertakes a limited form of merits review which is different from that normally conducted by the AAT, with decisions in most cases being made on the papers. The IAA does not conduct hearings, and only in exceptional circumstances does the IAA request or accept new information that was not before the primary decision-maker. The IAA review process is expected to take six weeks to complete, or longer if new material is considered. Of the 130 referrals finalised during 2015–2016 (admittedly a small sample), the decision under review was affirmed by the IAA in 94 cases and remitted for reconsideration in 36 cases. Judicial review applications were made in 35 per cent of those IAA cases, which portends a heavy case load for both the Federal Circuit Court and the Federal Court.<sup>4</sup>

The AAT has come under some pressure as a result of the enactment of the *Tribunals Amalgamation Act 2015* (Cth), which merged the AAT with the Social Security Appeals Tribunal, Migration Review Tribunal and Refugee Review Tribunal. It was estimated that the amalgamation would produce savings of \$7.2 million through reductions in back-office and property expenses.<sup>5</sup> The legislation does not seek to make significant changes to procedures which already applied in those tribunals but permits flexibility in the selection and use of appropriate procedures. Reference was made in the second reading speech to the 'heart of a strong merits review system [being] an independent generalist tribunal boasting a



range of specialist expertise'. I will return to that subject shortly in the context of the important topic of tribunal independence. Amalgamation saw a surge in review applications in the AAT, which rose from approximately 6 500 in 2014–2015 (AAT alone) to exceed 41 000 in 2015–2016 (post-amalgamation). This represents a 3 per cent increase in the number of applications lodged in the three pre-amalgamation tribunals. The AAT finalised more than 38 000 applications in 2015–2016.<sup>6</sup>

While there have been positive developments in Australia involving use of online technology, overseas experience should also be noted. For example, Turkey now has a national electronic service across all its judicial functions. This means that lawyers and litigants in person can examine files, pay application fees, submit their documents and claims and file cases electronically in any court in the country. The progress of a case can be monitored by accessing information, such as when a matter is fixed for trial, without having to contact registry staff by telephone or post. The Turkish system has nearly two million users and has led to estimated savings of \$100 million.

In early 2017, the province of British Colombia launched Canada's first online Civil Resolution Tribunal. It allows citizens to resolve small claims disputes of \$5 000 and under and strata property of any amount. It has several familiar stages, none of which requires legal professional involvement:

- (a) the parties are encouraged to try to negotiate a resolution, including by using the Tribunal's online negotiation platform, which is subject to short timelines and supported by templates for statements and arguments;
- (b) under the next stage, a Tribunal case manager is appointed to oversee a mediation process which is conducted online or over the telephone; and
- (c) if required, a final and binding adjudication process is available, which involves extensive use of online technology and video-conferencing.

An online dispute resolution system called the Rechtwijzer was introduced in the Netherlands in 2014. It was available for landlord–tenant disputes, debt and divorce proceedings. In March this year, however, the project's private backers announced that the system would close in July, as it had proved to be 'financially unsustainable'.<sup>7</sup> Different imperatives would drive government-funded ODRs as part of the State's obligation in a liberal democratic society to provide effective dispute resolution processes, including in the context of public administrative action.

In delivering the Lord Slynn Memorial Lecture in London last month, the Master of the Rolls (Sir Terence Etherton) said that the failure of the Rechtwijzer should not inhibit development of a proposed Online Solutions Court in England and Wales for small claim civil cases. That proposal has three broadly familiar elements:

- (a) individuals will be assisted to find the right sources of legal advice and help in order to enable them to consider whether they have a viable legal dispute and be able to submit relevant documents online, including a claim form;
- (b) case officers and court administrators exercising judicial functions under judicial supervision will assist parties to manage their claims and engage in online dispute resolution by way of mediation and conciliation processes; and
- (c) where alternative dispute resolution fails, a claim will be adjudicated by a judge. This may not take place in a traditional courtroom but instead be carried out online by video-link, telephone or be heard on the papers.<sup>8</sup>

This brave new world created by digital technology should come as no surprise to those of you who practise in the Federal Court, which over the last three years has rolled out an Electronic Court File (ECF) technology system.

The first Federal Court file to be wholly created, managed and stored electronically was produced in Adelaide just over three years ago, on 14 July 2014. The ECF is an eLodgment system by which documents can be placed on an electronic Court file. Although the Federal Court does not yet provide a means for disputes to be resolved online as do the countries just discussed, the ECF has benefits for both Court users and the Court itself. For users, the benefits include:

- automatic acceptance of supporting documents, with such documents that are eLodged generally being stamped with the seal of the Court and returned to the eLodger within minutes;
- expanding the range of documents available for view by authorised users on the Commonwealth Courts portal; and
- documents that are eLodged are uploaded to the Commonwealth Courts portal twice each business day, while stamped orders are generally available instantly.

For the Court, the benefits include:

- immediate access to the Court file and the documents on it;
- increased efficiency in case management, as time spent retrieving files and documents is greatly reduced;
- reducing the risk of files being lost or incomplete; and
- reducing storage and archiving costs.

The rollout of the ECF has coincided with the introduction of the Court's National Court Framework (NCF). The key purpose of the NCF is to reinvigorate the Court's approach to case management by further modernising its operations to better accommodate the needs of litigants. Nine National Practice Areas (NPAs) have been created, the most relevant of which for this audience is likely to be the Administrative and Constitutional Law and Human Rights NPA. A new practice note has been published for that NPA.<sup>9</sup> One of the key objectives is to have a nationally consistent and simplified practice and procedure, which should speed up litigation and make it less expensive. There is a strong focus on active case management, with early case management hearings to ensure that cases are managed efficiently and are ready for trial at the earliest appropriate time.

One new procedure in this NPA is that the parties may be directed to provide a three-page brief written outline of their case. The outline is not designed to supplant pleadings but aims to focus early attention on the essential issues, without the opaqueness which often plagues conventional pleadings. And, to help save costs and to speed things up, it is only in exceptional cases that there will be discovery or interrogatories in administrative law and constitutional cases. There is also likely to be greater use of lump sum and capped costs orders.

### **Legitimacy and certainty as core values in judicial review**

In any constitutional system which is based on the doctrine of separation of powers there will at times be tension between the legislature, executive and judiciary. Our history reveals how the invalidation of legislation on constitutional grounds or other groundbreaking cases can produce a backlash from senior parliamentarians: witness the response to *Bank of New South Wales v Commonwealth*<sup>10</sup> (*Bank Nationalisation case*), *Australian Communist Party v*

*Commonwealth*<sup>11</sup> (*Communist Party case*), *Mabo v Queensland (No 2)*<sup>12</sup> (*Mabo*) and *Plaintiff M70/2011 v Minister for Immigration and Citizenship*<sup>13</sup> (*Malaysian Solutions case*).<sup>14</sup>

The High Court's decision in the *Malaysian Solutions case* drew strong criticism from the then Prime Minister, Julia Gillard. She described the Court's 6:1 majority decision as 'turning on its head' the previous understanding of the law, and she criticised the Chief Justice personally for his alleged inconsistent decision-making.

The High Court's decision in *Wik Peoples v Queensland*<sup>15</sup> incited the then Premier of Queensland, Rob Borbidge, to describe the High Court as an 'historic pack of dills' and 'an embarrassment'. He may have been encouraged by the Deputy Prime Minister's previous remarks following *Mabo* when he said:

I'm not going to apologise for the 200 years of white progress in this country. I will take on and fight the guilt industry all the way ...

Mabo has the capacity to put a brake on Australian investment, break the economy and break up Australia — a brake, a break and a break-up we can well do without.<sup>16</sup>

The tension between the courts and the federal executive is most acutely felt in the area of administrative law, particularly in judicial review of migration decisions. This may partly reflect the fact that judicial review of migration decisions has assumed greater significance in recent decades and is seen by some to impede the exercise of what are sometimes referred to (misleadingly) as 'sovereign powers'. In the calendar year 2016 and the first quarter of this year almost 900 migration appellate-related applications were filed in the Federal Court (65 per cent were notices of appeal and the remaining 35 per cent were applications for leave to appeal or extension of time to appeal). And the number of migration cases arising in the Court's original jurisdiction is also growing. Many such proceedings involve judicial review challenges to ministerial decisions to cancel visas on character grounds under s 501 of the *Migration Act 1958* (Cth). In 2016, about 60 per cent of judicial review applications in the migration area in the Federal Court were of this kind. The area is, and always has been, particularly sensitive and is frequently at the forefront of the debate about the legitimacy of judicial review.

Few areas of Australian law have provoked greater friction with the federal government than judicial review of migration decisions. The then Minister for Immigration, Mr Philip Ruddock, wrote in an article in 2000 that courts ought not to be involved in review of migration matters at all because the judiciary is 'ill-suited' to deal with such matters.<sup>17</sup> He said that courts emphasised protection of individual rights and are not in the position to weigh the relative influence of other values in determining refugee cases. This view was reflected in amendments made to the Migration Act in 1998 which were designed to limit judicial review of migration decision-making.

When he was on the High Court, McHugh J gave a paper entitled 'Tensions between the Executive and the Judiciary'.<sup>18</sup> While he accepted that occasional conflict between the judiciary and the executive might do no harm, he believed that, if the tension persists, as has occurred in the migration area, it damages the public interest. The authority of courts is likely to be undermined and public confidence in the integrity and impartiality of the judges is likely to be diminished. While defending the right of the judiciary to speak publicly against any attempts by the legislature or the executive to undermine the rule of law, McHugh J also urged judges who exercise judicial review powers not to forget the words of Frankfurter J:

All power is in Maddison's phrase, 'of an encroaching nature' ... Judicial power is not immune against this human weakness. It must also be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint.<sup>19</sup>

The evolution of modern judicial review has largely been the work of judges, including in developing key concepts such as procedural fairness, unreasonableness and jurisdictional error. In a 1982 House of Lords decision, Lord Diplock said that progress towards a comprehensive system of administrative law was the greatest achievement of the English courts in his judicial lifetime.<sup>20</sup> Those comments are readily transportable to Australia.

In an article published in 2000, Sackville J said that he believed the courts had extended judicial review because they believed that they needed to fill a gap created by the failure of political forms of accountability to provide redress to individuals who are adversely affected by government decisions.<sup>21</sup> Similarly, Sir Gerard Brennan has remarked that the courts have been prompted to widen the boundaries of judicial review in response to a perceived diminution of legislative control over executive power. Sir Gerard is the author of probably the best known Australian statement of the critical need for judicial self-restraint. In *Attorney-General (NSW) v Quin*<sup>22</sup> (*Quin*) he said:

Judicial review has undoubtedly been invoked, and invoked beneficially, to set aside administrative acts and decisions which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise unlawful ...

The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison* (1803) 1 Cranch 137, at p 177 (5 US 87, at p 111):

It is, emphatically, the province and duty of the judicial department to say what the law is.

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. *The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.*<sup>23</sup>

The distinction between legality and merits can be challenging, but that is not to say that it is meaningless. As Gleeson CJ has pointed out, the distinction is not always clear cut, 'but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day'.<sup>24</sup>

The at times strained relationship between the three branches of the State is not confined to Australia. It was the subject of a recent paper by the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd.<sup>25</sup> Lord Thomas emphasised the importance of mutual respect and mutual support if the relationship between the three branches is to strengthen. On the importance of mutual respect and non-interference, Lord Thomas said:

Judicial independence is one aspect of separation of the branches of the State. Public comment must equally consider the effect on the Executive and Parliament. It must respect their constitutional roles, as much as it must respect that of the judiciary as an institution. It is for that reason that judges must not comment on matters of political controversy or political policy which are for Parliament and the Executive alone. It is why judges cannot and do not explain their judgments; the judicial branch speaks through its judgments. That is how it explains and interprets the law. A public explanation by judges of one of their own judgments would call the law into question: what is authoritative - the judgment or the extra-curial statement? It would undermine certainty in the law. It would undermine public confidence in the law. And it would undermine the Executive and Parliament's confidence in the courts to explain and interpret the law. Judicial silence on such subjects is not just a proper aspect of non-interference. It is an aspect of the respect the judiciary owes the Executive and Parliament.<sup>26</sup>

The importance of mutual respect between the three branches of the State cannot be overemphasised. The starting point from the judicial arm's perspective is the need for the other branches of the State to have a sound appreciation of the fact that the administration

of justice is not merely a matter of machinery. Rather, it is a fundamental part of the proper functioning of a liberal democracy and goes to the root of a well-ordered society.<sup>27</sup>

In the context of judicial review of administrative action, mutual respect from the judicial arm to the executive is reflected in the emphasis in Australian administrative law on the need to maintain the elusive distinction between review of the legality as opposed to the merits of executive decision-making. That is reflected in Sir Gerard Brennan's remarks in *Quin* which were cited above. It is also captured in the following observations of Nolan LJ in *M v The Home Office*:

The proper constitutional relationship of the executive with the courts is that courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.<sup>28</sup>

By definition, mutual respect is a two-way street. It is not difficult to find examples of the judiciary moulding judicial review principles to accommodate the need to recognise the different and important roles performed by members of the executive. A good illustration is the High Court's decision in *Minister for Immigration and Multicultural Affairs v Jia Legeng*.<sup>29</sup> The facts remind us that tension between immigration ministers and the AAT is not a new phenomenon. The AAT had set aside a ministerial delegate's decision to refuse a Chinese national a visa on the basis of bad character. The matter was remitted to the Minister with a direction that the applicant qualified for the visa because he was of good character. The then Minister made statements in a radio interview and wrote a letter to the President of the AAT expressing his concern at the Tribunal's decision and its approach in similar cases. The applicant contended that the Minister was biased when he later cancelled the applicant's visa.

Unsurprisingly, the High Court emphasised that the Minister's powers under provisions such as s 501 were subject to the rule of law. It was acknowledged, however, that such powers involved 'a complex pattern of administrative and judicial power, and differing forms of accountability', with the Minister being 'a Member of Parliament, with political accountability to the electorate, and a member of the Executive Government, with responsibility to Parliament'.<sup>30</sup> They approved French J's comments below that the Court should assess the Minister's conduct with an appreciation that he was 'an elected official, accountable to the public and the Parliament and entitled to be forthright and open about the administration of his portfolio which ... is a matter of continuing public interest and debate'.<sup>31</sup>

In a robust democracy, there will invariably be some tension between the judiciary and executive. But Lord Bingham put it well when, in 2010, he wrote:

There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live.<sup>32</sup>

A matter of particular concern to the executive seems to be the vagueness of some judicial review grounds and principles. This is said to obscure the boundaries of judicial review and undermines legitimacy. Procedural fairness, unreasonableness and jurisdictional error are concepts which attract particular attention.

Certainty is an important value in judicial review. Codification of the grounds of judicial review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) created a false sense of certainty. The difficulty lies not in identifying the heads of review but in their application. The complexities which are inherent in most public law cases are not avoided by treating the heads of review or other catchphrases as talismans. As Allsop CJ observed in *Minister for Immigration and Border Protection v Stretton*<sup>33</sup> (*Stretton*):

The proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. Both concepts concern the lawful exercise of power. For that reason alone, any attempt to be comprehensive or exhaustive in defining when a decision will be sufficiently defective as to be legally unreasonable and display jurisdictional error is likely to be productive of complexity and confusion. One aspect of any such attempt can be seen in the over-categorisation of more general concepts and over-emphasis on the particular language of judicial expression of principle. Thus, it is unhelpful to approach the task by seeking to draw categorised differences between words and phrases such as arbitrary, capricious, illogical, irrational, unjust, and lacking evident or intelligent justification, as if each contained a definable body of meaning separate from the other.<sup>34</sup>

In separate reasons for judgment in *Stretton*, I emphasised the importance of paying close attention to the specific statutory framework within which the challenged decision has been made, with particular reference to indicators in the legislation which assist in determining whether an exercise of discretion is one which exceeds the authority of the decision-maker and is unreasonable in the legal sense. Pointers in the Act which inform the breadth of the nature and ambit of the Minister's authority to cancel a visa under s 501 included:

- (a) the absence of an express list of considerations for the Minister to take into account;
- (b) the breadth of the stated object of the legislation as regulating 'in the national interest' the movement in and out of Australia of non-citizens;
- (c) the Minister's political office and personal accountability to the Parliament, as well as the absence of any right of review to the AAT if the Minister (as opposed to a delegate) makes the decision;
- (d) the Minister's obligation to provide a statement of reasons from which it can be ascertained whether there is an evident and intelligible justification for the decision; and
- (e) the Minister's power to either refuse to grant or to cancel a visa is a substantive power, as opposed to being a power of a procedural nature, such as the power to adjourn a tribunal hearing, as was the case in both *Li*<sup>35</sup> and *Singh*.<sup>36</sup>

And, if further illustration be required of how the courts strive to provide greater certainty, I commend to you the recent judgment of Wigney J on procedural fairness in *El Ossman v Minister for Immigration and Border Protection*.<sup>37</sup> That judgment provides valuable guidance concerning the content of the fair hearing rule by focusing attention on two primary matters. First, it is critical to have regard to the statutory or legal framework within which the decision is made. Where the statutory power involves the conduct of an inquiry, considerations that might be relevant include the subject-matter, nature and purpose of the inquiry; whether the statute provides for a hearing or other particular procedures or rules; and whether the inquiry is investigative, inquisitorial, or adversarial. Secondly, consideration must be given to the particular facts and circumstances of the case, focusing attention on the question whether the procedures which have been adopted have produced a 'practical injustice'.<sup>38</sup>

Others have proposed more radical solutions to the issue of uncertainty in the judicial review context. In a dissenting report in the ARC's 2012 Report No 50 on *Federal Judicial Review in Australia*,<sup>39</sup> Mr Roger Wilkins proposed the repeal of the ADJR Act, with constitutional judicial review remaining but complemented by legislation which set out in general terms the jurisdictional limits on executive decision-makers. For example, the jurisdictional limits might require a decision-maker to accord procedural fairness or to follow any procedures required by law. Thus the focus would shift to a statute along the lines of the *Acts Interpretation Act 1901* (Cth), which would state in general terms jurisdictional limits or standards of good administration which could guide public servants in the exercise of their public powers. One attraction of this proposal is that such statements might assist the courts in identifying jurisdictional and non-jurisdictional errors, particularly if the general statute clearly identified the limits on the exercise of particular powers and stated what the consequences were for non-adherence to those limitations.<sup>40</sup>

### ***The importance of tribunal independence***

This year has seen attention focused on how the independence of tribunals can be affected by appointment and reappointment decisions. Recently, the Government announced that 50 members of the AAT, most of them from the Migration and Refugee Division, would not be reappointed. The Minister for Immigration and Border Protection was quoted as saying in a radio interview:

When you look at some of the judgments that are made, the sentences [sic] that are handed down, it's always interesting to go back to have a look at the appointment of the particular Labor government of the day.<sup>41</sup>

The reference to 'sentences' in the context of an administrative tribunal is puzzling. The Minister was quoted as then adding that 'it's a frustration we live with'.

These remarks drew a prompt response from the President of the Law Council of Australia, Ms Fiona McLeod SC, who described them as 'unfortunate' and having the potential to undermine the standing and independence of the AAT. Ms McLeod added that:

Any suggestion by government that Australian jurists are not acting with independence is dangerous and erosive to our justice system and lies outside Australia's democratic tradition. It undermines the public perception of the legitimate role of the judiciary and weakens the rule of law.<sup>42</sup>

In May this year, the Minister gave another radio interview in which he described some of the AAT's decisions as 'infuriating'. The Minister is quoted as saying:

People who believe that they're above the law, above a scrutiny by the public – I think they should be the ones that shouldn't rest too well at night... if people are deciding matters and they aren't meeting community expectations then I don't see why people shouldn't face scrutiny over that.<sup>43</sup>

Of course, the AAT does face scrutiny, not the least because its decisions on questions of law may be challenged under s 44 of its enabling legislation or by judicial review.

The Minister's 'frustration' seems to have been influential in the proposed changes to Australia's citizenship laws which will empower the Minister to overrule some of the AAT's citizenship decisions. The Minister's decisions will remain amenable to judicial review. The Minister is quoted as saying:

Judicial processes are very important. It [sic] still allows people to have their day in court. But it doesn't give rise to a silly situation we're seeing at the moment [from the AAT].<sup>44</sup>

Some of the issues raised by the Minister have been subject of detailed consideration by the Council of Australasian Tribunals.<sup>45</sup> The following key points are emphasised in that publication:

- Tribunals play an essential role in our justice system by providing a timely and accessible dispute resolution at a low cost. To maintain public confidence in them, their independence must be assured, including in the processes for appointing members.
- Selection on the basis of merit is the surest way to appoint the best members and ensure independence.
- To ensure tribunal independence and excellence, appointment processes should be open, merit-based and transparent and can include recommendations from an assessment panel.
- Where an assessment panel makes a report, the Minister should select one candidate and seek Cabinet approval, with merit being the dominant consideration in selection

(assuming good character). Gender balance and diversity are relevant considerations but political considerations are not.

- Independence requires that a member's tenure and remuneration during a fixed term of appointment is secure for that period. Reappointment could be by way of application in an open competitive process. It is consistent with best practice to reappoint on the recommendation of the head of a tribunal where the member's performance demonstrates that relevant assessment criteria are met.

### **The need for the Administrative Review Council to be revived**

Many of the issues raised in this keynote address, plus other issues which will be discussed during this conference, highlight the desirability and need for the government to have access to sensible and informed advice on administrative law matters. Such advice was provided for almost 30 years by the ARC.<sup>46</sup> As contemplated by the Commonwealth Administrative Review Committee (Kerr Committee), the ARC had the role of overseeing and monitoring the operation of the new Commonwealth administrative law system. It was designed to assist the government in providing a review of administrative decisions in as many cases as possible, in setting up the appeals system in each case where review was provided, to supervise procedures, to minimise the number of privative clauses and generally to assist in the introduction of the new system of administrative law.<sup>47</sup>

In the parliamentary debate accompanying the Administrative Appeals Tribunal Bill 1975 (Cth), Mr Robert Ellicott QC said:

Another basic and far sighted amendment which the opposition will press is to establish an administrative review council and so implement another recommendation of the Kerr Committee. This council would consist of officials, including the president, the ombudsman, the chair of the Law Reform Commission, a senior administrative official and a parliamentary draftsman. It would enable a permanent and informed consideration of the process of administrative and judicial review. It would review further discretions to see whether they were appropriate for review by the administrative appeals tribunal. It would have a small staff to assist it.<sup>48</sup>

Forty years later, in addressing the ceremonial sitting of the amalgamated AAT in mid-2015, Mr Ellicott said that the ARC should 'be seen as the fulcrum of the Administrative Appeals Tribunal and the other things that are happening in administrative law. They're an engine room, they're defenders of the faith, if you like, they're the ones who are driving this pursuit of excellence in review'.<sup>49</sup>

Some of the important work of the ARC has been described by Kerr J In lamenting the demise of the ARC, Kerr J said:

The administrative law journey should not be forgotten. For more than four decades advice as to how best to achieve administrative law reform has been from the ARC. We too often take for granted our autochthonous administrative law which grants the citizen rights which should be celebrated as Malcolm Fraser did when he nominated 'reform of administrative law' and the AAT as among his great achievements.

The ARC has ensured that the reforms initiated by the Kerr Committee had ongoing champions. It has provided advice to government that included input from an independent body of members with extensive academic and business experience and those directly affected by government decisions, as well as input from within the bureaucracy.<sup>50</sup>

The ARC has been effectively moribund since 2012. Yet, to date, no relevant amendments have been made to the *Administrative Appeals Tribunal Act 1975* (Cth), which underpins its existence and sets out its statutory duties and functions. Following the recommendation by the National Commission of Audit in 2014, the ARC was absorbed into the Attorney-General's Department. The ARC's most recent report, *Federal Judicial Review in*



*Australia*, was published five years ago. Since that time no appointments have been made to the ARC. It no longer has a separate secretariat. The ARC has been unable to discharge its statutory functions since 2012, including its duty to provide an annual report.

This is most regrettable. The ARC was an effective and economical source of independent advice to government on administrative law matters. Some of the controversy surrounding the appointment or reappointment of AAT members, as well as that relating to the AAT's role in reviewing citizenship decisions, could have been avoided or perhaps minimised if the ARC were involved. At the very least, the public debate would have been better informed.

## Conclusion

These and other themes will be developed during this conference. Administrative law continues to be an area of considerable interest in Australia. Our systems of review of administrative action need to embrace new technology or they risk becoming inaccessible and obsolete in the eyes of many potential users. Access to administrative justice should be a primary concern of the state. Conferences like this provide a valuable forum in which important issues of public concern can be explored and debated. Long may that continue to be the case.

## Endnotes

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- 3 Immigration Assessment Authority, *Fast Track Process*, p 2.
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- 18 The Hon Justice Michael McHugh AC, 'Tensions Between the Executive and the Judiciary' (Paper presented at the Australian Bar Association Conference, Paris, 10 July 2002).
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- 25 Lord Thomas of Cwmgiedd, 'The Judiciary Within the State — The Relationship Between the Branches of the State', The Michael Ryle Memorial Lecture, Palace of Westminster, 15 June 2017.
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- 27 See T Wells, 'The Royal Commission on Assizes and Quarter Sessions 1966–69' (1970) 41 *The Political Quarterly* 216, 216; Chief Justice James Allsop, 'Values in Public Law' (2016) 13 *The Judicial Review* 53.
- 28 [1992] QB 270, 314.
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- 30 *Ibid* [61] (Gleeson CJ and Gummow J).
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- 32 Lord Thomas Bingham, *The Rule of Law* (Allen Lane, 2010).
- 33 (2016) 237 FCR 1.
- 34 *Ibid* [2].
- 35 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
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- 37 [2017] FCA 636, [79], [80].
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## HALTING THE RIPPLES OF AFFECTION: A PRACTICAL APPROACH TO PRESERVING 'THRESHOLD DECISIONS' OF DOUBTFUL VALIDITY

*Callum James Herbert\**

*'Across the pool of sundry interests, the ripples of affection may widely extend'<sup>1</sup>*

Much of Australian administrative law is underpinned by the principle of legality — the idea that action taken by the executive arm of government 'affecting the rights of the citizen, whether adversely or beneficially',<sup>2</sup> should have some basis in law. This is undeniably an important principle and one that serves as a practical embodiment of the rule of law.

