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RECENT DEVELOPMENTS

Katherine Cook

Commissioners announced for Victorian informants' Royal Commission

The Andrews Labor Government has announced a former President of the Queensland Court of Appeal will lead the Victorian Royal Commission into Management of Informants.

Attorney-General Jill Hennessy has announced the appointment of the Honourable Margaret McMurdo AC as the Royal Commission Chair, along with former South Australian Police Commissioner Malcolm Hyde AO APM as a Commissioner.

Justice McMurdo has had a highly distinguished legal career, having worked in the Public Defender's Office (1976–1989), and was admitted as a barrister of the Supreme Court of Queensland in 1989. She was appointed a judge of the District Court of Queensland and the Children's Court of Queensland (1993–1998).

In 1998, Justice McMurdo was appointed President of the Court of Appeal, Supreme Court of Queensland. She was appointed a Companion of the Order of Australia (2007) for service to the law and judicial administration in Queensland.

After serving 30 years as a member of Victoria Police, Mr Hyde was appointed Police Commissioner for South Australia Police in 1997. He was reappointed three times before he retired from the role in 2012.

From 2012 to 2013, Mr Hyde was a special adviser to the Victorian Parliament's Family and Community Development Committee Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations (Betrayal of Trust Inquiry).

Mr Hyde also conducted the Tasmanian Bushfires Inquiry in 2013, inquiring into three major fires in 2013. The inquiry covered the cause and circumstances of the fires as well as all aspects of the emergency response, including preparation and planning.

Under the Royal Commission's terms of reference, Justice McMurdo and Mr Hyde will inquire into and report on matters including:

- the number and extent of cases affected by informant 3838;
- the conduct of current and former members of Victoria Police in the handling and management of 3838;
- the current adequacy and effectiveness of Victoria Police's processes for recruiting, handling and managing human sources who are subject to legal obligations of confidentiality or privilege;
- the current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege; and
- the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of such human sources to prosecuting authorities.

Under the *Inquiries Act 2014* (Vic) the Commission can share information with any body or agency for investigation or action if it considers it relevant or appropriate.

The inquiry will provide an interim report by 1 July 2019 and provide a final report by 1 December 2019.

<https://www.premier.vic.gov.au/commissioners-announced-for-informants-royal-commission/>

Commonwealth Integrity Commission review panel announced

The panel of experts who will advise Government on the development of the legislation for the Commonwealth Integrity Commission (CIC) has been announced by the Morrison Government.

The panel will initially advise the Government directly whilst the public consultation on the proposed model, released last week, occurs. This will include the panel discussing the model directly with key agency stakeholders over the course of January 2019. Between now and 1 February 2019, while the public consultation phase on design principles is conducted, the panel will focus on providing advice based on interactions with key public sector stakeholders on successive drafts of the legislation before it progresses to Cabinet and the Coalition party room for approval ahead of further public consideration of the resulting legislation.

Margaret Cunneen SC is a longstanding figure in the criminal law fraternity with firsthand experience of the failings of State integrity bodies at a State level. Shortly to retire from the position of Deputy Senior Crown Prosecutor in New South Wales, Ms Cunneen was appointed Senior Counsel in 2007 and led the NSW Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Roman Catholic Diocese of Maitland–Newcastle.

After a long career in the senior ranks of the West Australian public sector (including as Director-General of the WA Department of the Premier and Cabinet), Mal Wauchope AO was appointed as WA Public Sector Commissioner in 2008. In this role, Mr Wauchope was responsible for ensuring that the Western Australian public sector acts with integrity, performs efficiently and meets the high standard expected by the public. He will bring these unique insights to the development of the public sector division of the Government's proposed CIC.

Mick Keelty AO APM was Commissioner of the Australian Federal Police from 2001 to 2009 and the inaugural Chairperson for the Australian Crime Commission in 2003. Mr Keelty's extensive experience in law enforcement and understanding of the organised crime and corruption landscape will be invaluable to ensuring the law enforcement division of the CIC is appropriately equipped to deal with this higher risk environment.

The unique experiences of these three individuals across criminal law and prosecution, public sector administration and law enforcement will assist the Government to ensure that the model for the CIC is effective, appropriate and balanced.

The Government has released a consultation paper and invited public submissions on the proposed model for a CIC. Submissions close on 1 February 2019. The paper is available at:

<https://www.ag.gov.au/Consultations/Pages/commonwealth-integrity-commission.aspx>

<https://www.attorneygeneral.gov.au/Media/Pages/Commonwealth-Integrity-Commission-Review-Panel-Announced-18-Dec-2018.aspx>

Preventing data breaches should be business as usual

The latest report of the Office of the Australian Information Commissioner (OAIC) shows it has been notified of 245 data breaches affecting personal information between July and September 2018.

The quarterly statistics report on the Notifiable Data Breaches (NDB) scheme indicates 57 per cent of incidents were caused by malicious or criminal attack and 37 per cent resulted from human error.

Australian Information Commissioner and Privacy Commissioner Angelene Falk said training staff on how to identify and prevent privacy risks needs to be part of business as usual.

'Everyone who handles personal information in their work needs to understand how data breaches can occur so we can work together to prevent them', Ms Falk said.

'Organisations and agencies need the right cyber security in place, but they also need to make sure work policies and processes support staff to protect personal information every day.

'Our latest report shows 20 per cent of data breaches over the quarter occurred when personal information was sent to the wrong recipient, by email, mail, fax or other means.

'Importantly, we also need to be on the alert for suspicious emails or texts, with 20 per cent of all data breaches in the quarter attributed to phishing.

'Phishing is when an individual is contacted by email or text message by someone posing as a legitimate institution to lure them into providing passwords or personal information.

'This can result in their credentials — their username and password — being compromised and used to gain access to their system or network, if additional protections are not in place.'

The report can be found at <www.oaic.gov.au/ndbreport>.

Key statistics

The Notifiable Data Breaches July–September 2018 report shows:

- 245 data breaches were notified to affected individuals and the OAIC, compared to 242 the previous quarter:
  - — 57 per cent were attributed to malicious or criminal attacks, compared to 59 per cent the previous quarter;
  - — 37 per cent were attributed to human error, compared to 36 per cent the previous quarter;
  - — 6 per cent were attributed to system faults, compared to 5 per cent the previous quarter;
- 63 per cent involved the personal information of 100 or fewer individuals, compared to 61 per cent the previous quarter;

- the top five industry sectors to report breaches were:
  - — private health service providers: 45;
  - — finance: 35;
  - — legal, accounting and management services: 34;
  - — private education providers: 16; and
  - — personal services: 13.

Background

The Notifiable Data Breaches (NDB) scheme requires regulated entities to notify affected individuals and the Australian Information Commissioner about 'eligible data breaches'. These are breaches where:

- there is unauthorised access to or unauthorised disclosure of personal information, or a loss of personal information, that an entity holds;
- this is likely to result in serious harm to one or more individuals; and
- the entity has not been able to prevent the likely risk of serious harm with remedial action.

The scheme commenced on 22 February 2018. The OAIC publishes quarterly statistical information about notifications received under the scheme to help the community, business and government understand its operation and the causes of data breaches.

Notifications to the OAIC from multiple entities relating to the same data breach are counted as a single notification in the report.

The OAIC has produced a data breach preparation and response guide for agencies and private sector organisations with obligations under the Privacy Act. Guidance for individuals on what to do after a data breach notification is also available at <oaic.gov.au>.

Religious freedom announcement

The Australian Human Rights Commission (AHRC) welcomes the release of the Religious Freedom Review.

The Commission looks forward to assessing any legislative proposals when they are released in order to ensure that they appropriately balance human rights.

'It is critical that any new laws do not create new forms of discrimination.

'Australia must protect the rights of all people, including those of faith and those who are lesbian, gay, bisexual, transgender, intersex or pregnant', said Commission President Rosalind Croucher.

The Commission welcomes the commitment of the Government to introduce religious freedoms protection.

The organisation has recommended such protections be introduced since its 1998 report titled Article 18.

'The use of exemptions to the Sex Discrimination Act is the wrong approach to protect religious freedom', said Human Rights Commissioner Edward Santow.

'We call for the urgent repeal of the exemption in section 38 of the SDA relating to students and teachers.'

The Commission recommended repeal of this section as far back as 1992 in relation to sex, pregnancy and marital status.

The AHRC welcomes the Government's commitment to referring an inquiry to the Commission to investigate the experience of discrimination and violence experienced by people of faith.

The Commission had recommended this in its submission to the Religious Freedom Review.

'Our goal should be to eliminate all forms of discrimination', said Commissioner Santow.

'Australia's piecemeal law in this area should be amended to prohibit all discrimination on the basis of religion and other belief, and also to remove the broad and out-dated exemptions in the Sex Discrimination Act.'

<https://www.humanrights.gov.au/news/media-releases/religious-freedom-announcement>

Release of the NSW Ombudsman's annual report

On 22 October 2018, the NSW Ombudsman, Mr Michael Barnes, tabled the NSW Ombudsman *Annual Report 2017–18* in the New South Wales Parliament.

The report details the work done across the broad range of areas within the Ombudsman's jurisdiction. The Ombudsman watches over New South Wales public sector agencies and thousands of private sector agencies that care for children and provide community services.

'This year we provided assistance and advice to more than 40 600 people and agencies who contacted the office for help', said Mr Barnes. 'We also finalised eight formal investigations and tabled six reports in Parliament on public interest issues.'

The annual report highlights the many ways that the Ombudsman adds value, including dealing with individual requests for assistance. Examples from the Ombudsman's report include:

- helping an Aboriginal father to enforce a 13-year-old arrangement for his weekly contact with his daughter, who was in care — see case study 3, p 50;
- assisting a complainant whose local council had changed parking restrictions without warning and fined him under those new restrictions, despite him having parked his car legally — see case study 29, p 77;
- helping a man to get his mother's estate finalised following delays at the Trustee and Guardian — see case study 23, p 69;
- helping an elderly couple in social housing after their oven became so hot they could not touch it — see case study 19, p 67;
- securing financial support for grandparent carers after their payment was stopped when they moved interstate — see case study 7, p 51;
- getting a child, who had been regularly suspended from his former school, back to school — see case study 16, p 66; and

- making service wide improvements following a complaint about a young person with disability being transported in the boot of a car — see case study 60, p 118.

These different examples give a flavour of the range of matters the Ombudsman deals with every day — reinforcing the public's confidence that the office can help resolve matters that affect them.

'Although it is important for my office to achieve the best possible outcomes for individual complainants, it is equally important for us to focus on fixing systemic issues and promoting best practice in the agencies we oversight', said Mr Barnes.

<https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/61698/Media-Release-Release-of-the-NSW-Ombudsmans-Annual-Report.pdf>

Commonwealth Ombudsman releases investigation report on the Department of Home Affairs' implementation of the recommendations of the Thom Review to prevent the immigration detention of Australian citizens

The Commonwealth Ombudsman, Michael Manthorpe PSM, has released a report on the Department of Home Affairs' implementation of the recommendations made in Dr Vivienne Thom's independent review of the detention of two Australian citizens in 2017 (the Thom Review).

The Thom Review made four recommendations in relation to the Department's strategies it had in place to prevent an Australian citizen from being detained. The Department accepted all recommendations made by Dr Thom.

During this investigation, the office looked at the implementation of the recommendations at a selection of critical points across the immigration detention process. The investigation enabled the office to identify gaps where, in practice, the Department's implementation activities had not entirely met its intent or the intent of the relevant recommendation.

'While I acknowledge the Department's progress in implementing the recommendations of the Thom Review, I consider further improvements are necessary to safeguard against the detention of Australian citizens and lawful non-citizens', Mr Manthorpe said.

'In my view, the Department and the Australian Border Force need to take further steps to ensure all relevant officers are adequately trained in the requirements for obtaining Australian citizenship, that tools and processes support officers to lawfully perform their roles and that quality assurance processes at these points are robust.'

The report makes 15 recommendations to the Department that offer specific guidance on ways it can ensure it has implemented the recommendations of the Thom Review effectively. The Department has accepted all of the Ombudsman's recommendations, 14 in full and one in part. The office will be monitoring the implementation of these recommendations.

<http://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2018/06-december-2018-commonwealth-ombudsman-releases-investigation-report-into-the-department-of-home-affairs-implementation-of-the-recommendations-of-the-thom-review-to-prevent-the-immigration-detention-of-australian-citizens>

Recent decisions

Administrative review of HSC results?

Valaire v NSW Education Standards Authority [2019] NSWCATAD 16 (11 January 2019)

On 22 August 2018 the applicant, Ms Valaire, made an application to the New South Wales Civil and Administrative Tribunal (the Tribunal). Ms Valaire stated, among other things, that her son Julian had studied HSC Russian in 2017 and received a mark of 84 per cent, but this mark was scaled down to a ranking of 41, which gave him an overall ATAR result of 66. Ms Valaire contended that, when Julian had enrolled in HSC Russian, the NSW Education Standards Authority (NESA) website stated it was a 'Continuers' course that was developed for non-native speakers. However, most students undertaking HSC Russian were from Russian-speaking countries and their previous education was conducted in Russian. Ms Valaire therefore believed that she was misled by the information on the NESA website. Ms Valaire further contended that Julian's results should have been scaled against those of other non-native speakers and not those who were fluent in Russian. If this had occurred, Julian's ATAR would have been higher. Ms Valaire stated that it was not until they contacted NESA following receipt of Julian's ATAR result that they were advised there were no entry requirements for HSC Russian because it is the only HSC Russian course available in New South Wales.

In her submissions, Ms Valaire identified a decision of NESA dated 8 March 2018 and a decision of the Department of Education dated 27 April 2018 as being the decisions under review. Ms Valaire contended that the relevant decisions were made under the *Children (Education and Care Services National Law Application) Act 2010* (NSW) (the Education Act) and the Children (Education and Care Services) National Law (the National Law).

The decision of NESA dated 8 March 2018 was a response by NESA to an email Ms Valaire had sent to the Minister for Education about her concerns about the eligibility of students undertaking HSC Russian and the scaling of HSC courses. The decision of the Department of Education dated 27 April 2018 was made in response to Ms Valaire's request for a review of a decision made on 26 February 2018 by the Department of Education in response to her complaint about the eligibility rules for HSC Russian and the ATAR received by Julian.

The respondents sought orders dismissing Ms Valaire's application on the basis that Ms Valaire has failed to identify a decision which is capable of being reviewed by the Tribunal.

The *Administrative Decisions Review Act 1997* (NSW) relevantly sets out the circumstances in which the Tribunal has administrative review jurisdiction over a decision of an administrator (see the *Civil and Administrative Tribunal Act 2013* (NSW) s 30). Section 55 of that Act provides that the Tribunal only has jurisdiction to review 'an administratively reviewable decision'. An administratively reviewable decision is defined in s 7 of the Administrative Decisions Review Act to be 'a decision of an administrator over which the Tribunal has administrative review jurisdiction'. Section 9 provides that the Tribunal has administrative review jurisdiction over a decision of an administrator 'if enabling legislation provides that applications may be made to the Tribunal for an administrative review under this Act of any such decision'.

The Tribunal found that the only decisions that can be reviewed by the Tribunal under the National Law are set out in ss 192 and 193 of that Act and relate to decisions determining a

person's applicability to provide educational and care services to children. The National Law does not relate to any of the matters about which Ms Valaire complained.

The Tribunal further held that it is apparent that no decision had been made by either respondent under the Education Act and the National Law. These Acts therefore do not confer any jurisdiction on the Tribunal to review the matters raised by Ms Valaire. In relation to the decision which Ms Valaire states was made by NESA on 8 March 2018, the letter sent to her does no more than explain the way in which NESA determines the eligibility criteria for students studying HSC Russian in New South Wales. The letter also stated that NESA is not involved in any matters relating to the scaling of HSC marks or determination of ATAR ranks. The letter in fact does not purport to make any decision about any matter and the information contained in the letter is not something which can be subject to any review by the Tribunal.

Similarly, in relation to the decision of the Department of Education dated 27 April 2018, there is no decision contained in the letter which is capable of review by the Tribunal. The Department of Education has made no decision on eligibility for HSC Russian, nor does it make any decision about a student's ATAR. The calculation of an ATAR for NSW HSC students is undertaken by a private company — the University Admissions Centre.

Ms Valaire's application did not disclose any decision which is capable of being reviewed by the Tribunal under the Administrative Decisions Review Act. The Tribunal therefore did not have jurisdiction to deal with the application and it was dismissed.

Error of law — no evidence

Hands v Minister for Immigration and Border Protection [2018] FCAFC 225 (17 December 2018) (Allsop CJ, Markovic and Steward JJ)

Mr Hands was born in New Zealand in 1971. He came to Australia with his parents when he was three years old. He remains a citizen of New Zealand. When asked, he said that he had not applied for Australian citizenship because he thought his mother had when he was small. By operation of law he was granted an 'absorbed person visa' on 1 September 1994.

On 16 October 2016 Mr Hands pleaded guilty to charges in the New South Wales Local Court at Batemans Bay involving property damage, stalking, intimidation and assault, all being part of a domestic violence incident involving his partner and one of his step-grandchildren. He was sentenced to 12 months' imprisonment, with a non-parole period of five months.

The sentence of 12 months engaged s 501 of the *Migration Act 1958* (Cth). Under s 501(3A), the Minister must cancel a visa if the Minister is satisfied, relevantly, that the person does not pass the 'character test' because the person has a 'substantial criminal record' as set out in s 501(7)(a), (b) or (c) — that is, the person has been sentenced to death, or to a term of imprisonment for life, or to a term of imprisonment of 12 months or more; and the person is still serving a full-time custodial sentence.

On 16 February 2017, about two weeks before he would have been released on parole, Mr Hands received notification that his absorbed person visa had been cancelled under s 501(3A). He was advised of the consequences of removal and that he could make representations to the Assistant Minister as to why the Assistant Minister should revoke the cancellation of the visa.

In his representations, Mr Hand submitted that, after coming to Australia as an infant with his mother and father, he left a violent or strict home in Warilla on the South Coast as a young teenager at 12 or 13 and was taken in by the Aboriginal community at Wallaga Lake. He came to be accepted by the community as Aboriginal and recognised by the Aboriginal community as a Koori man with long-term family connections with five local Aboriginal families — the Walkers, the Campbells, the Thomases, the Henrys and the Stewarts.

After receiving these submissions, the Assistant Minister decided not to revoke the Minister's decision to cancel Mr Hands' visa because he was not satisfied for the purposes of s 501CA(4)(b)(ii) that there is another reason why the original decision under s 501(3A) to cancel Mr Hands' visa should be revoked. As part of his decision, the Assistant Minister found that 'whilst I acknowledge Mr Hands may experience short term hardship, I find that over time he would be capable of settling in New Zealand without undue difficulty'.

Mr Hands sought review of the Assistant Minister's decision not to revoke the decision to cancel his visa in the Federal Court. The Federal Court dismissed the appeal and Mr Hands sought review of that decision in the Full Federal Court.

Before the Full Federal Court, Mr Hands contended that there were findings of fact in the Assistant Minister's decision for which there was no evidence.

The Full Court did not consider that there was any rational or probative evidence to support a conclusion that Mr Hands' emotional and psychological hardship would be short-term. All the material, if considered, would lead any reasonable person to a conclusion that this decision, unrevoked, will cause lifelong grief and psychological hardship to a number of people, including Mr Hands. The existence of the same language and similar culture and the standard of health care and social services in New Zealand are matters hardly to the point.

The Full Court held that the separation of Mr Hands from his community, his wider family, his partner, his children, grandchildren and step-grandchildren is a life-changing decision, potentially life-destroying, and this was a central and crucial consideration. The statements that he 'may experience some emotional and psychological hardship' and 'may experience short term hardship, [but] would be capable of settling in New Zealand without undue difficulty' are findings of fact that are simply incapable of being reasonably made by any decision-maker. There was no evidence at all to support them.

The Full Court found that the making of these findings without any material to found them was a sufficient basis to conclude that there has been jurisdictional error, given their central importance to the Assistant Minister's reasoning.

Procedural fairness and the legal practitioner

Livers v Legal Services Commissioner [2018] NSWCA 319 (14 December 2018) (Gleeson JA, Barrett AJA and Simpson AJA)

The appellant, Peter James Livers (the practitioner) is a legal practitioner who has practised as a solicitor since September 1974, becoming a principal of the firm Slattery Thompson in 1979 and its sole practitioner since 1989.

On 9 March 2015, the WorkCover Independent Review Office (WIRO) complained to the Legal Services Commissioner (the Commissioner) about the practitioner's conduct. WIRO manages the Independent Legal Advice Review Service (ILARS), which funds legal costs for workers to challenge insurers' workers compensation decisions. The practitioner had

entered into an agreement with WIRO in December 2012 to provide legal services to legally assisted persons.

WIRO alleged that the practitioner had misled it in the answers he gave to two questions in a funding application submitted in September 2014 and had attached documents that had been falsified as to their true date (including a client statement and an audiogram). WIRO alleged that the practitioner had failed to advise it of a prior claim for industrial deafness made by his client (Mr Souaid) in July 2012 (when Mr Souaid also represented by the practitioner) and the resolution of that claim by consent orders made by the Workers Compensation Commission (the Commission) in November 2013.

Following that complaint, the Legal Services Commissioner applied to the New South Wales Civil and Administrative Tribunal (the Tribunal) for a finding that the practitioner had engaged in professional misconduct and an order under s 562(2) of the Legal Profession Act that the practitioner's name be removed from the roll of lawyers or, alternatively, that the practitioner be publicly reprimanded or fined or for such other order as the Tribunal thinks fit.

The primary basis of the Commissioner's application to the Tribunal was that, in making the funding application in 2014, the practitioner had deliberately sought to conceal from WIRO the earlier claim for workers compensation for industrial deafness made by the client in 2012, including by altering the date on an audiogram that was submitted in support of the funding application. The Commissioner made no mention of alleged altering of the client statement.

The practitioner's response was that he believed that there was a proper basis for the client to make a claim for hearing aids in 2014. While he admitted negligence in respect of some of his conduct, he denied any knowing or recklessly careless conduct in misleading WIRO about the 2012 claim or that he falsified any document. In an affidavit filed by the practitioner he deposed that he believed Mr Souaid altered the date from 2012 to 2014.

On 3 August 2017, the Tribunal found the practitioner guilty of professional misconduct (the Stage One decision).

On 7 September 2018, after a hearing on penalty, the Tribunal ordered that the practitioner's name be removed from the roll of lawyers pursuant to s 562(2)(a) of the Legal Profession Act and that he pay the Commissioner's costs of and incidental to the filing and hearing of the application (the Stage Two decision). Relevantly, the Tribunal commenced these proceedings by summarising the background to the complaint against the practitioner and the Tribunal's findings and orders in the Stage One decision, including that the practitioner had altered the date of the client statement, in addition to altering the date on the audiogram.

