AIAL FORUM

ISSUE 92 JULY 2018

Australian Institute of
Administrative Law

July 2018 Number 92

AIAL FORUM

Australian Institute of Administrative Law Incorporated.

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The AIAL Forum is published by

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This issue of the AIAL Forum should be cited as (2018) 92 AIAL Forum.

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It is recommended that the style guide published by the Australian Guide to Legal Citation be used in preparing manuscripts.

Manuscripts should be sent to the Editor, AIAL Forum, at the above address.

Articles marked # have been refereed by an independent academic assessor. The refereeing process complies with the requirements of the Department of Education and the AIAL Forum is included in the ERA 2015 Submission Journal list. Refereeing articles is a service AIAL offers contributors to its publications including the AIAL Forum and the proceedings of the annual National Administrative Law Conference.

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ISSN 1322-9869

Printed on Certified Paper

TABLE OF CONTENTS

CORRECTION

In AIAL Forum issue 91 the article by Leighton McDonald, entitled ‘Graham and the Constitutionalisation of Australian Administrative Law’, was inadvertently published without a set of corrections by the author. The corrected version of the article can be found online at <www.aial.org.au/resources/latest-editions>.

RECENT DEVELOPMENTS

Katherine Cook

Review of national intelligence legislation

The Turnbull government will undertake the most significant review of intelligence legislation in more than 40 years.

Former Director General of Security, the head of the Australian Security Intelligence Organisation, Dennis Richardson AO, will head the review, which will examine the legal framework underpinning Australia's intelligence community and capability.

This will be the most comprehensive review of intelligence legislation in Australia since the Royal Commission on Intelligence and Security in the 1970s.

The review was a key recommendation of the 2017 Independent Intelligence Review conducted by Michael L'Estrange AO and Stephen Merchant PSM.

The legislative framework governing our intelligence agencies has evolved considerably since the *Australian Security Intelligence Organisation Act 1979* (Cth) and the *Intelligence Services Act 2001* (Cth) were first introduced.

The coalition government has so far passed 10 tranches of legislative reforms to properly equip our security agencies with the legal framework they need to respond to current and emerging security challenges. The 11th tranche of legislation to modernise espionage offences and establish new foreign interference offences is currently before the Parliament.

The national security environment is constantly changing, and it is essential that we ensure our agencies have the tools and framework they need to be effective and meet their core function — keeping Australians safe.

The review will consider options for harmonising and modernising the legislative framework that governs the activities of our intelligence agencies to ensure they operate with clear, coherent and consistent powers, protections and oversight.

Mr Richardson is ideally placed to undertake this important review, having an extensive career in the Australian Public Service, particularly in the national security, defence and foreign affairs environment. He was Secretary of the Department of Defence from 2012 to 2017; Director-General of ASIO from 1996 to 2005; and Secretary of the Department of Foreign Affairs and Trade from 2010 to 2012, prior to which he was Australia's Ambassador to the United States.

In addition to intelligence agencies, the review will consider the legislative frameworks for the intelligence functions of the Department of Home Affairs, Australian Federal Police, Australian Transactional Report Analysis Centre and Australian Criminal Intelligence Commission. This is consistent with the 2017 Independent Intelligence Review's recommendation to consolidate and expand linkages between members of the national intelligence community.

Terms of Reference for the review will be announced in the near future. It is expected the review will be completed within 18 months.

<https://www.attorneygeneral.gov.au/Media/Pages/Review-of-national-intelligence-legislation.aspx>

Privacy protection is everyone's business

Privacy Awareness Week (PAW) takes on a greater significance each year as technology evolves and people place more personal information online. The New South Wales Attorney-General Mark Speakman had this to say about the event:

'As we conduct an increasing amount of business and socialising online, we must be vigilant about reviewing social media privacy settings, choosing complex passwords and taking care when using public computers to access personal information.'

'PAW reminds us of the importance of safeguarding our privacy, particularly as new technology enables faster and easier collection, analysis and sharing of information', Mr Speakman said.

On 9 May 2018, Mr Speakman opened an Information and Privacy Commission event in Sydney that brought together leaders in privacy protection and the law.

Speakers included NSW Privacy Commissioner Samantha Gavel, New South Wales Government Chief Information Security Officer, Dr Maria Milosavljevic; Chair of the Law Society of NSW's Privacy and Communications Committee, Peter Leonard; and Microsoft Australia's Director of Corporate, External and Legal Affairs, Tom Daemen.

Mr Speakman said the New South Wales Government is aware of the need for legislation to evolve with technology in our rapidly changing world.

'The New South Wales Government's intimate image-based abuse reforms were introduced in 2017 to enable courts to penalise the non-consensual sharing of intimate images with sentences including terms of imprisonment.'

'In addition, the NSW Law Reform Commission is conducting a review of laws that affect access to a person's social media accounts and digital assets after they die or become incapacitated.'

PAW runs from 7 to 13 May. This year's theme is 'Privacy in the Digital Age'. For more information about privacy protection, visit www.ipc.nsw.gov.au.

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/privacy-protection-everyones-business.aspx>

New VCAT president appointed

The Andrews Labor government has announced the appointment of Supreme Court Justice Michelle Quigley as the new President of the Victorian Civil and Administrative Tribunal (VCAT).

Justice Quigley was appointed to the Supreme Court in December last year and is the first woman to be appointed as the President of VCAT.

Prior to her Supreme Court appointment, Justice Quigley spent almost 30 years as a barrister specialising in administrative law, including planning and environmental law, and land valuation and acquisition.

As a barrister, she was involved in several high-profile inquiries into environmental matters and planning amendments, regularly appearing before the Supreme Court, Court of Appeal, VCAT and Planning Panels Victoria.

She has received several awards, including the National Australia Day Committee 'Citizen of the Year' award in 2001 for her contribution to the City of Yarra by providing legal assistance with planning and heritage matters and planning policy formulation.

She was also awarded the PILCH/Law Foundation Pro Bono Award in 2000 for her work assisting the Abbotsford Convent Coalition to oppose the redevelopment of the Heritage Victoria listed St Heliers Convent.

Justice Quigley was admitted to legal practice in 1987, joined the Victorian Bar in 1988, and was appointed Senior Counsel in 2002.

She replaces Justice Greg Garde AO RFD as President of VCAT. Justice Garde has served as President for six years and will now return to the Supreme Court.

Established in 1998, VCAT is Australia's busiest tribunal, dealing with more than 85 000 cases annually at more than 46 venues across the state, including administrative, civil, residential tenancy and human rights disputes.

Justice Quigley will begin work as VCAT President from 1 June 2018.

<https://www.premier.vic.gov.au/new-vcat-president-appointed/>

Mr Kenneth Charles Fleming QC to be nominated as the NT Independent Commissioner Against Corruption

On 9 May 2018, the Northern Territory Labor government announced that Mr Kenneth Charles Fleming QC is to be nominated for appointment as Independent Commissioner Against Corruption (ICAC).

'In accordance with the Judicial Appointments Protocol, an Advisory Panel was convened to make an independent recommendation for this important appointment', Ms Fyles said.

Ms Fyles said that the Advisory Panel appointed in accordance with the Judicial Appointments Protocol comprised the Hon Trevor Riley QC as former Chief Justice of the Supreme Court of the Northern Territory, Solicitor-General Sonia Brownhill SC, and Acting Chief Executive Officer of the Department of Attorney-General and Justice, Meredith Day.

'Mr Kenneth Fleming QC was the Advisory Panel's sole recommendation for appointment as the Independent Commissioner Against Corruption', Ms Fyles said.

'We promised Territorians we would have our anti-corruption commission up and running by mid-this year and with the proposed appointment of Mr Kenneth Fleming QC to the position of ICAC Commissioner that promise is being realised.'

'I thank the Advisory Panel for their consideration of this important appointment', Ms Fyles said.

Minister Fyles said Mr Kenneth Fleming QC has a wealth of national and international experience in the practice and interpretation of criminal law.

'Mr Kenneth Fleming QC comes to the Territory following a long and successful legal career', she said.

Mr Fleming QC was appointed Queens's Counsel in 1998 and, from 1999 to 2003, he held various roles with the International Criminal Tribunal for Rwanda.

Since 2003, Mr Fleming QC has continued to practise in Australia and is on Doyle's List of Leading Criminal Law Barristers — Queensland 2017.

He has also been an Ethics Counsellor with the Bar Association of Queensland.

Minister Fyles said the Territory's Independent Commission Against Corruption will be a powerful and independent investigative body that Territorians can trust to increase government accountability.

'ICAC will have the independence and power to investigate anyone involved in the NT government and anyone spending taxpayer money', she said.

'We want to be absolutely clear that the Territory Labor government will be held to account by ICAC, just the same as anyone else that deals with or receives taxpayer dollars.

A motion of the Legislative Assembly is required before appointing the Independent Commissioner Against Corruption. The Government will formally move a motion to appoint Mr Kenneth Fleming QC on Thursday.

<http://newsroom.nt.gov.au/mediaRelease/25589>

The Commonwealth Ombudsman releases investigation report on delays in the clearance of international sea cargo

Commonwealth Ombudsman Michael Manthorpe has released an own-motion report into the Department of Home Affairs (Home Affairs) and the Department of Agriculture and Water Resources (DAWR) processing of international containerised sea cargo.

Numerous complaints have been received by the Ombudsman's Office regarding delays in the processing of containerised sea cargo by the Australian Border Force (ABF) resulting in additional costs for importers.

This investigation identified that, while the ABF has well-established administrative processes to manage containerised sea cargo compliance, more could be done to manage backlogs at cargo and container examination facilities. This in turn could reduce delays and the costs imposed upon industry.

The report recommended that the ABF should consider introducing a timeliness target for performing its scrutiny of containers to ensure that it does not lose sight of its facilitation role in the performance of its border protection mandate. The report also noted that inspection targets should be set according to available resources.

The report made a total of 10 recommendations. Home Affairs has accepted nine of the report's recommendations that related to it. Six of these recommendations were supported in full and three in part. DAWR has partially supported the two recommendations in the report that are relevant to it.

New guidance for the Victorian public sector on how to deal with challenging behaviour

Victorian government departments, local councils and other agencies dealing with challenging behaviour from members of the public will benefit from a new guide tabled in the Victorian Parliament.

Tabling her *Good Practice Guide to Dealing with Challenging Behaviour*, Victorian Ombudsman Deborah Glass said the guide aimed to help create better understanding between government bodies and the public.

'We are constantly asked for advice from government departments, agencies and local councils on what to do with overly persistent or abusive people', Ms Glass said. 'We also hear from people who complain that an agency won't deal with them, when they think they have a justified complaint.

'We recognise this difficult balancing act. The public sector exists to serve the public including those who may be demanding. But public sector resources are limited, and agencies need to protect the health and safety of their workforce.'

Ms Glass said the guide recommends a graduated four-stage response, starting with preventing challenging behaviour where possible by dealing with complaints in a fair, prompt and respectful way, through to the last resort of limiting a member of the public's access to the organisation.

It sets out the steps public bodies should take to ensure their responses to challenging behaviour are compliant with the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the *Equal Opportunity Act 1995* (Vic), and the *Occupational Health and Safety Act 2004* (Vic).

The guide includes tips for dealing with common situations and examples of what does or does not work, based on actual cases.

'I hope the guide helps to defuse, deescalate and demystify the behaviours that public servants encounter daily, and that greater understanding leads to fewer complaints', Ms Glass said.

For more information, read the *Good Practice Guide to Dealing with Challenging Behaviour Report and Guide*.

<https://www.ombudsman.vic.gov.au/News/Media-Alerts/How-to-deal-with-challenging-behaviour>

Recent decisions

The Immigration Assessment Authority's ability to review a decision affected by a jurisdictional error

Plaintiff M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16 (Gageler, Keane, Nettle, Gordon and Edelman JJ) (18 April 2018)

The plaintiff, a citizen of Iran, entered Australia on 11 October 2012 as an unauthorised maritime arrival and subsequently was permitted to apply for a temporary protection visa (TPV).

On 1 September 2015, he applied for a TPV and he became a 'fast-track applicant' within the meaning of the *Migration Act 1958* (Cth). The plaintiff claimed, among other things, that he would face a real chance of harm if he returned to Iran because he is a Christian. In support of his claim to be a committed Christian, he told the Minister's delegate that he had regularly attended a church in Melbourne since his release from immigration detention and provided material including a letter from the reverend of his church. With the plaintiff's permission, the delegate called the reverend, who told the delegate that the plaintiff had attended the church but had stopped regularly attending two years earlier and had only attended on a few occasions since then. The delegate made a file note of the telephone call but did not give the plaintiff particulars about what the reverend said.

During an interview with the plaintiff, the delegate also erroneously told him that he could provide further information for her consideration up until seven days after the protection interview.

Five months later, the delegate refused to grant a protection visa to the plaintiff because she did not accept that he had genuinely converted to Christianity. She also found that he had only attended the church for the sole purpose of strengthening his claim to be a refugee. She set out the information provided by the reverend in her reasons for decision.

On or about 15 April 2016, the Minister referred the delegate's decision to the Immigration Assessment Authority (the Authority) under pt 7AA of the Migration Act.

Part 7AA of the Migration Act relevantly provides that when a 'fast-track reviewable decision' is made, it must be referred to the Authority for review together with specified 'review material'. The Authority may either affirm the decision or remit the decision to the Minister for reconsideration, but the Authority is not authorised to set the decision aside or to substitute its own decision. Subject to exceptions, the Authority is required to review decisions on the papers. One exception is that the Authority may invite a person, including an applicant, to provide 'new information' in writing or at an interview. However, under pt 7AA of the Migration Act, the Authority is not permitted to consider any new information unless it is satisfied that there are exceptional circumstances and that the information either was not and could not have been before the Minister or is credible personal information which was not previously known.

The delegate's file note was included in the review material provided to the Authority. The plaintiff, through his migration agent, requested the Authority interview him, the reverend and other congregants from his church. He also provided a second letter from the reverend. The Authority declined to conduct the interviews and affirmed the delegate's decision. The Authority did not accept that the plaintiff had genuinely converted to Christianity or that he would be at risk of harm for that reason if he returned to Iran. However, in doing so, the Authority took into account information in the reverend's second letter but only to the extent

that the letter stated that the plaintiff had occasionally attended church in 2016. The Authority was satisfied that this new information was not before the delegate and there were exceptional circumstances (namely an error on the part of the delegate in failing to tell the plaintiff that he could provide new information any time up until she made her decision), which justified its consideration.

Before the High Court, the plaintiff contended, among other things, that the delegate had failed to comply with s 57(2) of the Migration Act — namely, failing to provide the applicant with the information she obtained from the reverend during the telephone call — and that this failure deprived the Authority of jurisdiction to review the delegate's decision.

The plaintiff argued that the limitations imposed by pt 7AA of the Migration Act on the Authority's ability to obtain and consider new evidence mean that the Authority's procedures are insufficient to ensure that review by the Authority will 'cure' non-compliance with s 57 of that Act.

The High Court unanimously held that a failure by a delegate to comply with s 57(2) of the Act[1] in the course of making a decision to refuse to grant a protection visa to a 'fast-track applicant' did not deprive the Authority of jurisdiction to review the delegate's decision.

The High Court held that the jurisdiction of the Authority under pt 7AA of the Migration Act is to review decisions that are made in fact, there is no requirement that those decisions also be legally effective. The Authority's procedures in pt 7AA are not constrained as to preclude the Authority from conducting a review in a manner which would negate a want of procedural fairness by the delegate. The Authority's task is to consider the merits of a decision under review by determining for itself whether it is satisfied that the criteria for the grant of the visa are met. However, if a decision under review is affected by jurisdictional error because of a failure to provide relevant information to an applicant in compliance with s 57(2), a failure by the Authority to exercise its powers to get and consider new information about the relevant information may be legally unreasonable.

The High Court further held that, in this case, the delegate had not failed to comply with s 57(2) by not providing the information provided by the reverend in the telephone call. This information was not 'relevant information' within the meaning of s 57(1). It was not information of such significance that it would be the reason, or part of the reason, for refusing to grant a protection visa. Rather, the reverend's information supported the plaintiff's claim, so far as it went.

The High Court also found the Authority had not acted unreasonably by declining to exercise its powers to interview the reverend and other congregants: that exercise of discretion was open to it and was justified by the reasons it gave.

Procedural fairness and the refusal of an interpreter

BLD15 v Minister for Immigration and Border Protection [2018] FCA 3467 (Katzmann J) (1 June 2018)

In June 2011, the appellant, a Rwandan national, arrived in Australia to study. In February 2013 he applied to the Minister for a protection visa, claiming to have a well-founded fear of persecution because of his support for, and active involvement in, the Rwanda National Congress (RNC) — an exiled party in opposition to the then (and current) ruling party, the Rwandan Patriotic Front (RPF), for which he formerly worked but with which he claimed to have fallen out. His application was initially considered by a delegate of the Minister who, following an interview in English, refused to grant him a visa because he was not satisfied

that the appellant met the necessary criteria. The appellant applied for review of that decision to the then Refugee Review Tribunal (the functions of which are now performed by the Administrative Appeals Tribunal).

At the hearing, the Tribunal repeatedly offered the appellant the opportunity to give evidence through an interpreter. He declined, instead confirming he was competent in English. The appellant's migration agent told the Tribunal that the appellant's third language was English and therefore his range of responses may be limited.

Following the hearing, Tribunal affirmed the delegate's decision.

The appellant then appealed to the Federal Circuit Court for constitutional writs to quash the Tribunal's decision and require it to reconsider his application. The Federal Circuit Court was not persuaded that the Tribunal's decision was affected by jurisdictional error and dismissed his application with costs.

The appellant then sought review of the Federal Circuit Court's decision in the Federal Court.

Before the Federal Court, the appellant contended, among other things, that the primary judge erred in failing to find that the Tribunal denied him procedural fairness 'by failing to afford him the benefit of proper interpreting service in the Tribunal hearing'. The appellant's counsel submitted that, while the appellant did agree to proceed with an interpreter, he was in an 'unequal bargaining position', under pressure from the Tribunal, in a formal and frightening situation, and was trying to negotiate in his third language.

The Federal Court held that s 425 of the *Migration Act 1958* (Cth) imposes an obligation on the Tribunal 'to invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review'. The invitation must be 'a real and meaningful one' (*Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553) and it may readily be accepted that it would contravene s 425 to deny an interpreter to an applicant who cannot speak English or is not proficient in English.

The Federal Court found that, although the appellant's third language was English, the Tribunal had before it evidence (an interview conducted in English by the delegate) of the appellant's capacity to communicate in English. It also gave the appellant an opportunity to postpone the hearing and have an interpreter if he wished. However, the appellant chose to proceed without an interpreter and to give evidence and present arguments.

The Federal Court found that, in these circumstances, the Tribunal was not required to insist on the use of Kinyarwanda interpreter or even a French interpreter (the appellant's second language), because English was not the appellant's first language. The Tribunal was not required to override the appellant's preference, particularly when the interview with the Minister's delegate was conducted in English.

The Federal Court held that the Tribunal provided the appellant with a genuine hearing and a proper opportunity to give evidence and present arguments. As such there was no failure to comply with s 425.

A hearing with regard to a further ground of appeal (that the Tribunal denied the appellant procedural fairness by not disclosing to him that it had in its possession two certificates issued under s 438(1) of the Migration Act) was adjourned until the disposition by the High Court of the appeals from the judgements in *SZMTA v Minister for Immigration and Border*

Protection [2017] FCA 1055; *Minister for Immigration and Border Protection v CQZ15* [2017] FCAFC 194; and *BEG15 v Minister for Immigration and Border Protection* [2017] FCAFC 198.

Procedural fairness and identity of anonymous complainants

Summersford v Commissioner of Police [2018] NSWCA 115 (McColl JA, Basten JA, and Payne JA) (29 May 2018)

In March 2015, the applicant, a member of the NSW Police Force, was the subject of an anonymous complaint. The complaint alleged that the applicant had engaged in acts of harassment of fellow police officers and in other inappropriate, sexually-charged conduct. The complaint also identified 25 further potential witnesses. These 25 officers were required, under a directive memorandum issued by the investigating officer, Inspector Cadden, to identify if they had witnessed any acts involving the applicant of the kind identified in the anonymous complaint in the past two years.

On 31 March 2015, the applicant was notified that he was the subject of a complaint. On 20 July 2015, prior to being issued with the conclusions of the investigation, the applicant was interviewed by Inspector Cadden. During this interview the allegations in the anonymous complaint and those statements from the 25 other police officers describing instances of improper conduct were put to the applicant in general terms.

On 24 August 2015, Inspector Cadden completed his report, in which he concluded that, on the balance of probabilities, two of the allegations made in the anonymous complaint had been made out. The report also stated that the original anonymous complaint may have been made as an act of reprisal against the applicant.

On 24 August 2015, Superintendent Lennon, the delegate under the *Police Act 1990* (NSW), told the applicant that he had made a provisional order that, subject to the applicant's response, he would issue a Commander's Warning Notice and place him on a Conduct Management Plan (an internal police behaviour management plan). In response, the applicant said, 'people in the office have it in for me'. However, he refused to identify to whom he was referring.

On 1 October 2015, Superintendent Lennon again met with the applicant. He read out all the names of the officers who had provided statements to Inspector Cadden, but he did not identify which officers made allegations about the applicant. Again, the applicant did not identify any issues he had with those officers. However, at the applicant's request, the superintendent agreed that the anonymous complaint should be further investigated.

On 26 October 2015, during a further interview between Inspector Cadden and the applicant, Inspector Cadden again put to the applicant, verbatim, all of the allegations against him. The applicant complained that he did not know who the witnesses were who had made the allegations against him. He said if he had known he could have told the inspector whether their statements were likely to amount to reprisals. The inspector asked him to identify which witnesses fell within this category, but he declined to do so.

On 2 November 2015, Superintendent Lennon met with the applicant. The complaint was found to be proven in two respects and he was given a warning under the *Police Act 1990* (NSW) (the First Decision).

The applicant subsequently requested a review of the decision to issue the warning. This was refused by the respondent (the Second Decision). After the Second Decision, the

applicant was provided with an unredacted copy of Inspector Cadden's report. The unredacted report contained considerable detail, including the identities of the officers who stated they had seen the applicant engage in the conduct of the kind described in the anonymous complaint. It also showed that many officers responded to the directive memorandum by stating they had not witnessed conduct of the kind described in the anonymous complaint.

The applicant commenced proceedings in the Supreme Court alleging, among other things, that he had been denied procedural fairness in the making of the First Decision. Specifically, that he was denied procedural fairness because:

- he was not provided with copies of all the written responses to the directive memorandum (including the potentially exculpatory statements from officers that stated they saw nothing); and
- he was not provided with an unredacted copy of Inspector Cadden's report prior to the First Decision.

The applicant also argued that the material, which he was provided with before the First Decision was made, was vague, imprecise and lacking specificity and had left him confused.

The Supreme Court dismissed the applicant's appeal.

The applicant then sought leave to appeal to the NSW Court of Appeal. On appeal the issues were, among other things, what was the content of the obligation to accord the applicant procedural fairness prior to the first decision.

The Court found that, in this case, the obligation to accord procedural fairness required the disclosure of all adverse material which is credible, relevant and significant (*VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72). It did not require the respondent to disclose all exculpatory material, regardless of whether that material was adverse (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) [2006] HCA 63). In this case, the Court found that the various statements by different officers that they saw nothing relevant were not relevant or significant.

After comparing Inspector Cadden's report with the matters specifically put to the applicant during the October interview, the Court found that the only matters not disclosed before the first decision was made were:

- the name of the police officers who made allegations; and
- deliberative processes and proposed conclusions.

In the Court's view, while the disclosure of the identity of complainants is permitted where necessary for the effective conduct of an investigation under Police Act or *Police Regulations 2008* (NSW), there is nothing in that legislation that creates a legal duty on the decision-maker to identify a complainant. Therefore, in this case, the failure to identify which officers made complainants was not a breach of procedural fairness. Additionally, the obligation to provide procedural fairness did not require the disclosure the decision-maker's deliberative processes or proposed conclusions (*Minister for Immigration and Multicultural Affairs; ex parte Miah* [2001] HCA 22).

The Court also found that the material put to the applicant during the investigation was not vague, imprecise and lacking specificity and did not leave the applicant confused. Rather, during the October interview, Inspector Cadden put each allegation to the applicant,

verbatim. Further, the applicant was not denied procedural fairness in circumstances where he clearly understood the allegations made against him and was given ample opportunity to respond as he wished.

Endnotes

1 Section 57(2) of the Migration Act relevantly provides that, in considering a visa application, the Minister or delegate must provide 'relevant information' to a protection visa applicant and invite the applicant to comment on it. 'Relevant information' includes information that would be the reason, or part of the reason, for refusing to grant the visa; that is specifically about the applicant; and that was not provided by the applicant.

HIDING THE BOATS: AUSTRALIA'S CLASSIFICATION OF INFORMATION RELATING TO SMUGGLED PERSONS

Samuel C White*

For those who've come across the seas
We've boundless plains to share;
With courage let us all combine
To Advance Australia Fair …

– *Peter Dodds McCormick, Advance Australia Fair (1878)*.

Within Western democracies, transparency and accountability are — subject to few exceptions — the cornerstones of effective government. National security has historically been the basis for one of those exceptions and has been used to validate a suite of actions and rhetoric, from abuses of human rights and restrictions on civil liberties[1] to violations of international treaties[2] and the implementation of immigration policies.

The arrival of irregular migrants[3] by boats has engendered extraordinary responses from Australians[4] and, consequently, Australian politics, with increasingly harsh government policies since 1989.[5] The latest — Operation Sovereign Borders (OSB) — has developed and modified previous border security and immigration control policies in a way that has increasingly offered[6] and been accepted[7] as a model for global replication.

This article is underpinned by the premise that halting irregular maritime migration to Australia is the correct policy objective of the government due to the potential risks associated with entrances without proper character checks, the attempt to halt the multi-billion dollar transnational people smuggling industry[8] and the need to prevent the deaths of irregular migrants at sea. However, among the measures implemented under the current border protection policy, the coalition government has classified information relating to smuggling of migrants to Australia under a veil of national security. It is this policy of classification that is contentious.

The full scope and effect of the classification of information relating to people smugglers is difficult to quantify. At the inaugural meeting for OSB, then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, highlighted the expansive and flexible nature of the restriction on information, noting that:

> operational and tactical issues that relate to current or prospective operations, whether it's the maritime environment, whether it's in the land environment, offshore or anywhere else, will not be the subject of public commentary from these podiums.[9]

* *Samuel White (BA/LLB) (UQ) is a Master of Laws candidate at the University of Melbourne and current Associate to the Hon Justice JA Logan RFD. The views expressed herein are solely those of the author and do not reflect the views or opinions of the University of Melbourne Law School or the Federal Court of Australia.*

But what exactly does 'operational, tactical and on-water' mean? While covering matters such as pre-deployment training,[10] 'radar surveillance, vessel speed, communication between vessels, identity of vessels, the timing of operations, authorisations and turn backs'[11] and on-water tactics, techniques and procedures (TTPs), the notion of operational matters has been additionally expanded to include information around the number of suspected illegal entry vessels (SIEVs) intercepted;[12] any information regarding the persons on board, including their nationality;[13] and the method by which their vessels are returned: towing, transfer or lifeboat.[14] Incidents at sea, which were previously reported through government publications, have been removed from public discussion.

Importantly, the restriction on information has also been extended to the process by which information is classified.[15] The inherent issue with this is that it is nearly impossible to provide a comprehensive catalogue of all information that is and is not accessible, especially information which is held to be restricted from the public but is simultaneously publicly accessible in alternative forums. Information surrounding the cost of the operation, incidents that occur at sea, violations of international or domestic law and memorandums between regional allies surrounding return of irregular migrants fall under the notion of 'land environment' and thus are restricted. Despite the classification of documents, all information used throughout this article is publicly sourced. Primarily this involved government statements, newspaper reports, publicly available Defence publications, ministerial statements and parliamentary debates. Reports and papers by non-government organisations were also used.

The objective of this article is threefold: to examine the government's purpose in and justification for classifying information relating to people smuggling; to critically assess and observe the implications, concerns and dangers of the policy of information classification; and to suggest solutions to mitigate any concerns. The classification of information concerning Australian offshore detention or detainees will not be covered in depth.[16]

Australian border control: past and present

Historical background

In order to understand Australia's current border protection policy, it is instructive to first analyse its historical, political and operational predecessors. Irregular migrants historically have remained easy targets for wider socio-economic concerns: national security, unemployment, and demographic and ethnic compositions.[17] As an island nation, Australia's fear of maritime invasion has characterised its border control policies since Federation, from the early threat of the 'Mongolian Octopus'[18] to current issues of refugees-turned-Islamic-terrorists attempting to enter through maritime back doors.[19]

Subsequent to the attacks on the United States in September 2001, the then Liberal government exploited fears of terrorism and lone-wolf attacks for political gain through demonstrations of national strength in tougher border protection. This was justified by playing 'the idea of the "good refugee" (who waits in a camp to be resettled) against the "bad refugee" (who jumps the queue by coming by boat)'.[20]

The relationship between boat arrivals and changes in Australian border protection policies is cyclical. On 21 August 2001, 433 irregular migrants were rescued at sea by a Norwegian freighter (the MV *Tampa*) that subsequently attempted to make port at Christmas Island due to the medical needs of persons onboard.[21] The Australian Government refused entry and the incident culminated in the boarding of the vessel by Australian special forces, indicative of growing public support for harsher border control.[22] One such policy was the Pacific Solution, of which Operation Relex constituted a significant role, implemented under the then

Liberal Prime Minister John Howard on 3 September 2001. The Pacific Solution was a policy developed to 'deny asylum seekers arriving by boat entry into Australia and to deter others from making the same journey'.[23]

Operations Relex and Relex II

The first border protection operation — Operation Relex — involved, inter alia, the active return of SIEVs to Indonesia by the Royal Australian Navy and various Commonwealth agencies.[24] The aim of the operation was to deny entry and thereby deter irregular migrants from crossing via boats into Australian waters. Through maritime patrols, SIEVs would be interdicted[25] at Australia's contiguous zone and, through active steering or towing, returned to the edge of Indonesian waters.[26] The towing of a vessel was only authorised when safe to do so, assessed in light of seaworthiness, onboard navigation and radio equipment, the ability and skill of the crew and the state of the vessel's engine.[27] This was due to the inherent safety issues surrounding the towing of a vessel with personnel onboard — yet during the operation, in which 12 vessels were intercepted and four returned to Indonesia,[28] three vessels sank, with the loss of two lives.[29]

After a vessel *SIEV X* reportedly sank in international waters off Indonesia with the loss of 353 lives,[30] the operation was terminated on 13 March 2002, so as to be able to give evidence to the Senate Select Committee on a Certain Maritime Incident. The committee brought to light the internal mechanics of Operation Relex, including how it introduced a novel 'public affairs plan' which established what images could be collected and what images could be provided to the public.[31] All media releases were centralised by the defence minister, who in turn required approval for any transmission of images outside the ministry.[32] All comment and media responses/inquiries were to be referred to the defence minister's media advisor.[33] More significant was the effect of the centralisation of information — no public correction could be made to information given by the government, unless the government through the defence minister agreed to those misrepresentations being corrected.[34]

The plan was noted for being unusual at the time, as it was inconsistent with the overarching Defence Organisational Communication Strategy. The committee concluded that:

> On the evidence available, however, it seems to the Committee that the public affairs plan for Operation Relex imposed upon the Department of Defence by the Minister's Office had two clear objectives. The first was to ensure that the Minister retained absolute control over the facts which could and could not become public during the Operation. The second was to ensure that no imagery that could conceivably garner sympathy or cause misgivings about the aggressive new border protection regime would find its way into the public domain.[35]

Operation Relex II,[36] a scaled-back but essentially identical operation, succeeded Operation Relex until 16 July 2006.[37] Both operations were characterised by classified information, justified under a veil of operational security.

Labor government policy

In November 2007 a new Labor government, led by Prime Minister Kevin Rudd, was elected, and the prior deterrent policy was discontinued in favour of a more open-border policy.[38] One reason for this policy change was an attempted increase in transparency and flow of information to the public relating to irregular migrants. The confusing balance between humanitarian assistance and strict border control is best highlighted by the newly elected Prime Minister himself, who noted:

> Our job — and I make no apology for it — is to take a hardline approach in dealing with illegal immigration. I make no apology whatsoever for adopting a hardline approach when it comes to illegal immigration activity, and I make no apology whatsoever having a hardline and humane approach to dealing with asylum-seekers. No apologies whatsoever in dealing with the vermin who are people-smugglers. We will take the harshest and hardest measures possible in dealing with that.[39]

Despite the rhetoric, these harsh and hard measures were transparent, implementing regular reports on fatal incidents at sea and mandated internal reviews within the Department of Customs and Border Protection. This was complemented by publicly accessible reports on the numbers of boat arrivals, personnel and crew and the nationality of irregular migrants.[40]

As part of their commitment to government accountability, the Labor government established an independent office in 2010 to promote open government, to the approval of then leader of the opposition, the Hon Tony Abbott MP.[41] The Office of the Australian Information Commissioner (OAIC) was established to provide, inter alia, an oversight of the *Freedom of Information Act 1982* (Cth) (FOI Act) through review mechanisms. The position — an evolution on the Freedom of Information Commissioner — was based on the proposition that 'information held by the Government is to be managed for public purposes, and is a national resource'.[42] The scope of the FOI Act allowed for public access to a suite of documents, including information relating to government decisions surrounding border protection.

Operation Sovereign Borders

In September 2013 a new government under Liberal Prime Minister Tony Abbott was elected and, upholding its election promise of stricter border protection policies,[43] immediately implemented OSB in order to halt irregular migrants entering the country. This was justified through citing the success of the Liberals' earlier Operation Relex and Operation Relex II: '[t]he Navy has done it safely before. [There is] no reason why they cannot do it again'.[44]

Officially described as a 'military-led, border security operation supported and assisted by a wide range of federal government agencies',[45] the operation has many striking similarities with earlier policies. However, there remain a few striking differences.

Similarities to previous operations

Primarily, the operational objectives have remained consistent: the use of the Navy to interdict irregular migrants at sea, as well as their return when safe to do so. There have remained issues, however, where towing as an operational procedure has been implemented. Towing has been controversial due to the associated risks and deaths at sea, causing the coalition government to simultaneously confirm and deny its use;[46] this has led to a situation similar to a modern Schrödinger's boat and its search for the ultimate reality.

Nonetheless, the substantial aim and methodology of the current operation remains the same, with interdicted vessels being returned to Indonesian waters.[47]

Differences from previous operations

The expansion of the scope of the operation is of particular importance, with OSB from its inception aiming to fall under a 'single operational command and a single ministerial responsibility'.[48] The newly established chain of command was purported to be required in order to cut through the different priorities of government agencies and streamline the government's political and military aims.[49] This is arguably a development on the earlier political input of Operation Relex, although that earlier operation was not mandated or officially unified.