There are, however, practical difficulties that may arise where the exercise of statutory power miscarries, particularly in the case of beneficial statutory schemes.<sup>3</sup> Many of the advantages that flow from the existence of government come about as a result of administrative decisions, including an array of welfare payments, medical and pharmaceutical benefits and by regulatory regimes. The impacts of an invalid decision will not always conveniently be quarantined to the person that is its subject. An entitlement to a particular benefit may rest on one or more previous administrative actions — for example, the approval of a private health insurer<sup>4</sup> or of a pharmacist to supply pharmaceutical benefits from particular premises.<sup>5</sup>

In cases such as these, third parties may have their interests affected by the invalidity of a decision to which they are not directly subject and in which they had no involvement. The validity of claims granted to them may be contingent on the legal effectiveness of the prior approval or registration. I will refer to these decisions on which other decisions rely as 'threshold decisions' for ease of reference.

A decision-maker that is given cause to doubt the legality of a threshold decision, but remains convinced of its merits, understandably may wish to preserve it. This will be true especially where the decision is favourable to both the relevant applicant and members of the wider community. The analysis that follows will often be confined to these 'uncontroversial' decisions — decisions that both the decision-maker and the applicant support and that, by virtue of their status as threshold decisions, have the potential to cause harm to a range of third parties if inoperative.

I have chosen to focus on these threshold decisions, as they provide a clear example of the way in which administrative law — in particular, its breach by a decision-maker — is capable of impacting widely upon the community. There will be greater impetus to argue for

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validity when doubt is cast upon them. These higher stakes give cause for a decision-maker thoroughly to consider all of the options that the law affords them for preserving the effect of their threshold decision, although there is no reason that much of what is set out in this essay could not be applied to other decisions as well.

This essay will argue that there are a range of options that may be available to a decision-maker to preserve the effect of a threshold decision in particular circumstances that will merit consideration, although these options are situational and cannot be applied universally. It will also consider the effect of what might be considered a form of validity, for all intents and purposes, arising from the particular circumstances of an uncontroversial threshold decision. Particular attention will be given in this regard to the presumption of regularity, the decision in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd*<sup>6</sup> (*Kawasaki*) and comments from the joint judgment in *State of NSW v Kable*.<sup>7</sup>

### Threshold decisions

The desirability of preserving the effect of a threshold decision is best illustrated by way of example.

At a general level, the payment of Medicare benefits for diagnostic imaging services is limited by s 16D of the *Health Insurance Act 1973* (Cth) to locations that are registered on the Diagnostic Imaging Register enacted by pt IIB of the Act. Where there is a purported registration in accordance with s 23DZQ of the Act which provides for professional services rendered using diagnostic imaging equipment at those premises, s 16D will not provide a barrier to eligibility. The registration decision is a threshold decision for the subsequent payment of Medicare benefits. Say then that some error is uncovered in the decision — the official that made the decision did not hold the appropriate delegation or the application was not ‘properly made’ as required by the provision.<sup>8</sup> The registration decision, if invalid, falls away and Medicare benefits were not payable by force of s 16D.

After *Williams v Commonwealth of Australia*,<sup>9</sup> without a general spending power and no apparent appropriation, the amounts paid will be recoverable as a debt to the Commonwealth.<sup>10</sup> On one view, the Commonwealth would then be obliged to go about informing the patients that had received professional services at the particular premises during the relevant time that in fact they were not eligible for the Medicare benefits they had received and would need to repay the debts that they had incurred through no fault of their own.<sup>11</sup>

This position is unsatisfactory. There is no real perversion of the statute’s purpose. Far from an unacceptable overreach by the Commonwealth, it is difficult to see how a person could be aggrieved were the decision to stand. The Minister or official is satisfied with the merits of their decision; the diagnostic imaging practice is, presumably, quite happy its customers are now eligible to receive Medicare benefits, as are the customers themselves. In *Kawasaki* Beaumont J observed that ‘where it appears to a decision-maker that his or her decision has proceeded upon a wrong factual basis or has acted in excess of power, it is appropriate, proper and necessary that the decision-maker withdraw his or her decision’.<sup>12</sup> There are dangers in accepting invalidity too readily in the case of threshold decisions and embracing uncritically the administrative consequences that would follow. It is quite proper for the decision-maker to come to the view that their decision was unlawful only after an appropriate consideration of whether there is any reasonably arguable basis for the decision’s validity.

Other than the fact that there is more at stake, there will not typically be any legal distinction between decisions that are a precondition for future administrative action and any other decision. A threshold decision will be susceptible to invalidity in the same way as any other executive action. It will also occasionally be the case that the nature of the decision as one that supports others will inform the construction of the power in ways that can either assist the decision-maker or undermine their position. The cause of invalidity will often impact upon the possible mechanisms for preservation of the decision — most of the options considered are available only in particular circumstances. It is beyond the scope of this essay to undertake a complete evaluation of the various means by which a threshold decision may be invalid, so I have limited my observations to some of the more common issues that can arise.

### **Remaking the decision**

One approach to curing a deficiency in a threshold decision would be to remake the decision afresh without falling into error. The question of when a decision-maker may revisit a decision has been the subject of much judicial and extra-judicial analysis, including a report by the Commonwealth Ombudsman,<sup>13</sup> which criticised the lack of a generally available mechanism to remake a decision, even in cases where a decision-maker accepts that there is a problem. At present, the ability to re-exercise a statutory power is only available in certain circumstances.

### **Jurisdictional error**

Where a decision-maker determines that their decision may have been attended by jurisdictional error, on one view the power is unexercised and it will be open to the decision-maker to exercise their power as if there had been no previous attempt. In the words used in the joint judgment of Gaudron and Gummow JJ in *Minister for Immigration and Multicultural Affairs v Bhardwaj*<sup>14</sup> (*Bhardwaj*), 'a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all'.<sup>15</sup>

Central to this discussion is the difference between what has been called the 'absolute invalidity approach' and the 'relative invalidity approach'.<sup>16</sup> The implications of these competing views will be discussed in greater detail below. For present purposes, the decision in *Bhardwaj* makes it reasonably clear that, where there is jurisdictional error there will generally not be any issue in the nature of *functus officio* where a power that has been exercised is spent and no further action can be taken. Of course, consideration will need to be given in every case to whether the doubts around validity have a reasonable basis and would justify treating the decision as never having been made.

It is worth noting that there are statutory mechanisms in the *Acts Interpretation Act 1901* (Cth) that are on occasion applicable where a decision-maker seeks to revisit a decision. The difficulty with the provisions of s 33 of that Act for present purposes is that they have limited relevance in the case of a decision of doubtful validity. While s 33(1) makes it clear that a power or function may be exercised from time to time as the occasion requires, and may support an argument that a decision-maker is not *functus officio* for the purposes of varying the decision, if the threshold decision is of doubtful validity then in principle a decision-maker is just as well placed to rely on the reasoning in *Bhardwaj* to exercise the power afresh.

Similarly, while s 33(3) of the Act relates to the revocation or variation of 'an instrument', if the exercise of the power miscarried in the first instance, there is no instrument to vary or revoke. There may also be difficulty around the requirement for 'an instrument' to have

been made, particularly as many threshold decisions involve a registration or approval that is not easily characterised this way.

Even where a decision can be remade, the decision-maker may not be able practically to preserve the effect of the first purported decision. Where threshold decisions are concerned, this is problematic, as subsequent action will likely have been taken in reliance on the validity of the threshold decision in the time that passes between the first purported exercise and the true exercise of the power. It may be difficult to maintain the validity of that subsequent action where the remade decision is not able to operate retrospectively.

There may also be practical difficulties in complying with the procedural requirements of the statute in relation to a threshold decision. Often, decisions must be made within a certain time frame after receiving an application, or there are procedural preconditions to the exercise of the power. There is a risk that, due to the passage of time, the decision-maker will not be able lawfully to reach the desired decision. Whether there are options to preserve the effect of the first purported decision in part or in its entirety will involve construing the enabling statute, and each case is likely to turn on its particular facts.

### ***Review mechanisms***

Decisions are often susceptible to a range of review mechanisms, including before courts and tribunals. However, in the present scenario, involving a threshold decision of questionable validity, these avenues will be of little use to a decision-maker. This is particularly the case where the error goes to jurisdiction.

For obvious reasons, judicial review is unlikely to be of much assistance. In the case of a purported threshold decision that is uncontroversial, neither party will have an interest in bringing proceedings over the decision. In any event, where the decision-maker is concerned about the validity of the purported decision, there is little advantage in a court making a declaration of invalidity. The decision-maker is in the same position as if they had simply determined the matter for themselves and proceeded in accordance with the reasoning in *Bhardwaj* to re-exercise their power.

A review in the Administrative Appeals Tribunal (AAT) is just as unlikely to occur in cases involving no real dispute between the parties. One potential advantage of this approach, on the off-chance that a review is sought, is that an AAT decision is deemed to operate from the date on which the original decision took effect, subject to a contrary order<sup>17</sup> (although there is some question about whether a decision that was in law a nullity ever took effect at all). As a right of review by the AAT is generally established on an *ad hoc* basis by enactments providing for review,<sup>18</sup> it will not necessarily be available for all threshold decisions.

Another common means of altering an administrative decision is through an internal review process. Certain statutes provide for the review of administrative decisions made by officials by some other, usually more senior, official.<sup>19</sup> These kinds of provisions may be useful for revisiting decisions more broadly. In circumstances of jurisdictional error affecting a decision sought to be preserved internal review is as useful as judicial review or review before the AAT. Where there is jurisdictional error, and the exercise of the power is thereby a nullity, it may be difficult to apply provisions that allow for the review of 'a decision'.

### ***Other options under the particular statute***

The example given above involved a decision under s 23DZQ of the *Health Insurance Act 1973* (Cth). Subsection (2) of that provision provides that registration takes effect on the day on which the application is properly made or the day specified by the applicant in the

application, whichever is later. In some circumstances, this backdating mechanism may operate to mitigate some of the potential harm of an invalid registration. Where the decision was made by an officer who lacked the relevant delegation, and as a result the registration was beyond power, it may be open to the Minister or an officer holding the relevant delegation to make the decision afresh. In such a scenario, the difficulties that would have arisen if the registration had not been effective from the date of the application will be avoided.

Another means available may be the discretion available to the Minister under s 16D, which commences 'unless the Minister otherwise directs'.<sup>20</sup> In order to preserve at least one consequence of the decision, the payment of Medicare benefits in respect of the diagnostic imaging service, it may be open to the Minister to direct that Medicare benefits are payable in a scenario where there is some deficiency with the registration decision. Although this would not preserve the decision itself, it would cut across some of the consequences for third parties relying on the registration until a proper registration could be made.

Options such as backdating will not be available for every kind of threshold decision. An answer to invalidity may present itself on the facts of a particular decision or in the provisions of the statutory scheme. However, there will not always be a convenient means available for a decision to be preserved in such a way that the new decision will relieve against all possible consequences of invalidity.

### **Preserving the initial decision or its effect**

Where remaking the decision is impractical, impossible or would not bring about the desired outcome, there are other options that can be considered where the circumstances are appropriate.

### ***Availability of the Carltona principle***

Where a decision-maker considers that they may have acted *ultra vires* for the reason that they lacked an effective delegation of the relevant power, the principle derived from *Carltona Ltd v Commissioners of Works*<sup>21</sup> (*Carltona*) may be of some assistance. It may be possible in limited circumstances to characterise the official as an authorised agent of the repository of the power, and to take the view that the power was exercised effectively on the repository's behalf. Where the *Carltona* principle applies, the acts of the agent are taken to be the acts of the principal, the statutory repository of the power.<sup>22</sup>

The limits to *Carltona* are well established. Where the statute manifests an intention that the power is to be exercised by the repository personally, the principle will not apply.<sup>23</sup> Where the context 'points to the nature, scope and purpose of the power being of central or strategic importance, or where the exercise will have significant consequences'<sup>24</sup> the principle will be less readily applied. Conversely, where the power is largely administrative or managerial, or its consequences are confined to a limited framework, the principle may be urged more easily.<sup>25</sup> Importantly, the principle is not excluded where there is an express power of delegation.<sup>26</sup>

Threshold decisions will often have consequences that could be described as significant. However, it is also the case that many take the form of an approval that has the effect of bringing a given person into the context of a particular statutory framework. These threshold decisions comprise an important foundational step for a program, but will not always involve immediate legal consequences, militating in favour of applying *Carltona*.

The benefits of successfully applying the *Carltona* principle are clear. The original decision stands, despite the lack of an effective express delegation of power. All of its consequences are preserved, including subsequent decisions that rely on the validity of the threshold decision. The difficulty is in getting there. Once again, the availability of this approach will turn on the facts in each case and applying the considerations set out above.

An interesting extension of the *Carltona* principle may be found s 16 of the *Human Services (Centrelink) Act 1997* (Cth) and s 8B of the *Human Services (Medicare) Act 1973* (Cth). Each provision is to the effect that 'a Departmental employee may assist' the Chief Executive Centrelink or Chief Executive Medicare, as the case may be, 'in the performance of any of the functions' of the relevant office holder.<sup>27</sup> In *Chief Executive Centrelink v Aboriginal Community Benefit Fund Pty Ltd*<sup>28</sup> Mortimer J appeared quite readily to accept the relevant provision as 'a statutory embodiment of the *Carltona* principle'.<sup>29</sup> An important concomitant to this observation is s 3 of the *Human Services (Centrelink) Act 1997* (Cth), which provides that the word 'function' includes 'power'.

Given the myriad of functions conferred on the Chief Executive Centrelink under the Act itself<sup>30</sup> (including any functions delegated to the Chief Executive Centrelink by other office holders) and the accompanying regulations,<sup>31</sup> the scope for applying this statutory equivalent of *Carltona* is considerable. Similar observations could presumably be applied to functions conferred on the Chief Executive Medicare, and provide a clear statutory basis on which to mount an argument that officials acted as authorised agents of the relevant Chief Executive.

### **Statutory requirement was not a precondition for validity**

Often a decision-maker will be required to follow certain steps or to accept applications in a particular form. Where the concern about validity centres on a failure to meet an associated statutory requirement, there will be a need carefully to consider whether compliance with the requirement was a condition of validity.

The question of what consequence will follow from a breach of a statutory requirement was considered by the High Court in the oft-cited *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>32</sup> (*Project Blue Sky*). The majority held that the appropriate question was 'whether it was a purpose of the legislation that an act done in breach of the provisions was invalid'<sup>33</sup> and that regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'.<sup>34</sup> In the context of a threshold decision, it will be important to consider the place of that decision in its wider statutory scheme. By their nature, threshold decisions form an important preliminary step in the achievement of the purposes of the statute.

There is earlier case law in *Montreal Street Railway Co v Normandin*<sup>35</sup> (*Montreal Street Railway*) that where the invalidation of administrative acts on the basis of a statutory requirement would 'work serious general inconvenience'<sup>36</sup> to people having no control over the decision-maker, and where this invalidation would at the same time not promote 'the main object of the Legislature',<sup>37</sup> it was the practice to regard such provisions as 'directory only'.<sup>38</sup> While *Project Blue Sky* disapproved of the distinction between 'permissive' and 'directory' requirements in favour of the test set out above, the observations made in *Montreal Street Railway* are nonetheless instructive in the application of that test.

The case for the validity of a threshold decision upon which other decisions in the statutory scheme will depend, despite non-compliance with some required statutory step, will arguably be more easily made out than in the case of decision without such a broad effect. It would seem objectively unlikely that Parliament intended for significant number



of payments under a beneficial scheme to be entirely dependent on a single application being in the approved form, particularly where those payments are to third parties with no control over the application or the decision.

There will certainly still be circumstances in which a threshold decision would be invalidated for a failure to follow certain procedures required by law. *Kutlu v Director of Professional Services Review*<sup>39</sup> concerned a power to make appointments to the Professional Services Review Committee under the *Health Insurance Act 1973* (Cth). In effect, the appointments were a threshold decision in that, as Rares and Katzmann JJ observed, 'if the Minister's failure to consult ... resulted in the appointment being invalid, then it is possible that several or many decisions or reviews in which the appointee participated would be invalid'.<sup>40</sup> Despite acknowledgement that significant 'public inconvenience'<sup>41</sup> would be likely to result from a finding that the appointments in question were invalid, the joint judgment nevertheless concluded that the magnitude of those consequences was merely because of the 'scale of both ministers' failures to obey simple legislative commands'<sup>42</sup> in circumstances where, if the appointments were treated as valid, the unlawfulness of their conduct would not be susceptible to a remedy. A clear statutory intention that a given step is an essential precondition to a decision will still operate to invalidate a threshold decision in accordance with the test in *Project Blue Sky*.<sup>43</sup>

### **Another power was available**

Where a decision-maker purports to proceed on a particular basis but discovers some error in the exercise of the power, it may nevertheless be possible for the decision-maker to call upon an alternative source of power for the action taken — invalidity will not automatically result merely because of a mistake about the source of a power.<sup>44</sup>

The practical usefulness of this principle is limited in the case of threshold decisions. There is unlikely to be, and I am unaware of any example of, a threshold decision being perfectly replicated under an alternative provision, as threshold decisions generally take the form of some approval, appointment or registration for the purposes of a particular statutory framework. It may be more likely that a decision made in reliance on the threshold decision could be supported by reference to an alternative power. There may be a range of provisions available in a given statute under which the Commonwealth may make particular payments, some of which do not require the threshold decision to have been made.

There are cogent reasons to be cautious in attempting to support a decision on this basis. As discussed under the previous heading, and subject to the considerations set out there, decisions made under a statute often have certain conditions precedent to their exercise.<sup>45</sup> Considerations that are relevant to one decision may be irrelevant to another and facts that decision-makers must satisfy themselves of prior to the exercise of the power will naturally differ from decision to decision. In my view, for the reasons above, the principle is likely to be useful only in exceptional circumstances.

### **Waiver of debts**

Another potential safety net for the preservation of at least the effect of decisions that have resulted in payments is the Finance Minister's power under s 63 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act), which provides that the Finance Minister may, on behalf of the Commonwealth, authorise the waiver of a debt owing to the Commonwealth. Where a payment has been made in purported reliance on a decision that is later determined to be invalid and a debt results, the person in receipt of the payment may be allowed to retain that money where the waiver power is exercised.

The exercise of the power in s 63 of the PGPA Act is discretionary. Guidelines issued by the Department of Finance indicate that the waiver mechanism is generally treated as a last resort.<sup>46</sup> There is no guarantee that the power will be exercised, even where the threshold decision-maker's agency is in agreement with an applicant for waiver that it would be appropriate in the circumstances. The discretion lies with the Finance Minister and the delegated officials in the Department of Finance, and each case will turn on its facts. Notably, this mechanism will not be helpful where the outcome sought to be preserved is not a payment, for example in the case of an appointment decision such as in *Kutlu v Director of Professional Services Review*<sup>47</sup> where it is the acts of an entity empowered by the threshold decision that are sought to be preserved.

### **Accepting invalidity — what follows?**

It may be that even after consideration of all that is set out above, and any other options that may be available, the decision-maker is forced to accept that on balance their decision is likely not sustainable. This determination does not conclude our inquiry. In the case of a threshold decision, the decision-maker, or the responsible agency, will need to address the question of the consequences for subsequent action taken in reliance on the threshold decision.

At this stage, no finding of invalidity has been made by a court. Although it is clear from *Bhardwaj* that a decision-maker does not need to await such a determination in order to treat a decision as invalid, it is difficult to say that there is invalidity in an absolute sense (that is, invalidity as against the world as opposed to invalidity as between the decision-maker and the subject of the decision).

### ***The presumption of regularity***

The presumption of regularity stands in slight tension with the principle of legality, holding that an exercise of power will be legally valid and effective until successfully impugned.<sup>48</sup> Where the decision is found by a court to be bad in law it will be ineffective as from the date upon which it was made. In the case of a threshold decision that is uncontroversial, it seems unlikely that a judicial determination will eventuate.

At the same time, and consistent with observations made in *Kawasaki*,<sup>49</sup> the principle of legality would not on its face appear to tolerate a decision-maker standing by an exercise of power that he or she accepts was *ultra vires*. It is difficult to reconcile observations that a decision made in excess of power is no decision at all and yet, at the same time, have that decision 'bear no brand of invalidity upon its forehead'.<sup>50</sup>

*Kawasaki* concerned a decision of the Comptroller-General of Customs (the Comptroller), by his delegate Mr Hand, to revoke a tariff concession order (TCO). The Court was called upon to consider whether the Comptroller or his delegate, where there was a clear power to both make and revoke a TCO, had an incidental implied power to revoke a TCO of doubtful validity.<sup>51</sup> In the result the decision, affected by an error of law, was able to be set aside by the decision-maker without the order of a court on the basis that the parties agreed it was invalid and the decision-maker did not intend to uphold its validity. In reaching this conclusion, the court had regard to the 'long recognised rule of policy' that the avoidance of litigation was in the public interest.<sup>52</sup> That the Court adverted to this principle rather than the principle of legality is interesting in itself — the conduct of the parties served to inform the practical and legal outcome.

The Commonwealth Ombudsman referred in its issues paper to an agency 'turning a blind eye'<sup>53</sup> to the legal obstacle in varying or remaking an earlier decision and that the

‘administrative reality is that a decision varying or made in substitution for an earlier decision will, in law, be presumed to be regular and effective until set aside by a court’.<sup>54</sup> The Ombudsman remarked, in a footnote to an observation that such a decision would be effective for all purposes, that this was a ‘variant of the *Kawasaki* principle’.<sup>55</sup> In this scenario, however, distinct from *Kawasaki*, executive action achieves validity (rather than invalidity) through the willingness of the parties to agree to it.

This view is supported by a closer consideration of the nature of invalidity. The High Court has urged great care using words like ‘void’ and ‘voidable’, as well as ‘irregularity’ and ‘nullity’,<sup>56</sup> saying that:

None [of the words] is used in a way which admits (or readily appears to admit) of the possibility that the legal effect to be given to an act affected by some want of power may require a more elaborate description which takes account not only of who may complain about the want of power, but also of what remedy may be given in response to the complaint.<sup>57</sup>

This analysis places emphasis not so much on the character of the decision but on the practical steps to be taken in relation to it. If there is no available remedy to cure some defect in a decision, it will remain legally effective for most if not all purposes — for example, if a limitation period has elapsed and no action can lawfully be maintained against it. The discretionary nature of certain remedies is also relevant to threshold decisions. It is open to a court to recognise an error and yet decline a remedy.<sup>58</sup> Reluctance to quash a threshold decision would be understandable where third parties with no control over the process have placed some reliance upon it. Whether it is of any legal significance that a challenge to the threshold decision is unlikely is not clear and perhaps unnecessary to consider in great detail. However, it would certainly be a factor in an assessment of whether a limitation period is likely to render the decision unassailable.

As a final point, it is unclear whether an order resulting in the invalidity of a threshold decision would operate to render subsequent decisions invalid as between the decision-maker and any person subject to those decisions. The observation in *Wattmaster* was that a finding of invalidity binds the decision-maker only as against the applicant in those proceedings.<sup>59</sup> That case concerned a determination by a Minister of broad application, and the joint judgment noted that the decision of the Court setting it aside would not necessarily result in the determination being of no effect as against other parties, going so far as to suggest that the decision-maker could again assert the validity of the determination in proceedings taken by other parties.<sup>60</sup> If a finding of invalidity will not displace the presumption of regularity in relation to the same decision as it affects other parties, there is no reason to think it will not apply to decisions made in reliance on an invalid threshold decision.

Rather than characterising the agency as turning a blind eye to legal impediments, the better view is that the agency considers on a sound basis that the decision, or at least the subsequent decisions, are legally effective by operation of the presumption of regularity and the ‘*Kawasaki* principle’. Alternatively, even if the decision-maker and potentially the affected parties stubbornly insist on the validity of a decision that is quite probably invalid and do in effect avert their gaze from any legal problem, the result is the same. That characterisation is less consistent with the principle of legality and unappealing for that reason.

### ***A stop-gap solution***

The presumption of regularity does not actually cure invalidity. It is a procedural mechanism, not a substantive source of power to be called upon where a decision is not

resisted. But it is the practical effect of the mechanism that may be of use in the circumstances.

However, even where the parties agree, there is no guarantee that a popular and apparently uncontroversial decision will not be impugned. There may be a third party with sufficient interest in the decision, such as a business competitor for a pharmacist granted approval under s 90 of the *National Health Act 1953*. Alternatively, the decision may, for whatever reason, be the subject of a collateral attack on one of the decisions that are contingent upon it. Even where a subsequent decision is nothing more than the payment of a benefit, it is not necessarily safe to assume that the recipient will not assert its invalidity.<sup>61</sup>

Further, nothing in the foregoing is intended to suggest that there is no limit on the ability of a decision-maker to regard their decision as valid where jurisdictional error is manifestly clear. Cases of 'flagrant invalidity',<sup>62</sup> where a decision-maker purported to exercise some power completely unknown to the statute, could probably not be rationalised in the way described.

### Conclusion

The invalidity of a threshold decision or purported decision can have wide-ranging consequences. If not adequately sustained it may result in the invalidity of actions taken by improperly appointed decision-makers or a community being without pharmaceutical benefits. Third parties who do not participate in the making of the threshold decision are in the unsatisfactory position of having merely to hope that the decision-maker will get it right.

In particular, threshold decisions made under beneficial schemes can play an integral role in the functioning of many aspects of society. It will be noted that many of the examples given in this essay occur in relation to various health programs that reach into the lives of millions of people in the Australian community. Decision-makers tasked with making sure that these schemes operate effectively are the repositories not just of statutory power but also of the public trust.

This essay has attempted to canvass a variety of options that a decision-maker may consider when given reason to doubt the lawfulness of their decision. These options can range from remaking a decision to using more novel approaches to preserve its effect. It may also be open to a decision-maker to determine, having considered the arguments for invalidity closely, that they are not to be preferred. Finally, even when a threshold decision is likely to be set aside if challenged, it may be open to a decision-maker to regard it as practically valid in limited circumstances on the basis of the principle of regularity and the outcome in *Kawasaki*.