The practitioner then appealed the Tribunal's decision to the NSW Court of the Appeal. The practitioner contended, among other things, that the Tribunal denied him procedural fairness by determining an allegation adverse to him not pleaded by the Commissioner — namely, that the practitioner had altered the date of the client statement. In response, the Commissioner accepted that the practitioner did not have an opportunity to be heard on the allegation that he was responsible for the alteration to the date of the client statement but submitted that the Tribunal did not find that such conduct itself constituted misconduct or dishonest behaviour and, in any event, the practitioner was on notice because he had referred to the issue in his affidavit sworn on 2 November 2016.

The Court found that the requirement to accord procedural fairness to the practitioner in this case is sufficiently stated in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63, where the plurality referred (at [32]) with approval to the following statement by the Full Court of the Federal Court in Commissioner for *ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590–1 (Northrop, Miles and French JJ):

> It is a fundamental principle that where the rules of procedural fairness apply to a decision making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material. (Emphasis in original.)

In this case, the Court held that this did not occur before the Tribunal. The allegations that the practitioner had altered the date of the client statement was not put to the practitioner before the Tribunal, nor was the practitioner given an opportunity to respond to the issues raised by these allegations. Further, and contrary to the Commissioner's submissions, the practitioner was not on notice that what he said in his affidavit concerning the alteration of the date of his client statement was in dispute or in issue, nor was the specific finding by the Tribunal concerning the synchronicity between the two dates on the audiogram and the client statement put to the practitioner in cross-examination for him to respond to.

The Court opined that it has been said that underlying the principles of procedural fairness is the concern of the law to avoid practical injustice: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [37] (Gleeson CJ). Therefore, the Court will not order a new hearing exercising its powers under s 75A of the Supreme Court Act unless it appears to the Court that some substantial wrong or miscarriage has occurred: *Uniform Civil Procedure Rules 2005* (NSW) (UCPR), r 51.53. Accepting that the practitioner was denied procedural fairness before the Tribunal, it is necessary to consider whether it would be futile to order a new hearing because to do so would inevitably result in the making of the same orders as made by the Tribunal: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

In this context, all that the practitioner needs to show is that the denial of procedural fairness deprived him of the opportunity of a successful outcome. To negate that possibility, the Commissioner must demonstrate that a properly conducted hearing could not possibly have produced a different result: *Stead v State Government Insurance Commission* at 147.

The Court held that, notwithstanding the weight of the evidence concerning the change of the date of the audiogram (which the practitioner denied making), the Court did not accept the Commissioner's submission that a favourable finding that the practitioner had no involvement in altering the date of the client statement would have had no material effect on the outcome of the complaint. First, the seriousness of the finding of the Tribunal that the practitioner altered the date of the client statement cannot be underestimated. The Tribunal found that the practitioner had deliberately falsified a document. It is not to the point that the Tribunal did not go on to say expressly that this conduct involved misconduct by the practitioner, given the absence of a pleaded complaint in relation to the alteration to the date of the client statement.

Further, and importantly, the Court held that the Commissioner's submission that the impugned finding was not taken into account by the Tribunal in its Stage Two decision cannot be accepted. The Tribunal referred in its Stage Two decision to its earlier finding that the practitioner had altered the date of the client statement and described the practitioner's conduct as deliberate and involving the falsification of a document. It was not possible to separate or unscramble the cumulative effect of this finding from the other

findings of the Tribunal which led to its characterisation of the practitioner's professional misconduct as justifying the removal of the practitioner's name from the roll of lawyers.

MICHAEL WILL ADDRESS: INTRODUCTORY REMARKS

Geoffrey McCarthy*

At the risk of stating an obvious but important proposition, I periodically pause to recognise that even a cursory consideration of world affairs is enough to bring home what an extremely free and safe country we live in, by comparison to others. Our freedom and safety are underpinned by the rule of law. But it is easy to overlook what a tenuous concept it is. Maintaining community respect for the rule of law, and upholding the rule of law, is a multi-faceted and tricky thing.

Everyone involved with the law plays their part. Some, especially those in academe, gather the threads of legal concepts, existing and developing, and help others to make sense of it all. In the area of administrative law, the Australian Institute of Administrative Law strives to enhance and broaden community and professional understanding of administrative law developments and principles. It does so through its annual conferences, periodic seminars and its quarterly publication, *AIAL Forum*. Tonight's presentation is to that end.

Before introducing our speaker, I pause to observe that the law, and development of the law, rather withers on the vine if it is not applied. And for that purpose, I think, practitioners are the primary operators. To a very high degree, they drive the law. They decide whether to turn left or right, drive fast or slow and where to go. Their advice and actions significantly affect community respect for the rule of law, for better or worse. What to do requires judgement, integrity and skill. However, an ironic aspect of practice is that much of what occurs goes quite unnoticed, especially when done well — save by those directly involved.

That brings me to explain the Institute's thinking when deciding to entitle tonight's presentation the Michael Will Address.

Michael will happily tell you about his early days as a taxi driver, making decisions about where to go without the benefit of Google Maps and the random cross-section of the community he encountered. But greater influence lay ahead. He became a partner in the Freehills' Canberra office before they packed up and drove out of town. He was then a partner at Sparke Helmore, then a partner at Phillips Fox, later DLA Phillips Fox, and then became the managing partner of the Canberra office of HWL Ebsworth.

In those roles, his advice and judgement guided very significant clients in the public and private sectors regarding application of, and upholding, the rule of law, especially in the areas of administrative law and workplace relations. In the public sector he acted for, and advised, for example, the Australian National University, the Australian Federal Police, the Australian Electoral Commission and the Department of Defence.

* *Geoffrey McCarthy is a member of the Australian Institute of Administrative Law executive committee. Geoffrey McCarthy introduced the inaugural Michael Will Address in honour of Michael Will, which was delivered by the Hon Justice Hilary Penfold QC at the 2018 Annual General Meeting of the Australian Institute of Administrative Law, in the presence of Michael Will and his family and friends.*

Michael's efforts in 'giving back' have also been significant. He was for 10 years a member and the Chair of the Administrative Law Committee of the Law Council of Australia. He is a past president of this Institute.

Michael, I know that for the past few months life in the main has been completely awful, however much you have faced it all with a sanguine smile as you learned about the different properties of different drugs and how to pronounce them. So it is fantastic to see you here tonight, especially with some hair and, I see, some weight packed back on. The wonders of modern medicine!

Can I also assure you that it is not just the free drinks and Hilary Penfold's paper that has caused so many people to be here this evening.

I see many of your professional colleagues, past and present, and from many practices. I see Hilary's husband, Mark Cunliffe, who you worked closely with over the years when he was your client at Defence. I also see their daughter, Jancis, who worked with you at HWL Ebsworth and who I am sure has attended not only to hear from Mum. I see Justice Mossop of the Supreme Court. I see Tribunal members. I see teaching staff, past and present, at the ANU. I see many members of this Institute and members, past and present, of its executive committee. I see former Commissioner Deegan, 18 years at the Fair Work Commission, who you and I and many others grew to know and fear — with a smile. I even see your longstanding Thursday night tennis partners.

I see also your family, Fiona, Johnny and Patrick. To each of you, I say he's 'done good'. This is a really tough thing you are all going through. On behalf of the Institute we hope that entitling tonight's presentation the Michael Will Address brings a bit of sunshine to the scene. It is also an acknowledgement — well deserved — of Michael's efforts.

And now to our distinguished speaker. Forgive me, Hilary, but I do not propose to dwell on your significant contributions to the law which are well known to this audience, save to note and congratulate you on your recent admission, if that is the right word, as a Fellow of the Australian Academy of Law. I note many illustrious names on the list of Fellows, to be found on the Academy's website.

Your significant contributions to the law base our invitation for you to speak this evening. We at the Institute are very grateful that you have accepted the invitation. You have chosen an intriguing topic, given your past professional lives. We look forward to hearing your insights.

MICHAEL WILL ADDRESS: LEGISLATION IN THE COURTS

The Hon Justice Hilary Penfold QC*

I begin by acknowledging the traditional custodians of this land and pay my respects to their elders past, present and emerging and especially to any Indigenous people who are here tonight.

Next, I acknowledge the presence here of Michael Will and the well-deserved honouring of Michael by his long-time friend Geoff McCarthy. I have only met Michael a few times — most recently at a farewell dinner for my husband, Mark Cunliffe, who finally retired last week — and I do not know him well, but I do know of him from his dealings with Mark and also our daughter Jancis, and everything I know of him is good.

Jancis worked with Michael at DLA Piper for a while, and he was involved not only in her recruitment but also, perhaps more importantly, in looking after her during her time there. I know that she thinks of him fondly still and has stayed in touch even after moving on.

Mark, of course, has dealt with Michael on and off over the years and holds him generally in very high regard, but he mentioned to me the other day that one of Michael's particular strengths was his skill as an educator — which makes perfect sense of Michael's willingness to mentor our daughter when she needed it.

So, knowing how highly regarded Michael is, not only within the ACT legal community, as Geoff has explained, but also within my own family, I am so pleased and gratified to have this presentation named in his honour.

My topic tonight covers a multitude of sins but in particular gives me scope to make some observations about legislation and what I have learned about it during my time on the Supreme Court, which is a perspective few legislative drafters ever experience.

Most of you know enough about my past, so tonight I note only that, relevantly, it involved 25 years as a legislative drafter in the Commonwealth, four years as the Secretary of a newly-created parliamentary department and then 10 years as a judge of the ACT Supreme Court. There is a lot that could be said about my time in the Department of Parliamentary Services but relevantly for present purposes it was my first experience of how real people use legislation. In 10 years in the Supreme Court I did not just watch other people struggle with legislation (although there was a bit of that) but I also had to make actual binding decisions on what legislation meant and how it worked. That has led me to think about a lot of things that affect how legislation is created, how it is used and what can be done to improve both of those processes, although I have not so far had time to take it further. I confess, however, that 25 years as a legislative drafter is not easily put aside, so, if these observations occasionally sound a bit defensive, they probably are.

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* *The Hon Justice Hilary Penfold QC is a judge of the ACT Supreme Court. Justice Penfold delivered this inaugural Michael Will Address at the 2018 Annual General Meeting of the Australian Institute of Administrative Law, in the presence of Michael Will and his family and friends.*

My observations encompass, very briefly, some sweeping generalisations about legislation, a couple of brief stories and some thought bubbles. The really interesting question, at least to me, is whether there are things that can be done (whether by those involved in making legislation, those involved in using it or others) to make the part played by legislation in our legal system even more efficient and effective and even more supportive of the rule of law in general. Unfortunately, I am not going to get far beyond the thought bubbles.

My first generalisation is that mostly legislation works pretty well — as would be shown by any statistical analysis (if anyone could ever be bothered doing the counting) of how many things are done or dealt with perfectly adequately under legislation without ever coming before any tribunal or court. How many Centrelink clients are paid correctly each week compared with the number who approach a tribunal, or find themselves before a magistrate, because someone seems not to have applied, or complied with, the law properly? I could go on, but instead of multiplying examples I make the further point that a significant proportion of matters dealt with in legislation that does finish up in courts or tribunals does not raise questions about the meaning or operation of the law but only issues of whether the facts fit within that law.

Next, I concede that, sometimes, legislative drafters simply get things wrong. One of my colleagues in the Commonwealth Office of Parliamentary Counsel famously drafted a series of amendments, of whatever the Act dealing with the postal service was called at the time, to address the emerging use of electronic mail. He did, in effect, a 'search and replace' by inserting a reference to electronic mail into each provision creating an offence in relation the use of postal services. It was fairly effective in general, although it did have people scratching their heads at the prohibition on sending explosive devices by electronic mail.

My own favourite drafting disaster (although it would not necessarily have been regarded as a disaster by most of the population) was to inadvertently, and briefly, deprive all federal politicians of all travel allowance entitlements. That lasted from late one Thursday night, when the legislation was drafted and passed, until lunchtime on the Friday, when amending legislation was passed — because no member of Parliament was willing to leave Canberra until the travel allowance entitlement was reinstated.

On other occasions, the drafting process can go wrong. The most common flaw in the drafting process, in my experience, arises in cases involving an interface between legislation and the common law, especially the criminal law, where neither the legislative drafters nor, importantly, their instructors (and certainly not the legislators) know enough about how the common law works and, in particular, enough about the language of the common law. These are areas where the common law has been so important for so many centuries, and the task of codifying it, or integrating legislation with bits of it, can be quite fraught.

However, accepting these problematic areas, there are many areas of law in which legislation is remarkably useful, and effective, in the courts. For instance, in the ACT courts, legislation is routinely applied, easily and efficiently, in various areas — operations are facilitated in all sorts of ways by the road maps, or perhaps checklists, provided by sentencing legislation, the Bail Act and the Evidence Act (even the Court Procedures Rules, at least for anyone who can work a table of contents). This, of course, does not mean that you will not hear the odd whinge from people who were much happier when they were able to make it all up as they went along.

Next, I suggest, much litigation about legislation arises from a compliance failure or an objection to policy, not from a drafting failure. There are two main cases in which people go

to court to fight about what legislation really means, or how it operates, when there is nothing actually wrong, or relevantly wrong, with the legislation as such. The first case is when a process provided for, or regulated by, a legislative scheme has gone wrong because someone has not complied with, or operated within, the scheme. For instance, one party to a legal relationship or process regulated by legislation (perhaps a tenancy agreement or the process of negotiating a motor accident claim) slips up — they miss a deadline or serve the wrong document, say — and the other party swoops, sometimes immediately and sometimes only later when the other party is not happy with how things are going. What the court is asked to determine is how the legislation should work when the process has gone right off the rails and outside the process set out in the legislation. That, of course, does not stop people criticising the legislation, in effect, for not making clear provision at each point about what should happen if the legislation is not complied with and the process does go off the rails (often while also complaining about how long Acts are these days).

The second case is where the policy expressed in, or implemented in reliance on, the legislation simply does not suit someone. Often, in fairness, the policy is extreme, but sometimes it is only extreme in not suiting a particular litigant with plenty of money to spend on litigation.

In another class of these cases, the litigation involves an unrepresented litigant (disproportionately often a person with legal qualifications who no longer practises) who will raise all sorts of more or less bizarre challenges to legislation just because it does not suit what he or she is attempting to establish against a defendant. Again, there is rarely anything actually wrong with the legislation as such, but that does not stop such litigants dragging the other party and the court through all sorts of thickets before the matter can be properly disposed of.

So, to summarise my comments so far, Australian legislation is a lot more fit for purpose than you might think from some of the commentary, although I would not argue that there is no room for further enhancements.

I turn now, also briefly, to what happens to legislation in the courtroom. My first proposition here is that purposive interpretation in its current form may not be an unmitigated Good Thing. Routinely these days, statutory interpretation in the courts involves recourse to the purpose or object of the legislation concerned. However, I have started wondering whether purposive interpretation in its current form invites litigators, and possibly obliges judges, to try their hands at policy-making in ways that are not always or necessarily positive.

At this point a potted history of purposive interpretation may be useful. In 1981, after much soul-searching, consultation and learned conferences, the *Acts Interpretation Act 1901* (Cth) was amended to include the following provision:

> 15AA. (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

That was then adopted by some (possibly all) other Australian jurisdictions, and certainly in the ACT. I shall refer to this provision as ‘s 15AA’, although obviously the equivalent provision is numbered differently in the ACT and other relevant jurisdictions.

In 1990, in *Chugg v Pacific Dunlop Ltd*[1] (*Chugg*), three members of the High Court (Dawson, Toohey and Gaudron JJ, the plurality in a five-person bench) pointed out, correctly, that provisions in this form only required the rejection of constructions that would

not promote the purpose or object of the Act and did not require the adoption of the construction that would best promote that purpose or object.

It would not be fair to describe this comment as a 'throwaway line', but it is fair to say that the plurality did not suggest that this was a flaw in the provision. The significance of the comment was only that the provision in its then form did not help the party who sought to rely on it to impose an onus of proof on a defendant employer prosecuted under a particular workplace safety provision (by implication, because neither of the suggested interpretations of the provision could be identified as impeding or frustrating the Act's identified purpose of 'the promotion of occupational health and safety').[2]

Furthermore, their Honours did not suggest that, if the provision had required or permitted a search for the 'best' interpretation in terms of the purpose of the Act, it would have been more helpful. In fact, their Honours' conclusion was ultimately based on a consideration that appeared to weigh the overarching aim of promoting occupational health and safety against the practical impact on relevant court proceedings if employers were found to bear an onus of proof in defending a prosecution for a workplace safety offence (at [24]) — even though occupational health and safety might have seemed to be promoted by putting more stringent obligations on employers.

Some years later, and despite the details of the consideration in *Chugg*, Queensland, the ACT and in due course the Commonwealth (and some other jurisdictions) amended the provision in question to 'respond' to *Chugg* by referring to an interpretation or meaning that best achieves the aim of the legislation. The new s 15AA of the Commonwealth Act, inserted in 2011, read:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

See also, for instance, s 139 of the *Legislation Act 2001* (ACT), as amended in 2003.

On the face of it, this might seem to be a perfectly sensible advance on the original provision, but I am starting to think that it raises real problems.

Put shortly, the original version of the provision was, as I recall, a polite way of telling the High Court, in interpreting the income tax laws, to stop looking after tax evaders. It is also my memory that by the time the provision was passed it had become apparently unnecessary (as someone put it at the time, 'the walls of Jericho fell before a single trumpet sounded': the provision came into effect on 12 June 1981; exactly a week earlier, on 5 June 1981, the High Court had handed down judgement in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,[3] in which the Court, to the benefit of the Commissioner of Taxation, 'corrected' a 'draftsman's mistake').

Be that as it may, the provision did no harm in standing as a permanent reminder to the judiciary that the legislation, and the aims of the legislature, needed to be respected rather than obstructed.

However, the new provision, especially in its use of 'best' rather than 'better', can be (and I think sometimes is) read as an open invitation to judges to second-guess the drafters, the policy-makers and the legislature by reference to explicit or inferred high-level policy objectives.

Most if not all of you, I expect, have had enough experience of the policy-making process from one perspective or another to realise that making good policy is hard work. Not only is it hard work; it is also work that should be done against a background of real evidence, processed through the filters of theory (including such things as basic principles of economics or psychology) and of values, including political values, and it is work that routinely involves a balancing act.

Furthermore, whatever process the new version of s 15AA is referring to, it is not just inviting that process but obliging judges to engage in it, and it is imposing an obligation that will be almost impossible to perform properly. The provision considered in *Chugg* is a useful example of the kinds of problems the amended provision could cause.

The question in *Chugg* was whether, in a prosecution for an offence of failing to maintain a safe working environment so far as is practicable, the prosecutor (the regulator) or the defendant employer bore the onus of proof in relation to what was 'practicable'. In the end, the High Court decided that the onus should be borne by the prosecutor, because this would ensure that the scope of the charge, and the investigation into what was practicable, would be determined, and confined, by the particular failure to maintain a safe working environment that was identified by the prosecutor in the charge. If the onus in respect of practicability was placed on the defendant employer, the judges said, the employer would be required to establish the *impracticability* of every possible response to the particular safety breach 'which the ingenuity of … counsel can suggest'.[4] The plurality said:

> It is impossible to read into s 21 of the Act an intention to place the onus of proof of the issue of practicability on a defendant *when that onus would entail the additional burden of anticipating and negating the practicability of every possible means of avoiding or mitigating a risk or accident that might be raised in the course of cross-examination*.[5]

That is, the judges decided that the weight of the burden placed on the employer should be moderated for reasons of practicality in relation to court proceedings.

But could the court have reached that point if the current version of s 15AA had applied or would they have felt obliged to decide that, in order to promote occupational health and safety, the legislative requirement to do something 'so far as was practicable' *should* include imposing the additional burden identified by the judges? That additional burden might well have seemed to some people a further way of promoting occupational health and safety — the expressed object of the Act.

It would be even easier to come up with examples where the 'best' requirement is problematic by looking at legislation that is clearly intended to balance competing considerations and aims and where that balance is a matter for the legislature, advised by expert policy-makers. In such cases the search for the 'best' interpretation may require, and can certainly be taken to require, the judge to determine where that balance should be struck. This may be especially problematic where the provision in question is not a core provision, for which the purpose of the legislation might seem to provide an obvious answer, but a subsidiary or procedural provision such that it is not necessarily obvious in the particular circumstances how the legislative purpose is best promoted. Without access to all the information and assumptions used in the original policy-making process, how can the judge, assisted only by counsel who will generally have no more policy-making expertise than the judge, hope to find the meaning that would best achieve the purpose of the Act?

The search for the 'best' meaning for a provision also raises another particular danger, indirectly adverted to by Deane J in *Chugg*,[6] being the increased risk that different cases, with different facts or different implications, might generate different interpretations of the

same provisions; in fairness, this may have been a minor risk under the old version of s 15AA, but I think it is more of an issue with the new version of the provision requiring the court to find the 'best' meaning by reference to purpose, because the version of the provision in question that seems to best achieve the purpose of the Act could vary depending on the facts of the particular case. Where does this leave the legislation and its unfortunate users?

I have long had a particular respect and admiration for former Chief Justice of the High Court Robert French, not least because he has always had an interest in legislation and an understanding of its significance in the legal system. In *International Finance Trust Company Limited v New South Wales Crime Commission*,[7] in the context of interpreting legislation to ensure its constitutional validity, his Honour identified the following caveat:

> The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this. The first is that if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity. The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished. Moreover, there is a real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning.[8]

His Honour's warning about the dangers of providing counterintuitive judicial glosses in interpreting legislation for constitutional purposes is, in my view, equally applicable to the risks inherent in setting judges up as supervisors of the detailed implementation of legislative policy. This is especially so if, as cannot be ruled out, judges can be induced to read the revised s 15AA as a licence to ignore the actual words of the legislation in favour of their own, not necessarily informed, views of what the details of the legislation ought to have said in order to achieve, in matters of fine detail, the high-level policy apparently intended.

Finally, I recount a brief story about a litigant who was obviously hoping for a bit of counterintuitive judicial gloss on the Australian *Constitution*, specifically s 117, which, you will all of course remember, says:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

This litigant, apparently a resident of, and admitted legal practitioner in, the ACT, turned up in front of me wanting to challenge a decision by the ACT Law Society to refuse him a practising certificate, and he wanted to use s 117 to do it. I decided not to waste everyone's time by asking him about the significance of the fact that the ACT is not a State, so instead I asked him:

> Which State are you a resident of, and in which other State are you subject to a disability or discrimination that would be not applicable to you if you were resident in that State?

And he said 'Well, if your Honour's going to read it that way …'.

Thank you all, and to you, Michael, and to your family Fiona, Johnny and Patrick, my very best wishes for the future. It has been an honour to be here.

Endnotes

1 [1990] HCA 41; 170 CLR 249, 262.
2 Ibid 262.
3 [1981] HCA 26; (1981) 147 CLR 297.
4 [1990] HCA 41; 170 CLR 249, [24]
5 [1990] HCA 41, [24] (emphasis added).
6 Ibid 254.
7 [2009] HCA 49; 240 CLR 319.
8 Ibid 349 (citation omitted).