Further, a set 48-hour turnaround objective (being 48 hours from the moment a vessel was interdicted to when its occupants were detained) was implemented to increase the efficiency of naval operations.[50] Under this banner of operational efficiency, new equipment (being single-use, unsinkable lifeboats) has been purchased and used in order to counter situations where irregular migrants may have scuttled or disabled their vessel in an attempt to be brought to shore by the Navy or where the SIEV is assessed as unseaworthy by Australian crew. This equipment consists of one-use, unsinkable lifeboats designed to have irregular migrants placed inside and returned to Indonesian waters.

There have been additional changes to departments and roles. The government has progressively underfunded the aforementioned OAIC — whose role is to oversee government action and review decisions on freedom of information requests — despite approving its creation in 2010.[51] This has led to a reduction of capability in the office and less oversight of government actions. Perhaps most pertinent is the amalgamation of various departments progressively after the initiation of OSB. The Department of Immigration and Citizenship was renamed the Department of Immigration and Border Protection,[52] indicative of a clear policy change aimed at highlighting irregular migrants as a security emergency rather than a humanitarian issue; as of 2018 it is now the Department of Home Affairs. The Department has increasingly used Orwellian language:[53] department employees were mandated to prefix 'maritime arrivals' with 'illegal',[54] reflecting the notion that irregular migrants are somehow 'queue jumpers' going against the 'Australian sense of fair play'.[55]

While OSB has built upon the earlier centralisation of information developed by Operation Relex, the scope and justifications surrounding the secrecy has set the current border security operation apart.[56]

Government justification for classification

The lack of transparency has been justified through government policy statements and political rhetoric, which can be summarised as the following: the overarching operational security requirements; the need to halt people smugglers; and regional relationships. This is not intended to be exhaustive, merely reflective of the three key propositions forwarded.

Justification: operational security

The first limb of the government's justification can be divided equally into three considerations: the need for operational effectiveness; Australia's alleged wartime status; and the overarching safety of Australian troops.

Operational effectiveness

Primarily, the coalition government has attempted to justify its classifications as necessary to preserve operational effectiveness. This is twofold: to reduce information on the capabilities of equipment and number of troops deployed under the operation and to prevent information updates on evolving tactics, techniques and procedures used by the military and civilian forces.[57]

Lieutenant-General Angus Campbell (as he then was), who was the inaugural commander of the forces on OSB and has subsequently progressed to become the Chief of the Defence Force, justified the restriction as follows:

> [There is an] absolute respect for the need for the Australian people to be aware of what is occurring through regular periodic briefings to the media. But there is also a balance that is struck operationally, which might send a message to the people smugglers of how we intend to conduct our business.[58]

This respect was facilitated through initial weekly meetings aimed at providing a forum of public discourse around the border protection policy, which quickly evolved. One month after OSB's inception, the weekly meetings were moved to Sydney for efficiency reasons,[59] which, incidentally, served to further limit exposure of the government to the Canberra press gallery. However, in January 2014 — merely three months after the operation began — the weekly meetings were cancelled and replaced by an online monthly statement by the Department of Immigration and Border Protection.[60] It was noted that the flow of information to the public would continue by virtue of the media and their reporting.[61]

Wartime status rhetoric

Secondly, the operational status of Australia's policy of border protection against irregular migrants is grounded upon the assumption that 'if we were at war, we would not be giving out information that is of use to the enemy'.[62] This is compounded by the coalition government's stance that smuggling of migrants into Australia has 'become a challenge to our national security. A country that can't control its borders sooner or later loses control of its future'.[63] By this definition, Australia's so-called 'war' will continue so long as irregular migrants attempt to enter into Australia by air, land or sea.

Safety of Australian Defence Force troops

A final consideration relating to the operational side of OSB is the safety of Australian Defence Force (ADF) troops currently deployed on Transit Security Element (TSE) rotations.[64] At this stage, however, no official examples have been offered regarding the correlation between information classification and personnel safety — merely that it is necessary.[65] The failure to denote any factual basis for how classifying information surrounding government decisions serves to protect the safety of ADF troops will be covered below.

Justification: halting people smugglers

Further, the justification of halting people smugglers has been threefold: in the reduction of information available to people smugglers; to deter irregular migrants from making the journey by vessel; and to prevent deaths by drowning at sea.

Reduction of information to people smugglers

The overall aim of denying people smugglers the 'oxygen of publicity'[66] has been used to justify the significant restrictions of information and accountability surrounding both the policy and the operation. This information includes the number of irregular migrant vessels arriving in Australia and their distance from Australian territorial waters before interception.[67] The restrictions are viewed as necessary to reduce the ability of smugglers to 'sell their services more efficiently to people desperate to get out of the situations in which they find themselves'.[68] The prior policy by the Labor government has been sold as a strong pull factor,[69] leading the coalition government to reiterate its position that it is not its 'job to run a shipping news service for the people smugglers'.[70]

Deterrence and stopping deaths at sea

Another consideration is restricting information in order to deter the journey by sea of irregular migrants and indirectly reduce deaths on the voyage. On OSB's initiation, the immigration minister noted that harsher measures were necessary in light of the 1100 deaths at sea under the previous government.[71] To this end, the coalition government held it to be prudent for irregular migrants to be 'met by a broad chain of measures end to end that are

designed to deter, to disrupt, to prevent their entry from Australia and certainly to ensure they're not settled'.[72]

These measures include — but are not limited to — the current and continuing offshore processing and detention centres on Nauru and formerly on Manus Island, education programs attempting to dissuade irregular migration, the possible payment of people smugglers to return their vessels to Indonesia,[73] and the classification of information surrounding the operation.

Justification: regional relationships

A final justification by the government used to classify information is the necessity for secrecy to preserve regional relationships, particularly the bilateral agreements between Australia and its offshore detention centre host countries (Papua New Guinea and the Republic of Nauru), as well as transit countries and various military operations,[74] secondments and covert operations.[75]

Assessment and observations

While the coalition government has been quick to declare OSB safe, effective and sustainable,[76] the viability and associated costs of the classification of information must be critically assessed. The observations will be in accordance with the government's summarised justification, followed by wider implications and concerns about the classification of information.

Operational security

Operational effectiveness

As with any military operation, it is necessary and proportionate to maintain secrecy and security of sensitive information. Accordingly, the primary justification of operational effectiveness is valid and extends to restricting information such as vessel capabilities, troop numbers, operational tempo, patrol routes and times, communication abilities and intelligence-gathering techniques. Moreover, such restrictions align with standard domestic law enforcement operating procedures.

The issue, however, lies in the publicly available nature of the supposedly classified information. While the coalition government has refused to comment on operational information, it is nonetheless available on both department websites[77] and defence media publications.[78] This includes details of boat locations, activities, patrol ranges and top speeds, personnel numbers and pre-deployment training, specific unit names and identities of individuals.[79] Logic dictates that, if information is publicly available, it is no longer covered under a 'veil of secrecy'.

Indeed, there are arguments to be made that easing the restrictions on information would allow for more robust and frank assessments to be made of the current operational tactics used by troops deployed on TSE rotations, which could lead to a more effective and efficient operation. One example is to publicly record the country of origin of irregular migrants as a way to combat the push factors and gain a more holistic understanding of who is attempting the maritime crossing and why.

Equally, by increasing transparency and discussion surrounding the decision-making process for maritime interdiction, the effectiveness of the operation could be improved. The current fusion of military and government has replaced the traditional chain of command with

political overtones and, as was experienced in early border protection operations with political oversight, is unresponsive to change and micromanaged from Canberra.[80] No information is available on the approval process for tow-backs, although it appears that political oversight and responsibility lies with the immigration minister.[81] The Australian Defence Association has voiced concerns over the militarisation of a civilian matter.[82]

Under OSB's predecessor, Operation Relex, ADF commanders were torn between their maritime obligations and the will of their political commanders. This was highlighted by the case of Vice-Admiral Shackleton (then Chief of Navy), whose account of the disintegration of *SIEV 4*[83] was in conflict with the official Howard government's report of children being thrown overboard.[84] While the truth eventually emerged in favour of Admiral Shackleton, under the current classification system any report conflicting with the government's would have to fight the chilling effects noted above, none less so than possible prosecution under the *Australian Border Force Act 2015* (Cth).

Wartime status rhetoric

In times of war, restrictions of civil liberties and the pre-eminence of government decisions are sometimes necessary for the greater good; this is recognised both within the *Australian Constitution*[85] and resoundingly in Australian common law.[86] The coalition government has been accused of using 'a cloak of a military campaign … as political camouflage to justify a cult of secrecy'.[87] War is historically an armed conflict between nation states or internal parties about the conquest of territory, or at least a dominant economic advantage. Under such a definition, the incursions on Australian territory in World War II — the bombings of Darwin, submarine incursions into Sydney Harbour and the defence of Port Moresby[88] — remain the last instances of Australia being under threat of attack. While the law has developed accordingly to meet the threats of lone-wolf attacks and terrorism,[89] this is not to say that the maintenance of secrecy through blanket classification of information is justifiable or achievable. To compare the current humanitarian crisis to war insults and belittles those who have fought and suffered for Australia in war and disregards the balance that the rule of law has with wartime powers.

Safety of Australian Defence Force troops

Finally, the safety of ADF troops has been used to classify their identities, although this is arguably to protect troops from being coerced into providing information to persons outside the military and government. If so, this is an indirect, ineffective and unnecessary means of protection operational information.

Historically the modus operandi of Australia's Special Air Service Regiment (SASR) has been to classify their identities, due to their performing sensitive strategic operations, reconnaissance and surveillance within enemy territory.[90] It is perhaps no coincidence that Lieutenant-General Campbell, as he then was, spent his career with the SASR. There are a few differences, however, between clandestine SASR operations and the troops deployed on border protection. OSB personnel do not intercept irregular migrants covertly or within enemy territory, or perform disruptive operations through infiltrating local populations.[91] Indeed, members of TSE have been publicly identified and photographed,[92] contrary to government rhetoric.

To use the safety of Australian troops on OSB as a justification for classifying their identity and information surrounding them ignores legislative developments to the contrary. The removal of the duty to take reasonable care of health and safety for themselves or other persons under the *Work Health and Safety Act 2011* (Cth) for service members on OSB is an unparalleled step. The identity of troops in Afghanistan, with the exception of the SASR

and other special forces for the reasons above, is not classified; nor is the identity of troops who conducted maritime operations against Somali pirates.[93] The interception of SIEVs poses risks of traumatic experiences through personal injury or by witnessing human degradation or misery on a large scale.[94] This has led to a post-traumatic stress disorder comparable to that of veterans returning from Timor-Leste, Iraq and Afghanistan. As one currently serving Navy officer noted:

> I would say that the secrecy surrounding the operation, and the fact that the public has very little information about what these people are actually doing — other than what they see as them failing to rescue people at sea, failing to take into account human rights — for the sailors to do these operations and then face that from the public, essentially they're the Vietnam veterans of our time.[95]

At any rate, the Navy has noted that the current turn-back policy is at risk of lowering morale and, accordingly, operational effectiveness in a broad sense.[96] By failing to acknowledge the need to discuss traumatic issues that arise in the course of duty, the gag orders of the Border Force Act (discussed later) put returned troops' health at risk.

Halting people smugglers

Reduction in flow of information to people smugglers and deterrence

'The boats have stopped' — so the coalition government reported.[97] Yet it is difficult to ascertain whether the classification of information had any effect on halting the smuggling of persons into Australia. While the government has noted that the policy has had a devastating impact on the people-smuggling trade (and also was popular with local voters)[98] this is not specifically attributable to the classification of information. Irregular migration to Australia had begun to lessen prior to the coalition government's election;[99] this is a complex issue involving a reduction of push factors in Afghanistan and Iraq and earlier government policies.[100] To claim that the classification of information has led to the reduction in irregular migration is unfounded — it is impossible to quantify the singular effect of the policy.

More important, however, is the viability of classifying documents as an integer of deterring irregular migrants from making the attempt to come to Australia by boat. Constituting a burden-shifting rather than burden-sharing measure, deterrence has been criticised and condemned by the United Nations High Commissioner for Refugees (UNHCR).[101] Subject to debate, it has emerged that the details of an individual country's asylum policy — including its deterrence mechanisms — have little significance in the decision-making process of irregular migrants.[102] Former Prime Minister of Australia Malcom Fraser commented that 'no amount of deterrence can match the terror from which those who are genuine refugees are fleeing'.[103]

Australia's deterrence policy merely forces people smugglers to evolve their practices through alternative maritime routes,[104] multi-buy deals and reduction in the price to journey to Australia,[105] as well as safe-arrival or money-back guarantees.[106] With potentially more people attempting the journey (due to cheaper costs) and alternative routes (with increased risk), the safety of persons at sea is jeopardised. However, due to the classification of information gained through border protection operations, there simply is not enough information available to know the extent to which irregular migrant safety is compromised.

Stopping deaths at sea

This lack of information also hinders assessment of the government's pledge to stop deaths at sea. Official reports from January 2015 claimed there were no known deaths in 2014 — a laudable achievement by any standard.[107] This fails to recognise the risks arising from

returning irregular migrants onboard unsinkable lifeboats that are deliberately fuelled to a level sufficient only to return to Indonesia.[108] As noted by Vice Admiral Tim Barrett (current Chief of Navy), once the passengers are adrift in Indonesian territorial waters, Australia cannot guarantee their safety.[109] There have been reports of the deaths of three irregular migrants, due to strong currents and lack of navigation skills, on a remote Indonesian island after their vessel was turned back with insufficient fuel to navigate out of the currents.[110]

One irregular migrant alleged that, when he expressed fears of dying on the lifeboats, he was informed by an Australian official:

> [T]hat's not our problem. That is yours. If you die in Indonesian waters, the Indonesian Government is in trouble and responsible. That is not our problem.[111]

Without access to the current government statistics, it is impossible to comment on whether there have been any deaths at sea or to assess the known risks resulting from the concurrently acknowledged and denied towing policy.[112] It is impossible to know whether any vessels have been broken or sunk by the Navy, as occurred under Operation Relex and Relex II. Unconfirmed reports state that on 15 January 2014 a Navy vessel fired shots across the bow of a SIEV to force it to halt.[113] On 28 September 2013 — 10 days after OSB's initiation — 44 irregular migrants allegedly drowned after the Navy ignored a distress call[114] — a clear breach of Australia's international legal obligations (discussed below) if true.[115] Information about these events cannot be accessed in public reports.

Regional relationships

The last justification by the coalition government to be discussed in this article is the alleged preservation of regional relationships.[116] This is in juxtaposition to the preliminary instructions given by the government to border protection agencies to 'stop the boats by all lawful means, notwithstanding fierce controversy at home and possible tensions abroad'.[117] While there are obvious sensitivities surrounding Australia's offshore processing centres (and relationships with Papua New Guinea and Nauru respectively), this justification fails to acknowledge or address the adverse impact the 'culture of secrecy' and classification of information has had on other neighbouring states.

The view of the United Nations

Australia's lack of transparency has led to commentary, criticism and condemnation by the United Nations.[118] Additionally, the United Nations Special Rapporteur on the Human Rights of Migrants has heavily criticised the debilitating effects of the Border Force Act on freedom of speech and whistleblower protection in Australia. Despite requests to the government for guarantees of protection from the maximum two-year sentencing under the Act, 'the threats of reprisals to persons who would want to cooperate with the UN is unacceptable'.[119] The Abbott government's reply was that Australians were 'sick of being lectured to by the United Nations, particularly given that we have stopped the boats'.[120]

Indonesia

It seems ironic, considering that the systematic turn-back of vessels into Indonesian territorial waters by the Australian Navy and consequent lack of transparency has been touted at promoting regional relationships, that this policy has resulted in a fractured relationship with Indonesia[121] and open condemnation by Indonesia's foreign minister, Retno Marsudi.[122] This has consequentially affected the necessary 'cooperation and commitment between countries of origin, transit and destination'.[123] The Australian Government, for its part, has denied that tough border policies have strained relations.[124] This stance is difficult

to maintain in the face of Indonesia deploying gunships and frigates to counteract Australia's incursions into its territorial waters.[125] Of more concern, however, are certain actions taken by former Prime Minister Tony Abbott to fix foreign relations. Surprisingly, he confessed that:

> as a very early sign of good faith to the Indonesians, I had West Papuan activists who'd arrived in the Torres Strait claiming asylum quietly returned to Papua New Guinea.[126]

As a party to the *Convention relating to the Status of Refugees*[127] and *Protocol relating to the Status of Refugees*,[128] Australia owes certain international obligations to persons seeking asylum, including non-refoulement.[129] This involves not expelling or returning refugees where their life or freedom would be threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.[130] It has also been expanded to include risk of torture or cruel, inhumane or degrading treatment.[131] West Papua — a province of Indonesia seeking self-determination — has been subject to alleged crackdowns by Indonesian officials involving shootings, beatings and claims of torture.[132] To return persons claiming asylum for the purpose of 'good faith' both contravenes international law and serves to further damage other regional relationships.[133] Moreover, the extent of this 'good faith' is impossible to establish.

Government accountability

There remains a further criticism of the coalition government's policy, particularly with regard to the need for government accountability across a wide spectrum of matters. The rule of law is based upon the fulfilment of the expectation that laws are applied uniformly. Indeed:

> secrecy is at odds with the principles of democratic governance and accountability, and highlights the erroneous portrayal by the government of asylum seekers being a national emergency.[134]

This accountability must be considered both domestically (with regard to the press, whistleblower protection, and economic accountability) and with regard to Australia's adherence to its international obligations.

Freedom of information and the press

The coalition government's legislative and procedural steps have led to a chilling effect in and outside of Canberra on the fourth estate. While restricting the ability for frontbenchers to be interviewed by the media,[135] additionally, the Abbott government increased filing fees for freedom of information requests in the Administrative Appeals Tribunal.[136] It is instructive to note British jurisprudence on increasing filing fees. In the recent UK Supreme Court decision of *R (UNISON) v Lord Chancellor*[137] a unanimous bench held that the right of access to justice and the courts was such a fundamental aspect of the rule of law that the imposition of fees could render laws 'liable to become a dead letter and the democratic election of Members of Parliament a meaningless charade'.[138] While no such case has been brought yet in Australia, it is an interesting concept on which to reflect. Ironically, with the reduction in the volume of freedom of information applications, when departments have granted requests the information is often 'stored, labelled, structured and formatted in a manner that makes analysis difficult'.[139]

More recently in the Administrative Appeals Tribunal, a freedom of information request surrounding text messages between the Chief of the Defence Force and the Vice Chief of the Defence Force was heard.[140] The matter, inter alia, explored the limiting nature that military information and military decisions have on the right to public transparency. The Tribunal emphasised the legitimate and valuable role of the media in the education and interrogation of government policies but eventually found that the need for candid, swift and

open discussion between members of the military (on military matters) was enough to satisfy the overwhelming public interest in refusing access. The matter of *Re Secretary, Department of Defence and Thomas*[141] is important to highlight the robustness of the current freedom of information system and the ability of the Administrative Appeals Tribunal to deal with such sensitive matters. Members of the Tribunal are not necessarily appointed based on understanding of law or experience as a legal practitioner — it is the practice of the Tribunal to appoint a member or senior member who 'in the opinion of the Governor-General has special knowledge or skills relevant'.[142] The Tribunal thus has heard and does regularly hear freedom of information requests dealing with sensitive military matters.

The current Public Service Commissioner, the Hon Mr John Lloyd, perhaps best summarises the current coalition government stance:

> [Our] Freedom of Information laws have gone beyond what they intended to do; they make us a bit over-cautious and make some of the advice more circumspect than it should be.[143]

Journalists who have revealed details of turn-backs have been investigated by the Australian Federal Police,[144] leading to allegations that 'Australians are getting more information from the Jakarta Post than from their own government'.[145]

Whistleblower protection and the Border Force Act

In situations where information is not readily accessible by valid procedure, there often remain options, when whistleblower protection is strong enough, for alternative paths to government accountability. The current government has attempted to impose a chilling effect on whistleblowers through provisions of the Border Force Act. Since its original implementation, legislative changes have been made to the Border Force Act which have rolled back certain penalties for healthcare workers.[146] Regardless of the consequent legislative developments, it is pertinent to note the original provisions in the Act — in particular, its criminalisation of recording or disclosing any 'protected information', defined as any information gained in the capacity of employment while on border protection, with a penalty of two years' imprisonment.[147] This is because, while certain concessions have been made for healthcare workers (general and specialist doctors, dentists, nurses, psychologists and health advisers[148]), other professions (lawyers, teachers and social workers) are still affected by the legislation. Indeed, the legislative developments merely attend to the criminal consequences of disclosure; employees still have the threat of civil legal action. It is interesting to note that the amendment regarding healthcare workers was made in light of a pending High Court challenge against the provisions.[149] In the meantime, the constitutionality of the secrecy provisions remains open for debate.[150]

Implemented under bipartisan approval, the Border Force Act allowed for disclosure of information surrounding the policy and operation only when 'necessary to prevent or lessen a serious threat to life or health'[151] or for public interest.[152] It is perhaps telling that organisational suitability assessments — explicitly noted by the Explanatory Memorandum as designed to screen prospective government employees who are less likely to adhere to or comply with non-disclosure requirements — act as an initial barrier to the flow of information that might be otherwise classified. The Act was effective in creating a complex and unclear labyrinth of definitions and threshold tests. Some defences are available to whistleblowers facing criminal prosecution through the *Public Interest Disclosure Act 2013* (Cth). Public interest is not a new concept,[153] although there remains a high degree of uncertainty as to when and whether these protections apply — in particular, whether information relating to border protection would prejudice international relations[154] or the security and defence of the Commonwealth.[155] National security is one such interest to be invoked under the Border Force Act, based on the notion of sensitive law enforcement information.[156] The legislation

places the evidentiary burden on the whistleblower — the effect of which is to make unclear the level of evidence required to enact any protection, especially for persons unsure of their legal or contractual rights. For a layperson considering whether to 'blow the whistle', the complexity of the legislative labyrinth might certainly deter them from doing so.

Perhaps most jarring of all is the way in which the Border Force Act affected the contractual rights and obligations of government employees. Under s 24 of the Act, an oath or affirmation must be made by an employee before the Border Force Commissioner to follow all undertakings. Failure to follow a direction can lead to an individual's dismissal.

Economic accountability

A further element of government accountability and transparency affected by the classification policy is its costs. Economic accountability, especially in times of war, has been of historic importance. Yet, increasingly, the umbrella term of 'military operations' has been used to provide carte blanche for spending. This is not merely limited to classifying information surrounding OSB. The recent military support by the Australian Government to the Government of the Philippines (under Operation Augury) has been obscured. The argument used by the Australian Government in both operations was summarised as: 'unlike all of the publicly costed military operations Australia has waged in the Middle-East, always in coalition with other countries, to publish the costs [of these operations] would give direct and unfiltered information to fighters about what is there'.[157] It seems unlikely that economic information publicly accessible to the Taliban or the Islamic State would not be used by the insurgency groups but would be by people smugglers. Equally, if the operation is placed in the budget then the matter is now public and is subject to public discussion.

Specifically, OSB was justified at its inception in part due to the costs of Labor's earlier operations and humanitarian relief given to irregular migrants,[158] amounting to an alleged $9 billion annually.[159] While the coalition government had assessed OSB costs as $262 million annually,[160] this fails to account for various classified factors including offshore detention (which was incorporated into Labor's costs). While the number of irregular migrants arriving by boat has lowered, the costs of maintaining operations have remained relatively untouched by commentary. Items such as the unsinkable lifeboats are defined as consumables and are thus 'not an asset required to be counted as assets in the inventory of the Commonwealth',[161] despite costing over $2.5 million.[162]

Economic accountability is necessary to assess the government's claim about the lower costs, especially considering that one estimate has the total annual cost of OSB amounting to an estimated $5.14 billion annually,[163] or a cost of over $400 000 per irregular migrant.[164] While this is less than Labor's alleged cost, the coalition should not aim to hide costs under a veil of operational security, and the economic facts should be open to the public.

Difficulty identifying compliance with international law

A final factor in favour of improving transparency and accountability for government actions is the difficulty in identifying any breaches of Australia's international obligations.

One such breach of international law relates to incursions into Indonesian territorial waters and whether or not such incursions are part of border protection tactics. The *United Nations Convention on the Law of the Sea* recognises the principle that every country is entitled to sovereignty and consequential respect of its maritime borders,[165] subject to the right of innocent passage.[166] While strong arguments can, and are, made both in favour of[167] and against[168] the concept of Westphalian sovereignty in the modern era, the principle has been used by Australia to justify its own border protection policy,[169] classified under operational

security and the need to protect operational effectiveness. It is unknown whether interdictions on the high seas, let alone incursions into Indonesian territorial waters, are condoned.[170]

On maritime obligations, the general principle of the law of the sea[171] extends to protect those in distress irrespective of their nationality, their status or the circumstances in which they are found.[172] The Australian Maritime Safety Authority (AMSA) currently is 'the main coordination body for search and rescue response arrangements in Australia'.[173] AMSA in recent years, however, has held that irregular migrants venturing in unseaworthy vessels are exploiting the international system for 'genuine distress'.[174] Despite the coalition government's rhetoric around stopping deaths at sea, OSB has failed to formally include search and rescue activities in its scope; there remains, nonetheless, an obligation to ensure assistance to any persons in distress.[175] Classification of information around the border protection policy makes it difficult to assess whether there have been instances of the Navy ignoring distress calls, as was alleged.[176]

A second issue is the allegation that Australian officials paid A$5000 to crew members to return a SIEV to Indonesia.[177] The crime of people smuggling is found in the *United Nations Convention against Transnational Organized Crime* and its *Protocol against the Smuggling of Migrants by Land, Sea and Air*.[178] Article 3 of the Protocol holds people smuggling as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.

The coalition government has not denied allegations of payment, noting: '[We] will do whatever we need to do to keep this evil trade stopped … [We have been] incredibly creative in coming up with a whole range of strategies'.[179] Failing the threshold of financial or other benefits being procured by the Australian Government, additionally, the Protocol criminalises a variety of offences relating to the smuggling of people, including being an accomplice,[180] organising or directing another to commit an offence,[181] or endangering the lives of migrants affected by smuggling.[182] If payment is confirmed, Australia would be liable for any of these additional offences.

It is evident that a large range of measures restricting the flow of information from Canberra have been justified under the need for national security and effective border protection. Where that information is classified, correctly or not, there now exists under the Border Force Act complex complementary legislation that imposes a chilling effect of the layperson.

Proposed solutions

The coalition government thus has three main policy challenges: to maintain a border protection system that is transparent and publicly accountable; to clarify Australia's international obligations and rescue/response system; and to maintain no loss of life at sea. In light of these three policy concerns, certain short-, medium- and long-term solutions will be examined.

Short term

Resurrection of meetings, public reports and internal reviews

An obvious preliminary measure to return transparency and accountability to OSB is the resurrection of regular public, face-to-face media meetings. Whether these meetings occur in Sydney, Canberra or any other city is a non-issue. Alternatively, regular published reports on the number of boat interceptions, incidents of assistance and methods of return could be

reinstated.[183] Failing a desire for publicly acknowledged incidents, a return of the internal reviews system within the Department of Home Affairs when there are major fatal incidents at sea could serve to mitigate further maritime issues. A combination of these mechanisms would allow Australia to satisfy its international and moral obligations as well as policy objectives.

Changing the scope of classified information

Additionally, the government could simply change the scope of classified information. This could be achieved through declassifying the process currently used to restrict information or through narrowing the scope of information captured in the current rule of 'operational, tactical and on-water'.[184] The release of the process used would serve to improve accountability and enable the media, courts and public to hold the government to account. It is valid to maintain secrecy on tactics, techniques and procedures of any operation if a military is to maintain its capability and effectiveness. This can equally be validly extended to the number and location of SIEVs intercepted and the numbers of vessels and personnel deployed. But if operational effectiveness is to justify the restriction of information, it is not acceptable to have it publicly available albeit just not in one easy location.

Information that is not validly classified — but currently is — surrounds the cost of the operation, failure to report incidents that occur at sea, and allegations of violations of international or domestic law. In no other current operational environment has a matter been explicitly listed in the budget but removed from public discussion, except with regard to Operation Augury. Equally, violations of domestic or international law in Iraq, Afghanistan or Timor-Leste have been able to be accounted for through transparency — not hidden behind a veil of secrecy.

Medium term

Law reform and whistleblower protection

Open government requires an indispensable check to be imposed on those entrusted with government power. In order to gain comprehensive access to information, and to facilitate transparency and accountability, the secrecy provisions of the Border Force Act will require further amendments. This can be achieved through a variety of means, although most easily by expanding on the exceptions granted to health workers or other professions. This solution, although failing to address the threat of civil litigation by employers, restores to those who work in border protection the same workplace rights as elsewhere.

By repealing pt 6 of the Border Force Act, the secrecy provisions would no longer act as a barrier to disclosure of valid information.[185] Under current Commonwealth law, the federal government already holds broad powers to prosecute departmental employees and contractors for the disclosure of unauthorised information.[186] In lieu of this, an exception could be made in the Border Force Act for public disclosure.

Increased use of the Administrative Appeals Tribunal

As noted, the current Freedom of Information Division of the Administrative Appeals Tribunal is well suited to dealing with requests of a sensitive military nature through the appointment of Senior Members and could even be expanded to include a 'Military Division' with respect to sensitive — either current or past — operational matters. While it is unlikely that the government would openly establish a separate division, there remains open the possibility of increasing its size or increasing the volume of requests it could accommodate. The Tribunal

could accordingly benefit from a reduction of the filing fees, allowing for further access to justice and information to the public.

Royal Commission into Operation Sovereign Borders

In Australia, the demand for a Royal Commission is often the first acknowledgement of a socially, economically or morally ambiguous issue. A Royal Commission is often the most appropriate body in situations where the government requires a disinterested person to ascertain facts from a series of disputed allegations. Yet, with the exception of mere fact-finding issues, Royal Commissions would appear a lengthy and expensive method of investigating a socio-economic issue.[187] As one critic noted:

> Almost all [members of a Royal Commission] have spent their entire working life at the Bar or on the Bench where they have developed the basically homogeneous set of values that any closed society acquires. Whatever the merit of these values, it is unsatisfactory that so small a group should have control of policy recommendations on important questions … that affect every person in the community.[188]

This homogeneity can be and often is mitigated through the inclusion of co-commissioners and the admission of amicus curiae reports. A Royal Commission into Operation Sovereign Borders would be unlikely to occur, given the federal nature of the operation and the embarrassment that may arise. Equally, in instances when a Royal Commission occurs, the recommendations are often not implemented in full, if at all. This has led to some describing them as 'a toothless tiger'.[189]

Long term

Establishment of an independent body to advise whistleblowers

An alternative to an ad hoc Royal Commission is the establishment of an independent federal body to provide confidential advice to would-be whistleblowers. The solution could be achieved through the expansion of the Office of the Australian Information Commissioner. This would serve the obvious purpose of further enforcing freedom of information requests by providing advice regarding confidentiality clauses in immigration-related employment contracts (failing any repeal of the Border Force Act), which would enable the aforementioned legal labyrinth to be navigated more easily. Financially, this is a relatively inexpensive solution in comparison to a Royal Commission and holds further tangible outcomes.

Regional and bilateral agreements

A final and more comprehensive solution to irregular migration into Australia, as Human Rights Watch has suggested, rather than 'a continued emphasis on punitive crackdowns on people smuggling',[190] is for Australia to do more to protect and promote the rights of people in South-East Asia. Through improving the human rights standards in transit countries, the incentive for irregular migrants to board vessels and take the dangerous northern maritime approach to Australia would be mitigated.

Such measures, facilitated through regional or bilateral agreements for reform, could include access to educational and basic health services; the granting of legal status to irregular migrants; protection for arbitrary arrest, detention and/or deportation; and the right to stay and seek gainful employment.[191] By shifting from attempting to deal with the pull factors (through interdiction, detention and deterrence) to aiming to address the push factors, Australia could easily achieve its goals of stopping the smuggling of persons by boat, stopping deaths at sea and preserving sovereign borders and regional relationships.

Conclusion

On balance, the disadvantages of classifying information relating to the smuggling of persons to Australia outweigh the benefits of operational effectiveness in the aforementioned policy objectives.

There always has been a need to classify sensitive military and law enforcement tactics, techniques and procedures. This need will remain. Equally, there can be and are situations where the equipment and number of personnel should validly be veiled in order to retain an advantage — either in surprise or in capability. But, if this information is to be restricted, it needs to be done comprehensively across government. As it stands, this information is publicly reported by both federal government and independent media. This is on a case-by-case, operation-by-operation basis and should require regular reassessments of the operational need.

There remain, however, fundamental and consequential issues with the government's current classification policy. Primarily, the justifications for the current border protection policy are either unfounded or not reflected in practice. Additionally, there remain various international, economic, political and foreign relations issues that require increased transparency. This is especially pertinent regarding allegations of potential breaches of international obligations.

While the above solutions are all viable, some are more urgently required than others. The re-establishment of the public meetings would reinitiate the flow of information to the public. Further, whistleblowers deserve the same protections guaranteed to those not subject to the Border Force Act. While progress has been made through lobby groups to exclude health workers, an effective humanitarian operation requires an environment where other professions can conduct their roles. Although a Royal Commission could serve to raise awareness surrounding the lack of government accountability, both domestically and internationally, it seems unviable and unlikely to be conducted. A comprehensive shift in how Australia and its politicians view irregular migrants attempting to enter Australia will allow a more effective border protection policy. As it stands, the current coalition government through its actions could be accused of hiding — rather than stopping — the boats.

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ROLES IN PROTECTIVE MANAGEMENT OF PERSON AND PROPERTY

The Hon Justice Geoff Lindsay*

The object of this article, addressed to members of the Guardianship Division of the New South Wales Civil and Administrative Tribunal (NCAT), is to consider:

(a) the respective roles of a 'guardian' and a 'financial manager' (appointed by NCAT in exercise of powers under the *Guardianship Act 1987* (NSW); and
(b) factors to be taken into account in appointing a guardian or financial manager.

The focus for attention is not on the criteria, or pre-conditions, for the appointment of a guardian or a financial manager but on (a) the respective roles assigned to the office of a guardian and the office of a financial manager, once appointed; and (b) criteria for selection of persons suitable for appointment to the office of a guardian, the office of a financial manager or both.

Treating guardians and financial managers as conceptually similar, because they both concern *prudential management* of the affairs of a person incapable of self-management, the article emphasises the *protective purpose* of each office; the need to ensure that an appointee is *able and willing to perform the duties of the office*; and the need to ensure, so far as may be practicable, that an appointee does not occupy a position of *conflict between their interests and their duties to be performed*.