To avoid too serious a conflict with the principle of legality, it may be appropriate to limit the scope of any assumption by a decision-maker that a decision may be relied upon despite invalidity. Uncontroversial threshold decisions under beneficial statutes are suitable candidates for this approach. In such cases it is necessary in order to preserve the effectiveness of subsequent decisions conferring benefits on innocent third parties, and to achieve the purpose of the enabling statute. The approach represents a step towards ensuring what might be thought of as a 'just' outcome (if not necessarily a correct outcome in the strict legal sense).

Decisions such as those in *Carltona* and *Kawasaki*, in my view, represent an approach that allows for a measure of pragmatism in the face of principles that would not ordinarily admit of convenient exceptions. They are, to use a phrase more often associated with the law of duress and provocation, a concession to human frailty and an acknowledgement of the

difficulties that exist in the effective exercise of statutory power. The path of administrative law is littered with decisions made on their facts and with regard to the potential consequences.

It goes without saying that no amount of merely arguable bases for validity will be preferable to a clear and unambiguously valid decision. Officials that are tasked with exercising statutory power in relation to threshold decisions should take care to ensure that their decisions are lawfully made. Even in the case of decisions that are objectively unlikely to be impugned, there will always be some element of risk when a decision is made otherwise than in accordance with its enabling statute, or where it trespasses against some other principle of decision-making.

Public officials, like anyone, are liable to make mistakes. Accordingly, it is fitting that there is a wide array of potential arguments (some admittedly more tenuous than others) that may be drawn upon where a decision-maker falls into error. Statutory decisions matter and the community legitimately expects that it will not be disadvantaged by avoidable mistakes in the bureaucracy. Where such a mistake is made, it will be important for a decision-maker carefully to consider their position in order to determine whether there is a legally defensible means of preserving their decision.

#### Endnotes

- 1 *Re McHattan and Collector of Customs* (1977) 1 ALD 67, 70 (Brennan J).
- 2 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 417 (Lord Roskill).
- 3 'Beneficial' is used here and throughout this essay in the sense of the class of statute.
- 4 *Private Health Insurance Act 2007* (Cth) s 279-5.
- 5 *National Health Act 1953* (Cth) s 90.
- 6 (1991) 32 FCR 219.
- 7 (2013) 252 CLR 118.
- 8 *Health Insurance Act 1973* (Cth) s 23DZQ(1).
- 9 *Williams v Commonwealth of Australia* (2012) 248 CLR 156.
- 10 Generally on the basis of the principle in *Auckland Harbour Board v The King* [1924] AC 318.
- 11 Section 11 of the *Public Governance, Performance and Accountability Rule 2014* requires the accountable authority of a non-corporate Commonwealth entity to recover debts for which the accountable authority is responsible, save for in limited circumstances.
- 12 (1991) 32 FCR 219, 225.
- 13 Commonwealth Ombudsman, *Mistakes and unintended consequences — a safety net approach*, issues paper, 2009.
- 14 (2002) 209 CLR 597.
- 15 *Ibid* 616 (Gaudron and Gummow JJ).
- 16 Australian Government Solicitor, *Don't Think Twice — When Can Administrative Decision Makers Change Their Mind?* Legal Briefing No 67 (2003).
- 17 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(6).
- 18 *Ibid* s 25.
- 19 See, for example, *Social Security (Administration) Act 1999* s 126.
- 20 *Health Insurance Act 1973* (Cth) s 16D.
- 21 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.
- 22 *Rail Signalling Services Pty Ltd v Victorian Rail Track* [2012] VSC 452, [85].
- 23 *Ibid* [89].
- 24 *Ibid*.
- 25 *Ibid* [90].
- 26 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 36–7 (Mason J).
- 27 *Human Services (Centrelink) Act 1997* (Cth) s 16; *Human Services (Medicare) Act 1973* (Cth) s 8B.
- 28 [2016] FCAFC 153.
- 29 *Ibid* [115].
- 30 See *Human Services (Centrelink) Act 1997* (Cth) s 8.
- 31 *Human Services (Centrelink) Regulations 2011*.
- 32 (1998) 194 CLR 355.
- 33 *Ibid* 390 (McHugh, Gummow, Kirby and Hayne JJ).
- 34 *Ibid* 391, quoting *Tasker v Fullwood* [1978] 1 NSLWR 20, 24.
- 35 [1917] AC 170.
- 36 *Ibid* 175.
- 37 *Ibid*.

- 38 Ibid.  
39 (2011) 197 FCR 177.  
40 Ibid 187.  
41 Ibid 190.  
42 Ibid.  
43 Ibid 188.  
44 *Johns v Australian Securities Commission* (1993) 178 CLR 408, [18] (Brennan J) citing *Moore v Attorney-General (Irish Free State)* [1935] AC 484, 498; *R v Bevan; Ex parte Elias and Gordon* 66 CLR 452, 487 and *Brown v West* 169 CLR 195, 203.  
45 Caution in this regard was urged in *Mercantile Mutual Life Insurance v Australian Securities Commission* (1993) 40 FCR 409 at 412 (Black CJ).  
46 Department of Finance, *Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013*, Resource Management Guide No 401, 10.  
47 (2011) 197 FCR 177.  
48 *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253, 258 (Sheppard and Wilcox JJ).  
49 (1991) 32 FCR 219, 225.  
50 *Smith v East Elloe Rural District Council* [1956] AC 736 at 769 (Lord Radcliffe).  
51 Ibid 224 (Beaumont J).  
52 (1991) 32 FCR 219, 230–1.  
53 Commonwealth Ombudsman, *Mistakes and unintended consequences — a safety net approach*, Issues Paper (2009), 5.  
54 Ibid.  
55 Ibid.  
56 (2013) 252 CLR 118, [21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).  
57 Ibid.  
58 See *R v Secretary of State for Social Services; Ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1.  
59 (1986) 13 FCR 253, 259 (Sheppard and Wilcox JJ).  
60 Ibid 259.  
61 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1.  
62 *AJ Burr Ltd v Blenheim Borough* [1980] 2 NZLR 1, 4 (Cooke J).

## CONNECTING THE DOTS: A CASE STUDY OF THE ROBODEBT COMMUNITIES

*Katie Miller\**

In the weeks leading up to Christmas 2016, Australians were checking their letterboxes — for Christmas cards, an aunty's annual Christmas newsletter and last-minute online gift purchases. Some Australians checking their letterbox found an unwanted surprise waiting for them — a letter from Centrelink advising they owed hundreds or thousands of dollars in Centrelink overpayments made as far back as 2010.<sup>1</sup>

Recipients of the letters were confused. They did what any confused person in today's world does — they went online looking for answers and to social media to share their experiences.

Other users of social media noticed the chatter. One of them — Lyndsey Jackson — created the *NotMyDebt* website to collect and share the experiences and created Twitter hashtags to connect the different conversations about the letters. In a matter of days, lawyers, journalists and community activists such as Asher Wolf and Justin Warren, social services and recipients of what came to be known as 'Robodebt letters' were talking about the letters and what could be done about them.

United in their opposition to the Department of Human Services' Online Compliance Intervention (OCI), these lawyers, journalists, activists and recipients became online communities, which I will describe as the 'Robodebt communities'.<sup>2</sup> The Robodebt communities are not communities that would be recognised by administrative law. Yet my contention is that the Robodebt communities *affected* and enhanced administrative law by connecting people with administrative law problems to administrative law solutions.

In particular, in this article I will:

- consider how online communities such as the *NotMyDebt* and Robodebt communities fit within Brennan J's analogy of the 'ripples of affection';
- explain who these online communities are, what they did and what the effect has been; and
- challenge members of the administrative law community to consider how we can engage with online communities in the future to enhance the effectiveness of administrative law.

### **Administrative law and communities**

Administrative law regulates the exercise of public power through an individual paradigm.<sup>3</sup> Administrative law processes generally consider a specific, as opposed to general, instance of the exercise of a public power. Standing requirements limit access to administrative law

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processes and remedies by requiring persons seeking to challenge the exercise of public power to have a 'special' interest in a specific exercise of the power. The classic example is that only persons with a direct interest in a decision may challenge that decision through merits or judicial review.

By privileging individual rights and interests, standing requirements distinguish between the individual and 'third parties'. The distinction is a strict one, with standing requirements treating an individual decision as being 'of no immediate consequence to anyone other than the [individual]'.<sup>4</sup> In Brennan J's metaphor of the 'ripples of affection', each exercise of public power is a distinct and separate disturbance in the 'pool of sundry interests',<sup>5</sup> as illustrated in Figure 1.<sup>6</sup>



**Figure 1**

In the Robodebt context, 200 000 people received Robodebt letters. Administrative law treats each of those 200 000 letters as separate and distinct disturbances in the 'pool of sundry interests'. Administrative law stipulates that each recipient of a Robodebt letter has an interest in their letter and their letter alone. Equally, the only person likely to be recognised by administrative law as having an interest in a specific Robodebt letter is the recipient of that letter.

There is an artificiality in treating each Robodebt letter as separate, distinct and of no interest to anyone but the recipient. Each of these letters stemmed from a single program — the OCI. The remedies and processes available to deal with the letters are common — that is, merits review, judicial review, complaints to the Ombudsman and requests under the *Freedom of Information Act 1982* (Cth). From a lay perspective, a recipient of a Robodebt letter (Halo) would at least be *interested in* the manner in which another recipient (Hades) challenged his Robodebt letter and the outcome, as it would inform Halo about how she should challenge her letter. That interest is not recognised by administrative law — but it does not mean it does not exist.

A consequence of the strict distinction between individuals with interests and third parties without interests is that standing requirements have traditionally struggled with the treatment of exercises of public power that have a communal effect, including exercises that:



- are of 'public concern with which no private person has any immediate connection'<sup>7</sup> (such as decisions affecting the environment<sup>8</sup>); or
- may indirectly affect a third party's interest (such as a decision that a duty applied to imported goods, when advice had been provided that such duty was not payable<sup>9</sup>).

Expressed another way, administrative law understands and recognises individual decisions that affect individual people. It struggles with individual decisions that affect many people and does not recognise at all the collective effect of many decisions with a common source that affect many people.

Traditionally, persons concerned with exercises of power with communal effect have formed communities in an attempt to fit communal interests within an individual paradigm. For example, environmental groups have incorporated and attempted to show, by way of their purposes, functions and activities, that they have interests in the exercise of public power greater than members of the general public.<sup>10</sup>

This attempt to fit communal interests in an individual paradigm has not occurred in the Robodebt context. Recipients of Robodebt letters have not incorporated a protest group against Robodebt. Existing groups that could be seen as having special interests greater than that of the general public (such as Social Security Rights Victoria) have not sought to challenge Robodebt letters in their own right — presumably because of the time, expense and uncertainty involved in establishing that they satisfy the standing requirements.

Instead, the communal interests about Robodebt have remained firmly communal and varied. The interests found within Robodebt, by and large, would be considered too remote and insufficiently distinct to be recognised by administrative law. At best, they are the fading, outer ripples in Brennan J's 'ripples of affection'.

To extend the metaphor, the online communities exist between the disturbances and ripples. They exist in, or are, the 'pool of sundry interests' (see, for example, Figure 2<sup>11</sup>). I contend that the pool (community) is not a passive thing that is affected by the disturbances (Robodebt letter). Rather, the pool is active and moving and can affect the disturbance as much as the disturbance affects the pool. Administrative law is not concerned with the pool (online community) but is nevertheless affected by it. This is particularly the case where multiple decisions (droplets) have a single or common source. To extend the metaphor, the OCI is the rain cloud from which 200 000 raindrops fell (Figure 3<sup>12</sup>).



**Figure 2**



**Figure 3**

### **Who are the Robodebt communities?**

The communities that arose around Robodebt are informal and amorphous. They are united by their shared interest in, and opposition to, the OCI. The Robodebt communities are not recognisable as a single entity. They may not even be a single community but, rather, a collection of many communities. They do not have a single identity, let alone a legal identity.

The communities exist online, connected on platforms such as Twitter, Facebook and Slack through hashtags, pages and groups. There are no leaders per se, although the efforts of

people like Asher Wolf, Lyndsey Jackson and journalist Justin Warren have given the communities visibility and profile, thus attracting interested people to the communities.

The 'members' of the Robodebt communities are varied. Some members are recipients of Robodebt letters, but many are not. Members include journalists, community activists, Centrelink payment recipients, lawyers, legal assistance organisations, industry and professional peak bodies, academics and citizens. Many members contribute in their professional capacities, but not all are doing so in a paid, employment or official capacity. I use the term 'member' loosely, because it is probable that the 'members' of Robodebt communities do not identify as 'members' of a Robodebt community.

The interests of the members are equally varied. Some are individuals who simply want their individual debt reversed. Some want the systemic issues underlying the OCI to be addressed. Others want improved government practice when exercising public functions through technology. The Robodebt communities are classic examples of 'single issue' communities. They are united by their desire to see the end of Robodebt (at least in its current incarnation), and the communities are unlikely to exist if and when the Robodebt issue is resolved.

In the language of administrative law standing requirements, the Robodebt communities are the antithesis of an organisation with a special interest in an administrative decision. They (we<sup>13</sup>) are 'busybodies' *par excellence*.

### **What did the Robodebt communities do?**

Since administrative law regulates the exercise of public power through an individual paradigm, reviewing exercises of public power (such as Robodebt letters) requires an individual to do a number of things. The last of these things is to invoke an administrative law process, such as apply for merits review. Douglas and Jones have identified that, before complaining or taking other administrative law action, an individual must:<sup>14</sup>

- be aware that there may be grounds for complaint;
- be aware that there exist channels of complaint and what those channels are;
- know how to mobilise or access those channels; and
- have sufficient confidence in the channels (and, I would add, their own abilities to make an effective complaint) to consider it worthwhile making the complaint.

The Robodebt communities provided individuals with the necessary awareness, knowledge and confidence to pursue administrative law remedies, particularly merits review.

The Robodebt communities crowd-sourced Robodebt stories and experiences through social media and the *NotMyDebt* website. The volume of tweets and posts about Robodebt raised awareness within the broader community that there was potentially a problem in the way in which the OCI was being implemented. This awareness extended to recipients of Robodebt letters, who may otherwise have assumed that the government was entitled to recover the debts claimed in the Robodebt letters.

Members of the community with experience in social security matters, such as lawyers, academics and social services organisations, contributed knowledge to the Robodebt communities. They identified:

- possible grounds and channels for complaint about the Robodebt letters and the debts they claimed;

- how to access those channels; and
- organisations that could assist recipients to take action.

Such organisations included community legal centres, legal aid commissions and social services organisations, which in turn used the Robodebt communities to distribute widely resources and information they developed to assist recipients of Robodebt letters. Recipients of Robodebt letters shared their experiences in challenging Robodebt letters and the debts claimed and whether their actions had been successful or not. The Robodebt communities enabled a crowd-sourced, iterative, en masse approach to addressing en masse administrative action that may have been infected by common administrative errors.

This crowd-sourced, iterative approach was particularly significant given the paucity of information contained in the original Robodebt letters and the challenges in obtaining information directly from Centrelink.<sup>15</sup> Given that the characterisation of the Robodebt letters themselves was, and remains, contested between the Department of Human Services and the Robodebt communities (are they 'debt letters' or 'clarification letters'), the letters did not contain information that would ordinarily be expected in letters about administrative action, such as how to access merits review. The Robodebt communities filled the gaps and connected the dots.

The Robodebt communities also gave recipients of Robodebt letters the confidence to take action. The experiences of recipients indicate that challenging Robodebt letters was stressful, difficult and time consuming. The awareness that this was a problem shared by thousands and that the effort achieved the desired outcome of a reduced debt arguably gave individual recipients the confidence and motivation to take action and to pursue that action until an outcome was obtained.

### **What were the effects of the actions of the Robodebt communities?**

The Robodebt communities raised awareness of the OCI and the problems associated with it. By focusing considerable attention on the conduct of the Department of Human Services and its agents, the Robodebt communities furthered one of the key objectives of administrative law — the accountability of public sector agencies exercising public power.

As a result of the awareness raised by the Robodebt communities, systemic issues with the Robodebt letters were recognised quickly. Within a month after the Robodebt communities were formed, the Commonwealth Ombudsman commenced an investigation of the OCI. On its second sitting day of 2017, the Senate referred to a Senate committee an inquiry into the OCI. The fact and timing of these investigations were attributed to the intense public pressure,<sup>16</sup> which in turn was facilitated by the Robodebt communities.

The Department of Human Services has made a number of changes to the OCI, such as using Registered Post to deliver Robodebt letters;<sup>17</sup> clearly stating in the Robodebt letters a telephone number through which further information can be obtained;<sup>18</sup> allowing recipients to use bank statements, rather than payslips, to establish the income received during the relevant periods; extending the time for responding to Robodebt letters; and not requiring repayment of the debt while it is disputed.<sup>19</sup> It is unlikely that these changes would have occurred, at all or as quickly, without the Robodebt communities effectively identifying the common problems with the Robodebt letters and generating intense public pressure for changes.

The attention focused by the Robodebt communities on the problems with Robodebt means that it is likely to become a case study for future governments intending to engage with technology assisted or automated decision-making. The Robodebt communities have

therefore assisted in achieving the objectives of administrative law — improving administrative action.

The effect on individual recipients of Robodebt letters is more difficult to assess. The Department of Human Services has not published data about the number of debts varied after a Robodebt letter was issued. Such data would be of limited utility in assessing the effect of the Robodebt communities, since one of the problems with the OCI process is that there is a considerable lack of clarity about the various stages of the process and an absence of the neat administrative law boxes of 'administrative action' and 'administrative review'.

Based on the conversations on Twitter, Facebook and *NotMyDebt*, it appears that recipients of Robodebt letters have taken action, such as seeking merits review by an Authorised Review Officer, after engaging with the Robodebt communities. In January 2017, South Australian community legal centres experienced a threefold increase in attendance as a result of Robodebt. In the same period in Victoria, Social Security Rights Victoria and Victoria Legal Aid experienced a 68 per cent and 150 per cent increase in legal services respectively. Given that, ordinarily, only 16 per cent of people with a legal problem recognise that they have a legal problem and seek help, it can be inferred that the significant increases in demand for legal services were facilitated, at least in part, by the Robodebt communities.

The effect of the Robodebt communities has not been complete or ideal. As online communities the Robodebt communities are messy. Anyone can provide information, and that information may not always be right. It is entirely possible, if not probable, that engagement with the Robodebt communities has increased the confusion of a recipient of a Robodebt letter before the recipient was connected to accurate and helpful information and organisations. The Robodebt communities have clearly not reached all 200 000 recipients, given that the Senate committee found that many individuals remain unaware of their rights when dealing with the department and that more needs to be done by the department to improve the OCI process. The OCI remains in place and is being extended to new groups of Centrelink recipients (namely, recipients of the aged care pension).

These observations are not offered as a condemnation of the Robodebt communities or a finding of failure. Rather, these observations indicate that the Robodebt communities can be improved. It is my contention that those improvements can be achieved, in part, through earlier and increased engagement by the administrative law community with online communities like the Robodebt communities.

### **The future for communities and administrative law**

The Robodebt communities demonstrate that communities that do not have standing to pursue administrative law remedies can nevertheless influence the effectiveness of those remedies. Rather than trying to fit within the individual paradigm of standing, online communities bring individuals together and provide common information and support to individuals to access the individual-based administrative law remedies.

Online communities can increase the likelihood that individuals will challenge individual administrative decisions by:

- making those individuals aware that there may be a problem with the decision;
- providing information about how to challenge a decision;
- connecting the individuals to organisations that can assist in challenging a decision; and
- giving individuals the confidence to take action.

Like all communities, online communities are only as good as their members. One of the benefits of an online community is access to information and expertise. The Robodebt communities were enhanced by contribution from experts in the legal and social services sectors. Experts assist by providing good quality information and clarifying and countering misinformation. Often, the information required is no more than the basics — things that are simple for experts but confusing or daunting for non-experts. Consequently, experts can contribute a lot without significant time or effort.

If administrative law is to exist beyond statute books and their digital equivalents then it is imperative for members of the administrative law community to engage with online communities that form around administrative law issues. The opportunities for engagement are as varied as the number of social media platforms available and include participating in Twitter conversations, writing blogs about administrative law issues (either general or specific), joining a Slack group and/or extending online and physical networks to include community activists and journalists who are regularly part of online communities.

### **The challenge for the administrative law community**

There are features of the administrative law community that may constrain the ability of members of that community to engage with online communities, especially those related to the fact that many, if not most, members of the administrative law community are employed by government. Public servants are required to be apolitical and may be concerned that, if they engage online with people who are engaged in political activities, they will be associated with those political activities and views. In some jurisdictions, the restrictions on public debate by public servants are enshrined in the constitution of that jurisdiction, the breach of which may constitute a criminal offence.<sup>20</sup>

Furthermore, like all employers, governments have (and should have) social media policies which set out the expectations and obligations for employees engaging in social media. These policies generally distinguish between using social media for work and personal purposes. Some will further distinguish unofficial professional use — that is, use of social media as a professional for purposes unrelated to their employment. Some policies require employees to notify their employer before engaging in public comment, even on social media, and to use certain disclaimers that may be difficult to express in the confines of social platforms such as Twitter.<sup>21</sup> Some policies restrict employees from commenting on *any* government policy, whereas others restrict public comment only in respect of the agency for which the employee works.

Members of the administrative law community who are lawyers may also be concerned about risks to their legal professional obligations, such as inadvertently creating a solicitor–client relationship or engaging in conduct that may not be protected by professional indemnity insurance.<sup>22</sup> Others may simply be concerned about the consequences of providing inaccurate information — that is, the consequences for the community member if they act in reliance upon that information and for the lawyer’s reputation.

Although members of the administrative law community may have significant knowledge and confidence in administrative law issues, they may feel less confident in the platforms on which online communities gather. Each platform has different features and cultural norms. This diversity is a strength for online communities, with communities using different platforms to best achieve their objectives. However, it is daunting for someone who has limited knowledge and confidence with a particular platform or social media generally.

These challenges need to be explored and discussed by the administrative law community. Engagement with online communities presents a significant opportunity to enhance the

relevance and effectiveness of administrative law. The challenge for the administrative law community is to identify how to reconcile these opportunities with their professional obligations.

Online technology and communities have changed how we perform our roles as citizens, consumers, students, employees and family members. It is inevitable that it will change the way in which people with administrative law problems access administrative law solutions. In the 'pool of sundry interests', every disturbance affects the others. How far will the administrative law community's ripples of affection extend?

#### Endnotes

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- 17 *Ibid* [3.16].
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- 20 Katie Miller, 'When is it OK for a public servant to tweet political opinions?' *VGSO Blog* (20 August 2013) <<http://blog.vgso.vic.gov.au/2013/08/when-is-it-ok-for-public-servant-to.html>>.
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## LESSONS LEARNT ABOUT DIGITAL TRANSFORMATION AND PUBLIC ADMINISTRATION: CENTRELINK'S ONLINE COMPLIANCE INTERVENTION

*Louise Macleod\**

In July 2016 the Department of Human Services (DHS) and Centrelink launched a new online compliance intervention system known as the Online Compliance Intervention (OCI).<sup>1</sup>

The OCI automates much of the investigation and debt-raising process where DHS detects a discrepancy between the amount of PAYG income a person declared in a year and the amount of PAYG income reported to the Australian Taxation Office (ATO).

DHS has investigated ATO data-match income discrepancies since 1991. Prior to the introduction of the OCI, resourcing considerations meant that DHS could manually investigate only around 20 000 income data-match discrepancies *per year*. By contrast, the OCI generated approximately 20 000 letters *per week*, and DHS expects to undertake around 783 000 assessments in the 2016–17 year.

By December 2016 the system, which was dubbed 'Robodebt' by the media, had come under sustained public criticism. The Commonwealth Ombudsman experienced a spike in the number of Centrelink debt related complaints being received and commenced an own-motion investigation in January 2017. A Senate inquiry<sup>2</sup> was also announced, and the committee issued its reports on 21 June 2017.

The Commonwealth Ombudsman published its investigation report<sup>3</sup> in April 2017. The report found there were issues with the transparency, usability and fairness of the system. It found that many of these problems could have been avoided by better project planning and stakeholder engagement. It made a number of recommendations to improve the system, which DHS accepted and has begun implementing.

Automated decision-making is not new. Australian Government agencies, including DHS, have increasingly used automated and semi-automated administrative decision-making platforms. DHS was part of the working group which delivered the *Automated Assistance in Administrative Decision Making Better Practice Guide* in February 2007 (Better Practice Guide)<sup>4</sup>. The guide built on the 27 best-practice principles identified in the November 2004 ARC report to the Attorney-General on *Automated Assistance in Administrative Decision Making* (ARC Best Practice Principles).<sup>5</sup>

This article considers the lessons to be learnt from the rollout of OCI and the continuing importance of the ARC Best Practice Principles and the Better Practice Guide in the context of a rapidly evolving technological and policy environment.

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### Automating the calculation of debts

In the investigation, the Commonwealth Ombudsman's Office examined the accuracy of debts raised under the OCI and was satisfied that the method of calculating debts had not changed and debts raised by the OCI are accurate decisions, based on the information which is available to DHS at the time the decision is made (that is, ATO data).

So what was different about the OCI as an automated decision-making process?

First, there was a shift in DHS's approach to fact-finding and the quality of information on which it is prepared to make a decision. While the method of calculation had not changed, the information being fed into the calculation tool was qualitatively different.

In the past, investigations were done manually by a compliance officer. This meant there was human intervention in every investigation. Where it appeared an overpayment may exist, the customer was asked to provide payslips or other supporting documentation to verify their income.<sup>6</sup>

If the information requested was not forthcoming or did not adequately address the request, generally the compliance officer wrote to the customer's employer using information-gathering powers<sup>7</sup> to obtain payroll records showing fortnightly income information.<sup>8</sup> This would then be manually entered by the DHS officer into a debt calculation tool.<sup>9</sup>

If fortnightly earnings information still could not be obtained, DHS guidelines permitted compliance officers to apportion ATO annual earnings over the debt period but only 'if every possible means of obtaining the actual income information has been attempted'.<sup>10</sup> The same DHS guidelines acknowledged that apportioning annual earnings could result in debts being over- or under-calculated if the person's actual fortnightly income was different from the averaged amount (for example, if their employment was fluctuating or intermittent). This is because, under the *Social Security Act 1991* (Cth), entitlements are calculated using fortnightly, not annual, income.

