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RECENT DEVELOPMENTS

Katherine Cook

Appointment of Disability Discrimination Commissioner

Mr Ben Gauntlett has been appointed as Australia's new Disability Discrimination Commissioner at the Australian Human Rights Commission for a five-year term.

Mr Gauntlett has extensive legal experience as a barrister in Victoria and Western Australia and will bring a range of skills and experience to the role, including lived experience with disability.

Prior to his role as a barrister, Mr Gauntlett worked at Freehills for four years in dispute resolution. He was an associate to the Hon Justice Kenneth Hayne AC at the High Court of Australia and also Counsel Assisting the Solicitor-General of the Commonwealth.

This appointment fills the vacancy created by Mr Alastair McEwin's appointment as Commissioner for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

Mr Gauntlett commenced as Disability Discrimination Commissioner on 7 May 2019. In the interim, recognising the importance of this role, President of the commission, Emeritus Professor Rosalind Croucher AM, has been appointed as acting Disability Discrimination Commissioner.

<https://www.attorneygeneral.gov.au/Media/Pages/Appointment-of-Disability-Discrimination-Commissioner-5-april-2019.aspx>

Review of the framework of religious exemptions in anti-discrimination legislation

The Morrison government has commissioned the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of the framework of religious exemptions in anti-discrimination legislation across Australia.

The review is part of the government's response to the Review of Religious Freedom, released in December 2018, conducted by the expert panel led by the Hon Philip Ruddock.

'In announcing the Government's response to the Ruddock Review on 13 December 2018, the Prime Minister and I indicated that we would consult with States and Territories on the terms of a reference to the ALRC on five of the Ruddock Review's recommendations (Recommendations 1 and 5–8) and that consultation has now been concluded', the Attorney-General said.

'It is essential that Australia's laws are nationally consistent and effectively protect the rights and freedoms recognised in international agreements to which Australia is a party. This particularly applies to the right to freedom of religion and the rights of equality and non-discrimination.'

The ALRC review will consider what reforms to Commonwealth, State and Territory law the *Fair Work Act 2009* (Cth) and any other Australian laws should be made in order to:

- limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to s 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

In undertaking this reference, the ALRC will have regard to existing reports and inquiries, including the *Report of the Expert Panel on Religious Freedom* and the ALRC *Report on Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*.

The terms of reference for the review are attached and further information about the review will be available on the ALRC website.

The commission has been asked to report to the government by 10 April 2020.

<https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>

Expanding the role of the South Australian Civil and Administrative Tribunal

The South Australian Civil and Administrative Tribunal (SACAT) will be given additional responsibilities under new laws proposed by the State government.

Attorney-General, Vickie Chapman MP, said the proposal would see SACAT take over the functions of the South Australian Health Practitioners Tribunal as well as the disciplinary functions of the Architectural Practice Board of South Australia and Veterinary Surgeons Board of South Australia.

A number of matters previously dealt with by the courts will also be transferred to SACAT.

Attorney-General Chapman said the move further supported the government's goal of reducing red tape by centralising administrative review functions.

'Since 2015, SACAT has been the central body of administrative dispute resolution within South Australia and we're working to further consolidate those functions', Ms Chapman said.

'By shifting these separate review and disciplinary functions to SACAT, we're streamlining the sometimes convoluted nature of these processes to the one place and increasing transparency and consistency.'

The move also involves the transfer of equal opportunity complaints and exemption applications from the South Australian Employment Tribunal (SAET) to SACAT.

'While many complaints of discrimination are employment-related, many are not, and involve everything from accommodation and education issues to sale of land', Ms Chapman said.

'The new legislation will transfer equal opportunity jurisdiction to SACAT, which is a more appropriate fit and brings us in line with other States across the country. However, for efficiency and to save double-handling, employment-related complaints can be referred to SAET if they are linked to workers compensation or other proceedings already underway in SAET. This will enable related proceedings to be dealt with at the same time.'

More than 15 other administrative review processes currently dealt with by the courts will also be transferred to SACAT, ultimately reducing the burden on the court system.

'By transferring these administrative reviews, disciplinary and other decision-making functions currently undertaken by the Magistrates Court and District Court to SACAT, we're essentially freeing up the courts to focus on their core judicial work', Ms Chapman said.

This is the fourth of a planned five-stage program to move a number of administrative reviews and disciplinary functions under SACAT.

The first phase in 2015 established SACAT to deal with housing disputes (including residential tenancies), guardianship and administration, consent to medical treatment and advance care directives.

Reviewing administrative decisions across local government, land and housing, taxation and superannuation, environment, energy and resources were then added to SACAT's remit in 2017.

<https://www.agd.sa.gov.au/newsroom/expanding-role-sacat>

Justice Pritchard first woman to be appointed President of the Western Australian State Administrative Tribunal

Attorney General John Quigley has announced the appointment of Supreme Court Justice Janine Pritchard as President of the State Administrative Tribunal (SAT) for a five-year term, beginning on 4 June 2019.

Justice Pritchard is a highly experienced judicial officer who was admitted to practice in Western Australia in December 1993.

In 1991, Justice Pritchard joined the then Crown Solicitor's Office (now the State Solicitor's Office) and worked in that office until her appointment to the bench.

Her primary areas of practice were administrative law, constitutional law, freedom of information and privacy law, industrial law and prosecution of regulatory offences.

Justice Pritchard previously served as Deputy President of the SAT after her appointment to the District Court of Western Australia in June 2009.

She was appointed as a judge of the Supreme Court of Western Australia in June 2010 and as a judge of the Court of Appeal in September 2018.

Justice Pritchard will maintain her commissions as a judge of the Supreme Court and the Court of Appeal.

<https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/04/Justice-Pritchard-first-woman-to-be-appointed-President-of-the-SAT.aspx>

Tasmanian Ombudsman reappointed

The Tasmanian Government has announced that Mr Richard Connock has been reappointed to the position of Ombudsman, ensuring the continuity of the operation of the Office of the Ombudsman and the related roles.

Mr Connock has served in this position, which incorporates the roles of Health Complaints Commissioner, Custodial Inspector, Principal Official Visitor and Co-ordinator of the Official Visitors Scheme, since 2015.

He was Director of the Office of the Ombudsman from 2007 until 2015 and worked as a solicitor and later a barrister between 1982 and 2000.

The appointment is for five years as Ombudsman, Health Complaints Commissioner, Custodial Inspector and Principal Official Visitor, and for three years as Co-ordinator of the Official Visitors Scheme.

It follows the Hodgman Liberal government increasing funding of $245 000 per year for the Office of the Ombudsman in the 2019–20 State Budget to support the Office of the Ombudsman's right to information work.

This funding will enable the recruitment of a new principal officer and new investigation and review officer to increase the capacity of the office in relation to right to information requests.

<http://www.premier.tas.gov.au/releases/ombudsman_re-appointed>

Recent decisions

The scope of merits review by the Administrative Appeals Tribunal

Frugtniet v Australian Securities and Investments Commission [2019] HCA 16 (15 May 2019) (Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ)

The appellant has a criminal record. It includes being convicted in the United Kingdom in 1978 of 15 counts of handling stolen goods, forgery and obtaining property by deception and theft (for which he was sentenced to a term of imprisonment and served two years), and by a finding by the Victorian Broadmeadows Magistrates' Court in 1997 that he committed an offence of obtaining property by deception in relation to the issue of airline tickets (for which no conviction was entered but he was fined $1000). At all relevant times these offences constituted spent convictions within the meaning of Pt VIIC of the *Crimes Act 1914* (Cth).

Division 3 of Pt VIIC of the Crimes Act has the relevant effect that:

- a person whose conviction is spent is not required to disclose to any Commonwealth authority the fact that the person was charged with or convicted of the offence; and
- a Commonwealth authority is prohibited from taking account of the fact that the person was charged with or convicted of the offence.

While a Commonwealth authority includes both the Administrative Appeals Tribunal (the Tribunal) and Australian Securities and Investments Commission (ASIC), s 85ZZH(c) of the Crimes Act also provides that Div 3 does not apply in relation to the disclosure of

information to, or the taking into account of information by, a tribunal established under a Commonwealth law.

In 2014, ASIC made a banning order against the appellant under s 80(1) of the *National Consumer Credit Protection Act 2009* (Cth) (the Credit Protection Act) on the basis that ASIC had reason to believe that the appellant was not a fit and proper person to engage in credit activities.

The appellant applied to the Tribunal for a review of ASIC's decision. In affirming ASIC's decision, the Tribunal took into consideration the appellant's spent convictions, which ASIC was expressly prohibited from taking into account under the Crimes Act.

The appellant then appealed to the Federal Court on grounds including that the Tribunal had erred in law in taking the spent convictions into consideration. When he was unsuccessful before the Federal Court, the appellant appealed to the Full Federal Court. Dismissing the appeal, the Full Federal Court held that s 85ZZH(c) of the Crimes Act entitled the Tribunal to take into consideration material which ASIC was prevented from taking into consideration.

By grant of special leave, the appellant appealed to the High Court.

The High Court held that the jurisdiction of the Tribunal on a review of a decision made by ASIC under s 80 of the Credit Protection Act is unaffected by s 85ZZH(c) of the Crimes Act.

The High Court held that the Tribunal was prohibited from taking into consideration a spent conviction. The question for determination by the Tribunal on the review of an administrative decision under s 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) is whether the decision is the correct or preferable decision.

The High Court explained that the Tribunal and the primary decision-maker exist within an administrative continuum. The Tribunal is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision.

The High Court held that, depending on the nature of the decision the subject of review, the Tribunal may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But, subject to any clearly expressed contrary statutory indication, the Tribunal may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide, as if the original decision-maker were deciding the matter at the time that it is before the Tribunal.

Al-Kateb almost revisited

M47/2018 v Minister for Home Affairs [2019] HCA 17 (12 June 2019) (Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ)

The plaintiff is an unlawful non-citizen who has been in immigration detention since his arrival in the migration zone in 2010.

When the plaintiff travelled to Australia, he used a Norwegian passport. The plaintiff destroyed the passport and presented himself to Australian immigration officers under a

different name, purporting to be a citizen of Western Sahara. The plaintiff had previously identified himself to Danish authorities as a citizen of Iraq, born in 1990; and to authorities in the Netherlands under a different name as a citizen of Gaza, born on 1 March 1988. In or about 2007, he applied for protection in Iceland under a different name as a citizen of Western Sahara, born in 1991. On 30 December 2009, the plaintiff was intercepted at Singapore airport attempting to travel to New Zealand via Australia on a counterfeit British passport which gave his date of birth as 27 March 1989. On or around 5 January 2010, the plaintiff sought asylum in Germany using the same date of birth.

In Australia, in a number of visa applications between 2010 and 2017, the plaintiff admitted that he had used false names, personal details and passports. In dealings with Australian immigration authorities, the plaintiff gave inconsistent accounts of his personal and family background. The plaintiff also adopted a posture of non-cooperation towards meetings arranged or proposed by those authorities between the plaintiff and the Moroccan and Algerian embassies in Canberra aimed at establishing his identity and nationality.

The plaintiff commenced proceedings in the original jurisdiction of the High Court seeking a declaration that his detention is unlawful because it is not authorised by ss 189 and 196 of the *Migration Act 1958* (Cth). Section 189 of the Migration Act relevantly provides that an officer who knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen must detain the person. Section 196 of the Act requires that an unlawful non-citizen who is detained under s 189 be kept in immigration detention until he or she is removed from Australia under s 198 or s 199, deported under s 200, or granted a visa.

Before the High Court, the plaintiff claimed he is stateless and there is no prospect that he will be removed from Australia to another country. Against that background, he contended that his continued detention is not authorised by ss 189 and 196 for two reasons. First, as a matter of construction, the mandate in ss 189 and 196 to keep an unlawful non-citizen in custodial detention suspends when his or her removal is not practicable at all, or in the reasonably foreseeable future, so that those provisions no longer authorise the plaintiff's detention. Secondly, even if ss 189 and 196 cannot be read as operating in that way, they are invalid in their application to the plaintiff because his continued detention is not sufficiently connected to a constitutionally permissible purpose of administrative detention and so may be imposed only through the exercise of the judicial power of the Commonwealth by the courts designated by Ch III of the *Constitution*.

The defendants submitted that they cannot establish the plaintiff's identity and country of origin because he is not cooperative. Therefore, the defendants contended that the High Court could not infer that the plaintiff is a stateless person or that there is no real likelihood or prospect of removal in the reasonably foreseeable future.

Previously, the High Court in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*) found, as a matter of fact in that case, that, although the 'possibility of removal in the future remained', there was 'no real likelihood or prospect of removal of the appellant in the reasonably foreseeable future'. The High Court held, by majority (McHugh, Hayne, Callinan and Heydon JJ), that the authority conferred by ss 189 and 196 of the Act is not limited, either as a matter of the proper construction of those provisions or as a matter of their constitutional validity, to cases where there is a prospect of the detainee being removed to another country within the reasonably foreseeable future.

By contrast, the minority in *Al-Kateb* (Gleeson CJ and Gummow and Kirby JJ) concluded, on the basis of the finding of fact referred to above, that ss 189 and 196, properly construed, did not authorise Mr Al-Kateb's detention. Chief Justice Gleeson did not

consider the constitutional question. Justice Gummow held that the administrative detention of aliens and their segregation thereby from the Australian community for a purpose unconnected with the regulation of their entry, investigation, admission or deportation is not compatible with Ch III of the *Constitution*. His Honour also concluded that the continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. Justice Kirby agreed that indefinite detention at the will of the executive government, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements. In the present case, the plaintiff submitted, among other things, that the minority's view in *Al-Kateb* should now be adopted by the High Court.

The High Court found that the inconsistent statements made by the plaintiff as to his identity and place of origin are not explicable by genuine uncertainty or ignorance, so it cannot be assumed that it is beyond his power to provide further information concerning his identity that may shed positive light on his prospects of removal; neither can it be concluded that the options for his removal within a reasonable time, if his cooperation is forthcoming, have been exhausted.

Accordingly, in this case, the High Court found the inferences contended by the plaintiff were not available and no factual basis for the application of the view of the minority in *Al-Kateb* was established. The result was that no question arose as to the lawfulness of the plaintiff's detention.

'Materiality' is essential to the existence of jurisdictional error

Minister for Immigration and Border Protection v SZMTA; *CQZ15 v Minister for Immigration and Border Protection*; *BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3 (13 February 2019) (Bell, Gageler, Keane, Nettle and Gordon JJ)

These three appeals from judgments of the Federal Court raised issues concerning the effect on a review by the Administrative Appeals Tribunal under Pt 7 of the *Migration Act 1958* (Cth) of a notification to the Tribunal from the Secretary of the Department of Immigration and Border Protection that s 438 of the Act applies in relation to a document or information.

In each of the three appeals, the visa applicant applied to the Tribunal for review of a decision by a delegate of the Minister for Immigration and Border Protection. As required by s 418(3) of the Act, the Secretary gave to the Registrar of the Tribunal documents considered relevant to the review. Subsequently, a delegate of the Secretary or an officer of the department notified the Tribunal that s 438 applied to certain information in the documents. Section 438 applies to a document or information either if the Minister has lawfully certified that disclosure of any matter in the document or of the information would be contrary to the public interest, or if the document, any matter in the document or the information was given to the Minister or the department in confidence. If a Tribunal is notified that s 438 applies to a document or information, the Tribunal may have regard to any matter in the document or to the information and, in certain circumstances, it may disclose to the applicant for review any such matter or the information.

In each appeal, notification was purportedly made under s 438; however, neither the Tribunal nor the Secretary disclosed this fact to the visa applicant.

In all three appeals, the Tribunal affirmed the decisions under review. The visa applicants then sought judicial review of the Tribunal's decisions in the Federal Circuit Court of Australia and Federal Court.

In *CQZ15 v Minister for Immigration and Border Protection* (*CQZ15*), the Federal Circuit Court held that the invalidity of the notification and the non-disclosure of the fact of the notification had resulted in jurisdictional error. The certificate stated that disclosure of specified information contained in specified parts of the departmental file would be contrary to the public interest. The Full Federal Court allowed an appeal by the Minister and remitted the matter for a determination of the materiality of the Tribunal's denial of procedural fairness.

In *BEG15 v Minister for Immigration and Border Protection* (*BEG15*), the Federal Circuit Court held that the information covered by the notification could have made no difference to the outcome of the Tribunal's review. The certificate covered three documents on the departmental file, all of which were in evidence before the Federal Circuit Court in a previous appeal. All three documents related to the disposition of the application for judicial review of the initial decision of the Tribunal. The first document recorded that the consent order had been made after a review by the department of the decision record, confirmed by advice from counsel, revealed 'a probable error of law'. The second document briefly summarised the initial decision of the Tribunal and went on to explain that the Tribunal in the initial decision had 'failed to apply the correct test for complementary protection'. The third document noted that the subject-matter of the review would in consequence be referred to the Tribunal for reconsideration. The Full Federal Court dismissed the appeal.

In *Minister for Immigration and Border Protection v SZMTA* (*SZMTA*), the invalidity of the notification was not raised by the visa applicant until his appeal from the Federal Circuit Court to a single judge of the Federal Court, who held that the Tribunal had made a jurisdictional error and allowed the appeal. The evidence before the Federal Court established that the SZMTA had previously been provided with copies of all of the documents the subject of the notification in response to a request under the *Freedom of Information Act 1982* (Cth).

By special leave, CQZ15 and BEG15 and the Minister in SZMTA appealed to the High Court.

The High Court unanimously held that the fact of a notification to the Tribunal that s 438 applies to a document or information will trigger an obligation of procedural fairness on the Tribunal to disclose the fact of the notification to the applicant for review.

The majority (Bell, Gageler and Keane JJ) explained that procedural fairness ordinarily requires that an applicant be apprised of an event which results in an alteration to the procedural context in which an opportunity to present evidence and make submissions is routinely afforded. A s 438 notification alters the procedural context within which the Tribunal's duty of review is to be conducted. For example, if valid, the notification erects a procedural impediment to the otherwise unfettered ability of the Tribunal to take into account the document or information if the Tribunal considers it to be relevant to an issue to be determined in the review. It also truncates the specific obligations of the Tribunal under ss 424AA and 424A — to give clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.

However, the majority of the High Court further held that a breach by the Tribunal of that obligation will result in jurisdictional error if, and only if, the breach is material, in the sense that the breach deprives the applicant of the possibility of a successful outcome (*Hossain v Minister for Immigration and Border Protection* [2018] HCA 34). By majority, the High Court also held that an invalid notification will result in jurisdictional error if, and only if, the notification is material.