The powers conferred on a person by appointment as a guardian or financial manager are 'fiduciary powers'[1] in that they must be exercised only for the purpose for which they are conferred, and not for collateral purposes — particularly not for the purpose of advancing the interests of the appointee.

In appointing a person to the office of guardian or financial manager, the Tribunal, looking forward, must be satisfied that the appointee can be relied upon to exercise the powers of the office responsibly and not for personal gain. To the extent that the future cannot be known, there is in this an element of risk management.

Statutory foundations

At the outset, recognition must be given to the primacy of legislation governing the powers, functions and duties of each of NCAT, a guardian appointed by NCAT and a financial manager appointed by NCAT. Each is a 'creature of statute' in the sense that each owes existence and authority to legislation, and everything done must be done within the limits of legislative authority.

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In this article an endeavour is made to draw together *ideas that inform the operation of legislation*, administered by the Guardianship Division of NCAT, governing the offices of guardian and financial manager. A thematic approach to the legislation involves analysis not tied to particular provisions. Readers are nevertheless reminded that, in adjudication of a particular case, there is no substitute for a process of reasoning, and an articulation of reasons, faithfully tied to the terms of applicable legislation.

Context

Upon any review of NCAT's Guardianship Division and its exercise of jurisdiction over guardians and financial managers, context at a number of different levels is important. A conversation about the topics addressed by this article cannot go far without recognition of those contextual levels or, at least, identification of the legislative and administrative framework for decision-making.

For my part, perhaps imperfectly, I have endeavoured in a number of judgements to locate decision-making within a contemporary framework, informed by historical exposition — for example, *PB v BB*,[2] *M v M*,[3] *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)*,[4] *Ability One Financial Management Pty Ltd v JB by his tutor AB*,[5] *Re W and L (Parameters of protected estate management orders)*,[6] *Re Application for partial management orders*,[7] *CJ v AKJ*,[8] *P v NSW Trustee and Guardian*,[9] *IR v AR*,[10] *Re AAA; Report on a protected person's attainment of the age of majority*,[11] *Re LSC and GC*[12] and *SLC v RTJ*.[13]

These references are provided here not as a 'last word' on any question but as a contribution to an ongoing conversation that necessarily engages all participants in decision-making affecting those who are, or may be, incapable of managing their own affairs.

By its nature, an exercise of protective jurisdiction must be firmly based on enduring principles, informed and tempered by empirical pragmatism. It must be responsive to the facts of a case. Practical outcomes matter. There is no escape from a need for practical wisdom in dealing with an individual case.

An increasing trend towards 'privatisation' of protective management regimes (which has manifested itself in widespread deployment of enduring attorney and guardianship appointments and, especially since *Holt v Protective Commissioner*,[14] a more liberal use of private financial managers) necessarily elevates the importance of recognising the fiduciary (trust-like) character of the powers of those who manage the affairs of a person incapable of self-management.

Protective purpose

At the highest level of abstraction, NCAT and its appointees represent a means by which the State of New South Wales endeavours to perform the protective function of the Crown in taking care of individuals who cannot take care of themselves.

In contemporary Australia we speak of 'the State'; but there remains utility — in historical exposition, at least — in personification of the protective function of the State by reference to functions of the Crown, functions delegated to agencies of 'government' in the broadest sense. Each branch of government (legislative, executive and judicial) plays a role in performance of the protective function of government.

In Australia, the classic formulation of the protective function is found in the judgement of the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB*[15] (*Marion's case*), elaborated by reference to the judgement of the Supreme Court of Canada in *Re Eve*[16] and the judgement of *Lord Eldon in Wellesley v Duke of Beaufort*.[17]

Historically, as those cases demonstrate, Anglo-Australian law is founded on the proposition that the Crown, as *parens patriae* (father, or parent, of the nation), has an obligation, with commensurate power, to take care of those who are not able to take care of themselves.

An underlying assumption of the law, not to be overlooked, is that each individual has a right (and duty) to take care of himself or herself, so far as he or she is able to do so. Respect is accorded to the dignity of each person as an individual. The gold standard underlying an exercise of protective jurisdiction is the concept of an autonomous individual living, with dignity, in his or her community of choice.

The purposive character of 'protective jurisdiction' looks to the protection of an individual unable to take care of himself or herself: unable to manage his or her own affairs, be those affairs described in terms of 'person' or 'estate' (property).

Everything done or not done on an exercise of protective jurisdiction must be measured against whether it is in the interests, and for the benefit, of the person in need of protection (*Holt v Protective Commissioner*,[18] and *GAU v GAV*[19]).

Care needs to be taken against an ever-present risk that the interests of a person in need of protection are subordinated to the interests or convenience of another person with whom, or an institution with which, his or her life intersects. This they cannot be.

Other contextual perspectives

At a lower level of abstraction, an exercise of protective jurisdiction by an NCAT (through its Guardianship Division) requires an appreciation of:

(a) the legislative framework within which the Guardianship Division must operate;
(b) the institutional framework associated with material legislation;
(c) the availability and nature of the inherent *parens patriae* jurisdiction of the Supreme Court of New South Wales preserved by that legislation;[20]
(d) alternative means available for management of the affairs of a person incapable of managing his or her affairs; and
(e) the general law principles (including equitable principles governing fiduciaries) called into play to hold to account a person who manages the affairs of another, particularly when that other is unable to take care of himself or herself.

It is not the purpose of this article to dwell at length on each of these contextual topics as a central focus. Nevertheless, they must be acknowledged if the declared object of the article is to be served; and particular note must be taken of both the fiduciary character of the office of a guardian or financial manager and the need for such officers to be accountable for due performance of their duties.

The single most important feature of the offices of guardian and financial manager (and one not, in express terms, acknowledged by the text of governing legislation) is that each office is, in character, 'fiduciary' — that is, in the nature of a trust for the benefit of the person in need of protection.

Legislative and institutional contexts

NCAT is a statutory tribunal, in lawyer's language the classic 'creature of statute'. It is constituted, and governed, by the *Civil and Administrative Tribunal Act 2013* (NSW) and cognate legislation.

The expression 'cognate legislation' can be taken as a reference to the *Guardianship Act 1987* (NSW); the *NSW Trustee and Guardian Act 2009* (NSW); and the *Powers of Attorney Act 2003* (NSW).

Insofar as the work of NCAT intersects with the work of licensed trustee companies as financial managers, reference might also be made to the *Corporations Act 2001* (Cth), chs 5D and 7; and the *Trustee Companies Act 1964* (NSW). Licensed trustee companies are regulated by the Australian Securities and Investments Commission and monitored in their performance of protected estate work by the NSW Trustee.

The powers, functions and duties of the Guardianship Division of NCAT are governed, specifically, by sch 6 of the *Civil and Administrative Tribunal Act 2013*.

Passing notice should be taken of the (alternative) avenues of appeal from a decision of the Guardianship Division of NCAT, namely:

(a) an appeal to an Appeal Panel of NCAT;
(b) an appeal to the Supreme Court of New South Wales.

In passing, also, notice should be taken of the fact that nothing in the Civil and Administrative Tribunal Act, the Guardianship Act, the Powers of Attorney Act or the NSW Trustee and Guardian Act displaces the jurisdiction of the Supreme Court of New South Wales, described variously as 'inherent jurisdiction', '*parens patriae* jurisdiction' or 'protective jurisdiction'.

That jurisdiction, however described, has its historical foundations in the *parens patriae* function of the Crown delegated to the English Lord Chancellor, by reference to whose office the jurisdiction of the Supreme Court was defined upon its establishment in the 1820s (and since preserved by s 22 of the *Supreme Court Act 1970* (NSW)), reinforced by s 23 of the *Supreme Court Act 1970*.

The legislative framework within which the Guardianship Division of NCAT operates underpins an institutional framework that assigns complementary roles to:

(a) NCAT itself;
(b) the Supreme Court of New South Wales, not limited to the Court's inherent jurisdiction;
(c) the Mental Health Review Tribunal;
(d) the NSW Trustee;
(e) the Public Guardian;
(f) licensed trustee companies; and
(g) appointees to the office of 'enduring attorney' (governed by the Powers of Attorney Act) and 'enduring guardian' (governed by the Guardianship Act).

Comparative advantages and disadvantages of tribunal and court proceedings

In addressing the Guardianship Division of NCAT as the Protective List Judge of the Supreme Court, I am aware of a need to acknowledge comparative advantages and disadvantages of protective proceedings in one forum or the other.

I am also aware of the practical constraints within which members of the Tribunal and officers of the Court must operate. Everybody must work within the limits of available resources.

NCAT has institutional features not routinely shared by the Supreme Court. They include, firstly, administrative arrangements designed to facilitate procedural informality in the conduct of hearings, and routine reviews of guardianship decisions; secondly, shared decision-making procedures involving lawyers, medical experts and community representation; and, thirdly, procedures which enable access to justice, which is, on the whole, likely to be cheaper for members of the community than more formal procedures pursued in the Court.

On the other hand, there are particular types of cases which must be dealt with by the Court or which might be better dealt with by the Tribunal. Such cases include:

(a) a protracted dispute involving competing claims to control of a large or complex estate, a need for discovery or substantial questions of law;
(b) a case in which a person (or an estate) in need of protection is located outside New South Wales or is proposed to be removed from the jurisdiction (for example, *IR v AR*[21]);
(c) a case in which there is a proposal that a private manager for reward (not being a licensed trustee company) be appointed as a financial manager (see, generally, *Ability One Financial Management Pty Ltd v JB by his tutor AB*;[22]
(d) a case in which consideration may need to be given to:
    (i) a claim for an ex gratia allowance out of a protected estate (for example, *JPT v DST*[23])
    (ii) a prospective application for a 'statutory will' (that is, a will made, for a person lacking testamentary capacity, by an order of the Court) under the *Succession Act 2006* (NSW) (see ss 18, 19, 21 and 23; *GAU v GAV*[24]; *Secretary, Department of Family and Community Services v K*[25]; and *W v H*[26]); and
    (iii) whether any (and, if so, what) relief should be granted to an enduring attorney or guardian who is, or may be, held liable to account for a breach of fiduciary obligations (for example, *C v W (No 2)*[27]; *SLJ v RTJ*).[28]

Both in preservation of its own jurisdiction and in aid of the jurisdiction exercised by the Guardianship Division of NCAT, the Court endeavours to channel routine guardianship work through NCAT, mindful of a need to maintain the integrity of available statutory procedures (*P v NSW Trustee and Guardian*[29]).

Functional comparisons

Historically, with continuing contemporary significance, there is a close functional equivalence between:

(a) the offices of 'guardian' and 'financial manager' appointed by NCAT under the Guardianship Act; and (respectively)

(b) the offices of a 'committee of the person' and a 'committee of the estate' appointed upon an exercise of the Supreme Court's inherent jurisdiction.

In the realm of estate management, a committee of the estate is not the closest parallel with a financial manager appointed by NCAT. Closer still is an exercise of the Supreme Court's jurisdiction under ss 40–41 of the NSW Trustee and Guardian Act to appoint a protected estate manager. What distinguishes a 'financial manager' and a 'protected estate manager' from a 'committee of the estate' is the engagement of statutory managers with the administrative structure (including oversight of the NSW Trustee, subject to review by the Court or NCAT) for which the NSW Trustee and Guardian Act provides.

An order for the appointment of a financial manager by NCAT does not require, and is not accompanied by, a prescription of functions similar to that which routinely accompanies NCAT's appointment of a guardian. An order for the appointment of a financial manager is routinely accompanied by an order that the estate of the protected person 'be subject to management' under the NSW Trustee and Guardian Act. That permits the NSW Trustee to give directions for the management of a protected estate by a private manager. Administrative directions can be adapted to the nature of a particular estate, and varied, with greater flexibility than is generally available in court or tribunal proceedings.

Guardianship orders made by NCAT offer a contrast because, conformably with the Guardianship Act, they are generally limited by reference to particular functions assigned to a guardian by the Tribunal. Assigned functions are generally defined by reference to decisions about the accommodation of the person under guardianship; access to him or her; and the provision of medical, dental or other services to him or her. By guardianship orders limited to particular functions, in duration, and by susceptibility to review, the Tribunal supervises guardians at closer quarters than is generally possible with financial managers.

The distinctive roles of a 'financial manager' and a 'guardian' are often, in practice, interdependent. Questions of accommodation may depend, for example, upon the availability of property and cooperation between a financial manager and a guardian.

There is no absolute bar against one person or institution serving as both a financial manager and a guardian. However, there is utility in recognising a difference between the two types of offices. A necessity for property management does not necessarily carry with it a necessity for management of the person. Civil liberties are generally best preserved by only a slow embrace of coercive powers over the person. Property managers generally do not have an interest in, or aptitude for, management of the person even if (as is increasingly recognised) their management of property must be responsive to the needs of the person whose affairs are under management. A separation of powers is often consistent with, and a safeguard of, both good management and the preservation of personal liberties.

Conceptually it remains true (adapting the classic text by HS Theobald, *The Law Relating to Lunacy*[30]) that, subject to regulatory oversight:

(a) the manager of a protected estate generally has committed to it the custody, regulation, occupation, disposition and receipt of property; and
(b) a guardian has custody of the person, and regulation of government of the person, under guardianship.

The Law Relating to Lunacy is an antiquated text, not one that requires everyday attention, but it has often been consulted by Australian courts called upon to expound the law or to solve particular problems: *W v H*.[31] Its influence can readily be discerned on a reading of *Re Eve*, approved by the High Court of Australia in *Marion's case*. It provides a convenient

summary of principles developed by, or in the time of, Lord Eldon. Those principles inform modern law and practice.

Functional similarities

Although terminology is important, one needs at times to rise above it. In some contexts, financial management is treated as an incident of 'guardianship'. The expression 'guardianship' is capable of embracing both guardians and financial managers. Context is important.

For some purposes, financial management and guardianship can be treated as a single generic class. An example of that is found in the seminal High Court judgment of Dixon J in *Countess of Bective v Federal Commissioner of Taxation*,[32] where the accountability of guardians, financial managers and others for property entrusted to them is expounded in terms that emphasise the need to ensure that 'a guardian' discharges his, her or its duty to take care of the person in need of protection.

Upon analysis of the respective roles of a 'guardian' and a 'financial manager', common denominators commonly encountered are the following:

- Jointly and severally, the offices of a guardian and a financial manager are concerned with *prudential management* of the affairs of a person incapable of self-management and, to that extent, in need of assistance.
- Each office is *fiduciary* in character because a guardian or financial manager is called upon to manage the affairs of another in the interests, and for the benefit, of the other (in circumstances in which that other is, or may be, vulnerable to exploitation).
- All appointments of a guardian or a financial manager are governed by *a duty to observe general principles* prescribed by legislation (the Guardianship Act, s 4; the NSW Trustee and Guardian Act, s 39) *which give primacy to the welfare and interests of a person in need of protection, and by considerations of utility*.
- *All appointments require an assessment of what is required to manage present and future risks, informed by due consideration of the particular circumstances and views of a particular individual, his or her significant others and his or her carers*.

Significance and implications of characterisation of an office or relationship as 'fiduciary'

To describe the offices of a 'guardian' and a 'financial manager' as 'fiduciary' is simply to recognise that, particularly vis-a-vis dealings with property, an office holder is amenable to orders made by the Supreme Court, upon an exercise of equitable jurisdiction, designed to maintain standards that require 'the fiduciary':

(a) not to take, receive or retain an unauthorised profit or gain from his, her or its office; and
(b) not to place himself, herself or itself in a position of conflict between his, her or its duty to the person in need of protection and his, her or its own interests.

Characterisation of the office of a guardian or financial manager as 'fiduciary' carries with it, as an incident of these standards, the proposition that those offices are prima facie gratuitous. As a general proposition, a financial manager or guardian (of an incapacitated person) who seeks payment for his, her or its services requires an order of the Supreme Court authorising remuneration: *Ability One Financial Management Pty Limited v JB by his tutor AB*.[33]

Lying at the heart of *the roles* of a guardian and a financial manager and *any process for selection* of a person or persons to occupy such an office are the following concepts, which require constant emphasis:

- the purposive character of all decision-making designed to protect the interests of, and to operate beneficially for, a person in need of protection because he or she is unable to take care of himself or herself;
- the duty of an office holder to act only in the interests, and for the benefit, of the person in need of protection; and
- a duty on the part of a fiduciary not to profit from the fiduciary office, and not to occupy a position of conflict between duty and personal interest, without due authority.

In the realm of protective jurisdiction, particularly because a guardian or financial manager might live in close proximity to the person under protection, an allowance might need to be made for the possibility that, while generally conforming to the fiduciary ideal, an office holder might obtain a personal benefit *incidental* to performance of the protective role.

That is recognised in *Countess of Bective v Federal Commissioner of Taxation*[34] by allowing that enforcement of a guardian's or a financial manager's obligation to account for the expenditure of funds entrusted to them might be relaxed if the Court is satisfied that any enjoyment by the guardian or manager of a personal benefit has been no more than incidental to due performance of the duty to serve the interests, and to act for the benefit, of the person under protection.

A recent example of the nature and complexity of problems of accountability that arise in the context of family members managing the affairs of family members (particularly pursuant to an appointment as an enduring attorney, unsupervised by the administrative arrangements that attend appointment of a financial manager) is *Smith v Smith*.[35] Left to their own devices, family members often do not recognise the existence of, or potential problems arising from, conflicts of interest. Not uncommonly, even professional advisors (erroneously) assume that no conflicts of interest arise, or need to be guarded against, in a family setting — see, for example, *Reilly v Reilly*.[36]

Consideration of duty and interest

Emphasis on considerations of 'duty' is often accompanied by a warning that a guardian or financial manager is appointed to serve the interests of, and to be beneficial for, the person in need of protection and nobody else: *Re Eve*[37]; *M v M*.[38]

Decision-making governed by a need to serve the interests, and to act for the benefit, of a person in need of protection often implicitly requires a hard-headed assessment of whether what is proposed to be done is driven by ulterior motives of others, particularly (human nature being what it is) those, including family and carers, who surround the person in need of protection. This requires close attention to the existence, in fact and potentiality, of interests in competition with those of the person in need of protection.

Translated into the vernacular, this requires one to ask questions like: What is in this arrangement for the benefit of the person in need of protection? At what cost? And what is in this for other people (particularly promoters of the arrangement, family and carers)?

Answers to these questions might require critical inquiries be made about past, present and prospective family, business, care and succession arrangements.

An absence of clear answers to critical questioning might necessitate an appointment of an independent guardian or financial manager (generally the Public Guardian or the NSW Trustee) on terms designed to facilitate administrative inquiries being made, and a report being provided, to inform further decision-making.

In the Supreme Court this might be done in estate management cases by the appointment of a receiver (usually the NSW Trustee): *JMK v RDC* and *PTO v WDO*.[39] Interim management orders to the same practical effect can be, and are, made by NCAT.

Approaches to selection of a guardian or financial manager

As the seminal judgement of the Court of Appeal in *Holt v Protective Commissioner*[40] illustrates (and as has been explored in a succession of recent judgements, including *M v M*[41] and *Re LSC and GC*[42]), the selection of a person suitable for appointment as a financial manager or guardian needs to be sensitive to the particular, subjective circumstances of the person in need of protection.

That said, the process of selection must also be informed by a hard-headed appreciation of:

- the primacy of duty; and
- risks associated with competing personal interests.

These types of considerations find reflection in the Guardianship Act — for example, in s 17(1). So far as is material, that subsection provides that:

> [A] person shall not be appointed as [a guardian] unless the Tribunal is satisfied that:
>
> (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship
>
> (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship
>
> (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.

In *SAB v SEM*,[43] White J dealt with a submission that, before the Guardianship Tribunal (the statutory predecessor of the Guardianship Division of NCAT) could find that a guardianship order was required by reason of a conflict of financial interests between an enduring guardian and a person in need of protection, it would have to find that the conflict was 'undue'.

His Honour rejected counsel's submission in the following terms:

> [60] … Section 17(1)(b) precludes the Tribunal from appointing *a person* as guardian unless it is satisfied that no undue conflict of interests between the proposed guardian and the affected person exists.
>
> [61] I accept that it follows that the Tribunal is not precluded from appointing *a person* as guardian if it considers that, although a conflict exists, the conflict is not '*undue*'. But the question of whether the Tribunal is precluded from appointing *a person* as guardian is not the same as the question whether the Tribunal considers that a guardianship *order* should be made.
>
> [62] In my view, the Tribunal is entitled to have regard to a conflict, whether undue or not, between the interests of the protected person and a person who is acting in the role of guardian in deciding whether a guardianship *order* should be made.[44]

His Honour accordingly concluded that there was no inconsistency between the requirements of s 17 and a determination by the Tribunal that there was a need for a guardianship order, in the circumstances of the particular case, because there was a clear conflict of financial interests between an enduring guardian and the person in need of protection.

The same language as is found in s 17 is not deployed by Guardianship Act provisions governing the appointment of a financial manager, but substantially the same concepts are at play via the fiduciary obligations of a financial manager as a manager or prospective manager of property. Fiduciary obligations and fiduciary relationships are sometimes more readily discernible in the context of dealings with property than they are in dealings with 'the person'. It may be for that reason that the Act is more explicit in its articulation of the qualities required of a guardian.

Upon consideration of an application (under the *Protected Estates Act 1983* (NSW), legislation antecedent to the *NSW Trustee and Guardian Act 2009* (NSW), s 41) for the appointment of private managers to the estate of a person incapable of managing her affairs, Young J made the following observations in *Re L*:

> [11] … [Both] in the interests of the incapable person and in the interests of minimising later supervision, the Court needs to be satisfied that the managers are able to provide for the incapable person the service she needs.
>
> [12] In the case of a relative, the Court must look to see that there are minimal conflicts of interest, or, if conflicts of interest cannot be avoided, that they are properly dealt with. In the case of a private manager who purports to have financial expertise, the Court needs to be satisfied not only of that person's good fame and character and of his or her ability generally to manage funds, but also that that person has a good conception as to what is required of a fund manager.[45]

In *IR v AR*[46] I made the following observations, drawing on the judgement of White J in *SAB v SEM* and that of Young J in *Re L*:

> [32] Section 17(1)(b) provides formal recognition of the fundamental principle, applicable under both the Guardianship Act and the general law, that the office of a guardian is that of a fiduciary whose obligations must be measured against the protective purpose of the appointment of a guardian in the particular case: The *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420–423; *Clay v Clay* (2001) 202 CLR 410 at 428[37]–433[49].
>
> [33] The expression 'no undue conflict' reflects the reality that, in a particular case, discharge of the obligations of a guardian (e.g. by a member of family living within the same household as the person under guardianship) might necessitate a sharing of resources devoted to the welfare of a person under guardianship, not a complete separation of the lives of guardian and ward …
>
> [35] A 'conflict of interest' is 'undue' within the meaning of s 17(1)(b) if it is reasonably likely, to an unacceptable degree, to impede the proposed guardian's performance of the duties of a guardian in the particular case.

As earlier mentioned, the powers exercised by the guardian or a financial manager are 'fiduciary powers' in the sense that they must be exercised only for the purpose for which they are conferred, and not for collateral purposes (particularly not for the purpose of advancing the interests of the office holder).

The nature of the work performed by a guardian (more than the nature of the work required to be performed by a financial manager) generally requires a degree of physical proximity with the person in need of protection. Each case must, of course, be considered on its own facts. This is especially so in a social environment in which the community enjoys sophisticated systems of communication and the Australian social welfare system routinely

involves placement of vulnerable people under professional nursing care — for example, *HS v AS*.[47]

As illustrated by *IR v AR*,[48] care needs to be taken not to allow a person (or estate) in need of protection to be moved beyond the jurisdiction without regulatory safeguards (including, if appropriate, orders for the appointment of a committee of the estate and/or a committee of the person so as to engage the contempt jurisdiction of the Supreme Court in the event of interference with a guardian or financial manager).

Because the offices of a guardian and a financial manager are fiduciary in character, no appointment by NCAT of a private person to such an office (other than a licensed trustee company, authorised and regulated by legislation) can carry an expectation of reward without the authority of a Supreme Court order.

If, as sometimes happens, a private manager for reward (not being a licensed trustee company) is appointed by NCAT, it should be on the express basis that an application will be made by the manager, on notice to the NSW Trustee, to the Supreme Court for authorisation to claim an allowance for remuneration.

Ability One Financial Management Pty Limited v JB by his tutor AB[49] and *Re Managed Estates Remuneration Orders*[50] outline procedures, including the preparation of a report to the Court by the NSW Trustee, which are designed to enable claims for remuneration to be dealt with in an orderly way.

The availability of the NSW Trustee and the Public Guardian as appointees 'of the last resort', and (in effect) as executive arms of the Court and NCAT, requires specific notice. One should be mindful of the assistance they give to decision-making, sometimes merely by their availability as an alternative form of appointment.

A person in need of protection may *require* the services they provide. Feuding families sometimes (but not always) may be brought to realise the need for cooperative engagement with regulatory authorities when confronted by the *possibility* of an appointment of the NSW Trustee and/or the Public Guardian rather than a partisan private appointee. Sometimes an appointment of the Public Guardian or the NSW Trustee as an independent manager of the affairs of a person who is or may be incapable of self-management is the only practical way to facilitate an inquiry and report essential to service of the protective purpose of the jurisdiction to be exercised in a 'guardianship' case (using that expression, in its broadest sense, to contemplate both guardians and financial managers).

Conclusion

A proper appreciation of the respective roles of a 'guardian' and a 'financial manager', and factors to be taken into account in the appointment of a person to one or both of those offices, requires an understanding of both the text and the context of legislation governing an exercise of protective jurisdiction. One without the other (text and context) is but half a story.

Of critical significance to an understanding of the full story is an understanding that the offices of guardian and financial manager are essentially fiduciary in character, with a consequence that the holder of such an office is duty bound (in positive terms) to serve only the protective purpose for which he, she or it was appointed to the office and (expressed proscriptively) not to allow collateral purposes or personal interests to intrude upon the performance of that primary duty.

Endnotes

1 In the sense described in Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* (LexisNexis Butterworths, Australia, 5th ed, 2015) [5-050].
2 [2013] NSWSC 1223.
3 [2013] NSWSC 1495.
4 [2014] NSWSC 31.
5 [2014] NSWSC 245.
6 [2014] NSWSC 1106.
7 [2014] NSWSC 1468.
8 [2015] NSWSC 498.
9 [2015] NSWSC 579.
10 [2015] NSWSC 1187.
11 2016] NSWSC 805.
12 [2016] NSWSC 1896.
13 [2017] NSWSC 137.
14 (1993) 31 NSWLR 227.
15 (1992) 175 CLR 218, 258–59.
16 [1986] SCR 388, 407–17; (1986) 31 DLR (4th) 1, 14–21.
17 (1827) 2 Russ 1, 20; 38 ER 236, 243.
18 (1993) 31 NSWLR 227, 238D–F, 241G–242A.
19 [2016] 1 Qd R 1, 25, [48].
20 An exposition of which can be found in Justice Geoff Lindsay, 'Children: The Parens Patriae, and Supervisory, Jurisdiction of the Supreme Court of NSW' (18 November 2017) Supreme Court of Australia <http://www.supremecourt.justice.nsw.gov.au>.
21 [2015] NSWSC 1187.
22 [2014] NSWSC 245.
23 [2014] NSWSC 1735.
24 [2014] QCA 308; [2016] Qd R 1.
25 [2014] NSWSC 1065.
26 [2014] NSWSC 1696.
27 [2016] NSWSC 945, [22]–[47].
28 [2017] NSWSC 137, [32].
29 [2015] NSWSC 579, [116].
30 London, 1924, 41.
31 [2014] NSWSC 1696, [30].
32 (1932) 47 CLR 417 [420]–[423].
33 [2014] NSWSC 245.
34 (1932) 47 CLR 417 [420]–[423].
35 [2017] NSWSC 408.
36 [2017] NSWSC 1419.
37 [1986] 2 SCR 388, [427], [429]–[430], [434]; (1986) 31 DLR (4th) 1, [29], [31], [34].
38 [1981] 2 NSWLR 334.
39 [2013] NSWSC 1362.
40 (1993) 31 NSWLR 227.
41 [2013] NSWSC 1495.
42 [2016] NSWSC 1896.
43 [2013] NSWSC 253
44 Ibid [60]–[62] (emphasis added).
45 [2000] NSWSC 721, [11]–[12].
46 [2015] NSWSC 1187, [29]–[35].
47 [2014] NSWSC 1498.
48 [2015] NSWSC 118.
49 [2014] NSWSC 245.
50 [2014] NSWSC 383.

INTEGRITY: THE KEYSTONE TO GOOD TAX ADMINISTRATION

Michael D'Ascenzo AO*

> The way in which revenues are collected and spent defines the symbiotic relationship between the state and its citizens, strengthening the former and making it more accountable to the latter.[1]

The proposition presented in this article is that corruption has a corrosive impact on the wellbeing of a nation and is especially damaging to tax administrations. On the flip side, integrity can be the keystone to good tax administration and benefits the nation in a number of ways.

The approach taken in this article is to contrast perceptions of corruption in relation to South Africa and Australia, with a view to supporting growing concerns that corruption might be getting worse in South Africa.

Corruption operates at multiple levels. At the national level, the political will to fight corruption requires leadership and the engagement of the wider community. At the level of tax system design, there are principles that can help to reduce the opportunity for corrupt practices. While these will require the agreement of government, policy advisers, including tax administrations, can influence government on the shape of the tax system. Similarly, at the level of the tax administration, leadership is also required. However, it is open for tax administrations to implement strategies that can be employed to minimise the risk of corruption associated with the collection of tax. Moreover, in doing so, the tax administration can be an agent of change by building community trust in public sector institutions by seeking recompense from those who undertook fraudulent activities and by collecting much-needed revenue to fund public goods and services.

Creating a mature tax administration is not a simple task. It requires unswerving commitment, at senior levels, to walk the talk and to nurture a high integrity culture. Nevertheless, the processes taken by the Australian Taxation Office (ATO) as a consequence of the reprehensible activities of Petroulias, probably the most significant corruption case in ATO history, provide a useful path to follow.

The corrosive impact of corruption

Corruption is recognised as one of the main barriers to sustainable economic growth, political and institutional stability and social cohesion.[2]

The Transparency International (TI) Corruption Perception Index 2016 highlighted the connection between corruption and inequality, which feed off each other to create a vicious circle between corruption, unequal distribution of power in society, and unequal distribution

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of wealth.[3] Under that index, Australia is ranked 13th out of 176 countries. This means that it is a relatively 'clean' country in terms of corruption. Nevertheless, there should be no complacency. And there is not: this is reflected in the recent changes to the bribery laws and calls for further progress in the fight against corruption.[4] These calls are made notwithstanding a number of successful inquiries by state-level Independent Commissions Against Corruption.[5] South Africa is ranked 64th on the TI Corruption Perception index.

While corruption indexes may have methodological flaws and are indicative only, many tell a similar story. For example, the Heritage Foundation 2017 Index of Economic Freedom ranks Australia 4th out of 180 countries, with the commentary:

> In addition to abundant natural resources, the economy has benefited from an effective system of government, a well-functioning legal system, and an independent bureaucracy, all of which have facilitated robust entrepreneurial development.[6]

South Africa is ranked 81st under that index, with the commentary:

> Performing far below its potential, South Africa's economy has been stifled by political instability and a weakening rule of law. Corruption hampers the functioning of government, however, and enforcement of anticorruption statutes is inadequate.[7]

Under the Worldwide Governance Indicators, in 2015 Australia was ranked 10th out of 215 economies, with scores of 92, 97, 94 and 95 (out of 100) for Government Effectiveness, Regulatory Quality, Rule of Law and Control of Corruption.[8] By comparison, South Africa's scores for these factors in 2015 were 65, 64, 59 and 58.[9]

It is acknowledged that different levels of corruption may be tolerated by different cultures and that the negative impact of corruption may not be uniform across all countries:

> The concept of corruption, defined as the act of breaking an accepted social or legal norm, must inevitably recognize that different societies respect different norms, and that some norms are not precisely defined. Therefore, an act that may be considered corrupt in one society may be seen as normal, expected, or tolerated in another. This is especially the case when the act reflects relations with, or assistance provided to, friends and family, or to other members of close communities.[10]

Nevertheless, while no society is immune from isolated acts of corruption, the impact of corruption on the ability of any state to carry out its functions increases as it becomes more systemic and acute:

> [I]n some circumstances corruption is no longer a deviation from the norm, but is manifested in a pattern of behaviour so pervasive and ingrained that it becomes the norm. In these situations, the state's ability to carry out its basic functions — such as raising revenue, supplying public goods and services (including security), regulating markets, and acting as an agent of society's redistributive goals — can become sufficiently undermined that it is likely to have a significant impact on economic performance.[11]

This is a risk that South Africa needs to bear in mind, because the indications are that the country has a corruption problem which is weakening the nation's potential. Corruption has been seen as a cancer eating away at South Africa's society.[12] This view is shared by many in South Africa, with a major concern being the involvement of the political elite in corruption.[13] A similar warning emerges from World Audit's 2017 World Democracy rankings:

> At 44th in the world [South Africa] is not out of reach of achieving full democracy, it ranks 5th amongst African nation states, but its democratic status is unquestionably under threat since the inheritors of power in the state, after independence, still dominate the nation's politics. These are inevitably without heavyweight political competition, riddled with corruption — always a mortal danger to democracy with any such distortion of an effective balance of power.[14]

The reality is that there are many factors that go towards a healthy economy and a healthy democracy. Most of these factors relate to the culture and customs of the wider society, so it is more extensive than just a public sector problem.[15] The solution to these wicked problems often requires the active involvement of that wider community. This too has been recognised by many in South Africa:

> In our own country, we have also watched how the abuse of power and misuse of public funds can compromise a young democracy … We have to remember that our democracy does not end at the ballot box, but that the public has to be actively engaged and participate at all levels of governance in … demanding transparency and accountability.[16]

There are both supply and demand factors associated with corruption, with no one panacea. Nevertheless, it is often argued that the strong political will of the political leaders is vital to countering corruption.[17] The effective, committed and persistent implementation of South Africa's draft 2017 National Anti-Corruption Strategy would be a step in the right direction.[18]

Leadership needs to be evident at multiple levels of government and administration. As the International Monetary Fund concludes:

> As in all areas, a key catalyst for institutional change is effective leadership. Accordingly, senior governmental officials can play a critical role in changing norms and expectations, not only through the design and execution of public policy but also through their own personal behavior.[19]

Possible futures

At the annual conference of the Asia–Oceania Tax Consultants' Association, held in Manila in 2005, the delegates expressed genuine concern about what they described as a malaise in the Philippine economy.[20] The nub of the concern was the lack of foreign investment — attributable to the absence of modern infrastructure and poor educational and health facilities. According to the speakers, all this was attributable to their tax administration not collecting sufficient revenue to fund essential public goods and services.