The OCI involved two departures from this previous manual process:

- first, the task of collecting and entering historical pay data shifted almost entirely to the customer;<sup>11</sup>
- secondly, if income information was not provided by the customer within the requisite time frames, the OCI used averaged ATO income information to calculate any debt.

Administrative decisions are made on the best available information at the time of the decision. If further information becomes available, a new decision can be made. To enable it to automate debt raising in situations where earnings information was not forthcoming from the customer, DHS decided to accept the best *already available* evidence<sup>12</sup> to calculate an approximate debt figure by averaging ATO data, rather than using its information-gathering powers to obtain verified fortnightly data to calculate an exact debt figure.<sup>13</sup> This decision was fundamental to the efficiency and scale of the system, because it meant that compliance officers did not manually have to intervene to obtain fortnightly payroll data.

In other words, the system would calculate an accurate debt, but only if the customer was ready, willing and able to collect and enter the requisite information accurately. Debt-raising decisions by the OCI, which are by their nature adverse decisions, may therefore be affected by a user's ability to engage effectively with the system. It follows that success of the

system, and the integrity of any decisions it made, would rely on its usability, transparency, accessibility and fairness and the adequacy of support for users of the system. Our investigation therefore concentrated on these aspects of the system, including quality of service delivery and procedural fairness.

Secondly, the OCI was different to existing automated systems.

To understand what was different about the OCI, it is also useful to look at other Commonwealth government systems which rely on self-assessment and data entry by individuals. DHS's self-service system for reporting income and the ATO's E-tax system are useful for the purposes of comparison.

DHS's self-reporting tool has enabled Centrelink customers to enter their fortnightly income information online or via an automated telephone service for many years. The system uses this information automatically to calculate the person's fortnightly entitlement resulting in an automated decision about the person's rate of payment for that fortnight.

The ATO's E-tax tool enables a person to enter their annual income information online by answering a series of questions. The answers given to those questions opens and closes alternative question pathways according to what is relevant to the person. At the end of the process the person is presented with an assessment of their income tax or refund for that financial year.<sup>14</sup>

No doubt there are a number of differences between these two examples and the OCI, but, for the purposes of this article, it is worth observing the following features of the DHS self-reporting and ATO E-tax tools:

1. Both systems rely on the user inputting information which relates to a relatively recent period — normally the preceding fortnights or annual year respectively.
2. Users of both systems will generally have been warned in advance, or ought reasonably to be aware,<sup>15</sup> they may need to have kept relevant income documentation for these purposes.
3. Users of both systems are generally current or relatively recent customers of the relevant agency.

By contrast, the OCI system relies on users inputting data which relates to a historical period, up to six financial years past. Our investigation found that DHS customers had not been forewarned they may need to retain their detailed fortnightly earnings information (such as payslips) indefinitely. For some, employers could no longer be contacted or may refuse to provide the relevant income information. Many users were not current DHS customers and had no reason to keep the agency updated about their current contact information. This meant they did not receive the originating OCI notices inviting them to go online.

## **What can be learnt from the OCI experience?**

### ***Communication with users***

One aim of digital transformation is to help citizens provide the information needed to assess their eligibility for benefits or services. As her Honour Justice Perry points out in her paper 'iDecide: The Legal Implications of Automated Decision Making', this self-service function holds great promise for government agencies, as it may help them process a high volume of transactions quicker, more reliably and less expensively than using human decision-makers.<sup>16</sup>

One of the key lessons from the OCI experience is that an agency's strategy for communicating with citizens about a new digital process is at the heart of successful digital transformation. A digital process that relies on electronic coding to process data is only as good as the information the citizen provides, so the citizen needs sufficient guidance to successfully navigate the new process.

How much guidance is necessary depends on the circumstances, including the complexity of the new process. However, generally consideration should be given to providing sufficient guidance to ensure:

- the citizen understands from the outset what the process will require from them, including what information they will need successfully to navigate it;
- where they have options or choices about how to use the process, guidance about which option is appropriate for them and/or the consequences of their choice; and
- where to go for help if they have questions or difficulties with the process.

There are likely to be a number of points where this information needs to be provided — in the online space itself, on a website and through a helpline. Providing guidance to manage user input to reduce the risk of error or misinterpretation is recommended in the Better Practice Guide.<sup>17</sup>

However, one of the key lessons from the rollout of the OCI was the importance of the quality of initial communication with users of a new digital service. The OCI's initial messaging to customers, both through its letters and in the system itself, was unclear and did not include crucial information.<sup>18</sup> What we learned from the OCI was that the first communication with users can influence their response to the process and how successfully a new digital service meets its objectives.

The initial communication should clearly explain:

- the process and key steps to be taken;
- the consequences of engaging with the process (either fully, partially or not at all);
- the options available, including if there is more than one way of engaging with the process; and
- what support is available and how to access it — for example, via a website, instructional videos or dedicated helpline.

The OCI experience also demonstrated the need to take extra care to ensure that initial communication is received if the user is not a current customer of the agency. When agencies are implementing new systems, and non-engagement may adversely impact an individual, careful attention needs to be paid to the agency's ability to contact former customers or determine whether contact has successfully been made.

### ***Design of digital platforms***

Digital transformation often involves the creation of an online platform for citizens to use to engage with a new process. The development of online access promises increased convenience for citizens and reduces expense for agencies. As identified in the ARC Best Practice Principles and the Better Practice Guide, when developing an online system, agencies should take into account access and equity considerations in the delivery of their services.

A key lesson from the OCI experience is that the design of the online platform may have a significant bearing on the successful launch of the new process.

Seemingly micro-level issues of design may have significant consequences. For example, if there is a helpline, how visible should the phone number be? What icon should be used? Should the phone number appear prominently on each webpage? This may determine whether people access help at critical points or instead give up in frustration, failing to complete the process correctly or at all. It may influence whether people seek to use other access points to an agency, attending a shopfront, instead of using the dedicated helpline into which resources have been put.

There are also more fundamental design questions to be considered. Where information is required from the citizen before a decision may be made, one standard design approach is to mandate in the business rules that certain critical questions be answered before the digital process may be completed by the citizen. We are all familiar with this kind of design — we get to the bottom of a webpage after answering a series of questions and click on the 'next' button, but we are told we have not answered all of the required questions (now marked with an asterisk).

However, an agency may consider for various reasons that it is appropriate to allow a citizen choice in how they access or interact with a digital process. This in turn presents a different set of issues. It may require greater attention to the communication issues already mentioned — ensuring that citizens are clearly informed of their options and the consequences of those options.

The OCI was an optional process. A person was invited to update their income details, but engagement with DHS was not legally required. However, there was a consequence for non-engagement, as DHS would apply their ATO income data to their record. Within the OCI itself, a person could make choices about whether to enter data (for example, they could choose to provide some but not all of the fortnightly income data for a relevant period).

What we learnt from the OCI is that, if a compulsory process is not used, this increases the need for clear communication and messaging both outside and within the online platform, particularly in regard to the consequences of opting not to engage with the system or of providing only partial information. It demonstrated that agencies designing optional systems should give close attention to:

- layout — for example, the helpline should be clearly displayed on every page;
- warnings — for example, warning of the consequences of skipping a step and prompts to review information; and
- messages about options and consequences.

### ***Transparency***

An important lesson from the OCI is that, when designing a digital system where human interaction may not eventuate, the messaging of the system is key to ensuring transparency.

Transparency is not just a fundamental administrative law value. It is also essential to the process of continuous improvement that is so important in digital transformation processes. It became apparent during our OCI investigation that poor communication was at the heart of the complaints we received about transparency, and it followed that improving the quality of communication was the key to improving transparency and usability of the system.

It was also clear that much of the misinformation about the system in the public domain derived from the lack of visibility of the system for commentators. Privacy is a key consideration in digital systems designed to be accessible only to the citizen and the staff of the owning agency. DHS ensured that its staff could access the system directly to talk people through the process and even enter data on behalf of the customer while they were on the telephone, where appropriate.

However the lack of visibility of the system for third parties was an issue in the public domain, where critics and commentators formed and voiced opinions without having seen the screens that customers were presented with when they went online. The Commonwealth Ombudsman's Office's understanding of the system was greatly improved by the 'walk-through' and 'screen shots' of the system that we received, which we annexed to our report, placing them in the public domain for the first time. Once we were able to 'see' the system, we were able to provide feedback to DHS that led to revisions and improvements to the system.

The value of a clear communication strategy cannot be overstated, and a key consideration for agencies is whether the inability of third parties to access a digital system may cause confusion in the public domain or impede third-party organisations, such as legal services and community organisations, from supporting users. There is value in providing 'walk-throughs', 'screen shots' and instructional video-on-demand resources to oversight bodies, peak bodies and other organisations that support users prior to and at the time of rollout as part of a comprehensive communication strategy. This approach is consistent with the Better Practice Guide, which recommends agencies consider providing access to customers, call centre operators (for providing general advice and information), outsourced service delivery agents and/or providers, and community organisations assisting their clients properly to achieve the benefits of the transition to digital service delivery.

### ***Support for users***

Understanding user needs is paramount when designing digital systems and is the first standard of the Digital Transformation Agency's Digital Service Standards.<sup>19</sup>

The design and implementation of a new digital process should include consideration of user needs and support for them. The nature and degree of support required will depend on a number of circumstances, including the novelty of the new process, its complexity, the demands made of users and the characteristics of the user group.

At one end of the spectrum are systems which require only clear information for users. For example, where the new process is relatively simple and users are relatively sophisticated, the process is similar in nature to other processes users will already be familiar with.

However, as the complexity and demands of a new process increase, so does the need carefully to consider the support required for users. In fact, the successful implementation and operation of the new process may depend on it.

There are a number of key issues for agencies to consider. These include:

- **the complexity of the process relative to the sophistication of the user.** For example, a portal for tax accountants may be able to assume a degree of knowledge and sophistication among its users that a portal for taxpayers could not
- **the extent to which alternatives to a new digital process should remain available.** What are the consequences if non-digital alternatives are not retained? If they are to remain available, questions of inclusion and exclusion may arise. For example, if access

to alternatives is restricted to 'vulnerable persons', how are they to be identified and defined? Will it be available short, medium or long term?

- **the novelty of the process for users.** If the process is new some people may continue — at least at first — to seek to undertake the transaction in the way they are familiar with. What training should be given to front-of-house staff who may be the first point of contact for people seeking help?
- **the form support should take.** This may range from information (for example, website, video-on-demand, a help button in the online platform) to specialist trained staff to assist people. It may be helpful to user test some forms of support in the planning stages to test its effectiveness. There needs to be a clear communication strategy directing users to sources of support
- **how to ensure support is accessible.** Considerations include timing (when it is needed, for example, at rollout) cost (including time, financial and emotional) user capacity (particularly where users may be vulnerable — for example, due to literacy, language, disability) and communication (in particular, pathways directing users to support). Steps should be taken to identify vulnerable customers prior to rollout, where possible, and a strategy should be developed for identifying and servicing customers whose vulnerability only presents after rollout.<sup>20</sup>

The OCI was an example of a complex system relative to the user. It followed that there would be a higher need for user support.

DHS had maintained non-digital channels and had set up a dedicated helpline with specialist trained staff. However, the existence of these supports was poorly communicated, as the helpline number was initially excluded from letters and was not obvious in the system. This meant customers called general customer service lines, resulting in long wait times, instead of the helpline.

The OCI provided other accessibility lessons for agencies rolling out complex digital systems on a large scale. It showed that instructional resources, such as user guides, factsheets, video-on-demand and other 'how to' resources should be developed and be available at the time a new system is launched. An incremental rollout approach should be taken if there is a risk that demand for support may reduce accessibility (for example, long telephone wait times).

Finally, the OCI demonstrated that, when designing systems where citizens enter data which will inform an automated decision, consideration must also be given to how readily available that information will be to the user. Wherever possible, agencies designing self-service systems should forewarn people to retain records they may need for future interaction with the system.<sup>21</sup> Where this is not possible, and where appropriate, agencies need to give consideration to whether they have adequate assistance and support for people to obtain the documentation or information they need effectively to engage with self-service systems. During our investigation, for example, DHS redesigned its system to enable people to enter bank statement data where payslips or payroll data were unavailable.

### ***External perspectives***

A key lesson for agencies and policy makers when proposing to roll out large-scale measures that require people to engage in a new way with new digital channels is that agencies must user test thoroughly and engage early with external stakeholders. Many of the problems outlined in this article and in our report could have been mitigated through better project planning, engagement, change management and communication at the outset.

An important consideration for agencies is at what point external stakeholders should be consulted in the design and implementation of a new digital service. This may be particularly difficult if there is a high risk that the new system could be jeopardised by criticism of early prototypes. However, this must be weighed against the risk that a lack of external perspective may affect the design and delivery of the project.

DHS did not ensure that all relevant external stakeholders were consulted during key planning stages and after the full rollout of the OCI. This was evidenced by the extent of confusion and inaccuracy in public statements made by key non-government stakeholders, journalists and individuals. Better consultation processes would have provided important feedback both for improving the system design and for identifying gaps in the communication strategy.

Our investigation found the OCI required more rigorous user testing and would have been improved by greater use of the co-design approach the department has adopted elsewhere. After DHS worked with the now Digital Transformation Agency (DTA) in February 2017 to review and redesign the OCI and undertook comprehensive user testing, this resulted in a more user-friendly system. In future, systems like the OCI should be developed in collaboration with the DTA and other oversight agencies. Consultation and use of multidisciplinary teams during design and testing is consistent with the ARC Best Practice Principles.

The OCI demonstrated the need for external perspectives in the design, testing and implementation of new digital systems. Wherever possible, systems should be tested with citizens, service delivery staff, oversight agencies and other organisations that support users at the earliest possible stages.

### **Guidance and oversight**

As her Honour Justice Perry commented in her paper, the ARC's *Automated Assistance in Administrative Decision-Making* report was groundbreaking and appears to have been the first report systematically to review the administrative law implications of automated decision-making systems. The Better Practice Guide, which assists agencies in their design and implementation of automated systems, was also the first of its kind.<sup>22</sup>

Somewhat prophetically, most of the problems with the OCI were foreshadowed by the Better Practice Guide. For example, the Better Practice Guide identified the risk that user interface design problems may 'artificially limit the effectiveness of the information gathering process that is essential to good administrative decision-making'. It also articulated the importance of access to support, including telephone and face-to-face support, and considering the impact that the new system may have on existing service delivery channels.

However, it is now 10 years since the Better Practice Guide was published, and questions arose about its currency in a rapidly changing environment. Our experience with the OCI suggests that, in particular, more guidance is needed on managing user input and the importance of effective communication strategies to ensure that public confidence in government administration is preserved during digital transformation.

The OCI experience also raises questions about whether greater project management oversight is required, particularly in pre-implementation phases.

In its 2004 report, the ARC recommended the establishment of an independent interdisciplinary advisory panel to oversee automated systems. It envisaged that the panel would focus on the extent to which administrative law values are reflected in the use of such

systems and proposed the panel would include the Auditor General and Commonwealth Ombudsman, as well as community organisations that represent users of these systems.

When DHS redesigned its system in February 2017, it incorporated feedback from the Commonwealth Ombudsman and the DTA. This was six months after implementation, when the insights and expertise of oversight agencies and other external stakeholders could have been captured in the early design and planning stages. One solution to this problem may be for agencies rolling out automated decision-making systems to consider establishing advisory panels or delivery units to oversee major digitalisation projects, which include external stakeholders — in particular, the DTA, the Commonwealth Ombudsman, the Office of the Australian Information Commissioner and the Australian National Audit Office — in the earliest stages of design and planning.

In October 2016 the Australian Government expanded the role of the DTA, which now has central oversight of the government's ICT agenda. In February 2017, the DTA announced the establishment of a new Digital Investment Management Office within the agency to improve transparency of ICT design and delivery across government and provide independent assurance. The DTA's *Digital Service Standard* has a strong focus on understanding user needs. DHS indicated that it will apply these standards and collaborate with the DTA in future. All government agencies embarking on the digital transformation journey would do well to ensure decision-making carried out by or with the assistance of an automated system is consistent with ARC Best Practice Principles, the Better Practice Guide and the *Digital Service Standard*.

#### Endnotes

- 1 The OCI was introduced as part of a 2015–2016 Budget measure, 'Strengthening the Integrity of Welfare Payments', and a December 2015 Mid-Year Economic Fiscal Outlook announcement.
- 2 Senate Standing Committee on Community Affairs, *Design, Scope, Cost-benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (2017) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/SocialWelfareSystem](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem)>.
- 3 Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 02/2017 (2017) <[http://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf](http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf)>.
- 4 Commonwealth Ombudsman, *Automated Assistance in Administrative Decision Making Better Practice Guide* (February 2007) <[http://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0032/29399/Automated-Assistance-in-Administrative-Decision-Making.pdf](http://www.ombudsman.gov.au/__data/assets/pdf_file/0032/29399/Automated-Assistance-in-Administrative-Decision-Making.pdf)>.
- 5 Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report No 46, November 2004.
- 6 This would be done by sending a legal notice under the *Social Security (Administration) Act 1999* (Cth) (the Administration Act) that required the customer to produce the information. For current social security recipients, the notice was sent out under s 63 or s 80 of the Administration Act, and the consequence for non-compliance was suspension or cancellation of payment. For former social security recipients, the notice was sent out under the department's broader information-gathering powers under pt 5, div 1, ss 192–197 of the Administration Act, the penalty being up to 12 months' imprisonment (unless the customer was unable to comply or had a reasonable excuse).
- 7 Administration Act, pt 5, div 1, ss 192–197.
- 8 If employer information was unavailable, DHS would seek information from other third parties as appropriate.
- 9 If a debt existed, the compliance officer could apply a 10 per cent recovery fee if satisfied the customer had refused or failed to provide information about their income, or had recklessly or knowingly failed to declare their income, without reasonable excuse: *Social Security Act 1991* (Cth) s 1228B.
- 10 Department of Human Services, *Operational Blueprint 107-02040020 — Acceptable documents for verifying income when investigating debts*.
- 11 Note that social security recipients have a legal obligation to keep DHS informed of changes to their income. This obligation may be created by the issuing of a notice under the social security law. There is also a freestanding obligation to do so (irrespective of whether a notice has been given) in s 66A of the Administration Act. However, in the past, DHS compliance officers performed the task of collecting and entering historical pay data during compliance investigations.
- 12 That is, ATO income data.



- 13 A 10 per cent recovery fee was also added to a debt if the debtor refused or failed to provide information about their income without reasonable excuse. In the OCI as it was originally designed, a person was provided with an opportunity to provide a reasonable excuse by ticking a box about 'personal factors' which may have affected their ability to declare their income.
- 14 The Hon Justice Melissa Perry, 'iDecide: the Legal Implications of Automated Decision Making' (Paper presented at *Process and Substance in Public Law*, Cambridge Centre for Public Law Conference 2014, University of Cambridge, 15–17 September 2014) p 2 <<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20140915>>.
- 15 The ATO publishes information explaining how long people need to keep their tax records — for example, on its website <<https://www.ato.gov.au/Individuals/Income-and-deductions/In-detail/Keeping-your-tax-records/>>.
- 16 Perry, above n 14, p 2.
- 17 Commonwealth Ombudsman, above n 4, p 26.
- 18 In particular, there was no clear explanation that income would be averaged across the employment period if they did not enter their income against each fortnight and that this may affect the amount of the debt. Complaints to the Commonwealth Ombudsman's Office showed that even users with high levels of education and digital readiness experienced difficulty understanding what information was required of them and how to enter the information once online.
- 19 Digital Transformation Agency, *Digital Service Standard* (10 May 2017) <<https://www.dta.gov.au/standard/>>.
- 20 DHS identified vulnerable customers using existing records prior to rollout and developed an alternative servicing strategy for those customers.
- 21 The Commonwealth Ombudsman's Office was also concerned about the fairness of a system which relied on users being able to provide historical employment income information, when those people had not been informed in advance they may need to keep that information. Many complainants to our office had problems collecting evidence about their employment income, particularly for periods from several years ago. Although it was subsequently amended, at the time the OCI was rolled out the DHS website advised people to keep their income information for six months.
- 22 Perry, above n 14, p 3.

## SOCIAL SECURITY OVERPAYMENTS AND DEBT RECOVERY: KEY DEVELOPMENTS

*Peter Sutherland\**

It is important to understand the history of the social security legislation, and other contexts such as the language of 'error', 'overpayment', 'debt' and 'fraud', to fully understand the social and legislative basis of social security debt recovery today.

### Legislative history

#### ***Social Security Act 1947***

In the *Social Security Act 1947* (Cth) (the 1947 Act), overpayments and debt recovery were dealt with in two sections in pt XXI, 'Miscellaneous':

- s 246, 'Recovery of overpayments'; and
- s 251, 'Write off, Waiver, &c'.

Section 246(1) stated:

- (1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance or benefit under this Act which would not have been paid but for the false statement or representation, failure or omission, the amount so paid is a debt due to the Commonwealth.

Section 246(2) provided for recovery by deduction from a current social security payment where 'an amount has been paid by way of pension benefit or allowance under this Act that should not have been paid'. Subsection (2) and (2A) extended this recoverability to certain other payments, including under the *Veterans' Entitlements Act 1986* (Cth), prescribed educational scheme and assurances of support.

Section 251 provided a broad discretion for the Secretary to waive a debt 'that is payable by the person under or as a result of this Act' and also provided for write-off of classes of debt specified by the Minister by notice in the Gazette, determinations by the Minister which give directions relating to the Secretary's waiver power, and a six-year limitation period on commencement of recovery action by legal proceedings.<sup>1</sup>

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These two relatively economical sections gave rise to a considerable body of case law developed by the Federal Court and the Administrative Appeals Tribunal (AAT). Prominent cases explored the various elements of the sections, including:

- ‘in consequence of’ — the failure or omission need not be the dominant or effective cause of the overpayment;<sup>2</sup>
- ‘false statement or representation’ or ‘failure or omission to comply’ — this is not confined to a knowing or intentional failure to comply;<sup>3</sup>
- principles of administration in s 246;<sup>4</sup>
- principles as to the discretion to waive: in *Director-General of Social Services v Hales*<sup>5</sup> (*Hales*) the Full Federal Court gave guidance as to the exercise of the discretion which were widely adopted and comprised:
  - (a) the fact that the applicant has received money to which he was not entitled;
  - (b) the way in which the overpayment arose whether as a result of innocent mistake or fraud;
  - (c) the financial circumstances of the prospective defendant;
  - (d) the prospect of recovery;
  - (e) whether a compromise is offered;
  - (f) whether recovery should be delayed if there is a prospect that the circumstances of the person who received the overpayments may improve; and
  - (g) compassionate considerations and the fact that the Act is social welfare legislation and any financial hardship which may result from an action for recovery.

There were a great many AAT decisions on the application of the *Hales* principles which were helpful at the time but now are not usually cited, as more recent cases consider the specific provisions of the successor to the 1947 Act, the *Social Security Act 1991* (Cth) (the 1991 Act).

### **Social Security Act 1991**

The 1991 Act repealed the 1947 Act on 1 July 1991. It was intended to be a ‘plain English’ rewrite of the 1947 Act with very little change in underlying legislative policy. The intent of the rewrite was discussed in the Department of Social Security *1990–91 Annual Report*:

The Act is a clear English rewrite of the 1947 Act. The language used should make the meaning of any particular provision apparent to the reader. The reader aids are designed to assist with any readability problems in areas of the Act which deal with complex policy matters.

The rewrite of the 1947 Act did not involve any major policy initiatives and its financial impact is negligible. The new legislation reflects existing policy.

The Act contains a Reader’s Guide to explain how the Act is arranged and how the other reader aids can help in reading the Act and finding one’s way through the legislation.

Other innovations include:

- an index of defined words and phrases and groups of definitions according to subject matter in the definitional part of Chapter 1 to facilitate accessibility;
- the use of modules, points and method statements where a step-by-step approach is required, such as in rate calculators;
- the location of the modules for each of the 20 types of Social Security payments in one Chapter (Chapter 2). Each module is now almost totally self-contained to enable a reader to find out everything he or she needs to know about a particular pension, benefit or allowance;
- the simplification and reorganisation of individual provisions so that they appear in a logical order, with all provisions which relate to a particular topic now being located together;

- the insertion of notes throughout the text which act as signposts to assist the reader in locating relevant provisions quickly and set the context for the provision and explain references to other Acts;
- the use of tables to replace complex formulae and textual provisions; and
- where cross-reference to other provisions occurs, brief descriptions of those provisions together with their section numbers.<sup>6</sup>

The new Act was less successful than its policy makers and drafters envisaged, for a number of reasons:

- The introduction of 'plain English' was generally welcomed; however, the drafters were less experienced in this form of drafting than is the case today. Drafters have learnt many useful lessons about 'plain English' and the structure of legislative provisions in the 25 years since the commencement of the 1991 Act.
- The policy makers and drafters attempted to create an Act which allowed an individual beneficiary to go to the legislation on their particular payment and, supposedly, find a self-contained statement of their rights and obligations. This approach failed completely, as it led to a large amount of legislation repeated for each payment type in ch 2 — the original 1991 Act comprised 1364 sections and its first printing by CCH exceeded 1000 pages of closely spaced text.
- Since its commencement the 1991 Act has been constantly and extensively amended for a number of reasons, including targeting and re-targeting of benefits, Budget initiatives and labour market initiatives. For many years, it was very difficult to obtain an accurate, up-to-date consolidation of the Act; however, this has now been achieved through vast improvements in IT and the construction of the *ComLaw* website.

The Full Federal Court commented adversely on the drafting of the 1991 Act in *Blunn v Cleaver*.<sup>7</sup> This criticism was echoed by Spender J in *Jackson v SDSS*,<sup>8</sup> where Spender J said:

The Act is admittedly complex. In *Blunn v Cleaver* (supra), the Full Court made it plain, particularly at 127–129, that the drafting of the Act produced a disconformity with the genuine objects of legislation in this area and the legitimate expectations of persons affected by such legislation.