MICHAEL WILL ADDRESS: CLOSING REMARKS

Michael Will*

I am very conscious that this is *the* Michael Will Address, not the address *by* Michael Will, so I will be brief. Thank you very much, Hilary, for your thoughtful and entertaining presentation.

It is not often that an administrative law issue makes the mainstream media, but I noticed this item in the *New York Times* last week. It is about the new acting Attorney-General of the US, Mark Whitaker. The paper reported that, when he sought the Republican nomination for senator in Iowa in 2014, Mr Whitaker criticised the foundational 1803 US Supreme Court decision in *Marbury v Madison*, which established that Court's power of judicial review and which has been cited by our High Court for the same proposition. 'There are so many' bad rulings, Mr Whitaker said. 'I would start with the idea of *Marbury v Madison*. That's probably a good place to start and the way it's looked at the Supreme Court as the final arbiter of constitutional issues.' I wonder who he considers should be the final arbiter.

Chief Justice Marshall in that case famously stated that 'It is emphatically the province and duty of the judicial department to say what the law is'. Those words are inscribed into the walls of the Supreme Court building in Washington. I think they may well outlast Mr Whitaker.

I would like to thank four people today. In doing so, I am mindful that I am not specifically naming and thanking a lot of other people, but please accept that I am very grateful to all of you, members of the judiciary and tribunals, fellow practitioners and members of my firm, for coming today. The four people I want to mention and thank are all professors of law, teachers, writers and practitioners, and they have all had a significant and lasting effect on my study and practice of administrative law, mainly, I think, because of that important combination of academic and practical experience with the law. I am particularly pleased that two of them, Robin Creyke and Dennis Pearce, are in the audience today.

The first is Emeritus Professor Robin Creyke. Robin taught me, and many others, administrative law at the ANU and subsequently we worked together at Phillips Fox and also served together on the National Executive of this Institute and the Administrative Law Committee of the Law Council of Australia. Thank you, Robin.

The next is Professor John McMillan, who taught me Principles of Constitutional Law, or what used to be called 'kiddie con', at the ANU law school (Leslie Zines taught me Commonwealth Constitutional Law). John was an excellent teacher of a fundamental public law subject which I always thought was an essential one for new law students, and I would strongly argue for its return to the syllabus.

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* *Michael Will is a lawyer with HWL Ebsworth. Michael Will made these closing remarks in response to inaugural Michael Will Address, which was delivered by the Hon Justice Hilary Penfold QC at the 2018 Annual General Meeting of the Australian Institute of Administrative Law.*

I was also taught by Emeritus Professor Dennis Pearce but not in a public law subject. He taught me Industrial and Intellectual Property — not an area in which I have professed much professional expertise since that time. Dennis too was an excellent teacher, and it was my great pleasure to serve with him on the AIAL National Executive and also to work with him directly in practice, including at my current law firm HWL Ebsworth, where he is still a consultant. Dennis sometimes, somewhat embarrassingly for me, refers to me in company as his boss. It is the other way around, Dennis!

Finally, I would like to thank Professor Margaret Allars SC, at the Sydney Bar, whom I have briefed in a number of administrative law matters over the years and with whom I have also served, over very many years, on the Administrative Law Committee of the Law Council. Margaret has always been a real pleasure to work with as counsel and is a sound and tenacious advocate. I would also like to thank the National Executive of AIAL for today's presentation and, in particular, Geoffrey McCarthy for his role in bringing it about and for his very kind words today.

As a final comment, I was particularly pleased to note that the Institute chose not to insert the word 'memorial' into the title of today's event. Thank you again to all for coming.

GRAHAM AND ITS IMPLICATIONS

James Forsaith*

The High Court in *Graham v Minister for Immigration and Border Protection*[1] (*Graham*) invalidated a statutory secrecy provision 'to the extent only that' it operated to restrict judicial review under or derived from s 75(v) of the *Constitution*. This confirms that s 75(v) of the *Constitution* entrenches more than just access to the Court's jurisdiction to issue the constitutional writs. But does it also mean that the High Court will deliver 'different grades or qualities of justice' in different cases depending on the source of its jurisdiction?

The High Court and s 75(v)

The early High Court took an expansive view of s 75(v). In 1910, in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow*[2] (*Whybrow*), the Court rejected an argument that it could not issue the writ of prohibition to an inferior federal court because it had not been given 'general supervising jurisdiction' akin to that possessed by the English courts.[3] It held that there was no such a priori requirement. Section 75(v) itself conferred jurisdiction in all cases in which one of the named writs was sought against an 'officer of the Commonwealth' — a term which embraced officers of inferior courts as well as of the executive.[4]

In reaching this conclusion, Griffiths CJ referred to 'the necessity of such a controlling power existing somewhere'.[5] Barton J considered it 'strange indeed' if 'the *Constitution* provided no means whereby other Federal Courts might be kept within the bounds of the jurisdiction assigned them by law'.[6] O'Conner J even went so far as to suggest that, regardless of s 75(v), the High Court's judicial power, being 'the supreme judicial power of the Commonwealth', must necessarily include such jurisdiction.[7]

Whybrow was confirmed, four years later, in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Ltd (No 1)*[8] (*Tramways (No 1)*). Adding to his earlier remarks, Barton J said that it would be 'grotesque' if the High Court, as the federal Supreme Court, lacked the power to restrain the wrongful assumption of jurisdiction by inferior Federal Courts.[9] It was unnecessary to determine whether 'such a power is a necessary implication of the whole scheme and structure of the Judicature chapter' because it was clearly conferred by s 75(v).[10]

As these remarks show, the early High Court was concerned to ensure that officers of the Commonwealth could be restrained from exceeding their jurisdiction. Indeed, its concerns extended beyond officers of the Commonwealth. Even in the absence of s 75(v), the Court displayed considerable hostility towards privative clauses. Most particularly, it held in *Clancy v Butchers' Shop Employees Union*[11] (*Clancy*) that the Supreme Court of New

* *James Forsaith is a public lawyer practising at the Victorian Bar. This article is an edited version of a paper presented at the Australian Institute of Administrative Law National Conference, UNSW Law School, University of New South Wales, Sydney, New South Wales, 27 September 2018.*

South Wales could issue a writ of prohibition to the Court of Arbitration to prevent the latter from exceeding its jurisdiction. This was despite s 32 of the *Industrial Arbitration Act 1901* (NSW), which provided that:

> Proceedings in the Court shall not be removable to any other Court by certiorari or otherwise, and no award, order, or proceeding of the Court shall … be liable to be challenged, appealed against, reviewed, quashed, or called into question by any Court of judicature on any account whatsoever.

Griffiths CJ, with whom Barton J agreed, pointed to other provisions in the same Act that served to limit the Court's jurisdiction and who could invoke it. These needed to be reconciled with s 32. This was not a difficult task:

> To hold in the face of these provisions that sec 32 prevents the Supreme Court from checking any excess of jurisdiction would be in effect to give the inferior Court unlimited jurisdiction. For these reasons I have no doubt that the Supreme Court had jurisdiction to grant a prohibition.[12]

O'Conner J also agreed. It was 'the right of every person to call attention to the fact that any Court is exceeding its jurisdiction'. The legislature had the power to derogate from this principle by making the Arbitration Court 'the sole judge of the extent of its own jurisdiction', but s 32 did not achieve this.[13]

Eventually, this early jurisprudence, 'elegant in its simplicity',[14] gave way to *R v Hickman, Ex parte Fox*[15] (*Hickman*), which afforded privative clauses real work to do in restricting the scope for judicial review, including under s 75(v). *Hickman* and its progeny in turn yielded to *Plaintiff S157/2002 v Commonwealth*[16] (*Plaintiff S157*), which restored s 75(v) to prominence.[17]

Plaintiff S157 concerned s 474(1) of the *Migration Act 1958* (Cth) — a privative clause that employed familiar language. Declaring that the 'so called "Hickman principle" is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions',[18] the plurality proceeded to read down s 474(1) as capable of ousting only judicial review for non-jurisdictional errors of law on the face of the record.[19] The five-judge plurality then explained this outcome by noting that:

> The Act must be read in the context of the operation of s 75 of the *Constitution*. That section, and specifically s 75(v), introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of judicial review.[20]

As McDonald has noted, the plurality could have used the familiar language of entrenched 'jurisdiction' but instead referred to an entrenched 'minimum provision' of judicial review, suggesting that at least some substantive principles may be entrenched by constitutional implication.[21] The plurality did not identify these but hinted:

> The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the *Constitution* of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the *Constitution*, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.[22]

Since then, for all its apparent significance, the High Court has only applied *Plaintiff S157* twice. First, in *Bodruddaza v Minister for Immigration and Multicultural Affairs*[23] (*Bodrudazza*), the Court invalidated rigid time limits that could, in practice, operate to deny litigants a foot in the door. This confirmed that the 'entrenched minimum provision of judicial

review' was concerned with practical, and not merely theoretical, access to the High Court's s 75(v) jurisdiction.

Most recently, in *Graham*,[24] the High Court took a much larger step by invalidating a statutory secrecy provision that did not *affect* access to its s 75(v) jurisdiction so much as the Court's ability to dispense justice in exercise thereof by engaging in judicial fact-finding. This raises questions as to what else may be entrenched by s 75(v). Furthermore, the very reliance on s 75(v) in this context — to invalidate the offending provision 'to the extent only that' it operated to restrict the exercise of judicial power under or derived from that subsection — raises questions about how the Court's s 75(v) jurisprudence fits in with its broader Chapter III jurisprudence, whereby other aspects of the judicial process have been protected more generally.

Graham, *Te Puia* and s 503A

Graham (and *Te Puia v Minister for Immigration and Border Protection* (*Te Puia*), which was heard together with *Graham*) involved challenges to visa cancellation decisions made on 'character' grounds under s 501(3) of the *Migration Act 1958* (Cth). That section gives the Minister a discretion to cancel a person's visa if he or she 'reasonably suspects that the person does not pass the character test' and 'is satisfied that … cancellation is in the national interest'.

In each case, the Minister relied on information that he understood to be 'protected from disclosure under section 503A' of the Migration Act.[25] At the time of each decision, he understood that s 503A permitted him to withhold such information not only from the person whose visa he was about to cancel but also from any court on judicial review.[26] He did not provide the s 503A information to the men whose visas he had cancelled and, when his decisions were challenged, he withheld it also from the Federal Court (in Mr Te Puia's case) and the High Court (in Mr Graham's case).[27]

Section 503A was added in 1998.[28] In recent years, it has been relied on often.[29] It provides, in subs (2), that if 'information is communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information and the information is relevant to the exercise of a power under section 501, 501A, 501B or 501C' (that is, a 'character' cancellation power) the authorised migration officer 'must not be required to divulge or communicate the information to a court, a tribunal, a parliament or parliamentary committee or any other body or person' and 'must not give the information in evidence before a court, a tribunal, a parliament or parliamentary committee or any other body or person'.[30] He or she may, however, communicate the information to the Minister or another authorised migration officer for the purposes of the exercise of a character cancellation power.[31] Thereupon, the Minister or other officer is similarly immune from being required to divulge or communicate the information.[32] The Minister alone may waive the immunity by declaring that subs (2) 'does not prevent the disclosure of specified information in specified circumstances to be disclosed to a specified Minister, a specified Commonwealth officer, a specified court or a specified tribunal'.[33] However, his discretion to do so cannot be compelled.[34]

The 'readily apparent' purpose of s 503A, as the Full Federal Court observed in *Vella v Minister for Immigration and Border Protection*[35] (*Vella*), is to permit information relevant to character cancellation decisions to be communicated to the decision-maker without the risk of it then having to be divulged 'to any other person or body'.[36] This purpose is achieved by premising protection not upon the information itself or the need (or ongoing need) for confidentiality (howsoever assessed) but, rather, upon confidentiality simpliciter.

Save only that it must be 'relevant to the exercise of' a character cancellation power, the information could be anything at all.

Section 503A thus stands in stark contrast to common law public interest immunity (PII), where the 'foundation of the rule' is 'that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production'.[37]

Moreover, the public interest, as Lord Reid explained in *Conway v Rimmer*,[38] has two aspects:

> There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.[39]

His Lordship's view was that 'the due administration of justice may be impaired for quite inadequate reasons' if courts were required to act on the view of a Minister 'who has no duty to balance these conflicting public interests'.[40] His Lordship noted that the US Supreme Court had likewise concluded that '[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers'.[41] The High Court reached the same conclusion in *Sankey v Whitlam*.[42] Where there were competing public interests, PII claims were to be determined by weighing these in the balance. This was 'in all cases the duty of the court, and not the privilege of the executive government'.[43]

Section 503A does not purport to modify these principles so much as bypass them completely by allowing elements of the executive to decide what information is confidential and, thus, protected. This has an obvious capacity to affect the work of courts; most particularly, in reviewing decisions that were based on secret information.

The facts in *Te Puia* illustrate this. The Minister found that Mr Te Puia failed the character test by virtue of s 501(6)(b), which provides that a person does not pass the character test if:

> the Minister reasonably suspects:
>
> (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
>
> (ii) that the group, organisation or person has been or is involved in criminal conduct …

The Minister gave a statement of reasons for his decision,[44] in which he reasoned as follows in relation to the character test:

> In relation to the application of the character test in this case, I have considered information which is protected from disclosure under section 503A of the Act.
>
> Having considered this information, I reasonably suspect that Mr TE PUIA does not pass the character test by virtue of section 501(6)(b) in that I reasonably suspect that he has been or is a member of a group or organisation and that the group or organisation has been or is involved in criminal conduct.[45]

By reasoning wholly upon protected information in this way, the Minister made it practically impossible for any court to review his exercise of power on anything other than the most formal of grounds. The same vice attended his reasoning in relation to 'national interest' and his ensuing exercise of discretion.[46]

Constitutionally, it was open to challenge this vice on different levels. Messrs Graham and Te Puia advanced a (broad) Chapter III argument focused on judicial process, as well as a (narrow) s 75(v) argument focused on that particular jurisdiction. The High Court treated the two arguments very differently.

The Chapter III argument

The broad argument is based on the separation of powers implied in the text and structure of the *Constitution*. As Brennan, Deane and Dawson JJ said in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*:

> the grants of legislative power contained in s 51 of the *Constitution* [do not] extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.[47]

It was, therefore, an 'impermissible intrusion' into the judicial power vested exclusively in Chapter III courts for Parliament to direct the courts as to the 'manner and outcome' of their exercise of jurisdiction.[48]

It being well established that the nature of judicial power includes its exercise in accordance with the judicial process,[49] it seems reasonable to suppose that an impermissible intrusion could relate to judicial fact-finding, which has variously been recognised as an important part thereof.[50]

Further support can be derived from *Kable* jurisprudence, having evolved along similar lines. In that context, French CJ and Kiefel J remarked in *Wainohu v NSW*[51] (*Wainohu*) that a State court's 'institutional integrity' is to be understood as its possessing 'the defining or essential characteristics of a court'.[52] Their Honours explained:

> The term 'institutional integrity', applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality. Other defining characteristics are the application of procedural fairness and adherence, as a general rule, to the open court principle.[53]

To this list of defining characteristics, their Honours added the giving of reasons:

> The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion.[54]

To view judicial fact-finding as lying 'at the heart of the judicial function' is not to say that Parliament cannot regulate it, for, as French CJ observed in *Condon v Pompano*[55] (*Pompano*), 'the defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms' but 'limits … rooted in the text and structure of the *Constitution* informed by the common law, which carries with it historically developed concepts of courts and the judicial function'.[56] Whether a law crosses one of these limits is a matter of substance and degree, to be assessed by reference to 'its practical operation within the scheme of the Act'.[57]

In *Wainohu*, the High Court proceeded to invalidate a statutory scheme for the making of control orders for members of declared organisations because it permitted eligible State judges to perform the preliminary step of declaring an organisation without giving

reasons.[58] Gageler J would later describe this as a 'constitutional gnat'.[59] And so Messrs Graham and Te Puia argued:

- that a court's ability to find facts so that it can make a decision in the first place is at least as 'essential' as the giving of reasons for that decision;
- that there must therefore be limits to Parliament's ability to pass a law that derogates from judicial fact-finding;
- that the common law of PII provides the relevant baseline for assessing the extent of such derogation; and
- that s 503A crossed the line by transferring control of the evidence base to the executive, in a case in which the executive is a party, upon spurious criteria that lacked common law analogues.[60]

These arguments based on institutional integrity were disposed of peremptorily by the High Court:

> The plaintiff's argument, that a court's institutional integrity is substantially impaired by s 503A(2), is not compelling. The fact that a gazetted agency and the Minister may control the disclosure of information does not affect the appearance of the court's impartiality, as the plaintiff contends.[61]

The Court did not even acknowledge that there may be a constitutional limit:

> the question of where the balance may lie in the public interest has never been said to be the exclusive preserve of the courts, nor has it ever been said that legislation may not affect that balance.[62]

However, it was careful to carve out its s 75(v) jurisdiction for separate treatment:

> Whether the *Constitution* permits legislation to deny a court exercising jurisdiction under s 75(v) the ability to see the evidence upon which a decision was based is another matter.[63]

The s 75(v) argument

The narrower s 75(v) argument was based on the same vice as the broader Chapter III argument but focused on how this affected the High Court's 'entrenched' jurisdiction to review for jurisdictional error. In essence, it was argued that:

- what is 'entrenched' by s 75(v) is not just a person's practical ability to *access* the court's jurisdiction but also the court's practical ability effectively to *exercise* this jurisdiction;
- there must therefore be limits to Parliament's ability to interfere with this; and
- s 503A crossed those limits for the reasons aforesaid.

By a majority of six to one, the High Court agreed. The judicial process considerations did indeed give rise to constitutional limits:

> Parliament cannot … enact a law which denies to this Court when exercising jurisdiction under s 75(v) … the ability to enforce the legislated limits of an officer's power. The question whether or not a law transgresses that constitutional limitation is one of substance, and therefore of degree. To answer it requires an examination not only of the legal operation of the law but also of the practical impact of the law on the ability of a court, through the application of judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power … have been observed …[64]

In this context, a 'blanket and inflexible limit on obtaining and receiving evidence relevant to the curial discernment of whether or not legislatively imposed conditions of and constraints

on the lawful exercise of powers conferred by the Act on the Minister have been observed' was problematic.[65] The Minister argued that PII claims can have the very same outcome, but the Court again emphasised judicial process:

> The court in such a case has not been deprived of access to the material *in limine*. The court has rather been able to weigh, and has weighed, the public interest in non-disclosure of the particular information against the interests of justice in the particular circumstances of the case before it and has made an assessment that the former outweighs the latter.[66]

Moreover, the Court noticed that Parliament's chosen criteria were spurious:

> This Court [is] denied the ability to require the information to be produced or adduced in evidence by the Minister irrespective of the importance of the information to the determination to be made and irrespective of the importance or continuing importance of the interest sought to have been protected by the gazetted agency when that agency chose to attach to its communication of information to an authorised migration officer the condition that the information be treated as confidential information.[67]

As these are all the very same factors that did not move the Court in the context of the broader Chapter III argument, one can only conclude that the High Court regards its judicial review jurisdiction as special and that, in other contexts, s 503A and other statutory secrecy provisions based on spurious criteria will validly operate to deny it the information it needs to dispense justice. This is confirmed in the Court's answer to Question 1 of the Special Case:

> Section 503A(2) is invalid to the extent only that s 503A(2)(c) would apply to prevent the Minister from being required to divulge or communicate information to this Court when exercising jurisdiction under s 75(v) of the *Constitution* …[68]

Different grades or qualities of justice?

As we have seen, the vice in s 503A is fundamentally about the judicial process and the High Court has significant (albeit unpredictable) Chapter III and *Kable* jurisprudence calibrated to deal with such issues, including as matters of substance and degree. But instead of developing that jurisprudence, the Court in *Graham* chose to expand its s 75(v) jurisprudence. Has it thus, by giving special treatment to s 75(v) in relation to matters of judicial process, created two different grades or qualities of justice depending on whether a constitutional writ is being sought?

The phrase 'different grades or qualities of justice' can be traced to Gaudron J's rejection of it in *Kable v Director of Public Prosecutions (NSW)*[69] (*Kable*):

> there is nothing anywhere in the *Constitution* to suggest that it permits different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by Parliament …[70]

Dawson J, dissenting, thought that this rather ignored what Chapter III actually says:

> The suggestion that the *Constitution* does not permit of two grades of judiciary exercising the judicial power of the Commonwealth, or that Ch III does not draw the clear distinction between State and federal courts which it has hitherto been thought to, simply ignores the fact that the *Constitution* ensures security of tenure and of remuneration in respect of judges of courts created by or under Ch III but does not do so in respect of judges of State courts invested with federal jurisdiction. It equally ignores the fact that the *Constitution* does not require that State courts only exercise judicial power.[71]

Nevertheless, upon this somewhat conclusory statement, Gaudron J reasoned that:

> Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth.[72]

Ever since, High Court judges have consistently rejected the idea that there can be different grades or qualities of justice as between Chapter III courts and State courts exercising federal jurisdiction.[73] So it is strange to think of the High Court itself meting out different grades or qualities of justice — by safeguarding aspects of the judicial process, or not — depending only on the source of its jurisdiction. After all, there does not appear in s 75 itself, or elsewhere in Chapter III, to be any textual or structural basis for the very sort of dichotomy that the Court so flatly rejected in *Kable*.

Let us now throw the matter open to an example. Hypothetically, would the High Court consider itself bound by a secrecy provision that allowed any 'confidential' information relevant to 'operational decision-making in relation to immigration detention centres' to be withheld from any court at the Minister's (non-compellable) discretion? Such a provision would make it very difficult for federal courts fairly to try claims by unlawful non-citizens regarding the conditions of their detention under the Migration Act. This would include claims invoking the High Court's original jurisdiction, in s 75(iii), to hear 'all matters … in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'.[74]

Would the High Court permit its s 75(iii) jurisdiction to be hobbled in this way or would it elevate it alongside its s 75(v) jurisdiction by implying into s 75(iii) a similar constitutional limit on Parliament's ability to affect its exercise in practice?

Graham, to be sure, does not foreclose an argument that federal jurisdiction conferred by or under other provisions of the *Constitution* should receive similar protection to the High Court's s 75(v) jurisdiction. But any such arguments would need to be based on their own constitutional considerations. The question, to adapt what was said in *Bodrudazza*, would in each case be whether the law affects the exercise of jurisdiction under the provision in question so as to be 'inconsistent with the place of that provision in the constitutional structure'.[75] The considerations supporting such a conclusion would not necessarily need to be as weighty as those attaching to s 75(v), but any reliance on *Graham* would tend to encourage such comparisons.