The Philippines is not alone in the challenge of developing a modern and high-integrity civil service, including an effective tax administration. Yet the integrity of the public sector and of a country's institutions of law and governance are vital to a nation's wellbeing:

> A public service that is based on merit, that does have high standards of integrity, that does in a quite fundamental way protect citizens from the arbitrary exercise of executive power, doesn't happen in most countries in the world today. And of course most of the time we don't realise we're doing this. It's only when you stand back from what you do and look globally that you recognise how profoundly important it is. We work and we've got to think to lead in the public interest.[21]

Dr Shergold went on to say in respect of Australia:

> Money doesn't change hands for services. Taxes are collected fairly.[22]

More pertinent perhaps for the African continent are the observations of Mwaniki Wa-Gichia, an ATO officer, made in 2010 to the then Commissioner of Taxation:

> Organisational structures have been built in Australia that develop policy, collect revenue, deliver services and manage corporate services with integrity. Where there is absence of such organisational structure and professionalism then corruption, nepotism and failure to collect revenue from taxes fairly is present.
>
> You have also stated that taxation is a price that we pay for a civilised society to provide social equity and promote economic competitiveness and that its administration reflects the nature of our society. It could reflect public fiat over the rule of law or disengagement from the law and its administration. I

> explained in Brisbane how I had seen a practical reality of these views in my own country of birth, Kenya, as evidenced in the taxation system.
>
> After a period of close to 24 years of organisational structures in the public services being eroded by poor governance (engendering corruption, nepotism, failure of collecting taxes fairly, gross avoidance of paying taxes), a government was voted in through a proper democratic process in 2002. This new government commenced on re-building the organisational structures and restoring professionalism in the public service. This was relatively successful and in the first term of government there were evidences of this success as manifested by the taxation system. Administration of taxes was fairer, more effective and efficient, with the public more engaged with the system and revenue was increasing significantly. Expenditure management of the government coffers was also significantly improved. After about four years of rebuilding organisational structures, development funds were disbursed nationally for nation building in an unprecedented manner.
>
> This was just the beginning of the re-building of organisational structures and restoring of professionalism in the public service in Kenya. Although it was short-lived (due to the post-election disturbances of 2008), it demonstrated how taxation and its administration are a key element of a functioning democracy or maybe even a measure of the state of democracy.[23]

It has been said in relation to South Africa:

> The culture of 'rampant acquisition' is spreading so widely that the professional standards of integrity which are the hallmark of functioning institutions are under enormous pressure.[24]

Tax corruption gives rise to a number of harmful consequences on social welfare and economic development. As the focus of this article is on the importance of a high-integrity tax administration to the social and economic wellbeing of a country, it is suffice to say that tax corruption has harmful consequences for a nation. These consequences have been well articulated by Binh Tran-Nam[25] and include:

- Tax corruption causes a loss in the tax revenue collected making it more difficult to fund much needed public goods and services.
- Tax corruptions causes distortion in the allocation of resources, reducing economic efficiency and inflows of foreign direct investment. It is likely to increase uncertainty and impose higher business transaction costs.
- Tax corruption reduces the policy equity of the tax system because those who predominantly enjoy its benefits tend to be higher-income individuals.
- Tax corruption has an adverse effect on the tax morale of taxpayers which weakens fiscal citizenship and voluntary tax compliance.[26]
- Tax corruption reinforces the public's perception of general corruption which decreases the legitimacy of the government.

The impact of corruption on the tax system

There is increasing recognition of the centrality to development of strong tax systems.[27] A tax system that resources services and infrastructure for the development of social and economic institutions serves the community and builds the nation. Taxation, it can also be argued, is central to the social fabric of a country. It is part of the social contract by which citizens collectively agree to contribute to their society.

Corruption can diminish a state's ability to carry out its basic functions, including the proper collection of taxes. As Rahman[28] notes, the underlying causes that drive the supply of corruption from tax officials include complex and unclear tax laws and procedures; non-transparent hiring and reward mechanisms; a low level of skills; a lack of professional ethics and integrity; low pay and a lack of incentives; conflicts of interest; personal greed; and insufficient checks and balances within the administration.

The immediate impact of corrupt behaviour is the direct revenue loss as a result of each individual act of collusion between a person liable to pay tax or duty and a tax or customs official. But there will also be a more pervasive and problematic consequence of corruption for any country's tax system (which must ultimately rely, to a significant extent, upon voluntary compliance with tax obligations by the bulk of taxpayers). It is that, when corrupt behaviour is commonplace among tax and customs officials, the incidence of taxation can become quite arbitrary. If there is only a limited prospect that a taxpayer's non-compliance will be detected and appropriate sanctions imposed (because tax or customs administration is weak) and, in addition, officials regularly engage in collusive behaviour with taxpayers to help them to circumvent tax and duty liabilities, voluntary compliance with the tax laws will necessarily continue to decline, as will the revenue collections.

Remedies

In reviewing the causes and consequences of corruption, it is important to address the overall factors which may lead to corrupt practices, such as extensive intervention of the government in the economy; cultural norms and practices that influence the behaviour of administrators; political interference in tax administration; excessive and unchecked discretionary power in the hands of administrators; the lack of independent agencies to detect and prosecute corruption; weaknesses in the rule of law; and the failure of courts to apply appropriate sanctions.

Many of these issues are outside the powers of the tax administration alone to deal with. In order to deal effectively with corruption, there should ideally be calls for change by the community and a commitment from the government to address the problem. However, subject to government support, progress can be made in relation to the collection of taxes by good tax system design to ensure that there is a clear and well-understood policy and legal framework. In addition, revenue authorities can introduce a range of measures designed to minimise the risk of corruption. In particular, digital processes that automate basic tax functions, appropriate levels of supervision and guidance, accountability mechanisms, codes of conduct, and internal hard and soft controls are effective strategies for improving the integrity of the tax organisation.

Below is a shopping list of strategies that can be employed to minimise the risk of corruption associated with the collection of tax. Some of these measures are in the bailiwick of government, while others can be pursued independently by the tax administration.

Tax policy measures: simplification of the tax system

Simplification of the tax system (for example, reducing the number of tax rates and restricting exemptions) is not only good economic policy but it can also help to reduce opportunities for corruption. From the viewpoint of the tax and customs administrators, clear legislation can provide the framework for the development of systems and procedures that are easily understood by taxpayers and officials. For example, laws which do not contain discretions or exemptions limit the potential for political interference. Similarly, law that are clear, limit the need and heighten the transparency of administrative interpretations of those laws. This policy framework could be based on the following principles:

- **Minimum number of rates**: Rationalisation of tax and tariff rates and clear definitions of how and when different rates apply can reduce the need for interpretation of the law (and regulations) by administrators. This can significantly reduce the need for face-to-face contacts, where, for example, a negotiation may result in the exchange of money for a favourable ruling.

- **Low rates**: If the general perception in the taxpayer community is that the tax system is fair and broadly-based and rates of tax are reasonable, there is less incentive to become involved in fraudulent activities.
- **Minimum exemptions and discretions**: Tax legislation should be written so as to clearly spell out any exemptions in the law and thereby limit, to the greatest extent possible, the discretionary power of ministers or government officials to grant exemptions. Similarly, any discretions should be based on objective criteria and amenable to review processes.
- **Minimum non-tariff barriers to foreign trade**: The need for numerous approvals for foreign trade licences and multi-agency authorisations to import and export creates the opportunity and incentive to engage in corrupt practices.[29]
- **An effective penalty system**: A culpability-based penalty system should provide the administrator with an ability to impose administrative penalties for offences. This may include monetary penalties or other administrative sanctions — for example, for failure to issue invoices for VAT purposes, for failure to file a return by the prescribed date and understatements of income or overstatement of deductions. Serious cases of fraud, including the bribing of revenue officials, should result in higher penalties or criminal prosecution.
- **An independent appeal mechanism**: In order to preserve the independence of the officials and the integrity of the tax system, it is important that taxpayers have the ability to challenge decisions, are assured of a fair and equitable hearing and know that decisions are widely publicised.
- **A regulated tax profession**: The regulation of the tax profession so as to mandate professional and ethical standards can mitigate both the supply and demand side of tax corruption. A well-regulated tax profession can guide their clients to comply with the tax law. In addition, the tax profession could bring to the attention of the tax administration situations where a tax officer is not applying the law correctly. Similarly, it can bring to the attention of scrutineers, the government or the community (for example, through the media), any systemic non-adherence to the tax law by the administration.
- **An effective anti-corruption agency**: Anti-corruption agencies have been used in many countries to varying degrees of success.[30] It is important that such an agency is independent, appropriately funded, sufficiently empowered and able to effect appropriate sanctions.

The framework for modern administration

A degree of autonomy

Many modern tax administrations have a degree of independence from the government, subject to appropriate levels of transparency, scrutiny and accountability. Best-practice approaches include the following:

- **Separating the setting of policy from its administration**: The policy-makers should engage in whatever research and dialogue is necessary during the design of tax policy and in the drafting of legislation, including discussions with the business community. Indeed, an integrated tax design process which involves the administrator and the private sector is recommended.[31] However, once the policy has been established and provided for in the law, there should be a level of separation between the roles of policy-makers and administrators. It must be clear that the law, as interpreted by the administrators, will be applied in that way (subject to the courts) and that it is not possible to obtain more favourable treatment through the influence of the policy-makers. It should not be the responsibility of senior policy-makers or ministers to review and rule on individual cases. Many modern tax and customs administrations have clearly established rules supporting this separation of responsibilities. In some countries, this separation of

responsibilities is spelled out in the legislation that governs the administration of the tax system. This administrative autonomy must however be balanced by an appropriate level of transparency, scrutiny and accountability.

- **Administrative autonomy:** In recent years, one strategy that has been followed by a number of countries for improving the effectiveness of tax administration and to address, among other issues, corruption has been to increase the autonomy of the agency. While there are a number of alternatives to providing greater autonomy, most share the following common features: a degree of financial independence, in the sense that the administrations are able to allocate budget funds as they determine appropriate; administrative independence, meaning that the administrations are provided the authority to formulate their own administrative policies and objectives; and independence from some of the general civil service requirements, so that the administrations are responsible for their own recruitment, salary structure, career paths, training, and establishing performance standards and codes of conduct. These are balanced by requirements for transparency, accountability and scrutiny.

Clear, transparent procedures

Whatever the level of government support, there are strategies which the tax administration can take to minimise the risk of corruption. These include simple, transparent and, where possible, automated procedures; a professional administration; transparent performance standards; a code of conduct; and an effective internal audit and fraud control capability.

Simple and transparent procedures not only reduce compliance costs for taxpayers but also minimise the opportunities for corruption. These procedures could include the following:

- **Digitisation**: The introduction of computerised support for the processing of tax returns and customs declarations, perhaps more than any other change, provides the opportunity to implement standardised procedures in tax and customs administration that leave little to the discretion of the officials. At a minimum, a properly designed system can generally ensure that correct rates of duties and taxes are applied; time frames for payment are met; and those who do not comply with filing and payment time frames are identified, with follow-up action being taken. In addition, the system can provide useful management information including, for example, transactions that do not meet time standards for processing or individual officers who undertake actions that are out of the ordinary.
- **Consistent guidance and interpretations**: Under self-assessment systems it behoves the tax administration to provide clear, concise and consistent guidance to taxpayers about their rights and obligations. Taxpayers can only be expected to self-assess their liabilities with confidence when the interpretation of the tax and duty laws is consistent and procedures are standardised.
- **One-step process**: This would cover the lodgement of the return together with any tax payable (both preferably undertaken electronically).
  Information and documentation requirements: Tax and customs administrations should define their information and documentation needs in a way that minimises the compliance burden on taxpayers. However, the existence of documentation requirements for tax purposes will help to provide a trail to verify the bona fides of the taxpayer's transactions, against which can be judged any interaction with tax officers. In addition, tax office staff should be required to keep documentation which outlines the rationale for their decisions.

Professional tax and customs administrations

The development of professional tax and customs administrations is important, not only to improve the effectiveness of these administrations but also to address issues of corruption. Experience in developed countries has shown that the best way to ensure fairness and neutrality in the administration of the tax system is to develop professional administrations that have clearly defined responsibilities and that are transparent about and accountable for their performance.

The following features characterise professional tax and customs administrations:

- **Professional management**: It is important that tax and customs administrations include skilled, knowledgeable supervisors and managers. The turnover of senior officials in the administrations, where, for example, there is a change of government, without regard to their abilities, integrity and expertise can have a negative impact on the effectiveness and culture of the administration. This is particularly so where good staff are replaced by individuals with little or no knowledge of legislation, regulations, systems, and procedures. In these circumstances, staff may perceive that they have limited career opportunities in the organisation and, perhaps as a consequence, may be more open to corruption. For those who join a tax or customs organisation for the term of a new government, working in that organisation may be seen as a reward and an opportunity to enrich themselves through the provision of exemptions and other concessions to the business or accounting community.
- **Management controls**: These include a clear statement of goals and objectives; well-documented operating procedures; supervision of day-to-day activities; and a regular review of the outputs of employees. These management controls need to be supported by effective communication to staff, internal investigative capabilities and appropriate sanctions. Management should also consider the results of its internal audits, feedback from taxpayers, and the views of its employees in evaluating the health of the tax organisation.
- **Merit-based recruitment and promotions**: A feature of the recruitment and promotional practices of leading tax administrations is the emphasis placed on merit.[32] It is important that people get appointed on merit and not on the basis of nepotism or undue influence. In developing professional administrations, it is important that personnel requirements are clearly defined, including the education and experience requirements of those being employed. Recruitment practices would then base job offers on candidates that best meet those selection criteria. In some countries, revenue administrations, because of restrictive civil service rules, have difficulties in engaging people with the skills required to carry out specialist tasks. However, the revenue authority, if supported by their minister, could seek an appropriate degree of flexibility in relation to human resource management matters (subject to appropriate scrutiny). An important part of establishing a professional administration is a clearly defined (but not guaranteed) potential career path and promotion policy that is based on merit. Each individual must feel that there is an opportunity, based on hard work, ability and integrity, to advance and that to engage in inappropriate behaviour may jeopardise this opportunity (and lead to dismissal). If this is not the case, staff may not be engaged with the goals of the organisation.
- **Compensation and working conditions**: Staff must be provided with sufficient compensation to minimise incentives to engage in corrupt practices. Salaries should be set at a level that provides a reasonable standard of living. This will reduce the incentive to accept bribes to augment wages where they are set so low as to place the officer at the poverty level. In recognition that it may not be possible to address low civil service pay in general, some countries have implemented special pay scales and incentives for staff in revenue agencies. However, improvements in salary levels alone will not be sufficient to guarantee a corruption-free environment. There still needs to be

complementary hard and soft management controls, including appropriate monitoring and sanctions to safeguard the integrity of the organisation and of its staff. Proper office space, equipment and training should also be provided to tax officers if they are to carry out their responsibilities in a professional manner. Poor conditions can also adversely impact on the psychology of the tax officials, reducing their level of pride and commitment to the work they carry out.

- **Staff rotation**: This is a common practice to reduce opportunities for collusion. However, care needs to be taken to ensure that there is a critical mass of capabilities to maintain skills and to ensure the effective day-to-day operations of the administration.
- **Training**: Staff training is crucial to the development of professional tax and customs administrations. In this regard, it is important that a careful analysis of the needs of both the organisation and its staff is completed to ensure that the training matches their needs. For example, the processes for the introduction of new legislation should give adequate attention to the training needs of staff, as well as the guidance necessary to assist taxpayers. In addition to improving the tax technical skills of staff, training can also serve to build 'esprit de corps' and an awareness of the need for responsibility and loyalty to the organisation, thereby reducing the incidence of corruption. Leading tax administrations also undertake office wide fraud awareness programs designed to inculcate high levels of integrity.
- **Complaint monitoring**: Tax administrations can establish a special unit for the receipt of complaints (both from taxpayers and from staff) concerning the performance of officials, and those complaints should be taken seriously and dealt with promptly. Often, the very existence of a unit of this kind may ensure that officials who might think about engaging in some form of unprofessional behaviour will be deterred from that action by the fear that they will be reported. It is good practice for the management of complaints to be monitored by an independent party. For example, in Australia the Ombudsman monitors and assists the ATO in its management of complaints.[33]

Organisational structure

Organisational structure can play an important role in limiting opportunities for corruption. While many leading tax administrations are moving to segment-based structures (for example, large business office, small business office and so on), for many developing countries, the creation of a functional organisation can be an effective way to combat corruption. Even within segment-based structures, there is a division of labour to increase efficiency, thereby also providing visibility across the segment to the end-to-end treatment of particular taxpayers.

Whether the structure is segment-based, functional or a hybrid, the important consideration is a shift away from individual officers being assigned responsibility for all activities (including audits) related to a particular taxpayer, importer or exporter. Through the separation of responsibilities for different tasks in a tax or customs administration, checks and balances can be built into the system. For example, the processing of a customs declaration and physical inspections of goods, when carried out by different officers, can reduce the opportunity to influence decisions such as those related to the classification and valuation of goods. Similarly, in a tax administration, decisions about which taxpayers should be audited will be made in one unit (ideally using digitised case selection systems), the taxpayers' cases will be assigned to a second unit (and the case progressed on a team basis and under appropriate supervision) and, possibly, a third unit will provide quality assurance in relation to the outcomes.

A major development in the history of the ATO was the shift to national approaches rather than local or regional management of the taxpayer population.[34] This refinement to the ATO's planning processes provided greater flexibility for structure to follow strategy rather

than circumscribing the treatments that could be used under functional approaches to improve levels of compliance (and to minimise compliance costs).

In the ATO context, national responsibility is distributed across the country, but decision-makers have a national focus in carrying out their duties. While integrity was not a factor for the ATO's decision to move to national management, in other environments there may be potential for local or regional 'fiefdoms' to resist change, sometimes for improper purposes.

In its national approach, with distributed national leadership, the ATO differs from the way a more traditional headquarters and regional/branch office structure operates in managing market segments, functions or tax types. Effective control of regional/branch approaches under the more traditional models relies on a strong headquarters to direct and monitor localised decision-making and performance.

Performance standards

Building on a base that includes clear legislation and transparent and streamlined procedures, tax and customs administrations should put in place performance standards that enable policy-makers, management and the public to measure how well an administration is performing. This has several advantages. First, it enables the policy-makers, including ministers, to hold heads of administrations responsible if agreed standards are not met. Secondly, it enables management to measure the performance of segments or offices to identify potential problems. Performance standards can also cascade to monitor the work of teams or individuals. Thirdly, it makes very clear to staff what the management's expectations are and that the performance of their area or team (and their own performance) will be measured against these expectations. Fourthly, the public is aware of what is expected and, therefore, should be more willing and encouraged to bring to the attention of management cases where the standards have not been met.

Performance standards should not consist solely of a revenue target and need to include the 'how' as well as the 'what'. In leading tax administrations, revenue targets are not allocated to individual staff, although their performance may be linked to the outcomes of their teams, office, market segment, tax type or national outcomes.

If the only performance standard established for the tax administration (and its staff) is the requirement to collect a certain amount of revenue, the agency (and its staff) may not be brought to account on 'how' the target might be achieved. Meeting revenue targets may do little to ensure that the law is applied in a consistent manner to all taxpayers and that the collection of expected revenue from new policy initiatives will be achieved in a sustainable way.

Similarly, where revenue estimates are not evidenced-based and prove to be fanciful, tax administrators may lose confidence in the legitimacy of their work, providing fertile ground for improper practices. In this situation, there is a need for a revenue estimating capability to better inform the government on realistic targets.

Performance standards in revenue administrations should include the following:

- **Revenue targets**: A professional revenue estimating unit should exist to guide the government in setting revenue targets. Tax and customs administrations should participate in discussions leading to the setting of revenue expectations. Tax statistics and expected GDP developments have critical roles to play in setting realistic forecasts of revenue collections. The administrators should also be invited to provide an

assessment of the practicability of policy proposals being considered by government; the feasibility of collecting projected revenues expected from those proposals; and the compliance cost implications for taxpayers. Once overall revenue estimates have been set, based on the available evidence, it is the responsibility of the administration to determine the strategies for facilitating the collection of revenue. Best-practice administrations would develop a range of strategies (both help and enforcement) built upon an in-depth analysis of risks.[35] The relevant programs, be they national or geographical, would be monitored and their performance measured against preset criteria.

- **Service, audit and enforcement standards**: There should be clearly articulated standards for the various functions that are performed in tax and customs administrations. Legitimacy and accountability is enhanced where a tax administration is transparent about its performance standards, particularly where taxpayers have the ability to seek reasons for any delays or shortcomings. By establishing service standards and making them known to staff and taxpayers, an administration can establish mechanisms to monitor its different functions and identify segments, offices, units and individual officers who regularly do not meet the required standards.

Performance standards are also important for monitoring audit and enforcement operations of a tax or customs administration. Tax administration managers need to know how long auditors are taking to complete their cases and the results achieved so as to be able to compare the work against organisational averages (and against the outcomes achieved using different strategies). Reports from a tax administration monitoring system may help to identify areas that should be investigated for potential corrupt practices, as well as guiding the types of strategies that are productive in raising revenue and improving compliance.

Code of conduct and taxpayers' charter

It is important that both the staff of tax and customs administrations and the people with whom they have to deal on a daily basis are aware of the conduct that is expected of both parties. Codes of conduct and taxpayers' charters play an important role in setting the desired behaviours. By clearly articulating expectations, administrations can hold employees accountable for their performance and take appropriate action when these standards are not met. For a code of conduct to be effective, it should include a description of the disciplinary actions that will be taken if unacceptable behaviour is discovered (and, to be effective, disciplinary actions must be taken where necessary on a consistent basis).

Moreover, it is vital that the code of conduct and the taxpayers' charter is embedded in the culture of the organisation.[36]

A code of conduct would normally include the following:

- **Maintaining integrity**: The acceptance of gifts, favours, or benefits to influence decisions is strictly forbidden. Disciplinary action, including dismissal, is normally taken in cases where employees accept a gift of any significant value. Prosecution action is taken where a bribe is involved.
- **Confidentiality of information**: Information contained in tax returns and customs declarations as well as that obtained from audit activities is highly confidential and, as such, must be kept secure by tax and customs employees. Leading tax administrations make it clear to staff that unauthorised access to taxpayer information is likely to lead to dismissal. Confidentiality of information is supported by data access constraints and holistic monitoring systems which track access to the organisation's IT systems.
- **Conflict of interest**: Employees should be prohibited from engaging in activities that are in clear conflict with their official position. For example, a customs officer would not be

permitted to own a customs brokerage business or to engage in any business that involves extensive import and export activities. Similarly, a tax official would not be allowed to conduct or control a tax advisory business. In addition, revenue officers would not be allowed to have any dealings with entities in respect of which the officers or their families have a material interest. Many administrations also have a requirement that employees disclose their assets at time of employment and update this information on a regular basis so that managers might detect, at an early stage, that an employee has accrued assets that are inconsistent with the level of compensation received by that employee. It is becoming more common practice for tax administrations to require the close relatives of tax officials to make similar declarations of their assets. The tax officials are also required to report any circumstance where the activities of their close relatives may constitute a conflict of interest for them.

- **Appearance and conduct**: Standards for appearance and conduct normally include observing the hours of duty; dressing appropriately; dealing courteously with the taxpaying public as well as with their colleagues; prohibiting the use of intoxicants in the work place; and using government equipment, including vehicles, only for business purposes.

Whistleblower provisions

The availability of avenues for whistleblowing (including protection from disclosure after the event) provides a hedge against corrupt practices. Information about whistleblowing should be actively provided to employees. This can be done, for example, through fraud awareness training, the employee handbook and the organisation's whistleblowing policy. Multiple channels could be offered to employees to raise concerns under the whistleblowing policy, including hotlines, secure intranet sites or directly to fraud prevention and internal investigations units.

There should also be public reporting of whistleblower numbers, with external monitoring by independent parties such as an Ombudsman.

Effective internal audit

While it is the overall responsibility of management to monitor performance and ensure that operational policies are being followed and performance standards are being met, this must be supplemented by an effective internal audit function. Usually, the internal audit team reports to the head of the administration and is responsible for carrying out regular reviews of the operations in the organisation. It is often the internal auditors in tax and customs administrations who are the first to detect instances of corruption when reviewing compliance with procedures.[37] Serious cases of corruption, involving violations of the law, are usually turned over to law enforcement officials for criminal prosecution. Internal audit activities normally include the following:

- **Compliance with operational procedures**: Based on clearly defined procedures which would normally be laid out in manuals or procedural guides, an auditor reviews the key risk areas in the actual day-to-day operations of the tax or customs offices. This would include, for example, reviews of taxpayer account reconciliation processes or results achieved from particular audit initiatives in a tax administration. In a customs administration, the internal auditors might look at declaration processing or procedures for the selection of shipments for physical inspection.
- **Expenditure/use of government funds/assets**: There are opportunities in the administration of large government departments to misappropriate funds. It is one of the roles of internal audit to review activities related, for example, to the purchasing of supplies, awarding of contracts and hiring of personnel.

Ongoing vigilance

Building a system to promote integrity in tax and customs administrations requires the implementation of measures to combat corruption and ongoing vigilance to ensure that such measures continue to operate as intended. In those countries that are considered to have effective and honest tax and customs administrations, considerable resources have been devoted to ensuring that appropriate checks are in place to detect and deal promptly with corrupt behaviour.

External scrutiny

The administration of the laws governing taxation (including customs duties) is critical to the funding of public goods and services. The way taxation is collected also influences the behaviour of taxpayers and of the wider society which it serves. Accordingly, with substantial responsibility should come high levels of accountability. For example, a corporate value of the ATO was to be open and accountable.[38]

In most leading jurisdictions, there is substantial scrutiny of the taxation agencies. For example, in Australia the ATO, while independent in the administration of the tax laws within its bailiwick, provides a comprehensive annual report to Parliament on its activities. The ATO is also subject to scrutiny by parliamentary committees, the Australian National Audit Office, the Inspector General of Taxation and the Commonwealth Ombudsman.

The Australian experience

The corruption indices referred to earlier in this article highlight potential 'alternative futures' for South Africa unless a concerted effort is made to mitigate the harmful consequences of corruption.

The contrasting fortunes of Australia and Argentina over the last century demonstrates the importance of good governance, the rule of law and institutions of high integrity:

> At the beginning of the 20th Century, two new nations were commonly identified as offering the greatest promise for the prosperity and wellbeing of their peoples. They were Australia and Argentina. At that time, the GDP per capita of those living in each country was roughly equal. The prospects for each nation appeared equally promising. However, in the course of the ensuing century, the people of Argentina, despite the great natural resources of their country, fell behind. They did so largely because of the imperfections of their governance. The Australian people, generally speaking, have continued to prosper under their 1901 Constitution.
>
> Among the reasons commonly advanced for these contrasting outcomes have been the inefficiencies and imperfections of the Argentinean law and practice on taxation. For much of the last century, the wealth in Argentina reflected the nightmare that haunted Lionel Murphy in his dissent in Westraders:
>
> > '[I]ncome tax becomes optional for the rich while remaining compulsory for most income earners.'[39]
>
> The example of Argentina's past misfortunes remains before us as a warning. In Australia, we must continue to uphold by law a regime of national taxation that obliges administrators to conform to their legal obligations; to act fairly; to avoid procedures or outcomes that are so disproportionate as to be irrational. At the same time, we must uphold the purposes of our revenue statutes and reject any notion that the paying of lawful taxes is optional.[40]

The ATO experience

The ATO is regarded globally as a leading tax agency administering a modern tax system.[41] The ATO also boasts a proud history where 'honesty and integrity had long been ingrained in the ATO, supported by a fraud and ethics consciousness program introduced in the late 1990s'.[42]

The ATO always had a variety of internal guidelines designed to minimise the possibility of individual officers taking inappropriate action.[43] Nevertheless, these safeguards proved not to be foolproof against an opportunistic attack on the agency's integrity. Nikytas (Nick) Petroulias, a relatively newly appointed assistant tax commissioner, was charged in 2000 with corrupt conduct which he undertook at the end of the 1990s. He was committed to trial in 2002. After around 30 court proceedings, he was convicted in 2008 and jailed for three years.

While the fact that he was caught and diligently prosecuted demonstrates that the existing safeguards eventually worked, the fact that he had made it through the recruitment vetting process and was appointed and then promoted to a senior position, all in a relatively short time frame, while carrying out criminal activities, reveals shortcomings in the processes at the time.

This case highlights the ongoing need for vigilance in safeguarding the integrity of the organisation. The case exposed the failure to carry out appropriate vetting and integrity checks associated with the appointment to a senior position of a person from the private sector and identified further administrative improvements that needed to be made to the operation of the private ruling system.

While not an excuse, the administrative and political environment of the late 1990s and early 2000s helps to explain how the ATO let down its guard. It needs to be remembered that at the time:

> [The ATO was] administering the most extensive tax reform program in the history of this country [associated with the introduction of the Goods and Services Tax] ... The ATO is also in the process of 'reinventing' itself as it prepares to introduce major organisational change to deal with the new tax system … An important added complexity is the increased political sensitivity of tax administration as the major political parties draw one of their major battle lines on tax reform and administration.[44]

More recently, in 2017, a deputy commissioner with three decades of experience in the ATO was charged with abusing his position as a public official, allegedly by having used his position to obtain information that he passed on to his son, who was subsequently charged with conspiracy to defraud the public purse.

As this matter is still to be resolved, it is not possible to determine the level of impropriety of the tax officer, if any. However, the allegations alone have an adverse impact on public perceptions of the ATO. Moreover, this sad episode highlights the importance of values and leadership to an organisation's culture, as well as potential risks associated with conflicts of interest.

The Petroulias matter

Possibly the most significant corruption case in Australian tax history culminated in the conviction of Nick Petroulias on two charges for offences under ss 73 and 70 of the *Crimes Act 1914* (Cth). The jury could not agree upon a verdict with respect to the first count under s 29D of that Act. In passing judgement on Petroulias, Johnson J made the following comments:

> (b) the Offender entered employment with the ATO for the purpose of conducting a business with respect to the marketing of EBAs [Employee Benefit Arrangements] outside the ATO, and using his contacts and influence within the ATO to advance his private business interests;
>
> (c) throughout the period when the Offender worked as a consultant or employee of the ATO between 1997 and 1999, he did not reveal to anyone the true nature of his associations and his private business interests in areas directly relevant to the exercise of his duties;
>
> (d) the Offender did, at the same time, influence favourable outcomes with respect to applications for advance opinions or private rulings in 1997 and 1998 and orchestrate, through Mr Morgan and others, the use of opinions and rulings (and associated documents) for marketing purposes for his own private financial interests;
>
> (e) with respect to the issue of the opinions and rulings, the Offender exercised influence, to varying extents, over Mr Chow, Mr Charles, Mr Targett and Mr Aivaliotes with respect to the issue of favourable opinions and rulings;
>
> (f) in the same period, the Offender used his influence to guide applications made by other interests towards unfavourable outcomes, which were difficult to reconcile with the favourable outcomes for interests associated with the Offender;
>
> (g) the Offender agreed to receive a benefit, namely money, and did receive money (about $41 000.00) as proceeds from these private business interests;
>
> (h) the Offender provided client lists to Mr Morgan in breach of the secrecy provisions in the tax legislation — the client lists were compiled from information obtained by use of the ATO's compulsory powers and were provided to Mr Morgan for marketing purposes to gain a commercial advantage over their business competitors.[45]

The judge went on to say:

> Rather, as I have said, this evidence bears upon the detrimental impact on public confidence in the ATO and the private ruling system administered in the public interest by the ATO, and the practical need for use of substantial ATO resources to, in the words of the Crown submission, sort out the mess created by the Offender's improper conduct. The credibility of the rulings and opinions issued by the ATO was integral to the tax system, and the actions of the Offender brought the ruling system into serious disrepute.
>
> The proper and impartial administration of the tax laws is critical to the operation of our federal system of government. The law vests substantial powers in those exercising these important functions. Those powers are accompanied by important responsibilities, including the duty to serve the public and to maintain confidentiality according to law. By his crimes, the Offender has betrayed the trust and responsibility vested in him. He has damaged the public fabric of our community by undermining confidence in the fair and impartial administration of the tax system.[46]

Private ruling system

Petroulias's activities enlivened various reviews of the ATO and, in particular, in relation to the public and private rulings systems. These included a review of the private ruling system commissioned by the then Commissioner, Michael Carmody and carried out by Tom Sherman[47] — a former Head of the National Crimes Authority. Sherman identified the following as major issues for consideration:[48]

- the tension between business lines and corporate requirements;
- the fragmentation of information technology systems in both case management and precedential systems;
- the establishment of appropriate accountability mechanisms for private rulings, including a distinctive identifier and a central registry;
- improving the system of delegations and authorities to perform private rulings work;

- whether there was any need for Advance Opinions (as distinct from binding private rulings);
- issues related to timeliness and costs;
- issues relating to fraud control;
- integrity checks;
- developing and maintaining current technical manuals; and
- whether private rulings should be drafted in in a way that they could be made public without disclosing the identity of the taxpayer.

On 15 November 2000, Commissioner Carmody[49] responded to the Sherman report and agreed to its recommendations, which included the following:

- that private binding rulings be signed off by the relevant case office and countersigned by an authorising officer, both of whom have to be subject to an integrity check;
- use of IT precedent systems;
- use of a national Case Reporting System to record all private binding rulings and assist in in quality and consistency through inbuilt mechanisms to identify significant issues and, through templates and prompts, to ensure that rulings are properly structured and relevant issues are considered;
- an income tax advice manual to guide officers engaged in technical work;
- escalation procedures designed to identify significant matters and to bring appropriate technical expertise to bear on these matters;
- quality assurance processes that involve a selection of representative cases on a regular basis for review by an assessment panel, commonly involving an external representative (from the private sector or academia); and
- the publication of private binding rulings on a public database without disclosing the identity of the taxpayer.

The latter recommendation, that is the publication of all private rulings on a public database with taxpayer identifiers deleted, was considered by Sherman as the most important measure.[50]

ATO governance

As a result of the 'mess' associated with Petroulias's activities, the ATO made a thorough and comprehensive review of its integrity framework. Existing processes were tightened, and new checks and balances were introduced.

As early as 10 March 2000, the Senate Economics References Committee report on the ATO concluded:

> The Committee is of the view that no organisation can be fully protected from individuals with criminal intent, and it would be unrealistic to suggest that future examples of criminal activity within the office will not arise. However, the Committee notes that the ATO has developed and implemented a comprehensive range of fraud prevention and control procedures and has subjected these procedures to external review.51

Over time the ATO could claim to have a very comprehensive and well-developed governance framework which embedded the Australian National Audit Office's public sector governance principles of leadership, accountability, efficiency, transparency, stewardship and integrity.