The Court, however, has to do the best it can in the discharge of its statutory obligation. The situation in the present case is complicated by the fact that it is likely that the factual circumstances thrown up by the present proceeding was not in contemplation of the legislature at the time when the provisions which are meant to govern its determination were enacted.<sup>9</sup>

The consolidation of the administration provisions by the *Social Security (Administration) Act 1999* (Cth) on 20 March 2000 reduced the overall bulk of the Social Security Law, but the problems arising from complexity of drafting remained. See, for example, the comments of Weinberg J in *SDFaCS v Geeves*.<sup>10</sup>

### ***Social Security Law and Family Assistance Law***

On 20 March 2000, the 1991 Act was restructured into five separate Acts:

#### *Social Security Law*

- 1991 Act: Chapters 1, 2, 3 and 5 continued in force but with a lot of duplicate provisions in ch 2 moved into a single Administration Act.
- *Social Security (Administration) Act 1999* (Cth): Essentially administrative provisions set out in chs 6, 7 and 8, and duplicated provisions in ch 2, were moved to this Act and consolidated in a logical format.

- *Social Security (International Agreements) Act 1999* (Cth): Part 4.1 and the Scheduled International Agreements were moved into this Act.

#### *Family Assistance Law*

- *A New Tax System (Family Assistance) Act 1999* (Cth): Family payments were moved to this new Act and provisions concerning child care were added.
- *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth): This Act deals with family assistance and child care administration issues.

The restructure did not affect the overpayment and debt recovery provisions in ch 5 of the 1991 Act; however, offences were moved to pt 6 of the *Social Security (Administration) Act 1999* (Cth). The *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) included parts dealing with overpayments, debt recovery and offences in similar (but not the same) terms as those in the social security law.

#### ***Developments in chapter 5 of the 1991 Act: 1991–2017***

Chapter 5 of the 1991 Act has seen a number of significant amendments since its commencement on 1 July 1991, including the following.

The *Social Security (Budget and Other Measures) Legislation Amendment Act 1993* (Cth) (No 121/1993) repealed the original s 1237 and inserted new ss 1236A, 1237 and 1237A with effect from 24 December 1993. The new sections attempted to restrict waiver to certain prescribed circumstances but were poorly drafted. In *Lee v SDSS*,<sup>11</sup> the Full Federal Court held that cases already determined by the department and subject to review should be considered under the repealed waiver provisions.

The *Social Security Legislation Amendment (Carer Pension and Other Measures) Act 1995* (Cth) repealed the existing waiver provisions (ss 1236A, 1237 and 1237A), replacing them with eight new sections (ss 1236A–1237AAD) intended ‘to provide more consistency and flexibility’ in the waiver arrangements. In particular, new s 1237AAD restored waiver in ‘special circumstances’, provided the debt did not arise ‘knowingly’ from a false representation, and new s 1237AAC extended waiver in relation to notional entitlement to certain other benefits.

The *Social Security Legislation Amendment (Budget and Other Measures) Act 1996* (Cth) made significant amendments to the debt recovery provisions, including repealing and substituting a new s 1223, ‘Debts arising from lack of qualification, overpayment etc.’. After this date, a debt was due to the Commonwealth if an overpayment was made on or after 1 October 1997 because the recipient was not qualified for the payment or because the amount was not payable. Clause 105(1) in sch 1A included a savings provision which provided that the amendments did not affect the operation of pts 5.2 or 5.3 before 1 October 1997; extinguish the amount of any debt arising before 1 October 1997; or prevent recovery of any outstanding debt.

The *Family and Community Services and Veterans’ Affairs Legislation Amendment (Debt Recovery) Act 2001* (Cth) (No 47/2001), with effect from 1 July 2001, introduced measures to strengthen the debt recovery processes of the Department of Family and Community Services and the Department of Veterans’ Affairs. The amendments made all overpayments (for any reason) recoverable and revised the arrangements for penalty interest,

administrative charges and recovery of amounts paid in error directly from financial institutions.

The *Commonwealth Reciprocal Recovery Legislation Amendment Act 1994* (Cth) (No 68/1994), commencing on 1 July 1994, amended ch 5 as part of a scheme to facilitate the reciprocal recovery of overpayments arising from the social security, student assistance and veterans' entitlements income support schemes.

The *Budget Savings (Omnibus) Act 2016* (Cth) included a significant number of Budget savings measures and three measures affecting debts which commenced on 1 January 2017:

- (i) application of a new interest charge to outstanding debts owed by former recipients of social welfare payments who have failed to enter into, or have not complied with, an acceptable repayment arrangement (sch 12);
- (ii) introduction of departure prohibition orders in new pt 5.5 of the Act (sch 13, pt 1); and
- (iii) removal of the six-year limit on debt recovery (sch 13, pt 2).

***The importance of language***

In considering social security overpayments and debt, it is important to be very clear about the language used, as there is a political and public confusion about this language, often conflating 'debt' and 'compliance' or similar terms with 'social security fraud'. In this article, I suggest a careful use of language in the following terms.

overpayment	An overpayment occurs where a customer receives an amount of payment higher than that authorised by the legislation. This may occur though official error, customer error, timing issues, omission or deception.
debt	A social security or family assistance debt arises where the legislation provides that a customer owes a debt to the Commonwealth because of receipt of an overpayment, imposition of penalty interest, recovery of an advance or other reason. Not all overpayments result in a debt, particularly under the former 1947 Act and the adjustment provisions of the family assistance law, and not all debts are recoverable.
error	Overpayments may occur because of error by Centrelink ('administrative error'), by a customer or due to a combination of causes.
'compliance' activities	This is a general term used by the Department of Human Services (DHS) to describe its processes for prevention and identification of overpayments.
non-compliance	This refers to failure to comply with a statutory obligation, usually (but not necessarily) with some connotation of knowing or reckless conduct.
serious non-compliance	'Serious non-compliance' is used by DHS as a general description of fraudulent or associated behaviour (see, for example, <i>Annual Report 2015-16</i> , p 119).
fraud	This is an activity which is an offence under the Social Security Law, the Family Assistance Law or criminal legislation such as the <i>Criminal Code</i> and the <i>Crimes Act 1914</i> (Cth). An offence may be committed under pt 6 of the <i>Social Security (Administration) Act 1999</i> (Cth) if the relevant conduct is false, misleading or reckless.

In a *Canberra Times* article 'Welfare crackdown a \$270m flop: report',<sup>12</sup> the reporter, DHS and the Minister for Human Services used varying language in relation to compliance measures:

- The reporter was reporting on an Audit Office report which found that ‘Government efforts to crack down on welfare have fallen hundreds of millions short of target’ because ‘compliance’ efforts had fallen \$270 million short of a target of \$790 million.
- DHS disagreed with the Audit Office findings, claiming that it had delivered savings of \$998 million from seven new compliance measures, putting it ahead by \$210 million.
- The Minister noted that the Audit Office and DHS had used different accounting measures. The Minister said that ‘the overall anti-welfare fraud effort was going very well’ (reporter’s language). The Minister was then quoted: ‘Across all fraud and compliance activities, the Commonwealth realised \$3.9 billion in savings since 2012, with the 10 measures delivering savings of \$1.4 billion against a target of \$1.07 billion, exceeding the target by 35 per cent.’

In this example, the language used is ‘crack down’, ‘compliance’ efforts, ‘new compliance measures’, ‘anti-welfare fraud effort’, ‘all fraud and compliance measures’ and ‘measures delivering savings’. Each of them has a different shade of meaning and could quite properly be applied to different resource expenditures and different savings targets.

Associate Professor Lisa Marriott illustrated the relevance of language about welfare payments in a recent seminar at the ANU Crawford School. She described variations in language used in the context of social welfare and taxation in New Zealand, where ‘benefits fraud’ totalled NZ\$24.17 million in 2014–15, whereas tax fraud, described euphemistically as ‘tax position differences’, totalled NZ\$1200 million. The disparity between New Zealand taxpayers and social welfare recipients was further emphasised by the fact that, in 2011–12, Inland Revenue wrote off NZ\$435 million of tax debt (54.1 per cent of penalties and 11.6 per cent of all debt), whereas the Ministry of Social Development wrote off NZ\$6 million of social welfare debt.<sup>13</sup> I suggest that the Australian experience around tax evasion and write-off is reasonably similar to the New Zealand position; however, the amount of social security debt waived in Australia probably is relatively much higher because of our legislative provisions, particularly pt 5.4 of the 1991 Act.

***DHS compliance activities***

The DHS *Annual Report 2015–16* reported on Social Security and Welfare Programme Compliance.<sup>14</sup> This covered social security and family assistance payments.

DHS reported on early intervention compliance activities, including the Online Compliance Intervention (OCI), in the following terms.

**Table 45: Social welfare payments compliance activity**

	<b>2013–14</b>	<b>2014–15</b>	<b>2015–16</b>	<b>% change</b>
Interventions	869 082	923 462	987 895	+7.0
Reductions in payments	77 272	52 100	69 921	+34.2
Fortnightly savings in future	\$19.2 million	\$18.2 million	\$21.7 million	+19.2
Prevented outlays	\$51.8 million	\$61.4 million	\$63.7 million	+3.7
Debts raised	101 351	126 134	210 009*	+66.5
Total debt value	\$283.6 million	\$362.1 million	\$694.6 million*	+91.8

\* The introduction of the Strengthening the Integrity of Welfare Payments — Employment Income Matching budget measure saw an increased focus on addressing historical overpayments. This compliance activity has resulted in a high incidence of debt and has subsequently contributed to a significant increase in debt savings from the 2014–15 financial year.

DHS also reported on the total number of social welfare debts raised.

**Table 49: Debts raised from customers receiving social welfare payments**

	2013–14	2014–15	2015–16
Number of debts raised	2 230 894	2 350 131	2 439 431
Amount raised	\$2.2 billion	\$2.5 billion	\$2.8 billion

DHS reported on the amount of customer debt recovered, including data on the modest proportion of debts that are recovered using commercial agents; usually this involves debtors who are no longer customers of DHS Centrelink.

**Table 50: Social welfare customer debt recovered**

	2013–14	2014–15	2015–16
Total debts recovered	\$1.27 billion	\$1.43 billion	\$1.54 billion
- amount recovered by contracted agents	\$124.8 million	\$131.3 million	\$144.7 million
- percentage of total recovered by agents	9.9%	9.2%	9.4%

### ***Fraud***

In 2015–16 DHS referred 980 social welfare cases to the Commonwealth Director of Public Prosecutions (CDPP) compared with 1366 referrals in 2014–15. The *DHS Annual Report 2015–16* includes little other statistical data on social security fraud.<sup>15</sup>

The CDPP *Annual Report 2015–16* stated that the CDPP dealt with 1246 summary defendants and 29 indictable defendants referred to them by DHS Centrelink in that financial year.<sup>16</sup>

In a 2012 article, (now) Professor Grainne McKeever studied social security fraud in the UK and Australia. Her findings are an interesting reflection on social security ‘fraud’:

In the UK levels of error — both claimant and official error — outstrip levels of fraud. The National Audit Office notes that in 2010–11, £1.2 billion was estimated by the Department for Work and Pensions to be lost to fraud, £1.2 billion to customer error and £800 million to official error, out of a total of £153.6 billion spent on benefits. (NAO 2011)

In Australia levels of ‘non-compliance’ — the combined figure for error and fraud — is \$536 million (out of an \$87 billion benefits bill), of which \$113.4 million is customer debts identified through fraud investigations (ANAO 2010: para 7).<sup>17</sup>

### **Chapter 5 — Overpayments and debt recovery**

Chapter 5 of the 1991 Act (ss 1222–1237) replaced ss 246 and 251 of the 1947 Act and was originally structured in four parts:

- pt 5.1, ‘Effect of Chapter’;
- pt 5.2, ‘Amounts Recoverable under this Act’
- pt 5.3, ‘Methods of Recovery’; and
- pt 5.4, ‘Non-Recovery of Debts’.



Part 5.5, 'Departure Prohibition Orders', was inserted by the *Budget Savings (Omnibus) Act 2016* (Cth) (No 55/2016), commencing on 1 January 2017.

### **Chapter 5 comprises a code**

In *Walker v SDSS*,<sup>18</sup> the Full Federal Court held that ch 5 of the 1991 Act is a code providing for the recovery of social security payments. Justice Drummond pointed to the contribution of s 1222 to this conclusion:

The table contained in sub-section (2) lists the sections of the Act under which recoverable debts arise; against each section there is listed the means of recovery, generally but not invariably by 'deductions', 'legal proceedings' and 'garnishee notice'. A column in the table identifies the particular sections of the Act that prescribe each such recovery method. The opening words of sub-section (1) are a strong indication that Chapter 5 contains an exclusive statement of how the Commonwealth can recover social security payments of the kind listed in that sub-section.

...

Chapter 5, however, does in my opinion reveal an intention to state, in an exclusive way, how the Commonwealth can recover certain kinds of overpaid benefits. Chapter 5 commences with the statement in s 1222 of its intended operation, which included the identification of those social security and other payments which are recoverable by the Commonwealth, and lists the procedures to be followed by the Commonwealth in recovering each class of payment. The Chapter then defines these recovery procedures and makes provision for recovery in two other ways (viz., by instalments and by consent deductions). It concludes with provisions empowering the Secretary to forego the Commonwealth's entitlement to recovery of such payments. In my opinion, the opening words of s 1222(1) and the structure of Chapter 5 show that it is a code which prescribes the exclusive methods whereby recovery can be lawfully effected of those social security and other benefits listed in s 1222(1).<sup>19</sup>

In *Coffey v SDSS*,<sup>20</sup> the Full Federal Court dealt with a converse situation. In that case, the applicant brought an action in the Federal Court alleging that a social security debt had been wrongly raised against him and seeking recovery of the amount plus interest. The Full Federal Court held that the Court did have jurisdiction to entertain the claim under s 39B(1A) of the *Judiciary Act 1903* (Cth) because that Act confers jurisdiction on the Court in matters 'arising under a law made by the Parliament'. However, the Court held that to allow the action would be an abuse of process because the Social Security Act provides a comprehensive and multi-level process for review of decisions under the Act and the applicant had availed himself fully of that review process.

This decision that the Act comprises a code has contemporary relevance. One example arose in the course of the OCI (colloquially known as 'Robodebt'), where some community agencies became concerned that DHS had sold the debts to external collection agencies and that they were harassing social security clients in an attempt to maximise their return from the purchase. In the event, DHS gave assurances that the two external agencies, Probe and Dun & Bradstreet, were simply acting as agents for DHS, which is probably within the parameters of pt 5.3, either as an element of 'legal proceedings' or in the general course of administration of the Act. It is unlikely that a social security debt purchased by a third party would have any basis for recovery under ch 5.

### **Part 5.1 — Effect of chapter**

Section 1222 in pt 5.1 sets out the methods of recovery for the various types of debts recoverable under the Act. The Recovery Methods Table sets out 25 items specifying the debt, the means of recovery and the relevant recovery sections. In almost all cases, the means of recovery is deductions (ss 1231 and 1234A); legal proceedings (s 1232); garnishee notice (s 1233); and repayment by instalments (s 1234). An example is item 1.

1	1135 (pension loan debt)	deductions	1231, 1234A
		legal proceedings	1232
		garnishee notice	1233
		repayment by instalments	1234

The exceptions to use of these means of recovery are items 12, 14, 18 and 19.

12	1226 (compensation payer and insurance debt)	legal proceedings	1232
14	1226 (compensation payer and insurance debt)	enforcement of security	1230C
		deductions	1232, 1234A
		legal proceedings	1232
		garnishee notice	1233
		repayment by instalments	1234
18	1230 (garnishee notice debt)	legal proceedings	1232
		garnishee notice	1233
19	1230 (garnishee notice debt under 1947 Act)	legal proceedings	1232
		garnishee notice	1233

Section 1222(3) provides that overpayments and debts under certain other Acts may be recovered by means of deduction from the person's social security payment.

**Part 5.2 — Amounts recoverable under this Act**

Part 5.2 (ss 1222A–1230C) specifies the various debts which are raised under the Social Security Act and other legislation and which can be recovered under the Act.

Section 1222A, 'Debts due to the Commonwealth', provides:

If an amount has been paid by way of social security payment, or by way of fares allowance under the *Social Security (Fares Allowance) Rules 1998*, the amount is a debt due to the Commonwealth if, and only if:

- (a) a provision of this Act, the 1947 Act, the *Social Security (Fares Allowance) Rules 1998* or the *Data-matching Program (Assistance and Tax) Act 1990* expressly provided that it was or expressly provides that it is, as the case may be; or
- (b) the amount:
  - (i) should not have been paid; and
  - (ii) was paid before 1 January 1991; and

(iii) was not an amount to which subsection 245B(2) of the 1947 Act applied.

Section 1222A had no direct equivalent in the 1947 Act and operates to exclude the possibility that a debt may arise on a basis other than the operation of the Social Security Law (or the Fares Allowance Rules or *Data-matching Program (Assistance and Tax) Act 1990* (Cth)). One such possibility, whereby a debt could be raised independently of the specific provisions of the Social Security Act, was the principle in *Auckland Harbour Board v R*,<sup>21</sup> as stated by Viscount Haldane:

no money can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorisation from parliament itself. The days are long gone by in which the Crown, or its servants, apart from parliament, could give such an authorisation or ratify an improper payment. Any payment out of the consolidated fund made without parliamentary authority is simply illegal and *ultra vires* and may be recovered, by the government if it can ... be traced.<sup>22</sup>

Section 1223, 'Debts arising from lack of qualification, overpayment etc.', is the key section raising social security debts. Section 1223(1) now provides:

(1) Subject to this section, if:

- (a) a social security payment is made; and
- (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;

the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

The effect of this provision, essentially, is that any overpayment of a 'social security payment' is a recoverable debt.

Other sections in pt 5.2 deal with other specific types of debts, including:

- s 1223AA, 'Debts arising from prepayments and certain other payments';
- s 1223AB, 'Debts arising from AAT stay orders';
- s 1223ABA, 'Debts arising in respect of one-off payment to carers';
- s 1224C, 'Data-matching Program (Assistance and Tax) Acts debts';
- s 1227, 'Assurance of support debts'; and
- s 1228, 'Overpayments arising under other Acts and schemes': This provision provides for debts under the *Veterans' Entitlements Act 1986* (Cth), the *A New Tax System (Family Assistance) Act 1999* (Cth), payments under various educational schemes and compensation paid under the *Military Rehabilitation and Compensation Act 2004* (Cth), to be recoverable by deduction under the 1991 Act.

The sections quoted are only an illustration of the many debts specifically provided for in the various sections in pt 5.2.

### **Data-matching**

Since 1990, data-matching between Commonwealth Government agencies and the ATO has been conducted under the *Data-matching Program (Assistance and Tax) Act 1990* (Cth). Section 1224C was inserted into pt 5.2 by the *Social Security Legislation Amendment (No 3) Act 1992* (Cth) (No 230/1992) as part of measures intended to make debts identified through data-matching recoverable under the Social Security Act. Relevant cases on social

security data-matching include *Re Sawyer and SDSS*,<sup>23</sup> *Re Sawyer and SDSS*<sup>24</sup> and *Re Frugtniet and SDSS*.<sup>25</sup>

The *Data-matching Program (Assistance and Tax) Act 1990* (Cth) specifies many procedures protective of customer interests, including that a program cycle must be completed within two months of its commencement and that a new cycle cannot begin until the previous one has finished. No more than nine cycles may be conducted each year. During 2015–16, two complete cycles were conducted for DHS and four complete cycles were conducted for the Department of Veterans' Affairs.

The DHS *Annual Report 2015–16* foreshadowed the cessation of data-matching under the *Data-matching Program (Assistance and Tax) Act 1990*:

In 2016–17 the department will undertake an enhanced approach to address compliance risks covered by the Data-matching Program. The new approach will replace the activity governed by the *Data-matching Program (Assistance and Tax) Act 1990* and bring the activity in line with the department's other data matching activity and the OAIC's Guidelines on Data Matching in Australian Government Administration (voluntary data matching guidelines). Programme cycles conducted under the Data-matching Program will be gradually phased out and cease during 2016–17.<sup>26</sup>

### **Part 5.3 — Methods of recovery**

Part 5.3 provides for various methods of recovery of debts specified as recoverable under pt 5.2. Part 5.3 should be read in conjunction with s 1222 in pt 5.1, which specifies which methods of recovery apply to each kind of debt (discussed above). The primary means of recovery are:

- s 1231, 'Deductions from debtor's pension, benefit or allowance';
- s 1232 'Legal proceedings';
- s 1233 'Garnishee notice'; and
- s 1234 'Arrangement for payment of debt' (repayments by instalments).

The Secretary can also recover funds from a bank where a payment has been made to the wrong person or after a recipient's death (s 1234) and, with consent, by deductions from the social security payment of a person who is not the debtor (s 1234A).

The 1991 Act has no counterpart to a highly unusual provision in the *Social Security Act 1964* (NZ) whereby the partner of a person engaging in welfare fraud can be made jointly liable for a debt where they 'knew, or ought to have known' of the fraud.<sup>27</sup> This appears to be an open invitation to increased levels of 'sexually transmitted debt', as it does not take into account the way that domestic violence and financial duress affects the choices many women realistically have in relation to their partner's financial affairs. Under Australian law, in some cases, a partner may be an accessory to the fraud or may be prosecuted as a joint offender and be subject to a reparation order.

### **Section 1231 — Deduction from debtor's pension, benefit or allowance**

Section 1231 authorises the Secretary to recover debts by deductions from the debtor's social security entitlement.

### **Section 1232 — Legal proceedings**

Section 1232 provides:

If a debt is recoverable by the Commonwealth by means of legal proceedings under:

- (a) Part 5.2 of this Act; or
- (b) the 1947 Act; or
- (c) the *Social Security (Fares Allowance) Rules 1998*;

the debt is recoverable by the Commonwealth in a court of competent jurisdiction.

Section 251 of the 1947 Act set a limitation period of six years on the initiation of 'proceedings' — a term of some ambiguity. The 1991 Act avoided this problem by specific reference to 'legal proceedings', where this is the intention, and 'action under this section', where some other action is contemplated (see, for example, s 1231A(2)(a)).

### **Section 1233 — Garnishee**

If a social security debt is recoverable by the Commonwealth, s 1233(1) provides that 'the Secretary may by written notice given to another person ... require the person to whom the notice is given to pay the Commonwealth' where that person holds or may subsequently hold money for or on account of the debtor.

A person who fails to comply with a notice under s 1233(1) commits an offence with a penalty of imprisonment for 12 months (provided the person is capable of complying with the notice). Section 1233(7) states that this section applies to money in spite of any law of a state or territory (however expressed) under which the amount is inalienable.

The department is entitled to use s 1233 to apply a payment of arrears of benefit to a pre-existing overpayment.<sup>28</sup> In garnisheeing the payment of arrears to Mr Walker, the department drew a manual cheque, which was then deposited personally into Mr Walker's bank account by a departmental employee. The garnishee notice was already in force and served on the bank before deposit, ensuring the effectiveness of the process.

In a later appeal to the Full Federal Court in *Walker v SDSS*,<sup>29</sup> the Court ultimately held that the garnishee should stand. In its decision, the Full Court discussed whether the department's actions had denied natural justice to the applicant by failing to give him an opportunity to be heard on the issue of garnishee or notice of the intention to garnishee. The Court (Drummond and Mansfield JJ), drawing a parallel to the collection of tax by attachment of debts, held that there were good reasons why s 1233 should not be construed as requiring the Secretary to comply with the rules of natural justice in deciding whether to serve a garnishee notice.

In *Re King and SDSS*,<sup>30</sup> substantial amounts of money had been credited to a loan account in the name of the applicant, without his knowledge, by a discretionary family trust; the credits appeared to be part of a tax minimisation scheme established by his father. Evidence before the Tribunal showed that the son was beneficially entitled to the sum of \$97 321 standing to his credit in the trust and that the trust held more than \$600 000 in cash on deposit. The Tribunal noted that this would appear to be an appropriate case for use of the garnishee power to recover a social security debt of \$17 713.63.

### **Effect of bankruptcy on recovery of a debt**

Decisions under the 1947 Act suggested that a social security debt could be recovered by deductions from payments.<sup>31</sup> However, in *SDSS v Southcott*<sup>32</sup> (*Southcott*), the Federal Court

held that the Department had no power to recover a social security debt from a debtor by way of garnishee because the debt raised under former s 1224(1) was replaced by a right to prove in bankruptcy, and former s 1224(2) could not operate because that subsection was premised upon the existence of 'a debt due to the Commonwealth under subsection (1)'. Justice North distinguished *Taylor v SDSS*<sup>33</sup> on the basis of the different wording of the relevant section in the 1947 Act. While *Southcott* specifically related to garnishee, the reasoning can be extended to other forms of recovery such as proceedings and deduction from payments.

Debts owed prior to bankruptcy are debts provable in bankruptcy, and it is not open to Centrelink to make determinations for waiver in respect of those debts. In *Re Klewer and SDFHCSIA*,<sup>34</sup> Centrelink recovered from the applicant part of a debt that was incurred prior to bankruptcy. The Tribunal held that it could not waive the pre-bankruptcy debt, but it could waive that part of the debt that arose after the bankruptcy was declared.

In *Re Caudell and SDEEWR*,<sup>35</sup> one of the applicants went into bankruptcy after the Social Security Appeals Tribunal decision but before the AAT proceedings. On the basis of s 58(1) of the *Bankruptcy Act 1966* (Cth), the Tribunal held that it had no power to continue with the appeal from that applicant. See also *Re Cook and SDEWR*<sup>36</sup> (*Re Cook*) and *Re Barber and SDFHCSIA*<sup>37</sup> to similar effect, relying on s 60 of the *Bankruptcy Act*. In *Re Cook*, the Tribunal noted that the applicant may have a right of review if the Secretary commenced recovery action for the debt, after his discharge from bankruptcy, on the basis that the debt was 'incurred by means of fraud'.<sup>38</sup>

The current approach to bankruptcy is illustrated by *Re SDFaCS and Grindlay*,<sup>39</sup> where the respondent was overpaid parenting payment of \$12 895.21 because of her husband's income. The Tribunal held that the debt was divisible and that the respondent was responsible for the overpayments which accrued after the date of her bankruptcy. The amount which accrued before her bankruptcy (\$597.53) was provable under s 82 of the *Bankruptcy Act 1966* (Cth) and was no longer recoverable under the 1991 Act (in the absence of fraud).