The majority explained that 'materiality' is essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision. Where materiality is in issue in an application for judicial review, and except in a case where the decision made was the only decision legally available to be made, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application.

The High Court found that, in *CQZ15*, the Federal Court was correct to remit the matter to the Federal Circuit Court. In *BEG15*, the Federal Court was correct to find no appealable error in the Federal Circuit Court's decision given the 'immaterial' nature of the documents subject to the certificate. Finally, in *SZMTA*, the Tribunal's denial of procedural fairness was immaterial, because the appellant had been provided with the documents under the Freedom of Information Act, and the Federal Court was wrong to find that the Tribunal had committed a jurisdictional error.

THE HIGH COURT'S DECISION IN *BURNS V CORBETT*: CONSEQUENCES, AND WAYS FORWARD, FOR STATE TRIBUNALS

Anna Olijnyk and Stephen McDonald*

The High Court's 2018 decision in *Burns v Corbett*[1] establishes that State tribunals that are not courts cannot exercise judicial power in matters of the kinds identified in ss 75 and 76 of the *Constitution*. While not unexpected,[2] the decision has the potential to cause widespread disruption to the work of State tribunals. This article explains the consequences of *Burns v Corbett* for State tribunals and considers seven options States may wish to pursue in response to the decision.

It is convenient, at the outset, to clarify some terms that will be used throughout this article. The first two have an established technical meaning. 'Federal jurisdiction' is authority to exercise judicial power conferred by the *Constitution* or by Commonwealth laws. With the exception of the High Court's appellate jurisdiction,[3] federal jurisdiction is limited to the classes of matters identified in ss 75 and 76 of the *Constitution*. 'State jurisdiction' is the authority to decide conferred by State laws.[4] The next two terms are non-technical phrases adopted in this article for convenience. We use the term 'federal matters' to refer to matters of the kinds identified in ss 75 and 76, irrespective of the source of jurisdiction. Finally, we will use the term 'non-judicial tribunal' to refer to a tribunal that is not a court.

Burns v Corbett was *not* about the exercise of federal jurisdiction by State non-judicial tribunals. It is clearly unconstitutional for a non-judicial tribunal to exercise federal jurisdiction.[5] The issue in *Burns v Corbett* was whether a State non-judicial tribunal could exercise *State* jurisdiction in a federal matter. The High Court held it could not.

This article examines the reasoning of the Court in *Burns v Corbett* and then explains the consequences of the decision for the States. Finally, it identifies some possible reform options for State governments.

The decision in *Burns v Corbett*

In *Burns v Corbett*, the High Court unanimously held that State tribunals that are not State courts cannot exercise judicial power with respect to any of the classes of matters listed in ss 75 and 76 of the *Constitution*.

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A majority of the Court, comprising Kiefel CJ and Bell, Gageler and Keane JJ, held that Ch III of the Commonwealth *Constitution* contains an implied limit on State legislative power: State parliaments have *no power* to confer judicial power with respect to the matters in ss 75 and 76 on non-court State tribunals.

The joint judgment of Kiefel CJ and Bell and Keane JJ emphasised the exhaustive nature of Ch III of the *Constitution* in various respects and the negative implications that had been held to arise from it. The majority acknowledged that s 77(ii) itself 'recognises the possibility that, absent Commonwealth legislation excluding the adjudicative authority that otherwise belongs to the State courts, that authority may continue to be exercised by those courts'.[6] However, the same was not true of non-court State *tribunals*.

Their Honours considered that:

> the approach to the interpretation of Ch III, whereby the statement of what may be done is taken to deny that it may be done otherwise, is also apt to deny the possibility that any matter referred to in ss 75 and 76 might be adjudicated by an organ of government, federal or State, other than a court referred to in Ch III.[7]

Chapter III expressly contemplates the exercise of adjudicative authority with respect to federal matters by:

- the High Court, exercising the (federal) jurisdiction conferred on it by the Constitution (s 75);
- the High Court, exercising the (federal) jurisdiction conferred on it by laws of the Commonwealth Parliament (s 76);
- other federal courts created by the Parliament, exercising the (federal) jurisdiction conferred on them by laws of the Commonwealth Parliament (s 77(i));
- the courts of the States, exercising the (State) jurisdiction that otherwise belongs to them under the laws of the States (s 77(ii)); and
- the courts of the States, exercising the (federal) jurisdiction invested in them by the Commonwealth Parliament.

Kiefel CJ and Bell and Keane JJ considered that Ch III must be taken to be an exhaustive statement not only of the adjudicative authority of State *courts* but also of *any* organ of government, federal or State. An important structural consideration supporting this conclusion was the scheme of appeals from State courts exercising federal jurisdiction, subject only to exceptions and regulations prescribed by the Commonwealth Parliament.[8] That scheme would be undermined if States could invest judicial power in tribunals from which no appeal necessarily lay to a State court.

Kiefel CJ and Bell and Keane JJ held that they did not need to consider the s 109 inconsistency issue, because the question of whether an implication was to be drawn from Ch III was 'logically anterior to any question as to the power of the Commonwealth Parliament to override such a conferral of adjudicative authority by a State Parliament'.[9]

Justice Gageler expressed general agreement with the conclusions of Kiefel CJ and Bell and Keane JJ and 'substantial' agreement with their Honours' reasoning.[10] In contrast to the joint judgment, however, Gageler J explicitly considered the s 109 inconsistency argument first. Justice Gageler explained that, in order for an inconsistency to arise between s 39(2) of the *Judiciary Act 1903* (Cth) and a State law conferring jurisdiction over federal matters on a non-court State tribunal, the Commonwealth law must first be taken to legislate exhaustively within a particular 'universe'. Whether it could do so depended upon the scope of the legislative power conferred on the Commonwealth Parliament.

Justice Gageler held that s 39(2) of the Judiciary Act could not have a 'negative penumbra' excluding jurisdiction from non-court State tribunals, because s 39(2) was enacted pursuant to s 77(iii) of the *Constitution* and s 77(ii) and (iii) referred only to State courts.[11] Nor could the incidental power, in s 51(xxxix) of the *Constitution*, support a law excluding the jurisdiction of State tribunals.[12] His Honour thus concluded that the Commonwealth Parliament had no power 'to exclude the adjudicative authority of non-court State tribunals'.[13]

For Gageler J, this conclusion strengthened the structural considerations in support of the Ch III implication, because it meant that 'that question falls to be considered against the background of an absence of Commonwealth legislative power to achieve the same result'.[14] If the Ch III implication were not drawn, there would be 'a hole in the structure of Ch III' and '[t]he Commonwealth Parliament would have no capacity to plug it'.[15] If the Commonwealth Parliament had had power to exclude the jurisdiction of non-court State tribunals then it might be said that the Ch III implication was unnecessary because — consistently with the apparent purpose of s 77(ii) and not inconsistently with the structure of appeals to the High Court under s 73 being subject to exceptions prescribed by the Commonwealth Parliament — the Commonwealth Parliament retained control over the organs capable of exercising judicial power in federal matters.[16]

The remaining justices — Nettle, Gordon and Edelman JJ — each held that, while State parliaments did not lack legislative power to confer such jurisdiction on non-court State tribunals, the operation of State laws which purported to do so was excluded by a law of the Commonwealth Parliament — s 39(2) of the *Judiciary Act 1903* (Cth) — which invests federal jurisdiction in State courts.[17] The minority held that the Commonwealth Parliament, by enacting s 39(2), had evinced an intention that the only bodies capable of exercising judicial power in matters of the kinds listed in ss 75 and 76 of the *Constitution* should be federal courts and State courts. For Nettle and Gordon JJ, a State law which conferred judicial power on non-court State tribunals in respect of matters of those kinds was inconsistent with the Commonwealth law and so was invalid by operation of s 109 of the *Constitution*.[18] For Edelman J, ss 38 and 39 of the Judiciary Act operated directly to exclude the jurisdiction of State courts.[19]

The consequences of *Burns v Corbett* for State tribunals

After *Burns v Corbett*, it is clear that a constitutional implication exists, according to which a State tribunal lacks jurisdiction to determine a matter in the following circumstances:

- the matter falls within one of the descriptions in ss 75 and 76; and
- the tribunal exercises judicial power in the determination of the matter; and
- the tribunal is not a court.

Each of these elements requires elaboration.

Federal matters

Matters affected by *Burns v Corbett* are those identified in ss 75 and 76 of the *Constitution*. Section 75 confers original jurisdiction on the High Court in all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Section 76 empowers the Commonwealth Parliament to confer original jurisdiction on the High Court in matters:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

The matters in ss 75 and 76 — 'federal matters' — include some matters in respect of which State jurisdiction has never existed; for example, s 75(v).[20] But, equally clearly, State jurisdiction could exist in some classes of 'federal matter' — for example, s 75(iv).

The cases in which the constitutional issue in *Burns v Corbett* has arisen show how easy it is for federal matters to arise in State tribunals.

Perhaps the most obvious possibility is the so-called diversity jurisdiction in s 75(iv), which includes matters between residents of different States. Residential tenancies disputes, for example, between a local tenant and an interstate landlord are not unusual in State tribunals. *Burns v Corbett* itself involved a complaint, in a tribunal's anti-discrimination jurisdiction, by a resident of New South Wales against residents of Queensland and Victoria. Matters in diversity jurisdiction may account for a significant proportion of the caseload of some tribunals. However, there are several important limits on the diversity jurisdiction. The jurisdiction does not catch matters between a resident of a State and a *corporation* in another State[21] or, indeed, any matter in which an artificial person is a party.[22] Nor is the jurisdiction attracted when at least one party on either side of a dispute comes from the same State, even if residents of other States are also parties.[23]

Slightly more unusual, but clearly possible, is a matter arising under a law made by the federal Parliament and therefore falling within s 76(ii). State tribunals, of course, exercise jurisdiction under State legislation. But there may be cases in which a State tribunal, in the exercise of those powers, is required to apply Commonwealth legislation. An example is *Qantas Airways Ltd v Lustig*.[24] Mr Lustig commenced proceedings against Qantas in the civil claims division of the Victorian Civil and Administrative Tribunal (VCAT) seeking various orders including damages, an apology and 10 million frequent flyer points. Mr Lustig's grievance arose out of an altercation that occurred when he was boarding a plane some six years earlier. Qantas invoked provisions of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth), which effectively created a limitation period of two years. In this way the VCAT proceedings became a matter arising under a law of the Commonwealth Parliament, thus answering the description in s 76(ii).

A further possibility is that a State tribunal might hear a matter to which the Commonwealth is a party, bringing it within the description in s 75(iii). An example is *Commonwealth v Anti-Discrimination Tribunal*.[25] A man visited a Centrelink office in Hobart and was told he

had no alternative but to stand in a queue if he wished to consult a staff member — this despite the physical discomfort he was experiencing due to a medical condition. He commenced proceedings in Tasmania's Anti-Discrimination Tribunal, claiming to have experienced discrimination on the ground of disability. The other party was Centrelink, a Commonwealth agency, bringing this matter within the scope of s 75(iii).

Perhaps surprisingly, a State tribunal may find itself adjudicating a dispute involving the interpretation of the *Constitution*. This issue has arisen again in anti-discrimination proceedings, with persons against whom a complaint of vilification has been made arguing that the legislation making such vilification unlawful is in breach of the constitutional implied freedom of political communication.[26] It is possible to imagine other instances of constitutional issues arising in tribunal proceedings: for example, it might be argued that a charge imposed by the State was an excise or that there had been an infringement of the freedom of interstate trade in s 92 of the *Constitution* or that State legislation was inconsistent with Commonwealth legislation under s 109.

In short, there is much potential for 'federal matters' to come before State tribunals, often in unexpected ways. 'Federal matters' can arise across a wide range of powers and subject matters. As the submissions for the Attorney-General of Queensland, intervening in *Burns v Corbett*, pointed out:

> [T]he subject-matters in ss 75 and 76 are not discrete topics for adjudication and resolution … Rather, they cut across and may arise in potentially any topic for adjudication. State legislatures cannot avoid them when conferring judicial power on tribunals; they are a latent potentiality in the exercise of any judicial power in Australia.[27]

Judicial power

The *Burns v Corbett* limitation will only apply when a State tribunal is exercising judicial power. Tribunals are more commonly associated with the exercise of administrative power. But it is not uncommon for State tribunals to exercise judicial power. This is particularly common for civil and administrative tribunals, which often have substantial civil jurisdiction.

The question of whether a decision-making power is 'judicial power' is one of the more conceptually contested questions in Australian constitutional law. Judicial power is a concept that seems 'to defy, perhaps it were better to say transcend, purely abstract conceptual analysis'.[28] Whether a power is 'judicial' turns on the analysis of a range of related features.[29] This includes whether the power determines existing rights of the parties;[30] involves the application of legal standards;[31] is binding and authoritative;[32] and is exercised in accordance with the judicial process.[33] History is sometimes significant: the fact that a power that has been exercised by courts in the past supports a conclusion that the power is judicial power.[34]

Moreover, the evaluative judgment involved in determining whether a particular function involves the exercise of judicial power is made more difficult by the recognition that there are some functions which may be performed in the exercise of either administrative or judicial power and which may 'take their colour' or character from the nature of the tribunal upon which they are conferred.[35] This is most likely to be the case for functions that might, of their nature, be thought to be administrative but which are analogous to functions historically performed by courts,[36] or to adjudicative powers which, when conferred on a court, will be conclusive and enforceable but which, when conferred on an administrative tribunal without the machinery for enforcement, can be characterised as not involving judicial power.[37]

Some jurisdictions conferred on civil and administrative tribunals appear readily to answer the description of 'judicial power'. Residential tenancies disputes, small claims and consumer law matters, for example, generally involve resolving an *inter partes* dispute by application of the law to determine the parties' existing legal rights, including under contract.[38]

The enforceability of the tribunal's decisions will at least sometimes be decisive. In *Brandy v Human Rights and Equal Opportunity Commission*,[39] the arrangement under which a determination of the Tribunal could be registered in the Federal Court and thereby take effect as a judgment of the Court was the determinative factor marking the Tribunal out as exercising judicial power. Several State tribunals have a similar enforcement mechanism, indicating that these tribunals are likely to be found to exercise judicial power in at least some matters.[40]

Other enforcement mechanisms may also indicate the existence of judicial power. In both New South Wales and South Australia, residential tenancies legislation provides for orders of the relevant tribunal to be enforced by a sheriff's officer (in New South Wales)[41] or bailiff (in South Australia).[42] The power of the Tribunal to make orders terminating a residential tenancy agreement (in New South Wales) and for vacant possession (in South Australia) have been held to be judicial power.[43]

A growing body of case law considers whether particular powers conferred on tribunals amount to judicial power. The power of the New South Wales Civil and Administrative Tribunal (NCAT) under the *Residential Tenancies Act 2010* (NSW) to make an order for the termination of a residential tenancy has been held to be judicial power.[44] So too has the power of the South Australian Civil and Administrative Tribunal (SACAT) to make an order for vacant possession of property upon the termination of a residential tenancy.[45] While these cases may provide some guidance in analogous situations, the characterisation of a power as judicial or non-judicial will always necessitate a detailed examination of the nature of the specific power. In the wake of *Burns v Corbett*, a slew of litigation about whether key areas of tribunal jurisdiction involve judicial power appears inevitable.

A court?

The limitation identified in *Burns v Corbett* is only engaged if the tribunal is not a court. There is no prohibition on State courts exercising judicial power in federal matters. In the case of a State court, any jurisdiction exercised in such matters will, in fact, be federal jurisdiction by virtue of s 39 of the *Judiciary Act 1903* (Cth).

When is a tribunal a 'court'? Some tribunals are established as courts. For example, s 164 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) designates the Queensland Civil and Administrative Tribunal (QCAT) as a court of record. When the legislation creating a tribunal contains no such express provision, determining whether a body is a Ch III court involves the application of an evaluative, multi-factorial test. Some factors that have been considered in the authorities include whether the body is described, in legislation, as a 'court';[46] the presence, or absence, of legislative designation as a 'court of record';[47] whether the tribunal exercises judicial power or predominantly exercises judicial power;[48] whether the tribunal is composed predominantly by judges;[49] whether it is independent and impartial;[50] whether it has powers traditionally possessed by courts;[51] and whether it carries out its functions in a judicial manner.[52] Whether all the members of the tribunal can properly be called 'judges' is often a particularly important factor[53] and one closely intertwined with the question of independence and impartiality. The resolution of these questions may require examination of, *inter alia*, the manner in which tribunal members are appointed;[54] whether members have Act of Settlement tenure;[55] the length of

the term of appointment and possibility of renewal;[56] whether members must be legally qualified;[57] and the circumstances in which they may be removed from office.[58]

This may often be a difficult evaluative judgment to make. This is illustrated by the conflicting decisions, in first half of 2018, on the issue of whether NCAT is a court. In *Johnson v Dibbin*,[59] the Appeal Panel of NCAT held that NCAT is a court. But, in *Zistis v Zistis*,[60] a single judge of the Supreme Court of New South Wales reached the opposite conclusion. In November 2018, the New South Wales Court of Appeal confirmed that NCAT is *not* a court.[61]

The questions of whether tribunals exercise judicial power in particular instances, and whether a tribunal is a court, are complex and technical. But they are, happily, questions to which clear answers may be given in the fullness of time. We have already seen litigation on whether the residential tenancies jurisdictions of the South Australian[62] and New South Wales[63] civil and administrative tribunals involves the exercise of judicial power and whether the respective tribunals are courts. It may be that, after a flurry of litigation, the questions of judicial power and whether a tribunal is a court become settled — at least until State parliaments substantially amend the legislation establishing tribunals or confer new jurisdiction or powers on existing tribunals.

Possible responses to *Burns v Corbett*

The balance of this article considers how States might respond to *Burns v Corbett* in a way that preserves, to the greatest extent possible, the ability of State tribunals to deliver accessible, efficient justice. Seven design options are discussed. Several jurisdictions have already implemented some of these changes; these are also discussed in this section.