Some of the key features, processes and products associated with the ATO's governance framework included the following.

Leadership

- A Strategic Statement to provide a clear sense of direction and a setting for ATO activities. The objective at the ATO became to embed within the organisation a virtuous circle of care, integrity and commitment by staff to the important work of the ATO to continuous improvement and top-down and bottom-up innovation, to new thinking and new ideas and to success.[52]

Accountability

- An outcome and outputs framework that detailed the ATO commitments to the government. It is also used for planning, budgeting and reporting performance within the ATO and externally to government.
- The ATO Plan translated the outcome and outputs framework commitments into specific priorities and deliverables:
  - Business and service line plans and branch plans, as well as individual performance and development agreements, underpin the ATO Plan.
  - The ATO plans are informed by a robust risk management process and health of the tax system analysis.
- The agency agreements set the leadership requirements and development expectations of leaders and staff:
  - A range of communication mechanisms were also used to educate staff throughout the organisation about the importance, and key elements, of good governance and high integrity — these included the weekly Commish article in the ATO's online magazine *News Extra*, SES/EL2 dialogue days, seminars and online learning programs and the Employee Handbook.
- The Taxpayers' Charter set out the relationship the ATO wanted to have with taxpayers and promoted an environment of mutual respect. Its ethos was embedded into the ATO's culture:

> Furthermore, at least so far, the charter approach to tax administration has continued in Australia and found support from both ATO staff and Australian taxpayers. In addition the Australian Taxpayers' Charter has moved on from a simple list of principles and become more embodied in the culture of the ATO. The survey evidence from Australian taxpayers is not only positive but also fits in with the way compliance policy is developing in the organisation.[53]

Efficiency

- The ATO's Compliance Model required a proportionate response to identified risks. Planning processes became more sophisticated as the ATO undertook regular 'health of the system analyses' based on market segments and using multiple lenses.
- The ATO website made the ATO more accessible to taxpayers and their agents and started the trend towards self-service applications which, in recent times, have become a feature of leading tax administrations.
- The changes made to the way the ATO operates as a result of the Change Program were pervasive and in their totality provided a platform for innovation and for building comparative advantage for the ATO.[54]
- There was also increased emphasis on the performance management of staff.[55]

Transparency

- The ATO released its first Compliance Program to the public in relation to the 2002–03 fiscal year and has continued to do this annually.

- The ATO publishes its performance standards on its website and in its report to Parliament.
- The Australian Information Commissioner has described the ATO as being well placed to meet the new requirements of the *Freedom of Information Act 1982* (Cth) because of its approach to informing taxpayers.[56]
- In seeking to make the system easier, cheaper and more personalised for taxpayers, the ATO pioneered two closely related concepts:
  - User-Based Design; and
  - The 3Cs of 'consultation', 'collaboration' and 'co-design'. The 3Cs became formal elements of the ATO's 2006–2010 Strategic Statement and were prominent in the values and themes that underpinned the ATO's 2010–2015 Strategic Statement. The ATO convened an extensive number of consultative forums, which gave a broad range of stakeholders a voice in how the revenue system is administered. The forums included professional advisory committees, liaison groups, expert panels and industry partnerships. There was also active complaints management as an improvement loop for ATO operations. In addition, the ATO commissioned independent taxpayer perception surveys, which it made public. Such surveys are commonly designed to elicit taxpayers' views about the overall fairness and integrity of the tax administration.

External scrutineers of the ATO included parliamentary committees, the Australian National Audit Office, the Inspector General of Taxation, the Commonwealth Ombudsman and the Office of the Privacy Commissioner. The Joint Committee of Public Accounts and Audit observed in its 2011 Report 426 that 'On relationships with the ATO, the scrutiny bodies were unanimous — relationships are good and getting better … Overall, the committee was satisfied with the ATO's handling of the recommendations in reviews and reports made by the external review agencies, especially the large number of recommendations agreed and implemented'.[57]

Stewardship

- Corporate committees constitute a key element of the ATO's governance and assurance arrangements.
- Practice statements outlined internal policies which support efficient, effective and ethical stewardship of powers and resources.
- The ATO has an active Audit Committee, and a Fraud Control unit whose plans are signed off annually by the Commissioner.
- Financial management procedures existed to ensure proper use of money, public property and other resources:
  - Chief Executive Instructions guided officials delegated or appointed to undertake financial tasks under the *Financial Management and Accountability Act 1997* (Cth).
  - Financial assurance processes included implementation of financial controls, and the preparation of certificates of compliance in relation to these controls.
  - Business and service line managers assured the Commissioner of the ATO conformance with internal and external conformance obligations through certificates of assurance.

Integrity

- The Integrity Framework[58] outlined the arrangements that helped to build and maintain an integrity-based culture:

- The framework explained the behaviours, values, and ethics that were essential elements of the ATO's approach, as well as key integrity processes and responsibilities.
- The integrity framework was accompanied by an award-winning fraud awareness program, Make the Right Choice.[59]
- Integrity assurance arrangements included the appointment of an external integrity advisor.
- Various channels and protections existed for whistleblowers, and all claims were investigated.
- There were real and severe penalties (including dismissal and prosecution) for malfeasance, a zero-tolerance approach for unauthorised access to taxpayer information and strong likelihood of detection by internal audit or fraud control staff.

The importance of values and organisational culture

As at 2012, the ATO's integrity framework included a wide range of integrity indicators and a program of certificates of assurance, complemented by internal audit and fraud prevention functions. As part of this framework the ATO:

- set ethical standards for employees, including adherence to the ATO and Australian Public Service values;
- told the community how they could raise concerns or make complaints;
- had an independent integrity adviser to provide advice directly to the Commissioner;
- had systems to prevent and control fraud; and
- used its corporate governance committees to consider and monitor integrity.[60]

Strong internal controls; automated processes; avenues for employees, taxpayers or agents to raise concerns; and an internal audit and fraud control investigation capability coupled with appropriate sanctions are all essential elements of any strategy designed to address corruption in a revenue authority. However, an effective integrity framework works best when it is supported by a high-integrity organisational culture. A focus on nurturing the right culture is at the centre of building a world-class tax administration:

> The ATO culture was of a community of people bound together by the shared knowledge that they were doing important work for the Australian community and a sense of shared professionalism.[61]

Conclusion

Just as a masonry arch or vault cannot be self-supporting until the keystone is placed, high integrity in government and administration, together with adherence to the rule of law, are necessary to carry the weight of community expectations.

While solutions that address the problem of corruption will often require the active involvement of the wider community, the tax administration can be an important harbinger of change. It can introduce measures that minimise the risk of corruption in its organisation and develop and nurture a culture of high integrity within its organisation. A high-integrity tax administration helps to build trust in the public service and collects the revenue necessary to support the government's expenditure agenda. This is not an easy challenge. A tax administration is better able to mature where it has high integrity. So many developing administrations face a catch-22 dilemma — they struggle to mature into world class administrations because corruption negatively impacts on their approaches and on the legitimacy of the tax agency in the eyes of the community.

Nevertheless, it is a challenge that needs a response. This article outlines some approaches that help guide the actions that can be taken to promote a corruption-free administration, where there is effective leadership and the will to do so. What is fundamental is that the staff of the tax administration are aware of and engaged with the importance of integrity at the personal, organisational and national levels.

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FITNESS AND PROPRIETY, SPENT CONVICTIONS AND TECHNOLOGY: LESSONS FROM ASIC INVESTIGATIONS

Nathalie Ng*

The Full Court of the Federal Court of Australia decision to uphold ASIC's permanent ban on Mr Rudy Frugtniet from engaging in credit activities[1] concludes the most recent chapter in what has been almost 25 years of conflict between Mr Frugtniet and various authorities. At the heart of this conflict lies Mr Frugtniet's repeated failure to satisfy regulators that he is a 'fit and proper person' to engage in a range of professions. At times they have also negatively impacted on those around him, including his business partner and one-time domestic partner, Ms Meenakshi Callychurn, who was also recently banned by ASIC. Through the lenses of these two decisions, this article seeks to explore the understanding of 'fit and proper person' obligations, the importance of disclosure obligations owed by directors to the Australian Securities and Investments Commission (ASIC), the use by the Administrative Appeals Tribunal (AAT) of material not available to an original decision-maker when reviewing a decision and the potential pitfalls that can arise when agencies rely on standard electronic forms which may be flawed.

This article considers two recent appeals to the Full Court of the Federal Court of Australia (Full FCA) from decisions of two single judges each dismissing separate appeals from the AAT which, in turn, had each affirmed decisions by delegates of the ASIC to impose banning orders on Ms Meenakshi Devi Callychurn and Mr Rudy Noel Frugtniet.[2]

First, we focus on Mr Frugtniet's chequered history and brushes with the law, his tendency towards dishonesty and lack of candour when dealing with various authorities, and the consequences that followed.

We then discuss the reasons for Mr Frugtniet's failed applications for admission to the legal profession in 2002 and 2005 and examine the phrase 'fit and proper person' in the context of the legal and other professions. We examine the Werribee Magistrates' Court event that resulted in Mr Frugtniet's disqualification under the legal profession.

We analyse ASIC's separate actions against Mr Frugtniet and Ms Callychurn and their subsequent appeals to the Full FCA in respect of ASIC's banning orders. We compare and contrast the differing outcomes in the Full FCA between Mr Frugtniet's permanent ban and Ms Callychurn's four-year ban (subject to a rehearing before the AAT at the time of writing).

We conclude with significant learnings from these cases, including the peculiar operation of ss 85ZV and 85ZZH of the *Crimes Act 1914* (Cth); responsibilities owed by company

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directors; and technology issues in the use of electronic forms. We also raise the possibility of a shared information database between authorities flagging persons the subject to disciplinary action, enabling early preventative action.

Mr Frugtniet's chequered history

Mr Frugtniet has been remarked as carrying with him a 'massive bag of dishonest conduct',[3] possessing disgraceful conduct[4] and demonstrating a 'pattern of conduct [which] rais[ed] a substantial question mark concerning his honesty and his character and reputation'.[5] It is worth setting the scene by examining Mr Frugtniet's history of confrontations with regulators and law enforcement that have led to such comments.

Mr Frugtniet was born in Sri Lanka in 1954 and spent his early years in the United Kingdom. It was here, aged 23, where he had his first brush with the law. Mr Frugtniet was convicted at the Leeds Crown Court on 15 counts of handling stolen goods, forgery and obtaining property by deception and theft. He was sentenced to four years in prison, of which he served two[6] (the UK convictions). As he later reflected on his UK convictions, Mr Frugtniet appeared to deny responsibility for these actions, instead laying the blame squarely at the feet of others, stating 'I was easily influenced and manipulated into joining a group of friends that caused me to commit the offences'[7] and 'as a young man, I fell into bad company, was naïve, totally lost and vulnerable to a group of people who manipulated and exploited me'.[8]

Between 1982 and 1988, Mr Frugtniet travelled to and from Australia periodically, with stints working in the Australian travel industry. In 1989, while working as a travel agent, Mr Frugtniet on several occasions debited credit cards twice for a single transaction. He was initially charged with obtaining property by deception; however, the charges did not proceed to trial because a witness failed to cooperate with the police.[9]

In 1990, Mr Frugtniet migrated to Australia and was granted citizenship. He married and worked in his wife's travel agency. Soon after, Mr Frugtniet began what would become a pattern of ignoring legal requirements and misleading regulatory and licensing authorities.

In 1992, Mr Frugtniet, when giving evidence before the Travel Agents Licensing Authority (TALA) in a matter relating to his wife's travel agent's licence, stated on oath that he had never been convicted of a criminal offence. He specifically denied that he had ever been convicted of a criminal offence in the United Kingdom. His wife lost her licence and appealed to the AAT.[10] In the AAT proceedings, Mr Frugtniet again lied on oath, repeatedly denying suggestions that he had been convicted in the UK as 'the most outrageous suggestion … a most scandalous allegation'.[11] The AAT found that Mr Frugtniet had acted in a 'systematic breach'[12] by being involved with his wife's travel agency, despite there being a special condition imposed on the agency excluding him from involvement in the business.[13] AAT Deputy President MacNamara noted Mr Frugtniet's 'tortuous history', admonished him as 'verbose and argumentative' and declared his 'evidence … simply incredible'.[14]

Unfortunately, Mr Frugtniet did not appear to learn from these experiences. In 1997, he was charged with five counts of obtaining financial advantage by deception for selling invalid airline tickets through his wife's travel agency (the airline tickets charges),[15] demonstrating a 'significant level of criminality'.[16] Mr Frugtniet pleaded guilty to one count of the airline tickets charges in the Broadmeadows Magistrates' Court and paid a $1000 fine, although no conviction was recorded.[17]

Later in 1997, Mr Frugtniet was charged with three counts of perjury in relation to evidence given in 1992 to TALA and the AAT (the perjury charges).[18] He successfully argued that he had believed that his UK convictions were 'spent' convictions and that he was not required to

reveal them to either authority. His claims were accepted by the jury who acquitted him of the perjury charges.[19] In later proceedings, Pagone J noted that the relevant legislation on which Mr Frugtniet believed he had relied did not in fact apply in Victoria[20] and stated that his successful defence 'was not that [Mr Frugtniet's] evidence had been truthful, but rather that his state of mind at the time of giving the evidence afforded him with a defence' to the perjury charges.[21]

In March 1998, while employed by the Australia and New Zealand Banking Group, Mr Frugtniet was charged with six counts of theft and three of attempted theft (the ANZ charges). It was alleged that Mr Frugtniet had provided an accomplice with personal details of account holders, enabling his accomplice to steal money from those accounts.[22] Despite the accomplice pleading guilty, in March 2000, Mr Frugtniet was acquitted.

In October 1999, Mr Frugtniet applied to the Migration Agent Registration Authority (MARA) for registration as a migration agent. As part of this application, Mr Frugtniet was asked whether he was the subject of any outstanding charges or had been convicted of any offence which is not spent.[23] Although his ANZ charges were still on foot, Mr Frugtniet answered 'no' (the false MARA declarations).[24]

In May 2002, MARA initiated an investigation over the possible false MARA declarations.[25] In response, Mr Frugtniet provided a letter of explanation to MARA. This letter was described by Gillard J, in the course of considering his second admission application, as follows:

> [The letter is] rambling, full of irrelevant detail and obviously aimed at creating confusion in the minds of the persons looking into his conduct. He was successful. MARA did not take any further action.[26]

In 2003, Mr Frugtniet was charged with defrauding the Commonwealth of Australia by failing to declare income to Centrelink resulting in his overpayment of entitlements (the Centrelink frauds); however, these charges were dismissed in 2004.[27]

Admission to the legal profession and disciplinary actions against Mr Frugtniet

In 2001, Mr Frugtniet had graduated with a Bachelor of Laws degree from Deakin University, Victoria,[28] and sought admission to the legal profession. It is a core requirement of admission to practice that an applicant is a fit and proper person for admission to legal practice, and an applicant must supply an affidavit of disclosure asserting that he or she has made full disclosure of every matter which is relevant to consideration of fitness for admission. The form of disclosure emphasises both the depth of information needed to be produced and the breath of subject matter to be covered.[29]

Fit and proper person: the various iterations

First, we consider what the phrase 'fit and proper person' means. The expression 'fit and proper person' standing alone carries no precise meaning;[30] rather, it takes meaning from its context.[31] It refers to the personal qualities and conduct of a person in discharging his or her responsibilities, with defining characteristics being honesty, knowledge and ability: honesty to execute truly without malice, affection or partiality; knowledge to know what one ought duly to do; and the ability to execute one's office diligently.[32] The concept of a 'fit and proper person' is not confined to the legal profession. The general principles are replicated across a broad range of fields and vocations.[33] It was observed by Hale J:

> Clearly different qualifications are needed by e.g. lawyers, transport operators, hotel keepers and land agents …[34]

The criteria have been used in the context of the grant of licences for broadcasting,[35] licensing of persons to import drugs under customs regulations[36] and licensing under air navigation regulation,[37] amongst others.

Fit and proper person: legal practitioners

As outlined above, an applicant seeking admission must satisfy an admissions board[38] that he or she is a 'fit and proper' person and suitable for admission to the legal profession. This applies both at the time of first admission (to newly admitted practitioners) and to post-admitted practitioners attempting to renew their annual Australian practising certificate.[39]

The admissions board is entitled to take into consideration a myriad of wide-ranging factors[40] to determine whether a person meets the criteria of being a 'fit and proper person'. The list of factors is non-exhaustive but includes whether a person:[41]

- is currently of good fame and character;[42]
- is, or has been, a bankrupt in his or her personal capacity;[43]
- has been convicted or found guilty of an offence, including a spent offence in Australia or a foreign country, having regard to the nature of the offence, how long ago the offence was committed, and the applicant's age when the offence was committed;[44] or
- has been the subject of any disciplinary action in Australia or a foreign country in any profession or occupation,[45] regardless of whether there was an adverse finding against the person.[46]

One question asks whether a person is currently able satisfactorily to carry out the inherent requirements of practice as an Australian legal practitioner.[47] However, there has been no case law on this specific point to date.

At the time of Mr Frugtniet's application for admission in August 2001, his disclosure affidavit deposed to details relating to his 1997 conviction before the Broadmeadows Magistrates' Court, but not to the UK convictions, perjury charges or ANZ charges mentioned above.[48] When these came to light, his application was rejected by the Board of Examiners.[49]

Mr Frugtniet appealed the Board of Examiners' decision. On 1 May 2002, his de novo appeal was heard by Pagone J in the Supreme Court of Victoria without success. Justice Pagone criticised Mr Frugtniet's 'significant' omission in failing to disclose his UK convictions,[50] stating that the obligation was to 'inform the decision-maker of everything that could bear upon the judgement that needed to be made about … his character … not to select and edit from his life's experiences'[51] and that he should have been, but was not, the 'source of the Board's and the Court's knowledge' of the matters.[52]

His Honour stated:

> the way in which details of perjury charges, the ANZ charges and, more particularly, the UK convictions [came] to light in [the] proceedings [does not] leave [me] with sufficient confidence in the applicant[53] … I am not satisfied that [the failure to volunteer the facts which had given rise to the convictions] have been satisfactorily explained or justified by the applicant.[54]

Whilst Pagone J acknowledged that it was not his task to make a positive finding that Mr Frugtniet was not a fit and proper person for admission to practice,[55] on the materials before him, he found that Mr Frugtniet had failed to satisfy the court that he was a fit and proper person for admission.

Whether an applicant is a fit and proper person for admission to practise is a matter to be determined as at the time of admission.[56] Significant weight can be given to past events. Yet, the existence of old offences, even involving dishonesty, are not necessarily a bar to admission to practice if an applicant can show that he or she has reformed.

In July 2005, Mr Frugtniet made a second application to the Victorian Board of Examiners for admission. He was again refused. Mr Frugtniet appealed against this decision and his appeal was heard by Gillard J of the Supreme Court of Victoria on 24 August 2005.

Justice Gillard heard the matter afresh and delivered a decision on the evidence presented. His Honour recounted Mr Frugtniet's lengthy history, noting that, despite Mr Frugtniet's resolution 'never to do wrong that might cause me to ever lose my freedom',[57] his conduct between 1989 and 2000 clearly showed that his resolve was put to one side.[58]

His Honour described the criteria for a court to be satisfied that a person who has a history of previous transgressions has indeed been reformed: demonstration that his past character or past outlook have changed,[59] usually by evidencing a long period of blameless, honest life.[60]

It has been said that the more serious the transgressions, the longer the period of time necessary to show rehabilitation. Mere expression of contrition is not sufficient — rather, a person claiming to be reformed must show that, on the balance of probabilities, there is not only contrition but that one will not deviate from the high standards required by his profession.[61]

His Honour noted Mr Frugtniet's chequered history, raising the airline ticket charges, perjury charges, ANZ charges, Centrelink frauds, false MARA declarations and UK convictions as examples of dishonesty and deception.[62] He made several damning statements of Mr Frugtniet: 'a man who is loose with the truth and prepared to distort [it] if he thinks it will help him';[63] 'a witness whose first move was to think of an answer which would help his cause rather than being frank and honest';[64] and 'went off on some tangent seeking to minimise his criminality in the past'.[65] His Honour questioned Mr Frugtniet's credibility and went so far as to call Mr Frugtniet's claims 'humbug'.[66] Needless to say, the Court did not accept that Mr Frugtniet was contrite or had reformed, stating that he had refused candidly to admit his level of honesty[67] and that he 'carries … a massive bag of dishonest conduct'.[68]

Justice Gillard went one step further than Pagone J in 2002, remarking that he considered it unlikely that Mr Frugtniet would ever meet the required threshold to demonstrate that he was a fit and proper person. Mr Frugtniet's failure to demonstrate that he was a fit and proper person for admission to the legal profession in 2002 and 2005 effectively closed the door to him practising as an Australian legal practitioner.[69]

At various other times he also failed to meet these criteria to engage in credit activities,[70] to be registered as a tax agent,[71] to give immigration assistance,[72] or to be eligible to work as a licensed conveyancer.[73]

Fit and proper person: migration agents

Mr Frugtniet was first registered as a migration agent on 28 October 1996. Each year thereafter, he applied for repeat registration.[74] In November 2014, a delegate of MARA decided to cancel Mr Frugtniet's registration on the basis that Mr Frugtniet was not a person of integrity or was otherwise not a fit and proper person to give immigration assistance[75] and because of the possible false MARA declarations. Mr Frugtniet appealed the decision to cancel his registration and his appeal was heard by Forgie DP in the AAT in January 2016.

Under the *Migration Act 1958* (Cth), MARA must not register an applicant if the applicant is not a fit and proper person to give immigration assistance.[76] In determining whether an applicant is a fit and proper person, relevant consideration is given to whether the applicant has been convicted of a criminal offence[77] and any inquiry or investigation[78] or disciplinary action[79] of which the applicant has been the subject. MARA may also consider any other matter relevant to the applicant's fitness to give immigration assistance.[80]

Noting Mr Frugtniet's history and the fact that he continued to display no contrition or remorse, instead attempting to distort what happened and refusing to candidly admit his dishonesty,[81] the AAT found that Mr Frugtniet did not exhibit the requisite behaviour of a fit and proper person and a person of integrity.

Relevantly, Forgie DP stated:

> The responsibilities of a registered migration agent are, to a large extent, codified … but, for all that, they are little different from those described by Pagone J as those of a legal practitioner … While the focus of a migration agent will be much narrower than that of a legal practitioner, the same commitment to honesty is required as is candour and frankness irrespective of self-interest and embarrassment.[82]

Fit and proper person: tax agents

After investigating three complaints from Mr Frugtniet's clients about his conduct, the Tax Practitioners Board (Tax Board) in February 2013 took the decision to terminate Mr Frugtniet's registration and prohibited him from reapplying for five years on the basis that he ceased to meet the tax practitioner registration requirement that he was a fit and proper person.[83]

The income tax regime applies the fit and proper person criteria for registration as a registered tax agent[84] and to prepare income tax returns.[85] The legislation features references to 'good fame, integrity and character'.[86] In the context of a tax agent, it has been said:

> A person is a fit and proper person to handle the affairs of a client if he is a person of good reputation ... He should be a person of such competence and integrity that others may entrust their taxation affairs to his care. He should be a person of such reputation and ability that officers of the Taxation Department may proceed upon the footing that the taxation returns lodged by the agent have been prepared by him honestly and competently.[87]

Further, in completing his application for registration as a migration agent, Mr Frugtniet claimed that he had not had his membership or registration with a professional body or registration board refused, cancelled or suspended. The Tax Board regarded this answer as false or misleading.[88] Significant weight was also given to the two decisions in 2002 and 2005 where the Supreme Court declined to find that Mr Frugtniet was a fit and proper person for admission as a legal practitioner. On appeal, AAT Senior Member Fice affirmed the Tax Board's decision, stating that Mr Frugtniet's 'disgraceful conduct [as] a registered tax agent'[89] showed that he was clearly not a fit and proper person to be registered as a tax agent.[90]

Fit and proper person: credit activities

Under the Credit Act, a fit and proper person to engage in credit activities is one who has the attributes of good character, diligence, honesty, integrity and judgement.[91]

ASIC's decision to make banning orders against Mr Frugtniet and Ms Callychurn on the basis that ASIC had reason to believe that both were not fit and proper persons to engage in credit activities[92] is examined in greater detail below. It is sufficient to say that Mr Frugtniet's persistent contraventions[93] and adverse disciplinary history did not meet the standards expected of a fit and proper person. Similarly, Ms Callychurn's failure to engage actively in the operations of the credit business also demonstrated that she was not a fit and proper person.

Disqualification under the Legal Profession Act 2004 (Vic) and fit and proper persons in the context of licensed conveyancers

On 25 May 2010, Mr Frugtniet attended Werribee Magistrates' Court, where he deliberately and falsely represented to the magistrate and opposing party's barrister that he was a sole legal practitioner appearing on behalf of a party.[94] In fact, having twice been refused admission to practice, he had never been an Australian legal practitioner.

Consequently, the Law Institute of Victoria (LIV) applied to the Victorian Civil and Administrative Tribunal (VCAT) for an order that Mr Frugtniet be designated a disqualified person under the *Legal Profession Act 2004* (Vic) (now repealed and replaced by the *Legal Profession Uniform Law Application Act 2014*).[95] Disqualification would have the effect of preventing him from acting as a lay associate of a law practice without the approval of the Legal Services Board.[96] VCAT noted that Mr Frugtniet 'failed to demonstrate any insight into his behaviour' and 'failed to express any responsibility or remorse'[97] and imposed a three-year disqualification order.

During the VCAT hearing, Mr Frugtniet claimed that he had not represented himself as a legal practitioner. Instead, he said he relied on a general power of attorney to appear in the Werribee Magistrates' Court. Although he tendered a document which appeared to have been signed and stamped by a registrar at the Magistrates' Court of Victoria on the day of the hearing, it transpired that the registrar was not working at the Werribee Magistrates' Court on that day.[98] No copy of the power of attorney was listed as being filed or located on the court file.

Vice President Judge Jenkins noted the contrast between Mr Frugtniet's evidence and the evidence of various employees at the Magistrates' Court, concluding:

> I have grave reservations about the veracity of his evidence in a number of respects, but in particular his evidence that he filed the original power of attorney with the Court Registry …[99]

It was also noted that:

> the circumstances reveal that there appears to have been some degree of planning undertaken by Mr Frugtniet in order to get around the limitation which he faced.[100]

Mr Frugtniet sought leave to appeal VCAT's decision.[101] In July 2012, his appeal was heard by Warren CJ, Nettle JA and Beach AJA in the Court of Appeal of the Supreme Court of Victoria.

On appeal, Mr Frugtniet argued that the LIV could only seek a disqualification order in respect of a person who has in fact acted as a lay associate, and the LIV was required to establish that, but for a disqualification order, it was probable that such person would have become an associate.

The Court of Appeal[102] rejected both arguments. The Court said that a disqualification order could be sought regardless of whether the person was a lay associate at the time of the order[103] in order to prevent inadequately disposed persons acting as lay associates:

> given the evident legislative purpose of preventing inappropriate persons from acting as associates of solicitors, it is unrealistic to suppose that Parliament intended to limit the scope of the delegation to taking action against existing associates of solicitors.[104]

Notwithstanding the findings against him, in December 2012 Mr Frugtniet applied for special leave to appeal the decision of the Court of Appeal to the High Court. The special leave application was refused by Hayne and Crennan JJ,[105] stating 'an appeal … would enjoy no prospect of success'.[106]

As a disqualified person[107] under the Legal Profession Act, Mr Frugtniet was automatically disqualified under the *Conveyancers Act 2006* (Vic)[108] and ineligible to obtain a conveyancing licence. In circumstances where a licensed conveyancer has the ability to deal with trust moneys and operate a trust account, it is sensible and logical[109] that a person who is disqualified from the legal profession is also disqualified from conveyancing. The effect of this is that the Conveyancers Act imports the same honesty and fit and proper person requirements from the Legal Profession Act.

Decisions before the Full FCA

Permanent ban from engaging in credit activities

Having presented Mr Frugtniet's background, we now move on to discuss the parts of his story and those of his one-time business and domestic partner, Ms Callychurn,[110] which are directly relevant to the principal cases in this article.

In 2004, Mr Frugtniet commenced work as a finance broker, becoming the sole proprietor of Unique Mortgage Services (UMS), which provided mortgage and loan facilities to consumers.[111] In July 2005, UMS entered into an agreement with Australian Finance Group (AFG) under which UMS would receive a commission for each potential customer it referred to AFG.[112]

In November 2010, UMS lodged an application with ASIC for an Australian Credit Licence (ACL) under the *National Consumer Credit Protection Act 2009* (Cth) (Credit Act),[113] which was granted on or about 24 December of that year.[114] Mr Frugtniet was, at this time, the sole director, secretary and shareholder of UMS.[115] Having obtained an ACL, UMS commenced business as a finance and mortgage broker and an intermediary between credit providers and consumers, dealing with home, vehicle and personal loans and credit cards.[116]

In June 2011 Ms Callychurn was appointed as a director of UMS.[117] Soon after this, in October that year, Mr Frugtniet ceased to be a director of UMS, having been a disqualified person under the Legal Profession Act, leaving Ms Callychurn as the sole director.[118] In spite of this, Mr Frugtniet remained the sole signatory for UMS's bank accounts[119] and continued to maintain control of certain other areas of UMS's operations which ought to have been controlled by its director. For instance, he was responsible for writing and processing loan applications, and he remained the sole contact on the website and for complaints against the company.[120]

At this time, Ms Callychurn also became one of UMS's fit and proper persons for the purposes of its ACL.[121]

As part of her duties as a director of UMS, Ms Callychurn was responsible for lodging its annual compliance certificates with ASIC in the years 2011 and 2012. On 5 February 2012, she completed and lodged online the annual compliance certificate for the compliance period ending 24 December 2011. On 6 February 2013, Ms Callychurn completed the 2012 annual compliance certificate for the compliance period ending 24 December 2012.[122]

She was required to answer the following questions in her certificate on behalf of UMS:

(1) Does the licensee certify that it has no reason to believe that any of its fit and proper people have:
(2) been refused the right or been restricted in the right to carry on any trade, business or profession for which an authorisation (licence, certificate, registration or other authority) is required by law?
(3) been subject to disciplinary action in relation to any such authorisation?
(4) within Australia or overseas been the subject of any investigations or proceedings that are current or pending and which may result in disciplinary action being taken in relation to any such authorisation?

Mr Frugtniet had ceased to be one of UMS's fit and proper persons on 12 January 2013. However, due to technical issues with the online filing form, entering Mr Frugtniet's name in the section for individuals who were no longer fit and proper persons automatically removed his name from the section for naming who *was* (had been) a fit and proper person in the 2012 compliance year, although he had only ceased to be a fit and proper person on 12 January 2013, *after* the annual compliance date of 24 December 2012 and the 2012 year had concluded.[123] This technical glitch prevented Ms Callychurn from properly completing the form and resulted in her filing a document that was, in effect, inaccurate and false in a material particular or materially misleading.

ASIC began investigating both Mr Frugtniet and Ms Callychurn and, in March 2014, issued notices under the Credit Act requiring the production of certain books in UMS's possession, as well as those in the possession of another company, Ozwide Financial Services Pty Ltd, for which Ms Callychurn was the director. Ms Callychurn failed promptly to comply with those notices.[124]

Following on from these investigations, on 26 June 2014, an ASIC delegate made a permanent banning order against Mr Frugtniet under s 80(1) of the Credit Act,[125] effectively preventing Mr Frugtniet from ever again carrying on a business providing credit. Despite its proximity to these proceedings, Mr Frugtniet failed to inform ASIC of his termination as a migration agent by MARA, providing yet another example of what appears to be a pattern of attempts to conceal past behaviour from regulators.[126]

Shortly after this, on 27 February 2015, a delegate of ASIC made a banning order prohibiting Ms Callychurn from engaging in credit activities for five years and,[127] as a consequence of no longer having any directors or fit and proper persons, the delegate also stripped UMS of its ACL under s 55(1) of the Credit Act.[128] Under the Credit Act, ASIC has powers to make a banning order against a person if ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities.[129] As will be outlined below, ASIC alleged that Ms Callychurn failed actively to engage in the operations of the business and failed to meet the standards expected in the roles of key person and fit and proper person. It followed from such allegations being established that she would be unfit to engage in credit activities.[130]

Ms Callychurn sought review before the AAT, which found that, given her knowledge of the disciplinary action and proceedings against Mr Frugtniet, she had contravened s 225 of the Credit Act by failing to take reasonable steps to ensure that she did not make, or authorise the making of, a statement which was false in a material particular or materially misleading in filing the annual compliance certificates for the years 2011 and 2012, 'a matter that could [have affected] the ability of [ASIC] to appropriately monitor UMS'.[131] The AAT also relied on other

facts in determining that Ms Callychurn had failed in her duties as a director of UMS and was not a fit and proper person to engage in credit activities. For example, although Mr Frugtniet ceased to be one of UMS's fit and proper persons, Ms Callychurn allowed him to continue controlling UMS's affairs.[132] They also considered that Ms Callychurn caused UMS not to respond to a notice to produce documents issued by ASIC.

It is worth taking a moment to go into more detail about the steps that appear to have been taken to save UMS from losing its ACL, including the appointment of Madeleine Seyfarth as a director in April 2015 and the appointment of David Fu as company secretary in June 2015, when Ms Seyfarth resigned as director.[133] It later emerged that Ms Seyfarth was the niece of Mr Frugtniet and, as an undischarged bankrupt,[134] had been disqualified from managing corporations. While little is known of Mr Fu, his appointment was not sufficient to save UMS, and the AAT decision-maker, Deputy President Professor Robert Deutsch, expressed concerns about his relationship with the other parties.[135] Also of note at this time were two applications made by Ms Callychurn — the first to stay proceedings before the AAT[136] and the second for the member, Deputy President Professor Robert Deutsch,[137] to recuse himself on the grounds of apprehended bias. Neither application was granted.[138]

The AAT upheld ASIC's decision but varied the length of Ms Callychurn's ban from five years to four years.[139] Before the AAT, Ms Callychurn raised her particular difficulty in completing the 2012 certificate on ASIC's online form. Initially ASIC did not accept this point but, after the AAT hearing, it conceded that Ms Callychurn's claim was accurate and the online form was deficient, as it did not permit Ms Callychurn to manually add Mr Frugtniet's name to the 'list of fit and proper people as at the licensee's annual compliance date'.[140]

Ms Callychurn and Mr Frugtniet separately appealed the AAT decisions in their respective proceedings to the Federal Court of Australia. Both appeals were denied, Ms Callychurn's by Bromberg J in 2016[141] and Mr Frugtniet's by Beach J in 2017.[142] Mr Frugtniet and Ms Callychurn each then appealed to the Full Federal Court.