Section 75(iii) is a prime candidate. In the first place, it too is 'entrenched' within s 75. This was recognised as long ago as 1923, when the High Court, in *Commonwealth v NSW*,[76] rejected an argument by New South Wales that it could not be sued in tort by the Commonwealth without its consent.[77] As with s 75(v), there was no *a priori* requirement. As Knox CJ remarked:

> power is conferred by the *Constitution* itself on this Court to take cognizance of this matter. Any legislation by Parliament directed to conferring this power would, therefore, be as superfluous as legislation by Parliament to restrict the limits of the jurisdiction would be ineffective. The argument for the applicant based on sec 78 of the *Constitution* ignores the essential distinction between matters which come within the terms of sec 75 and those which come within sec 76. In respect of the former class the jurisdiction of the High Court is independent of, while in respect of the latter class it is dependent upon, Parliamentary enactment. The result of acceding to this argument would be in effect to remove sub-sec III from sec 75 and place it in sec 76.[78]

Isaacs, Rich and Starke JJ went further, by implying into s 75(iii) and the *Constitution* more generally a rejection of the ancient maxim that 'the King can do no wrong'.[79] Were it otherwise, their Honours reasoned, the Commonwealth could legislate under s 78 to 'render a State liable to the Commonwealth, and to refuse a reciprocal liability'.[80]

In *Werrin v Commonwealth*[81] (*Werrin*), Dixon J queried whether the plurality's reasoning in *Commonwealth v NSW* not only denied the ancient maxim but also involved 'the consequence that the dilectual and contractual liability of the Commonwealth as well as, within Federal jurisdiction, of the States is imposed by sec 75 of the *Constitution* and cannot be discharged, barred or otherwise affected by any law of the Parliament as for example by an Act indemnifying the Crown'.[82] In other words, did the *Constitution* itself impose liability in tort and contract? His Honour held that it did, but only in the limited sense that, 'by the creation of a jurisdiction in which the Crown may be sued without its consent', it exposed the Commonwealth and the States (within federal jurisdiction) to 'liability … already existing *in abstracto*'.[83]

This view was endorsed by a majority in *Commonwealth v Mewett*[84] (*Mewett*) and confirmed in *British American Tobacco v Western Australia*.[85] Gaudron J in *Mewett* summarised the position thus:

> So far as it authorises laws with respect to '[m]atters incidental to the execution of any power vested by this *Constitution* in the ... Government of the Commonwealth', s 51(xxxix) of the *Constitution* permits the Commonwealth to legislate so as to prevent any liability arising for acts done in the exercise of its executive powers. But absent legislation of that kind, liability attaches to the Commonwealth under the general law and the *Constitution* applies to deny immunity from suit.[86]

Thus, although the ability to sue the Commonwealth in tort and contract is entrenched by s 75(iii), it is the common law that supplies the substance of the cause of action. Parliament can therefore legislate to affect the rights of the parties, including by denying the Commonwealth's liability altogether.[87] The extent to which s 75(iii) differs in this regard from s 75(v) would appear to depend on the extent to which various 'jurisdiction-expanding' measures, such as very broad discretions or so-called 'plenary' provisions, are effective to shrink the latter's remit by reducing the scope for error or rendering errors non-jurisdictional in nature.[88]

Regardless, there is no denying that s 75(iii) is constitutionally important jurisdiction or that it is often viewed together with s 75(v) as part of the one schema.[89]

Gageler J has spoken of s 75(iii) and (v) together as provisions whereby 'the relationship between the Executive Government of the Commonwealth and the federal Judicature was then spelt out in Ch III of the *Constitution*'.[90] Section 75(iii) 'had the consequence of exposing the Commonwealth from its inception to common law liability, in contract and in tort, for its own actions and for actions of officers and agents of the Executive Government'.[91] Section 75(v) supplemented it 'to safeguard against the possibility of [it] being read down by reference to United States case law so as to exclude a matter in which a writ of mandamus was sought against an officer of the Executive Government'.[92]

In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[93] (*Richard Walter*), Deane and Gaudron JJ remarked:

> Implicit in each of s 75(v) and s 75(iii) is a conferral of a right to invoke the jurisdiction of the Court upon any person with an interest which is sufficient to provide standing to seek judicial relief in a matter of a kind specified in the relevant sub-section. Together, the two sub-sections constitute an important component of the *Constitution's* guarantee of judicial process in that their effect is to ensure that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.[94]

For essentially these reasons, Perram J in *Habib v Commonwealth*[95] (*Habib*) rejected an attempt by the Commonwealth to argue that s 75(v) is somehow more entrenched than s 75(iii).

Mr Habib had sued the Commonwealth in tort, claiming to have suffered harm at the hands of foreign officials when he was 'rendered' to Guantanamo Bay with the acquiescence of Commonwealth officers. In order to succeed, he had to prove that foreign officials had committed acts of torture.[96] The Commonwealth, relying on the so-called 'act of state' doctrine, argued that the acts of foreign officials done in their own territories were not justiciable.[97] It conceded that the doctrine could not oust judicial review for jurisdictional error under s 75(v) but argued that a common law (as opposed to a constitutional) claim for damages brought under s 75(iii) was in a different category.[98]

Jagot J, with whom Black CJ agreed, noted that there was in fact a constitutional dimension to the case, viz: allegations that Commonwealth officials had acted in excess of the executive power conferred by s 61 of the *Constitution*.[99] The act of state doctrine did not preclude such an action brought in s 75(iii) jurisdiction.

Perram J decided the case on broader constitutional grounds. The principle expounded by Marshall CJ in *Marbury v Madison* is 'axiomatic'.[100] It ensures that questions 'as to the limits of Commonwealth power' are justiciable.[101] The judicial power of the Commonwealth was engaged not only in relation to the constitutional question identified by Jagot J but also to the question of whether Australian Federal Police and ASIO officers had acted within the constraints of their respective legislation. Even in relation to these questions, the act of state doctrine could not operate to 'confer immunity from suit on the Commonwealth', as this would be inconsistent with 'constitutional orthodoxy'[102] — namely, 'the principle in *Marbury v Madison* and the provisions of s 75(iii) and (v) taken together and the schema they express'.[103]

If, as his Honour held, the act of state doctrine cannot operate to negate the High Court's s 75(iii) jurisdiction in relation to an ordinary tort claim against the Commonwealth, it seems but a small step to suggest that, in circumstances comparable to those in *Graham*, an egregious secrecy provision should also be invalidated.

Similar arguments could be mounted in support of the jurisdiction conferred by the other subsections within s 75. Each is significant in its own way, and the framers saw fit to entrench each within that section rather than leaving the matter to Parliament under s 76. Indeed, in *Plaintiff S157* itself, the plurality emphasised the whole of s 75:

> Quite apart from s 75(v), there are other constitutional requirements that are necessarily to be borne in mind in construing a provision such as s 474 of the Act. A privative clause cannot operate so as to oust the jurisdiction which other paragraphs of s 75 confer on this Court, including that conferred by s 75(iii) in matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'.[104]

To these might be added situations where the *Constitution* otherwise confers a right to proceed by implication — for example, against a State for infringing the *Constitution* itself.[105]

Accordingly, if (as *Graham* seems to imply) the High Court is to administer two 'different grades or qualities of justice' defined along jurisdictional lines, the line might logically be drawn between jurisdiction conferred by the *Constitution*, whether expressly or by implication, and jurisdiction conferred by Parliament.

Such logic does not, of course, supply a juridical basis for differentiating along jurisdictional lines in relation to some aspects of judicial process (for example, judicial fact-finding) but not others (for example, natural justice and the giving of reasons). Furthermore, in the absence of a clear textual or structural hook, the very notion of the High Court meting out

different grades or qualities of justice along jurisdictional lines still sits awkwardly alongside what was said in *Kable*.

Conclusion

The High Court in *Graham* correctly identified the vice in s 503A of the Migration Act, but its solution — loading s 75(v) with judicial process protections — raises more questions than it answers. At the same time, its peremptory (and, in the circumstances, unnecessary) rejection of the broader Chapter III argument forecloses what would appear to be the most obvious solution.

There are hundreds of secrecy provisions on the Commonwealth statute books, of which s 503A is not alone in purporting to apply in the courtroom. *Graham* will thus beget arguments that other parts of federal jurisdiction warrant the same level of protection. Such arguments, if they relate to constitutionally entrenched jurisdiction, could be dealt with piecemeal, on confined bases. But it seems likely that, sooner or later, the argument will be made in a case brought in non-entrenched jurisdiction. The spectre of different grades or qualities of justice will then cause the High Court to take another look at *Graham* and its implications.

Endnotes

1 (2007) 228 CLR 651.
2 (1910) 11 CLR 1.
3 The argument is outlined in the judgement of O'Connor J, ibid 41.
4 Ibid 22 (Griffith CJ), 33 (Barton J), 41–2 (O'Connor J).
5 Ibid 22.
6 Ibid 33.
7 Ibid 41.
8 (1914) 18 CLR 54, 61–2 (Griffiths CJ), 66–8 (Barton J), 80–1 (Isaacs J), 83 (Gavan Duffy and Rich JJ), 85–6 (Powers J).
9 Ibid 65. See also at 81 (Isaacs J).
10 Ibid 66.
11 (1904) 1 CLR 181.
12 Ibid 196–7 (Griffiths CJ), 203–4 (Barton J).
13 Ibid 204–5.
14 Will Bateman, 'The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463, 470.
15 (1945) 70 CLR 598.
16 (2003) 211 CLR 476 (*Plaintiff S157*).
17 For a 'doctrinal retrospective', see Bateman, above n 14, 470–6.
18 *Plaintiff S157* (2003) 211 CLR 476, [60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
19 Ibid [81] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
20 Ibid [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Edelman J has describes these remarks as obiter: *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350 (*Graham*), [73]. However, the remarks fall under the heading of '[g]eneral principles' and, as McDonald notes, they appear to have been included by the plurality with a view to explaining its 'entire approach': Leighton McDonald, '*Graham* and the Constitutionalisation of Australian Administrative Law' (2018) 91 *AIAL Forum* 48.
21 *Plaintiff S157* (2003) 211 CLR 476, [103].
22 Ibid [104].
23 (2007) 228 CLR 651.
24 *Graham* (2017) 347 ALR.
25 Ibid [68].
26 Ibid.
27 Ibid [6].
28 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).
29 According to information released by the Department of Immigration and Border Protection under the *Freedom of Information Act 1982* (Cth) s 503A, there were 205 visa cancellation decisions involving s 503A information in the seven years to 30 June 2015.
30 Section 503A(2)(a), (c) and (d).

[31] Section 503A(1)(b).
[32] Section 503A(2)(b), (c) and (d).
[33] Section 503A(3).
[34] Section 503A(3A).
[35] (2015) 230 FCR 61.
[36] At [69] (Buchanan, Flick and Wigney JJ).
[37] *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822, 830 (Swinfen-Eady LJ). See also *Smith v East India Co* [1841] 1 Ph 50, 54; 41 ER 550, 551 (Lord Lyndhurst LC); *Conway v Rimmer* [1968] AC 910, 957B, 962B–C (Lord Morris), 991B–D (Lord Upjohn); *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] 1 AC 405, 433G (Lord Cross); *Sankey v Whitlam* (1978) 142 CLR 1, 43–4 (Gibbs ACJ).
[38] [1968] AC 910.
[39] Ibid 940C.
[40] Ibid 951A.
[41] Ibid 951C, quoting *United States v Reynolds* (1953) 345 US 1, 9 (Vinson CJ, for the Court).
[42] (1978) 142 CLR 1.
[43] Ibid 38–9 (Gibbs ACJ); see also at 58–9 (Stephen J), 95–6 (Mason J); see also *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582, 592 (Mason J).
[44] Under s 501C(3) of the Migration Act, the Minister was required to give the person whose visa he had cancelled without natural justice under s 501(3) a written notice setting out his decision and particulars of any information that 'would be the reason, or part of the reason' for that decision.
[45] See Mehaka Lee Te Puia, 'Applicant's Annotated Submissions', Submissions in *Te Puia v Minister for Immigration and Border Protection*, P58 of 2016, 12 December 2016, [6].
[46] See *Graham* [58] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[47] (1992) 176 CLR 1, 27.
[48] Ibid 36–7 (Brennan, Deane and Dawson JJ).
[49] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J); *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 501–2 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Nicholas v R* (1998) 193 CLR 173, [73] (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, [103] (Kirby J), [175] (Crennan J); *Cesan v R* (2008) 236 CLR 358, [70] (French CJ); *Magaming v R* (2013) 252 CLR 381, [65] (Gageler J).
[50] See, for example, *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, where a six-member plurality remarked, at [56], that '[j]udicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process'. Their Honours cited *Grollo v Palmer* (1995) 184 CLR 348, 394 (Gummow J). See also *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Condon v Pompano* (2013) 252 CLR 38, [142] (Hayne, Crennan, Kiefel and Bell JJ).
[51] (2011) 243 CLR 181 (*Wainohu*).
[52] Ibid [44].
[53] Ibid.
[54] Ibid [58].
[55] (2013) 252 CLR 38.
[56] Ibid [68].
[57] *Wainohu* (2011) 243 CLR 181, 229 [107] (Gummow, Hayne, Crennan and Bell JJ). See also *South Australia v Totani* [2010] HCA 39, [74], 52 [81] (French CJ), 63 [134], 65 [138] (Gummow J); 67 [149], 84 [213] (Hayne J).
[58] Ibid at [53]–[59], [68]–[70] (French CJ and Kiefel J); [95]–[109], [115] (Gummow, Hayne, Crennan and Bell JJ).
[59] *Condon v Pompano* (2013) 252 CLR 38, [191]. In *Wainohu*, Heydon J, dissenting, noted at [119]–[121] that this argument did not even occur to the plaintiff's legal representatives but, rather, was supplied by the Court during oral argument, even then receiving 'very little attention'.
[60] See Aaron Joe Thomas Graham, 'Plaintiff's Annotated Submissions', submission in *Graham v Minister for Immigration and Border Protection*, M97 of 2016, [11]–[32].
[61] *Graham* (2017) 347 ALR 350, [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), [72] (Edelman J).
[62] Ibid [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), [72] (Edelman J).
[63] Ibid.
[64] Ibid [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[65] Ibid [50] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[66] Ibid [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[67] Ibid [52] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[68] [2017] HCA 33, 4.
[69] (1996) 189 CLR 51.
[70] Ibid 103.
[71] Ibid 82; see also at 67–8 (Brennan CJ).

[72] Ibid; see also at 115 (McHugh J).
[73] See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [101] (Gummow J); *Wainohu* (2011) 243 CLR 181, [45] (French CJ and Kiefel J), [105] (Gummow, Hayne, Crennan and Bell JJ); *Condon v Pompano* (2013) 252 CLR 38, [123] (Hayne, Crennan, Kiefel and Bell JJ).
[74] *Plaintiff S157* (2003) 211 CLR 476.
[75] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
[76] (1923) 32 CLR 200.
[77] Ibid 206–7 (Knox CJ), 210–11, 216 (Isaacs, Rich and Starke JJ).
[78] Ibid 206–7. See also at 216 (Isaacs, Rich and Starke JJ).
[79] Ibid 213.
[80] Ibid 214.
[81] (1938) 59 CLR 150.
[82] Ibid 166.
[83] Ibid 168.
[84] (1997) 191 CLR 471, 491 (Brennan CJ), 531 (Gaudron J), 550–1 (Gummow and Kirby JJ).
[85] *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, [59] (McHugh, Gummow and Hayne JJ), [172] (Callinan J). See also at [16]–[19] (Gleeson CJ).
[86] *Commonwealth v Mewett* (1997) 191 CLR 471, 531.
[87] Including, it would seem, in the manner feared by Isaacs, Rich and Starke JJ in *Commonwealth v NSW* (discussed above).
[88] See *Plaintiff S157* (2003) 211 CLR 476 [101]–[102]. There is considerable academic discussion on this question but little jurisprudence. See Bateman, above n 14; Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2014) 21 *Public Law Review* 14; Lisa Burton-Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 124–6.
[89] For example, *Commonwealth v Mewett* (1997) 191 CLR 471, 547 (Gummow and Kirby JJ); *Habib v Commonwealth* (2010) 183 FCR 62, [32] (Perram J).
[90] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [123].
[91] Ibid [125].
[92] Ibid [126].
[93] (1995) 183 CLR 168.
[94] Ibid 204–5.
[95] (2010) 183 FCR 62.
[96] Ibid [22] (Perram J).
[97] Ibid [23] (Perram J).
[98] Ibid [32] (Perram J).
[99] Ibid [127]–[128].
[100] Ibid [25], citing *Marbury v Madison* 5 US 137, 177 (1803).
[101] Ibid [28].
[102] Ibid [29].
[103] Ibid [32].
[104] *Plaintiff S157* (2003) 211 CLR 476.
[105] See, for example, *British American Tobacco Pty Ltd v Western Australia* (2003) 217 CLR 30, [22] (Gleeson CJ), [155] (Kirby J).

THE IMPACT OF ADMINISTRATIVE LAW ON ANTI-CORRUPTION AND INTEGRITY AGENCIES

The Hon John McKechnie QC*

The land on which Corruption and Crime Commission's headquarters are located has deep significance to the Noongar people. In the present built environment of Northbridge, it is difficult to imagine this land 200 years ago. The first white settlers noted the wetlands to the north of the city in the area now encompassed by Northbridge, North Perth, Highgate and Leederville. They were known as Perth Great Lakes, and a memory of those lakes lives on in both the name of the nearby street and Hyde Park. According to the Noongar people, the Wagyl — a huge spirit serpent — moved across the land creating trails and hills and going underground before rising to form the lakes. These lakes were an abundant supply of fresh water and foods such as water birds, frogs, gilgies and turtles. Inevitably, the wetlands were drained to make way for the inner-city development with which we are familiar. To our eternal shame, between 1927 and 1945 Aboriginal Australians were not permitted in the region now known as Northbridge without a 'native pass'. So, mindful of their long-term connection to the land, I acknowledge and pay my respects to the Noongar people, particularly those of the Whadjuk and to their elders past, present and emerging.

In view of the calibre of previous speakers to this august body, I am honoured to have been asked to speak on the impact of administrative law on anti-corruption and integrity agencies. An anti-corruption commission under different names and some different functions now exists in every State and the Northern Territory. A partial body, the Australian Commission for Law Enforcement Integrity (ACLEI), deals with uniformed members of the federal government apart from the Defence Force. They form part of what James Spigelman, former Chief Justice of New South Wales, has described as 'the integrity agencies'. I shall be concentrating on anti-corruption commissions, but other agencies — the Parliamentary Commissioner, known as the Ombudsman; the increased power of the Auditor General; the rise of the public sector under an independent officer in most States; the Information Commissioner — all have their genesis in the decline of Parliament from being a true representative of local communities to a body largely controlled by the discipline of the party system. So there has been a growth in administrative bodies to close the gap and, in consequence, a resurgence of administrative law revitalising the ancient remedies of prerogative writs and using flexible modern applications for injunctive or declaratory relief.

It is perhaps worth reflecting that, less than a century ago, the term 'administrative law' was pejorative. In his seminal and controversial book *The New Despotism*, published in 1929, the Lord Chief Justice, Lord Hewart, wrote that administrative law was profoundly repugnant to English ideas and it would be a strange use of terms if the name 'administrative law' were to be applied to that which, upon analysis, proved nothing more than administrative lawlessness.

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Lord Hewart would not be comfortable in modern Australia, replete with administrative tribunals such as the State Administrative Tribunal (SAT) and the Administrative Appeals Tribunal (AAT) to deal with the exercise of non-judicial power. However, here we are.

Different commissions

Royal Commissions

It is useful to commence with Royal Commissions because an anti-corruption commission shares some of the characteristics, but there is, as I will explain, a crucial difference. Royal Commissions are amenable to judicial review. For example, in *Halden v Marks*,[1] there was a challenge by way of injunctive relief to a Royal Commission inquiry into the circumstances of the tabling of a petition in Parliament (the Lawrence affair). The challenge asserted improper motives by the executive in calling a Royal Commission. The challenge failed. The Court discerned a legitimate purpose for the peace, order and good government of the State.

In *Edwards v Kyle*[2] and, subsequently, *Bradshaw v Kyle*,[3] declaratory relief in the first and injunctive relief in the second was obtained in respect of an inquiry into the City of Wanneroo under the *Local Government Act 1995* (WA). The inquiry had the powers of a Royal Commission.

The executive has long used Royal Commissions for a variety of purposes, the chief of which is to enable an impartial inquiry into a particular subject, to inform government and Parliament so that, if necessary, action may be taken. The first inquiry in Western Australia appears to have been an inquiry into the treatment of Aboriginal native prisoners of the Crown in 1884. Since then, there have been Royal Commissions into topics such as the 'rabbit question', the reasons for substituting stucco for Donnybrook stone in the new Supreme Court, the immigration of non-British labour and the prevalence of gold stealing. There have been Royal Commissions into particular people, including a Royal Commission into a judge — Justice Park. The chairperson of that Royal Commission was Chief Justice Stone. It would appear conflict of interest rules were a little laxer in those days. The Royal Commission into the dismissal from the railway services of one Hugh McLeod and his reinstatement, along with perhaps more weighty matters as the Royal Commission into the system of public elementary education and various Royal Commissions into the collapse of companies. In latter times, they tended to be taken over by corporate affairs and the appointment of an inspector with similar powers.

The difference between a Royal Commission and an anti-corruption commission

There is a crucial difference between a Royal Commission and an anti-corruption commission. The answer lies in the definition of 'mission': 'an important assignment given to a person or group of people'. It is standard form these days in any organisation to spend hours and often lots of resources developing a 'mission statement'. It is very important to have one of these, as it dovetails nicely into your vision and your values. Apparently, you do not know what your organisation does until you have worked these things out!

A Royal Commission's terms of reference is its mission and, typically, its job is done when it has carried out its mission and reported back to Parliament. It is given a time frame — I add, in parenthesis, one that is invariably extended.

Anti-corruption commissions

Anti-corruption and crime commissions and, for that matter, other integrity agencies are invariably established by act of Parliament. They are commissions with perpetual succession.

There may be more than one Commissioner — Queensland and New South Wales are examples. An anti-corruption commission is a standing commission in the sense that it has no particular time frame or lifespan. Crucially, neither the legislative body nor the executive decide what it will or will not investigate. It is independent from direction by either body and for this if no other reason it does not fit neatly into either category to the despair of constitutional law purists.

The commission has jurisdiction over 'serious misconduct' as defined:

(a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment; or

(b) a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person; or

(c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment.[4]

Police misconduct is defined as:

(a) misconduct by —

(i) a member of the Police Force; or

(ii) an employee of the Police Department; or

(iii) a person seconded to perform functions and services for, or duties in the service of, the Police Department;

or

(b) reviewable police action.