Some of the redesign options would clearly avoid constitutional difficulty in future cases. But these options would involve some compromise in the ability of tribunals to perform their functions. Other redesign options suggested in this article raise some new constitutional questions but offer the States more flexibility in the operation of their tribunals. Elsewhere, Gabrielle Appleby and Anna Olijnyk have argued that, when governments are developing policy in areas of constitutional uncertainty, constitutional validity ought to be one factor in a holistic assessment of the risks and benefits of proposed legislation.[64] Where genuine uncertainty about the constitutional position exists, a government should not necessarily adopt an option that is certain to be constitutionally valid if it does not meet the policy objectives. Governments should also consider options that pose a greater constitutional risk but better meet the needs of the community. The option that is chosen should be the outcome of a well-informed deliberative process that balances risks and benefits and considers available alternatives.

Business as usual

One possibility is for State tribunals to continue operating as they always have. That is, those State tribunals that currently exercise judicial power could continue to do so, accepting that, whenever a federal matter came before the tribunal, the tribunal would lack jurisdiction.

This option has several drawbacks. The parties to federal matters would certainly be inconvenienced. They would have to find an alternative way of resolving their dispute: court proceedings (if Parliament has conferred relevant jurisdiction on a court), alternative dispute resolution, or taking no action. If a matter had been on foot for some time before it was identified as a federal matter, the parties and tribunal would have wasted resources on a matter that cannot be decided. There is also the potential for manipulation of the

tribunal's jurisdiction. A party who wishes to avoid the tribunal's jurisdiction may be able to convert a dispute into a federal matter by raising a non-colourable federal issue.[65] Such a party could, for example, raise an arguable constitutional issue or invoke Commonwealth law. Those who avail themselves of this technique are likely to be those with access to legal advice — and, therefore, who are well-resourced. They are also more likely to be respondents (who wish to avoid a claim against them) than claimants (who have themselves invoked the tribunal's jurisdiction).

Express exception to jurisdiction

As a variation on the 'business as usual' model, the jurisdiction of tribunals could be made subject to an express exception for federal matters. This could be achieved by inserting a provision into the legislation establishing the tribunal.

This option would remove some of the inconvenience caused by *Burns v Corbett* by preventing matters that were, from their inception, obviously federal matters from proceeding before a non-judicial tribunal in the exercise of judicial power. The option has the advantage of alerting potential tribunal users to the limits of the tribunal's jurisdiction before proceedings are commenced. But, of course, not all tribunal users will read the legislation. In practice, the burden of identifying federal matters might fall on registry staff (to the extent that the federal nature of the matter is apparent from the originating documents) or on tribunal members.

Moreover, like the first option, this approach leaves open the possibility that a matter may progress for some time before it is identified as a federal matter. For example, a party might not raise an issue arising under the *Constitution* or under Commonwealth law until the issues in the dispute had been fleshed out through the early stages of tribunal proceedings. This will create considerable inconvenience in these matters.

Clearly, there are practical difficulties with the first two options. However, some State governments may form the view that these difficulties are a reasonable price to pay for preserving a tribunal system that is functioning effectively in its current form.

No judicial power for tribunals

States could completely avoid the *Burns v Corbett* problem by ensuring that their tribunals do not exercise judicial power. There is no impediment to a non-judicial body determining a federal matter in the exercise of non-judicial power. This solution, therefore, would have the advantage of certainty and clarity. There would be no need to sift federal from non-federal matters; no part-heard proceedings would have to be abandoned.

There is some policy downside to this option. It deprives tribunal users of a binding, authoritative decision that can be enforced using the machinery of judicial power. There are some areas of tribunal jurisdiction in which the enforceability of decisions is critical to their utility. In a residential tenancies matter where a landlord seeks vacant possession, for example, anything short of an immediately enforceable decision made in the exercise of judicial power may be insufficient.

It may not always be easy to determine whether a power is judicial or non-judicial. While the nature of enforcement mechanisms will be decisive in some cases, in others it will be less relevant. The question of whether a power is judicial is not susceptible of a universal answer in respect of all powers conferred on a particular tribunal. It is necessary to consider whether each power or jurisdiction involves the exercise of judicial power. This is

the case both for powers already conferred on tribunals and for any powers States may wish to confer on their tribunals in future.

Therefore, while the solution of conferring only non-judicial power on tribunals is relatively attractive and apparently neat, it brings its own uncertainty and practical difficulties.

Tribunals as courts

There is a second way of avoiding the fragmentation of proceedings that might be caused by *Burns v Corbett*: turning State tribunals into courts for the purposes of Ch III of the *Constitution*. As noted above, some State tribunals are already courts. Turning tribunals into courts would mean they could continue to exercise judicial power, even in federal matters. There is, of course, no constitutional prohibition on State courts exercising judicial power in federal matters. On the contrary: ss 71 and 77(iii) of the *Constitution* contemplate the exercise of federal jurisdiction by State courts. Section 39 of the *Judiciary Act 1903* (Cth) vests all State courts with jurisdiction in federal matters (with limited exceptions).

There is a further consequence of being a State court which may be regarded as desirable in some respects but less convenient for State governments and legislatures. State courts are subject to the so-called *Kable* principle.[66] This principle prohibits State legislatures from substantially impairing the 'institutional integrity' of State courts.[67] The High Court has applied the *Kable* principle to strike down laws authorising a court to order the 'preventive' detention of a named individual;[68] requiring a court to make a control order against a person who was a member of a criminal organisation;[69] relieving a judge, acting *persona designata*, from the obligation to give reasons for a decision;[70] and requiring a court to hear certain applications *ex parte* on the application of the executive.[71] Application of the *Kable* principle requires, in each case, a careful consideration of the legislative circumstances, and it is difficult to generalise about what will, or will not, infringe the principle.[72] Relevant matters are likely to include the closeness of any connection between the executive and the court; any interference with the judicial process; and the extent to which the court retains its impartiality and independence.

While a State tribunal might be a court for the purposes of Ch III, many of the features that make tribunals useful are distinctly un-court-like. Tribunals are, typically, designed to be more flexible and agile than courts. For example, tribunal members do not have the security of tenure enjoyed by judges. In many tribunals, members may be reappointed. Tribunal members are not necessarily legally educated; people from diverse sectors of the community make a valuable contribution to tribunal decision-making. Procedure in tribunals is generally less formal than in courts, and lawyers are often excluded, with many parties appearing in person. The functions conferred on tribunals are wide-ranging, some being purely administrative, with varying degrees of connection to the executive government.

The existing case law makes it difficult to predict whether characteristics of this kind would, in particular circumstances, infringe the *Kable* principle. All that can be said with certainty is that there is uncertainty in this area. At the least, State governments who turn their tribunals into courts will need to exercise caution when conferring adventurous new powers on tribunals or when reforming the institutional features of tribunals.

Federal matters to be referred to a State court

The next two options in this article would allow State tribunals to continue exercising judicial power without being converted into courts.

The first of these is to have a mechanism for a federal matter in a non-judicial State tribunal to be transferred to a State court. Under this arrangement, applicants could still commence proceedings in a State tribunal, but, if it became apparent that a matter was a federal matter, it could be transferred to a court. Some jurisdictions already have provision for a matter to be transferred from a tribunal to a court.[73]

Burns v Corbett has prompted other jurisdictions to create a mechanism specifically for federal matters to be transferred to courts. In New South Wales, a new Pt 3A was inserted into the *Civil and Administrative Tribunal Act 2013* (NSW)[74] allowing the District Court or Local Court, on application by a party, to hear a federal matter that has been commenced in the Tribunal. If the Court grants leave for the application to be made to the Court, the Court has all the functions and jurisdiction the Tribunal would have had if it could exercise jurisdiction in the matter,[75] with certain exceptions that seem to be aimed at striking a balance between traditional standards of court procedure and the flexibility associated with tribunal proceedings. For example, the Local Court's rules of practice and procedure generally apply to proceedings transferred from the Tribunal,[76] but a person who is not a legal practitioner may represent a party in the Court if they would have been able to do so in the Tribunal;[77] and the Court may choose not to apply the rules of evidence if they would not have been required to be applied in the Tribunal.[78]

The Parliament of South Australia acted swiftly in the wake of *Burns v Corbett* (and a decision of SACAT applying *Burns v Corbett*)[79] to introduce a similar mechanism. Under the new Pt 3A of the *South Australian Civil and Administrative Tribunal Act 2013* (SA),[80] the Tribunal may order that proceedings be transferred to the Magistrates Court if the Tribunal considers that 'it does not have, or there is some doubt as to whether it has, jurisdiction to determine the application because its determination may involve the exercise of' the jurisdiction referred to in s 75(iii) or (iv) of the *Constitution*:[81] that is, diversity jurisdiction or matters in which the Commonwealth is a party. As in New South Wales, the Court has all the powers and functions the Tribunal would have had.[82] While the New South Wales legislation leaves procedure to be governed largely by the Court rules, the South Australian model provides that the Court is to follow the procedures that would have been applicable in the Tribunal, unless the Court determines otherwise.[83] These legislative changes are to be supplemented by the appointment of a Tribunal member as an auxiliary magistrate, with the intention that proceedings transferred from SACAT to the Magistrates Court will be heard by this auxiliary magistrate at SACAT's premises, thus minimising the disruption for the parties.[84]

Such arrangements for transferring proceedings from a tribunal to a court allow tribunals to continue exercising judicial power in non-federal matters. As with the options outlined above, they may create some fragmentation of proceedings if a matter has proceeded for some time before the federal element is identified. However, the procedure for transferring from a tribunal to a court is likely simpler than the 'business as usual' alternative, which would require the parties in a federal matter to abandon tribunal proceedings and file a fresh application in a court of competent jurisdiction.

There remains room for different views about the best design for these mechanisms. For example, Gabrielle Appleby has argued that the New South Wales model inappropriately places the onus of determining whether federal matters are engaged, and whether to apply to a court, on the applicant.[85] From this perspective, the South Australian model may be thought preferable because it gives the Tribunal the power and discretion to decide when to transfer proceedings. On the other hand, the South Australian legislation applies only to matters falling within s 75(iii) and (iv) of the *Constitution*, leaving no recourse for the (admittedly rare, but hardly unforeseeable) matters within other classes of jurisdiction described in ss 75 and 76 that may come before the Tribunal.

An exception to judicial power

Legislation conferring judicial power on a State tribunal could provide that, in federal matters, the tribunal could only exercise non-judicial power. Alternatively, this could be achieved through a provision in the legislation establishing the tribunal. Under this option, the tribunal could exercise judicial power in most matters. But, if it became apparent that a matter was a federal matter, the tribunal would switch to exercising non-judicial power. This would potentially mean the tribunal could still determine federal matters, just not in the exercise of judicial power. It would therefore avoid the inconvenience and fragmentation associated with some of the other options discussed in this article.

However, this may be easier said than done. As explained earlier, it is not always easy to determine whether a particular power conferred on a tribunal is judicial power, so there may not be a failsafe way of rendering a power *non*-judicial.

In some cases, provision for the order of a tribunal to be registered in a court will be determinative of the question of judicial power.[86] In such instances, it would be relatively simple to provide that registration is not available in federal matters. This would mean that the tribunal could decide federal and non-federal matters in substantially the same way. The tribunal's orders in non-federal matters could, upon registration, be enforced as orders of a court; orders in federal matters could not be so enforced. Conceptually, this solution is not entirely satisfactory and raises further questions: can a single provision really simultaneously confer both judicial and non-judicial power on a tribunal? Moreover, the solution may create practical difficulties if a matter is not identified as a federal matter until *after* the tribunal has made an order. Has the tribunal already (purportedly) exercised judicial power, making the order invalid?

Could the *Burns v Corbett* problem be fixed by the consent of the parties? Of course, parties to a matter could not consent to the tribunal acting unconstitutionally. But, if it became apparent that a federal matter had arisen and the tribunal lacked jurisdiction, could the parties agree between themselves to be bound by the tribunal's decision? The tribunal's decision would then derive its legal force from the agreement of the parties rather than from sovereign authority and would thus, at least arguably, not be an exercise of judicial power.[87] The tribunal would, in such cases, effectively act as an arbitrator. This solution would enable part-heard proceedings to continue smoothly. But, again, this solution is not foolproof. A respondent who did not wish to be subject to a potential adverse decision might decline to assent to being bound by the tribunal's decision. It is possible that a court would view the 'agreement' of the parties as a charade to mask a real exercise of judicial power. The reality of the consent of the parties may also be open to question, especially if a party was self-represented. Can such a party be taken to understand the consequences of agreeing to abide by the decision of a 'tribunal', now acting as a private adjudicator?

Hybrid tribunal

The option of carving out an exception to judicial power of federal matters would allow State tribunals to determine federal matters but not in the exercise of judicial power. The final option outlined in this article would allow State tribunals to exercise judicial power in federal matters and would also preserve much of the institutional flexibility tribunals enjoy when they are not courts.

This solution requires a tribunal to comprise two parts: a 'judicial section' that is a Ch III court; and a 'non-judicial section' that is not a court. This structure is not unprecedented. Until 2016, the New South Wales Industrial Commission could sit in Court Session as the

Industrial Court of New South Wales.[88] South Australia's recently established South Australian Employment Tribunal has a similar structure.[89] Under both of these models, judicial power was conferred on the tribunal in court session, while the non-judicial section of the tribunal exercised only non-judicial power.

This structure could potentially be adapted to overcome some of the difficulties States face after *Burns v Corbett*. The non-judicial section of the tribunal could exercise judicial power; there is no general prohibition on the exercise of judicial power by State tribunals. But if a federal matter arose in the non-judicial section of the tribunal, the matter could be transferred to the judicial section of the tribunal.

This solution has already been adopted in the South Australian Employment Tribunal, in legislation introduced after *Burns v Corbett*.[90] Under a new s 6AB of the *South Australian Employment Tribunal Act 2014* (SA), the South Australian Employment Court (that is, in effect, the judicial division of the institution) must hear proceedings that involve, or that the Tribunal considers may involve, the exercise of the jurisdiction described in s 75(iii) and (iv) of the *Constitution* (diversity jurisdiction and matters in which the Commonwealth is a party). If proceedings are referred to the Court by the Tribunal when already underway, steps taken in the Tribunal are treated as if they had been taken in the Court.[91]

A practical advantage of this option is that, if a matter is part-heard before it becomes apparent that it is a federal matter, the tribunal could be reconstituted as the judicial section. The legislation creating the tribunal could provide for evidence or other material already before the tribunal to be treated as being before the judicial section in this situation. If the member who had been hearing the matter was also a member of the judicial section, the hearing could continue with minimal disruption.

This structure would have further practical advantages in that the judicial and non-judicial sections of the tribunal could share premises, infrastructure and staff. There could be substantial overlap in the membership of the judicial and non-judicial sections. Members with a suitable level of legal experience and/or status — and, perhaps, a higher level of statutory independence — could be members of both sections. The non-judicial section could also include members who brought valuable non-legal attributes to the tribunal and members appointed on more flexible conditions.

However, these kinds of 'hybrid' tribunals are not without their own difficulties. For example, it may often be difficult for parties, or even tribunal members themselves, to be certain what part of the tribunal is hearing a particular matter. Experience suggests that, in practice, this question may not be addressed at all until it becomes apparent that the answer is important. At that point the potential benefits of enabling a tribunal to act either as an administrative tribunal or as a court may have been lost if the matter was in fact heard by the wrong part of the tribunal or if the issue is one that may itself be the subject of doubt and dispute.

This proposal is relatively novel. Guidance on the design of such a tribunal can be drawn from the New South Wales and South Australian examples, but the answers to several practical and constitutional questions remain uncertain.

First, a practical question: who would be responsible for identifying federal matters? One of the great advantages of tribunals over courts is that it is usually possible for individuals to present their case effectively without legal assistance. It seems unlikely that many unrepresented parties will be aware of the constitutional limits on a tribunal's jurisdiction. This would place the onus on the tribunal to identify federal matters. What follows is an initial outline of how the process might work.

Applicants could simply file their application in the tribunal, without nominating whether the matter was to be heard by the judicial or the non-judicial section. An initial check could be performed by registry staff to see whether the matter is a federal matter. In some cases, this will be apparent from the initiating documents — for example, whether the parties are residents of different States or whether one or more of the parties is a State or Commonwealth government entity. Registry staff would then allocate the matter to either the non-judicial section or (if the matter had been identified as a federal matter) to the judicial section. The tribunal member before whom each new matter came could then perform an additional check and, if necessary, transfer the matter to the judicial section at that stage. The tribunal member would need to remain alert to the possibility of a federal matter arising when the matter was part-heard. Undoubtedly, this system would place an extra burden on tribunal members and staff; this is something for State governments to consider when crafting a response to *Burns v Corbett*. But this is simply an aspect of the 'first duty' of any tribunal to satisfy itself that it has jurisdiction.

Now for some of the constitutional questions that this institutional arrangement might raise.

If a part-heard matter was reallocated to the judicial section of the tribunal, could any evidence before the non-judicial section be treated as evidence before the judicial section, without any further procedure? This would amount to outsourcing a large part of the fact-finding function to a non-judicial body. Would this infringe the *Kable* principle? Could any problems be cured by making the consent of the parties a precondition to the transfer of a matter to the judicial section? If so, could this be exploited by a party who wished to avoid the tribunal's jurisdiction?

For the purposes of the *Kable* principle, can the judicial section of a tribunal be insulated from the non-judicial section? Are the institutional characteristics of, or functions conferred on, the non-judicial section capable of affecting the institutional integrity of the judicial section?[92] If this is the case, does the State lose the advantage of flexibility in the non-judicial section — in which case, why not just make the whole tribunal a court?

We do not know the answers to these questions. Because the arrangement is novel, so too are the constitutional questions.

Conclusion

Burns v Corbett clarified the limits on the States' power to confer judicial power in federal matters on their non-judicial tribunals. But the application of this constitutional limit raises many fresh questions, the answers to which are unclear. Litigation in each State will give us the answers to some questions: which tribunals are 'courts'? Which jurisdictions involve the exercise of judicial power?

Meanwhile, State governments must work to develop responses to *Burns v Corbett*. This article has suggested a range of options for reform. These options could be placed along a spectrum from the constitutionally conservative (such as turning all State tribunals into courts) to the constitutionally adventurous (such as the split-tribunal idea). But the reform options must also be evaluated by reference to their operational efficacy and responsiveness to the needs of the community. It is for each State to weigh its appetite for constitutional risk against the desirability of particular policy goals.

Endnotes

1 (2018) 92 ALJR 423.

[2] The issue in *Burns v Corbett* had been the subject of a series of intermediate appellate court decisions: see, for example, *A-G (NSW) v 2UE Sydney Pty Ltd* (2006) 226 FLR 62; *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85; *Sunol v Collier* (2012) 81 NSWLR 619; *Owen v Menzies* [2013] 2 Qd R 327; *Qantas Airways Ltd v Lustig* (2015) 228 FCR 128.