The Frugtniet decision

Mr Frugtniet raised a number of grounds of appeal, all of which were ultimately dismissed by Reeves, Farrell and Gleeson JJ of the Full FCA. However, it is worth considering this case for some key statements of current law, most notably around the areas of the requirements of fit and proper person tests and material which the AAT may consider when considering an application for review.

Both Bromberg J at first instance and the Full FCA applied the *Bond* test[143] whereby a question of who is fit and proper should be considered in context of the activities in which he or she will be engaged.

The second area of note is the application of ss 85ZM, 85ZV and 85ZZH of the Crimes Act regarding 'spent' convictions. While s 85ZV provided that Mr Frugtniet was not required 'to disclose to any Commonwealth authority in that State … for any purpose, that fact that [he had] been charged with or convicted of [an offence within the meaning of s 85ZM]', s 85ZZH excludes the operation of this section where 'a court or tribunal [is] established under Commonwealth law … for the purpose of making a decision'. This means that, while the ASIC delegate was not able to consider certain of Mr Frugtniet's past convictions (namely the Broadmeadows and UK convictions) in reaching his or her conclusion, the AAT was not so restrained. Despite describing this as possibly 'giv[ing] rise to strange outcomes … [where] the AAT in reviewing [a] decision of ASIC, could take account of material that ASIC was not permitted to take into account',[144] Bromberg J chose to follow a decision of Middleton J in *Toohey v Tax Agents' Board of Victoria*[145] (*Toohey*) and held that the AAT was not precluded

from considering more material than ASIC.[146] Justice Bromberg considered the Toohey decision on point and that, unless Middleton J's decision was 'plainly wrong', he should follow it[147] — a view endorsed by the Full FCA on appeal.[148] In further considering this, the Full FCA also drew on an 'instructive' decision from the NSW Court of Appeal's decision in *Kocic v Cmr of Police, NSW Police Force*,[149] which considered a similar provision in the *Criminal Records Act 1991* (NSW).[150] The Full FCA found the reasoning of White JA in that matter 'persuasive' and noted that:

> The question for determination of a Tribunal is not whether the decision which the decision-maker made was the correct or preferable one *on the material before him*. The question for the determination or the Tribunal is whether that decision was the correct or preferable one *on the material before the Tribunal*.[151]

The Full FCA finally drew on the High Court's decision in *Shi v Migration Agents Registration Authority*,[152] concluding that 'that case makes it clear that, depending on the decision under review, the [AAT] may have regard to material that was not before the original decision maker'.[153] In an interesting quirk of law, it is clear that the AAT was allowed to consider the Broadmeadows and UK convictions and therefore had an expanded pool of considerations to draw from as compared with the original ASIC delegate.

The Callychurn decision

Central to Ms Callychurn's appeal to the Full FCA were her affirmative responses to the three authorisation questions in UMS's annual compliance certificates for the 2011 and 2012 years. Justices Rares, Collier and O'Callaghan focused on two main grounds of appeal: first, whether Ms Callychurn had accurately answered the three authorisation questions, as Mr Frugtniet had not, as a result of the VCAT order, been refused or restricted the right to carry on a profession for which he was required to hold an authorisation (being that of a lay associate of a law practice); and, secondly, whether Ms Callychurn's inability to complete the defective online annual compliance certificate meant that the certificate was false or misleading.

Regarding the first ground, when completing the annual compliance certificate, Ms Callychurn had answered a series of questions (outlined previously), including one as to whether any of UMS's fit and proper people had been 'refused the right … to carry on any trade, business or profession for which an authorisations … is required by law'. The AAT had stated that, as a result of the VCAT disqualification order, Mr Frugtniet was restricted in his right to practice as a lawyer. The Full FCA noted that this was 'clearly incorrect', since Mr Frugtniet had never been a lawyer; rather, he had been denied admission to practise in the first place in 2002 and 2005.[154] Further, the Full FCA disagreed with the AAT's finding that the effect of the VCAT order was that Mr Frugtniet was required to obtain authorisation to work as a lay associate of a legal practice. Rather, the Court found that there was, in fact, no authorisation required at law for a person to be employed as a lay associate under the provisions of the *Legal Profession Act 2004* (Vic).[155] Mr Frugtniet had not, therefore, 'been refused or restricted in a right to do anything for which any authorisation was required by law',[156] so Ms Callychurn's answers to the authorisation questions on the annual compliance certificate were neither inaccurate nor false and misleading.[157]

The second ground of appeal concerned the difficulty that Ms Callychurn had encountered in completing the 2012 certificate electronically, due to the deficiency in the online form:

> Put simply … it was not possible for [Ms Callychurn] when completing the online form, once she had filled in the field that Mr Frugtniet had ceased to be a fit and proper person … to include his name in the field immediately below in the list of fit and proper people as at the licensee's annual compliance date.[158]

This was a view which ASIC ultimately accepted.[159] The Full FCA resolved the issue neatly and succinctly, reasoning that questions of 'whether a person makes a statement that he or she knows to be false in a material particular requires the tribunal of fact to read the documents as a whole'.[160] As a logical consequence of its proper reading the form 'conveyed to a reasonable reader that Mr Frugtniet had been a fit a proper person [of UMS]' in December 2012 as he had ceased to be one in January 2013.[161]

There was no issue on appeal that Ms Callychurn was a fit and proper person to engage in credit activities; accordingly, the Court remitted the matter to the AAT for reconsideration of the period of the ban according to law.[162] As at the time of writing, Ms Callychurn's matter in the AAT is still ongoing, with a further hearing to be resumed on 26 March 2018.

Conclusions and learnings

Drawing from the experiences of Mr Frugtniet and Ms Callychurn, the ASIC investigations reveal key learnings in respect of the use by a Commonwealth court or tribunal of material not available to an original decision-maker when reviewing a decision and the potential pitfalls that can arise when agencies rely on flawed electronic forms. It also raises the possibility of a shared knowledge database in respect of persons with an adverse disciplinary history. Emphasis was placed on the fact Commonwealth must observe a traditional standard of fair play in dealing with private parties,[163] as private parties cannot be penalised for government system malfunctions, and these implications extend beyond just ASIC to other Commonwealth bodies.

Crimes Act and spent convictions

As outlined above, in several proceedings Mr Frugtniet claimed that some of his past convictions were 'spent' and, as such, he was not required to disclose them or, alternatively, that decision-makers should not take them into account. In particular, this was a significant issue in Mr Frugtniet's appeal against ASIC's permanent banning order. Although ASIC has the power, under the Credit Act, to consider any criminal conviction from up to 10 years before the banning order is proposed to be made[164] or any other matter ASIC considers relevant,[165] it could not consider his older convictions due to provisions within the Crimes Act. As discussed previously, however, the AAT was not so restricted. While Bromberg J suggested that this interpretation could give rise to 'some strange outcomes',[166] it was endorsed by the Full FCA.[167]

The peculiar result of this finding is that the AAT had the ability to take into account various past convictions of Mr Frugtniet which the ASIC delegate had been prevented from considering. While the delegate's decision and that of the AAT were no different in their effect one could envisage a scenario where a delegate, or other decision-maker, prevented from considering convictions in excess of 10 years old, imposes a *relatively* minor ban but on review, the AAT, or some other tribunal, taking in to account these prior convictions increases the ban, or other negative outcome, for the party seeking review. Persons with chequered histories who are aggrieved of decisions by statutory bodies and considering reviews by a tribunal should be aware of such a contingency lest they find themselves in a worse position than they were in before.

Responsibilities of company directors

Generally, a company is to be managed by or under the direction of its directors.[168] Company officers carry important legal and fiduciary responsibilities. As company directors, Ms Callychurn and Mr Frugtniet were found to have failed in discharging their duties with due care

and diligence,[169] in good faith in the best interests of the corporation and for a proper purpose.[170]

Director duties are contained in the *Corporations Act 2001* (Cth) and other laws, including the general law. Obligations on directors apply equally to validly appointed directors as well as persons who are not validly appointed but act as de-facto directors and shadow directors.[171] For example, Mr Frugtniet maintained control of all material aspects of UMS operations despite having been removed as a director. His responsibility for writing and processing loan applications and his responsibility as the sole signatory to UMS's bank account were indicative of powers and duties characteristic of a company director.[172] As the sole contact on the company website and for complaints against the company, Mr Frugtniet could reasonably be perceived by third parties as a company director.[173] Non-director persons associated with business operations should take care not to act outside their authority.

Ms Callychurn also failed in her director duties by failing to respond to notices issued to her companies. She failed to be honest and forthcoming in her interactions with regulatory authorities and her excuse for non-compliance was described by the court as untenable.[174] Persons who are company directors must demonstrate that they are appropriately engaged with operating the business and attending to duties associated with their office. Vice versa, improper and inappropriate delegation also constitutes a dereliction of duty.

Technology

Many government and statutory bodies are spearheading the move to electronic document management systems. Sophisticated online portals permit template electronic forms to be accessed, completed, and lodged. For example, ASIC requires many commonly used forms to be lodged online via portals and ASIC Connect. The State Revenue Office operates the Duties Online system for payment and processing of duty, Land Victoria maintains the online title registry, and property exchange platform PEXA facilitates property transactions and settlements.

Often, it is in the interests of the administering bodies to use template forms specifying a set number of potential responses. For instance, users may only be permitted to select an answer from a drop-down pick list of designated pre-completed options or 'tick' a limited number of options on a checklist. Furthermore, forms with open-ended questions may have a character or size limit. Whilst one could previously pen in additional information in the column of a paper form, or annex extra sheets to the end elaborating on answers, most electronic forms do not allow this.

Although this is an efficient exercise for administering bodies, electronic platforms throw up a new set of challenges for the users, especially those less literate in technology. Indeed, Ms Callychurn complained of the difficulty in providing accurate information where the glitch in ASIC's system operated to automatically omit Mr Frugtniet's name from the list of 'fit and proper persons', and there was no functionality for Ms Callychurn to manually add his name in. It is here that the Full FCA provides some comfort to users, stating:

> ASIC knew, or must be taken to have known, of how its own electronic form operated to prevent listing someone in the field for fit and proper persons at the compliance date where that person's name appeared in the field for persons who had ceased to be fit and proper persons.[175]

Nevertheless, in the face of any uncertainty, users should err on the side of caution and ensure that they take reasonable steps to supply accurate information and keep detailed records substantiating their answers.

Concurrently, administering bodies may also be able to overcome the technology glitch experienced by ASIC in the design stage and rigorous pilot testing, as well as ensuring that they have intrinsic knowledge of their electronic platforms (including limitations of same) and make available adequate technical support for users.

A shared database?

There is a considerable body of case law relating to Mr Frugtniet and his associates. A search of the Frugtniet name brings up cases dating back to 1991 involving Mr Frugtniet, his ex-wife, his brother and sister-in-law, his niece and Ms Callychurn. Mr Frugtniet currently has proceedings on foot before the MARA and therefore his litigation story is still a work in progress.

Our review of the existing case law with respect to Mr Frugtniet showed that the various authorities, in the course of taking disciplinary action against him, consistently and exhaustively repeated a similar set of facts relating to his history and misbehaviour. There is a clear pattern of regulators discovering Mr Frugtniet's history and taking action which Mr Frugtniet appeals, even when, as one judge stated, 'the appeal is incompetent, and even if treated as competent it is of little merit'.[176] This litigation places pressure on both the courts and the regulators themselves.

Whilst noting that many of the authorities maintain a register of disciplinary action, a single shared database amongst the authorities flagging persons with disciplinary history and sanctions could, therefore, prove useful for authorities and also serve the public interest. As evidenced by Mr Frugtniet, it is not unusual that a legal practitioner might also practise in conveyancing, tax, and migration matters — and might have been subject to disciplinary proceedings in each field. In *SZFDE v Minister for Immigration and Citizenship*,[177] an individual had held himself out as being a solicitor and a migration agent when in fact he had been struck off as a solicitor and deregistered as a migration agent, then defrauded his clients into not appearing before the Refugee Review Tribunal to their detriment.

Despite the Supreme Court of Victoria finding in 2002 that Mr Frugtniet was not a fit and proper person, nevertheless, in December 2010, a company of which he was sole director, secretary and shareholder was granted an ACL. Shared knowledge between the various statutory bodies could go some way to avoid this recurring.

Further, or in the alternative, tying in legislation across various industries to mirror the causal relationship of the Legal Profession Act and Conveyancers Act in respect of disqualified persons — a disqualified person under the Conveyancers Act is now a disqualified person within the meaning of the Legal Profession Uniform Law (Victoria) — could potentially reduce the need for each authority to expend individual resources in separately commissioning investigations and pursuing persons of interest.

Endnotes

1 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162.
2 *Callychurn v Australian Securities and Investments Commission [*2017] FCAFC 137; and *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162.
3 *Frugtniet v Board of Examiners* [2005] VSC 332, [67] (Gillard J).
4 *Frugtniet and Tax Practitioners Board* [2014] AATA 766, [104].
5 *Frugtniet v Board of Examiners* [2005] VSC 332, [68] (Gillard J).
6 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [7].
7 *Frugtniet v Board of Examiners* [2005] VSC 332, [39].
8 Ibid [41].
9 Ibid [17].
10 Ibid.

11 Ibid.
12 *Corine G Frugtniet (t/a Karina Travel Int) v Travel Agents Licensing Authority (1995/32930)* [1995] VICCAT 39.
13 Ibid; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [8].
14 *Corine G Frugtniet (t/a Karina Travel Int) v Travel Agents Licensing Authority (1995/32930)* [1995] VICCAT 39.
15 *Frugtniet v Board of Examiners* [2005] VSC 332, [53].
16 Ibid [59].
17 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [9]; *Frugtniet v Board of Examiners* [2002] VSC 140, [2]; *Frugtniet v Board of Examiners* [2005] VSC 332, [60].
18 *Frugtniet v Board of Examiners* [2005] VSC 332, [17]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [49]; *Frugtniet v Board of Examiners* [2002] VSC 140, [5].
19 *Frugtniet v Board of Examiners* [2005] VSC 332, [17]; *Frugtniet v Board of Examiners* [2002] VSC 140, [7].
20 *Frugtniet v Board of Examiners* [2005] VSC 332, [17].
21 *Frugtniet v Board of Examiners* [2002] VSC 140, [7] (Pagone J).
22 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [10]; *Frugtniet v Board of Examiners* [2002] VSC 140, [5]; *Frugtniet v Board of Examiners* [2005] VSC 332, [48].
23 *Frugtniet v Board of Examiners* [2005] VSC 332, [45].
24 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [11].
25 Ibid [13].
26 *Frugtniet v Board of Examiners* [2005] VSC 332, [50].
27 *Frugtniet v Secretary, Department of Family and Community Services* [2004] AATA 996.
28 *Frugtniet v Board of Examiners* [2005] VSC 332, [17].
29 *Frugtniet v Board of Examiners* [2002] VSC 140, [2].
30 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, [380].
31 Ibid.
32 *Hughes and Vale Pty Ltd v State of NSW (No 2)* (1955) 93 CLR 127, [156].
33 Ibid.
34 *Maxwell v Dixon* [1965] WAR 167, [169].
35 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
36 *Re Dowling and Secretary to Department of Health* [1985] AATA 237; (1985) 8 ALD 171.
37 *Re Taylor and Department of Transport* [1978] AATA 64; (1978) 1 ALD 312.
38 In Victoria and New South Wales, lawyers and law practices are subject to the same framework of Legal Profession Uniform Rules made by the Legal Services Council — in Victoria, the Victorian Legal Admissions Board; in New South Wales, the Legal Profession Admission Board.
39 Legal Profession Uniform Law, s 45(2). The Uniform Law applies as if it were an act: see *Legal Profession Uniform Law Application Act 2014* s 4. The Uniform Law is in force in New South Wales by application of the *Legal Profession Uniform Law Application Act 2014*. The Uniform Rules also apply to Australian-registered foreign lawyers.
40 *Legal Profession Uniform Admission Rules 2015*.
41 *Legal Profession Uniform General Rules 2015* r 13(1), in force in Victoria and New South Wales.
42 Ibid r 10(1)(f). The equivalent provision for a renewal of practicing certificate is the *Legal Profession Uniform General Rules 2015* r 13(1)(a).
43 Ibid r 10(1)(g). The equivalent provision for a renewal of practising certificate is the *Legal Profession Uniform General Rules 2015* r 13(1)(b)(i).
44 Ibid r 10(1)(h). The equivalent provision for a renewal of practising certificate is the *Legal Profession Uniform General Rules 2015* r 13(1)(c).
45 Ibid r 10(1)(i).
46 Ibid r 10(1)(j). The equivalent provision for a renewal of practising certificate is the *Legal Profession Uniform General Rules 2015* rr 13(1)(g)(i), (ii).
47 Ibid r 10(1)(k). The equivalent provision for a renewal of practicing certificate is the *Legal Profession Uniform General Rules 2015* r 13(1)(m).
48 *Frugtniet v Board of Examiners* [2002] VSC 140, [3] and [5].
49 *Frugtniet v Board of Examiners* [2005] VSC 332, [17].
50 *Frugtniet v Board of Examiners* [2002] VSC 140, [3] and [5].
51 Ibid [11].
52 Ibid [14].
53 Ibid [11].
54 Ibid [13].
55 Ibid [15].
56 *Re B* [1981] 2 NSWLR 372, [381].
57 *Frugtniet v Board of Examiners* [2005] VSC 332, [43].
58 Ibid [43] and [44].
59 Ibid [31].
60 Ibid [32].
61 *Stasos v Tax Agents' Board of New South Wales* [1990] FCA 379.
62 *Frugtniet v Board of Examiners* [2005] VSC 332, [18].

63 Ibid [68].
64 Ibid [37].
65 Ibid [68].
66 Ibid [65].
67 Ibid [66].
68 Ibid [67].
69 *Frugtniet v Board of Examiners* [2002] VSC 140; *Frugtniet v Board of Examiners* [2005] VSC 332; *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178.
70 *National Consumer Credit Protection Act 2009* (Cth) s 37(2).
71 *Tax Agent Services Act 2009* (Cth) s 20.15.
72 *Migration Act 1958* (Cth) s 303(1)(f).
73 By virtue of being deemed a 'disqualified person': *Conveyancers Act 2006* (Vic) ss 5(c), 11(c).
74 *Frugtniet v Migration Agents Registration Authority* [2016] AATA 299, [1].
75 Ibid.
76 *Migration Act 1958* (Cth) s 290(1).
77 *Migration Act 1958* (Cth) ss 290(2)(c), (d).
78 *Migration Act 1958* (Cth) ss 290(2)(e), (f).
79 *Migration Act 1958* (Cth) s 290(2)(g).
80 *Migration Act 1958* (Cth) s 290(2)(h).
81 *Frugtniet v Board of Examiners* [2005] VSC 332, [566].
82 *Frugtniet v Migration Agents Registration Authority* [2016] AATA 299, [136].
83 *Frugtniet and Tax Practitioners Board* [2014] AATA 766, [12].
84 *Tax Agent Services Act 2009* (Cth)s 20-5(1)(a).
85 *Income Tax Assessment Act 1936* (Cth) s 251BC(1).
86 *Income Tax Assessment Act 1936* (Cth) s 251BC(1)(d).
87 *Su v Tax Agents' Board of South Australia* [1982] AATA 127, [4] and [5].
88 *Frugtniet and Tax Practitioners Board* [2014] AATA 766, [108].
89 Ibid [104].
90 Ibid [106].
91 *Australian Securities and Investments Commission Regulatory Guide* 204.177.
92 *National Consumer Credit Protection Act 2009* (Cth) s 80(f).
93 *Australian Securities and Investments Commission Regulatory Guide* 218.55 Table 2.
94 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [22].
95 Pursuant to div 3 of pt 2.2. of the *Legal Profession Act 2004* (Cth) (the applicable legislation at that time).
96 *Law Institute of Victoria Limited v Frugtniet (Legal Practice)* [2011] VCAT 596; *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [3]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [9]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [25].
97 *Law Institute of Victoria Limited v Frugtniet (Legal Practice)* [2011] VCAT 596, [163].
98 Ibid [62].
99 Ibid [152].
100 *Frugtniet v Law Institute of Victoria Ltd* [2011] VCSA 184, 20.
101 *Rudy Noel Frugtniet v Law Institute of Victoria Ltd* [2011] VSCA 176.
102 *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178.
103 *Rudy Noel Frugtniet v Law Institute of Victoria Ltd* [2011] VSCA 178, [22] and [29]; *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [3]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [8]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [25].
104 *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178, [29].
105 *Rudy Noel Frugtniet v Law Institute of Victoria Ltd* [2012] HCASL 162.
106 Ibid.
107 *Conveyancers Act 2006* (Vic) s 5.
108 *Frugtniet v Law Institute of Victoria Ltd* [2011] VSCA 184, [18].
109 Ibid.
110 *Frugtniet v Secretary, Department of Social Services* [2018] FCA 1227, 3. Centrelink had determined that, during this period, Mr Frugtniet was a member of a couple with Ms Callychurn for the purposes of the *Social Security Act 1991* (Cth).
111 *Frugtniet and Australian Securities and Investments Commission* [2015] AATA 128, [8]. In addition, Mr Frugtniet also conducted a business and tax consultancy and migration agency under the Unique Mortgages Services business name: see *Frugtniet v Tax Practitioners Board* [2014] AATA 766.
112 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [20].
113 Ibid [23].
114 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [2]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [6]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [23].

115 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [2]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [6]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [23].
116 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [2].
117 Ibid [7].
118 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [3] and [4]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [8].
119 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [15].
120 *Callychurn v Australian Securities and Investments Commission* [2016] AATA 114, [53]–[56].
121 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [10].
122 Ibid [12].
123 Ibid.
124 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [16]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [15].
125 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [16]; Australian Securities and Investments Commission, 'ASIC permanently bans Victorian finance broker', (Media Release, 14-163MR, 10 July 2014) <http://Australian Securities and Investments Commission.gov.au/about-Australian Securities and Investments Commission/media-centre/find-a-media-release/2014-releases/14-163mr-Australian Securities and Investments Commission-permanently-bans-victorian-finance-broker/>.
126 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [30].
127 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [17]; Australian Securities and Investments Commission, 'ASIC bans finance broker and cancels Australian Credit Licence' (Media Release, 15-064MR, 20 March 2015) <http://Australian Securities and Investments Commission.gov.au/about-Australian Securities and Investments Commission/media-centre/find-a-media-release/2015-releases/15-064mr-Australian Securities and Investments Commission-bans-finance-broker-and-cancels-australian-credit-licence/>.
128 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [17].
129 *National Consumer Credit Protection Act 2009* s 80(f).
130 Australian Securities and Investments Commission, '15-064MR ASIC bans finance broker and cancels Australian Credit Licence' (Media Release, 15-064MR, 20 March 2015) <http://Australian Securities and Investments Commission.gov.au/about-Australian Securities and Investments Commission/media-centre/find-a-media-release/2015-releases/15-064mr-Australian Securities and Investments Commission-bans-finance-broker-and-cancels-australian-credit-licence/>.
131 *Callychurn v Australian Securities and Investments Commission* [2017] AATA 114, [30]–[43].
132 Ibid [57]–[59], [66].
133 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [19].
134 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [17]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [26].
135 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [47].
136 *Callychurn v Australian Securities and Investments Commission* [2015] AATA 567; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [20]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [73].
137 *Callychurn v Australian Securities and Investments Commission* [2015] AATA 726.
138 Ibid [30]; *Callychurn v Australian Securities and Investments Commission* [2015] AATA 726, [53]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [20]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [97] and [77].
139 *Callychurn v Australian Securities and Investments Commission* [2016] AATA 114, [86].
140 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [47].
141 *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995.
142 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29.
143 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
144 *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995, [74].
145 (2007) 171 FCR 291.
146 *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995, [76].
147 Ibid [76].
148 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [93].
149 (2014) 88 NSWLR 159.
150 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [104]–[105].
151 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [116] (emphasis in original).
152 (2008) 235 CLR 286.
153 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [116].
154 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [35].
155 Ibid [40].
156 Ibid [41].
157 Ibid [42]–[43].
158 Ibid [47].
159 Ibid [48].

160 Ibid [52].
161 Ibid [53].
162 Ibid [56].
163 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, [342].
164 *National Consumer Credit Protection Act 2009* (Cth) s 80(2)(c).
165 *National Consumer Credit Protection Act 2009* (Cth) s 80(2)(d).
166 *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995, [74].
167 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [116].
168 *Corporations Act 2009* (Cth) s 198A(1).
169 Ibid s 180(1).
170 Ibid s 181(1).
171 Ibid s 9 (definition of 'director' in (b)(ii)); *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129 [87], [93]).
172 *Deputy Commissioner of Taxation v Austin* [1998] FCA 1034, [569]–[570]. Whether a person is acting as a director of a company will depend upon the nature of the functions and powers which are exercised and the extent to which they are exercised. It is a question of fact which may often be one of degree. It requires consideration of the duties performed by the person in the context of the operation and circumstances of the company.
173 *Deputy Commissioner of Taxation v Austin* [1998] FCA 1034, [570]. The circumstances which bear on the question include the size of the company, its internal practices and structure and how the alleged de facto director is perceived by outsiders who deal with the company.
174 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [88].
175 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [53].
176 *Frugtniet v Tax Practitioners Board* [2013] FCA 752, [38].
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EXPULSION: A COMPARATIVE STUDY OF AUSTRALIA AND FRANCE

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In liberal democratic States, the decision to remove long-term residents who have committed crimes involves a challenging balancing act. On the one hand, States must do their utmost to protect everyone within their territory, yet, on the other, States must also act in accordance with their core values and principles, such as equality before the law and non-discrimination. In this article, I explore how these objectives are reconciled in two States: Australia and France. My primary focus is on Australia because, as Professor Juss recently noted, '[w]hen it comes to immigration and asylum policy, Australia is the laboratory of the world'.[1]

I explore two aspects of Australia's system which are highly problematic and have come under fierce criticism from within Australia and internationally. I begin by reviewing the legal framework, namely s 501 of the *Migration Act 1958* (Cth), under which the Minister for Immigration or a delegate may cancel visas on the grounds of character. In late 2014, further dramatic changes were introduced, which provide for mandatory visa cancellation in circumstances where a non-citizen has a substantial criminal record and is serving a sentence of imprisonment.[2] This change in the law has resulted in an exponential increase in visa cancellations.[3] In this context, I explore how the visas of long-term residents, some of whom have lived in Australia for more than 50 years, may be cancelled under s 501 and explain why this is a problem.[4] I then examine the visa cancellation process and the review rights flowing on from visa cancellation, again highlighting concerns.

In the second part of the article, I explore expulsion — the process and review rights in France. France is a fruitful source of comparison because, like Australia, it is a diverse, multicultural society with a strong liberal democratic tradition but, unlike Australia, has been the target of many violent terrorist attacks.[5] In this article I do not look at the treatment of non-citizens who have committed terrorism or other related offences. However, the fact that France has been the victim of multiple terrorist attacks informs its approach to immigration in general. How it balances the competing interests is therefore of particular interest and offers a different perspective on how a liberal democratic state deals with long-term residents who have been convicted of crimes. In the final, substantive part of the article, I look at what we can learn in Australia from the French system.

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* *Dr Bostock is a University of New South Wales teaching fellow. Dr Bostock uses the broad term 'expulsion' to encapsulate visa cancellation in the Australian context and 'l'expulsion' in the French context and terms such as long-term residents as used in common parlance.* *Dr Bostock would like to thank the Goddard Sapin-Jaloustre Scholarship Trust for its financial support and Mmes Durigon, Gainot, Rodier and the Groupe d'Information et de Soutien des Immigrés and its lawyers for their assistance while conducting the research for the article. The author also thanks Emeritus Professor Aronson and Dr Glass for their comments on an earlier version of the article and the anonymous reviewers for their helpful comments.* *All translations from French into English are by the author. This article builds upon the PhD thesis of the author, entitled The Administrative Appeals Tribunal and character assessments for non-citizens, which may be found at <https://trove.nla.gov.au/work/195613017?q=Chantal+Bostock&c=book&versionId=252603072>.*

The Australian system

Visa cancellation under section 501

In Australia, the law and process underpinning visa cancellations under s 501 sit within a broader system of strict immigration control, no doubt facilitated by the fact that Australia is an island. The relevant law is principally contained in the *Migration Act 1958*, which provides that all non-citizens must hold a visa.[6] The Migration Act contains various powers that may be used to cancel visas, including a specific provision that provides that the deportation provision cannot apply to non-citizens who have resided as permanent residents in Australia for more than 10 years.[7] The key provision relied upon to remove non-citizens who have committed crimes, however, is s 501 of the Migration Act.[8] Section 501 is potentially applicable to all non-citizens, regardless of the length of their residence and their level of absorption into the Australian community.[9] Non-citizens whose visas are cancelled under s 501 are subject to immigration detention, removal and exclusion from Australia.[10]

Prior to the recent changes, which I discuss shortly, s 501(2) was regularly invoked to cancel a visa. This provision permits the Minister, or a delegate, to cancel the non-citizen's visa when not satisfied that the non-citizen passes the character test.[11] The character test itself sets out a series of grounds upon which a person may fail the character test, including if the person has 'a substantial criminal record'.[12] In turn, 'substantial criminal record' is defined, amongst other things, to include if the person has been sentenced to a term of imprisonment of 12 months or more or two or more terms of imprisonment, where the total of those terms is 12 months or more.[13] Visa cancellation under s 501(2) involves two steps. The non-citizen is served with a Notice of Intention to Cancel a Visa and given an opportunity to put forward information, including further evidence. If the non-citizen does not satisfy the Minister or the delegate that he or she passes the character test, the decision-maker must then consider whether to exercise the discretion to cancel the visa.

Section 501 was amended in 2014 in order 'to strengthen the character and general visa cancellation provisions in the Migration Act to ensure that non-citizens who commit crimes in Australia, pose a risk to the Australian community or represent an integrity concern are appropriately considered for visa refusal or cancellation'.[14] Significantly, the 2014 amendments inserted a new, mandatory visa cancellation ground — namely, s 501(3A), which provides that the Minister or a delegate must cancel the non-citizen's visa if satisfied that the person does not pass the character test because the non-citizen has a substantial criminal record and is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth or a state or territory.[15] The purpose of the new provision was explained by the Department of Immigration as follows:

> Under existing provisions non-citizens in prison who do not pass the character test can be released from prison prior to the character visa cancellation or refusal process being finalised. This has meant that criminals who may potentially present a risk to the community can reside lawfully in the community while this consideration takes place. The proposed mandatory cancellation process assists in ameliorating this risk.[16]

Once the Minister or the delegate has made a decision under s 501(3A), he or she must, as soon as practicable, give the person a written notice, setting out the decision and the reasons for the decision and inviting the person to make representations.[17] Under s 501CA of the Migration Act, the Minister or the delegate may revoke the visa cancellation if the person makes representations in accordance with the invitation and the Minister or the delegate is satisfied that the person passes the character test or 'there is another reason why the original decision should be revoked'.[18]

When exercising the discretion to cancel a visa under s 501(2) or considering the revocation of a decision made under s 501(3A), delegates must consider the direction in force made under s 499 of the Migration Act.[19] While personally not bound,[20] directions enable 'Ministers of State to dictate the exercise of discretion by non-Ministers of State, a fetter otherwise not permissible'.[21] Directions are thus designed to promote 'consistency between decisions of non-Ministers of State'.[22]

Direction No 65, the direction currently in force, provides that its purpose 'is to guide decision-makers performing functions or exercising powers under s 501 of the Act, to refuse to grant a visa or to cancel a visa of a non-citizen who does not satisfy the decision-maker that the non-citizen passes the character test, or to revoke a mandatory cancellation under s 501CA of the Act'.[23] Direction No 65 provides 'a framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under s 501, or whether to revoke a mandatory cancellation under s 501CA'.[24] The direction provides that Australia has 'a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia', as it is 'a privilege'.[25]

The direction contains parts relating to visa holders, visa applicants and revocation requests, each of which contains 'primary' and 'other' considerations. The direction provides that 'primary considerations should generally be given greater weight than other considerations' and that 'one or more primary considerations may outweigh other primary considerations'.[26] Part A, which relates to visa holders, and Part C, which relates to revocation requests, contain the same primary and other considerations. Under the heading of primary considerations, decision-makers must consider the protection of the Australian community from criminal or other serious conduct, the best interests of minor children in Australia and the expectations of the Australian community.[27] The factors listed in the 'other' considerations are international non-refoulement obligations; strength, nature and duration of ties; impact on Australian business interests; impact on victims; and extent of impediments if removed.[28] The 'primary' and 'other' considerations must 'be considered in accordance with the significance placed upon them by the Direction'.[29]

The cancellation of visas and subsequent removal of long-term residents is highly problematic. Long-term residents are essentially Australian 'by upbringing and long residence'.[30] Many arrive in Australia as children, attend school and, as adults, create their own families. They work and pay taxes, their children attend school and they participate in local 'cultural and recreational activities'.[31] This active participation in civil society leads to the creation of 'a wide range of human ties and social attachments that affect their lives in many ways'.[32] The building of these profound social connections occurs as soon as a person starts living in a community.[33] These long-term permanent residents 'are members of the society where they have lived their entire lives, the society whose language they speak and whose culture they share'.[34] In effect, they are 'Australian in all but law'.[35]

In addition to serving their term of imprisonment, they are subject to visa cancellation and removal, thereby receiving 'double punishment'.[36] Although they have character flaws, they are 'Australia's responsibility'[37] and removing them is seen as 'cleansing' Australian society.[38] Severing these ties, particularly familial and social ties, can have devastating consequences for non-citizens, not least of which is their prospect of rehabilitation. As Allsop CJ recently held in relation to a 54-year-old long-term resident:

> the removal of someone from Australia who has spent much of his life here (arriving as a child of six years) itself has a quality of harshness that might, in other statutory contexts, together with the effect on him and his family, bespeak unjustness, arbitrariness or disproportion of response. Whilst not a citizen of Australia, Mr Stretton has lived here since he was a small boy. His human frailties are of someone who has lived his life here, as part of the Australian community.[39]

The effects of visa cancellation and removal are exacerbated when the non-citizen has few, if any, connections, to their country of citizenship. In some cases, long-term residents do not speak the language of their country of citizenship and have no family, social or other connections. Non-citizens may also suffer poor physical and mental health as well as drug and alcohol addictions. Yet non-citizens may be returned to 'developing and strife-torn countries with rudimentary mental health and drug rehabilitation services',[40] such as Sudan, Vietnam, Iraq, Lebanon and Afghanistan.[41] An added, important dimension of visa cancellation and removal is the impact on family members, who may be forced to choose either to remain in Australia without the non-citizen or to leave Australia as a family.