#### *Debts incurred by fraud*

In *Re SDSS and Malaj*,<sup>40</sup> the Department was seeking recovery by garnishee pursuant to s 1233 of the 1991 Act of a debt which wholly arose under the 1947 Act. The respondent argued that he had been released from the debt by operation of s 153 of the *Bankruptcy Act*. The Tribunal held that the debt was incurred by fraud and thus his discharge from bankruptcy did not release him from his debt to the Commonwealth because of s 153(2)(b). This provision states that the discharge of a bankrupt from bankruptcy does not release the bankrupt from 'a debt incurred by means of fraud'. Note that the Department cannot commence recovery action until after the debtor is discharged from bankruptcy.<sup>41</sup>

#### **Part 5.4 — Non-recovery of debts**

Part 5.4, 'Non-recovery of debts' (ss 1235–1237AB), provides for write-off and waiver of debts. The sections in this part are:

- s 1235, 'Meaning of *debt*' (debt recoverable under pt 5.2, the 1947 Act, an international social security agreement and the Fares Allowance Rules);
- s 1236, 'Secretary may write off debt';
- s 1237, 'Power to waive Commonwealth's right to recover debt';
- s 1237A, 'Waiver of debt arising from error';
- s 1237AA, 'Waiver of debt relating to an offence';

- s 1237AAA, 'Waiver of small debt';
- s 1237AAB, 'Waiver in relation to settlements';
- s 1237AAC, 'Waiver where debtor or debtor's partner would have been entitled to an allowance' (applies only to an entitlement of family payment, family allowance, parenting allowance and parenting payment);
- s 1237AAD, 'Waiver in special circumstances';
- s 1237AAE, 'Extra rules for waiver of assurance of support debts'; and
- s 1237AB, 'Secretary may waive debts of a particular class'.

### Legislative history — Write-off and waiver

Under the 1947 Act, in s 251 (and earlier s 240), the Secretary was given a general discretion to waive or write off debts. The exercise of this discretion was shaped by principles developed by the Full Federal Court in *Hales*, discussed above.

Section 251 of the 1947 Act in essence was replaced by two sections in the 1991 Act: s 1236, dealing with write-off of debts; and s 1237, dealing with waiver. Section 1237 included a provision, s 1237(3), which empowered the Minister to give directions relating to the Secretary's power to waive debts. A similar provision was included in the 1947 Act, but no Directions were ever issued under that Act.

The Minister issued a Notice under s 1237(3) on 8 July 1991, taking effect from that date, and on 5 May 1992, this Notice was revoked and replaced with a new Notice taking effect from 18 May 1992. The Full Federal Court in *Riddell v SDSS*<sup>42</sup> ultimately determined that the Guidelines were invalid, as they improperly fettered the broad discretion in the section. In consequence, the principles developed in *Hales* continued to guide the exercise of the discretion until legislative amendments in 1993 (*Social Security (Budget and Other Measures) Legislation Amendment Act 1993* (Cth)), in 1996 (*Social Security Legislation Amendment (Carer Pension and Other Measures) Act 1996* (Cth)) and in 1997 (*Social Security Legislation Amendment (Budget and Other Measures) Act 1997* (Cth) (1 October 1997)). The 1996 and 1997 amendments were relatively beneficial, so there have not been difficulties around retrospectivity.

The write-off and waiver provisions have remained fairly stable since 1997 and a considerable body of cases now discuss the various provisions, making reference to the *Hales* principles and cases under the 1947 Act that are generally of historical interest only.

### Write-off of debts

Section 1236, in its current form, provides:

- (1) Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.
  - (1A) The Secretary may decide to write off a debt under subsection (1) if, and only if:
    - (a) the debt is irrecoverable at law; or
    - (b) the debtor has no capacity to repay the debt; or
    - (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
    - (d) it is not cost effective for the Commonwealth to take action to recover the debt.

In *SDSS v Hodgson*,<sup>43</sup> the Federal Court described the meaning of 'write-off':

The power to 'write off' a debt stems from s 1236 of the 1991 Act. It seems that the expression 'write off' is used in an accounting sense, that is to say that action is taken to write off an existing liability in the accounting records of the Commonwealth dealing with social security: cf *AGC (Advances) Ltd v Commissioner of Taxation* (1975) 132 CLR 175. So used, the expression does not impact upon the liability of the person overpaid, although, as a practical matter, once a debt has been written off, it is unlikely that recovery would be pursued.<sup>44</sup>

A Note at the end of an earlier form of s 1236 explains the meaning of write-off in the following terms:

Note: if the Secretary writes off a debt, this means an administrative decision has been made that, in the circumstances, there is no point in trying to recover the debt. In law, however, the debt still exists and may later be pursued.

Amendments by the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996* (Cth), which commenced on 1 October 1997, substantially restricted the ambit of the write-off powers under the Act. The end result of this is that write-off is not particularly useful to most recipients, as the debt will be recovered from their payment in an amount which usually is manageable for the customer. Write-off may still be important for a debtor who is not currently on benefit.

### **Waiver — administrative error**

Section 1237A(1), 'Waiver of debt arising from error', provides:

- (1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.

Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).

Section 1237A(1A) provides that subs (1) only applies if:

- (a) the debt is not raised within a period of 6 weeks from the first payment that caused the debt; or
- (b) if the debt arose because a person has complied with a notification obligation, the debt is not raised within a period of 6 weeks from the end of the notification period;

whichever is the later.

The key elements of this waiver are:

- 'attributable solely to';
- 'administrative error'; and
- 'received in good faith'.

In *SDEETYA v Prince*<sup>45</sup> (*Prince*), a student cancelled his entitlement to Austudy in December but payments continued to be made for several months thereafter. After six weeks, the student became aware of the continuing payments and contacted the Department of Education Employment Training and Youth Affairs (DEETYA) repeatedly in an attempt to have the payments stopped. Payment was finally cancelled after the student's MP contacted DEETYA on his behalf. The Federal Court held that the money was not



received in good faith at any time (even before he became aware of the payments) because he knew he had no entitlement to Austudy.

*Prince* has been consistently followed and applied in a great many cases since 1997.

### **Waiver — special circumstances**

Section 1237AAD reinstated waiver in ‘special circumstances’ provided:

- the debt did not result from the debtor or another person knowingly making a false statement or representation, or failing to comply with the Act (s 1237AAD(a));
- there were special circumstances (other than financial hardship alone) that made it desirable to waive (s 1237AAD(b)); and
- it was more appropriate to waive than to write off the debt (s 1237AAD(c)).

The addition of ‘knowingly’ makes it clear that the provision is not intended to catch situations such as in *McAuliffe v SDSS*<sup>46</sup> and *Re King and SDSS*<sup>47</sup> where objectively the statements were untrue but this was not known to the debtor.

In *SDSS v Hales*,<sup>48</sup> French J discussed the breadth of the discretion in s 1237AAD:

The concept of special circumstances is broad. A constellation of factors, including financial circumstances, may fall within it. The express exclusion of financial hardship alone as a special circumstance is an indicator that it would otherwise be included. This gives some measure of the range of circumstances which will qualify as special. But as a matter of grammar and ordinary logic, the exclusion of financial hardship alone as a special circumstance does not mandate its inclusion in the range of matters constituting such circumstances for the purpose of enlivening the Secretary’s discretion. ...

The evident purpose of s 1237AAD is to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of a requirement for recovery of debt. It is inappropriate to constrain that flexibility by imposing a narrow or artificial construction upon the words. It may be that there will be few cases in which the Secretary will be satisfied that there are special circumstances in the absence of financial hardship. It may be that there are few cases in which having found special circumstances to exist, the Secretary would exercise the discretion to waive in the absence of financial hardship. But to anticipate the limits of the categories of possible cases by imposing on the language of the section a fetter upon its application which is not mandated by its words, is to erode its useful purpose.<sup>49</sup>

In *Hales*, the Court observed that ‘the exclusion of financial hardship alone as a special circumstance does not mandate its inclusion in the range of matters constituting such circumstances for the purpose of enlivening the Secretary’s discretion’<sup>50</sup> and also rejected the Secretary’s argument that, if it was not appropriate to write off a debt, the Tribunal was precluded from waiving the debt.

There have been differences of opinion in the Tribunal about whether a notional entitlement to another payment could be relevant special circumstances. In *Oberhardt v SDEEW*,<sup>51</sup> Spender J held that notional entitlement should not be excluded from the range of relevant considerations in deciding whether there are ‘special circumstances’ to waive a debt under s 1237AAD.

### **Part 5.5 — Departure prohibition orders**

Part 5.5, ‘Departure prohibition orders’ (ss 1240–1260), was inserted into the Social Security Act by item 13 in sch 13 to the *Budget Savings (Omnibus) Act 2016* (Cth) (No 55/2016), commencing on 1 January 2017. The measure was intended to protect the integrity of

outlays through welfare payments, and encourage welfare debtors to repay their debts, by using departure prohibition orders (DPOs) (similar to the arrangements applying in the child support legislation) to prevent targeted debtors from leaving Australia. DPOs will be used for debtors who persistently fail to enter into acceptable repayment arrangements.

Part 5.5 has seven divisions:

- div 1, 'Secretary may make departure prohibition orders' (s 1240);
- div 2, 'Departure from Australia of debtors prohibited' (s 1241);
- div 3, 'Other rules for departure prohibition orders' (ss 1242–1245);
- div 4, 'Departure authorisation certificates' (ss 1246–1251);
- div 5, 'Appeals and review in relation to departure prohibition orders and departure authorisation certificates' (s 1252–1255);
- div 6, 'Enforcement' (ss 1256–1258); and
- div 7, 'Interpretation' (ss 1259–1260).

The Explanatory Memorandum discussed the measure:

#### **Outline of chapter**

Schedule 13 of the Bill introduces departure prohibition orders so that, in certain cases where a person does not have a satisfactory arrangement in place to repay their social security, family assistance, paid parental leave or student assistance debt(s), they may be prevented from leaving Australia without either having wholly paid their debt(s) or making satisfactory arrangements to pay. This system will closely mirror the existing departure prohibition order system in place under the *Child Support (Registration and Collection) Act 1988* (Child Support Registration and Collection Act). Targeted debtors will largely comprise ex-recipients of social welfare payments but may also apply to other social welfare payment recipients in limited circumstances.

#### **Background**

This Part amends the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act), *Paid Parental Leave Act 2010*, *Social Security Act 1991* and *Student Assistance Act 1973* to introduce departure prohibition orders to prevent debtors under these Acts from leaving the country. Departure prohibition orders will not be made without consideration of all the circumstances and only where the Secretary believes on reasonable grounds that it is appropriate to do so. Where a departure prohibition order is in force, the Secretary can vary or revoke the order, or can issue a departure authorisation certificate allowing the person to depart the country for a specified period of time.

Departure prohibition orders were introduced into the *Child Support Registration and Collection Act* in 2000. Currently, there are approximately 120,000 child support customers with child support debts. However, there are only some 2,000 departure prohibition orders in place — that is, departure prohibition orders apply to less than two per cent of all debtors. Departure prohibition orders are only invoked when all reasonable administrative actions have been undertaken to recover the child support debt from the paying parent.

While the number of social welfare payment debtors is significantly higher than the number of child support debtors, it is anticipated that the departure prohibition orders will only be issued in the most extreme social welfare payment debt cases.<sup>52</sup>

#### **Departure prohibition orders under the child support legislation**

Section 1240 is based on and is similar to s 72D of the *Child Support (Registration and Collection) Act 1988* (Cth), which provides that the Child Support Registrar may make a DPO on grounds similar to s 1240(1)(a)–(c).

In *Whittaker v Child Support Registrar*,<sup>53</sup> Lindgren J discussed the nature and purpose of a DPO:

... Generally speaking, the terms of s 72D(1) show that a DPO is intended to 'ensure' that a person does not depart from Australia without either wholly discharging his or her child support liability or making arrangements satisfactory to the Registrar for its discharge. While a DPO is not security in a proprietary sense, it is security in a broader sense of a procedure designed to prevent recovery being frustrated.

It may be that the present submission is intended to distinguish between a purpose of preventing a particular imminent departure from Australia and a more general prevention of any departure from Australia. In my view even the latter is within para (b) of s 72D(1) [s 1240(1)(c)]. That is to say, that paragraph is satisfied if the Registrar believes on reasonable grounds that it is 'desirable' to make the DPO for the purpose of 'ensuring' (a strong word: see *Troughton v Deputy Commissioner of Taxation* [2008] FCA 18; (2008) 66 FCR 9 at [20]) that the person does not depart at any time in the future from Australia for any foreign country without first discharging the child support liability or making arrangements satisfactory to the Registrar for its discharge.<sup>54</sup>

The DHS *Annual Report 2015–16* reported on the amount of child support debts collected under DPOs: \$6.2 million (2013–14); \$6.7 million (2014–15); and \$7.9 million (2015–16). It did not provide any other data such as the number of orders.

### **Departure prohibition orders under the Social Security Act**

Section 1240 in div 1 authorises the Secretary to make a DPO prohibiting a person from departing from Australia for a foreign country if circumstances set out in paras (a)–(c) apply. Section 1241 imposes a penalty of imprisonment for 12 months for departure from Australia knowingly or recklessly in breach of a DPO.

The *Guide to Social Security Law*<sup>55</sup> sets out policy for administration of DPOs; however, this is little more than a summary of the legislative provisions and does not give a great deal of additional insight to when and how the discretion should be exercised. The Explanatory Memorandum states that DPOs 'will only be issued in the most extreme social welfare payment debt cases' and the practicalities of the scheme suggest that this is likely to be the case for reasons including that:

- many debtors who travel overseas will still be on social security payments. If the payment is fully portable (for example, the Age Pension), debt recovery can be easily achieved by deductions from instalments of payments. Where the payment is portable only for a short period, data-matching with the Department of Immigration and Border Protection usually ensures that the recipient's departure overseas is quickly discovered by Centrelink and payment is suspended — a saving to the Department considerably larger than any likely fortnightly repayment amount under pt 5.3
- a DPO would be more likely where the person is no longer in receipt of income support payments and there are reasonable prospects of recovering the debt through DPO action — for example, because the debtor has assets or has prospects of a significant income while overseas. Likely triggers for a DPO will be if the debtor is transferring assets offshore (either directly or indirectly) or they have sufficient resources to live offshore (for example, family, assets, employment or business).

Where a DPO has been issued, there will be substantial pressure on the debtor to pay the debt in full or to negotiate with the Secretary to have a departure authorisation certificate (DAC) issued on one of the grounds in s 1247 or by giving security for the debtor's return to Australia (s 1248).

### **Appeals and reviews in relation to departure prohibition orders**

Section 1252 in div 5 provides that a person aggrieved by the making of a departure prohibition order may appeal to the Federal Court or the Federal Circuit Court against the making of the order. Section 1254 provides that the Court may, in its discretion:

- (a) make an order setting aside the order; or
- (b) dismiss the appeal.

Section 1255(1) provides that an application may be made to the AAT for review of a decision of the Secretary under s 1244 ('Revocation and variation of departure prohibition orders'), s 1247 ('When Secretary must issue departure authorisation certificate') and s 1248 ('Security for person's return to Australia'). Section 1255(2) provides that pts 4 and 4A of the *Social Security (Administration) Act 1999* (Cth) does not apply in relation to these decisions. Accordingly, there will be no internal review or social security first review by the Tribunal in departure prohibition order matters.

### **Extended meaning of 'Australia' for departure prohibition orders**

Section 1260(1) in div 7 provides that, for the purposes of pt 5.5, 'Australia', when used in a geographical sense, includes the external territories. This disapplies the definition of 'external Territory' in s 23(1) in pt 1.2 of the Social Security Act. Section 1260(2)(b) provides that 'external Territory' has the meaning given by s 2B of the *Acts Interpretation Act 1901* (Cth), which states:

**external Territory** means a Territory, other than an internal Territory, where an Act makes provision for the government of the Territory as a Territory.

This has the effect of permitting travel to Norfolk Island, Cocos (Keeling) Islands and Christmas Island if a DPO is in force.

### **Part 6, Social Security (Administration) Act — offences**

Social security offences may be prosecuted under the *Crimes Act 1914* (Cth) or the *Criminal Code (Criminal Code Act 1995)* as an alternative to use of pt 6 of the Social Security (Administration) Act.

Under the Crimes Act, the more serious offences were prosecuted as indictable offences, often under former ss 29B, 29C or 29D of that Act:

#### **False representation**

**29B** Any person who imposes or endeavours to impose upon the Commonwealth or any public authority under the Commonwealth by any untrue representation, made in any manner whatsoever, with a view to obtain money or any other benefit or advantage, shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

#### **Statements in applications for grant of money etc.**

**29C** A person who, in or in connexion with or in support of, an application to the Commonwealth, to a Commonwealth officer or to a public authority under the Commonwealth for any grant, payment or allotment of money or allowance under a law of the Commonwealth makes, either orally or in writing, any untrue statement shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

#### **Fraud**

**29D** A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence.

Penalty: 1,000 penalty units or imprisonment for 10 years, or both.

In *R v Evans*,<sup>56</sup> the New South Wales Court of Criminal Appeal held that deliberate silence could amount to a 'representation' for the purposes of s 29B. The Court noted that:

Whether failure to disclose information involves, or amounts to a representation, depends upon the circumstances of the case.

Whether suppression of the truth involves suggestion of falsehood is, in any given case, a question of fact. (at 142 FLR 320)

Under the *Criminal Code*, the relevant offences are found in pt 7.3, 'Fraudulent conduct', and pt 7.4, 'False or misleading statements'.

In *Poniatowska v Commonwealth DPP*,<sup>57</sup> the Full Court of the South Australian Supreme Court held that s 135.2 of the *Criminal Code* does not support a prosecution for the offence of obtaining financial advantage where there was an omission to comply with a notice given under pt 3 of the *Social Security (Administration) Act 1999* (Cth):

In summary, we are of the view that s 135.2 does not define any duty or obligation relevant to an offence committed by way of an omission. The DPP does not rely on any notice issued to the appellant for the purpose of establishing such a duty; nor was it suggested that the duty was to be found elsewhere in the *Administration Act*. The approach of the *Administration Act* is to provide for the issuing of notices by the department requiring information and to impose a penalty punishable by imprisonment for a failure to comply with such notices. The *Administration Act* does not create a separate 'stand alone' obligation. We have explained why we consider that s 135.2 does not impose a relevant obligation.<sup>58</sup>

In *Commonwealth Director of Public Prosecutions v Poniatowska*,<sup>59</sup> the High Court dismissed an appeal. By the time the decision was handed down, the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth) (No 91/2011) had been enacted, with a retrospective commencement of 20 March 2000. This Act made the debts recoverable, but it does not support the many *Criminal Code* convictions entered between 12 June 2001 and 14 August 2011 or any subsequent prosecutions based on notices subsequently validated by the Act.

### Reparation Orders and recovery of debts

It is open to the CDPP to request a sentencing court to impose a Reparation Order either for the amount of the social security debt or the proportion of it covered by the charges. The amount of the order is paid to the Commonwealth. Reparation Orders are not sought in all cases; they seem to be sought more often in more serious cases prosecuted under the *Criminal Code*. A court may also issue a Forfeiture Order when the convicted person holds assets acquired as a result of committing the offence.

This contrasts with New Zealand practice where Associate Professor Marriot<sup>60</sup> observed that the Ministry of Social Development (MSD) does not seek reparation orders in social welfare prosecutions, stating 'Reparation order not sought: the Ministry will recover the full amount of the overpayment directly from the Defendant'.

In the case of joint offenders, the Reparation Order may be made against both parties on a joint and several basis; however, the court has a discretion to apportion the loss between co-offenders on the basis of relative culpability or length of offending.<sup>61</sup>

A debt which is subject to a Reparation Order may subsequently be waived under pt 5.4 of the Act; however, the waiver does not modify the order of the court, which stands with full force. There are some differences in the cases on the 1947 Act about the relationship

between waiver and the continuing effect of Reparation Orders, but it was suggested by the AAT in *Re Anderson and SDSS*<sup>62</sup> that the Secretary should not seek to enforce a recognisance where the applicant, relying on a waiver, did not repay monies in the time specified in her recognisance.

Where the amount of the Reparation Order is less than the total amount of the debt, it is important to look closely at the basis of sentencing and the judge's remarks to see if payment of the amount in the Reparation Order extinguished the whole of the debt.<sup>63</sup> There is now also a specific waiver provision in s 1237AA of the 1991 Act for debts relating to an offence requiring waiver where the sentencing judge has imposed a longer custodial sentence because the offender was unable or unwilling to repay the debt: see the discussion above.

The *Memorandum of Understanding Centrelink and Commonwealth Director of Public Prosecutions 1999* states:

**Part 9: Criminal Assets**

...

**B: Reparation**

- 9.5 The DPP will seek a reparation order in any case in which a defendant is convicted, or a case is found proven, unless there is some reason why reparation should not be sought in the particular circumstances of the case.
- 9.6 Unless otherwise agreed, reparation will be sought for the full amount outstanding in relation to the charges and without specific repayment orders or time frames.
- 9.7 Where a case involves more than one defendant, the DPP will, if possible, seek reparation on the basis that the defendants are jointly and severally liable for the debt.

**C: Recovering the Proceeds of Crime**

***The role of the DPP***

- 9.8 It is part of the DPP's function to pursue and recover the proceeds of Commonwealth crime. The function is not exercised in every criminal case.
- 9.9 In deciding whether to exercise its criminal assets function, the DPP will consider whether the following conditions are satisfied:
- a) if it is alleged that the defendant obtained a significant financial benefit from the relevant crime;
  - b) if the defendant owns or controls assets against which recovery action can be taken; and
- Either
- I) it appears that the normal processes of Commonwealth debt recovery are not available or are likely to be less effective than action by the DPP; or
  - II) there is a need to co-ordinate recovery action with the criminal process.<sup>64</sup>

**Endnotes**

- 1 *Re Green and SDSS* [1988] AATA 706; 16 ALD 187.  
2 *Director-General of Social Services v Hangan* [1982] FCA 262; 45 ALR 23; 70 FLR 212; 5 ALN N4.

- 3 *Re Babler and Director-General of Social Services* [1982] 4 ALN N130; *Re Pepi and Director-General of Social Security* [1984] AATA 507; 7 ALD 155.
- 4 *Re Taylor and SDSS* [1986] AATA 166; 10 ALN N196.
- 5 [1983] FCA 81; 47 ALR 281; 78 FLR 373; 5 ALN N162.
- 6 Department of Social Security, *1990–91 Annual Report* (AGPS, 1991).
- 7 [1993] FCAFC 852; 47 FCR 111; 119 ALR 65; 18 AAR 344; 31 ALD 28.
- 8 [1997] FCA 1111; 26 AAR 27; 48 ALD 241.
- 9 *Ibid.*
- 10 [2004] FCAFC 166; 136 FCR 134, [37]–[40].
- 11 (1996) 68 FCR 491.
- 12 Noel Towell, 'Welfare crackdown a \$270m flop: report', *Canberra Times*, 1 March 2017.
- 13 Lisa Marriott, 'Tax and Welfare in New Zealand: all are equal but some are more equal than others' (Presentation to the Tax and Transfer Payments Institute, ANU Crawford School, June 2017).
- 14 Department of Human Services, *Annual Report 2015–16* (AGPS, 2016) 3.3.
- 15 *Ibid.*
- 16 Commonwealth Director of Public Prosecutions, *Annual Report 2015–16* (AGPS 2016) p 33.
- 17 Grainne McKeever, 'Social Citizenship and Social Security Fraud in the UK and Australia' (2012) 46(4) *Social Policy and Administration* 465–482.
- 18 [1995] FCAFC 130; 56 FCR 354; 129 ALR 198; 36 ALD 513; 21 AAR 147.
- 19 *Ibid.*
- 20 [1999] FCA 375; 56 ALD 338.
- 21 [1924] AC 318.
- 22 *Ibid* 326–7.
- 23 *Re Sawyer and SDSS* [1988] AATA 763; 53 ALD 102.
- 24 *Re Sawyer and SDSS* [1996] AATA 383; 24 AAR 293; 44 ALD 86.
- 25 *Re Frugtniet and SDSS* [2004] AATA 996; 84 ALD 774.
- 26 Department of Human Services, *Annual Report 2015–16* (AGPS 2016) p 240.
- 27 Marriott, above n 13.
- 28 *Walker v SDSS* [1995] FCAFC 130; 56 FCR 354; 129 ALR 198; 36 ALD 513; 21 AAR 147 (Spender J).
- 29 *Walker v SDSS* [1997] FCA 589; 75 FCR 493; 147 ALR 263; 48 ALD 512; 25 AAR 258.
- 30 *Re King and SDSS* [1994] AATA 144.
- 31 *Taylor v SDSS* [1988] 18 FCR 322; 79 ALR 327; 14 ALD 655.
- 32 [1998] FCA 323; 82 FCR 100; 50 ALD 162; 27 AAR 106.
- 33 [1988] 18 FCR 322; 79 ALR 327; 14 ALD 655
- 34 [2008] AATA 964; 49 AAR 291.
- 35 *Re Caudell and SDEEWR* [2008] AATA 196.
- 36 [2007] AATA 1690.
- 37 [2008] AATA 349.
- 38 *Bankruptcy Act 1966* (Cth) s 153(2)(b).
- 39 *Re SDFaCS and Grindlay* [2005] AATA 91.
- 40 *Re SDSS and Malaj* [1993] AATA 181; 31 ALD 391.
- 41 *Re Civitareale and SDFaCS* [1999] AATA 486; 57 ALD 451; 29 AAR 505.
- 42 (1993) 42 FCR 443.
- 43 [1992] FCA 510; 37 FCR 32; 108 ALR 322; 27 ALD 309; 15 AAR 563.
- 44 *Ibid* 42.
- 45 [1997] FCA 1565; 152 ALR 127; 26 AAR 385; 50 ALD 186.
- 46 [1991] FCA 346; 23 ALD 284; 13 AAR 462.
- 47 [1994] AATA 144.
- 48 [1998] FCA 219; 82 FCR 154; 51 ALD 695; 153 ALR 259; 26 AAR 51.
- 49 *Ibid* 162.
- 50 *Ibid.*
- 51 (2008) FCA 1923; 174 FCR 157; 106 ALD 36.
- 52 At p 157.
- 53 [2010] FCA 43; 264 ALR 473.
- 54 *Ibid* [291]–[292].
- 55 Australian Government, *Guide to Social Security Law*, 20 September 2017, 6.7.2.100.
- 56 [1998] NSWCA 60401/1997.
- 57 [2010] SASCFC 19.
- 58 *Ibid* [38].
- 59 [2011] HCA 43.
- 60 Marriott, above n 13.
- 61 *R v Theodossio & Said* [1998] QCA 421.
- 62 [1993] AATA 172; 31 ALD 155.
- 63 *Re SDSS and Wornes* [1997] AATA 476.
- 64 Commonwealth Director of Public Prosecutions, *Memorandum of Understanding Centrelink and Commonwealth Director of Public Prosecutions 1999*, 9.5–9.9.