[3] Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 5–6.

[4] *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1141; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 570 [3]; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 349 [24]; *Burns v Corbett* (2018) 92 ALJR 423, 442 [71] (Gageler J).

[5] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[6] (2018) 92 ALJR 423, 435 [41].

[7] Ibid 436 [45].

[8] Ibid 432 [19], 437 [49], 441 [68], [70], 447 [97]–[98].

[9] Ibid 430 [4].

[10] Ibid 441 [69].

[11] Ibid 446 [92].

[12] Ibid 446 [93].

[13] Ibid 443 [79].

[14] Ibid 446 [95].

[15] Ibid 447 [95].

[16] Cf *Burns v Corbett* (2018) 92 ALJR 423, 464 [184] (Gordon J): 'Logically, that concern [fragmentation of an exclusive scheme for the exercise of judicial power over ss 75 and 76 matters, pursued by the exercise of Commonwealth legislative power in ss 77(ii) and (iii)] could only provide support for [the Ch III implication] if there were no other way in which such circumvention could be prevented once the powers were exercised.'

[17] (2018) 92 ALJR 423, 456–7 [142]–[145] (Nettle J); 457–8 [150], 465–6 [192]–[193] (Gordon J); 478–9 [255]–[257] (Edelman J).

[18] Justice Nettle held that the power in s 77(iii), to invest the courts of the States with federal jurisdiction over ss 75 and 76 matters carried with it an implied incidental power to exclude the jurisdiction of State tribunals: *Burns v Corbett* (2018) 92 ALJR 423, 455–6 [139]–[141]. Justice Gordon regarded s 77(ii) *and* s 77(iii) *together* as supporting a law which provided, in effect, that only one or more of the courts identified in Ch III could deal with s 75 or s 76 matters (or some such matters): 466 [195]. Her Honour also placed reliance upon the express incidental power in s 51(xxxix): 466 [196]–[198].

[19] *Burns v Corbett* (2018) 92 ALJR 423, 471 [219]–[223]. Accordingly, for Edelman J, there was no need to invoke s 109 of the *Constitution*: 468 [208], 478 [254].

[20] *Ex parte Goldring* (1903) 3 SR (NSW) 260; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 621 [30] (Gleeson CJ, Gummow and Hayne JJ).

[21] *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290; *Cox v Journeaux* (1934) 52 CLR 282.

[22] *British American Tobacco Australia Ltd v WA* (2003) 217 CLR 30. A suit between a State and a resident of another State is, of course, expressly within diversity jurisdiction as defined.

[23] *Watson and Godfrey v Cameron* (1928) 40 CLR 446.

[24] (2015) 228 FCR 148.

[25] (2008) 169 FCR 85.

[26] *Owen v Menzies* [2013] 2 Qd R 327; *Sunol v Collier* (2012) 81 NSWLR 619; *A-G (NSW) v 2UE Sydney Pty Ltd* (2006) 226 FLR 62.

[27] Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening)', Submission in *Burns v Corbett*, S183/2017, *Burns v Gaynor*, S185/2017, *A-G (NSW) v Burns,* S186/2017, *A-G (NSW) v Burns*, S187/2017, *New South Wales v Burns*, S188/2017, 24 August 2017, [38].

[28] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J).

[29] For classic descriptions of judicial power, see *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

[30] See *Australian Boot Trade Employees Federation v Whybrow and Co* (1910) 10 CLR 266, 318 (Isaacs J).

[31] *R v Davison* (1954) 90 CLR 353, 366–7 (Dixon CJ and McTiernan J); *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, 18 (Aickin J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 376–8 (Kitto J); 400 (Windeyer J); 411 (Walsh J); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, [153], [168] (Crennan and Kiefel JJ).

[32] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

[33] See *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 208 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J).

[34] See *R v Davison* (1954) 90 CLR 353.

[35] See, for example, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ, Brennan and Toohey JJ); *Thomas v Mowbray* (2008) 233 CLR 307, 413 [303], 426–7 [339]–[344] (Kirby J, diss), 473 [461] (Hayne J, diss).

[36] See, for example, *Thomas v Mowbray* (2007) 233 CLR 307, 327–9 (Gleeson CJ), 356–7 (Gummow and Crennan JJ); James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 264–5.

[37] See *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 543.
[38] See *Attorney-General (NSW) v Gatsby* [2018] NSWCA 254 [125]–[128]; *Silk Bros Pty Ltd v State Electricity Commission (Vic)* (1943) 67 CLR 1, 9 (Latham CJ), 21 (Starke J).
[39] (1995) 183 CLR 245.
[40] See, for example, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 121–122; *State Administrative Tribunal Act 2004* (WA) ss 85, 86.
[41] *Residential Tenancies Act 2010* (NSW) s 121.
[42] The bailiff may enforce the tribunal's orders by, *inter alia*, entering premises and using reasonable force: *Residential Tenancies Act 1995* (SA) s 99.
[43] *A-G (NSW) v Gatsby* (2018) 361 ALR 570; *Zistis v Zistis* [2018] NSWSC 722; *Raschke v Firinauskas* [2018] SACAT 19.
[44] *A-G (NSW) v Gatsby* (2018) 361 ALR 570; *Zistis v Zistis* [2018] NSWSC 722.
[45] *Raschke v Firinauskas* [2018] SACAT 19.
[46] See, for example, *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148, 165 [70] (Perry J).
[47] See, for example, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 [85] (French CJ); *Owen v Menzies* (2012) 265 FLR 392; cf *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603 [185] (Bathurst CJ).
[48] See, for example, *Owen v Menzies* (2012) 265 FLR 392, 400.
[49] See for example, *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 71, 87 (Spigelman CJ); *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603 [186] (Bathurst CJ).
[50] See, for example, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29].
[51] See, for example, *Lane v Morrison* (2009) 239 CLR 230, 243 [32]–[33] (French CJ and Gummow J).
[52] See, for example, *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71 [67] (French CJ); *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 291 [49]–[50].
[53] *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 71, 87 [49] (Spigelman CJ).
[54] See *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 290–1 [42].
[55] See *Forge v ASIC* (2006) 228 CLR 45, 79 [73] (Gummow, Hayne and Crennan JJ); *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603 [187] (Bathurst CJ), 607 [203] (McColl JA).
[56] See, for example, *Director of Housing v Sudi* (2011) 33 VR 559, 594 [201] (Weinberg JA); *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 613 [226] (Basten JA).
[57] See *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 291 [43].
[58] See, for example, *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 291 [48]; *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603–4 [189] (Bathurst CJ).
[59] [2018] NSWCATAP 45.
[60] [2018] NSWSC 722.
[61] *A-G (NSW) v Gatsby* (2018) 361 ALR 570.
[62] *Raschke v Firinauskas* [2018] SACAT 19.
[63] *A-G (NSW) v Gatsby* (2018) 361 ALR 570.
[64] Gabrielle Appleby and Anna Olijnyk, 'Parliamentary Deliberation on Constitutional Limits in the Legislative Process' (2017) 40 *University of New South Wales Law Journal* 976.
[65] A claim that a federal issue arises is 'colourable' if it is 'made for the improper purpose of "fabricating" federal jurisdiction': *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212.
[66] From *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[67] See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 593–5 [39]–[40] (French CJ, Kiefel and Bell JJ).
[68] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[69] *South Australia v Totani* (2010) 242 CLR 1.
[70] *Wainohu v New South Wales* (2011) 243 CLR 181.
[71] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.
[72] See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 [104] (Gummow J).
[73] See, for example, *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 83; *Northern Territory Civil and Administrative Tribunal Act* (NT) s 99A.
[74] The first version of Pt 3A, which applied only to proceedings in federal diversity jurisdiction, was enacted before the High Court's decision in *Burns v Corbett* but in reaction to the New South Wales Court of Appeal's decision in that matter: *Justice Legislation Amendment Act (No 2) 2017* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 September 2017, 2–3 (Mark Speakman, Attorney-General). The provisions have subsequently been amended to apply to all federal matters: *Justice Legislation Amendment Act (No 3) 2018* (NSW).
[75] *Civil and Administrative Tribunal Act 2013* (NSW) s 34C(3).
[76] Ibid s 34C(4)(e).
[77] Ibid s 34C(4)(e)(ii).
[78] Ibid s 34C(4)(e)(i).
[79] *Raschke v Firinauskas* [2018] SACAT 19.
[80] Inserted by the *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Act 2018* (SA).
[81] *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 38B(2).
[82] Ibid s 38C(3).
[83] Ibid s 38C(4).
[84] South Australia, *Parliamentary Debates*, Legislative Council, 5 July 2018, 743 (Rob Lucas).

[85] Gabrielle Appleby, 'The 2018 High Court Constitutional Term: The Court in its Inter-Institutional Context' (Paper presented at Gilbert + Tobin Constitutional Law Conference, Sydney, 15 February 2019).
[86] See the discussion of *Brandy v HREOC* (1995) 183 CLR 245 above.
[87] Cf *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).
[88] *Industrial Relations Act 1996* (NSW) Ch 4 Pt 3 (prior to 7 December 2016, when it was repealed by *Industrial Relations Amendment (Industrial Court) Act 2016* (NSW)).
[89] See *South Australian Employment Tribunal Act 2014* (SA) s 5(2).
[90] *South Australian Employment Tribunal (Miscellaneous) Amendment Act 2018* (SA).
[91] *South Australian Employment Tribunal Act 2014* (SA) s 6AB(4).
[92] See *Wainohu v New South Wales* (2011) 243 CLR 181, in which a function conferred on a judge *persona designata* was held to affect the institutional integrity of the court of which the judge was a member.

THE APPLICATION OF THE 'DUTY TO INQUIRE' TO THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

Dr AJ Orchard*

Since it was first framed in *Prasad v Minister for Immigration and Ethnic Affairs*[1] (*Prasad*), the so-called 'duty to inquire' has 'occupied a tenuous and perhaps unwelcome position in judicial review of decisions of merits review tribunals'.[2]

While the High Court in *Minister for Immigration and Citizenship v SZIAI*[3] (*SZIAI*) accepted the general principle that 'a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review',[4] the Court did not go on to clarify what those circumstances might be.

The High Court had a further opportunity to consider the issue in *Minister for Immigration & Citizenship v SZGUR*,[5] but, while accepting the general principle from *SZIAI*, the Court decided that it was not necessary further to explore the questions of principle.[6]

Subsequent cases (as set out below) have also accepted the general principle but have failed clearly to identify the circumstances in which the duty will arise. However, there now seems little doubt that in appropriate circumstances merits review tribunals are required to make obvious inquiries about critical facts which are readily ascertainable.

The first section of this article considers the general nature of the 'duty to inquire'. The second section explores the legislative and regulatory scheme for the resolution of financial services disputes in Australia and the general nature of the Australian Financial Complaints Authority (AFCA). The third section comes to a conclusion as to whether the principles that apply to merits review tribunals in respect of 'the duty to inquire' apply equally to the financial services external dispute resolution scheme, the AFCA.

The general duty

The starting point for a review of the general nature of the duty to inquire is *Prasad*.[7] In that case, Wilcox J was reviewing a decision to deny the applicant a residence visa. A question arose, in the context of considering the reasonableness of the final decision, as to the relevance of material not before the Minister (the decision-maker). In that regard and particularly in respect of the need to inquire about such material, his Honour commented:

> A power is exercised in an improper manner if, upon the material before the decision maker, it is a decision to which no reasonable person could come. Equally, it is exercised in an improper manner if the decision maker makes his decision — which perhaps in itself, reasonably reflects the material before him — in a manner so devoid of any plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew

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> to be readily available to him. The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the Court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it. It would follow that the Court, on judicial review, should receive evidence as to the existence and nature of that information.[8]

Thus, to avoid the risk of a decision ultimately being overturned on *Wednesbury*[9] grounds, Wilcox J indicated that the manner in which the decision was made must not be unreasonable. Moreover, failing to obtain information centrally relevant to the decision and which is readily available may be so unreasonable that no reasonable person would have proceeded in that manner.

This approach was considered by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*[10] (*Teoh*). In that case, Mason CJ and Deane J accepted the correctness, in appropriate cases, of the general principle enunciated by Wilcox J in *Prasad*.[11]

Subsequently, in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[12] (*VEAL*), the High Court found that the relevant tribunal was 'bound to make its own inquiries and form its own views upon the claim which the appellant made'.[13]

In *Minister for Immigration and Citizenship v Le*,[14] Kenny J in the Federal Court of Australia considered the relevant authorities and came to the following conclusion:

> Thus, a failure by a decision-maker to obtain important information on a critical issue, which the decision-maker knows or ought reasonably to know is readily available, may be characterized as so unreasonable that no reasonable decision-maker would proceeded [sic] to make the decision without making the enquiry … In this circumstance what vitiates the decision is the manner in which it was made. Since this is a limited proposition, it does not conflict with the larger statement that the Tribunal is under no general duty with respect to making enquiries.[15]

Perhaps the clearest statement of the general principle was provided by the High Court in *SZIAI*. In that case, French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ held that:

> Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a 'duty to inquire', that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case.[16]

The plurality in *SZIAI* also took the opportunity to address the comment from the Court in *VEAL* quoted above. Their Honours noted that the comment related to the context of that case in which the principles of natural justice required the Refugee Review Tribunal to put certain information to an applicant in order to seek a response.[17] In so doing, the plurality appeared to be clarifying that the earlier comment did not indicate the existence of a general duty to inquire.

Subsequent to *SZIAI*, Cowdroy J considered the principle in *Khant v Minister for Immigration and Citizenship*.[18] In that case, Cowdry J said:

> Therefore a failure of a Tribunal to make inquiries in certain circumstances may also constitute jurisdictional error due to '*Wednesbury* unreasonableness' … Despite comments in *SZIAI* at [13]–[15]

> and [22]–[23] noting the difference between judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and judicial review under s 75(v) of the *Constitution*, *SZIAI* would not appear to disturb *Le*. Indeed at [26] of *SZIAI* the majority stated: '*no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review* ***or that it was otherwise so unreasonable*** *as to support a finding that the tribunal's decision was infected by jurisdictional error*.'[19]

The principle was considered further in *Kowalski v Military Rehabilitation and Compensation Commission*.[20] In that case, Dowsett, Cowdroy and Logan JJ held that, in reference to *SZIAI*:

> The High Court accepted that an administrative tribunal, in exercising a power of review, might be obliged to make 'an obvious enquiry about a critical fact, the existence of which is easily ascertained', and that any breach of that duty might amount to a failure to review or other jurisdictional error. However the decision does not establish a general obligation to inquire.[21]

The combined effect of the various decisions is that while merits review tribunals have no general duty to initiate inquiries, in certain limited circumstances there may be an obligation to make an obvious inquiry about a critical fact, the existence of which is easily ascertained (the *Prasad* principle). Failure to do so may amount to jurisdictional error, in failing to undertake the necessary review or in making a decision so unreasonable that no reasonable decision-maker would have made such a decision (*Wednesbury* unreasonableness).

Failure to make the appropriate inquiry does not amount to a breach of the principles of natural justice. Chief Justice Mason and Deane J in *Teoh*[22] stated that they 'do not see how the suggested failure to initiate inquiries can be supported on the footing that there was some departure from the common law standards of natural justice or procedural fairness'.[23]

In *SZIAI*, the plurality also made it clear that any breach of the limited duty to inquire did not amount to a corresponding breach of the principles of natural justice, stating:

> It is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law.[24]

Justice Cowdroy appeared to adopt this position in *Khant v Minister for Immigration and Citizenship*,[25] finding that:

> Such statement would appear to confirm that a failure to make an inquiry could constitute jurisdictional error for at least two different reasons. Those are, a constructive failure to exercise jurisdiction in fulfilling the role of the Tribunal to review, and '*Wednesbury* unreasonableness'.[26]

The fact that these decisions proceed on the basis that a failure to make inquiries in limited circumstances may give rise to jurisdictional error but not a breach of natural justice principles is not surprising. It is clear that the natural justice requirements are procedural in nature in that they relate to the manner in which a decision is made as opposed to the merits of the decision.[27] Indeed, the High Court emphasised in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[28] (*SZBEL*) that, in respect of natural justice, the reviewing court is concerned with the fairness of the procedure rather than the decision itself.[29]

Conversely, the restricted obligation to make an obvious inquiry about a critical fact may take into account the potential outcome. The majority in *SZIAI* specifically referred to the outcome in the following terms:

> It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, *supply a sufficient link to the outcome* to constitute a failure to review.[30]

This certainly suggests that the Court considered the potential impact of the failure to inquire on the outcome. Indeed, Heath and Johnson[31] suggested when commenting on the High Court reasoning in *SZIAI*:

> This serves to highlight that review on the ground of unreasonableness is focused on the making of the decision under review, and not on the procedure followed. Consequently, the question is whether the outcome is unreasonable, not whether the procedure was unreasonable.[32]

Despite this and the clear statement by the High Court in *SZIAI*, some commentators still consider natural justice as providing 'an alternative and perhaps more coherent basis for the duty'.[33] Regardless of the basis of the obligation to inquire, it is clear that such an obligation would only arise in exceptional circumstances.[34]

When considering the basis for the restricted obligation to make certain inquiries, it is also important to consider the nature of the tribunal and, in particular, whether it is inquisitorial or adversarial in nature.

There is little doubt that merits review tribunals (the decisions of which have given rise to the principles in respect of the restricted obligation to inquire) tend to operate in an inquisitorial rather than adversarial manner.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154*,[35] Gummow and Heydon JJ said:

> Accordingly, the rule in *Browne v Dunn* has no application to proceedings in the Tribunal. Those proceedings are not adversarial, but inquisitorial; the Tribunal is not in the position of a contradictor of the case being advanced by the applicant. The Tribunal Member conducting the inquiry is not an adversarial cross-examiner, but an inquisitor obliged to be fair.[36]

Following that clear statement, in *SZBEL*[37] the High Court said:

> More than once it has been said that the proceedings in the Tribunal are not adversarial but inquisitorial in their general character. There is no joinder of issues between parties, and it is for the applicant for a protection visa to establish the claims that are made. As the Tribunal recorded in its reasons in this matter, however, that does not mean that it is useful to speak in terms of onus of proof. And although there is no *joinder* of issues, the Act assumes that issues can be identified as arising in relation to the decision under review. While those issues may extend to any and every aspect of an applicant's claim to a protection visa, they need not. If it had been intended that the Tribunal should consider afresh, in every case, all possible issues presented by an applicant's claim, it would not be apt for the Act to describe the Tribunal's task as conducting a 'review', and it would not be apt to speak, as the Act does, of the issues that arise in relation to the decision under review.[38]

The last point made in this quote is of particular significance. The fact that a tribunal is inquisitorial or is conducting a review in an inquisitorial fashion does not necessarily mean that the tribunal is bound to consider every possible issue arising out of the applicant's claim. This follows from the fact that the tribunal is conducting a review of a particular decision.