A recent case study played out in the media exemplifies these issues. Maryanne, also known as Mirjana, Caric, a 'long-term drug user', left the former Republic of Yugoslavia and arrived in Australia at the age of two, where she has lived for almost 50 years.[42] Caric was sentenced to various terms of imprisonment for drug offences and as a result, her visa was cancelled under s 501(3A).[43] The intended country of removal was Croatia, where Caric has no connections and does not speak the language.[44] Her family, including her daughter and grandchildren, would remain in Australia.[45] The Parliamentary Secretary accepted that she had 'been away from her country of origin for close to 50 years and having no personal support network there together with her health and substance abuse issues, that it would be extremely difficult for her to make the necessary adjustments to life there' but nevertheless decided to not revoke the decision.[46] While her judicial review application was successful and her request for revocation has been remitted for reconsideration according to the law, there is no guarantee that her visa cancellation will be revoked.[47]

These unjust effects of visa cancellation and subsequent removal on non-citizens and their families have been widely recognised and resulted in significant criticism for many years from many quarters, including the Commonwealth Ombudsman, the Australian Human Rights Commission, judges, academics and the community. For example, following a review of the s 501 system, in his 2006 report, the then Commonwealth Ombudsman recommended that the application of s 501 to long-term residents should be reviewed. He questioned whether s 501 should be applied to a person who met a number of criteria, including those who had arrived in Australia as minors, spent their formative years in Australia, had been absorbed within and had strong ties to the Australian community and could not be removed under the deportation provision.[48] Other relevant factors included the degree of hardship upon return to the receiving country, the presence in Australia of family members and whether the non-citizen would constitute a significant risk to the Australian community if released from detention.[49] Instead, the mandatory visa cancellation scheme under s 501(3A) was introduced. The new scheme is even more controversial, considered to be, at a minimum, deeply unfair [50] if not unlawful, prior to the recent High Court decision in *Falzon v Minister for Immigration and Border Protection*.[51]

The visa cancellation process

As previously mentioned, under s 501(2), non-citizens are served with a Notice of Intention to Cancel a Visa before a decision is made, while, in contrast, decisions made under s 501(3A) are made and subsequently served on non-citizens. The non-citizen must then seek revocation under s 501CA within 28 days[52] — a process which effectively reverses the onus of proof.[53] The decision to cancel a visa or to not revoke a visa cancellation may be made by a delegate of the Minister or the Minister personally. When delegates cancel a visa or decide to not revoke a visa cancellation, non-citizens may seek review before the Administrative Appeals Tribunal within nine days of the date of notification of the decision.[54] Policy provides that applicants with a merits review application on foot are not removed.[55] The Tribunal stands in the shoes of the original decision-maker and is tasked with making

'the correct or preferable decision' in each individual case.[56] It has the power to affirm or set aside the delegate's decision.[57]

If the Tribunal sets aside the delegate's decision to cancel the visa or to refuse to revoke the visa cancellation, however, the Minister may overturn the Tribunal's decision on the grounds of national interest, as it was considered 'appropriate that the Minister have the power to be the final decision-maker'.[58]

Where the Minister personally makes the decision under s 501(2) or s 501(CA), as is generally the case, there is no right of review to the Tribunal.[59] Non-citizens may seek judicial review and are generally permitted to remain in Australia during the course of the proceedings.[60] The role of the courts, however, is 'necessarily limited' to supervising legality.[61]

Decision-making under ss 501(2), 501(3A) and 501CA is also highly problematic, principally because of the lack of procedural fairness. It goes without saying that procedural fairness is the cornerstone of administrative decision-making. Fair procedures ensure respect for the dignity of the affected person, enabling and fostering their participation in a process, which directly affects them and increases the chances of the correct or preferable decision being made precisely because of their participation.[62] In the processes described earlier, however, the ability of non-citizens to participate is seriously compromised. As publicly-funded legal representation is limited and many cannot afford lawyers, numerous non-citizens are not represented throughout the process,[63] thereby reducing their chances of a successful review or appeal.[64] Many have poor levels of education, which reduces their ability to understand the complex law and procedures and to know what material is relevant to their case and how to obtain it.[65] Their ability to present their case by, for example, giving instructions to their lawyers or contacting family and friends to obtain further evidence is further compromised by their incarceration, often in remote places like Christmas Island, where access to telecommunications and to the outside world is difficult.[66]

Given the limited ability of non-citizens to participate, it is unfortunate that the Department's fact-finding processes have also been shown to be deficient. In a 2006 report relating to the application of s 501(2), the then Commonwealth Ombudsman was highly critical of the Department. He noted that the Department's issues papers which are submitted to final decision-makers, contained information about the visa holder that was 'incorrect or of doubtful relevance'.[67] He observed that 'the currency of information is important in assessing the rehabilitation of the visa holder and prospects of recidivism' yet 'in many of the Issues Papers reviewed, little effort seem[ed] to have been made to ensure that up-to-date information about the visa holder [was] used'.[68] Ten years later, while acknowledging improvements in 'the quality of information given to the Minister in the revocation decision process', the current Ombudsman noted that the process for obtaining criminal histories and sentencing remarks could be 'problematic' and also recommended 'improving processes'.[69]

The ability of non-citizens to understand the issues and provide further, probative material, through either their legal representative or on their own initiative is critical, if seeking to avert, or revoke, a visa cancellation or to appeal a decision. As the Federal Court noted, 'it is not the content of the Direction which determines the outcome of the exercise of the s 501 discretion, but rather its application by a particular decision-maker to the evidence and material in an individual case'.[70]

Whether the non-citizen has a right of review before the Tribunal depends on whether the Minister or a delegate made the decision. Decisions made by the Minister are not reviewable by the Tribunal and, as a result, non-citizens are seriously disadvantaged. While non-citizens have access to judicial review, the role of the court differs markedly from the Tribunal. The

Tribunal stands in the stead of the primary decision-maker and must undertake the balancing exercise set out in the direction. However, the Minister may overturn any decision made by the Tribunal which favours the non-citizen — another serious concern. As the Australian Human Rights Commission observed, these ministerial powers to set aside Tribunal decisions gives 'the Minister power, without holding a hearing, to overturn a finding of fact made after a full hearing by an independent appellate tribunal'.[71] It questioned whether the Minister was indeed 'better qualified to make findings of fact than an independent tribunal':[72]

> Placing powers such as these in the hands of an elected representative risks decisions with serious human rights implications being made for politicized purposes, rather than being made on the merits of the individual case.[73]

In addition, as Wilcox J noted, if the outcome of the review process is not accepted by the Minister, 'the decisions of the Tribunal fall into disrepute'.[74] The Tribunal review process requires time and effort and imposes costs on the non-citizen and his or her family and the taxpayer:

> Unless the decisions of the Tribunal are customarily accepted, all of this effort and expense is wasted.[75]

Furthermore, as Murphy and Burley JJ recently observed, given the Minister's admitted practice that, 'in every refusal and cancellation decision' over a 15-month period, 'his draft reasons for decision were prepared by somebody else and he had signed them without alteration':[76]

> One might reasonably ask why Parliament would provide the Minister for Immigration and Border Protection with a personal power to cancel a visa (as an alternative to having the decision made by a delegate), and oblige the Minister to give reasons for doing so, if Parliament understood or intended that in every case the Minister would adopt, without change, the draft reasons prepared by departmental officers. Such a practice has a tendency to undercut Parliament's intention to provide a right to merits review where a visa cancellation decision is made by a delegate rather than by the Minister personally.[77]

As indicated, there are thus serious concerns with the substantive law and the procedural aspects of the existing s 501 system.

The French system

The law of expulsion

France also has multiple mechanisms in order to remove non-citizens from the country, including the imposition of bans from the territory ordered by criminal judges following the non-citizen's criminal conviction (*interdiction du territoire français*). France's immigration law is principally contained in the code of entry and stay of foreigners and of asylum law (*le Code de l'entrée et du séjour des étrangers et du droit d'asile)* (the Code). Non-citizens must also have permission to be present or residing in French territory.[78] Like Australia, the Code also contains various, different powers under which non-citizens may be removed. The vast majority of non-citizens, including those living in France without authority or in breach of visa conditions, are removed, after having received a notice called 'requirement to leave French territory' ('*l'obligation de quitter le territoire français*').[79] In this article, however, I focus on another article found in the Code (*expulsion*) because it is used to remove non-citizens lawfully resident in France. I note at this point that I have not considered the removal of European Union citizens, who are subject to special rules as a result of their status.

Article L521-1 of the Code provides that non-citizens may be removed if their presence constitutes a serious threat to public order (‘*une menace grave pour l’ordre public*’) — a phrase not defined in the Code.[80] While the phrase is interpreted in a ‘flexible’ manner, the *Conseil d’Etat*, the highest administrative court in France, held that it is intended to ‘protect public order and security’ and not act as a sanction.[81] Therefore, criminal convictions do not necessarily amount to a serious threat to public order.[82] The phrase requires an evaluation, in all the circumstances of the case, of ‘whether the person’s presence constitutes a threat to public order’.[83]

Articles L521-2 and L521-3 of the Code provide two categories of non-citizens who are protected from removal. The first category of ‘relative protection’ provides that certain categories of non-citizens, such as those who have lived for more than 10 years in France,[84] those married and living with a French spouse for at least three years[85] or raising their French children[86] cannot be removed unless sentenced to a term of imprisonment of at least equal to five years or their removal constitutes an absolute necessity for the security interests of the State or public safety (‘*une nécessité impérieuse pour la sûreté de l'Etat ou la sécurité publique*’).[87] While this expression is also not defined in the Code, ‘it implies a level of seriousness, additional to the requirement of a serious threat to public order’.[88] Examples include terrorist-related offences,[89] serious drug offences[90] and gang rape of a minor.[91]

The Code sets out a second category of non-citizens who benefit from even greater protection from removal, called ‘quasi-absolute protection’.[92] Non-citizens falling within this type of protection include non-citizens who arrived in France before the age of 13,[93] those who have resided in France for more than 20 years[94] or more than 10 years where they have been married to a French citizen or long-term French resident for more than four years, [95] or are raising their French children.[96] These protected categories cannot be removed even when sentenced to a term of imprisonment of more than five years unless their behaviour ‘harms’ the fundamental interests of the State, is linked to terrorist activities or constitutes explicit and deliberate acts of incitement to discrimination, hatred or violence against a particular individual or a group of people.[97] Cases falling under this rubric must be ‘particularly serious’ and ‘exceptional’,[98] such as non-citizens travelling to Syria to fight in the international jihad.[99] Finally, the law provides that minor children cannot be deported.[100]

The current two categories of protection were introduced in 2003 as a result of a widespread, NGO-led public campaign to end double punishment (‘*la double peine*’) in both the criminal and immigration context. Recognising that the removal of long-term residents from all their familial, friendship, professional and cultural ties in France had ‘serious consequences’ for residents and their families, the then Minister of the Interior, Nicholas Sarkozy, convened a commission, which was tasked with reviewing the law and making any necessary law reform proposals.[101] The commission made three overarching observations relating to deportation law. First, it was inconsistent with the notion of rehabilitation, and thus contrary to the fundamental philosophical underpinnings of criminal law, which was to punish and rehabilitate.[102] It noted that the prospects of rehabilitation in the country of removal were minimal for people separated from their family and social environment and removed to a country where they knew neither the language nor the culture.[103] Secondly, deportation was harsh and perpetual.[104] It observed that, for those who spent their childhood in France, deportation meant leaving a country with which they shared everything, except nationality, to go to a country with which they shared nothing, except nationality.[105] While non-citizens could in principle seek revocation of the deportation order, in practice it was very difficult, thus resulting in the punishment of the non-citizen ‘for life’.[106] Deportation also resulted in the punishment of family members of the non-citizen being deported.[107] Finally, the commission observed that authorities had great difficulty executing deportations, for example, because the non-citizen’s home country would not issue travel documents, the non-citizen’s identity

could not be established or because removal to the country of citizenship would breach international obligations — for example, those contained in the *European Convention on Human Rights*.[108] In any event, as the commission observed, a certain number of those removed secretly returned to France.[109] It therefore made sense to amend the law in order to reduce the number of cases that were 'practically and actually impossible to remove from France'.[110]

The commission therefore proposed the categories of non-citizens who should be prima facie protected from deportation. These categories are now found in the current law.[111] The commission's objective was to prevent two situations: first, the banishment of non-citizens who had lived in France since childhood; and, secondly, those who had lived in France for a certain period and who had established a stable family.[112] In suggesting these reforms, the commission was also motivated by a number of other considerations. It noted that, given the importance of law reform to sectors of the migrant community, only the introduction of protected categories would demonstrate that the law had been substantially reformed.[113] In addition, the protected categories would promote legal certainty, as the legislature clearly expressed its will by defining the protected categories.[114] Finally, the categories reflected the jurisprudence of the European Court of Human Rights.[115] As one French commentator noted, 'behind the different types of relative protection, we can see the shadow of Articles 2, 3, and 8 of the ECHR'.[116]

The expulsion process

The Code sets out certain procedures that must be followed before the decision to deport is made. The Prefect must summon the non-citizen to attend a hearing before the Commission of Expulsion ('*la Commission d'Expulsion*') 15 days prior to the hearing.[117] The Commission is composed of three judges, namely the President (or delegate) and another judge of the *Tribunal de Grand Instance* and a judge of the *Tribunal Administratif*.[118] The non-citizen must be informed of his or her right to have assistance, including legal aid, and an interpreter before the Commission.[119] The Commission must hold a public hearing, during which the non-citizen is able to provide reasons against deportation.[120] The Commission must then decide whether the presence of the non-citizen constitutes a serious threat to public order and whether or not it is in favour of the non-citizen's deportation.[121]

Within one month of the date upon which the non-citizen is summonsed to appear, the Commission must set out the non-citizen's case and its reasons for its decision and serve it on the authorities and the non-citizen.[122] Failure to comply with these procedural requirements may result in a successful appeal.[123] The Code stipulates, however, that the procedural requirements relating to the Commission of Expulsion may be dispensed with on the grounds of absolute emergency — a term not defined in the Code but, in practice, broad.[124] In such cases, there are no procedural requirements before the making of the deportation order.

While there are strict procedural requirements set out in the Code, it is important to note that the Commission's decision is not binding on the Prefect. While no statistics are available, it is known that the Commission's opinion is not always followed.

In the event that a deportation order is made, the non-citizen has two months from date of notification of decision in which to lodge an appeal to the administrative tribunal.[125] The administrative court must then review the decision, including whether the deportation is necessary to protect public order, if art 8 of the *European Convention of Human Rights* is invoked.[126] If unsuccessful before the administrative court, non-citizens may appeal to the administrative court of appeal and ultimately, on error of law alone, to the *Conseil d'Etat*.

The Prefect's decision to deport is immediately effective, regardless of whether an appeal has lodged. If the non-citizen, however, has lodged an appeal, he or she may apply to the *juge des référés* seeking a stay of the deportation order.[127] A stay may be granted in urgent cases, where there is 'serious doubt' relating to the legality of the decision.[128] In deportation cases, urgency is presumed.[129] Where the deportation has been carried out, if the *juge des référés* grants the stay, the non-citizen is permitted to return to France pending final determination of the appeal.[130]

Discussion

What has become evident is that similar concerns relating to the effect of removal on non-citizens and their families have been expressed in both Australia and France. Yet the result of recent law reform has culminated in two quite different legal approaches to criminal non-citizens.

Section 501 is unjust because it may be applied to long-term residents, who are members of the Australian community. Ministerial directions set out factors that must be considered by decision-makers. Directions regularly change, reflecting the broader social objectives of the government of the day.[131] Sometimes, factors such as length of residence and the strength of ties constitute primary considerations, while at other times they are merely 'other' considerations.[132] The different weight accorded to the considerations will have significant implications for long-term residents wishing to remain in their community.[133] Because of the Minister's ability to change the weight accorded to the various considerations, the directions do not adequately safeguard the interests of long-term residents. In France, arts 521-2 and 521-3 of the Code provide that certain categories of non-citizens, including those with long periods of residence in France and those with strong, established family ties to France, are generally protected from removal. There is thus legal recognition that these factors are powerful indices that the non-citizen has become a member of the French community and, for that reason, should not be removed. Only where the behaviour of the non-citizen 'harms' the fundamental interests of the State, is linked to terrorist activities or constitutes explicit and deliberate acts of incitement to discrimination, hatred or violence against a particular individual or a group of people may the non-citizen be removed.[134] As the French law reform commission indicated, the categories of protection reflect the will of legislators, setting up a filtering mechanism by which certain non-citizens are protected from deportation, subject to the derogations within the law.[135] While this approach is not without its flaws, I would nevertheless argue that it is preferable to the Australian approach.[136] In its current state, s 501 is too broad. It should, at the very least, set out factors relating to the non-citizen, which ought to be considered by the Minister and delegated decision-makers before cancelling a visa.

The visa cancellation processes under s 501 are procedurally unfair because the ability of non-citizens to participate in the processes is seriously compromised given their lack of legal assistance, their incarceration and the complexity of the law and procedures. Departmental fact-finding processes have been found to be wanting. The position of non-citizens under s 501(3A) is of particular concern because their visas have already been cancelled and they are thus liable to detention, removal and exclusion unless they are able to satisfy decision-makers that the decision should be revoked.

In France, the Code sets out numerous, compulsory, pre-deportation procedures, including a public hearing before a panel of three independent judges, during which the non-citizen is able to argue against removal. At first glance, the French system is a model of procedural fairness. However, it has a major flaw — namely, the opinion of the Commission of Expulsion does not bind decision-makers. While the opinion of the Commission may be considered by the administrative court in relation to any appeal brought by the non-citizen,

the costs, time and effort involved in convening the Commission begs the question whether the procedures leading to the opinion are worthwhile. Secondly, the procedures do not apply in the cases of absolute urgency. Like other terms in the Code, this term is broadly defined, thus allowing decision-makers to bypass the procedural requirements set out in the Code.

In Australia, decisions made by the Minister under ss 501(2), 501(3A) and 501(CA) are not reviewable by the Tribunal — a serious deficiency. Merits review is critically important because an independent Tribunal considers the factors under the directions and undertakes the balancing exercise. In France, decisions of the Minister and the Prefects are subject to the same appeal mechanisms — namely, review by the administrative courts. Unlike Australia, there is no differentiation of review rights according to the decision-maker. While there is no system of merits review in France, when art 8 of the ECHR is invoked, the administrative court also reviews the proportionality of the deportation, thus also providing another set of independent eyes on the balancing act.[137] While this independent review provides an important safeguard, again, there is a significant fault with the French system. Unlike the Australian system, the lodgment of appeals does not halt deportation proceedings and, unless a stay of execution is granted, non-citizens may be removed while awaiting the outcome of review by the administrative court.

Conclusion

Carens argues that once non-citizens become members of society, the state's right to deport them should be 'greatly constrain[ed]':[138]

> In brief, people who live in a society over an extended period of time become members of that society and moral claims to legal status follow from that membership. Thus, the allocation of legal rights by the state should not be regarded as a morally unfettered political choice. The relationships established in civil society significantly limit and constrain the kinds of allocations of rights that a political society can properly make.[139]

In Australia, provisions under the Migration Act specifically dealing with the removal of long-term residents who commit crimes are bypassed, and powers under s 501 have been expanded, allowing the Minister or decision-makers to unjustly cancel the visas of long-term residents, who are members of the Australian community. Under the law, decision-makers must consider and accord weight to factors set out in ministerial directions, which frequently change according to the objectives of the government of the day. This approach is dissatisfying as it fails adequately to safeguard the interests of long-term residents. In contrast, French law specifically provides that certain categories of non-citizens, including those with lengthy periods of residence in, and strong family connections to, France, cannot be deported unless in the circumstances set out in the law. In this regard, the French approach is preferable, because it recognises the non-citizen's profound personal, familial, social and other ties to the French community and provides that they should not be removed as a result. Section 501 should also be amended — for example, by setting out factors relating to the non-citizen that ought to be considered by the Minister and delegated decision-makers before cancelling a visa.

Discretionary, and in particular mandatory, visa cancellation under s 501 is highly problematic because of the unfair manner in which it is undertaken and given the grave consequences for non-citizens and their families. The lack of merits review for decisions made by the Minister is questionable given the importance of independent review, while the power of the Minister to set aside Tribunal decisions in favour of non-citizens is disturbing and lends itself to the politicisation of decision-making. At first glance, the French system has gold-standard procedures leading up to the deportation order, which Australia would do well to follow. Unfortunately, the opinion of the Commission of Expulsion is not binding on authorities. Thus, both the Australian and French systems have significant flaws when it

comes to the decision-making process. Finally, in Australia, we take for granted that applicants will not be removed while awaiting the outcome of review/appeal proceedings, but in France an appeal does not suspend the decision to deport — an extraordinary shortcoming of the system. While the s 501 system gives rise to legitimate and grave concerns and ought to be amended, there are other aspects of the Australian system that should be retained.

Endnotes

1 Satvinder Juss, 'Detention and Delusion in Australia's Kafkaesque Refugee Law' (2017) 36 *Refugee Survey Quarterly* 146, 146.

2 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

3 Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958*, Report No 08/2016, Commonwealth of Australia (2016) [1.4]: 'Since the passage of the new legislation the number of people who have had their visas cancelled under s 501 has grown from 76 in 2013–14 to 580 in 2014–15 and 983 in 2015–16'.

4 See, for example, *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; and *Caric v Minister for Immigration and Border Protection* [2017] FCA 1391. I note at the outset that this article does not deal with 'crimmigration' — namely, 'the criminalisation of immigration law': Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56 *American University Law Review* 367, 376. For relevant articles relating to s 501 in the crimmigration context, please see the following: Michael Grewcock, 'Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners under Section 501 *Migration Act 1958*' (2011) 44 *Australian and New Zealand Journal of Criminology* 56; Peter Billings, 'Crimmigration Law in Australia: Exploring the Operation and Effects of Mandatory Visa Cancellation, Immcarceration and Exclusion' *SSRN Electronic Journal*, January 2017; Khanh Hoang and Sudrishti Reich, 'Managing Crime through Migration Law in Australia and the United States: A Comparative Analysis (2017) 5 *Comparative Migration Studies* 12.

5 See, for example, Human Rights Watch, *France: In the Name of Prevention: Insufficient Safeguards in National Security Removals* (June 2007) [6].

6 *Migration Act 1958* (Cth) s 13.

7 Section 200 of the Migration Act provides that '[t]he Minister may order the deportation of a non-citizen to whom this Division applies'. Section 201 of the Migration Act provides as follows:
'Deportation of non-citizens in Australia for less than 10 years who are convicted of crimes
Where:
(a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;
(b) when the offence was committed the person was a non-citizen who:
(i) had been in Australia as a permanent resident:
(A) for a period of less than 10 years; or
(B) for periods that, when added together, total less than 10 years; or
(ii) was a citizen of New Zealand who had been in Australia as an exempt non-citizen or a special category visa holder:
(A) for a period of less than 10 years as an exempt non-citizen or a special category visa holder; or
(B) for periods that, when added together, total less than 10 years, as an exempt non-citizen or a special category visa holder or in any combination of those capacities; and
(c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year; section 200 applies to the person.'

8 Parliament of Australia, Senate Legal and Constitutional References Committee, *Administration and Operation of the Migration Act 1958* (2006) [9.30]. Section 501 of the *Migration Act 1958* has been amended many times: see my abovementioned thesis, which charts its amendments.

9 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

10 *Migration Act 1958* (Cth) ss 189, 198; and *Migration Regulations 1994* (Cth) sch 5.

11 Section 501(2) of the Migration Act provides as follows: '[t]he Minister may cancel a visa that has been granted to a person if:
(a) the Minister reasonably suspects that the person does not pass the character test; and
(b) (b) the person does not satisfy the Minister that the person passes the character test'.

12 Section 501(7) of the Migration Act provides as follows:
'(7) For the purposes of the character test, a person has a substantial criminal record if:
(a) the person has been sentenced to death; or
(b) the person has been sentenced to imprisonment for life; or
(c) the person has been sentenced to a term of imprisonment of 12 months or more; or
(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:
(i) been found by a court to not be fit to plead, in relation to an offence; and
(ii) the court has nonetheless found that on the evidence available the person committed the offence; and
(iii) as a result, the person has been detained in a facility or institution.'

13 *Migration Act 1958* (Cth) s 501(7)(c) and (d).
14 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 2 (Scott Morrison).
15 Section 501(3A) of the Migration Act provides as follows:
'The Minister must cancel a visa that has been granted to a person if: (a) the Minister is satisfied that the person does not pass the character test because of the operation of: (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or (ii) paragraph (6)(e) (sexually based offences involving a child); and (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.'
16 Parliament of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Character and General Visa Cancellation) Bill 2014 [Provisions]* (2014) [2.32].
17 *Migration Act 1958* (Cth) s 501CA(3).
18 *Migration Act 1958* (Cth) s 501CA(4).
19 Section 499 of the Migration Act provides as follows:
'(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:
(a) the performance of those functions; or
(b) the exercise of those powers.
(1A) For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.
(2) Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.
(2A) A person or body must comply with a direction under subsection (1).
(3) The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given …'
20 *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 4.
21 *Bochenski v Minister for Immigration and Border Protection* [2017] FCAFC 68 [77]. Bromwich J further held at [77] as follows: 'Viewed in this way, s 499 may be seen at most to reflect or recognise a hierarchy which recognises or places the Parliament at the apex (of course subject to the powers of the Governor-General under the *Constitution*), then the Ministers of State appointed to administer the Department and allocated responsibility for administering the Migration Act, and then any other persons or bodies performing functions or exercising powers under the Migration Act (being delegates and the Tribunal).'
22 Ibid [72].
23 Direction No 65 — *Migration Act 1958* — Direction under Section 499 — *Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (22 December 2014) [6.1(4)].
24 Ibid [6.2(3)].
25 Ibid [6.3(1)].
26 Ibid [8(4)]–[(5)].
27 Ibid [9(1)], [13(2)].
28 Ibid [10(1)], [14(1)].
29 *Minister for Immigration v Taufahema* (2010) 114 ALD 537, 546.
30 Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (University of New South Wales Press, 2007) 159.
31 Joseph Carens, 'Citizenship and Civil Society: What rights for Residents' in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 100, 103.
32 Ibid 103.
33 Ibid 102–103.
34 Ibid 103.
35 *Minister for Immigration, Local Government and Ethnic Affairs v Roberts* (1993) 41 FCR 82, 86.
36 The argument is legally untenable: see *Djalic v Minister for Immigration and Multicultural Affairs* (2004) 139 FCR 292.
37 Glenn Nicholls, 'Detention and Deportation: A Continuing Scandal' (2007–2008) *Arena* 40, 42.
38 David Wood, 'Deportation, the Immigration Power and Absorption into the Australian Community' (1986) 16 *Federal Law Review* 288, 298.
39 *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 [15].
40 Nicholls, above n 30, 8.
41 Commonwealth Ombudsman, above n 3, [3.8].
42 Damien Carrick, *The Law Report*, ABC, 14 March 2017 <http://www.abc.net.au/radionational/programs/lawreport/deportation-of-foreign-nationals-with-criminal-records/8349692#transcript>.
43 *Caric v Minister for Immigration and Border Protection* [2017] FCA 1391.

44 Carrick, above n 42.
45 Ibid.
46 *Caric v Minister for Immigration and Border Protection* [2017] FCA 1391.
47 Ibid.
48 Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long Term Residents 01/2006* (2006) [4.8].
49 Ibid.
50 As Lloyd QC explained to the High Court in *Falzon v Minister for Immigration and Border Protection*, 'You could have had a substantial criminal record in 1975, be in prison for two days for fine defaulting and then the cancellation is mandatory': transcript.
51 In *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2, the applicant, who had lived in Australia for 61 years, argued that s 501(3A) authorised the Minister to impose punishment for a breach of the law, thus purporting to 'confer judicial power of the Commonwealth on the Minister': *Falzon v Minister for Immigration and Border Protection*, Short Particulars <http://www.hcourt.gov.au/cases/case_s31-2017>. The High Court dismissed the application.
52 *Migration Regulations 1994* (Cth) r. 2.52.
53 Australian Human Rights Commission, *Inquiry Into the Migration Amendment (Character and General Visa Cancellation) Bill 2014: Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Legislation Committee*, 28 October 2014 [67].
54 *Migration Act 1958* (Cth) s 500.
55 See PAM3: Act — Compliance and Case Resolution — Case resolution — Returns and removals — Removal from Australia. The Procedures Advice Manual provides as follows: 'Section 198 of the Act (with the exception of s 198(1) which relates to removal on request) does not authorise removal of an unlawful non-citizen who has unfinalised merits review entitlements relating to a substantive visa application. This includes both circumstances where a person has a valid unfinalised merits review application and circumstances where they are still within relevant eligibility periods for lodgement.'
56 *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 (Bowen CJ and Deane J). For a recent decision relating to the role of the Tribunal, see *Singh (Migration)* [2017] AATA 850 (16 June 2017).
57 *Administrative Appeals Act 1975* (Cth) s 43.
58 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [42]. See also Joanne Kinslor and James English, 'Decision-Making in the National Interest?' (2015) 79 *AIAL Forum* 35–51.
59 Commonwealth Ombudsman, above n 3, [4.16]: As at April 2016, 75 per cent of cases were assigned to the Minister, while 12 per cent were assigned to the Assistant Minister.
60 PAM3: Act — Compliance and Case Resolution — Case resolution — Returns and removals — Removal from Australia. The Procedures Advice Manual provides as follows: 'The Act does not preclude involuntary removal of unlawful non-citizens who are entitled to seek judicial review or who are seeking judicial review of a decision in relation to a substantive visa. However, as a matter of policy, persons in this cohort usually should not be removed because:
    - the person should be given adequate time after a negative tribunal decision to consider their legal options to seek judicial review;
    - the court may ultimately overturn the substantive visa decision; and
    - the court may grant an injunction to prevent removal of the person.'
61 *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 [8]. While beyond the scope of this article, for a recent, significant case, see *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, which deals with the legislative limitations on the evidence available to a judicial review court which is called to enforce an implied 'reasonableness' requirement to be observed by the Minister when determining to cancel a visa.
62 See, for example, Denis Galligan, *Due Process and Legal Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996); and Jerry Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985) 171.
63 Justice John Griffiths, 'Keynote Address: Developments in Judicial Review Affecting Migration' (Paper presented at the Law Council Immigration Law Conference, Sydney, 24–25 February 2017) 18. See also, for example, *Vivi v Minister for Immigration and Border Protection* [2017] FCA 1341 at [5]–[6], where the applicant, who arrived as a one-year-old in Australia, was unsuccessful in obtaining legal representation.
64 See Chantal Bostock, 'Procedural Fairness and the AAT's Review of Visa Cancellation Decisions on Character Grounds' (2010) 17 *Australian Journal of Administrative Law* 77, 87.
65 Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long Term Residents 01/2006* (2006) [3.63]. See also Commonwealth Ombudsman, above n 3, [5.9].
66 See, for example, Commonwealth Ombudsman, above n 3 [6.3], [5.4]. The Commonwealth Ombudsman found at [1.4] that '[c]urrently 66% of persons who have their visa cancelled under s 501(3A) apply for revocation with the average time to process and decide a s 501(3A) revocation request being 153 days although 21 cases have taken more than 12 months'.

67 Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long Term Residents 01/2006* (2006) [3.12]. See also Commonwealth Ombudsman, above n 3, 4.24, 'Case study'.
68 Ibid [3.18].
69 Commonwealth Ombudsman, above n 3, [6.10], [4.13], [4.14].
70 *Jagroop v Minister for Immigration and Border Protection* [2016] FCAFC 48 [78].
71 Australian Human Rights Commission, *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014: Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Legislation Committee*, 28 October 2014 [80].
72 Ibid [82].
73 Ibid.
74 *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, 84.
75 Ibid.
76 *Folau v Minister for Immigration and Border Protection* [2017] FCAFC 214 [74], [81].
77 Ibid [89].
78 The Code, Article L211-2-1. Under French law, citizens over the age of 18 years may obtain citizenship after five years of lawful residence and subject to character, language and other requirements. For a summary of the requirements in French, see France Diplomatie, *L'acquisition de la nationalité française* (March 2016) <https://www.diplomatie.gouv.fr/fr/services-aux-citoyens/etat-civil-et-nationalite-francaise/nationalite-francaise/article/l-acquisition-de-la-nationalite-francaise>.
79 *'L'obligation de quitter le territoire français*' (OQTF) is the principal method by which non-citizens are removed. There are many grounds upon which an OQTF may be served, including unlawful residence and breach of visa conditions. See 'Le Juge Administratif et le Droit des Etrangers', *Les Dossiers Thématiques du Conseil d'Etat*, Conseil d'Etat, 15 June 2015.
80 The Code, art 521-1.
81 CE 20 Janvier 1988, no 87036.
82 CE 21 Janvier 1977, no 01333.
83 CE 11 Juin 1982, no 32292.
84 Article L521-2 (4°) of the Code provides as follows: 'The non-citizen, who has regularly resided in France for more than 10 years, except if, throughout this period, he has held a student temporary residence card.' The French is as follows: '*L'étranger qui réside régulièrement en France depuis plus de dix ans, sauf s'il a été, pendant toute cette période, titulaire d'une carte de séjour temporaire portant la mention "étudiant".*'
85 Article L521-2 (2°) of the Code provides as follows: 'The non-citizen married for at least three years to a French spouse, on the condition that their relationship has not ceased since marriage and the spouse has conserved French nationality.' The French is as follows: '*L'étranger marié depuis au moins trois ans avec un conjoint de nationalité française, à condition que la communauté de vie n'ait pas cessé depuis le mariage et que le conjoint ait conservé la nationalité française*.'
86 Article L521-2 (1°) of the Code provides as follows: 'The non-citizen, not living in a state of polygamy, who is father or mother of a French minor child living in France, on the condition that he or she effectively contributes to the maintenance and education of the child … since the child's birth or for at least one year.' The French is as follows: '*L'étranger, ne vivant pas en état de polygamie, qui est père ou mère d'un enfant français mineur résidant en France, à condition qu'il établisse contribuer effectivement à l'entretien et à l'éducation de l'enfant dans les conditions prévues par l'article 371-2 du code civil depuis la naissance de celui-ci ou depuis au moins un an*.'
87 The Code, art L521-2.
88 Dictionnaire Permanent, 'L'Expulsion', *Editions Législatives*, Chapitre 1 [25].
89 CE 6 Mai 1988, no 79375.
90 CE 24 Juin 1988, no 74547.
91 CE 22 Septembre 1997, no 165434.
92 The Code, art L521-3.
93 Article 521-3(1°) of the Code provides as follows: 'The non-citizen, who proves using whatever means, having habitually resided in France since having attained the age of 13.' The French is as follows: 'L'étranger qui justifie par tous moyens résider habituellement en France depuis qu'il a atteint au plus l'âge de treize ans.'
94 Article L521-3(2°) of the Code provides as follows: 'The non-citizen who has regularly resided in France for more than 20 years.' The French is as follows: '*L'étranger qui réside régulièrement en France depuis plus de vingt ans*.'
95 Article L521-3(3°) of the Code provides as follows: 'The non-citizen, who having regularly resided in France for more than 10 years, and who, not living in a state of polygamy, has been married for at least four years to either a French resident who has retained French nationality or a non-citizen, who meets the condition in (1°), on the condition that their relationship has not ceased since marriage.' The French is as follows: '*L'étranger qui réside régulièrement en France depuis plus de dix ans et qui, ne vivant pas en état de polygamie, est marié depuis au moins quatre ans soit avec un ressortissant français ayant conservé la nationalité française, soit avec un ressortissant étranger relevant du 1°, à condition que la communauté de vie n'ait pas cessé depuis le mariage*.'
96 Article L521-3(4°) of the Code provides as follows: 'The non-citizen who having regularly resided in France for more than 10 years and who, not living in a state of polygamy, is father or mother of a French minor child

living in France, on the condition that he or she establishes that he or she effectively contributes to the maintenance and education of the child … since the child's birth or for more than one year.' The French is as follows: '*L'étranger qui réside régulièrement en France depuis plus de dix ans et qui, ne vivant pas en état de polygamie, est père ou mère d'un enfant français mineur résidant en France, à condition qu'il établisse contribuer effectivement à l'entretien et à l'éducation de l'enfant dans les conditions prévues par l'article 371-2 du code civil depuis la naissance de celui-ci ou depuis au moins un an*.'