Reviewable police action is defined as:

any action taken by a member of the Police Force, an employee of the Police Department or a person seconded to perform functions and services for, or duties in the service of, the Police Department that —

(a) is contrary to law; or

(b) is unreasonable, unjust, oppressive or improperly discriminatory; or

(c) is in accordance with a rule of law, or a provision of an enactment or a practice, that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or

(d) is taken in the exercise of a power or a discretion, and is so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations; or

(e) is a decision that is made in the exercise of a power or a discretion and the reasons for the decision are not, but should be, given;

It has power to form opinions on misconduct but lacks any power to enforce its opinions.

The difference between a commission and a court

The relationship between a commission and a court is in many respects the same as the relationship between any other body and the judiciary. The commission is an inferior tribunal, amenable to a judicial review in its various forms under RSC O56.

A commissioner's appointment is time limited, unlike a judge, who holds office until retirement age. A commission has a parliamentary committee and inspector for oversight.

A commission looks a bit like a court, especially in procedure. The roles of a commissioner and a judge are quite different, although some of the functions — conducting examinations, summonsing and swearing witnesses and requiring documents to be produced — are analogous to each. Essentially, a judge makes findings of fact and declares rights of parties. A finding of fact is incontrovertible (leaving aside appeals). It binds at least the parties and, on occasions, perhaps others. A judge's main function in a non-criminal jurisdiction is declaring rights between citizens, whether they arise under contract or through tort or some other reason. In criminal matters, a judge has sole power to enter judgement of conviction or acquittal, whether after plea or after trial by jury or judge. By contrast, the commission does not make findings. It investigates and reports to Parliament or a minister, or perhaps a departmental head, on the results of its investigation. Its investigations are not adversarial but inquisitorial. They may range far and wide within the ambit of serious misconduct as defined, subject only to the scope and purpose of the investigation as set by the commission. An examination under oath, whether conducted in private or in public, is only a small part of the commission's wider investigatory function. The commission is given power to form opinions of misconduct, but those opinions are not legally binding.

In *Cox v Corruption and Crime Commission*[5] (*Cox*), Martin CJ set out the commission's role and functions:

> The Commission does not perform the function of making binding adjudications or determinations of right. It is neither a court nor an administrative body or tribunal in the usual sense of those expressions. In the performance of the misconduct function it is an investigative agency. After conducting investigations, its role is limited to making assessments, expressing opinions and putting forward recommendations as to the steps which should be taken by others. In characterizing the findings made by the Commission as 'assessments' and 'opinions' it is clear that the legislature intended that the conclusions of the Commission should not be regarded as determinative or binding in any subsequent proceedings. So, if the Commission expresses an opinion that a member of the public service has been guilty of misconduct and that disciplinary proceedings are warranted, the question of whether or not a breach of discipline has been committed can only be authoritatively determined in the course of subsequent disciplinary proceedings instituted by the relevant employing authority, and not by the Commission.[6]

An applicant might have considerable difficulty in invoking the court's jurisdiction where there has been a discretionary exercise of power but, nevertheless, the ultimate power of the court to control the commission remains.

I say 'considerable difficulty' because of the wide discretion given to a commission and its evaluation of the public interest. Mr A was a police officer who, we will see, launched multiple challenges to the commission's powers. In *A v Corruption and Crime Commission*,[7]

at issue was a decision by the Commissioner to release a CCTV recording for public dissemination. Martin CJ and Murphy JA in a joint judgement commented:

> given the protean concept of the public interest in the context in which the Commission will be required to apply the evaluative standard imposed by s 152(4)(c), it may well be that reasonable minds differ on the question of whether disclosure is 'necessary' in the particular circumstances at hand. However, that evaluative judgment is entrusted to the Commission, not the court.[8]

The section referred to allows official information to be disclosed when the Commission is satisfied that disclosure is necessary in the public interest. Moreover, citing authority for the proposition, their Honours said:

> It is trite to observe that the fact the court may emphatically disagree with the decision reached by a decision-maker does not lead to the conclusion that it is unreasonable, irrational or illogical.[9]

Amenability to prerogative relief: an inferior tribunal

The commission's exercise of power may be challenged by judicial review and prerogative relief — theoretically mandamus, but more likely certiorari or prohibition, which is a less restrictive, less cumbersome and therefore more usual application for injunctive or declaratory relief.

There is an exception. While the Commission's chief remit is corruption, the *Corruption, Crime and Misconduct Act 2003* (WA) (CCM Act) provides the exercise of certain exceptional powers. These relate to organised crimes, and exceptional powers are granted to police following application to the Commission. Many of those powers are now to be found in the *Criminal Investigation Act 2006* (WA), and it is unnecessary for the police to exercise them.

Another exceptional power is to summons a person for an examination. The examination protects the companion principle by providing under the CCM Act s 50(1):

> A person summoned on an organised crime summons cannot be examined about matters that may be relevant to an offence with which the person stands charged, but this section does not prevent any other person from being examined about those matters.

I will discuss the companion principle shortly. The CCM Act gives wide interpretation to the expression 'being charged', including when a person is informed that he or she will be charged and when persons investigating the event ought to have formed the view that a person should be charged with the offence, whether or not a prosecution notice has been made or sworn. In recent years, police have made little use of this power partly because a Commonwealth agency, the Australian Criminal Intelligence Commission, provided a quicker and cheaper method of examination. That may change pending a reserved decision in the High Court from Victoria.

The exception to which I refer, excluding judicial review, is s 83, which requires the Parliamentary Inspector's consent to initiating proceedings for prerogative relief during an investigation:

> (1) Except with the consent of the Parliamentary Inspector, a prerogative writ cannot be issued and an injunction or a declaratory judgment cannot be given in respect of the performance of a function for the purpose of this Part and proceedings cannot be brought seeking such a writ, injunction, or judgment.
>
> (2) Subsection (1) does not apply after the completion of the investigation that it was being sought to facilitate by performing the function.

Mandamus

An application for mandamus is unlikely to be successful because, although the Commission has the power to investigate serious misconduct, it is under no duty to do so.

In *Re the Corruption and Crime Commission; Ex parte Calabro*,[10] Beech J dismissed an application for mandamus on the basis that mandamus compels the performance of a legally enforceable duty and not the performance of a discretionary power. The Commission has no legal duty to conduct a particular investigation. Whether the carrying out of further action is in the public interest is a wide-ranging value judgement where there is limited scope for intervention by the Court. It is analogous to the position that applies when a complainant reports or alleges to the police that an offence has been committed.

In *Hinchcliffe v Commissioner of Australian Federal Police*,[11] Kenny J dismissed a claim for mandamus based on an allegation that the Commissioner had a duty to cause an investigation to be made.[12]

In *Re Rodger Macknay QC; Ex parte A*,[13] Beech J dismissed an application for writs of certiorari and prohibition to quash the Commissioner's decision to release CCTV footage in a public examination and disclose it to the media. The application focused on the power of the Commission conferred by s 152(4)(c), which granted power to the Commissioner to certify that disclosure of the material was necessary in the public interest. The Commissioner had asked and answered that question deciding in favour of disclosure. While there is a threshold that has to be crossed before the power conferred by s 152(4)(c) could be exercised, it is a broad discretionary decision entrusted to the decision-maker. The power was not exercised for a purpose other than the purpose for which it was conferred. Beech J did not fail to take into account relevant considerations or take into account irrelevant considerations.

In *A v Corruption and Crime Commissioner*,[14] A, as has been discussed, appealed against the decision of Beech J and the appeal was dismissed. The appellant sought to raise a new ground of unreasonableness, but this also failed. I have referred briefly to the opinion of the majority. An assessment was made as to what might be in the public interest.

A common ground on which proceedings or decisions of administrative tribunals are challenged is for lack of procedural fairness. The point at which a particular rule of procedural fairness becomes live varies from case to case. The Commission conducts private examinations. A person who may be reasonably suspected of serious misconduct will be summonsed to a private examination at some point. Evidence is taken under oath or affirmation and the witness is expected to be truthful. The purpose of an examination is to further an investigation which might be quite wide ranging. So the rule in *Browne v Dunn*[15] does not apply in full force and rigour at the point of an examination. The witness will often be given a non-confrontational opportunity to explain a particular transaction.

Should it turn out that the witness has been less than truthful or has omitted facts, there may be a second examination which is partly designed to ensure that the person has a full opportunity to be aware of the material which might indicate misconduct.

The rule of procedural fairness requiring a person to make representations on adverse matters is also enshrined in s 86:

> Before reporting any matters adverse to a person or body in a report under section 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.

This is no mere formality. In my time as Commissioner, I have, on many occasions, changed part of a report following receipt of representations.

In *Cox*,[16] the applicant sought a prerogative relief to quash parts of a report in which adverse findings were made against him and declaratory relief to the effect that the Commission had exceeded its jurisdiction in making those adverse findings. Martin CJ noted the principles enunciated in the context of an administrative body or tribunal undertaking a determinative or adjudicative function were not necessarily applicable without modification to a body like the Commission undertaking a function which was primarily investigative. Applying *Ainsworth v The Criminal Justice Commission*,[17] the Chief Justice noted that the findings and conclusions of the Commission have no operative legal effect.

The Court was prepared to consider as a principle that injury to reputation may provide a sufficient basis for the grant of declaratory relief in cases where certiorari is not available.

In *Greiner v ICAC*,[18] certiorari was refused because the determinations of the Commission were extremely damaging to the reputations of individuals but had no legal consequences.

Notwithstanding the comments in *Cox*, in my view, it remains an open question as to whether declaratory relief will lie to protect reputations. The answer is 'probably'. In the absence of a remedy of certiorari quoting the Commission's opinion, the drafting of a declaratory order will be interesting and challenging.

The two issues for discussion

For the purpose of administrative law, there are a number of areas which may form the basis of judicial review:

- bias, prejudice;
- lack of procedural fairness; and
- exceeding jurisdiction.

These are fairly standard and I will not develop them. Instead, I will focus on two issues:

- the clash with the companion principle; and
- adverse opinions and publicity.

The clash with the companion principle

In *Lee v The Queen*[19] (*Lee [No 2]*), the High Court noted that our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused.

The principle of the common law is that the prosecution is to prove the guilt of an accused person. The companion principle is that an accused person cannot be compelled to testify. Put another way, the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.

An issue in the various cases relating to crime and corruption commissions is the intrusion of a compulsory examination of a suspect or an accused person into the central attributes of modern criminal law and, in particular, the bundle of rights comprehensively, though often misleadingly, known as the right to silence. Put starkly, can Parliament enact a law which requires a person accused of a crime to be compelled to answer questions under

oath relating to the alleged crime, even though those answers may not be admissible in a subsequent or current prosecution? Should an accused be compelled to disclose their defence, if they have one, or the lack thereof at a time prior to the trial or is that an impermissible impost on the functions of a court, especially a court defined in Chapter III of the *Constitution?*

The discussion in Australia conveniently can start with *Hammond v Commonwealth of Australia*[20] (*Hammond*). Mr Hammond was charged with conspiracy to export prohibited meat. Mr Hammond was subsequently called to give evidence before the Commission in private session and refused to answer questions. Gibbs CJ, with whom Mason J agreed, said:

> Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial.[21]

The Chief Justice went on to hold that the questioning would likely prejudice him in his defence. Murphy J based his decision on a wider issue — that is, to maintain the integrity of the administration of the judicial power of the Commonwealth, perhaps foreseeing the later rise and expansion of the concepts of the judicial power of the Commonwealth.

Murphy J is often overlooked as a jurist, but this is an example of a concept that predated *Kable v Director of Public Prosecutions (NSW)*.[22] There have been a series of cases in the High Court in the last few years where the Court has had to construe various Acts giving commissions powers and whether those Acts with 'irresistible clearness', to use the words of O'Connor J in *Potter v Minahan*,[23] are intended to infringe any of the bundle of rights.

In *X7 v Australian Crime Commission*[24] (*X7*), a person had been charged with criminal offences. The Australian Crime Commission (ACC) proposed to conduct a compulsory examination of the accused with the respect of the subject matter of the offences. In common with similar statutes, under the *Australian Crime Commission Act 2002* (Cth) (ACC Act) s 25A, the proceedings were held in private and the evidence could not be published if the examiner gave a direction on the basis that the publication would prejudice the fair trial of a person who may have been charged with an offence.

French CJ and Crennan J applied the rule of construction that statutory provisions are not to be construed as abrogating important common law rights and immunities in the absence of clear words or necessary implication to that effect. They concluded that nothing in the history of the examination provision throws any doubt on the conclusion based on the text and purpose of the provisions that the examination powers may be exercised after charges have been laid.

They also noted that legislatures have in different settings abrogated or modified the 'deep rooted' privilege against self-incrimination and concluded that the ACC Act reflects the legislative judgement that the functions of the ACC would be impeded if the laying of a charge against one member of a group by a prosecutor prevented continuing investigation of the group's activities by way of examination of that member by the ACC:

> It may be that the expression 'the right to silence' is often used to express compendiously the rejection by the common law of inquisitorial procedures made familiar by the Courts of Star Chamber and High Commission. Be that as it may, 'the right to silence' has been described by Lord Mustill in *R v Director of Serious Fraud Office; Ex parte Smith* as referring to 'a disparate group of immunities, which differ in nature, origin, incidence and importance'. Given the diversity of the immunities, and the policies underlying them, Lord Mustill remarked that it is not enough to ask simply of any statute whether

> Parliament can have intended to abolish the longstanding right to silence. The essential starting point is to identify which particular immunity or right covered by the expression is being invoked in the relevant provisions before considering whether there are reasons why the right in question ought at all costs to be maintained.[25]

French CJ and Crennan J, however, were in the minority. In a joint judgement, Hayne and Bell JJ, with whom Kiefel J agreed, also applied the same rule of construction. The notion of an accused person's right to silence encompasses more than the rights that the accused has at trial; it includes the rights (more accurately described as privileges) of a person suspected of, but not charged with, an offence other than the rights and privileges which that person has between the laying of charges and the commencement of the trial. Their Honours laid emphasis on the trial of an indictable Commonwealth offence, being at every stage accusatorial and that the provision of the ACC Act must be construed against that background:

> If these provisions were to permit the compulsory examination of a person charged with an offence about the subject matter depending on the charge it would affect the fundamental alteration to the process of criminal justice.[26]

The apparently entrenched principle reiterated in *X7* did not long survive. In *Lee v NSW Crime Commission*,[27] the judges who formed the court in *X7* were joined by Gageler and Keane JJ. These judges made the difference. The judges in *X7* held to their same views. Hayne J, who, it will be remembered, was in the majority in *X7*, appealed somewhat plaintively to the doctrine of precedent which underpins the proper exercise of the judicial power, saying, 'the principles recognised and applied by the majority in *X7* apply with equal force to this case'.[28] That *cri de coeur* was insufficient to turn Gageler and Keane JJ, who made only passing reference to *X7* and, when they did so, to French CJ and Crennan J in preference to *Hammond*. Of importance to their Honours was that the examination was before the Supreme Court:

> When it is appreciated that the conduct of the examination remains at all times subject to the supervision and protection of the Supreme Court, the possibility that the implementation of the examination order might give rise to an interference with the administration of justice does not rise to the level of a real risk merely because the subject-matter of the examination will overlap with the subject-matter of pending criminal proceedings against the person to be examined.[29]

And so the examinations were allowed to continue. However, any jubilation felt by the officers of the State in their win against Mr Lee was shortlived. Mr Lee was duly convicted after trial for drugs and weapon offences. Notwithstanding the direction from the examiner that the evidence was not to be published, it was nevertheless improperly supplied to police and the Director of Public Prosecutions (DPP). The subsequent judgement in the High Court was short because of a concession made by the DPP. French CJ and Crennan, Kiefel, Bell and Keane JJ jointly reaffirmed the fundamental principle that it is for the prosecution to prove the guilt of an accused person, with the companion rule that an accused person cannot be required to testify. The Court said:

> the publication to the DPP, in particular, was for a patently improper purpose, namely the ascertainment of the appellant's defences.[30]

The Court did not need to resort to questions of policy to determine whether a miscarriage of justice had occurred:

> what occurred in this case affected this criminal trial in a fundamental respect because it altered the position of the prosecution vis-a-vis the accused.[31]

For lawyers, anti-corruption and crime commissions must be the gifts that keep giving. Next to come under scrutiny was the Victorian Anti-Corruption Commission. The High Court

returned to the issue in *R v Independent Broad-based Anti-corruption Commissioner*.[32] The Independent Broad-based Anti-corruption Commission had commenced an investigation of the conduct of certain members of Victoria Police stationed at Ballarat. The Independent Broad-based Anti-corruption Commission issued witness summonses for various police officers to give evidence in public examination. The police officers submitted that the public examination should be held in private and that one of them could not be compelled to give evidence. The Commission rejected the submission, and review proceedings in the Supreme Court failed. The applicants appealed to the High Court. The submission on behalf of the appellant relied on the fundamental principle of the onus of proof and the companion rule that an accused person cannot be required to testify. The High Court rejected this submission, holding the companion principle was not engaged because the appellants had not been charged and there was no prosecution pending.[33] The Court declined to extend the principle. Gageler J, in a separate judgement, concluded that the answer to an argument based on the companion rule is that:

> whatever the temporal operation of the companion rule might be, the IBAC Act manifests an unmistakable legislative intention that a person summoned and examined might be a person whose corrupt conduct or criminal police personnel misconduct is the subject-matter of investigation.[34]

Before moving to *A v Maughan*,[35] it is useful to distil some principles from the High Court as to the interaction between courts and commissions with compulsory powers of examination over matters which might come before a court:

- The fundamental rule is that the prosecution must prove a case against an accused. The companion rule is that a person cannot be compelled to testify.
- The fundamental principle and companion rule may be abrogated by express statutory language so long as it is irresistibly clear that a legislature so intended.
- A court will act to protect the trial process — in particular, the fairness of the trial process to prevent a miscarriage of justice.
- Although not explicit within the decisions, a court has available to it a number of tools to ensure a fair trial, including exclusion of evidence and, if necessary, a stay of the indictment. As *Lee [No 2]* demonstrates, however, interference with the fundamental principle may be sufficient to quash a conviction even if there was perhaps no practical unfairness in doing so.

And so I come to Western Australia.

A v Maughan[36]

Mr A was a serving police officer who was charged with assault offences arising out of an incident in the Broome lock-up. Mr A had been assiduous in challenging rulings of the Commission in earlier proceedings and at earlier stages of the Commission investigation but had been unsuccessful. *A v Maughan* was not strictly speaking an appeal but a referral by a primary judge to the Court of Appeal. There were a number of matters agitated. One was the Commission's power to institute prosecutions. The Court held that, on proper construction of the CCM Act, there was no such power. Nothing more need be said about this aspect. It appears to me that, regardless of whether Parliament did or did not invest the Commission with prosecution power, the result would have no effect on judicial power enlivened on the institution of the proceedings and their subsequent course. The important parts of the judgement for present purposes are the other matters decided. Corboy J summarised the Commission's powers:

> I do not consider that the Commission has power to prosecute a person, at least where the offence alleged is under a statute other than the CCC Act. However, I consider that the Commission:

(a) may compulsorily examine a person who is suspected of having committed a criminal offence that would constitute serious misconduct but who has not been charged with an offence (a 'suspected witness');

(b) may examine a suspected witness for the purpose of investigating and assembling evidence about a suspected offence;

(c) may possess and use the transcript and any other record of the evidence given by a suspected witness for the purpose of further investigating and assembling evidence about the suspected offence ('derivative use');

(d) may furnish the DPP or another prosecuting authority with evidence that has been assembled, including the transcript and any other record of the examination evidence given by a suspected witness — the evidence that may be furnished is evidence that may be admissible in a prosecution of the witness;

(e) must provide the DPP or another prosecuting authority with all materials that are required to be disclosed under the CPA where it recommends that consideration be given to prosecuting a suspected witness.

I further consider that the DPP or another prosecuting authority is authorised to receive and possess materials that must be disclosed in a prosecution and evidence that has been assembled by the Commission, including the transcript and any other record of the examination evidence given by a suspected witness. Moreover, in my view the DPP or another prosecuting authority may:

(a) use materials received from the Commission for the purpose of giving disclosure in the prosecution of a suspected witness;

(b) where necessary, make derivative use of materials and evidence assembled by the Commission;

(c) subject to s 145, use materials and evidence assembled by the Commission in the prosecution of a suspected witness.[37]

McLure P said:

If on the proper construction of the CCC Act, the Commission (1) has the power to compulsorily examine a suspect on matters relevant to the offences which he is suspected of having committed and (2) can, by itself or its duly authorised officers, commence and prosecute criminal proceedings in respect of those offences, it necessarily follows that the CCC Act authorises the possession and use of compulsorily acquired information in, and for the purpose of, such criminal proceedings unless otherwise excluded, expressly or by necessary implication. The only express exclusion is in s 145 of the CCC Act. Section 145 is confined to partial, direct use immunity. There is no express prohibition on the derivative (indirect) use by the Commission, as prosecutor, of compulsorily acquired information. There can be no implied prohibition on its derivative use unless it is to be inferred that the legislature intended the erection of Chinese walls within the Commission. Such a construction is unsustainable …[38]

Martin CJ, applying and following *R v IBAC*, concluded that access by the prosecution to the transcript of the applicant's examination before the Commission does not involve any alteration to any fundamental principle of the common law or the criminal trial process, nor does it abrogate any fundamental freedom right or immunity. In deciding the question whether the CCM Act authorised prosecution access to the transcript, Martin CJ found of significance that the principal object of the CCM Act and primary functions of the Commission include the investigation of criminal conduct. He also relied on the definition of 'misconduct', which includes criminal conduct by a public officer.

Martin CJ noted that the Commission might exercise discretion to hold a public examination and, although the Commission is empowered to make an order restricting disclosure of evidence given at a public examination, the default position is that there is no restriction

upon disclosure of evidence given at a public examination. The Chief Justice also drew on the provisions of s 145, which is in some respects a curious provision.

The CCM Act, s 145, provides:

> (1) A statement made by a witness in answer to a question that the Commission requires the witness to answer is not admissible in evidence against the person making the statement in —
>
> (a) any criminal proceedings; or
>
> (b) proceedings for the imposition of a penalty other than —
>
> (i) contempt proceedings; or
>
> (ii) proceedings for an offence against this Act; or
>
> (iii) disciplinary action.
>
> (2) Despite subsection (1), the witness may, in any civil or criminal proceedings, be asked about the statement under section 21 of the *Evidence Act 1906*.

Section 145(2) appears unique among anti-corruption Acts. It is logical: why should a witness be permitted to advance under oath a version of events different from that earlier advanced under oath without the court being able to assess the credibility of the version now advanced? The *Evidence Act 1906* (WA), s 21, provides:

> Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.
>
> The same course may be taken with a witness upon his examination in chief or re-examination, if the judge is of opinion that the witness is hostile to the party by whom he was called and permits the question.