In *SZIAI*, in referring to the Refugee Review Tribunal, the plurality cited *SZBEL* and said:

> It has been said in this Court on more than one occasion that proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation. The word 'inquisitorial' has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision-maker, is

> not itself a contradictor to the cause of the applicant for review. Nor does the primary decision-maker appear before the Tribunal as a contradictor. The relevant ordinary meaning of 'inquisitorial' is 'having or exercising the function of an inquisitor', that is to say 'one whose official duty it is to inquire, examine or investigate'. As applied to the Tribunal 'inquisitorial' does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal's functions. They are to be found in the provisions of the Migration Act. The core function, in the words of s 414 of the Act, is to 'review the decision' which is the subject of a valid application made to the Tribunal under s 412 of the Act.[39]

There seems little doubt then that those merits review tribunals that have been considered to operate in an inquisitorial manner. That said, it is clear from the High Court's comment in *SZIAI* that the expression 'inquisitorial' does not carry the full ordinary meaning. Because the tribunals are conducting a review of a decision, this inquisitorial function is limited and does not extend to a general duty to inquire, examine or investigate.

Groves, in considering the High Court's comments in *SZIAI*, suggests that 'if Tribunals may be constituted generally, but not totally, according to the inquisitorial model, the creation of tribunals with many inquisitorial features does not necessarily import the full panoply of inquisitorial features such as a power or duty to inquire'.[40] That is, merely being inquisitorial in nature does not necessarily give rise to a duty to inquire.

While Alderton, Granziera and Smith in considering the Court's comments in *SZIAI* suggest that 'the existence of a broader duty to inquire in *some* circumstances acknowledged by the majority of the court is one incident of this reality',[41] the broader duty to which they refer is clearly that limited obligation from *Prasad*.

The position of merits review tribunals in respect of the so-called duty to inquire can therefore be summarised in the following principles:

(1) The particular merits review tribunals which have been the subject of consideration in the cases exploring a possible duty to inquire are inquisitorial in nature.
(2) The mere fact of being inquisitorial in nature does not give rise to a broad duty to inquire.
(3) Merits review tribunals are not subject to a broad duty to inquire.
(4) Inquisitorial tribunals are subject to an obligation to make an obvious inquiry about a critical fact, the existence of which is easily ascertained (the *Prasad* principle).
(5) A failure to make obvious inquiries about a critical fact may give rise to a jurisdictional error either in failing to undertake the review or in making a decision so unreasonable that no reasonable decision-maker would make the decision.

The next section of this article considers whether these same principles that apply to merits review tribunals apply in the same manner to the circumstance of a scheme designed to resolve disputes between parties in the financial services sector.

The external dispute resolution scheme

Before considering the application of the foregoing principles, it is first necessary to understand the legislative and regulatory system for the resolution of financial services disputes.

The Australian Securities and Investments Commission (ASIC) approved external complaint resolution (EDR) scheme plays a vital role in the financial services and credit regulatory systems in Australia. By virtue of ss 912A(2) and 1017G(2) of the *Corporations Act 2001* (Cth), financial services licensees, unlicensed product issuers and unlicensed secondary sellers must be members of the AFCA scheme. The AFCA scheme is defined to mean the external dispute resolution scheme for which authorisation under Pt 7.10A is in

force.[42] Pursuant to s 1050 of the *Corporations Act 2001* (Cth), the Minister has approved the AFCA as the AFCA scheme.

Under s 47 of the *National Consumer Credit Protection Act 2009* (Cth), a credit licensee must be a member of the AFCA scheme. Further, a credit representative, who is authorised by a registered person or credit licensee, must be a member of the AFCA scheme in accordance with ss 64 and 65 of the *National Consumer Credit Protection Act 2009* (Cth).

Before 1 November 2018, instead of AFCA, there were two ASIC approved EDR schemes: the Financial Ombudsman Service (FOS) and the Credit Ombudsman Service Limited (COSL).[43] Effectively, those two schemes, and the Superannuation Complaints Tribunal, merged to form AFCA.

ASIC has summarised the broad purpose of EDR schemes as follows:

> These schemes provide:
>
> (a) a forum for consumers and investors to resolve complaints or disputes that is quicker and cheaper than the formal legal system; and
>
> (b) an opportunity to improve industry standards of conduct and to improve relations between industry participants and consumers.[44]

In essence, AFCA has financial services and credit licensees as its members and it seeks to resolve disputes between those members and their customers.

The AFCA Rules set out the purpose of the EDR scheme as follows:

> A.1.1 AFCA is an external complaint resolution scheme established to resolve complaints by Complainants about Financial Firms. AFCA is operated by an independent not-for-profit company that has been authorised to do so by the responsible Minister under the Corporations Act.
>
> A.1.2 These rules form part of a contract between AFCA and Financial Firms and Complainants. AFCA may develop Operational Guidelines setting out how AFCA interprets and applies these rules.
>
> A.1.3 AFCA's complaint resolution scheme is free of charge for Complainants. Complainants do not generally need legal or other paid representation to submit or pursue a complaint through AFCA.
>
> A.1.4 A person is not obliged to use the AFCA complaint resolution scheme to pursue a complaint against a Financial Firm and instead may institute court proceedings or use any other available dispute resolution forum. A Complainant who submits a complaint to AFCA may withdraw their complaint at any time.
>
> A.1.5 These rules apply to complaints submitted to AFCA from 1 November 2018, and complaints treated as being submitted to AFCA under rule B.4.5.1.[45]

The Guiding Principles of AFCA are also set out in the AFCA Rules:

> A.2.1 AFCA will:
>
> (a) promote awareness of the scheme, including by undertaking outreach to vulnerable and disadvantaged communities;
>
> (b) make the scheme appropriately accessible to a person dissatisfied with a Financial Firm's response to their complaint including by:
>
> (i) providing a range of ways by which to submit a complaint,

(ii) helping Complainants submit a complaint, and

(iii) using translation services and providing information in alternative formats, as appropriate;

(c) consider complaints submitted to it in a way that is:

(i) independent, impartial, fair,

(ii) in a manner which provides procedural fairness to the parties,

(iii) efficient, effective, timely, and

(iv) cooperative, with the minimum of formality;

(d) support consistency of decision-making, subject to its obligations both under section 1055 of the Corporations Act and to do what is fair in all the circumstances;

(e) have appropriate expertise and resources to consider complaints submitted to it;

(f) be as transparent as possible, whilst also acting in accordance with its confidentiality, privacy and secrecy obligations;

(g) support regulators of Financial Firms by:

(i) reporting matters to them in accordance with the Corporations Act, the Privacy Act and any other relevant legislation, and

(ii) complying with any ASIC regulatory requirements and directions;

(h) account for its operations by publishing Determinations and information about complaints and reporting systemic issues;

(i) consult regularly with AFCA's stakeholders; and

(j) promote continuous improvement of its service, including by commissioning regular independent reviews of its complaint handling operations and meet the benchmarks for Industry-Based Customer Dispute Resolution.[46]

The AFCA Rules form part of the tripartite contractual relationship between the complainant, the financial firm and AFCA and contain the powers of the EDR schemes, including the power to make binding decisions.

The specific provision identifying the existence of the tripartite contract confirms the position established through a number of cases which considered the terms of reference of FOS (or predecessor schemes which merged to form FOS).

In *Masu Financial Services P/L v FICS and Julie Wong (No 2)*[47] (*Masu*), Shaw J considered whether the Financial Industry Complaints Scheme (FICS) (a predecessor scheme to FOS) was bound by the established principles of procedural fairness or natural justice.

Leaving aside the issue of judicial review, Shaw J found that FICS was contractually bound to provide procedural fairness to the plaintiff, who was a member of the dispute resolution scheme. His Honour found that a contract arose from the operation of the Rules and, in so doing, relied upon the fact that one of the objects of FICS was 'to create or modify procedures for resolving complaints concerning members to be known as rules, which shall be a contract between a member and a company'.[48]

His Honour also found, consistent with a submission by counsel for FICS, that:

> the effect of the cases to which I have referred is: that this court may review a decision of FICS on the basis of jurisdictional error, including, in some circumstances, breach of the principles of procedural fairness …[49]

Subsequently, in *Financial Industry Complaints Scheme v Deakin Financial Service Pty Ltd*[50] Finkelstein J held that a contract was formed between the member and the EDR scheme on the basis of the offer by the member (comprising the completion of the application form and payment of the necessary fee) and acceptance by the EDR scheme (comprising the acceptance of the application and the entry into the register of members).[51]

In *Mickovski v Financial Ombudsman Service Ltd and Another*[52] (*Mickovski*), the Victorian Court of Appeal firstly considered whether FOS was subject to judicial review in accordance with what was referred to as the '*Datafin* principle'.[53] After referring to the principle as 'appealing', the Court decided not to make a decision as to whether *Datafin* applies in Australia. Instead, the Court held that the parties to the dispute, in submitting their dispute to FOS, became bound to comply with the rules of the process and entitled, as a matter of contract, to have FOS proceed in accordance with the rules.

Effectively, the Court held that there was a tripartite contract formed involving FOS and the two disputants. It found that the consideration provided by the applicant was his submission to the processes of FOS and the consideration from FOS and the firm was their promise to deal with the matter in accordance with the terms of reference and to be bound by the outcome.

This was a significant decision in that, while members of FOS were, by virtue of the clause in the FOS Constitution, expressly bound by contract, the applicant in the process was not at any stage expressly so bound.[54]

In the more recent case of *Wealthsure v Financial Ombudsman Service Ltd and Box*[55] Gilmour J, referring to *Mickovski*, proceeded on the basis that FOS and the relevant firm in that case were in a contractual relationship and, in so doing, made reference to *Mickovski*.

Clearly from *Mickovski* the parties have the right to have the dispute dealt with in accordance with the rules of the process. In that case the Court found that review would be available if 'it is otherwise apparent that the determination has not been carried out in accordance with the agreement'.[56]

In any event, the issue is put beyond doubt with the AFCA Rules making it clear that the Rules form part of a contract between the parties to the disputes and AFCA[57] and that AFCA is bound to apply the principles of procedural fairness (natural justice).[58]

Another important aspect of EDR schemes is the manner in which the schemes fulfil their contractual obligations. The AFCA Operational Guidelines make it clear that AFCA operates in an inquisitorial manner.[59]

The foregoing gives rise a question in respect of the effect of a breach of the contract between AFCA and its member. In *Chapmans Ltd v Australian Stock Exchange Ltd*[60] the Full Court of the Federal Court considered the consequences of the Australian Stock Exchange (ASX) not complying with the terms of the Listing Rules in the course of removing the name of a company from its list.

The Court found in that case that the specific Listing Rule that was breached constituted a term of the contract between the ASX and the company. As appropriate notice of the potential removal by the ASX was not provided in accordance with the particular rule, the decision to remove the company was void.

Applied to ASIC approved EDR schemes, this suggests that failure to comply with the Rules or terms of reference in reaching a final decision might mean that any final determination is void and therefore not binding on the member firm.

This is broadly consistent with the approach adopted by Shaw J in *Masu*.[61] In that case, his Honour held that the plaintiff (a member of the relevant EDR scheme) had 'a sufficient number of valid criticisms of the tribunal's decision and its reasoning process to warrant a declaration that both decisions are of no force or effect'.[62] In addition, though, Shaw J ordered that the matter be remitted to a differently constituted panel of FICS for redetermination.[63]

This is also consistent with the decision in *Mickovski*, in which the Court suggested that a determination will not be final and so subject to review if the determination is not carried out in accordance with the contract, akin to jurisdictional error.

From the foregoing analysis, it is clear that AFCA:

(a) is inquisitorial in nature (in the same or similar manner as merits review tribunals);
(b) is contractually bound to determine disputes in accordance with the Rules and, in particular, with the principles of procedural fairness; and
(c) may have its determinations declared void in the event that they are not developed in accordance with the Rules.

The application of the principles to AFCA

To determine the ultimate question as to whether AFCA is subject to a duty to inquire, it is necessary to consider the operation of the general principles in the context of the operation of AFCA as a dispute resolution scheme. To revisit, the general principles developed in the first section of this article were as follows:

(1) The particular merits review tribunals which have been the subject of consideration in the cases exploring a possible duty to inquire are inquisitorial in nature.
(2) The mere fact of being inquisitorial in nature does not give rise to a broad duty to inquire.
(3) Merits review tribunals are not subject to a broad duty to inquire.
(4) Inquisitorial tribunals are subject to an obligation to make an obvious inquiry about a critical fact, the existence of which is easily ascertained (the *Prasad* principle).
(5) A failure to make obvious inquiries about a critical fact may give rise to a jurisdictional error either in failing to undertake the review or in making a decision so unreasonable that no reasonable decision-maker would make the decision.

Those general principles can then be applied to the circumstances of AFCA as set out in the previous section to determine whether AFCA is subject to a general 'duty to inquire.'

First, AFCA is inquisitorial in nature,[64] in the same or similar manner as merits review tribunals. However, it is clear from the general principles in the first section of the article that this does not itself give rise to a general duty to inquire.

However, it is equally clear that an inquisitorial body which does not make obvious inquiries about a critical fact may commit a jurisdictional error either in failing to undertake the review or in making a decision so unreasonable that no reasonable decision-maker would make the decision.[65]

AFCA is subject to review for jurisdictional error (either contractually or as a result of *Masu*). It therefore follows that, as an inquisitorial body subject to jurisdictional review, if AFCA fails to make obvious inquiries about a critical fact, it may be the subject of review in the same manner as merit review tribunals.

In short, merits review tribunals are bound to make obvious inquiries about a critical fact, the existence of which is easily ascertained, because, if they do not do so, they may have committed a jurisdictional error either in not exercising their jurisdiction or in making a decision so unreasonable that no reasonable decision-maker would have made it (see above). Given that AFCA is an inquisitorial body that is also subject to review for jurisdictional error, the same requirement applies to those schemes.

Therefore, in the course of determining disputes, while decision-makers within AFCA are not subject to a broad, general duty to inquire, they must make obvious inquiries about a critical fact, the existence of which is easily ascertained.

Endnotes

1 (1985) 6 FCR 155.
2 Mark Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Monash University Law Review* 230, 231.
3 (2009) 259 ALR 429.
4 Ibid 436.
5 (2011) 241 CLR 594.
6 Ibid [23].
7 (1985) 6 FCR 155.
8 Ibid [33].
9 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
10 (1995) 183 CLR 273.
11 (1985) 6 FCR 155.
12 (2005) 225 CLR 88.
13 Ibid [26].
14 [2007] FCA 1318.
15 Ibid [66].
16 (2009) 259 ALR 429, [25].
17 Ibid [19].
18 (2009) FCA 1247.
19 Ibid [67] (emphasis added).
20 [2011] FCAFC 44.
21 Ibid [20].
22 (1995) 183 CLR 273.
23 Ibid [33].
24 (2009) 259 ALR 429, [24].
25 (2009) FCA 1247.
26 Ibid [16].
27 *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J).
28 (2006) 228 CLR 152.
29 This point was also made by the High Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.
30 (2009) 259 ALR 429, [25] (emphasis added).
31 Rebecca Tenille Heath and Anna Johnson, 'Casenote — *Minister for Immigration and Citizenship v SZIAI*' (2010) 17 *Australian Journal of Administrative Law* 66.
32 Ibid 69.
33 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, Australia, 5th ed, 2013), [8.130].
34 Ibid.

[35] (2003) HCA 60.
[36] Ibid [57].
[37] (2006) 228 CLR 152.
[38] Ibid [40].
[39] (2009) 259 ALR 429, [18].
[40] Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings', (2011) 33 *Sydney Law Review* 177.
[41] Matthew Alderton, Michael Granziera and Martin Smith, 'Judicial Review and Jurisdictional Errors: The Recent Migration Jurisprudence of the High Court of Australia' (2011) 18 *Australian Journal of Administrative Law* 138, 149.
[42] *Corporations Act 2001* (Cth) s 761A.
[43] ASIC Class Order 10/249.
[44] ASIC Regulatory Guide 139, 139.35.
[45] Australian Financial Complaints Authority Rule A1.
[46] Australian Financial Complaints Authority Rule A2.
[47] [2004] NSWSC 829.
[48] Ibid [10].
[49] Ibid [8].
[50] [2006] FCA 1805.
[51] Ibid [43].
[52] [2012] VSCA 185.
[53] The Court was referring to the principle from *R v Panel on Take-overs & Mergers; Ex parte Datafin plc* [1987] QB 815.
[54] Prior to *Mickovski*, it had been assumed that there was no contractual relationship between the scheme operator and the consumer so that the consumer had no contractual right of challenge: Ken Adams, 'Judicial Review of Claims Review Panel Decisions' (1997) 8 *Insurance Law Journal* 105; Paul O'Shea, 'Underneath the Radar: The Largely Unnoticed Phenomenon of Industry Based Consumer Dispute Resolution Schemes in Australia' (2004) 15 *Australasian Dispute Resolution Journal* 156.
[55] [2013] FCA 292.
[56] [2012] VSCA 185, [41].
[57] Australian Financial Complaints Authority Rule A1.2.
[58] Australian Financial Complaints Authority Rule A2.1(c)(ii).
[59] Australian Financial Complaints Authority Operational Guidelines 9.1.
[60] (1996) 67 FCR 402.
[61] [2004] NSWSC 829.
[62] Ibid [22].
[63] Ibid [28].
[64] Australian Financial Complaints Authority Operational Guidelines 9.1.
[65] *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429.