## PROCEEDING IN CERTAINTY: TAX RULINGS

*David W Marks QC\**

The value of the ability to proceed in certainty, when preparing a tax return or making an agreement, is recognised by the Commonwealth's system of private binding tax rulings. But the utility of, and the ability to obtain, a ruling has recently been questioned by the agency involved. One key is the accuracy of the facts laid out for the Australian Taxation Office's (ATO's) consideration. Another key is the ATO's confidence in the facts so laid out by the applicant. The ATO has been proactive in seeking solutions and has engaged with practitioners. Issues include resourcing and timeliness; the ability to state facts sufficiently and accurately; who should be the master of the 'facts' when making a ruling; what the ATO should do if it has no confidence in the facts as presented; and the extent to which the ATO can be expected to engage with an applicant for a ruling in delivering a useful product.

Income tax is self-assessed, either (for corporate entities) as a matter of law or (for other entities such as individuals) in a substantial sense. In the latter case, the Commissioner of Taxation generally accepts a return on its face.<sup>1</sup>

The former model of assessment was for the Commissioner of Taxation's officers to look through a return and supporting documents, and themselves to make a calculation or 'assessment' of the tax due.<sup>2</sup> We have not seen that, on a mass basis, for more than two decades. There will be no return to that system.

There are penalties for making an incorrect statement in a tax return.<sup>3</sup> Even when an entity engages a tax agent to prepare the return, the statement is attributed to the entity<sup>4</sup> and there is only a limited safe harbour applicable to an entity who has given everything relevant to the registered tax agent or BAS agent.<sup>5</sup>

There are other penalties applicable to actions and omissions under the tax laws. Further, a taxpayer has a reputational risk if it falls into dispute with a revenue authority (regardless of the merits of the dispute).

The tax laws are complex.<sup>6</sup> The reach of those laws is wide, into every sector of the economy, including the third sector. The agency administering the laws is large. It has a range of skills and expertise within its ranks, which can be called upon to meet needs. Those caught by the laws likewise have a diverse range of abilities. Their advisers are more or less resourced. Small businesses and unsophisticated individuals can find themselves with a complex tax issue.<sup>7</sup> Some citizens have a risk profile such that they prefer to disclose an arrangement, and have the agency's view, before filing a return.<sup>8</sup> Some deals cannot proceed economically unless the agency's view is known.<sup>9</sup>

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Thus, in the move to self-assessment, the Commonwealth provided a system of binding private rulings, in part to address the risk of penalty associated with lodgement of an incorrect return. The reports and recommendations at the time, in the early 1990s, will be examined later in this article.

As we have seen, a second matter calling for an ability to apply to the Commissioner for advice relates to prospective transactions. Some transactions will proceed regardless of the taxation consequences. It is then a matter of correctly preparing a return, which may in fact involve deliberately misstating the return in favour of the Commissioner so as to avail the objection and appeal process once the Commissioner issues an assessment (or an assessment is deemed issued, for corporate entities). Of course, it is open to an entity to apply to the Commissioner for advice, which will be issued before the return must be completed and filed, but that does not assist with the transaction that must be priced (or rejected) based on tax consequences.

Where the transaction is sensitive to the tax consequences, the parties to the transaction may each apply to the Commissioner for advice about its consequences. Prior to a system of private rulings in Australia, this was done by applying for an Advance Opinion. In my observation, the system worked well, and the Commissioner would generally not depart from an opinion he expressed, except for good reason.<sup>10</sup> For a matter to proceed with greater certainty, including as to price and terms, a system of private binding rulings was nevertheless thought desirable.

### **Matters considered by government in introducing private binding rulings**

The move toward self-assessment of income tax formally began in the 1986-87 year. By 1989-90, companies and superannuation funds were subject to full self-assessment, as opposed to the 'first stage' self-assessment that had begun a few years earlier:

The essential difference between first stage and full self assessment is that, under the latter system, the taxpayer goes the one step further than ascertaining the taxable income by also calculating the tax payable on that income and remitting that amount to the ATO with a return that contains only limited information. The ATO does not issue an assessment on the basis of the return lodged.<sup>11</sup>

As at the present date, individuals remain at 'first stage' self-assessment.

The 1990 Consultative Document identified a number of advantages, including 'the elimination of receipt, checking and handling of bulky paper returns'. That was estimated to reduce costs of return processing, which in 1989-90 were about \$80 million.<sup>12</sup>

Rather:

[There would be] a shift in emphasis from processing work [which] allows the ATO to devote its resources to more productive tasks by helping taxpayers to meet their obligations, for example, through enhanced enquiry and advisory services, and more generally, by focusing more closely on taxpayer needs, or by taking enforcement action against those who don't comply.<sup>13</sup>

The 1990 Consultative Document recorded 'strong support among professional and other bodies for extending self-assessment arrangements', but the 'support' was conditioned on changes including legislative changes for 'greater taxpayer certainty under the law'. Accordingly, the intention was to 'authorise the issue of general Taxation Rulings and Private Rulings that are binding on the Commissioner of Taxation, and make Private Rulings subject to review by the AAT or a court'.<sup>14</sup>

The Commonwealth went on to explain what was proposed in relation to rulings, again emphasising that this was not 'a further way of producing uncertainty'.<sup>15</sup> The idea would be for a system of private rulings and general taxation rulings to be given effect, the Commissioner being bound by both. In relation to private rulings, there would then be a system by which a person dissatisfied could object and then seek review or appeal the objection decision. There would then be limits on the ability of the taxpayer to contend for a different outcome from the subject of the private ruling, to ensure finality.<sup>16</sup>

There would be consequences for the taxpayer (although I note that there have been changes to legislative arrangements over the years) if the taxpayer declined to follow a ruling, including a private ruling.<sup>17</sup>

An Information Paper was issued in August 1991, further fleshing out the intention of the Commonwealth.<sup>18</sup>

One point which must have arisen during consultation was whether a taxpayer would be able to request a private ruling on the application of the general anti-avoidance provisions contained in pt IVA of the *Income Tax Assessment Act 1936* (Cth). As we will see, the key provisions in that Part provide a number of unweighted criteria for the Commissioner to evaluate in deciding whether to make a determination. The making of such a determination triggers the potential for adjustment to tax liability and special penalty arrangements. The 1991 Information Paper says:

Taxpayers will be able to request Rulings on Part IVA issues, but will be required to specifically and separately address all the matters listed in each of the sub-paragraphs of paragraph 177D(b), where applicable. The Ruling may state that no guarantee will be given that the taxation consequences sought will be achieved, or that it should not be assumed that the arrangements will not be challenged by the Tax Office. In both cases the reasonably arguable position will not be affected. The Tax Office will not enter into correspondence or discussion aimed at establishing how schemes devised to exploit perceived loopholes in the law might be structured or altered to facilitate marketing of the scheme.<sup>19</sup>

This perhaps jumps a little ahead. The Commissioner was not going to be empowered to make rulings in the abstract. Rather, the idea was to have private rulings which addressed 'the taxation consequences arising from a transaction, act or event which is proposed to take place or has already taken place'.<sup>20</sup> Thus, in applying for a ruling, the taxpayer had to detail the transaction, et cetera, and it was anticipated that 'copies of all relevant documents or copies of extracts, draft documents ... and flow charts of funds' would be provided.<sup>21</sup>

The Taxation Laws Amendment (Self Assessment) Bill 1992 was introduced into the House of Representatives on 26 May 1992. This was part of a package of measures (foreshadowed in the 1990 Consultative Document and the 1991 Information Paper), as noted in the second reading speech by the Minister Assisting the Treasurer.<sup>22</sup>

The second reading speech says, materially:

Taxpayers who are genuinely uncertain about the tax effect of a completed or proposed arrangement would be able to seek a Private Ruling from the Commissioner. The Commissioner will be bound by the ruling to the extent that the tax that would be payable by the taxpayer would be reduced to reflect the tax that would be payable under the ruling. ...

A taxpayer will be able to have an unfavourable Private Ruling ... reviewed by the AAT or courts. When the review process is finalised, the decision of the AAT or the court will be legally binding and conclusive as to the application of the ordinary provisions of the legislation to an actual arrangement not relevantly different from the proposal or arrangement to which the Private Ruling related. ...

The new system of binding and reviewable rulings will promote certainty for taxpayers, and thereby reduce their risks and opportunity costs.<sup>23</sup>

Initially, provisions about both public and private binding rulings were contained in the body of the *Taxation Administration Act 1953* (Cth) at pts IVAAA (public rulings) and IVAA (private rulings). Those provisions were rewritten and removed to sch 1 of that Act with effect from 1 January 2006. The structure of the current law is:

- (a) objects and common rules are in div 357;
- (b) public rulings are dealt with by div 358; and
- (c) private rulings are dealt with by div 359.

### **Practical issues in obtaining certainty**

From the beginning, it was seen that both the system of public rulings and the system of private rulings had to be studied carefully and applied sensibly (as part of a suite of measures available both to the Commissioner and the taxpayer), to mitigate uncertainty in the developing self-assessment environment.

### ***Principles, and inferences drawn***

A key issue for both public and private rulings was defining the 'arrangement' (nowadays, the 'scheme') to which the Commissioner's opinion as to the operation of the law applied. This was exemplified, in relation to public rulings, by litigation concerning deductions sought by the new owner of a power station, in *Bellinz v Commissioner of Taxation*<sup>24</sup> (*Bellinz*). A key issue appeared to be reliance by the foreign purchaser upon various utterances by the Commissioner over the years, expressed in more or less general terms. Some of those utterances were under old system non-binding public rulings. Those utterances could not bind the Commissioner. Other utterances, purportedly in binding public rulings, were qualified with words such as 'generally' in expressing the approach that the Commissioner might take. As the Full Court said:

The binding quality which the legislation gives to a public ruling applies to the tax consequences of the arrangement or class of arrangements to which the ruling relates, and not, as the appellants contend, to the underlying philosophy behind the ruling.<sup>25</sup>

### ***Another aspect of Bellinz — factual complexity***

This case concerned review of a private binding ruling which the taxpayers had sought.

As well as expressing dissatisfaction with the Commissioner's departure from various statements over the years, as described above, the taxpayers were dissatisfied with the Commissioner's conclusion that the general anti-avoidance provisions in pt IVA would apply to the arrangement. (This issue could only arise in the event that the taxpayers were, contrary to other parts of the private ruling, entitled to the claimed depreciation.)

The Full Court noted:

While there is nothing to suggest that in an appropriate case a ruling could not issue on Pt IVA of the Act, both the Commissioner and the taxpayer must be aware of the difficulty which a private ruling on a Pt IVA issue will create. Section 177D(b) sets out the various matters to which the Commissioner shall have regard in reaching the conclusion that a person ... entered into or carried out the scheme ... for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with it. One of those matters is 'the manner in which the scheme was entered into or carried out'. Where the arrangement in respect of which a private ruling is sought has not yet been carried out, it is difficult to see how there could be adequate facts upon which to base a private ruling. Even where the scheme has been carried out, there may in many cases be difficulty in obtaining all relevant facts, particularly those relating to the manner in which the scheme was entered into or carried out. In the present circumstances there is no need to consider these difficulties.<sup>26</sup>

There remains unease as to the effectiveness of a ruling about the operation of pt IVA of the *Income Tax Assessment Act 1936* (Cth). Essentially, value judgments must be made, given unweighted criteria, and upon a diverse range of classes of facts potentially material to the value judgments.

### ***Transactions in progress as ruling proceeds***

Another practical issue that arises, for a prospective transaction, is that the scheme or arrangement the subject of a private ruling application must remain constant, even throughout the objection process and beyond on review by the tribunal or appeal to the Federal Court.

I make no complaint about timeliness on the part of the Commissioner. Some matters are more or less complex. The Commissioner has undertaken from time to time to resource his consideration of serious commercial transactions in progress.

However, with a prospective transaction in the course of negotiation, it may be impractical for the parties fully to negotiate an agreement then wait for the Commissioner to embark on a consideration of an application for a private ruling on the finalised documents. So Merkel J, at first instance in *Bellinz*,<sup>27</sup> pointed out that a problem arose in that:<sup>28</sup>

the Lessor Partners from time to time sought to comply with objections raised by the Commissioner by making amendments, or agreeing to make amendments, to their transaction documents. As a consequence the documents recording the arrangements did not necessarily accord with the agreed description of the arrangements or the applicant's submissions as to the arrangements. Whilst I have endeavoured to accommodate the discrepancies I would point out that the Court is not giving an advisory opinion on the basis of an arrangement that might be paid. A private ruling was applied for and given on the basis of the arrangement in respect of which the private ruling was sought by the applicants. That arrangement was recorded in the documentation ... executed by the parties. Yet the agreement by the parties as to the arrangement on which the ruling was sought departs from the documentation.<sup>29</sup>

### ***Strictures about changing the scheme***

#### *Relevance of the scheme*

As noted, the basis for making a private binding ruling, and for any legal consequences that flow, is specification of the relevant scheme.

In accordance with s 357-60 of sch 1 to the *Taxation Administration Act 1953* (Cth), a ruling binds the Commissioner in relation to the taxpayer if (relevantly) the ruling 'applies' to the taxpayer.

Section 359-5 provides that the Commissioner may, on application, make a written ruling on the way in which the Commissioner considers a relevant provision 'applies' or would 'apply' to a taxpayer in relation to a specified scheme.

Thus the application of a ruling is tied, in part at least, to specification of the scheme.

A private ruling has to:

- (a) identify the entity to which it applies and specify the relevant 'scheme'; and
- (b) identify the provision to which it relates.<sup>30</sup>

### *Objection*

It is possible for an applicant who is dissatisfied with a private ruling to object. In general the objection and appeal process has proven unsatisfactory. Nevertheless, there are cases where it is wise to follow the procedure. An important strategic consideration is that the applicant tends to give up rights of objection against any subsequent assessment of taxation because of s 14ZVA of the *Taxation Administration Act 1953* (Cth). That is a problematic provision, but some comfort about its potential to annihilate rights was provided in the key decision of *Rosgoe v Commissioner of Taxation*<sup>31</sup> (*Rosgoe*).

An applicant might be better to lodge a return (usually in accordance with the ruling) and then object to an assessment. That may prove more satisfactory, as the applicant would then be able to conduct an objection and any review or appeal on the basis of the facts that have actually occurred and may be proven by admissible evidence, as opposed to looking only at the written terms of a scheme. The ruling is only as good as the stated 'scheme', and it may be a barren exercise to dispute it where its stated facts will be put in issue at the stage of a disputed assessment.

### *Constancy of scheme*

A major limitation of the objection and review or appeal system with private binding rulings is that the scheme under consideration must remain constant throughout that process.<sup>32</sup> Thus the tribunal could not, on the hearing of an application for review of an objection against a private ruling, redefine the arrangement. A further limitation is that the agency may not consider that the facts stated in the 'scheme' are incapable of proof. Rather, the scheme is taken as correct.<sup>33</sup> That could lead to hesitation on the part of the agency. There are various ways of dealing with this.

Section 357-105 permits the Commissioner to obtain further information. Additional information provided by the applicant may be taken into account in making the private ruling. If the information comes from a third party, that information should be provided to the applicant so that the applicant has a reasonable opportunity to respond before the making of the ruling.<sup>34</sup>

If further information comes to hand during the course of the objection process, the Commissioner may consider that new information. But if the additional information 'is such that the scheme to which the application related is materially different from the scheme to which the ruling relates' then the objection is disregarded and the Commissioner is to request the applicant to make a fresh application for private ruling.<sup>35</sup> There is a question as to whether that additional information is able to be used to change the 'scheme', at least prior to objection. (At objection stage, it seems not.)<sup>36</sup>

Finally, it is possible to make a ruling based on *assumptions*, in accordance with s 357-110. The exact role of assumptions is still debated, and it is not necessary for the purposes of this article to express views.<sup>37</sup>

Practical problems have arisen:

- (a) At first instance in *Bellinz*,<sup>38</sup> Merkel J noted that the transaction documents kept developing during the hearing of the appeal from the objection decision. His Honour recounted that he had 'endeavoured to accommodate these matters' but that this tended to 'emphasize the importance of the Commissioner stating the arrangement on which he was ruling ... with clarity and precision in the ruling itself'.

- (b) A consistent problem in recent matters has been the endeavour by the applicant to place before the Commissioner a large amount of evidential material, presumably to attempt to cover the applicant for purposes of any later allegation of non-disclosure of a material fact. This leads to the 'scheme' being stated as comprising a written narrative together with the few binders of material annexed.
- (c) One potential difficulty with that approach is that the agency may find, in the mass of evidential facts, contradictory indications on some material ultimate factual conclusion. The distinction between evidential, and ultimate, facts is one known from the law of the stated case: *EIE Ocean BV v Commissioner of Stamp Duties*.<sup>39</sup> Indeed, there is some analogy with a stated case, although it is a weak analogy.

The particular difficulty that arose in *Rosgoe*, above, is that the Commissioner looked to the mass of material provided and drew the conclusion of fact that the applicant had been conducting a business.<sup>40</sup> This was significant in terms of the analysis of a receipt by the applicant.

Justice Logan found that it was not for the Commissioner to add that finding of fact in making the ruling. The Commissioner's appeal to a Full Court was settled.<sup>41</sup> However, there were two lessons in Logan J's judgment which remain practical considerations for an administrator:

- (a) If the Commissioner had thought the statement of the arrangement put to him for ruling was deficient, he might have declined to make a ruling or might have made an assumption.<sup>42</sup>
- (b) So far as the applicant was concerned, if the true state of affairs was other than as stated in the scheme for the ruling, the applicant would be unable safely to rely on the ruling: [32].

This shows up limitations in the private ruling system. The Commissioner is being confronted with large amounts of evidential material, doubtless for good and genuine reasons, making disclosure to an agency. But the Commissioner is limited to some extent in what he may do with that evidential material. And the Commissioner (and the applicant) are hamstrung to some extent during the objection and the review or appeal process from dealing with information that emerges. Information might emerge entirely innocently, as with further drafts of documents with a prospective transaction the subject of a ruling application, or the Commissioner may, through his various sources of information, come across information germane to the accuracy of the scheme put for ruling.

#### *Whether the Commissioner must give a ruling*

There has been recent litigation concerning whether the Commissioner was obliged, in certain factual circumstances, to give a private binding ruling. However, the decision of *Hacon Pty Ltd v Commissioner of Taxation*<sup>43</sup> is under appeal, and this limits the extent to which counsel concerned should prudently discuss the matter.

Justice Logan decided that the Commissioner's decision to decline to make a private ruling should be quashed and the matter should be remitted to the Commissioner for the purposes of dealing with that ruling application according to law.

A known feature of the ruling application was that it mentioned the potential application of sections in pt IVA of the *Income Tax Assessment Act 1936* (Cth), which is highlighted above, and which have been the subject of comment over the years.

One section that was in contest was s 359-35, which provides that the Commissioner 'must' comply with an application but subject to express exclusions.

Justice Logan found as follows:

Difficult to see though that may be, there is no express exemption in the Pt 5-5 rulings system in respect of the furnishing of rulings as to the application of Pt IVA of the ITAA36 in respect of an arrangement yet to be carried out. Its administration should not be approached as if there is. The private ruling system provisions now found in Pt 5-5 are, and their earlier counterparts always were, intended to effect a profound reform in revenue law and practice, both within the Commissioner's office and amongst taxpayers. It is imperative that their invocation or attempted invocation by taxpayers via a ruling application and the administration of the provisions by the Commissioner be approached with this firmly in mind. Pedantry has no place in their administration, or in dealings by taxpayers with the Commissioner.

It is the duty of an officer of the Executive tasked by Parliament with carrying into effect the terms of an Act to do that in accordance with the letter, and spirit, of that Act, difficult though that may be. It is equally a responsibility of those who seek to have the advantage of the legislatively conferred benefit to co-operate with that officer of the Executive, here the Commissioner, in his discharging what may be a difficult duty. Of course, in relation to a particular ruling application a position may be reached where, even after a request for further information, a response, and after giving full voice to beneficial legislative ends in relation to the making of assumptions, it is just not possible for the Commissioner to make the ruling applied for. If so, the TAA, as noted, provides lawful bases for the Commissioner to decline to make a ruling. But these are safe havens after a long voyage, not ports of first call.

It necessarily follows, on above analysis, that, in the circumstances of this case, the Commissioner became subject to an imperative obligation to request information which he considered necessary. This he did not do. Indeed, in the letter of 12 July 2016, he expressly stated that he refrained from so doing. This was not permissible. The Commissioner made an error of law which, in the context of the Pt 5-5 rulings scheme of which s 357-105(1) is part, is also a jurisdictional error.

...

It is also necessary to bear in mind that, even if after giving every consideration to the beneficial end to which the ruling system is directed, the Commissioner, for cause, declines to make a ruling, that a ruling has been sought in good faith will not be irrelevant in the context of any later penalty decisions which relate to the 'scheme' in respect of which a ruling was sought.

In summary, the Commissioner's administration of the ruling system miscarried as soon as he reached the point of considering that there was a need for further information from the applicants.<sup>44</sup>

The Commissioner has appealed.

### **Suggested remedies**

The need for the private binding ruling system was established historically, on moving to a more general self-assessment system.

The current private binding ruling system has some limitations. I will spell out each of the limitations that I have identified and suggested ways of dealing with them.

First, the scheme remains *relatively* static through to objection stage (with exceptions identified above) and then *completely* static beyond objection. This evidently troubled Merkel J in *Bellinz*, before whom successive drafts of transaction documents, in a live transaction, were placed. Part of the solution may already be with us.

The institution of tax lists in both the Administrative Appeals Tribunal and Federal Court has led to a more streamlined and rapid procedure. However, there is no indication of any particular delay in *Bellinz*.

The reality is that a transaction in progress poses special difficulties. In that kind of situation, the remedy may be simply to recognise limitations of having to resort to the judicial system and instead to concentrate on administrative solutions with the agency concerned. The Commissioner offers an early engagement service, which is more in the nature of a compliance 'product'. It may be the true solution. Even that process contemplates that a ruling may be issued, if relevant.<sup>45</sup>

Another possibility, though subject to real constitutional issues as to whether there is truly a 'matter' before a court, is to allow variation of the scheme, by consent of the parties, as it progresses through review or appeal.<sup>46</sup>

The second issue is whether the Commissioner ought to have a power to find ultimate facts.

*Rosgoe*, whether accepted or not, now poses real difficulty in practice.

The Commissioner, confronted with a deal of evidential material by taxpayers and their advisers, may feel that the current legislative solutions are inadequate.

Failing to make a ruling might be problematic.

Certainly, reaching an ultimate factual conclusion which is not in accordance with the written narrative accompanying the folders of documents often provided is also problematic. (An attempt to insert that factual conclusion in the stated 'scheme' would meet resistance if it is controversial.)

In short, perhaps the Commissioner should have more power in setting the scheme.

According to the agency's website, the early engagement process actually contemplates 'full and true disclosure'. Perhaps this is the answer — a collaborative approach to settling the stated 'scheme'.

There is evidently current controversy concerning the power of the Commissioner to decline to give a private binding ruling. As counsel in the current reported matter, which is on appeal, I should not discuss that further.

But, in the long run, the result of any judicial decision will need to be examined to see if further changes are necessary.

When we hark back to the origins of, and reasons for, a private binding ruling system, it seems that some sort of system, including one that gives a high degree of assurance to an applicant, remains warranted.

The tax laws are no less complex than they were in 1992, when self-assessment is generally seen as commencing. The transactions are no less complex. The timelines have been accelerated by technology and the pace of business — there was little by way of email in commerce in 1992, for example. Penalties for an incorrect return are still with us. There is heightened reputational risk nowadays with regard to tax matters. It ought to be easier to comply with tax obligations. The private binding ruling system, perhaps subject to modernisation, remains part of the mix.