Section 21 is remedial in that it abrogated the rule in *Queen Caroline's case*.[39] Section 145 was enacted before the disclosure provisions of the *Criminal Procedure Act 2004* (WA). The result, which may have been unintended, is as Corboy J in *A v Maughan* explains.

In practice, this represents a narrowing of the companion principle because the State has full access to the transcript of a suspect witness. So does the accused, who knows that substantial departure from the evidence given before the Commission carries the risk that it will become admissible in the trial. Another possible narrowing of the companion principle is that the Commission's reasonable suspicions of misconduct do not translate into a charging or prosecuting agency's reasonable suspicion of a criminal offence.

In *X v Callanan*,[40] the Queensland Court of Appeal dismissed an appeal against a challenge to a witness summons. The facts are illuminating:

> Z was shot and killed at the Gold Coast in 2009. On 11 October 2011, the Crime and Misconduct Commission issued a notice to the appellant under s 82 *Crime and Misconduct Act 2001* (Qld) to appear at a hearing. The appellant unsuccessfully challenged the validity of that notice. On 10 December 2015, the presiding officer of the Commission, the respondent, prohibited, under s 180(3) of the Act, the publication of any answer given or document or thing produced at the hearing or anything about any such answer, document or thing; and any information that might enable the existence or identity of the appellant to be ascertained, to any officer of any prosecuting agency with carriage of, or

> involvement in, any prosecution of the appellant for any charges, whether arising from the investigation or any other investigation. The respondent also ordered under s 197(5) of the Act that all answers given by the appellant in the proceedings were to be taken to be answers given under objection on the grounds of privilege against self-incrimination.
>
> At the hearing, the respondent asked the appellant the whereabouts of the firearm used in Z's shooting. The appellant declined to answer on the ground of reasonable excuse under s 190(1) of the Act. He claimed that the purpose of the question was to make derivative use of his answer; the whereabouts of the firearm could be used to further investigate Z's killing and as evidence against him in a future criminal trial. The respondent determined the appellant had no reasonable excuse to decline to answer. The appellant applied for leave to appeal to a trial judge of this Court, seeking an order that the respondent's decision be set aside and declaratory relief that the appellant was entitled to refuse to answer questions insofar as those questions asked anything of his knowledge of the circumstances surrounding Z's murder. This appeal is from the primary judge's order dismissing that application. [41]

The Court (McMurdo P; Gotterson JA and Atkinson J agreeing) rejected a submission that *R v IBAC* was not binding. The Court saw as important that the Crime and Corruption Commission was an investigative body without power to charge or prosecute:

> This Court must construe the common law privilege against self-incrimination and the companion principle in light of the plurality's binding decision in *IBAC*. But in any case, although the respondent suspected the appellant had committed an offence when he questioned him under the Act, the Commission is an investigative, evidence gathering body without general powers to itself charge suspects or prosecute criminal offences. Neither Lord Hughes's statements in *Beghal* nor anything else to which the appellant has referred us suggest that in the present case there has been a breach of the common law companion principle, or, indeed, of art 6, if it be relevant.
>
> Third, nothing said in *X7* supports the appellant's contention that the companion principle is engaged prior to the actual charging of the person claiming its protection, at least where 'charging' is broadly construed as including the point at which those with the power to charge a person, suspect he or she has committed an offence. That wider construction of 'charging' does not assist the appellant as the respondent had no power to charge him for the matters the Commission was investigating.
>
> …
>
> The companion principle was not engaged in this case. When the respondent required the appellant to answer his question as to the whereabouts of the firearm used in Z's shooting, the appellant had not been charged and no prosecution had commenced. It did not matter that the respondent had formed a suspicion that the appellant had committed a criminal offence as the respondent could not charge him and was not an officer of a prosecuting authority. The appellant's first ground of appeal must fail.[42]

What I might term the High Court's wariness about commissions and their intrusion into the judicial power has evolved since *Hammond* and no doubt will continue to do so. The Court seems now more willing to acknowledge a legislative intention to equip commissions with strong investigative powers. I would strongly argue that such powers are necessary in the national and State interest where institutions may be threatened by terrorism, criminal trafficking and corruption.

But such powers do have to be balanced against the democratic institution of a fair trial under the rule of law and there will, from time to time, be turbulence at the intersection.

Adverse opinions and publicity

The Commission may not give authoritative rulings and is enjoined against reporting a finding or opinion that a particular person is guilty of, or has committed, is committing or is about to commit a criminal offence or disciplinary offence. Indeed, a finding or an opinion that misconduct has occurred is not to be taken as a finding or opinion that a particular person is guilty of a criminal offence or disciplinary offence.[43]

The common law reached the conclusion that is now in statutory form. In *Parker v Miller*,[44] the Anti-Corruption Commission appointed a special investigator, who presented a report that found a number of police officers guilty of criminal conduct and serious improper conduct.

A police officer sought and obtained (by majority) prerogative relief by way of certiorari. Malcom CJ and Ipp J held that the finding were ultra vires, although their views as to why certiorari was granted differ. Malcolm CJ considered that certiorari would likely quash the decision of the Police Commissioner to dismiss the officers because the findings, conclusions and recommendations by the special investigator as adopted by the ACC were intended to be a step in the process of altering rights, interests or liabilities. Ipp J considered that prerogative relief should be granted on the basis that the findings of the special investigator, if published, were capable of causing far-reaching prejudice to those affected by it. Franklin J dissented and would have discharged the order nisi.

The matter came again before the full court in *Parker v The Anti-Corruption Commission*.[45] Murray J AC (with whom Pidgeon and Wheeler JJ agreed) was of the opinion that a report of the ACC, with or without recommendations, might be seen as a step in the process capable of affecting the rights of the individual. However, as a matter of statutory construction, the power confirmed on the ACC included a power to report and a report to summarise the outcomes of an investigation to make an evaluation of the evidence gathered and to comment upon it. The order nisi for certiorari was discharged.

In the well-known authority of *Ainsworth v Criminal Justice Commission*,[46] a report was prepared by the Criminal Justice Commission and tabled in Parliament. It contained adverse recommendations about certain persons involved in the poker machine industry. The Court held that the Commission was required to comply with the rules of procedural fairness in preparing the report because reputation, whether personal, business or commercial, is an interest which attracts the rules of procedural fairness.

The Court went on to discuss relief. Mandamus was inappropriate because the Commission was under no statutory duty to investigate and report about the person and might in the future be of a different view as to whether it should investigate and report. Certiorari did not lie because there was no legal effect or consequence attached to the report. However, the persons whose reputations were affected had a real interest in declaratory relief.

In *Cox*,[47] Dr Cox sought both a prerogative writ to quash parts of the Smiths Beach Report in which adverse findings were made against him; and declaratory relief to the effect that the Commission exceeded its jurisdiction in making adverse findings against him and that those findings are of no force or effect. Neither prerogative writ nor declaratory relief was awarded, as none of the grounds advanced by Dr Cox sustained the proposition that the Commission had exceeded its jurisdiction in expressing opinions adverse to him in the Smiths Beach Report.

Greiner v Independent Commission against Corruption[48] was another attempt to quash adverse findings. The New South Wales Supreme Court declined to grant an order of certiorari to quash a determination of Independent Commission Against Corruption because determinations of the Commission, although extremely damaging to the reputations of individuals, did not have legal consequences.

Can a commission be prevented from reporting to Parliament?

Under the CCM Act Part 5, the Commission is granted power to report to Parliament and that report may contain statements as to the Commission's assessments, opinions and recommendations and statements as to any of the Commission's reasons for the assessments, opinions and recommendations. There is a question that arises but has not been resolved.

Around Christmas 2008, the Commission sought a writ of prohibition against the Parliamentary Inspector. This was unusual and I make no comment on the propriety of such a course. Ultimately, it appears that the proceedings were settled. In the first judgement, which was in the nature of a directions hearing, *Re Parliamentary Inspector of the Corruption and Crime Commission; Ex parte Corruption and Crime Commission*,[49] Martins CJ noted that 'The boundaries of the respective jurisdictions of the courts and the Parliaments have been in issue in this country and in England for centuries'.[50] In the second decision, *Corruption and Crime Commission of Western Australia v McCusker AO QC*,[51] the Chief Justice remained sufficiently concerned about the issue as to require that the presiding officers of each House of Parliament have an opportunity to indicate whether they wished to be heard.

The Chief Justice noted that the proceedings raised a question with respect to the capacity of the Court to entertain the proceedings and provide the relief on the basis they were not justiciable, including for the reasons they would interfere with the internal workings of Parliament. The matter was never resolved, as I have said, because they settled. The Parliamentary Inspector may, on one view, be closer to Parliament and therefore its internal workings because the Parliamentary Inspector is an officer of Parliament and is responsible for assisting the Standing Committee in the performance of its function.[52]

The Commission is not an office of the Parliament but does have statutory power to report at any time to Parliament, and the question is whether that power can be in any way fettered by a court. Looming in the background, of course, is Article 9 of the Bill of Rights 1688:

> the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Time does not permit an exegesis of the extent of parliamentary privilege.

As earlier discussed, in 2013, the Commission was challenged by Mr A as to the release of CCTV footage of an incident in the Broome lock-up. This was not quite a challenge to tabling a report in Parliament. The footage had been played during a public examination and the Commission proposed to release a pixilated version prior to report. Nevertheless, similar issues could arise if the Commission includes CCTV or other footage within its report.

In *A v Corruption and Crime Commissioner*,[53] the Court divided over the question whether the Commission had made an error. Martin CJ and Murphy JA dismissed the appeal. McLure P would have upheld the appeal. The judgements, particularly that of the majority, contain a restatement of the general principle in relation to jurisdictional error:

> Questions with respect to the ascertainment of the public interest will rarely have one dimension — *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423 [55] (Hayne J); *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 [137] (Hayne J); *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* [80] (Buss JA). Very often the ascertainment of the public interest will require the consideration of a number of competing factors or considerations,

> or differing features or facets of the public interest — see *Osland v Secretary to the Department of Justice* [137].
>
> Further, the ascertainment of what is 'necessary in the public interest' for the purposes of the grant of a certificate in accordance with s 152(4)(c) of the Act will be undertaken in a context in which the range of 'official information' received by the Commission may be extremely broad (see *Corruption and Crime Commission v Allen*), and in a context in which the functions to be performed by the Commission in the furtherance of the public interest are many and varied. In such a context it is difficult to envisage many, if any, circumstances in which disclosure could be said to be 'essential' to the advancement of the public interest in the sense of absolutely essential or indispensable to its maintenance or advancement. The multi-faceted nature of the public interest, and the likelihood of a discretionary judgment balancing competing considerations being required in the exercise of the power conferred by s 152(4)(c) in this statutory context are, in our view, incompatible with the proposition that a certificate can only be issued if the Commission concludes that disclosure is 'essential' to advance the public interest. Rather, these considerations reinforce the view that s 152(4)(c) imposes 'an evaluative standard requiring restraint in the exercise of the power', and require a value judgment to be made 'subjected to the touchstone of reasonableness'.
>
> Given the protean concept of the public interest, and the context in which the Commission will be required to apply the evaluative standard imposed by s 152(4)(c), it may well be that reasonable minds differ on the question of whether disclosure is 'necessary' in the particular circumstances at hand. However, that evaluative judgment is entrusted to the Commission, not the court.[54]

On the same theme:

> It is trite to observe that the fact the court may emphatically disagree with a decision reached by a decision-maker does not lead to the conclusion that it is unreasonable, irrational or illogical. Applying a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of the decision-maker — *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*, 432 (Latham CJ); *Foley v Padley* (1984) 154 CLR 349; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20* [2003] HCA 30; (2003) 77 ALJR 1165 [5] (Gleeson CJ); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 [40] (Gleeson CJ and McHugh J); [1999] HCA 21; *Li* [30] (French CJ), [66] (Hayne, Kiefel and Bell JJ); *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611. In *Li*, French CJ noted that:
>
> > The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker [30].[55]

The majority concluded:

> Because the public interest is likely to be multi-faceted, and because of the assessment of the public interest will very likely involve the evaluation of competing considerations, the evaluation of which is vested in the Commission and not the court, it will be a rare case in which such a process of evaluation and assessment could be said to lack an evident or intelligible justification.[56]

McLure P concluded that the discretion had miscarried to the point of error. She stated that disclosure of CCTV footage was positively contrary to the public interest in the due administration of criminal justice and that it was not open to the Commission to be satisfied on reasonable grounds that the disclosure was necessary in the public interest. In the end, all judges approached the issue broadly on the application of the *Wednesbury* principle, differing only in the factual result as to whether error was disclosed.

The judgement is of general application to reports by the Commission to Parliament and illustrates the difficulties in the way of a successful injunction, preventing the Commission from making a report to Parliament.

The indefatigable A applied for special leave to appeal to the High Court and sought an injunction in the interim: *A v CCC (No 2)*.[57] In refusing the injunction, Martin CJ made

remarks which, though obiter dicta, are an important indicator in respect to an attempt to constrain the Commission from reporting to Parliament:

> Given the nature of the injunctive relief sought and its context, there is a very real question as to whether it would be appropriate in any circumstance for this court to restrain a statutory agency from exercising its duty and responsibility to report to the Parliament even if there was an arguable case for relief. That question would properly raise important issues relating to the relationship between the courts and the Parliament and might raise issues with respect to the privileges of the Parliament and the possibility that any such order might constitute a contempt of the Parliament. However, as I have concluded that there is no arguable basis for the grant of injunctive relief, it is unnecessary to address those issues.[58]

Special leave was refused by the High Court. A was partially successful in *A v Maughan*. As we have seen, the Court held the Commission did not have authority to prosecute. Therefore, the charges were dismissed. However, the DPP laid a fresh charge of assault. A eventually pleaded guilty, notwithstanding the many applications to the Supreme Court seeking to avoid that outcome.

Conclusion

This has been a relatively brief overview of some of the administrative law issues affecting crime and corruption commissions. In particular, I have focused on two aspects. The first is the intersection between the administration of criminal justice and its fundamental principles and the power of a commission compulsorily to examine witnesses who may be suspected of or charged with an offence. The second is the all-compassing nature of the public interest (which, wisely, few judges have attempted to define) and the limited challenge available to the exercise of a discretion in the public interest, even when the results, at least to reputation, might be significant. I have also touched on the border between judicial review and parliamentary privilege.

Endnotes

1 (1925) 17 WAR 447.
2 (1995) 15 WAR 302.
3 (1995) 15 WAR 327.
4 *Corruption, Crime and Misconduct Act 2003* (WA) s 4(a)–(c).
5 [2008] WASCA 199.
6 Ibid [45].
7 (2013) WASCA 28 306; ALR 491.
8 Ibid [82].
9 Ibid [123].
10 [2012] WASC 355.
11 [2001] FCA 1747.
12 Ibid [17]–[18].
13 [2013] WASC 243.
14 [2013] WASCA 288.
15 (1893) 6 R 67 (HL).
16 [2008] WASCA 199.
17 (1992) 175 CLR 564.
18 (1992) 28 NSWLR 125.
19 [2014] HCA 20; 308 ALR 252.
20 (1982) 42 ALR 327.
21 Ibid 333.
22 [1996] HCA 24; 189 CLR 51.
23 (1908) 7 CLR 277, 304.
24 [2013] HCA 29; 248 CLR 92.
25 Ibid [40] (footnotes omitted).
26 Ibid [25].
27 [2013] HCA 39; 251 CLR 196.
28 Ibid [42].
29 Ibid [340].

30 *Lee v The Queen* [2014] HCA 20, [39].
31 Ibid [51].
32 [2016] HCA 8; 256 CLR 459.
33 Ibid [48].
34 Ibid [73].
35 [2016] WASCA 128; 50 WAR 263.
36 Ibid.
37 Ibid [189], [190].
38 Ibid [164].
39 (1829) 129 ER 976.
40 [2016] QC A 335.
41 Ibid [1]–[2].
42 Ibid [24]–[27].
43 *Corruption, Crime and Misconduct Act 2003* (WA) s 217A.
44 [1998] WASCA 124.
45 Unreported, Supreme Court, WA Library No 990162.
46 (1992) 175 CLR 564.
47 [2008] WASCA 199.
48 (1992) 28 NSWLR 125.
49 [2008] WASC 305.
50 Ibid [30].
51 [2009] WASC 44.
52 *Corruption, Crime and Misconduct Act 2003* (WA) s 188(4).
53 [2013] WASCA 288.
54 Ibid [80]–[82].
55 Ibid [132].
56 Ibid [129].
57 [2014] WASCA 33.
58 Ibid [32] (Martin CJ).

ACADEMIA AS AN INFLUENCER OF TAX POLICY AND TAX ADMINISTRATION

Michael D'Ascenzo AO*

> *More than ever, research is playing an important part in supporting proposed tax reforms and finding solutions to Australia's tax system. Also, for tax academics, the importance of quality research is critical in an increasingly competitive tertiary environment.*[1]

This article considers how academia can influence tax policy and administration, highlighting examples where this has occurred. However, overall it concludes that the impact of academia does not appear on its face to have been as substantial as one might have sought. This article explores the hurdles and conundrums that may have limited the impact of tax researchers on tax policy and administration. The article nevertheless is optimistic about the potential for a closer engagement of tax researchers with tax policy advisers and the tax administration and for corresponding benefits in the impact of that engagement. In terms of methodology, this article is enhanced by the Delphi-type interviews on the topic with a number of relevant stakeholders.

There is good news and bad news. The bad news first: Australian tax research has probably not made as much of an impact as one might have imagined, particularly in the sphere of tax policy. The good news is that it can be an important influencer of tax policy and that there is scope for tax research to be a more significant contributor to the tax policy agenda.

Notwithstanding the impressionistic conclusions outlined above, this article acknowledges the inherent complexities associated with an empirical measurement of research impact in the field of taxation. For example, the tangible outcomes of thought leadership and tax research may not arise until well into the future. Moreover, it will often be difficult to attribute an outcome to one causal factor only.

The article outlines a range of ways in which academia can influence policy and administration. It provides specific examples of where this has occurred and suggests avenues for further collaboration between academics and the Government, the federal Treasury and the Australian Taxation Office (ATO). The qualitative judgements in this article are made on a scale of what might be possible. Within the context of a topic focusing on academic impact, this article also takes the opportunity to make more general comments on frameworks, processes and capabilities in relation to tax policy development.

How academia influences policy and administration

One way for academic researchers to influence Australia's legal frameworks has been through membership of law reform and other review bodies. The research, teaching and

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publication activities of these academics have often given them the prominence to be selected for those positions.

Another way is for academics to be directly engaged in policy development or administration by being consultants to government or government departments. Again, the standing of the academic in the relevant area, often demonstrated by their research, teaching and publications, provides the passport for those engagements, as do past links with government, the public sector, industry or the tax profession.

A good example of those types of activities, albeit outside the tax field, is the contribution of Harold Ford to the development of company law.[2] At a more micro level, his input on the registration of company charges drew on his intimate knowledge not only of company law but also of real property law and improved the operational workings of the underlying policy. Closer to home, the iconic example is the input of Robert Gregory to the development of the HECS.[3] In the broader tax and transfer field, John Piggott and Greg Smith were members of the Henry review.[4]

Academics have also translated their expertise in areas of law into the administration or interpretation of the law as members of regulatory bodies or the Administrative Appeals Tribunal (AAT). For example, a number of academics have accepted roles such as Ombudsman or Information Commissioner. The ATO used to have a position of 'academic in residence' and has used the services of academics on its public rulings panels.

While, as outlined above, academics have occupied a range of positions that influence tax policy and administration, there are two most common roles adopted by them that may influence the development of tax policy and administrative practices.

Independent commentary

As part of their academic work, tax researchers publish papers that bring to attention potential improvements to the tax system or to tax administration. These published papers may influence the thinking of policy-makers, advisers and administrators. It does not really matter if the recommendations made in these papers have a 'slow burn' in terms of their gestation period. Even where they are rejected, they provide a framework for discussion about counterfactuals to the status quo. Parliamentary committees often question Treasury and ATO officials about the viability of these different approaches.

Academics have been influential in bringing coherence to concerns expressed by those in opposition to a policy change or those lobbying for a change in policy.[5] Here academics need to be watchful of maintaining their academic integrity. However, in circumstances where technical changes emanating from a user perspective can improve the operation of a policy, academics can be influential in the modification of that policy. Similarly, coherent and consistent user input can simplify the administrative operation of the tax system.

It is difficult to measure the impact of thought leadership provided by academics and academic research. As well as influencing the students they teach and publishing learned papers, academics also present at conferences and may be vocal in the media regarding their research. Their arguments may leave a lasting impression on exiting or future tax advisers, as well as stakeholders in industry and the tax profession. For example, Treasury used to have an in-house Seminar Series, where academics had the opportunity to directly influence Treasury staff.[6] ATO officers regularly attend and participate in academic tax conferences.

Direct advice to government

The possibility for academics to be drawn within the tent of policy development is often enhanced where they have links with the policy-makers and advisers and/or the potential target group for the policy measure. Again, it is important to avoid capture and undue influence when providing advice or fronting a perspective as to the desired policy outcome. A conundrum for some academics when the opportunity arises to contribute to policy development or administrative practices relates to copyright issues and the academic's independence in publishing the outcome of their work. There are two observations that can be made here. First, independence of thought should never be lost, because the value-add benefit to the Government and to the community flows from the provision of full and frank advice and evidence-based analysis. However, this does not mean that the academic is free to use the work in a way that is contrary to the wishes of the employer. Academics need to understand that, in working within the tent of the government of the day and its administrative arms, such as public sector departments, there will often be a perceived need to control the timing and manner of public release of the research activities or advice or, indeed, whether there is any public release at all. This reticence may apply no matter whether the engagement relates to research, reviews of existing policy or arrangements, the development of new policy or the crafting of administrative strategies or procedures. It is an issue that has been a show-stopper to many opportunities for collaboration between academics and the public sector.

When tax researchers take on commissions to work within the tent, they are burdened with the same yoke as policy advisers or other employees. For example, Treasury itself must provide professional, evidenced-based, full and frank advice to the government of the day, but it is then up to the government to accept it or not:

> The Treasury Department is a department of state. It is part of the executive government. It works to the government of the day, whatever the political persuasion of the government of the day. And so in that sense of course the Treasury is not independent from government and it can never behave as if it is independent from government. But there's another sense in which it does have a degree of independence and that is that the Treasury conducts its analysis without government interference. It's up to the government of the day to decide whether to accept that analysis or whether to reject that analysis.[7]

The role of the in-house policy adviser requires patience, perseverance and a good sense of timing. The downsides for tax researchers in this position are that they may be unable to publish the fruit of their work, and this may negatively impact on their university/academic careers; and some may find the lack of transparency morally confronting.

The challenges in recognising the impact of tax researchers

A challenge for the university sector is to find additional ways to recognise the excellence, engagement and impact of academics.[8] Moreover, impact in the tax field will be inherently difficult to measure given the slow-burn nature of changes to tax policy. In addition, there will often be various other contributors or events that have a causal connection with changes in tax policy and administration. It may be difficult accurately to attribute the causality of a change, particularly where some of the contributions are not specifically made public.