IS 'SUNSETTING' LIMPING OFF INTO THE SUNSET?: RECENT DEVELOPMENTS IN THE REGIME FOR SUNSETTING OF COMMONWEALTH DELEGATED LEGISLATION

Stephen Argument*

In 2003, with the passage of the *Legislative Instruments Act 2003* (LIA), the Commonwealth Parliament established, in the Commonwealth jurisdiction (among other significant reforms), a regime for the 'sunsetting' of Commonwealth 'legislative instruments' (in simple terms, delegated legislation). 'Sunsetting', a concept that had already been in operation in New South Wales, Queensland, South Australia and Victoria, dating back to the 1980s, refers to the automatic repeal of delegated legislation once it has been in operation for a certain number of years. Under the LIA, the number of years stipulated was 10, chosen in preference to shorter periods in the State jurisdictions. The explanatory memorandum that accompanied the relevant Bill stated:

> Ten years has been chosen as an appropriate period of time to prevent the persistence of antiquated or unnecessary legislative instruments, and enable ample time for review and re-making of legislative instruments that may still be required. A shorter time span would be more resource intensive.[1]

The sunsetting regime has now operated for over 15 years.

As required by s 60 of the LIA, a review of the sunsetting regime was conducted in 2017 after the regime had been in operation for 12 years. The sunsetting review[2] is discussed in more detail below. However, before the review was concluded, the (then) Minister for Immigration and Border Protection, the Hon Peter Dutton MP, took action to exempt the *Migration Regulations 1994* (Cth), in their entirety, from the sunsetting regime. The Migration Regulations are voluminous, and far-reaching in their effect, especially on individuals. They have also operated for over 25 years (more than double the period set for sunsetting). As a result, their exemption from sunsetting was a significant step, especially if effected *before* the statutory review of the sunsetting regime had been completed. While the Senate (through the Senate Standing Committee on Regulations and Ordinances (Senate Committee)) took steps to explore with the Minister the justification for the exemption, the Senate Committee, in effect, accepted the Minister's arguments in favour of exemption and the Senate, in turn, ultimately allowed the exemption to stand.

In my view, this was regrettable (and disappointing), as the exemption of the Migration Regulations from sunsetting seriously undermined the effectiveness of the sunsetting regime and also (arguably) created a 'precedent' that invited further exemptions to be sought and given. I set out the reasons for my view below.

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Legislative Instruments Bill 2003

The LIA established 'a consistent system for registering, tabling, scrutinising and sunsetting all Commonwealth legislative instruments'.[3] Sunsetting was, evidently, one of the four key elements of what was enacted as the LIA.

The explanatory memorandum for the Legislative Instruments Bill 2003 states:

> **Part 6 — Sunsetting of Legislative Instruments**
>
> This Part provides for the automatic repeal or sunsetting of each legislative instrument 10 years after the date that the instrument must be placed on the Register. Ten years has been chosen as an appropriate period of time to prevent the persistence of antiquated or unnecessary legislative instruments, and enable ample time for review and re-making of legislative instruments that may still be required. A shorter time span would be more resource intensive.[4]

In his second reading speech, the (then) Attorney-General, the Hon Daryl Williams QC MP, stated:

> The final feature of this bill which I wish to emphasise is the sunsetting mechanism.
>
> The bill provides for the sunsetting or the automatic repeal of legislative instruments after a period lasting approximately 10 years from the time that the instrument is registered. Sunsetting will ensure that legislative instruments are regularly reviewed and only remain operative if they continue to be relevant.
>
> This has clear benefits for business and the community.
>
> The bill provides a number of targeted exemptions from the sunsetting provisions because the nature of the instrument would make sunsetting inappropriate — for example, where commercial certainty would be undermined by sunsetting or the instrument is clearly designed to be enduring.
>
> In addition, either house of parliament may, by resolution, exempt nominated legislative instruments from sunsetting.
>
> This addresses a concern previously expressed by the opposition.
>
> The bill provides for a review of the operation of the legislation to take place three years after commencement and for a further review of the general sunsetting provisions 12 years after commencement.
>
> The requirement for a review recognises the importance of ensuring that the bill is operating as intended, in particular that the requirement for rule makers to periodically review and remake legislative instruments is operating in an efficient and effective manner.[5]

The exemptions to which the Attorney-General alluded were set out in s 54 of the LIA. They included 50 types of legislative instruments that were specified in a table in s 54(2) of the LIA.[6] It is important to note, at the outset, that the exemption of a legislative instrument from sunsetting was originally considered to be significant enough to be included in primary legislation rather than delegated legislation.

Table item 51 provided for the exemption of '[l]egislative instruments that are prescribed by the regulations for the purposes of this table'. As originally promulgated, Sch 3 of the *Legislative Instruments Regulations 2004* (Cth) (LIRs) exempted a further six classes of instruments.[7] By the time that the LIRs were superseded (see below), Sch 3 listed 58 classes of legislative instruments that were exempt from sunsetting, demonstrating that the power contained in table item 51 of s 54(2) of the LIA had been much used.[8]

Acts and Instruments (Framework Reform) Act 2015

In 2015 (with effect from 2016), the LIA was significantly amended — and renamed the *Legislation Act 2003* (Cth) — by the *Acts and Instruments (Framework Reform) Act 2015* (Cth) (Framework Reform Act).[9] The content and breadth of the amendments is a matter for another article. However, an important element of the amendments, for this article, was that the content of s 54 was largely moved to Pt 5 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) (LEOMR). That regulation currently exempts seven classes of legislative instrument and almost 100 particular instruments from sunsetting.[10] However, the important thing to note is that what was previously done (largely) by primary legislation is now done by delegated legislation. This is a key issue for the discussion below.

It is interesting to note, at the outset, that the Senate Standing Committee for the Scrutiny of Bills (Senate Scrutiny of Bills Committee) did not comment in any detail on this element of the Bill that became the Framework Reform Act.[11] The removal of legislative activity from primary legislation and its placing, instead, within delegated legislation might be expected to attract attention from the Senate Scrutiny of Bills Committee on the basis that it involved an inappropriate delegation of legislative power (for principle (iv) of the Committee's terms of reference) or involved insufficiently subjecting the exercise of legislative power to parliamentary scrutiny (for principle (v) of the Committee's terms of reference).[12] The removal of the sunsetting exemptions from the primary legislation was identified as a potential issue only obliquely — in a comment that was primarily directed at the removal of the exemption of legislative instruments from disallowance from the primary legislation. The Senate Scrutiny of Bills Committee stated:

> It is understood that it is intended that the categories of exempt instruments will be consolidated in the new regulations. *While a consolidated approach is desirable, the committee notes that in moving material from primary to delegated legislation a justification should be provided for each item or class of instrument to be exempted from disallowance or sunsetting (current and new categories) and for each item or class of instrument to be removed from the tables of those instruments exempt from disallowance or sunsetting.*[13]

This was identified as potentially involving legislation insufficiently subjecting the exercise of legislative power to parliamentary scrutiny. The Senate Scrutiny of Bills Committee stated:

> The committee draws this matter to the attention of the Regulations and Ordinances Committee for information.[14]

While the (then) Attorney-General, Senator the Hon George Brandis QC, responded to the Senate Scrutiny of Bills Committee's comments on the Framework Reform Bill,[15] the response did not directly address the sunsetting issue discussed above. The Senate Scrutiny of Bills Committee concluded its consideration of the Framework Reform Bill by stating:

> The committee draws its concern that, generally, instruments should be deemed to be legislative and subject to disallowance and sunsetting to the attention of Senators, and leaves the matter to the consideration of the Senate as a whole.
>
> The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.[16]

In other words, the Senate Scrutiny of Bills Committee left the matter to the Senate Regulations and Ordinances Committee (and to the Senate as a whole). The Senate Regulations and Ordinances Committee's dealing with the issue is discussed below.

Exemption of the *Migration Regulations 1994* from sunsetting

In 2016, under the authority of the (then) Minister for Immigration and Border Protection, the *Migration Amendment (Review of the Regulations) Regulation 2016* (Cth) (Amendment Regulation) was promulgated. The Amendment Regulation inserted into the Migration Regulations a new reg 5.44A that set out a new review regime for the Migration Regulations. In essence, the new regulation provided that the Migration Regulations be reviewed every 10 years.[17] As no requirements for the review were specified, it could be assumed that the review would be entirely within the control of the relevant department. Significantly, there was no requirement to make the outcome of any review public — even to the Parliament — and, similarly, no obligation to remake or amend the Migration Regulations in the light of the outcome of a review. The latter point was relevant, also, to the capacity of the Parliament to retain meaningful oversight over the (accumulated) content of such regulations.

Less than a month later, under the authority of the (then) Attorney-General, Senator the Hon George Brandis QC, the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016* (Cth) (Sunsetting Exemption Regulation) was promulgated. The Sunsetting Amendment Regulation amended the LEOMR to insert various new exemptions from sunsetting. Item 10 of the amendment schedule exempted the Migration Regulations from sunsetting[18] — in their entirety. Absent this amendment, the Migration Regulations would have sunsetted on 1 October 2018 (unless remade or otherwise continued in force[19]).

No justification was provided, in the explanatory statement for either the Sunsetting Exemption Regulation or the Amendment Regulation, for exempting the Migration Regulations from sunsetting. Given the importance of sunsetting to the legislative regime established by the LIA, and given the volume of the Migration Regulations, how long they had been in force and their potential effect (particularly on individuals), this seems quite extraordinary.

Concerns raised by the Senate Committee

The Senate Committee commented on both the Amendment Regulation and the Sunsetting Exemption Regulation, in a single entry, in Delegated Legislation Monitor 1 of 2017.[20] The Senate Committee stated:

> Neither the [explanatory statement] to the [Amendment Regulation] nor the [Sunsetting Exemption Regulation] provides information on the broader justification for the exemption of the Migration Regulations from sunsetting.
>
> The committee also notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects departments and agencies to plan for sunsetting well in advance of an instrument's sunset date.
>
> *The committee is concerned that neither the [explanatory statement] to the [Amendment Regulation] nor the [Sunsetting Exemption Regulation] provides information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.*[21]

The Senate Committee sought a response from 'the Minister' (which was evidently intended to include the Attorney-General). The Attorney-General responded (including on behalf of the Minister for Immigration and Border Protection) in a letter dated 1 March 2017. The letter is discussed in Delegated Legislation Monitor 3 of 2017.[22] In essence, the Senate Committee was not satisfied with the further information provided and sought a further response.

In a letter dated 15 June 2017, the Minister for Immigration and Border Protection responded to the Senate Committee. The response is discussed in Delegated Legislation Monitor 7 of 2017.[23] Again, the Senate Committee was not satisfied with the further information provided and sought a further response.

At this point, it is not helpful to reproduce here the precise detail of the further correspondence. Suffice it to say that, over numerous responses (discussed in Delegated Legislation Monitors 8, 9, 13 and 15 of 2017[24]), from the Minister and from the Attorney-General, the Senate Committee seems to have remained less than happy with the information provided in response to its concerns. The Senate Committee's concerns are underlined by the fact that 'protective' notices of motion[25] to disallow were placed on the Amendment Regulation (on 28 March 2017) and the Sunsetting Exemption Regulation (on 31 March 2017).[26] This had the effect of preserving the Senate Committee's jurisdiction over the Migration Regulations pending receipt of a satisfactory response to its concerns.

However, the Senate Committee ultimately withdrew the notices of motion, despite apparently not being able to agree entirely with the arguments made in a series of responses by the Attorney-General and the Minister. In Delegated Legislation Monitor 15 of 2017, the Senate Committee concluded its scrutiny of the Amendment Regulation and the Sunsetting Exemption Regulation, stating:

> The committee is conscious that these instruments have been the subject of an extensive dialogue over a long period, and acknowledges the cooperation of both the Attorney-General and the Minister for Immigration and Border Protection in assisting the committee with its consideration of this matter. The committee recognises that there is a difference of view between the committee and the relevant ministers in relation to these issues, which is unlikely to be resolved through further correspondence.
>
> The committee nonetheless reiterates its concern that these instruments have effectively removed from comprehensive parliamentary scrutiny a significant body of delegated legislation, in an area of law which engages a large number of Australia's national and international legal obligations, and has significant ramifications for individuals as well as the national interest. The committee reiterates its considered view that it is essential that Parliament retain direct oversight of the outcomes of the review of significant pieces of delegated legislation, including the *Migration Regulations 1994*.
>
> The committee also reiterates its expectation that the review of the Migration Regulations, and the resulting report, would be thorough and, at a minimum, reflect the principles outlined in the Attorney-General's Department *Guide to Managing Sunsetting of Legislative Instruments*.
>
> The committee has concluded its examination of the instruments. However, the committee draws its concerns regarding the exemption of the Migration Regulations from sunsetting, and the absence of alternative arrangements for appropriate parliamentary oversight of those regulations, to the attention of the Senate.[27]

In other words, despite apparently finding a series of ministerial responses to its concerns less than compelling, the Senate Committee did not seek to have the regulations in question disallowed but, rather, merely restated its underlying concerns and reiterated its 'expectation'. But the bottom line was that the Migration Regulations had 'escaped' the sunsetting regime.

What is the problem?

There are two fundamental points that I would like to make about the interchange between the Senate Committee and the Attorney-General and the Minister, discussed above. The first is what I identify as the substantive justification that was (eventually) provided for exempting the Migration Regulations from sunsetting. The second is the fact that all of this was occurring while a major statutory review of the sunsetting regime was underway and the fact that what was proposed was that the Migration Regulations be exempted, without

such exemption being considered (and adjudged), in the context of the outcome of that review.

Justifications provided for the exemption

In my view, the most substantive justification provided[28] for the exemption of the Migration Regulations from sunsetting is set out in a letter to the Senate Committee from the Minister, dated 13 July 2017, which is discussed in Delegated Legislation Monitor 8 of 2017.[29] In the letter, the Minister stated:

> Remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources, with limited effect on the reduction of red tape, the delivery of clearer law or the alignment of the existing legislation with current Government policy.
>
> In addition, a remake of the Migration Regulations would require complex and difficult to administer transitional provisions. It is likely that this would have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for:
>
> (a) the millions of visa holders whose visa conditions and the grounds on which their visa is held, including when that visa ceases, are determined by the Migration Regulations;
>
> (b) the millions of current or future visa applicants whose eligibility for an Australian visa is determined by the Migration Regulations;
>
> (c) sponsors and potential sponsors; and
>
> (d) industries where the conduct of business is reliant on migrants, either as employees or clients.
>
> The Migration Regulations were exempted from sunsetting on the basis that the new review process met the objectives of the sunsetting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* (the Legislation Act), which are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49).
>
> There is no question that the Migration Regulations are still needed — as described above, they are in constant use to support Australia's migration programme. There is also no question that the Migration Regulations are kept up to date and fit for purpose; the regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments. Amendments are also made several times each year to address changing policy and administrative requirements.
>
> In addition, as a deregulation measure, in 2012–2013 the Migration Regulations were comprehensively reviewed and were amended in 2014 to remove redundant provisions and regularise terminology (see the *Migration Amendment (Redundant and Other Provisions) Regulation 2014* for further details about these amendments).
>
> The process involved individual consideration of every provision of the Migration Regulations and categorisation as 'still required', 'possibly redundant', and 'redundant'. The relevant policy area was then consulted to provide instructions to repeal, or justification to keep the provisions. The process also involved updating cross references and terminology, and certain drafting practices.[30]

The Minister went on to state:

> In future, the Migration Regulations will continue to be reviewed and improved to ensure they are up to date and align with Government policy …
>
> In light of the above, I consider that the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act, and that the review arrangements inserted by the *Migration Amendment (Review of the Regulations) Regulation 2016* formalise, and add to, what is effectively an ongoing review process. I note, moreover, that each time amendments are made to the Migration Regulations the changes are subject to Parliamentary scrutiny, including possible disallowance.[31]

I consider that much of the above justification could be said about *any* of the complicated Commonwealth legislative regimes that are subject to sunsetting. Many other agencies could (surely) argue that the review process that is involved with sunsetting 'would incur significant costs, and place a high impost on Government resources'. Similarly, many other agencies could (surely) argue that regular amendments mean that *their* legislation is 'kept up to date'. This was, surely, something that had been considered when the sunsetting regime was originally put in place by the LIA.

Unfortunately (relying on the published information), the Senate Committee did not pursue this issue with the Minister or the Attorney-General.

More worrying, however, is what I see as a logical inconsistency that is inherent in the Minister's response, extracted above. If regular amendment of the Migration Regulations means that they are 'kept up to date' (especially given the additional review processes to which the Minister refers) then how can it be that remaking the Migration Regulations (as part of sunsetting) would *necessarily* 'incur significant costs, and place a high impost on Government resources'? If regular amendment has, in fact, kept them 'up to date' then surely it should not take much to review and remake the Migration Regulations for the purposes of sunsetting.

Again, unfortunately (relying on the published information), the Senate Committee did not pursue this issue with the Minister or the Attorney-General.

Exemption of the Migration Regulations from sunsetting pre-empted the outcome of the Review of the Sunsetting Framework

Section 60 of the LIA provides for a review of the operation of the sunsetting provisions, by a 'body' of persons appointed to conduct such a review, after they had been in operation for 12 years.[32] The Sunsetting Review Committee was appointed in early 2017 and released a consultation paper for public comment on 30 May 2017,[33] with the report to be completed by 1 October 2017 (in accordance with the statutory requirements).

As mentioned above, the Amendment Regulation and the Sunsetting Exemption Regulation were promulgated at the end of 2016 prior to the commencement of the sunsetting review. However, for much of the time during which these regulations were the subject of discussions between the Senate Committee and the Minister and the Attorney-General, the sunsetting review was operating. Indeed, the Senate Committee did not conclude its consideration of the two regulations in question until 29 November 2017, *after* the Sunsetting Review Committee had reported.[34]

In my view, given their volume, how long they had been in force and their potential effect (particularly on individuals), the exemption of the Migration Regulations from sunsetting should have been considered in the context of the sunsetting review rather than taking place regardless of the outcome of the review. This seems both logical and not unreasonable.

Instead, all the report of the Sunsetting Review Committee did was report on the interchange between the Senate Committee and the Minister and the Attorney-General[35] and then make some (fairly obvious) recommendations about what agencies should do in the future if seeking to justify an exemption from sunsetting.

Meanwhile, a significant part of the body of Commonwealth legislation had 'escaped' the sunsetting regime. In my view, this was *a bad thing*, both in terms of the removal of a significant body of Commonwealth legislation from the sunsetting regime (and the scrutiny

that attaches to such a regime) and in terms of the message that (in effect) allowing this to happen sent to other agencies (discussed further below).