#### Endnotes

1 Assessments either issue or are deemed to issue, with no-one looking at returns individually on a routine basis. Returns are doubtless selected for closer scrutiny based on metrics and sampling techniques. The



- agency's sources of information are wide. For example, a land transaction will come to the agency's attention automatically, so the agency can check a return is then filed dealing with that land transaction.
- 2 The definition of 'assessment' for the purposes of the income tax laws still uses the term 'ascertainment': *Income Tax Assessment Act 1997* (Cth) s 995-1(1), read with *Income Tax Assessment Act 1936* (Cth) s 6(1) and *Taxation Administration Act 1953* (Cth) sch 1, s 155-5(2)(f)–(h).
- 3 *Taxation Administration Act 1953* (Cth) sch 1, s 284-5.
- 4 Section 284-25.
- 5 Section 284-75(6). The entity will, however, not be liable to penalty if the entity or its agent 'took reasonable care in connection with the making of the statement'. This becomes relevant since taking reasonable care may have involved applying to the Commissioner for the Commissioner's opinion concerning the matter.
- 6 *Carrasco v The Commissioners for Her Majesty's Revenue and Customs* [2017] 1 WTLR 1; [2016] UKFTT 0731, [25]; *Azer v Commissioner of Taxation* (2016) ATC 10-429 [25].
- 7 For example, the capital gains tax concessions for small business, in the *Income Tax Assessment Act 1997* (Cth) div 152, raise complex issues of valuation, characterising relationships and characterising property. The complexity starts with the location of key definitions within each of divs 152, 328 and 995, with an overlay by which div 152 modifies aspects of div 328.
- 8 This was, at least initially, the position in *Rosgoe v Commissioner of Taxation* (2015) ATC 20-539; appeal to the Full Court discontinued by the Commissioner in circumstances to which I am not privy.
- 9 *Bellinz v Commissioner of Taxation* (1998) 84 FCR 154, 158–9, appears (at least initially) to have been in that category.
- 10 See Withdrawn taxation ruling IT 2500, from para 12. The Commissioner notes (para 14) that the kinds of situations where the Commissioner would depart from an Advance Opinion would be confined to situations where there had been legislative change, where an applicable tribunal or court overturned or modified an interpretation of the law on which the Advance Opinion was predicated, or the approach adopted in the Advance Opinion was no longer considered appropriate. Further, the Commissioner indicated that generally there would be no retrospective departure. Nevertheless, an Advance Opinion was not legally binding.
- 11 Consultative Document, 'A Full Self Assessment System of Taxation', forming part of the Tax Simplification Statement made 13 December 1990 by Treasurer Paul Keating. This is referred to here as the '1990 Consultative Document'.
- 12 1990 Consultative Document, foreword.
- 13 *Ibid*, italics added.
- 14 *Ibid*.
- 15 *Ibid*, para 4.6.
- 16 *Ibid*, para 4.17.
- 17 *Ibid*, paras 4.15 and 4.16. The former penalty for failure to follow a private ruling has been repealed, but doubtless this would be taken into account in assessing whether the taxpayer had a reasonably arguable position, or had acted reasonably, in determining whether the penalty should be assessed.
- 18 Information Paper August 1991, 'Improvements to self-assessment — priority tasks', referred to here as '1991 Information Paper'.
- 19 At para 8.17.
- 20 *Ibid*, para 8.5.
- 21 *Ibid*, para 8.10.
- 22 *Australian Federal Tax Reporter*, 'New Developments', para 992-040, and see particularly pp 887, 653. Under the heading 'Consultation' the Minister refers to the two documents of 1990 and 1991 in saying that Government had 'consulted extensively with taxpayer and tax professional representative bodies'.
- 23 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2774 (Peter Baldwin) (emphasis added).
- 24 *Bellinz v Commissioner of Taxation* (1998) 84 FCR 154.
- 25 *Ibid* 169C (Hill, Sundberg and Goldberg JJ).
- 26 *Ibid* 170C-D.
- 27 (1998) 38 ATR 350; 98 ATC 4399.
- 28 (1998) 98 ATC 4399, 4405.
- 29 *Ibid* (emphasis added).
- 30 Section 359-20
- 31 *Rosgoe v Commissioner of Taxation* (2015) ATC 20-539
- 32 *Commissioner of Taxation v McMahon* (1997) 79 FCR 127, 133, 140–141, 151.
- 33 *Cooperative Bulk Handling Ltd v FCT* (2010) 79 ATR 582, [15], [16].
- 34 Sections 357-115 and 357-120.
- 35 Section 359-65.
- 36 *Ibid*.
- 37 *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, 400, 415.
- 38 *Bellinz Pty Ltd v FCT* (1998) ATC 4399, 4405–6.
- 39 [1998] 1 Qd R 36, 39A.
- 40 In fact, that argument may have emerged during the review before the AAT, but it matters not for present purposes.

- 41 The appeal was resolved in circumstances not known to the author. It may be that the agency does not accept everything in the reasons for judgment. The agency has not issued a Decision Impact Statement at time of writing.
- 42 2015 ATC 20-539, [23].
- 43 2017 ATC 20-64.
- 44 *Hacon v Commissioner of Taxation* [2017] FCA 659 [43]–[45], [48]–[49].
- 45 Australian Taxation Office, *Early Engagement* (1 December 2016) <[https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-\(rulings\)/Early-engagement/](https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-(rulings)/Early-engagement/)>.
- 46 The initial important case concerning the private binding ruling system, *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, does deal with constitutional issues and the question of whether there truly was a ‘matter’ before a Chapter III Court.

## THE CONSTITUTION AMENDMENT (RECOGNITION OF ABORIGINAL PEOPLE BILL) 2015 (WA): ITS PASSAGE, SIGNIFICANCE AND IMPLICATIONS

*Ben Wyatt MLA\**

On 19 August 2015, the Member for Kimberley, the Gidja woman Ms Josie Farrer, moved that the Constitution Amendment (Recognition of Aboriginal People) Bill 2015 be read for the third time in the Legislative Assembly. This was done with unanimous support and transmitted to the Legislative Council. The Legislative Council, also unanimously, read the Bill for the third time on 10 September 2015. Thus, without the need for a referendum, following Royal Assent the Western Australian *Constitution Act 1889* was amended to add, at the end of the Preamble, the following words:

And whereas the Parliament resolves to acknowledge the Aboriginal people as the First People of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia.

While there has long been discussion about ‘cleaning up’ redundant sections of our state’s Constitution, this was outside the remit of the Joint Select Committee on Aboriginal Constitutional Recognition. However, we did take the opportunity to remove two redundant provisions that specifically referenced Aboriginal people.

Clause 5 of the Bill deleted s 42 of the Constitution. Section 42 provided that, in calculating the population of the Colony of Western Australia, the ‘aboriginal natives’ of WA were to be excluded. While the parliamentary debates surrounding the introduction of what became s 42 made no mention of why this approach to the population head count was adopted (probably because, at the time, it needed no debate), it was the committee’s view that it was no longer appropriate that this remain on the statute books.

Clause 6 of the Bill deleted part of s 75 of the *Constitution Act 1889*, which was to delete the definition of the Aborigines Protection Board. The board had long been redundant, and the Parliament took the opportunity to also remove the last vestiges of the board from the Constitution.

While the desire to amend our state Constitution specifically to acknowledge Aboriginal people was not new, Western Australia was late to make this amendment, being the last of the mainland states to recognise Aboriginal people in its Constitution. South Australia was the most recent state to recognise Aboriginal people: it passed legislation on 5 March 2013. New South Wales passed legislation on 19 October 2010. Queensland passed legislation on

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23 February 2010. The first state to give recognition to Aboriginal people was Victoria, passing the Constitution (Recognition of Aboriginal People) Bill on 26 August 2004.

At a federal level the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 was passed by the House of Representatives on 13 February 2013 and was assented to on 27 March 2013. This Bill was part of the ongoing debate around Commonwealth constitutional recognition of Aboriginal people and had a two-year sunset clause. The purpose of the sunset clause was explained by the Minister at second reading as:

The sunset date ensures that legislative recognition does not become entrenched at the expense of continued progress towards constitutional change.

The requirement for a referendum makes such change a much more difficult task than for the Australian states.

### **Constitutional history**

While Josie Farrer's Bill eventually sailed through the state Parliament without a dissenting voice, the history of Aboriginal people with our state Constitution is, of course, problematic.

While we have amended our state Constitution to specifically acknowledge Aboriginal people, it is not in the context of a Constitution that was silent about Aboriginal people — indeed, the original *Constitution Act 1889* gave much thought to Aboriginal people. And, over the years, the position of Aboriginal people in the Constitution has been the subject of much debate. Most of it, of course, did not reflect favourably on Aboriginal people and, specifically, did not seek to acknowledge and celebrate the long connection to this country.

However, what is clear is that, in the lead-up to the granting of self-government in Western Australia, those in London did not trust its far-flung colony on the Swan River to provide for its Aboriginal inhabitants.

It was Western Australian Governor Broome who was largely responsible for making the case for self-government — acting as the emissary between an increasingly parochial and independent Swan River population and Whitehall. Writing to the then Secretary of State for the Colonies, Lord Knutsford, in May 1888, Governor Broome wrote:

Unceasing vigilance is required to protect the Aborigines from ill-usage by those evil-disposed persons who are to be found in every community, and it appears to me, looking to the great extent and special circumstances of this Colony, in which the settlers are ever coming into new contact with the Natives at numerous points in a million square miles of territory, that it is absolutely necessary, when party Government shall be introduced, that some permanent body, independent of the political life of the day, shall be specially charged to watch over the Aboriginal population.

As we know, eventually the new state legislature was empowered to 'make laws for the peace, order and good government of the colony' — except with respect to Aborigines. Like all other states except Tasmania, Western Australia had established the Aborigines Protection Board under the Aborigines Protection Act. Its members were appointed by the Governor and were responsible directly to him. Those coming under the Act were defined as 'every aboriginal native of Australia, every aboriginal half-caste or child of a half caste, such half caste or child habitually associating and living with aboriginals'.

Thus, as a condition of granting responsible government to Western Australia, the British Government insisted that the Aboriginal Protection Board remain an autonomous body under the control of the Governor.

Our Constitution's original form had the well-known s 70:

There shall be payable to Her Majesty, in every year, out of the Consolidated Revenue Fund the sum of Five thousand pounds mentioned in Schedule C to this Act to be appropriated to the welfare of the Aboriginal Natives, and expended in providing them with food and clothing when they would otherwise be destitute, in promoting the education of Aboriginal children (including half-castes), and in assisting generally to promote the preservation and well-being of the Aborigines. The said annual sum shall be issued to the Aborigines Protection Board.

It goes on to state, 'under the sole control of the Governor', and then later, importantly:

Provided always, that if and when the gross revenue of the Colony shall exceed Five hundred thousand pounds in any financial year, an amount equal to one per centum of such gross revenue shall, for the purposes of this section, be substituted for the said sum of Five thousand pounds in and for the financial year next ensuing.

The Board and s 70 were very quickly the subject of critique by the governing establishment in the new self-governing colony, led principally, and interestingly, by the Premier, Sir John Forrest.

I say 'interestingly', as it was Forrest, as Surveyor General, who headed the commission for Governor Broome that recommended, in September 1884, the establishment of a board 'for the management of all matters connected with the Aborigines, and to which all monies to be expended on them should be entrusted'. Forrest, as Premier, would seek the abolition of this board just six years later.

Westminster's hesitation in handing over authority over the colony's Aboriginal inhabitants continued after self-government was granted. Chamberlain, the then Colonial Secretary, wrote to Governor Broome advising:

When in 1887 the Legislative Council of the colony passed a resolution that the time had arrived when the executive should be made responsible to the Legislature of the colony, and that Western Australia should remain one and undivided, Lord Knutsford, while accepting these resolutions in principle, stipulated for special protection for the natives, and, in his Despatch of January 3, 1888, he expressed his concurrence in the opinion of the Governor, Broome, that some measure would be necessary for placing the aboriginal inhabitants under the care of a body independent of the Parliament of the day...

It went on:

This correspondence was before the Imperial Parliament when considering the Bill, and the provision respecting the Aborigines Protection Board was clearly understood to be one of the conditions of the grant of self government.

It did not take long for Forrest to succeed: the Western Australian Parliament passed a repeal Bill in 1894 and sent it to Britain for agreement. In a despatch to the British Parliament, Forrest wrote:

The Parliament of Western Australia is more likely to look after the interest of the aborigines than the Imperial Government. I am not aware that the Imperial Government has ever done much for the aborigines of Western Australia, nor do I know of any special efforts being made for their welfare by the people of the United Kingdom. That being so, why all this outward show of sympathy for the aborigines and, at the same time, want of confidence in the colonists of Western Australia, who have alone done whatever has been done for their welfare?

The colonial legislation purporting to abolish s 70 then sat at Downing Street for a period of time. Chamberlain, lobbied by Forrest, was aware of the desire of a Western Australian Parliament, but he still had his concerns about the welfare of the Aboriginal inhabitants of the colony. He did not want to give up s 70 quite so easily, so he wrote to Sir AC Onslow, the

Acting Governor in 1895, about a year after the state Parliament passed the repeal Bill and said:

I am anxious to meet the views of Colonial Government as far as possible. I am prepared to approve Reserved Bill, omitting from Section 70 as much as places expenditure under the care of independent unofficial Board, so that while permanent appropriation of 5,000L secures requirements of natives, your responsible advisers would advise Governor as to management of fund, same way as other expenditure.

That is, Chamberlain's compromise was that the board would not be abolished but made responsible to a government department instead of to the Governor.

Ultimately Forrest was, of course, successful in having s 70 repealed. However, the series of attempts to do so had what the late Peter Johnston described as 'an element of farce'.

The first attempt lapsed due to failure to receive Royal Assent within the required two years.

I am again indebted to the late Peter Johnston for bringing to my awareness a most interesting footnote to the repeal of s 70. In 1905, Mr F Lyon Weiss, a man of particular interest in the welfare of Aborigines, challenged the validity of the 1898 repeal of s 70. The end result was the Secretary of State for the Colonies recommending that another Bill be passed by the Western Australian Parliament as soon as possible, validating everything done since 1897 (and, of course, avoiding the necessity of paying out the £5000). Parliament took this advice and quickly passed the now infamous *Aborigines Act 1905* (WA), which validated everything between 1897 and 1905.

It is important when reflecting on debates around constitutional recognition of Aboriginal people, be it at a state or federal level, that Aboriginal people have not been absent from those documents. Indeed, much time was spent working out the place of Aboriginal people in the developing legal structures of the Swan River colony. Perhaps most surprising is the level of concern that Whitehall and Westminster had about the intentions of the colonialists towards the welfare of Aboriginal people.

### **Western Australian amendment**

Recognising Aboriginal people in the state Constitution took a bit of time in Western Australia.

The Bill, introduced by Ms Farrer on 11 June 2014 as a Private Member's Bill, came on for substantive debate at second reading on 12 November 2014.

In the first instance the Government did not support Ms Farrer's Bill. There were three main arguments advanced for this refusal to accept the Member for Kimberley's Bill:

1. It was proper to wait for the Commonwealth constitutional amendment to proceed beforehand.
2. It might jeopardise the Noongar claim.
3. It will have impacts on freehold title renewal.

Ultimately, Kim Hames gave the real indication about why the Government was reluctant, initially, to support Ms Farrer's Bill when he advised the Parliament that 'bipartisan manner is normally initiated by the government of the day'.

Two weeks later, on 26 November 2014, the Member for Kimberley moved to suspend Standing Orders to move the following motion:

That the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 be immediately referred to a select committee of six members for consideration and report by 26 March 2015 ...

After some discussion, both Houses of the Parliament passed a motion that established a joint select committee of seven members — three from the Council (Mr Michael Mischin, the Chair and Attorney-General), Ms Sally Talbot and Ms Jacqui Boydell; and four from the Assembly — Ms Josie Farrer, Mr Murray Cowper, Ms Wendy Duncan and me.

The time frame for the committee was tight: the committee was instructed by the Parliament to report to both Houses on 26 March 2015. Accordingly, the terms of reference were deliberately narrow and crafted to not include the merits of whether recognition ought to be made (by now this was universally accepted in the Parliament) but how it ought to be done.

Interestingly, the third clause of the motion establishing the Joint Select Committee stated that 'the standing orders of the Legislative Assembly relating to standing and select committees will be followed as far as they can be applied'.

Standing Order 251 of the Legislative Assembly states:

No Minister of the Crown will be eligible to be appointed as a member of a committee.

Nothing was made of this dichotomy in the Legislative Assembly with the Attorney-General on the committee — we were taken by the Premier's offer to have the Attorney-General on the committee, thereby giving the committee access to the advice of the Solicitor General. In any event, each chamber controls its own destiny and we had suspended Standing Orders so appointed as we saw fit.

The Hon Nick Goiran, disgruntled at having a fewer members on the committee from the Legislative Council, did point out this contradiction — however, the committee was duly formed and away we went.

### **Towards a true and lasting reconciliation — Report into the appropriate wording to recognise Aboriginal people in the Constitution of Western Australia**

The report of the committee contained 16 findings and two recommendations.

The findings primarily deal with issues concerning manner and form requirements in the *Constitution Act 1889*, any potential unintended consequences of the proposed amendment (including potential to limit the legislative powers of the state), and whether a non-effects clause was necessary to protect the Parliament from any unintended consequences. The committee also made a finding regarding two other sections of the Constitution, being ss 42 and 75.

Having spent most of my political life in opposition, it was also of some satisfaction to be able to access the advice of the Solicitor General, Mr Grant Donaldson SC, and the State Solicitor's Office Legal Officer, and old Constitutional law lecturer, Dr Jim Thomson SC. Noting that both represented the Government, the committee also engaged its own legal advice and had the benefit of barrister, Mr Adam Sharpe, as a research support, and commissioned two pieces of advice from Mr Peter Quinlan SC — our new Solicitor General.

For the benefit of public debate, the committee elected to make public the advice that we received from Mr Quinlan SC as an appendix to the committee report.

### **Special legislative procedure**

The first issue considered by the committee was: did constitutional recognition of Aboriginal people require a special legislative procedure to be followed?

It is well established that the Constitutions of the various Australian states can be amended by legislation that is enacted following the ordinary procedure — unless there is a special procedure specified by the Constitution of that state.

The only provision in the *Constitution Act 1889* that provides for special procedures is s 73.

Section 73(1) provides that any Bill which makes ‘any change in the Constitution of the Legislative Council or the Legislative Assembly’ must be passed by an absolute majority in each House of Parliament.

Section 73(2) specifies five categories of Bill which must be passed by absolute majority and then obtain the support of a majority of electors at a referendum to be lawfully enacted.

I do not propose to go through s 73 in detail but suffice it to say that the committee found that the proposed recognition of Aboriginal people in the form set out in the Member for Kimberley’s Bill would not trigger the provisions of s 73 and thus could be enacted by ordinary legislative procedure.

### **Requirement to entrench?**

The committee also examined whether the Parliament should seek to require that any future amendment of the constitutional recognition of Aboriginal people only be effected by special legislative procedure. Victoria ‘entrenched’ their amendment by requiring any future amendment to require a three-fifths majority in each House of Parliament.

The committee did not consider it necessary to include any entrenching provisions, as it was the view of the committee that future parliaments should be well placed to make their own decisions about the contents of the Constitution. Further, entrenching provisions tend to transfer power away from Parliaments to the courts — always a sure way to scare off a proposed amendment.

### **Inhibit the Parliament’s power to legislate?**

Could such amendment limit the power of the Parliament ‘to make laws for the peace, order and good Government of Western Australia’? As is often the case, parliaments worry themselves with any potential implied limitation that a court may find on state legislative power. The Government’s lawyer, Mr Donaldson SC, advised that there is a remote risk of a court in future interpreting aspirational words of recognition as limiting the power of Parliament so that Parliament could not enact legislation that was inconsistent with those aspirations. However, such a notion was also acknowledged as being contrary to the law as presently understood.

The general presumption that Parliament intends to pass legislation that is valid was taken by the committee, from advice, that any Bill intended to alter the legislative power of the Parliament would need to be enacted in accordance with the special procedure set out in



s 73(2). It follows that, if a Bill proposing the constitutional recognition of Aboriginal peoples were enacted in accordance with ordinary procedures, this would lead a court to presume that the Bill was not intended to affect legislative power because it was not enacted in accordance with s 73(2).

Thus the committee found that any likelihood of the proposed amendment in the Member for Kimberley's Bill limiting the legislative power of the state could be discounted.

### **Location of recognition?**

The Member for Kimberley's Bill had the words of recognition in the preamble. The committee noted that, of the other Australian states to have included statements of recognition, Queensland is the only jurisdiction to have chosen the preamble as the preferred location. Victoria, New South Wales and South Australia all included their statements in the operative provisions.

The committee concluded that the risk of unintended consequences is very low no matter where the statement of recognition is included in the *Constitution Act 1889*. However, we did come to the conclusion that the risk of unintended consequences is reduced further if words of recognition are included in the preamble because, while the interpretation of a preamble as having a substantive legal operation is not unprecedented, it is unusual.

### **Requirement of a non-effects clause?**

The committee spent quite some time on this question.

All Australian states that have statements of recognition also have non-effects clauses. In Victoria, the non-effects clause provides that Parliament, in its statement of recognition, does not intend to create in any person any legal right or give rise to any cause of action, or to affect the interpretation of the Constitution or any other law of the state. The Queensland provision has similar scope. The New South Wales provision goes further by adding that the statement of recognition does not give any right to review of administrative action. The South Australian provision simply provides that the statement of recognition is not intended to have any legal force or effect.

The committee looked hard at this issue as the inclusion of a non-effects clause clearly diminish the words of recognition.

The committee examined both whether a non-effects clause is required to achieve the intended result that the words of recognition will not have substantive legal effect and whether a non-effects clause would have any efficacy in practice.

Because of some of the findings of the committee that I have already outlined and the impact of extrinsic materials, such as the Explanatory Memorandum, as per s 19(2) of the Interpretation Act it was the committee's view that it is amply clear that the proposed statement was not intended to have any substantive legal effects. Further, a non-effects clause would thus be superfluous where a court is following the orthodox approach to statutory interpretation. The committee took the view that the only case in which a non-effects clause might become relevant is if a judge was determined to ignore the clear intention of Parliament as confirmed by the extrinsic materials and find some substantive legal effect in the words of the preamble. A judge so determined would not see the presence of a non-effects clause as too much of a hurdle it was broadly thought.

Thus the committee found that a non-effects clause *should not* be incorporated into any statement of recognition, as such a clause would either be superfluous, or ineffective, and undermine the spirit in which the statement of recognition is made.

### The passage

The Member for Kimberley's Private Member's Bill, with the unanimous support of both Houses of Parliament, amended the *Constitution Act 1889*.

There are, in effect, two parts to the amendment:

- first, the acknowledgment — that Parliament resolves to acknowledge the Aboriginal people as the first People of Western Australia; and
- secondly, the aspiration — that Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia.

And, of course, two pieces of the now redundant section of the Constitution that sought to embed the discriminatory relationship that the state had with its Aboriginal inhabitants were removed.

The resolution to acknowledge is, to be frank, almost mundane in its impact. For years the vast majority of Western Australians have acknowledged the position of Aboriginal people as the first people of Western Australia — whether it be through the regular 'Welcome to Country' words we speak at the beginning of most public and corporate events or through those that travel through our vast state and country, with the Burrup Rock art and rock art of the Kimberley perhaps the most powerful statement that Aboriginal people have had this country for a long, long time. The 'normalisation' of the bitter and divisive native title debate that followed the High Court's *Mabo* decision has also led Australians to acknowledge that Aboriginal people have a title to country that predates any of our more recent forms of tenure.

It is the aspirational side of the amendment that will challenge us all in the years ahead. Reconciliation is, by its very nature, a personal journey. Yes, it is a symbol. I have outlined the effort that the committee went to to ensure that the recognition in our Constitution would have no unintended consequences and would not impinge on the legislative power of the State. So is there a point? Of course.

Back in 2009, Dr John Falzon, the CEO of the St Vincent de Paul Society National Council, wrote a very thoughtful piece for the Catholic magazine *The Record*. In his article he reflected on the importance of symbolism:

Human beings are profoundly personal in the way we relate to the world, at the same time as being profoundly symbolic and profoundly political. I know that there are many who baulk when I put things this way but this is a truth that must be spoken. The human being is indeed, as Aristotle phrased it, *zoon politikon*, a political animal. We do not exist in a limbo; we are both the product of, and producers of, the social world. We are born into social relationships until we die.

The historical relationship between Aboriginal Australia and non-Aboriginal Australia is perhaps our greatest social weakness. Symbols are important. That is why so much effort is going into the debate around reconciliation and constitutional recognition, and why so many waited and depended on the Apology to the Stolen Generation. As Ms Farrer said in her second reading speech to this amendment Bill, recognition gives us 'the opportunity for us to stride into the future, not to shuffle forward with eyes closed from the truths of the past'.

Symbols deal with the personal — the relationships between people. The past terrible actions of government must be recognised and accounted for. Without them, the more 'practical' outcomes of reconciliation that we desire will not eventuate.

### **Noongar recognition Bill**

In parallel with the Member for Kimberley's recognition Bill has been the state government's settlement negotiations with the Noongar people of the south-west of Western Australia. The first, and key, part of the Government honouring its side of the settlement has been the introduction, and subsequent passage, of the *Noongar (Koora, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*.

Schedule 1 to this Act has the 'Noongar Recognition Statement':

We, the Noongar people, are the largest single Aboriginal cultural bloc on the Australian continent. We belong to one of the oldest surviving living cultures on this earth. As a people, we have a common ancestral language, and a similar history and spirituality. We know that our traditional country is south and west of a line that stretches from Geraldton in the north to Cape Arid in the south-east, and that the spirit of this place can never be conquered.

Noongar culture, spirit and economy have always depended on the resources of Noongar boodja. Families still return to the biddi (paths) of our ancestors. Our people continue to refer to natural landmarks, especially hills and waterways when describing which families belong to different areas of Noongar boodja. Although barriers may exist, it is still in our hearts, in our blood, it is still our country.

Our living culture, which is long and continuing in this part of the world, begins with Noongar people. This is the opportunity for all Western Australians to experience the ancient tradition of respect, relationships and reciprocity with Noongar people. We have survived.

We have survived. The Noongar people, at the very first instance, wanted the Parliament to recognise the survival of the Aboriginal community that bore the brunt of colonialism. But the Noongar people also want all Western Australians to 'experience the ancient tradition of respect, relationships and reciprocity' with the Noongar.

Symbols examine our social psychology. For too long non-Aboriginal Australians had an entitled ignorance to the cause of the Aboriginal world. The *Aborigines Act 1905*, Stolen Generation, Noonkanbah, citizenship and deaths in custody all reflected a long-embedded ignorance — that Aboriginal people need not be considered in the quest for the greater good.

It is symbols that challenge us to address this ignorance.

### **Conclusion**

Earlier this year I was privileged to give the Rob Riley Memorial Lecture, 20 years after Rob's death. In that speech I examined my fear that what has replaced Australia's entitled ignorance is a 'great impatience' — a great impatience with Aboriginal people, culture and aspirations; and a great impatience with Aboriginal people's demand for inclusion, genuine inclusion, in laws that affect them. To me, this has been the underlying frustration from government about our state's remote communities: not that they exist but that they have failed to thrive. The fact that, when we pass laws in the state Parliament, we specifically exempt our housing and public health laws from these lands and that most remote communities exist on a land tenure of no security whatsoever is lost in government demands for immediate satisfaction.

Symbols require us to examine, personally, our social relationships. This is what the Member for Kimberley challenged us to do with her Private Member's Bill to recognise Aboriginal people in our state Constitution.

It is significant and it is something of which the Parliament should be proud.