The upsides of being within the tent are the direct access to the decision-makers and their deliberations and, importantly, access to data that may not otherwise be available. While there is a choice to be made, being within the tent as an unbiased provider of evidence-based research provides the academic with a substantially greater opportunity to influence the direction of policy development. In addition, the insights gained from this work

can help guide and direct the researcher's future independent academic research and publications.

However, how this effort is recognised by the university sector is still an open question. Evans has observed that independence can be a 'double-edged sword', leaving the institution to '"think the unthinkable" and to make proposals that may take the debate outside institutional comfort zones', but that this freedom may not translate to legislative outcomes.[9] This conundrum has also played out in relation to joint research activities with the ATO, where opportunities to collaborate have been thwarted by the issue of the ownership of copyright to the outcome of the work.

A cooperative approach between government and academics

In the field of tax administration, the ATO has sought to support academia by releasing a sanitised 2 per cent sample file to aid research efforts. Further increasing the percentage of ATO data that could be available and accessed for research activity would be a boost for tax researchers, especially if the access included longitudinal data.[10] The ATO has also supported joint research activities, subject to the secrecy provisions in the law. In addition, tax academics have also been involved in the ATO's Tax Gap research activities and lobbied for this research.[11]

Nevertheless, there is further scope for the ATO to engage academics as short-term employees, or under other types of engagement, to undertake research activities using the rich database available to the ATO. While these arrangements may mean that the tax researcher is subject to the ATO's secrecy provisions, the output of the researcher's activities is directly brought to bear in the future development or review of tax policy and administration. Moreover, the insights gained can usefully guide the tax researcher's future independent and academic research.

More generally, better access to data would allow tax researchers to predict more reliably changes in tax behaviour associated with any tax policy or administrative change. Treasury has used academics to assist in modelling policy changes. For example, in relation to superannuation, it has used distributional data from the National Centre for Social and Economic Modelling (NATSEM)[12] and the Melbourne Institute's Household Income and Labour Dynamics in Australia (HILDA) survey for households.[13]

The role of think tanks in tax policy development

Another way that tax researchers have influenced the tax agenda is through the work of 'think tanks'[14] such as the Grattan Institute[15] and the Tax Transfer Policy Institute.[16] Some institutes receive funding from Treasury, and the Grattan Institute has a Treasury secondment. Governments may be cautious about being aligned with any particular institute, particularly where the institute has its own 'push agenda' which may not coincide with the Government's short-term rhetoric. In addition, it could be argued that the proliferation of think tanks means that public funding is often spread lightly amongst them.

One benefit of the independence of think tanks is their ability to socialise new ideas with the general public — an outcome that would not be open to Treasury unless sanctioned by the Government. This freedom could justify a review of current funding and institutional arrangements, such as the use of strategic partnerships between a think tank whose views are aligned with those of the Government and the Government. However, alternatives to current arrangements should be harmonious with the concept of responsible government and the wide traditional role of Treasury.[17]

The downside of this approach is that it may impede a more organic development of thought leadership, including 'out-of-the-box' thinking on the model tax system for the future. This may occur if funding is skewed to one institution or where original research is not listened to or otherwise supported.

Governments and Treasury have, or should have, a long-term trajectory for a model tax system. Democratic and political processes often result in an extended period of public socialisation before the steps along the pathway to a model tax system crystallise into legislation. This reality opens up the opportunity for a strategic partnership between government, the Treasury, think tanks and academics, where the think tanks and academics can publicly raise issues, engender debate and better inform the public about the pros and cons of major changes to the existing tax framework. In other words, the Government does not necessarily have to be aligned with proposals which still require the general support of the public, with the socialisation of the proposals undertaken by others. The Government would show its hand at a time where there is general community acceptance of a major change.[18]

There is a risk that different think tanks may hold different views and propose diametrically opposed views and approaches, further polarising the debate on tax policy. On the other hand, over time these think tanks are likely to bring coherence to each of the opposing viewpoints and, in so doing, better articulate the choices for government and the general public. On balance, think tanks provide academics with the opportunity to bring to public attention the outcomes of their research which ultimately may find their voice in changes to policy and the status quo.

The rise of think tanks and the evolving role of the Board of Taxation make tax policy advice more contestable and provide the Government with policy advice from sources other than Treasury.[19] In this environment it behoves the Treasury to ensure that it has the wherewithal to provide the Government with professional, evidence-based advice which draws in the evolving tax literature, international tax experience and sophisticated research and modelling. It could be argued that Treasury needs to do more if it is to remain the Government's key adviser on tax policy.

It has been questioned in the past whether Treasury sees its role as bringing together all of the threads relevant to the development of sound tax policy, including the intelligence drawn from research, consultation and international tax law developments, so as to formulate a blueprint for the future tax system.[20] Such a blueprint could guide Treasury's advice to government.

The good news is that there are two recent developments that suggest that Treasury does see itself as authoring such a blueprint, recognising that ultimately tax policy is a matter for government. Hence the public release of any such roadmap, or parts of it, is also a matter for government. In the past, such releases have accompanied reviews of the tax system commissioned by the Government.

The first is the establishment within the Treasury Revenue Group of a Tax Framework Division[21] to develop a long-term picture of a model future tax system. This division should bring together domestic and international tax research and, in engaging with academics, provide for cross-fertilisation of views and spur targeted research into areas of mutual interest. The second is the establishment of the Treasury Research Institute.[22] The institute aims to deepen Treasury's understanding of contemporary economic developments and to stimulate debate on important policy issues. It publishes papers on topical economic and policy issues, written by both external contributors and staff. It identifies research topics of interest to Treasury to encourage work or collaboration with researchers.

The long gestation period of major changes to the tax system

In the main it takes a long time to make substantial changes to the tax system. Accordingly, to make a difference, academics and policy advisers more generally need to appreciate that policy development may take time and that policy development is usually a repeat game. For example, the introduction of the Goods and Services Tax (GST) in Australia was a saga that played out over numerous attempts over three decades.[23]

One of the most influential reviews of the Australian tax system was the 1975 Commonwealth Taxation Review (Asprey review). A key theme of the report of that committee — the Asprey report[24] — was the need to broaden the tax base to improve equity and efficiency. It is useful to note here the key involvement of Ross Parsons from the University of Sydney as a member of that review body. In 1985, the draft white paper recommended a broadening of the tax base through the adoption of a broad-based consumption tax, the introduction of a capital gains tax and comprehensive taxation of fringe benefits. As Sam Reinhardt and Lee Steel observed:

> The Draft White Paper and tax academics also argued for taxing capital gains to improve economic efficiency and reduce tax avoidance. In particular, it was argued that the lack of a capital gains tax distorted investment towards assets providing returns in the form of capital gains, rather than income streams, and provided an incentive to convert income into capital gains. It was also argued that, combined with the classical taxation of dividends (discussed below), the lack of a capital gains tax created incentives for companies to retain profits, potentially resulting in less efficient investment choices from an economy wide perspective.[25]

The recommendations relating to capital gains and fringe benefits taxation were adopted following the draft white paper, but there was insufficient support for the implementation of a broad-based consumption tax at that time. Notwithstanding general academic acceptance that the existing wholesale sales tax was neither efficient nor simple,[26] the introduction of a broad-based consumption tax in Australia proved difficult, with unsuccessful attempts to introduce such a tax in 1985 and in 1993.

It was only in July 2000 that the Government introduced a GST based on the value-added tax model as part of a broader package of taxation reform. This elephantine gestation period demonstrates the slow-burn nature of major policy shifts. Ken Henry[27] made a number of statements on the time scales of major tax reform in his address to the Atax Post-Henry Review Tax conference on 21 June 2010, reported in the *Australian Financial Review*:

> Dr Henry said the introduction of the goods and services tax 10 years ago led to the 'most extraordinary' reform of state taxes, and future reforms would require 'something like that' compact between the Commonwealth and the states.
>
> The Rudd Government has been widely criticised for adopting less than 10 of the 138 Henry tax review proposals — the most notable being the 40 per cent resource super profits tax — and ruling out almost 30 recommendations.
>
> But Dr Henry said the 1975 Asprey tax review demonstrated the success of the Henry review should be measured 'not in months or years' but decades.
>
> 'Asprey's recommendations received little attention from the Whitlam government and then also the Fraser government, but the issues it raised did not disappear.'
>
> Indeed, capital gains tax, fringe benefits tax and dividend imputation were eventually introduced by then treasurer Paul Keating in the 1980s, before John Howard introduced the GST in 2000.
>
> 'All of these reforms were stimulated by Asprey,' Dr Henry said.[28]

Policy issues on the short- and long-term horizons

The long-term future of the Australian tax system provides fertile ground for further academic work.

The Base Erosion and Profit Shifting (BEPS) agenda has put the spotlight on the development of new laws preventing multinational tax avoidance.[29] Many of the changes proposed are within the current paradigm of the existing international framework. Even in this context, some out-of-the-box thinking may still be necessary in developing effective solutions to the BEPS problem.[30] For example, there is academic research being undertaken in relation to a destination-based cash flow tax.[31]

Australia's domestic tax system relies heavily on personal income tax and company tax. Viewed objectively, the tax system could be characterised as narrow-based with relatively high rates. In relation to personal tax there have been carve-outs for superannuation, capital gains, negative gearing and work-related expenses. With reduced growth in wages, bracket creep alone may not be sufficient to keep pace with government spending.[32]

The nominal rate of company tax is now high relative to OECD and Asian averages. Moreover, there is a growing body of academic opinion that the mobility of capital and international tax competition may put at risk the viability of the corporate tax system.[33] For Australia, corporate taxation constitutes a substantial proportion of total taxes relative to most other OECD countries, albeit that imputation credits apply to resident shareholders. Without corporate taxes, mechanisms such as dividend withholding taxes (to tax non-residents) and undistributed profits taxes might be needed to obtain equivalent aggregate tax outcomes.

Tax planning also diminishes the tax revenue associated with major business transactions. For example, some stapled structures arguably recharacterise trading into more favourably taxed passive income which can have the effect of reducing the Australian tax applicable to that income in the hands of non-resident investors.[34] In addition, levels of debt to equity, and particularly related party debt and interest rates, remain high relative to prudent commercial practices.[35]

The GST has its own set of carve-outs — for example, food, health, housing and aged care. It requires the agreement of nine jurisdictions for a change in the rate. Without a significant change to current federal–State funding arrangements, any additional GST would flow to the States. The taxation of Australian resources, such as the Petroleum Resource Rent Tax, has uplift factors that reduce its ability to source substantial taxation, particularly in relation to the shift from petroleum to gas projects.[36] A mining tax was introduced but then repealed. Land taxes are, of course, a matter for the States and Territories.

Academic research and the ATO

The ATO has long had a productive engagement with academia. For example, in the early 1980s the ATO first engaged a resident academic (Robin Woellner) — an experiment repeated in the 1990s. There has also been substantial engagement and interaction between the ATO and academics since the 1980s focusing on cost of compliance research. This included the ATO sponsoring academic conferences and research on compliance costs. One of these conferences in 1985 included a presentation from Cedric Sandford — a pioneering scholar in this field — and, with the major tax reforms from the mid-1980s, a greater focus was placed on complexity and compliance cost issues by taxpayers, academics, tax professionals, the ATO and the Government.[37]

These ATO-driven activities in relation to compliance costs were reallocated to Treasury after the introduction of the GST as part of the Regulatory Impact Statement program. Over time, research activities of this nature were resurrected by the ATO to supplement its market research, and collaboration with academics on compliance cost studies continue to this day.[38] The ATO also had a close relationship with the University of New South Wales through its sponsorship of the Australian School of Taxation (Atax). Atax considers itself as a major contributor to the tax agenda:

> Atax has contributed to many technical and policy related tax issues through research, including the seminal study of tax compliance costs in Australia — one of the world's largest such studies, the 2011 Tax Summit, and the study of federal fiscal relations. Other key areas of taxation research Atax has contributed to include; international tax, Capital Gains Tax, tax in China, taxation of superannuation, environmental tax and GST.[39]

In the late 1990s Valarie Braithwaite was instrumental in the development of the ATO's Compliance Model:

> The ATO Compliance Model captures the importance of investing heavily in building a broad base to the pyramid, a base where there is considerable consensus on what compliance means, strong commitment to doing the right thing, and communication networks that reinforce the importance of law abiding behaviour. Such bases cannot be taken for granted.[40]

There is no doubt that the Compliance Model has had a substantial and positive impact on the way the ATO has approached its compliance work.[41] For example, the ATO's 2012–13 compliance program booklet states:

> The model helps us understand the factors that influence compliance behaviour and attitudes of different groups of taxpayers and their advisers to compliance. Based on that understanding we apply differentiated strategies to address risks to the fair operation of Australia's tax and superannuation systems.
>
> Our aim is to influence as many taxpayers as possible to move down the pyramid into the 'willing to do the right thing' zone.[42]

From 1999 to 2005 the ATO sponsored the Australian National University's Centre for Tax System Integrity. According to the ANU's School of Regulation and Global Governance:

> The partnership of the Australian Taxation Office (ATO) and the Australian National University (ANU) produced ground-breaking research on how voluntary taxpaying cultures can be maintained and why cooperation and contestation occur within the tax system. The work of the Centre located tax systems and their administration within the context of democratic governance where the fair and reasonable treatment of citizens is understood to be a basic entitlement.[43]

There are two other areas that highlight the impact of academics to tax administration. The first is the contribution of academics on the ATO's public rulings panels.[44] Public rulings outline the 'ATO view' on contentious tax interpretation matters and are important in providing certainty to taxpayers.

Another area where the work of academics has been pivotal is the building within the ATO of sophisticated and world-class capabilities in the field of analytics. The harnessing of the power of analytics has driven a more efficient and effective tax administration.[45]

Given the high level of engagement of academics with the ATO, as outlined above, a conclusion that the impact of academics on tax administration has been less than optimal perhaps belittles the substantial contributions made by academics to the evolving sophistication and modernisation of the ATO.

Perhaps this underestimation of the impact of academic research on tax administration is a result of the inherent difficulty of measuring impact; perhaps it is the result of an error in the attribution of the causal link to the many initiatives undertaken by the ATO across the wide canvass of its operations; and perhaps it reflects an insatiable appetite as to what could possibly be achieved.

Notwithstanding the many significant contributions made by academics to the operation of the ATO, it is surprising to find little reference to the impact of academia in the ATO's annual reports. In fact, over the last decade the sole reference is in the 2011–12 annual report:

> We support independent academic research where appropriate. Requests for our support come from both academic institutions and individuals. The provision of a data sample set which allows academics and other interested parties to undertake their own research is one example of the support we provide. We are also collaborating with the Institute of Chartered Accountants in a study on the cost of compliance.[46]

Researchers are also mentioned in the 2012 Taxation Statistics publication:

> Each edition of Taxation statistics is a broad collection of data compiled from income tax returns (in this case for the 2009–10 income year) and other information provided to the ATO such as goods and services tax (GST) annual returns and business activity statements (here, for the 2010–11 financial year) … In addition, to assist more advanced researchers, we can make available a file containing a 1% confidentialised sample of individual tax return information.[47]

While the ATO undertakes a substantial amount of market research activities, these have mainly involved survey firms rather than academics.

Overall, while there have been high levels of engagement between administration and academics, a glass-half-empty appraisal of the impact of academics on tax administration might say that more could have been achieved. This conclusion flows from the view that there is still more scope for collaborative work between academics and the ATO. The hurdles here are often the reluctance of academics to abrogate their independence in relation to the research output; and trade-off decisions by the tax administration in relation to internal and external funding options.

Fitting in and adding value to the ATO's agenda would work well for academics and the community. In addition, academics should continue to play a critical role in bringing to public attention areas where the tax system is not working well, whether that be in relation to tax policy, tax administration or judicial interpretations of the tax law.

Conclusion

Tax research should and has played a role in influencing tax policy. However, it remains an open question whether tax researchers are a resource that could be better utilised by tax policy-makers and advisers. Similarly, while academics have certainly made a substantial and positive impact on the ATO's focus, strategies and processes, there is arguably scope to do more.

Tax researchers may often have a choice to make:

- be in the tent with the prospect of better data and a greater likelihood of the research output influencing policy or administrative change; or
- think the unthinkable but accept that adoption of those views, if at all, is likely to be a slow burn.

It is important to have tax researchers both directly influencing policy and administration inside the tent and thinking the unthinkable outside the tent. Fortunately, in the tax world there is an ongoing need for research either to sandbag the current domestic and international tax system or for over-the-horizon thinking about the future.

Given the increasing contestability of tax policy advice, there is a growing range of avenues through which academics can pursue relevant tax research and have their views considered in the development of policy. There is also the opportunity to collaborate with Treasury, either inside or outside the tent. Doing so will help enhance Treasury's capabilities, which is vitally important to Treasury's role as the Government's principal adviser on tax policy.

Similarly, there is always scope based on research to improve the operations of the tax administration. For example, for some time now the ATO has sought to better measure its impact, and academics have been assisting with this work.

It also worth noting, although difficult to measure, the impact of academia on staff in Treasury and the ATO. For example, academic focus on the cost of compliance has encouraged ATO officers to search for ways to minimise those costs, including the pre-filling of tax returns and the ATO's emphasis on digital processes such as Standard Business Reporting.

In terms of academic impact on at least one staff member at the ATO, I will conclude on a personal note. As a relatively junior officer at the ATO, I read an article by Yuri Grbich on the potential use of section 260 of the *Income Tax Assessment Act 1936* (Cth) against the trust stripping schemes of the 1970s and 1980s. These views emboldened me and others over time to persuade the ATO to consider the use of section 260 (and arguments based on sham) against the trust stripping schemes of that era. This was at a time when there was still a general view that the courts had 'despatched the old section 260 of the *Income Tax Assessment Act 1936* (Cth) into that forlorn purgatory reserved for legislative provisions which had fallen from judicial favour'.[48] The adoption of this approach worked, with ATO assessment action, settlements and the threat of retrospective legislation bringing finality to these schemes.[49]

Endnotes

1 Kerrie Sadiq and Brett Freudenberg, 'Emerging from the shadows: tax as a research discipline' (2014) 27(1) *Accounting Research Journal* <https://doi.org/10.1108/ARJ-02-2014-0024>.

2 'With the death of Harold Ford, the Australian legal community has lost a remarkable teacher, scholar, law reformer and author, who was the undisputed founding father of modern Australian corporations law. His contribution to commercial law over six decades is unequalled and his influence impossible to overstate.' Justice Julie Dodds-Streeton (Eulogy for Professor Ford), 'Wrote the Book on Commercial Law', Obituaries, *Sydney Morning Herald* (Sydney), 2 November 2012 <http://www.smh.com.au/comment/obituaries/wrote-the-book-on-commercial-law-20121101- 28n5q.html>.

3 Robert Gregory, 'Musing and Memories on the Introduction of HECS and Where to Next on Income Contingent Loans' (2009) 12(2) *Australian Journal of Labour Economics* 237.

4 The Australia's Future Tax System Review, informally known as the Henry tax review, was published in 2010. It was established to examine Australia's tax and transfer system, including state taxes and make recommendations to position Australia to deal with the demographic, social, economic and environmental challenges of the 21st century.

5 For example, Robert Deutsch has recently taken on the role of senior tax counsel at The Tax Institute: The Tax Institute, 'New Senior Tax Counsel appointment — message from the CEO' (Media Release, 27 February 2017). Professor Deutsch has also been a member of the Administrative Appeals Tribunal and the ATO's public rulings panel.

6 Examples of speakers and topics included Neil Warren, 'What Does It Take to Get States to Reform Their Taxes?' (2013); John Taylor, 'An Examination of Some Approaches to Cross Border Corporate-Shareholder Taxation for Australia' (2013); and Richard Vann, 'The Missing Pieces of BEPS? Theory and the Method Analysis' (2014).

7 ABC Radio, 'Treasury boss says Budget was beyond the 'reading age' of its critics', *PM*, 19 May 2009 (Ken Henry) <http://www.abc.net.au/pm/content/2008/s2575258.htm>.

8 'In the Innovation Statement late last year, the federal government indicated a strong belief that more collaboration should occur between industry and university researchers. At the same time, government, education and university bodies have made numerous recommendations for the "impact" of university research to be assessed alongside or in addition to the existing assessment of the quality of research': Steven Taylor, 'When measuring research, we must remember that engagement and impact are not the same thing', *The Conversation* (online), 11 April 2016 <http://theconversation.com/when-measuring-research-we-must- remember-that-engagement-and-impact-are-not-the-same-thing-56745>.

9 Chris Evans, 'Reviewing the Reviews: A Comparison of Recent Tax Reviews in Australia, the United Kingdom and New Zealand or "A Funny Thing Happened on the Way to the Forum"' (2012) 14(2) *Journal of Australian Taxation* 155, 146.

10 The ATO is phasing in a de-identified sample longitudinal file (called aLife) for individuals. This implements a recommendation made by the Henry Review; Bruce Bastian, 'ATO Data Presentation' (Presented at the 8th Queensland Tax Researchers' Symposium, Brisbane, 3 July 2017); Steven Hamilton, 'Data Resolution: Recent Developments in Empirical Tax Policy Research' (Presented at the Treasury Seminar Series, 2013) highlights the use of longitudinal data for research purposes in Denmark.

11 The ATO first published Tax Gap estimates for the GST and the luxury car tax (LCT) gap in 2012 as part of its increased emphasis on measuring the effectiveness of its activities: ATO, *Measuring tax gaps in Australia for the GST and the LCT* (NAT 74422) 2012. A number of tax academics had previously recommended tax gap research to be undertaken by the ATO, similar to the research done in a number of other countries. See Jacqui McManus and Neil Warren, 'The Case for Measuring Tax Gap' (2006) 4(1) *eJournal of Tax Research* 61–79 <http://www.austlii.edu.au/au/journals/eJlTaxR/2006/3.html>; and Sylvia Villios, 'Measuring the Tax Gap of Business Taxpayers in Australia' (2012) *Revenue Law Journal* 21(1), Article 1 <http://epublications.bond.edu.au/rlj/vol21/iss1/1>. The ATO has since established a Tax Gap Expert Panel, which includes academic input: Australian Taxation Office Submission, *Inquiry into the Impact of the Non-payment of the Superannuation Guarantee*, 2017.

12 The National Centre for Social and Economic Modelling at Canberra University.

13 The University of Melbourne, HILDA Survey (2017) <http://melbourneinstitute.unimelb.edu.au/hilda>.

14 Policy and/or research institutes.

15 'This year Grattan Institute again contributed the highest-quality policy research and ideas to public debate. We also strengthened our capability to communicate these ideas effectively to policy makers, opinion leaders, and the public through the media, presentations and events, and our website.' The Grattan Institute, *Report on Operations 2015–16* (30 June 2016) <https://grattan.edu.au/wp-content/uploads/2015/11/Grattan-Institute-Annual-Report-on-Operations-30-June-2015.pdf>.