In making this comment, I note that the report of the Sunsetting Review Committee stated:

> Sunsetting is an important mechanism for the Australian Government to implement policies to reduce red tape, deliver clearer laws and align existing legislation with current government policy. The sunsetting framework commenced in 2003. Since then 2024 legislative instruments have appeared on sunsetting lists tabled by the Attorney-General under section 52 of the Legislation Act. Approximately 60% (1215) of those listed instruments were either allowed to sunset (413 instruments), were actively repealed (340 instruments), or have been replaced (462 instruments). The sunsetting framework has played a key role in keeping the statute book up to date.[36]

So sunsetting is 'an important mechanism for the Australian Government to implement policies to reduce red tape, deliver clearer laws and align existing legislation with current government policy' and its operation has apparently produced significant results. But it should not apply to the Migration Regulations.

Do the Migration Regulations actually need reviewing and rewriting?

Whether or not the Migration Regulations actually need reviewing and rewriting is an issue on which opinions would presumably differ. Clearly, the Minister thought not, having told the Senate Committee about the reviews to which the Migration Regulations had been (and will be) subject and also his view that, as a result, they are 'up to date'. As indicated above, I consider the Minister's arguments to be weak (and contradictory). As a result, in my view, they should have been scrutinised further by the Senate Committee. In addition, however, it seems unlikely that there is anything that makes the Migration Regulations different from other Commonwealth legislation, such that they would *not* be enhanced by the benefits identified by the report of the Sunsetting Review Committee as generally flowing from sunsetting — that is, the reduction of red tape, the delivery of clearer laws and the alignment of legislation with current government policy.

An example of an aspect of the Migration Regulations that would seem to be an obvious target for review and remaking is Sch 2 of the Migration Regulations. Schedule 2 sets out the criteria that apply to eligibility for specific subclasses of visas. It deals with primary and secondary criteria, with the main applicant having to satisfy the primary criteria and others involved in the application (for example, partners and children) being the subject of secondary criteria. In addition, Sch 2 also distinguishes between criteria that must be met at the time an application is made and criteria that must be met at the time that a decision is made.

It is difficult to explain, neatly and quickly, how the issues required to be dealt with in Sch 2 have resulted in a complexity of drafting architecture that renders Sch 2 difficult to amend, let alone to understand. However, a simple example is the fact that Sch 2 contains at least six instances where the drafting requires reference to sub-subparagraphs (see items 445.223(4); 676.611; 773.213(2), (3) and (4); and 801.321 of Sch 2). Use of sub-subparagraphs (in my experience) is relatively rare in Commonwealth legislation. Their use demonstrates an obvious level of complexity that, surely, would be addressed if the Migration Regulations were subject to the kind of comprehensive review that would be involved in a sunsetting exercise.

That said, it would be understandable if the (now) Department of Home Affairs was wary of the time, resources and expense that would be involved in a comprehensive review — and, probably, rewrite — of the Migration Regulations. The Department would, no doubt, be aware of what has happened in relation to the *Civil Aviation Safety Regulations 1998* (Cth).

It is my understanding that a substantial rewrite of those regulations commenced over 20 years ago and was expected to take two years to complete. It is *still* proceeding and must have already cost multiple millions of dollars in legislative drafting resources alone (including as a result of the formation of a drafting 'taskforce'). Over the years, this has been the subject of criticism.[37] Any Commonwealth agency would, presumably, be wary of potentially facing a similar experience with its legislation.

As a side issue, it is relevant to note that the *Civil Aviation Safety Regulations 1998* were exempted from sunsetting by the LIA from the outset.[38]

Subsequent exemptions from sunsetting

I suggested above that the fact that the exemption of the Migration Regulations from sunsetting was allowed to stand (despite what I regard as weak justifications) could set a 'precedent' that invited further exemptions to be sought and given. Sure enough, in August of 2017, the (then) Attorney-General, the Hon Senator George Brandis QC, was involved in promulgating the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017* (Cth) (Second Sunsetting Exemption Regulation).[39] That regulation exempted a further 17 regulations, plus some further legislative instruments, from sunsetting. The exempted regulations included the *Corporations Regulations 2001* (Cth) — another significant, voluminous piece of Commonwealth legislation that had been in force for a substantial number of years. The following justification was provided in the explanatory statement for the Second Sunsetting Exemption Regulation:

> The Corporations Regulations, made under the *Corporations Act 2001*, prescribe matters relating to corporations, securities, the futures industry, financial products and services, and other purposes. The Corporations Regulations are integral to the Corporations Agreement 2002, an intergovernmental scheme between the Commonwealth, States and Territories. They are reliant on a referral of power from the States. Ordinarily, amendments to the Corporations Regulations must be approved by the Legislative and Governance Forum for Corporations. The sunsetting of the Corporations Regulations would bypass this requirement, contrary to the Commonwealth's obligations under the Corporations Agreement.
>
> The Corporations Regulations are also integral to long-term decision making by the relevant stakeholders. Subjecting the regulations to the sunsetting regime would create significant commercial uncertainty and impose a heavy regulatory burden on stakeholders. Additionally, the Corporations Regulations are currently being reviewed as part of other reform processes (including implementation of the recommendations of the Financial System Inquiry). Due to the size of the Corporations Regulations, the current approach to updating the Regulations to ensure they remain fit for purpose is to review and reform discrete sections of the Regulations on a thematic basis. These amendments have been supported by extensive consultation and often follow a comprehensive public review. This ensures that there is strong stakeholder engagement in the review process that enables stakeholders to more easily adapt to any change, as the reforms are limited to a particular set of issues each time.
>
> Accordingly, it is appropriate to exempt the Corporations Regulations from sunsetting.[40]

Of the arguments set out above, I find the reference to the operation of the intergovernment scheme the most persuasive. However, I also note that legislative instruments made under the *Corporations Act 2001* (including the Corporations Regulations) have, since the enactment of the LIA, been expressly excluded from the general exemption from sunsetting that applies, under s 54(1) of the Legislation Act, to a legislative instrument that:

(a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories; and
(b) authorises the instrument to be made by the body or for the purposes of the body or scheme.

One wonders what had changed between the enactment of the LIA and the giving of this latest exemption so as to require (in effect) the removal of the exclusion of legislative instruments made under the Corporations Act from the general exemption from sunsetting applicable to legislative instruments relating to intergovernmental schemes. This issue is not addressed in the explanatory statement for the Second Sunsetting Exemption Regulation.

The Senate Committee considered issues raised by the Second Sunsetting Exemption Regulation in Delegated Legislation Monitor 13 of 2017, seeking further information from the Attorney-General.[41] The Attorney-General's response (which referenced the correspondence in relation to the Amendment Regulation and the Sunsetting Exemption Regulation, mentioned above) is discussed in Delegated Legislation Monitor 14 of 2017.[42] Readers can make their own judgment about the justifications provided by the Attorney-General. My view is that they are no more convincing than the earlier arguments made in relation to the Migration Regulations. The Senate Committee nevertheless concluded its scrutiny of the Second Sunsetting Amendment Regulation (thereby allowing it to stand, without a disallowance motion, et cetera), stating:

> The committee remains of the view that exemptions from the sunsetting requirements of the Legislation Act are significant matters, and that the circumstances in which an exemption will be appropriate are limited. The committee's focus where an exemption from sunsetting is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated.
>
> The committee acknowledges that the Corporations Regulations are regularly amended, and that those amendments are subject to parliamentary scrutiny and disallowance. However, the committee considers that removing the requirement to remake the Corporations Regulations every ten years, after a significant review, reduces Parliament's oversight of those regulations. The committee considers that Parliament's opportunity to consider amendments to an instrument on an ad hoc basis, as they arise, is not the same as comprehensive periodic oversight of an instrument in its entirety, as envisaged by the sunsetting regime.
>
> The committee notes that no other form of parliamentary oversight has been introduced to replace the Legislation Act sunsetting process in relation to the instruments being exempted, including the Corporations Regulations.
>
> *The committee has concluded its examination of the instrument. However, the committee draws the exemption of several additional and significant legislative instruments from sunsetting, including the Corporations Regulations, and the lack of alternative arrangements for appropriate parliamentary oversight of those instruments, to the attention of the Senate*.[43]

In other words, again, despite apparently finding the ministerial responses to its concerns less than compelling, the Senate Committee did not seek to have the regulations in question disallowed but, rather, merely restated its underlying concerns. Again, the bottom line was that a further swathe of significant delegated legislation had 'escaped' the sunsetting regime.

More recently, in April 2019, the (then) Attorney-General, the Hon Christian Porter MP, was involved in promulgating the *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No 1) Regulations 2019* (Cth).[44] That regulation exempts from sunsetting several further sets of regulations and legislative instruments, including regulations made under the *Fair Work Act 2009* (Cth), the *Fair Work (Registered Organisations) Act 2009* (Cth) and the *Work Health and Safety Act 2011* (Cth). At the time of writing, the Senate Committee does not appear to have commented on the regulation.

On previous indications, however, it seems unlikely that the Senate Committee will move to have the regulation disallowed. As indicated above, my view is that a 'precedent' has been set and that, in effect, the floodgates have been opened.

Other problems with sunsetting

Based on my experience of working with Commonwealth delegated legislation, I am generally disappointed (to put it mildly) by the way that some Commonwealth agencies have dealt with their sunsetting obligations. I have seen too many examples of agencies apparently leaving the issue of sunsetting to the last minute then dealing with it badly. In my view, there is a suggestion in the Senate Committee's commentary on the Migration Regulations that that was the case in that instance too.[45]

In this context, I also note that over 50 instruments currently appear on the Federal Register of Legislation that defer or 'alter' sunsetting dates.[46]

I offer the following example — the worst of the examples that I could identify apart from the Migration Regulations — of sunsetting issues apparently being left until the last minute and, generally, being handled badly.

Seacare Authority Code of Practice Approval 2017

On 23 March 2017, the Minister for Employment (Employment Minister) made the Seacare Authority Code of Practice Approval 2017[47] (the Code) under s 109 of the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth). The explanatory statement for the Code stated:

> The Code was first approved by the Minister for Employment, Workplace Relations and Small Business on 10 May 2000. The Code is due to sunset on 1 April 2017 [just over a week after the Code was made] under section 51 of the *Legislation Act 2003*. The Code has been under review by a working group formed by the Seacare Authority. The Chairperson of the Seacare Authority consulted and received the unanimous support of the working group members to request that the Code be remade to allow for that review to be completed. The working group is made up of representatives from the Australian Maritime Safety Authority and employee and employer representatives (Maritime Industry Australia Ltd, the Australian Maritime Officers Union, the Australian Institute of Marine and Power Engineers and the Maritime Union of Australia).
>
> The content of the Code is unchanged and the approval is limited to a two year period while updated guidance for industry participants is prepared, reflecting developments in work health and safety.[48]

While the Code was over 200 pages, the explanatory statement for the Code was only two pages. It contained little background information about the Code and *no* clause-by-clause explanation of the operation of the provisions of the Code.

The Senate Committee dealt with the Code in Delegated Legislation Monitor 5 of 2017.[49] The Senate Committee noted the absence of the clause-by-clause analysis in the explanatory statement but made a fairly benign comment on the issue. However, the Senate Committee raised an issue in relation to a matter that arose because of the absence of a clause-by-clause analysis. The Senate Committee noted that the Code incorporated two other codes by reference, but the explanatory statement did not address certain requirements of the Senate Committee in relation to incorporation of documents by reference.[50] As a result, the Senate Committee sought advice from the Minister for Employment.

The (then) Minister for Employment, Senator the Hon Michaelia Cash, responded to the Senate Committee's comments in a letter dated 30 May 2017. The response is considered

in the Senate Committee's Delegated Legislation Monitor 6 of 2017.[51] The response of the Minister for Employment was (in part):

> Your committee considers that the text of the Code should state the manner in which documents are incorporated. To now include in the text a new description of how matters referred to are incorporated would have been an amendment of the Code.
>
> Access to referenced documents is expressly dealt with in the *Occupational Health and Safety (Maritime Industry) Act 1993*. Subsection 109(7) of the OHS(MI) Act provides that the Australian Maritime Safety Authority (as the Inspectorate under the OHS(MI) Act) will ensure that all incorporated material is available for inspection at its offices, which are located in 19 major ports around Australia (see www.amsa.gov.au/about-amsa/organisational-structure/amsa-offices/index.asp).
>
> Industry participants have had 17 years to locate and become familiar with the relevant referenced material but, if required, the maritime industry is able to obtain referenced material directly from the AMSA.
>
> Failure to comply with any provision of a code approved by me cannot make a person liable for any civil or criminal proceedings (see subsection 109(8) of the OHS(MI) Act). The Code merely provides practical guidance to operators on how to meet their duties under the OHS(MI)Act (see subsection 109(1) of the OHS(MI) Act). The Code provides a benchmark against which maritime industry participants and the Inspectorate can assess compliance and operates alongside other guidance material.
>
> I have written to the Chair of the Seacare Authority requesting that the replacement code of practice be made as soon as reasonably practicable, and drawing his attention to the need for the replacement code to meet modern drafting standards.
>
> Having regard to the above, I do not propose to provide any further supplementary explanatory material in support of my approval.[52]

This response is, in my view, in all the circumstances, quite surprising. Fault had been found with a 'quick-fix' approach to a sunsetting obligation that had existed since the passage of the LIA in 2003, and the response of the Minister for Employment was to be (in my view) less than helpful.

To the Senate Committee's credit, it did not accept the response of the Minister for Employment and sought further advice from the Minister.[53]

The Minister for Employment provided a further response, dated 19 June 2017. In the response, the Minister provided some additional information but concluded by repeating that she did not propose to provide any further supplementary explanatory material. The Senate Committee dealt with this response in Delegated Legislation Monitor 7 of 2017.[54] Disappointingly, the Senate Committee merely reiterated its 'expectation' in relation to the relevant issues and concluded its examination of the Code.

Legal Services Directions 2017

A (perhaps) more concerning example — given that they were promulgated by the Attorney-General's portfolio, which has administrative responsibility for the sunsetting regime — is the *Legal Services Directions 2017*, made on 29 March 2017.[55] The explanatory statement for these directions states:

> Under the sunsetting regime provided by the Legislation Act, the 2005 Directions were due to sunset on 1 April 2016. On 11 February 2016, the Attorney-General issued a certificate under section 51 of the Legislation Act, to defer the sunsetting of the 2005 Directions by 12 months to 1 April 2017. The certificate explained that the Secretary of the Attorney-General's Department (AGD) was undertaking a review of Commonwealth legal work. The Review was examining how legal work can be delivered

> most effectively and efficiently to the Commonwealth, including consideration of changes to the 2005 Directions. The reasons for issuing the certificate of deferral remain valid, but the Legislation Act does not allow the making of a second certificate of deferral. Following consideration of the Review by government, further updates to the Directions are expected.[56]

This means that, even after a deferral of the sunsetting date, the agency responsible for the sunsetting regime could not be relied upon to deal with a sunsetting process in a timely and efficient manner.

The Senate Committee raised issues with the directions, including in relation to the approach to sunsetting, in Delegated Legislation Monitor 5 of 2017.[57] The Senate Committee pursued various issues (though not the sunsetting issue as such) with the Attorney-General over Delegated Legislation Monitors 6, 8 and 13 of 2017.[58] It is, in my view, disappointing that the Senate Committee did not make any substantive comments about the way that the Attorney-General's Department had dealt with the sunsetting of the directions. In my view, Australians are entitled to expect better from the agency responsible for sunsetting, and this point might have been made by the Senate Committee.

The Attorney-General's Department's approach to sunsetting (and that demonstrated by the Migration Regulations example) might be contrasted, for example, with the approach of the Department of Communications and the Arts to the sunsetting of the *Copyright Regulations 1969* (Cth) (old Copyright Regulations). The old Copyright Regulations were scheduled to sunset on 1 April 2017, but (as noted in the explanatory statement for the regulations that replaced them) this was deferred to 1 April 2018 by the *Legislation (Deferral of Sunsetting — Copyright Instruments) Certificate 2017*.[59] At the time of being superseded, the old Copyright Regulations were some 135 pages. So they were not insignificant or insubstantial.

The *Copyright Regulations 2017* (Cth) (new Copyright Regulations) were registered on 18 December 2017.[60] The explanatory statement indicates that an exposure draft was released for public consultation on 11 September 2017. It further indicates both that a large number of stakeholders were consulted but also that concerns raised by stakeholders were taken into consideration in the process of finalising the new Copyright Regulations.[61] So there is no suggestion of the remade regulations being a 'quick-fix' of the sunsetting issue.

There are numerous other examples that (in my view) demonstrate a 'quick-fix' approach to sunsetting, made necessary because sunsetting had not been properly prepared for in advance.[62] There are also, no doubt, better examples of a timely and efficient approach to sunsetting than the Corporations Regulations. It is not possible to canvass them all in this article.

In my view, this is (at best) disappointing. Sunsetting obligations did not arise for Commonwealth agencies by ambush. They have existed since the passage of the LIA in 2003 (and were foreshadowed as early as 1994[63]). In my view, the Senate Committee has not done enough to call agencies out for the deficiencies in their approach to sunsetting. If the Senate Committee has commented at all then its comments have been fairly benign, as demonstrated by the Senate Committee's approach to the Code. In essence, the Senate Committee's approach has largely been to note that 'the process to review and remake instruments can be lengthy' and to remind departments and agencies that they 'should plan for sunsetting well in advance of an instrument's sunset date'.[64]

The role of the Office of Parliamentary Counsel

In this context, it is important to consider the role of the Office of Parliamentary Counsel (OPC) in relation to sunsetting. Under s 16 of the Legislation Act (and, previously, under

s 16 of the LIA), OPC has an obligation to promote and encourage 'high standards in the drafting of legislative instruments'. This includes, under para 16(2)(d), an obligation to '[provide] training in drafting and matters related to drafting to officers and employees of Departments or other agencies'. One would have expected that these obligations would have included an obligation to provide, well in advance of the sunsetting obligations arising, training in relation to sunsetting obligations.

Based on information provided in OPC annual reports, it appears that it was not until 2016–17 that OPC provided such training on a public-service-wide basis. The 2016–17 annual report states:

> This year OPC presented a number of seminars on sunsetting to staff of many agencies that are responsible for instruments. The seminars were presented at OPC in conjunction with the Attorney-General's Department and with input from the Department of Defence.[65]

In my view, this training should have started much earlier. In saying this, I note that OPC's 2013–14 annual report stated:

> The first date for the sunsetting of instruments is now approaching and OPC is working with sunsetting coordinators in all portfolios to encourage early action on sunsetting.[66]

Similar sentiments were reflected in subsequent annual reports. OPC's 2015–16 annual report states:

> OPC worked closely with sunsetting coordinators in all portfolios to encourage early action on instruments due to sunset. Key legislative instruments that were reviewed by portfolios and redrafted by OPC before the instruments were due to sunset on 1 April 2015 included the *Customs Regulations 1926* and *Excise Regulations 1925* as well as the *Telecommunications Numbering Plan Declaration 2000* and *Telecommunications Numbering Plan Number Declaration* and related instruments. OPC greatly improved the quality and readability of these instruments through this process.[67]

But why did it take until 2016–17 for OPC to start providing general training to agencies on sunsetting? By that time it was (surely) too late. The poor standard of approach demonstrated by Commonwealth departments and agencies is reflective of the lack of timely and effective training.