97 The Code, art L521-3.
98 Dictionnaire Permanent, 'L'Expulsion: *Le champ d'application de l'expulsion*', *Editions Législatives*, section 5 [31].
99 CAA de Paris, 9eme chambre, 7 Mars 2016, no 15PA02906.
100 The Code, art L 521-4.
101 Rapport du Groupe de Travail institué par M Nicolas Sarkozy, ministre de l'intérieur de la sécurité intérieure et des libertés locales, *La 'Double Peine': Propositions de Réforme* (Mars 2003) 3.
102 Ibid 24. At the same page, the Commission also noted that there was no incentive for the non-citizen facing removal to rehabilitate, knowing that he or she faced deportation upon leaving prison. In addition, deportation did not take into account any improvements in the behaviour of non-citizens whilst incarcerated and, finally, impending deportation was a barrier to accessing training and work programs offered whilst in prison because of the shortage of these programs and a view amongst prison officials that it was pointless to propose training to those facing removal.
103 Ibid 25.
104 Ibid.
105 Ibid.
106 Ibid 27.
107 Ibid 26.
108 Ibid 28.
109 Ibid 29.
110 Stéphane Maugendre, 'Double Peine: Une Réforme de Dupes' 2004/1 (59–60) *Plein Droit* 23, 24.
111 Rapport du Groupe de Travail, above n 101, 48–51.
112 Ibid 49.
113 Ibid 48.
114 Ibid. The Commission was particularly concerned to propose criteria which were easily verified — for example, marriage rather than de facto relationships.
115 See Chloe Peyronnet, 'Undesirable and Unreturnable Migrants under French Law: Between Legal Uncertainty and Legal Limbo' (2017) 36 *Refugee Survey Quarterly* 36.
116 Ibid 49.
117 The Code, arts L522-1 and 522-2.
118 The Code, art L522-2.
119 The Code, art L522-2. Applicants may obtain publicly funded legal representation throughout the expulsion process: see GISTI, *Comment bénéficier de l'aide juridictionnelle?* (GISTI, 2nd ed, 2017).
120 The Code, art L522-2.
121 Dictionnaire Permanent, 'L'Expulsion: *Les procédures d'expulsion*', *Editions Législatives*, Chapitre 2, Section 3 [73].
122 The Code, art L522-2.
123 Dictionnaire Permanent, 'L'Expulsion: *Les procédures d'expulsion*', *Editions Législatives*, Chapitre 1 [64].
124 See Decision no 2016-580 QPC, 5 Octobre 2016.
125 *Code de Justice Administrative*, Article R421-1.
126 Article 8 of the *European Convention on Human Rights* provides as follows:
'Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'
As one French commentator observed, 'the European Convention of Human Rights has become a particularly important source of French law': Gustave Peiser, *Droit Administratif Général* (Dalloz, 26th ed, 2014) 31. See also Elisabeth Lambert Abdelgawad and Anne Weber, 'The Reception Process in France and Germany' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP Publisher, 2008) 107.
127 *Code de Justice Administrative*, art L521-1. Under art L521-2 of the *Code de Justice Administrative*, an applicant may also appeal to the *juge des référés* arguing the deportation constitutes a serious and manifestly illegal breach of a fundament right. The judge, who must rule within 48 hours, may take all necessary measures to safeguard that fundamental right.
128 Ibid.
129 CE 26 Septembre 2001, no 231204.
130 GISTI, *Les Etrangers Face à l'administration: Droits, Démarches, Recours* (Editions La Découverte, 2013) 130.
131 *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.

132 See, for example, Direction No 41 — *Visa Refusal and Cancellation under Section 501 of the Migration Act 1958* (3 June 2009).
133 See, for example, Chantal Bostock, 'The Effect of Ministerial Directions on Tribunal Independence' (2011) 18 *Australian Journal of Administrative Law* 161.
134 The Code, art L521-3.
135 In 2016, 149 non-citizens were subject to expulsion: see Rapport commun sur les centres de rétention administrative par l'Assfam, Forum Réfugiés, France terre d'asile, La Cimade, l'Ordre de Malte et Solidarité Mayotte, *Rapport 2016 sur les centres et locaux de rétention administrative* (27 Juin 2017) 13.
136 One flaw of the revised approach, however, is that the term 'serious threat to public order' is not defined in the law. As one commentator recently noted, the authorities in France enjoy a very wide 'margin of appreciation' in determining who poses a serious threat to public order: see Peyronnet, above n 115.
137 See Conseil d'Etat, *Le Juge Administratif et le Droit des Etrangers: Les Dossiers Thématiques du Conseil d'Etat* (15 June 2015).
138 Joseph Carens, 'Immigration, Democracy and Citizenship' in Oliver Schmidtke and Saime Ozcurumez (eds), *Of States, Rights and Social Closure* (Palgrave Macmillan, 2008) 27.
139 Ibid 28.

ADJR AT 40: IN ITS PRIME OR A DISAPPOINTMENT TO ITS PARENTS?

Greg Weeks*

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) received royal assent on 16 June 1977, although it did not commence operation until 1 October 1980. Therefore, a commemorative function held in April 2017 was somewhat premature on either count. We know now that the ADJR Act did indeed survive to reach the first of its possible 40th birthdays, and we can be relatively certain that it will reach the second, if that is when it should properly be marked. Our confidence on the latter score is well placed, if for no other reason than that nobody has yet mustered the energy to repeal the ADJR Act. If that seems unduly negative, consider the lack of legislative enthusiasm that greeted the final report of the Administrative Review Council (ARC) in 2012: rather than legislate the ARC's minimal suggested changes to the ADJR Act, the government simply defunded the ARC.[1]

The ADJR Act cannot be properly understood without recognising the role of its slightly older legislative twin, the *Federal Court of Australia Act 1976* (Cth). After all, it was 'part of the reason for the Federal Court being created'.[2] The jurisdiction to make decisions under the ADJR Act is reserved by s 8(1) to the Federal Court, and, since 1999, by s 8(2), first to the Federal Magistrates Court and then to the Federal Circuit Court of Australia. Celebrations were held in Sydney in September 2017 to celebrate the Federal Court's 40th anniversary,[3] so I will not trespass further on that topic now.

There are many issues which arise under the ADJR Act and are worth examining in the context of an anniversary celebration. Compelled to be selective, I will therefore make a few comments about the influence of ADJR at state level after I first look at what many have seen as ADJR's most enduring reform: the right to obtain reasons for a decision. Finally, I will briefly give some reasons why, like most 40-year-olds, the ADJR Act has both achieved a level of maturity and also been tainted with disappointment on the basis that it could have done more.

Reasons

There was no common law right to obtain reasons when the *Commonwealth Administrative Review Committee: Report*[4] (the Kerr Committee report) was making its deliberations and none has arisen since.[5] The Kerr Committee report characterised the absence of a statutory provision providing a right to obtain reasons as 'inhibit[ing] the exercise of jurisdiction by courts to correct an improper exercise of power by administrators and erroneous decisions of law made by administrative tribunals'.[6]

These comments were expanded upon in the recommendations of the *Prerogative Writ Procedures: Report of Committee of Review*[7] (the Ellicott Committee report), which also

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presaged the limitations on the statutory right to reasons subsequently enacted in ss 13A and 14 of the ADJR Act.[8] Neither report came close to reflecting the depth of detail that today characterises, and restricts, the right to reasons under the ADJR Act.[9]

When giving the second reading speech in the House of Representatives for the Administrative Decisions (Judicial Review) Bill, the Attorney-General (RJ Ellicott QC), who had previously been a member of both the Kerr and Ellicott committee, said:

> [A] person who is aggrieved by a decision usually has no means of compelling the decision-maker to give his reasons for the decision or to set out the facts on which the decision is based. Lack of knowledge on these matters will often make it difficult to mount an effective challenge to an administrative decision even though there may be grounds on which that decision can be challenged in law. Accordingly, one of the principal elements of the present Bill is a provision that will require a decision-maker to give to a person who is adversely affected by his decision the reasons for that decision and a statement of findings on material questions of fact, including the evidence or other material on which those findings were based. There is already a like provision[10] in the *Administrative Appeals Tribunal Act*[11] in respect of decisions from which an appeal lies to the Tribunal.[12]

He went on to say: 'No longer will it be possible for the decision maker to hide behind silence'.[13]

With respect, silence was not itself the issue, as the High Court's decision in *Minister for Immigration and Citizenship v Li*[14] later made clear. There is precedent,[15] going back at least as far as *Sharp v Wakefield*,[16] via decisions of Sir Owen Dixon in *House v R*,[17] *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[18] and *Klein v Domus Pty Ltd*,[19] which leads to the conclusion that the failure of a decision-maker to give reasons for his or her decision allows a court which cannot itself see a good reason for that decision to invalidate it on the ground of *Wednesbury* unreasonableness.[20]

The capacity of a court to interpret a decision-maker's silence as demonstrating the lack of a good reason for making a decision (and therefore the invalidity of that decision) is a common law work-around.[21] It has a certain remedial potency but falls short of empowering a person by statute[22] to obtain reasons for a decision affecting him or her before commencing judicial review proceedings. One of the reasons why the ADJR Act's flaws and shortcomings have been overlooked over the last 40 years is that the right conferred by s 13 to obtain reasons stands in contrast to the lack of any such right at common law. This provision has been described as 'probably [ADJR's] most enduring reform' but might arguably serve the same purpose within, say, a new division of the *Freedom of Information Act 1982* (Cth).[23] It is, alone, a tenuous basis on which to claim that the ADJR Act has been even a qualified success.

The influence of ADJR in state jurisdictions

The High Court has told us more than once that there is a single common law of Australia which it has the responsibility for setting.[24] However, the states and territories of Australia are entitled, subject to staying clear of areas of exclusive Commonwealth legislative competence, to have their own statutory arrangements. The benefits of the ADJR Act's model were initially generally accepted with regard to:

(a) simplifying the procedures for accessing the courts and applying for judicial review;
(b) codifying the common law grounds for review; and
(c) providing for a right to written reasons in respect of certain administrative decisions.

However, it is noteworthy that only three[25] other jurisdictions (the ACT,[26] Queensland[27] and Tasmania[28]) have created legislation based on the Commonwealth ADJR Act. It is also

peculiar that those which did so chose to do so at a point when the limitations of the Commonwealth's statutory judicial review scheme were becoming apparent.

New South Wales, the Northern Territory, South Australia and Western Australia have no statutory judicial review scheme. It seems increasingly apparent that these jurisdictions might not feel the need to supplement common law judicial review with a statutory scheme, especially since *Kirk v Industrial Court*[29] (*Kirk*) removed the capacity of privative clauses to protect jurisdictional errors from judicial review in state Supreme Courts. Statutory schemes, by contrast, are still subject to being rendered ineffective by subsequent legislation. The removal of decisions under the *Migration Act 1958* (Cth) from the jurisdiction of the ADJR Act, where they had once almost exclusively been reviewed, is a case in point.[30]

The Law Reform Commission of Western Australia conducted an inquiry into judicial review, which reported in 2002.[31] Among other things, the Commission recommended the 'enactment of legislation substantially similar' to the ADJR Act. Nothing came of this.

In 2011, the Legislation, Policy and Criminal Review Division of the New South Wales Department of Attorney-General and Justice released a discussion paper on reform of judicial review in New South Wales and invited submissions.[32] The discussion paper suggested the possibility of adopting a range of statutory schemes, including legislation modelled on the Commonwealth ADJR Act (either closely, as in the ACT, Queensland and Tasmania, or a modified version) or using a 'natural justice' test of jurisdiction (as under the Victorian *Administrative Law Act 1978*). For reasons which were never made public but which we can speculate were at least somewhat connected to the change of government in a landslide election win in the same month as the release of the discussion paper, nothing more was said about this reform proposal and no legislation was drafted, whether modelled on the ADJR Act or otherwise.

Whether this was unfortunate for the State of New South Wales (and for Western Australia before it) is open to discussion, but in some ways it was unfortunate for all of us on the basis that a direct comparison of statutory and common law methods of review was never carried through. Such an exercise might have placed further focus on important issues which have not been fully addressed with regard to the ADJR Act. These might have included whether a jurisdictional scope based on the presence of a 'decision … made under an enactment' is unduly narrow; whether the benefits of judicial review legislation are unacceptably limited by the capacity of the operation of such legislation to be excluded; whether a statutory scheme or a common law scheme[33] would be better placed to extend judicial review's coverage to the performance of public functions by private bodies; whether codification retards the development of judicial review (to the extent that the statute is not amended to take account of common law developments or to make its own advances); and the desirability or otherwise of allowing a statutory scheme to offer different standards of review to the common law. These are just examples, and I do not argue that the last chance to discuss them has passed. However, the decisions of Western Australia and, particularly, New South Wales not to proceed with statutory reform of judicial review did amount to a lost chance to debate the value of statutory judicial review at a time when legislative minds were focused by the promise of impending statutory developments on the subject.

The ADJR Act at 40: report card

I have been privileged in recent years to have been asked to speak at a number of 40th birthday celebrations. I count myself fortunate that this is the first time I have ever found it necessary to consider aloud whether 40 years marks the point at which the experiment must be said to have failed and should be followed by immediate 'repeal'. The fact that I do so now is excused somewhat by the fact that I am far from the first to speculate that all[34] or

most[35] of the ADJR Act might be repealed. Furthermore, since I have never been asked to celebrate the 40th birthday of a former child star or racehorse, this is the first time I have been in a position to repeat the speculation of others[36] that the honoree peaked in its first decade and has been in decline since.

It is often supposed that the ADJR Act offers significant advantages over common law procedures, as it was of course intended to do. I say with genuine respect to both parties that the ADJR Act has had no fonder admirer, judicial or otherwise, than Justice Michael Kirby, who described the Act's effects as being 'overwhelmingly beneficial'[37] and endorsed the description of the Act (used by the Attorney-General in his second reading speech) as 'one of the most important Australian legal reforms of the last century'.[38] The results, from which Kirby J dissented in *NEAT Domestic Trading Pty Ltd v AWB Ltd*[39] and *Griffith University v Tang*[40] are examples of the shortcomings of statutory schemes generally and demonstrate at the very least the fragility of the benefits and reforms so lauded by his Honour.

Professor John McMillan credited the ADJR Act's 'marked and positive influence on law and administration' to the fact that 'it provides a clear and coherent structure for judicial review'.[41] This is true, although I generally beg leave to doubt the related and frequently made claim that the grounds of review enumerated in ss 5, 6 and 7 have any significant 'educative effect'.[42] As a list, the grounds of judicial review mean little at best (before his elevation to the High Court, Stephen Gageler SC referred to 'the now almost forgotten list of grounds in the ADJR Act'[43]) and, at worst, are actively misleading. After all, they include terms of art such as 'natural justice', which must be a mystery to the uninitiated, and various terms that do not share the meaning which they carry in English as it is usually understood. These include references to 'an *improper* exercise of … power' (meaning 'unauthorised' and having nothing to do with propriety) and to '*irrelevant*' and '*relevant*' considerations (meaning 'forbidden' and 'mandatory' respectively and having nothing to do with relevance). Perhaps most notoriously, judicial review refers to exercises of power 'so *unreasonable* that no reasonable person could have so exercised the power'. What this actually means is a never-ending source of impassioned debate in administrative law circles. Gageler thought this common law formula, repeated in the ADJR Act, to be 'well-understood and frequently repeated'.[44] While the latter claim is beyond dispute, it is perhaps only the effect of the language which is 'well-understood'.[45] In any case, there is consensus that *unreasonableness* in the administrative law sense has nothing to do with reasonableness in the usual fashion). At least the common law 'no evidence' ground does what it says on the tin — something which the equivalent ground in the ADJR Act cannot claim.[46]

The advantages of the ADJR Act are supposed to be particularly apparent in regard to accessibility, remedial flexibility and the right to obtain reasons. I have already considered the last of these benefits at length. Additionally, I will not now consider in any detail the belief that ADJR is a more accessible judicial review mechanism than its constitutional or common law equivalents.[47] The least that can be said of such a claim is that it was certainly the intention of those who drafted the Act that it should be so. Any doubts about the veracity of such a claim spring from the restricted jurisdictional formulation which sees review under the ADJR Act limited to 'decisions … made under an enactment'. A judicial review scheme can, after all, only be considered accessible to the extent that it allows people to bring claims. The ADJR Act, for all its benefits, is drafted more narrowly than the common law mechanism.

The 'flexible and expanded remedial framework'[48] which is apparent on the face of the ADJR Act is often assumed to operate in its intended fashion, but that effect has not fully been borne out in fact. For example, s 16(1)(a) provides a court which hears an application under the Act with the discretion to make 'an order quashing or setting aside the decision, or a part

of the decision, with *effect from the date of the order or from such earlier or later date as the court specifies*'.[49]

In *Wattmaster Alco Pty Ltd v Button*,[50] Pincus J held that an anti-dumping duty had been paid under an invalid customs declaration but elected to set aside that declaration under s 16(1)(a) from the date of the Court's decision rather than from the earlier date of the declaration itself. His Honour noted the difference between the 'apparently unfettered discretion' to fix the date from which an order becomes operative under the Act and the substantively different situation under the general law, and held that:

> prima facie the setting aside should be operative from the date of the court's decision; a party desiring the specification of a different date must demonstrate the propriety of that course.[51]

There are difficulties with reading s 16(1)(a) in that fashion, and these were pointed out on appeal.[52] Sheppard and Wilcox JJ (with whom Fox J agreed on this point) held that the drafting of s 16(1)(a) was 'intended to do no more than to indicate that the Court has a choice from all the available possibilities: the date of the order, an earlier date or a later date'.[53] With respect, that is the preferable view. Furthermore, their Honours noted that there is no particular difficulty with making an administrative act or decision a nullity from a date other than that on which the act or decision first demonstrated jurisdictional error,[54] although to do so would be unusual in a general law order.[55]

Sheppard and Wilcox JJ agreed with Pincus J's initial observation that setting the date from which an order under s 16(1)(a) takes effect is left 'entirely' to the Court's discretion but denied that the Act imposes any presumption as to the exercise of that discretion or that either party bears an onus to demonstrate why a particular date is appropriate.[56] The Court's choice of a date should be guided only by the justice of the individual case. The Full Court therefore set aside the decision of Pincus J to nullify the relevant unlawful declaration only from the date of his decision rather than from the date of the declaration itself.[57] Its reasoning was guided heavily by general law considerations and had the practical effect of keeping the ADJR remedial scheme closer to that which would have been available under s 39B of the *Judiciary Act 1903* (Cth).[58]

Notwithstanding this apparent reluctance to apply a remedial discretion which does not exist at common law, retrospective nullification is occasionally withheld from applicants under the ADJR Act. In *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*,[59] the Full Federal Court held that a nursing home's status as an 'approved provider' was able to be restored but that, since it had never alleged the presence of a jurisdictional error or sought to have the cancellation of its status declared a nullity, any such restoration could be prospective only. Again, this is a case which might be seen to hobble the ADJR Act to a significant extent, since the general law application of judicial review remedies essentially overrules a statutory regime whose whole point, successfully realised for 'the first decade or so' of its operation,[60] was to operate beyond the limitations of jurisdictional error.[61]

Still later, the Full Federal Court in *Grass v Minister for Immigration and Border Protection*[62] suggested in obiter dicta that, had it been asked to consider the scope of ADJR s 16(1)(a), it would have considered it arguable that:

> in empowering the Court to fix a date which is earlier, or later, than the date of the Court's judgment, s 16(1)(a) does not authorise the Court to fix a date which preserves a decision it has found to be unlawful, especially where the error identified is of a jurisdictional kind. We do not consider *Wattmaster* or *Jadwan* are determinative on this point.[63]

The logic of their Honours' suggested approach is clear, with respect. It does, however, indicate the continuation of the slide of ADJR's remedial provisions towards those of the

common law. The virtual omnipresence of jurisdictional error as a driving concept in judicial review[64] appears now to extend to the ADJR Act, with which it once, by design, had nothing to do.

The flexibility of the ADJR Act remains considerable but falls prey to the same problems as any other codified legislative scheme: it is still a scheme realised through a legislative instrument which is interpreted by the courts in the same way as any other legislative instrument. The years of confusion created by the words 'under an enactment' — before the High Court imposed a solution[65] which was perhaps only marginally less confusing but had the clear benefit of at least being definitive — is an example. The result in *NEAT Domestic Trading Pty Ltd v AWB Ltd*[66] is another. The judgement of Gleeson CJ made clear that AWBI, which was the beneficiary of a legislative scheme which allowed it to succeed in the case before him, nonetheless held a 'virtual or at least potential statutory monopoly in the bulk export of wheat … which is seen as being not only in the interests of wheat growers generally, but also in the national interest'.[67] That fact was insufficient to bring AWBI within the scope of the ADJR Act.

Conclusions

The ADJR Act is far from perfect. I would argue that for every benefit, such as the capacity to obtain statements of reasons, there is the much larger disbenefit that the ADJR Act is drafted in such narrow terms that it excludes a significant proportion of otherwise deserving claims. Rather than expanding upon the common law judicial review regime, it has taken on many of its more difficult features (such as the prominence of jurisdictional error) within a narrower scope.

To return to the beginning of this article, one could hardly say that the ADJR Act is in its prime but neither do its parents have any right to feel disappointed in it. It is neglect which bears a large share of the blame for putting the ADJR Act in its current state. It has been infrequently amended in substance, with the result that, over 35 years since common law courts were first able to review vice-regal decisions,[68] the same still cannot be done under the ADJR Act.[69]

The indifference of successive governments to reforming the ADJR Act, compounded by the current government's effective (but non-legislative) disbanding of the ARC, has resulted in the ADJR Act becoming stale. It has gone from being the preferred method of seeking judicial review in Commonwealth matters to being something of an afterthought. A colleague once told me that, having just published a book on judicial review in the mid-1980s, he was upbraided by a judge who asked why my colleague had bothered to spend so many pages talking about s 75(v) of the *Constitution* and the Federal Court's jurisdiction under s 39B of the Judiciary Act when it was clear to the meanest intelligence that only the ADJR Act mattered now. Such a statement seems today like the bizarre relic of a lost world.

The ADJR Act is an experiment worth persevering with, but we cannot expect more of a statute into which no effort towards reform is placed. Its 40th birthday need not be another stage in inevitable further decline. However, legislative energy is going to have to be spent if we are truly to be able to say of the ADJR Act that 'life begins (again) at 40'.

Endnotes

1 Administrative Review Council, *Federal Judicial Review in Australia* (2012).
2 Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 94.
3 See Australian National University, '40th Anniversary of the Federal Court of Australia', 8 and 9 September 2017, <https://law.anu.edu.au/sites/all/files/media/documents/events/2017_federal_court_web.pdf>.

4 Parliamentary Paper No 144 (1971).
5 See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; cf Justice Michael Kirby, 'Accountability and the Right to Reasons', and Michael Taggart, 'Osmond in the High Court of Australia: Missed Opportunity' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 36 and 53 respectively.
6 Justice JR Kerr et al, *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 of 1971 (Kerr Committee Report) (1971), [94]. See also ibid [266] and [390] (Recommendation 8).
7 Parliamentary Paper No 56 (1973).
8 RJ Ellicott, FJ Mahoney and LJ McAuley, *Prerogative Writ Procedures: Report of Committee of Review*, Parliamentary Paper No 56 of 1973 (Ellicott Committee Report) (1973), [34]–[38].
9 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 13, 13A and 14, and sch 2.
10 Another like provision appears in the *Ombudsman Act 1976* (Cth) s 15(2)(e), which states: 'Where the Ombudsman is of the opinion … that reasons should have been, but were not, given for a decision to which this section applies … the Ombudsman shall report accordingly to the Department or prescribed authority concerned'.
11 *Administrative Appeals Tribunal Act 1975* (Cth) s 28. Where an applicant is able to obtain a statement of reasons under this section of the Administrative Appeals Tribunal Act, the relevant decision is not one to which ADJR s 13 applies: *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(11).
12 Commonwealth, *Parliamentary Debates*, House of Representatives, 1395 (RJ Ellicott QC).
13 Ibid 1396.
14 (2013) 249 CLR 332.
15 See *Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 [75] (McHugh and Gummow JJ).
16 [1891] AC 173.
17 (1936) 55 CLR 499.
18 (1949) 78 CLR 353.
19 (1963) 109 CLR 467.
20 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
21 A related example is where rules of court enable a court in proceedings commenced against a public authority to compel that authority to provide reasons for the challenged decision; see, for example, *Uniform Civil Procedure Rules 2005* (NSW), r 59.9.
22 There are in fact many statutes beyond the ADJR Act which entitle people to obtain reasons from decision-makers. The *Acts Interpretation Act 1901* (Cth) s 25D ties the interpretation of such provisions to s 13 of the ADJR Act.
23 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 213.
24 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [135]; and *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, [99].
25 The *Administrative Law Act 1978* (Vic) operates on a completely different model to the ADJR Act: see Matthew Groves, 'Should the Administrative Law Act 1978 (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451.
26 *Administrative Decisions (Judicial Review) Act 1989* (ACT).
27 *Judicial Review Act 1991* (Qld).
28 *Judicial Review Act 2000* (Tas). Tasmania is conducting a review of its legislation.
29 *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531.
30 See Gageler, above n 2, 95.
31 Law Reform Commission of Western Australia, *Judicial Review of Administrative Decisions*, Final Report — Project No 95 (2002).
32 NSW Government Department of Justice and Attorney-General, *Discussion Paper: Reform of Judicial Review in NSW* (March 2011) <www.justice.nsw.gov.au/justicepolicy/Documents/reform_of_judicial_review_in_nsw_discussion_paper.pdf>.
33 As to the Commonwealth, see Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316.
34 Indeed, there was a statement of dissenting views from the ARC's report, above n 1, by Roger Wilkins AO (recorded in 'Appendix A: Jurisdictional Limits Model — Directions to Decision') which argued strongly that the ADJR Act should be repealed. See Kathleen Foley and Kateena O'Gorman, 'Constitutional Writ Review and the ADJR Act: Ships in the Night?' in Debra Mortimer (ed), *Administrative Justice and its Availability* (Federation Press, 2015) 172, 175. That sole dissent accurately represents the push to repeal ADJR: present and visible, but very much in the minority.
35 See Aronson, above n 23, 213–14.
36 Peter Billings and Anthony Cassimatis, 'Australia's Codification of Judicial Review: Has the Legislative Effort Been Worth It?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 180, 183.
37 *Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 [94]. His Honour simultaneously alleged that the ADJR Act had to some extent 'retarded' the development of

the common law of judicial review in Australia, something that Professor Aronson has denied: Aronson, above n 23.

38 *Griffith University v Tang* (2005) 221 CLR 99 [133].
39 (2003) 216 CLR 277.
40 (2005) 221 CLR 99.
41 John McMillan, 'Restoring the ADJR Act in Federal Judicial Review' (2012) 71 *AIAL Forum* 12, 12.
42 Aronson, above n 23, 214.
43 Gageler, above n 2, 105.
44 Ibid 94.
45 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [377–78] (Gageler J).
46 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(h) and 5(3). There was no shortage of submissions suggesting that this demonstrably confusing ground be amended: Administrative Review Council, above n 1, [7.68]–[7.79]. The ARC recommended changes in Recommendation 8, ultimately to no effect.
47 McMillan, above n 41, 12.
48 Administrative Review Council, above n 1, [4.19]. The areas in which s 16 exceeds the 'amplitude of [the remedial] … power' held by general law courts are set out in Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 4th ed, 2015), [17.8.2].
49 (1986) 8 FCR 471.
50 Emphasis added.
51 *Wattmaster Alco Pty Ltd v Button* (1986) 8 FCR 471 at 480.
52 *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253, [255]–[256] (Sheppard and Wilcox JJ).
53 Ibid [256].
54 See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017), [10.20]–[10.30].
55 *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253 [256].
56 If the order does not stipulate a date, it is assumed under s 16(1)(a) that the operative date is the date of the order itself.
57 See, however, criticism of the Full Court's lack of clarity in this regard: *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 [18] (Gray and Downes JJ).
58 (2003) 145 FCR 1.
59 There were also some practical issues around the fact that the appellant had already paid substantial sums of import duty, under protest, on the authority of the invalid order: Aronson, Groves and Weeks, above n 54, [10.365].
60 Gageler, above n 2, 96.
61 (2015) 231 FCR 128 (Perram, Yates and Mortimer JJ).
62 However, there is an argument that the same reasoning will come into effect whenever an applicant seeks an order that the decision under challenge was not 'made under' the enactment in question: *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 [17]; and Aronson, Groves and Weeks, above n 54, [2.410].
63 *Grass v Minister for Immigration and Border Protection* (2015) 231 FCR 128, 146–47.
64 See, for example, JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.
65 (2003) 216 CLR 277.
66 *Griffith University v Tang* (2005) 221 CLR 99 [130–31] (Gummow, Callinan and Heydon JJ).
67 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 27 [290].
68 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; and *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
69 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3 ('decision to which this Act applies').

CASE NOTE

Kristy Katavic*

What to do when judicial minds differ: *Legal Practitioner P1 v ACT Civil and Administrative Tribunal*

The case of *Legal Practitioner P1 v ACT Civil and Administrative Tribunal*[1] involved a decision of the ACT Civil and Administrative Tribunal which concerned the proper construction of two provisions in the *Legal Profession Act 2006* (ACT): ss 395 and 424.

Essentially, the Court's task was to look at the substance of the provisions in issue rather than as mere procedure. The issue was whether the requirements for dealing with a late complaint that are set out in s 395(2) of the Act are 'procedural requirements' that the Tribunal may disregard under s 424 of the Act or fundamental requirements that must be met in order for the Tribunal to have jurisdiction to deal with a complaint. The relevant provision is as follows.

> the complaint cannot be dealt with (otherwise than to dismiss it or refer it to mediation) if the complaint is made more than 3 years after the conduct is alleged to have happened, unless the relevant council for the person about whom the complaint is made decides that —
>
> (a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
>
> (b) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.

In this instance the Council of the Law Society of the ACT did not address s 395(2). There is no doubt that the circumstances enlivened consideration of s 395(2) and it was incumbent upon the Council to turn its mind to that issue and make a decision.

The Council dismissed the complaint. The complainant appealed to the ACT Civil and Administrative Tribunal seeking review of the Council's dismissal. The failure to address s 395(2) was not raised in those proceedings.

The Tribunal overturned the Council's dismissal and ordered it to commence proceedings. It did so in March 2016. These proceedings were the subject of the Court's decision. As it happens, the Council observed its own failing in relation to s 395 and sought to regularise it using s 424. Section 424 enables the Tribunal to disregard a failure by the Council to observe a procedural requirement in relation to a complaint before the application was made if there is no prejudice to the parties.

The Tribunal dealt with the issue of 'procedural regularisation' by finding that s 395 was a procedural requirement encompassed by s 424. It was satisfied there was no prejudice and made the order that the Council's failure to address s 395 could be disregarded.

The Tribunal followed the decision of Burns J in *Practitioner D3 v ACT Civil and Administrative Tribunal*[2] (*D3*). In *D3*, Burns J decided that s 395(2) was a procedural

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requirement capable of being disregarded under s 424. He did so based on three key reasons:

(1) the statutory text and context;
(2) consistency with the legislative history; and
(3) distinguishing the approach taken by HCA in *John Pfeiffer Pty Ltd v Rogerson*.[3]

When the matter came before the Chief Justice, the practitioner argued that *D3* was decided wrongly. The practitioner succeeded. The Chief Justice respectfully disagreed entirely with Burns J in *D3*. Her Honour's core finding was that the apparent purpose of s 395 and the expression 'the late complaint *cannot be dealt with*' is to prevent a council from *dealing with* a late complaint by progressing it to an investigation unless it has first decided it is just and fair to deal with the complaint having regard to delay or whether it is in the public interest.

Her Honour considered the purpose of s 395 and likened it to the imposition of a limitation period that may be overcome in certain circumstances. Against that analysis, her Honour considered that the work of s 424 lay in excusing procedural lapses, not acquiring jurisdiction.

Her Honour's view was fortified by aspects of the Explanatory Statement that alluded to what might have been meant by 'procedural requirement'. Section 395 did not feature in that examination. She went on to distinguish the character of decisions made under ss 395 and 424: the former dealing with permission and the latter being concerned with prejudice.

Essentially s 395 was concerned with a deeper kind of consideration requiring some balanced analysis of the position of the parties and the broader public interest.

Her Honour also found that provisions limiting actions should be characterised as imposing a substantive requirement rather than a procedural requirement albeit where they might appear in a particular legal context.

What did the ACT legal profession learn from this? Undoubtedly it is a cautionary tale about the need for decision-makers to ensure that they acquit themselves of all aspects of the decision-making process and pay attention to provisions that may not obviously confer a decision-making power, although it seemed apparent in this case.

Furthermore, there are now two single-judge decisions of the Supreme Court that point in opposite directions in relation to the same provisions. While the exact same issue may not arise in the future, the operation of s 424 may well be the subject of judicial consideration — a matter no doubt ripe for the Court of Appeal.

Endnotes

1 2017] ACTSC 173.
2 [2016] ACTSC 61
3 (2000) 203 CLR 503.