16 'Responding to the need to adapt Australia's tax and transfer system to meet contemporary challenges, TTPI delivers policy-relevant research and seeks to inform public knowledge and debate on tax and transfers in Australia, the region and the world. TTPI is committed to working with governments, other academic scholars and institutions, business and the community.' Tax Transfer Policy Institute (TTPI), *About Us* (25 February 2016) <https://taxpolicy.crawford.anu.edu.au/about-taxpolicy>.

17 Michael D'Ascenzo, 'Pathways for Tax Policy and Administration: Institutions and Simplicity — An Australian Perspective' in Chris Evans, Richard Krever and Peter Mellor (eds), *Tax Simplification* (Kluwer Law International, 2015) 301.

18 While politics may often make major change a long-term exercise, it is a government responsibility to be a prime mover of change where it considers this necessary and urgent notwithstanding electoral risks.

19 Robert Heferen, Nicole Mitchell and Ian Amalo, 'Tax Policy Formulation in Australia' (Paper presented at the Canadian Tax Foundation Tax Policy Roundtable, Ottawa, 20 June 2013).

20 D'Ascenzo, above n 17, 293.

21 Australian Government, The Treasury, *Organisational Structure* (2017) <http://www.treasury.gov.au/About-Treasury/OurDepartment/Organisational-structure>.

22 Australian Government, The Treasury, *Treasury Research Institute* (2017), <http://research. treasury.gov.au/>.

23 Sam Reinhardt and Lee Steel, 'A brief history of Australia's tax system', (Paper presented at the 22nd APEC Finance Ministers' Technical Working Group Meeting, Vietnam, 15 June 2006).

24 Commonwealth of Australia, Taxation Review Committee (Report [Asprey report] 31 January 1975) <http://adc.library.usyd.edu.au/data-2/p00087.pdf>.

25 Reinhardt and Steel, above n 23 (emphasis added).

26 The narrow base and differential rate structure created distortions to production and consumption decisions in favour of low-taxed or untaxed goods or services. Cascading of the WST through the production chain reduced economic efficiency and export competitiveness by increasing the cost of production in Australia. The arbitrary range of WST tax rates and exemptions imposed significant costs in terms of complexity and compliance.

27 Secretary to the Treasury and Chair of the Australia's Future Tax System inquiry at the time.

28 John Kehoe, 'Asprey review shows reform is a long-term process', *The Australian Financial Review* (online), 22 June 2010 <http://www.afr.com/news/politics/asprey-review-shows-reform-is-a-longterm-process-20100621-ivbel>.

[29] Note the efforts of the Tax Justice Network and associated academics to promote this agenda. The Federal Government has responded by implementing both legislative and administrative changes under the banner, 'Earned here, Taxed here'. Australian Government, New laws preventing multinational tax avoidance (2017) <https://fairtax.gov.au>.

[30] Michael D'Ascenzo, 'BEPS: Thinking Inside or Outside the Box' (Paper presented at the University of New South Wales Thought Leadership Seminar, 19 November 2013).

[31] Alan Auerbach, Michael P Devereux, Michael Keen and John Vella, 'Destination-Based Cash Flow Taxation' (Working paper 17/01, *Oxford University for Business Taxation*, February 2017).

[32] 'Individual taxpayers will soon feel the bite from an ever-rising burden of funding government services as the cost of company tax cuts and bracket creep falls on households, independent budget office modelling shows': Jacob Greper, 'Bracket Creep Ends Personal Taxes Surging, PBO [Portfolio Budget Office] Warns,' *The Australian Financial Review* (online), 5 July 2017 <http://www.afr.com/news/policy/tax/bracket-creep-sends-personal- taxes-surging-pbo-warns-20170705-gx56mi>.

[33] 'With continuing globalisation, tax settings will be of increasing importance for decisions about where capital will be invested, especially for small open economies like Australia … Many countries are reducing tax rates on business and capital income relative to labour income and consumption. There has been a clear downward trend in statutory company income tax rates, particularly among small open economies (Table 1.1). Empirical evidence indicates that company tax rates matter for investment decisions, particularly investments for which location is not critical, and decisions by firms about where to declare profits and pay tax': Commonwealth of Australia, *Australia's Future Tax System — Final Report* (2 May 2010) [1.4].

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[36] Tax Justice Network Australia (Jason Ward), Opening statement to the Senate Inquiry into Corporate Tax Avoidance (3 July 2017) <http://www.taxjustice.org.au/opening_statement_senate_inquiry>.

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[38] See Chris Evans, Phil Lignier and Binh Tran-Nam 'Tax Compliance Costs for the Small and Medium Enterprise Business Sector: Recent Evidence from Australia' (Research Discussion Paper 003-13, Tax Administration Research Centre, 2013).

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[41] Michael D'Ascenzo, 'Modernising the Australian Taxation Office: Vision, People, Systems and Values' (2015) 13(1) *eJournal of Tax Research* 1, 5, 15–16.

[42] Australian Taxation Office, *Compliance program 2012–13* (Internet Archive Waybackmachine, 19 June 2013). Similarly, the Compliance Model was prominent on the ATO's website in 2015.

[43] Australian National University School of Regulation and Global Governance (RegNet), Centre for Tax System Integrity (CTSI) (2 February 2016) <http://regnet.anu.edu.au/research/centres/centre-tax-system-integrity-ctsi>.

[44] For example, Richard Vann, Rick Krever and others made a tangible contribution to the development of public rulings associated with the introduction of the GST.

[45] Federal Commissioner of Taxation Michael D'Ascenzo, 'The effective use of analytics in public administration: The Australian Taxation Office Experience' (Paper presented at the Australian Institute of Company Directors, Hobart, 22 June 2012); and Michael D'Ascenzo, 'Global Trends in Tax Administration' (2015) 1(1) *Journal of Tax Administration* 81, 89.

[46] Commissioner of Taxation, 'Support for Academic Research', *Annual Report 2011–12* (30 October 2012) <https://www.ato.gov.au/About-ATO/Annual-Reports/Annual-Report-2011-12/Part-02-Our-performance/Encouraging-community-engagement/Conducting-research/Support-for-academic-research/>.

[47] Australian Taxation Office, *Taxation Statistics 2009–10* (April 2012) <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Taxation-statistics/Taxation-statistics-2009-10/>.

[48] Yuri Grbich, 'Anti-Avoidance Discretions: The Continuing Battle to Control Tax Avoidance' (1981) 4(2) *University of New South Wales Law Journal* 17, 17; See Yuri Grbich 'Problems of Tax Avoidance in Australia' 3(4) *Canadian Taxation* 203; John G Head (ed), 'Taxation Issues of the 1980s' (Paper presented at the Australian Tax Research Foundation Conference, Sydney, 19–21 August 1982) 416, 424–426; Julie Cassidy, 'Part IVA — A Toothless Tiger?' (2001) 11(11) *Revenue Law Journal* 65.

[49] Trevor Boucher, *Blatant, Artificial and Contrived, Tax Schemes of the 70s and 80s* (1st ed, Australian Taxation Office, 2010).

RESOLUTION INITIATIVES AT THE VETERANS' REVIEW BOARD

Jane Anderson*

I started my administrative law career in a specialist tribunal: the Guardianship Board of South Australia, which also operated as the State's mental health review tribunal. When I left my role there in the context of my move to New South Wales, the Guardianship Board was beginning its journey to become part of a new super-tribunal: the South Australian Civil and Administrative Tribunal (SACAT). Similarly, my appointment to New South Wales Civil and Administrative Tribunal (NCAT) came about a month after the Guardianship Tribunal of New South Wales became the Guardianship Division of NCAT.

So, if you like, in taking up a role with the Veterans' Review Board (VRB) I am returning to an administrative body which remains a standalone tribunal, rich in history and context. Indeed, a veteran's right to seek review of decisions regarding entitlements extends back over 100 years, when the *War Pensions Act 1914* (Cth) provided for a three-person review board. The first external appeals tribunals were established in 1929 following strong advocacy from ex-service organisations about the need for an independent right of appeal.

It is in this important historical setting that I am extraordinarily humbled to assume the role of leading the VRB as it enters its next phase and continues to adapt to the needs of the veterans to whom it provides a critical service, recognising the changing nature of conflict and the changing face of the veteran.

For those who may not be aware, the VRB operates all over Australia. There are approximately 42 members based in all locations with the exception of the Northern Territory. The membership comprises Senior Members — generally lawyers with significant relevant experience; Services Members — men and women who have served or are currently serving in the Army, Navy or Air Force; and Members — people with a diverse range of experience, including in the community, public service, academia and professional sectors. When conducting VRB hearings, each category of membership is represented on a three-member panel.

The VRB has two operational registries in Sydney and Brisbane. The National Registry is located in Sydney and the National Registrar, Katrina Harry, assists me in the performance of my duties.

The VRB reviews certain decisions under the *Veterans' Entitlements Act 1986* and certain determinations under the *Military Rehabilitation & Compensation Act 2004*. The parties to the proceedings are the applicant (commonly a veteran or current serving member of the Australian Defence Force (ADF)); and the Commission (the Repatriation Commission or Military Rehabilitation and Compensation Commission).

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Approximately 80 per cent of applicants are represented by lay advocates from ex-service organisations. Lawyers are prohibited from appearing at VRB hearings; however, there is no barrier to their provision of written submissions in support of an applicant's case. Furthermore, whilst not common, lawyers are not prevented from participating in directions hearings or events in the VRB's alternative dispute resolution (ADR) program, which I discuss below.

The VRB's statutory objective is to provide a mechanism of review that:

- is fair, just economical, informal and quick;
- is proportionate to the importance and complexity of the matter; and
- promotes public trust and confidence in the decision-making of the Board.

The objective aligns with those of a number of other boards and tribunals across the States and Commonwealth. In this article I propose to discuss the transformation that has occurred at the VRB over the last few years and the new initiatives introduced or trialled this year. Each of these reforms has been designed to further meet the VRB's objective of being fair, just, economical informal and quick.

Alternative dispute resolution

I emphasise that I cannot take the credit for perhaps the largest change that has occurred at the VRB in recent times: the introduction of its ADR program. I need to credit my predecessors for the bold and brave steps taken to create and pursue this important reform which has resulted in applicants having considerably more input and control over the outcome of their applications and has significantly reduced the time taken to finalise their matters.

In 2015, a trial of ADR was started at the VRB. The success of the trial led to it becoming a permanent feature of the VRB, complete with legislative amendments incorporating a suite of ADR mechanisms and case management powers. A previous lack of powers meant that there were limitations on the VRB's ability to properly manage matters, accounting for an average time taken to finalise applications of 12 months or longer.

The legislative changes saw the ability of the VRB to conduct directions hearings, allowing jurisdictional issues to be resolved efficiently—for example, determining whether an application has been lodged within time; determining whether a particular decision is reviewable or not; and ensuring matters are 'hearing-ready', thereby reducing the risk of adjournment at the substantive hearing before a three-member panel.

There is now the ability to dismiss those applications where an applicant has failed to appear or failed to progress their application. Used sparingly, and in appropriate circumstances, they ensure that matters proceed in a timely manner and the VRB can properly manage its listings.

ADR at the VRB is conducted by both Board members and Conference Registrars. There are a number of different ADR mechanisms available, usually starting with the Outreach: a 15 to 30-minute initial discussion between the Board Member / Conference Registrar and the veteran and/or advocate, specifically developed in response to their expressed needs. Its success can be measured by the fact that applications proceeding through ADR are finalised on average after only 1.5 Outreaches.

Other mechanisms include a Case Appraisal or a Neutral Evaluation: a non-binding written opinion by a Board member about the merits of the case and prospects of success, enabling veterans to make informed decisions about their applications. Finally, there are Decisions on the Papers, where the VRB can make a favourable decision without the need for a hearing. The flexibility of the model means that a Case Appraisal can in effect turn into a Decision on the Papers if the Board member carrying out the Case Appraisal is of the view (and I am likewise of the view) that the available evidence is sufficient (and sufficiently reliable and probative) so as to enable a favourable decision to be made.

Another mechanism which is beginning to be further utilised is the Conference. Unlike an Outreach, a Conference involves both parties: the applicant and his/her advocate; and a representative of the Repatriation or Military Rehabilitation and Compensation Commission. The Conference is facilitated by a Board member or Conference Registrar, who assists the parties to reach agreement on issues relevant to the application. It is proving to be highly effective in generating outcomes in a non-adversarial manner. It brings both parties to the table — a practice which has not traditionally been the case at the VRB, with the Commission generally not appearing or providing written submissions in VRB hearings.

Conferences are producing excellent results, with terms of settlement being achieved in the majority of cases. The Conference model gives veterans the opportunity to explain their case face-to-face — an opportunity they may not have had when the original claim was being considered. It also enables the Commission to explain information and evidence, including complex calculations or documents that may be difficult to understand in the absence of verbal explanation and which may have traditionally led to adjournments and/or multiple directions being issued. Importantly, both parties participate in the Conference prepared and willing to reach agreement with a view to resolving the matter.

The Conference model is ideally suited to those matters where a veteran may be at risk and where undue delay to proceedings would have an adverse effect on the veteran's health and/or financial situation — for example, veterans with a terminal illness seeking an Extreme Disablement Adjustment to their rate of pension or those incapacitated from work and seeking review in relation to incapacity payments.

The results of the ADR program are outlined in the VRB's annual report. For those applicants who enter into the ADR program, the average time taken to finalise applications is approximately four months. In the last financial year, 82.6 per cent of matters in the ADR program were finalised (without the need for a hearing) within 4.5 months. This represents an eight-month reduction in the total time taken, as, prior to the introduction of ADR, it would take on average 12 months for a veteran's appeal to be finalised.

ADR has now been rolled out to every Board location in Australia, with the exception of Queensland. It will be made available in that State following the imminent implementation of the Board's new case management system.

Importantly, I see VRB ADR as a living program. It is a flexible and agile model which is continuously being refined and improved according to the specialised needs of its users, with a focus on talking to the veteran (or advocate) with a view to resolving issues in a fair, just and timely manner.

Indeed, the value of verbal dialogue is key to two further recent initiatives I have introduced since assuming the role of Principal Member:

(1) thinking more flexibly about eliciting evidence, as outlined in the revised Evidence Practice Direction; and
(2) an oral reasons trial.

New approaches to eliciting evidence

Medical evidence forms an important part of any application for review by the VRB. For example, the applicant may contend that he or she has a medical condition that is related to service and/or that the level of impairment or incapacity as a result of a service-related condition has been incorrectly assessed.

Commonly, by the time the application for review is before the VRB, there may well be several medical reports. They may include reports provided by the applicant's treating doctor/s, assessments arranged by the Department of Veterans' Affairs, and reviews of reports and supporting material by departmental medical officers or contracted medical advisers. All of the medical evidence is provided to the VRB in documentary form. Often, by the time a matter reaches hearing at the VRB, there may well have been a large number of assessments undertaken and reports prepared.

At hearing, issues can arise which relate to diagnosis or clinical onset of an applicant's condition/s, incapacity to work or level of impairment. If the VRB panel is unable to make a determination on these issues, traditionally the panel will consider adjourning the hearing and requesting the Department to obtain a further medical report. In its direction, the VRB will typically pose a series of questions to which the medical practitioner is asked to respond in a written report.

Sometimes, this approach (that is, an adjournment for an indefinite period pending receipt of the report) may not be welcomed by an applicant, especially those applicants who have had multiple prior assessments and have already experienced delay to their matters. It may also be problematic for applicants who are at risk, either financially because they do not have a current stable source of income; or because of the state of their mental health. The prospect of undergoing another assessment, and being asked a further time to recount traumatic events that occurred during their service, can cause considerable distress and frustration.

To address these issues, I am encouraging the VRB to look at other ways to obtain the requisite evidence, including arranging for a medical practitioner (who has previously provided a written report in relation to the applicant) to give brief oral evidence by telephone during the course of the hearing. Often, it will only be discrete issues that require clarification and this can be done simply and effectively during the course of a hearing.

Indeed, this is a practice regularly used in other tribunals where medical evidence forms a large component of the material under consideration. Certainly, in my experience over many years conducting guardianship hearings, medical practitioners, if given sufficient notice and an indication that their telephone attendance would be required for a short period of time only, are prepared to assist a tribunal in this fashion. Not only does this approach avoid adjournment and delay (particularly as some reports can take a number of months to be produced); it also enables the issues to be resolved quickly and informally, consistent with the VRB's statutory objective.

Oral reasons trials

The other way in which the VRB is responding to the needs of its users is a via an oral reasons trial. The legislation permits the VRB to give oral or written reasons for decision.

However, traditionally, the practice of the VRB has been to reserve its decision at the conclusion of the hearing and give its decision and reasons in writing at a later date. The legislation does not stipulate the time frame in which reasons are to be provided; however, it has been the expectation that they are provided to the parties within 28 days.

I recognise that not all matters will be appropriate for oral reasons. However, the trial has identified certain matters that, prima facie, appear suitable for consideration. As part of the trial, the matters were listed for hearing before a panel of three experienced Board members tasked with trialling the delivery of oral reasons at the conclusion of the hearing. It included decisions that the panel had decided to set aside as well as decisions it had decided to affirm. Amongst other things, the panel was asked to identify those matters suitable or, conversely, unsuitable and to indicate the reasons why that was the case.

The trial, which commenced in June of this year, has only just been completed and the evaluation is taking place at the present time. However, the preliminary results are positive. Importantly, applicants are getting outcomes a month or more earlier than they might otherwise and at a time when they have the support of their representative and family in attendance.

From a member's perspective, the giving of oral reasons is a collaboration. Excellent preparation is essential and, although only one of the three panel members delivers the reasons, all three have been involved in their creation and are present for their delivery. This is to be contrasted with the drafting of written reasons, which can happen sometime after the hearing and in circumstances where there may be challenges to the ability of the three members given they are part-time sessional members sometimes residing in different States and with other work commitments, and this means that the opportunity for face-to-face dialogue post-hearing may be somewhat restricted. I am looking forward to the learnings and results of the trial and how they might inform the VRB's future practices and procedures.

Other recent activity at the VRB has been in relation to technology and the ways it can enhance and assist the Board in its functions and operations. It is imperative that we are accessible to veterans and their families wishing to actively participate in the appeal process. We use video and telephone conferencing technology on a regular basis, providing our services to applicants no matter where they live. This is especially important for those applicants who are current serving members and may be on a posting away from their usual residence. In my view, there is no reason why they should be deprived of the ability to participate in their appeals because of their geographical location. Indeed, the VRB has conducted hearings with applicants in the Philippines, Brazil and Afghanistan, just to name a few overseas destinations where applicants may be at any one time.

Accessibility to the VRB is a key priority. I recognise the challenges of participating in hearings and ADR events for some applicants, particularly younger current serving members. As a result, I am considering ways to address this issue, including access to VRB services after the standards hours of operation. I do find it interesting that, while people's basis of work has changed, including work hours and times, many courts and tribunals and their registries' operating hours have tended to remain relatively unchanged. Rethinking and being flexible in relation to parties' access may also open up opportunities for further participation by representatives, including those offering their services on a volunteer or pro bono basis.

The VRB also uses technology to survey stakeholders, online surveys being a common feature. We offer learning and development sessions to members and Conference Registrars via video-conference and we will soon be podcasting sessions as well. This is a

great advancement given the VRB's multiple locations and the sessional nature of the membership, which means that members may not always be able to attend learning and development sessions in person. I am also looking to collaborate with other agencies and tribunals to share off-the-shelf resources so that we are not reinventing the wheel or duplicating relevant products readily available and of high quality.

In addition, the VRB will shortly be rolling out its new IT case management system. This will properly support the ADR program and will further enhance the VRB's transformation. Once implemented, the VRB will be in a position to offer ADR to every location in Australia, and the new system will effectively see the end of paper files. The case management system's e-portal will enable veterans to upload documents directly in support of their applications and check on the status of their appeals online, thereby providing them with further knowledge and input into their application for review. The Department will also be able to furnish material easily and effectively. As well, the VRB will have a clearer understanding of the source of any delays in the appeals process.

Conclusions

The issue of delay brings me to my concluding points and the opportunity to share with you my overarching vision for the VRB. As someone who has worked in courts and tribunals, both big and small, I believe firmly in the need to respond to a changing environment and new demands placed on our administrative law systems. A board or tribunal needs to be able to adapt and be flexible as the demographic changes and where there are increased expectations about getting decisions quickly and informally. In my view, there is no excuse for unreasonable delay, and I believe that being informal and quick is not inconsistent with being fair and just.

As with other tribunals and boards, delay has detrimental consequences. It can cause a loss of confidence in the process and a criticism of the process being overly formal and legalistic. In the case of the veterans' jurisdiction, it can add to psychological issues that a veteran may already be suffering and have a consequential impact on the veteran's family and carers.

The introduction of ADR has made significant inroads in addressing this — dealing with applications early and getting outcomes much earlier. Not only has ADR reduced delay; it has also helped to address concerns about the adversarial nature of proceedings and encouraged cooperation between the VRB and the parties.

There remains an important place for VRB hearings as well. It is appropriate that certain matters do proceed to hearing before a three-member panel where the expertise of a three-member panel is crucial. For example, the Services Member plays a critical role in leading lines of inquiry about particular experiences and incidents on service and brings a developed understanding of the realities of service life. The Member brings his or her community or professional experience to the role, while the Senior Member ensures that the principles of natural justice and procedural fairness are applied and upheld, so that the hearing is fair and just.

Significantly, the learnings of ADR are also being brought into the hearing room, using the combined knowledge and skills of each of the panel members. These learnings include being flexible and responsive in terms of how the evidence is elicited, and encouraging and promoting cooperation and best practice by the parties to ensure that the focus is on the real issues in dispute.

I am also committed to veteran-centric reform — that is, putting veterans at the front and centre during their appeal journey and ensuring that that they do not get lost in the process. Also, I firmly believe that advances in technology and different models of communication, rather than depersonalising or isolating the veteran, can actually enable better access for the veteran and a better way to participate in the process. In my view, we need to embrace technology and other forms of modern communication so that the VRB is at the forefront of modern and progressive administrative legal systems.

My other interest is veterans' mental health. As well as presiding over mental health review and guardianship tribunals, I have also been on the board of management of a non-government organisation providing advocacy and support for people with mental illness. I have seen first-hand the effects of mental illness on people and their families. This work has led me to look for better ways of addressing the needs of applicants who come before boards and tribunals. I also see it as critical that a tribunal does not add to or compound an applicant's psychological distress. During my term I am keen to seek ways to improve how we triage and manage matters involving veterans with mental health concerns.

I am truly honoured to be given the opportunity to respond to these challenges and to work to ensure that the VRB continues to be held in high regard, known for resolving matters in a fair, just, independent and impartial way and being accessible and user-friendly to veterans and all who access the VRB's services, both now and into the future.