I note that I have previously been critical, including in this journal, of OPC's approach to its s 16 obligations.[68]

Concluding comments — a sorry, disappointing tale

In conclusion, it is my view that the Senate Committee's failure to take an effective stand against the exemption of the Migration Regulations from sunsetting has contributed to the sunsetting regime being significantly undermined. Similarly, the Senate Committee's relatively benign approach to what I have identified as deficiencies in the way that many Commonwealth departments and agencies have dealt with their sunsetting obligations, in my view, has done little to discourage the poor standards that have developed.

The Senate Committee's failure has been magnified by deficiencies that I observe in OPC's management of the sunsetting obligations, despite its obligations under s 16 of the Legislation Act. If OPC is not doing its job as well as it might then there is no-one else (other than the Senate Committee) who can take action to ensure that the sunsetting of Commonwealth delegated legislation is undertaken in a timely and efficient fashion, effectively and *in accordance with the law*.

In making these comments, I acknowledge that the Senate Committee has always avoided 'policy' issues in its operation,[69] undertaking 'technical' legislative scrutiny, with a 'non-partisan' approach.[70] But the operation of the sunsetting regime should not have been a partisan issue. The LIA was passed with bipartisan support (the Australian Democrats moved amendments that were not supported and not passed[71]).

The Senate Committee's role in these matters has been particularly disappointing. I fear that the sunsetting regime has been left significantly weakened as a result.

Endnotes

1 Explanatory Statement, Legislative Instruments Bill 2003, <https://www.legislation.gov.au/Details/C2004B01468/Explanatory%20Memorandum/Text>.
2 See Attorney-General's Department, 'Review of the Sunsetting Framework under the Legislation Act 2003', <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/Review-of-the-sunsetting-framework-under-the-legislation-act-2003.aspx>.
3 Above n 1.
4 Ibid.
5 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17623 (Daryl Williams, Attorney-General), <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/2003-06-26/0025%22>.
6 For the LIA, as originally enacted, see <https://www.legislation.gov.au/Details/C2004A01224>.
7 For the LIRs, as originally promulgated, see <https://www.legislation.gov.au/Details/F2005B00003>.
8 See <https://www.legislation.gov.au/Details/F2015C00509>.
9 Available at <https://www.legislation.gov.au/Details/C2015A00010>.
10 See <https://www.legislation.gov.au/Details/F2018C00538>.
11 See Senate Standing Committee for the Scrutiny of Bills, Alert Digest No 15 of 2014, 19 November 2014, pp 1–4, <https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/alerts/2014/pdf/d15.pdf?la=en>.
12 See Australian Government, Senate, *Standing Orders and Other Orders of the Senate*, August 2018, Standing Order 24, <https://www.aph.gov.au/~/media/05%20About%20Parliament/52%20Sen/523%20PPP/Standing%20Orders%202015/StandingOrders.pdf?la=en>.
13 Senate Standing Committee for the Scrutiny of Bills, above n 11, p 4.
14 Ibid.
15 See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, First Report of 2015 (11 February 2015), pp 7–22, <https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/bills/2015/pdf/b01.pdf?la=en>.
16 Ibid, p 11.
17 See <https://www.legislation.gov.au/Details/F2016L01809>.
18 See <https://www.legislation.gov.au/Details/F2016L01897>.
19 See, for example, *Legislation Act 2003* (Cth) s 53.
20 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 1 of 2017, pp 38–9, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no01.pdf?la=en>.
21 Ibid, p 38 (footnotes omitted).
22 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 3 of 2017, pp 32–6, 199–200, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no3.pdf?la=en>.
23 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 7 of 2017, pp 14–20, 49, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no7.pdf?la=en>.
24 Parliament of Australia, 'Delegated Legislation Monitor (2017)', <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2017/index>.
25 See R Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, Canberra, 14th ed, 2016), ch 15, <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15>.
26 See Parliament of Australia, 'Disallowance Alert 2017', <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts/alert2017>. Note that both motions were eventually withdrawn.
27 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 15 of 2017, p 38, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no15.pdf?la=en>.
28 Though readers should form their own views, having read the correspondence in its entirety, as other arguments were also made.

[29] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 8 of 2017, pp 38–47, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no8.pdf?la=en>. The response was: Letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to Senator John Williams, Chair, Senate Regulations and Ordinances Committee, 27 June 2017, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/Responses/Responses_no8.pdf?la=en>.

[30] Ibid.

[31] Ibid.

[32] See above n 6 for LIA as originally enacted.

[33] See Australian Government, Attorney-General's Department, *Review of the Operation of the Sunsetting Provisions in the Legislation Act 2003* (Consultation Paper, May 2017), <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Consultation-paper-review-of-the-sunsetting-framework.pdf>.

[34] The report was tabled in the House of Representatives on 23 October 2017 and in the Senate on 13 November 2017 (see Attorney-General's Department, *Review of the Sunsetting Framework under the Legislation Act 2003*, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/Review-of-the-sunsetting-framework-under-the-legislation-act-2003.aspx#SunsettingReview>).

[35] As did the submission by the Department of Immigration and Border Protection to the sunsetting review (see Department of Immigration and Border Protection to Attorney-General's Department, *Submission to the Review of the Operation of the Sunsetting Provisions of the Legislation Act 2003*, 30 June 2017, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/sunsetting-review-submissions/DIBP-Submission.PDF>).

[36] Attorney-General's Department, above n 2, p 5.

[37] See, for example, ProAviation, *Submission to the Aviation Safety Regulation Review*, 21 February 2014, <http://proaviation.com.au/2014/02/22/proaviations-submission-to-the-asrr/#_Toc380758472>.

[38] See item 9 of the table in s 54(2) of the LIA as originally enacted (above n 6). The exemption is maintained by item 15 in the table in s 12 of the LEOMRs.

[39] Available at <https://www.legislation.gov.au/Details/F2017L01093>.

[40] Explanatory Statement, *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017* (Cth), <https://www.legislation.gov.au/Details/F2017L01093/Explanatory%20Statement/Text>.

[41] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 13 of 2017, p 16, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no13.pdf?la=en>.

[42] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 14 of 2017, pp 67–73, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no14.pdf?la=en>.

[43] Ibid, p 73.

[44] Available at <https://www.legislation.gov.au/Details/F2019L00550>.

[45] See, for example, the Senate Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2017* (Commonwealth of Australia, 2018), para 3.78, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/annual/Annual_2017.pdf?la=en>.

[46] See Australian Government, Federal Register of Legislation, <https://www.legislation.gov.au/Browse/Results/ByTitle/LegislativeInstruments/Asmade/Le/0/0/all>.

[47] Available at <https://www.legislation.gov.au/Details/F2017L00326/e91a7aa2-20ba-45da-8a42-32e35e3f27da>.

[48] Explanatory Statement, *Seacare Authority Code of Practice*, <https://www.legislation.gov.au/Details/F2017L00326/4b608618-359b-4963-9ab5-89c9010e3cbb>.

[49] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 5 of 2017, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no5.pdf?la=en>.

[50] Ibid, p 19. See also Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, 'Guideline on Incorporation of documents', <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents>.

[51] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 6 of 2017, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no6.pdf?la=en>.

[52] Ibid, pp 29–30.

[53] Ibid, pp 30–1.

[54] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 7 of 2017, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no7.pdf?la=en>.

[55] Available at <https://www.legislation.gov.au/Details/F2017L00369>.

[56] Explanatory Statement, *Legal Services Directions 2017*, <https://www.legislation.gov.au/Details/F2017L00369/Explanatory%20Statement/Text>.

[57] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 5 of 2017, especially pp 12–13, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no5.pdf?la=en>.

[58] The issues and the correspondence are summarised in Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 13 of 2017, pp 75–9, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no13.pdf?la=en>.

[59] Explanatory Statement, *Copyright Regulations 2017*, <https://www.legislation.gov.au/Details/F2017L01649/Explanatory%20Statement/Text>.

[60] Available at <https://www.legislation.gov.au/Details/F2017L01649>.

[61] Senate Standing Committee on Regulations and Ordinances, above n 57.

[62] See, for example, the explanatory statements for the legislative instruments on the Federal Register of Legislation with these registration numbers: F2016L01455, F2017L00189, F2017L00202, F2017L00403, F2017L00701, F2017L01279, F2017L01311 and F2017L01515.

[63] See S Argument, 'The Legislative Instruments Bill — Lazarus With a Triple By-pass?' 2006 (39) *AIAL Forum* 44.

[64] See, for example, Senate Committee on Regulations and Ordinances, above n 45, para 3.78.

[65] Office of the Parliamentary Counsel, *Annual Report 2016–17* (2017), para 10 <https://www.opc.gov.au/sites/default/files/annual_report_2016_-_2017.pdf>.

[66] Office of the Parliamentary Counsel, *Annual Report 2013–14* (2014), para 20, <https://www.opc.gov.au/sites/default/files/annualreport2013_14.pdf>.

[67] Office of the Parliamentary Counsel, *Annual Report 2014–15* (2015), para 22, <https://www.opc.gov.au/sites/default/files/annualreport2014_15.pdf>.

[68] See S Argument, 'The Importance of Legislative Drafters — Challenges Presented by Recent Developments in the Commonwealth Jurisdiction', (2015) 81 *AIAL Forum* 40, <http://www.aial.org.au/aial-forum-articles/the-importance-of-legislative-drafters-challenges-presented-by-recent-developments-in-the-commonweal>. See also S Argument, 'The Use of Legislative Rules in Preference to Regulations: A "Novel" Approach?' (2015) 26 *Public Law Review* 4.

[69] See, for example, DC Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, Australia, 5th ed, 2017) pp 185–6.

[70] See, for example, Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 2 of 2019, p ix, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2019/Final%20Delegated%20Legislation%20Monitor%202%20of%202019.pdf?la=en>.

[71] See information available at Parliament of Australia, 'Legislative Instruments Bill 2003', <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1850>.

10 YEARS POST *BYRNE V MARLES*: REFLECTIONS ON THE PURPOSE OF PROCEDURAL FAIRNESS IN A REGULATORY CONTEXT

Caroline Morgan*

Ten years ago the *Legal Profession Act 2004* (Vic) (LPA) was amended[1] so as to clarify that there is no requirement to seek submissions at the pre-investigation stage of the complaint-handling process about lawyers.[2] The LPA (now repealed) was enacted to regulate lawyers in Victoria[3] and created a complaints-handling scheme administered by the Legal Services Commissioner (LSC).[4] A complaint could be assessed as a civil complaint, a disciplinary complaint or a mixture of both;[5] and to the extent that a complaint involved a disciplinary complaint it required investigation and possible disciplinary action and prosecution.[6]

The specific amendments to the LPA were made in direct response to a decision of the Victorian Court of Appeal in the case of *Byrne v Marles*[7] (*Byrne*). In *Byrne* the Court unexpectedly[8] found that natural justice (procedural fairness)[9] applied when a complaint was being assessed at a stage before the complaint was classified and either referred for investigation or summarily dismissed.[10] More specifically, the right to be heard and make submissions to the LSC was found to apply at the first stage of the complaint-handling process.[11]

It is timely to reflect on *Byrne* and its aftermath. It provides an opportunity to consider the purpose of procedural fairness — which was recently noted by Professor Matthew Groves as one area of the doctrine of procedural fairness that remains unsettled[12] — and do so in a regulatory context.[13] It also provides an opportunity to reflect on a rare example of a statutory exclusion of procedural fairness and the hearing rule.[14]

This article will first define 'regulation' so that *Byrne* and this analysis is put into context. It will then outline the case of *Byrne*, along with the regulatory arguments put to the Court and the statutory exclusion that was subsequently enacted. It will consider some of the justifications offered for the purpose of procedural fairness, including a brief discussion about whether there need be a purpose and how these rationales fit with regulation. Finally, it will offer some observations about *Byrne*, the purpose of procedural fairness and whether and when to exclude it in a regulatory context.

Regulation

'Regulation' has been defined in numerous but not dissimilar ways.[15] Relevantly, the Victorian Government defines it as follows:

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> 'regulation' means the actions and requirements of government that are intended to change the choices and actions of individuals, community organisations and businesses.[16]

While complaint handling is not necessarily regulatory in nature, the investigation and subsequent discipline of lawyers (and *Byrne*) fall within a regulatory framework because they are processes and tools which aim to improve standards and change behaviours.[17]

Consistent with the Victorian Government's definition of 'regulation', regulation is chiefly instrumental in that it exists to achieve a purpose.[18] Almost inextricably linked to the instrumental purpose of regulation are the key concepts of 'effectiveness' and 'efficiency'. In brief, effectiveness concerns achieving the regulatory purpose.[19] Efficiency is about getting the job done with the least amount of costs.[20] These more specific goals are considerations which generally feature in any regulatory context.

While regulation is mainly instrumental, there are some non-instrumental values associated with 'good regulatory design'.[21] These include administrative law requirements such as procedural fairness.[22] Yeung also identifies procedural fairness as relevant to the values that *constrain* public regulation.[23] The *Byrne* decision is an example of an instance where procedural fairness was applied as a constraint upon regulatory processes (but see Nettle JA below, at 'Utilitarian justifications'). It raises questions about whether procedural fairness should always trump regulatory and statutory objectives.

The case of *Byrne*

In 2008, the Victorian Court of Appeal in *Byrne* found that a lawyer the subject of a complaint to the office of the LSC had a right to be heard by the LSC before the complaint was classified and referred for investigation. Having failed to do so in this particular instance was a denial of 'natural justice' (and the rules of procedural fairness).[24]

The LSC was established by the LPA as an independent statutory authority whose chief objective was to receive and handle complaints against lawyers.[25] It was mandated to carry out this function in a 'timely and effective manner'.[26] The decision in *Byrne* was a clear challenge for this (then) relatively new and small office, requiring as it did for submissions to be invited from lawyers subject to a complaint at the pre-investigation stage of the complaint-handling process.[27]

Byrne arose from a complaint made to the LSC in July 2006, only a short time after the LSC was established.[28] Mr Byrne, the solicitor subject of a complaint, applied to the Supreme Court soon after he was given notice by the LSC of the complaint and its referral to the Law Institute of Victoria (LIV) for investigation.[29] He sought judicial review of the LSC's decision to treat the complaint against him as a disciplinary complaint and refer it to the LIV for investigation.[30] He was unsuccessful at first instance.

On appeal, Mr Byrne included an additional ground of review. Counsel for Mr Byrne argued that he had a right to be heard before the complaint was classified. He was successful on this ground. The Court of Appeal found that the LSC was obligated to provide a hearing (invite submissions) from Mr Byrne about whether or not the complaint made against him should be treated as a disciplinary complaint and investigated.[31] The 'preliminary decision'[32] of the LSC to deal with the relevant complaint as a disciplinary complaint was declared invalid, but the LSC was permitted to make it again in accordance with the principles of procedural fairness.[33]

The decision in *Byrne* was reached following a consideration of the authorities concerning the application of the hearing rule of procedural fairness in multi-stage decision-making

processes. While the Court acknowledged that there is a line of authority supporting the position that it is unnecessary to provide a hearing at a preliminary stage of a multi-stage process where a full hearing is to be heard at a later stage,[34] and arguments from the LSC that this line of authority should be followed,[35] the Court made its decision based on an interpretation of the structure and operation of the LPA.

Regulatory arguments

In *Byrne*, counsel for the LSC had argued that an interpretation of the law that required that procedural fairness be applied at the pre-investigation stage of the complaint-handling process should be 'resisted' because of 'the detrimental effects on the efficiency of the administrative process set up by [the LPA]'.[36] Further:

> [t]hey argued that it would lead to delays, and the possible frustration of investigations, by court proceedings alleging failure by the commissioner to hear or heed the submissions of solicitors against whom complaints have been made. In counsel's submission, it surely is not to be supposed that Parliament intended to make hostage to the vicissitudes of such judicial review proceedings a system of complaints investigation which was set up in order to make it 'accessible' and 'efficient'.[37]

The Court was not persuaded by this argument. Justice Nettle (with whom the other judges agreed) held that:

> [o]ne may also doubt that recognition of the solicitor's right to be heard at that stage would result in the sorts of *inefficiencies* which the commissioner fears. The content of natural justice is variable according to the circumstances of the case and, in the ordinary case, it should not require much more than the commissioner inviting the solicitor to respond to the complaint and specifying a relatively short period of time (perhaps no more than a week after giving notice) in which any such response should be provided. In other kinds of cases, for example in cases of real urgency, or where the giving of notice would likely lead to the destruction of evidence or something of that nature, the content of natural justice might be reduced; in some cases perhaps even to the point of effectively abrogating it altogether. All in all, there should be few cases in which there is much of a problem.[38]

It is noteworthy that the Court engaged with the arguments about efficiencies in the regulatory processes. While it confirms their relevance to procedural fairness and statutory interpretation, it nonetheless raises for consideration whether or not the judiciary is well placed to comment on the practical operations of an administrative office (see further Edelman J below, 'Utilitarian justifications').

Aftermath

The Byrne decision had a significant impact on the operations of the LSC.[39] The new procedural fairness step increased the time taken to deal with complaints.[40] This was 'largely due to the LSC receiving detailed submissions from lawyers outlining reasons why the complaints should be dismissed. This resulted in significant follow up activity by the LSC'.[41] These outcomes were contrary to the statutory objective of the LSC to deal with complaints effectively and efficiently.[42]

Two amendments were subsequently made by the Victorian Parliament to the LPA to clarify that procedural fairness did not apply to the pre-investigation stage of the complaint-handling process: one amendment concerned the classification of a complaint; the other amendment addressed the summary dismissal of a complaint. Section 23 of the *Professional Standards and Legal Profession Acts Amendment Act 2008* provided as follows:

> **23 Complaints**
>
> (1) After section 4.2.8(2) of the *Legal Profession Act 2004* insert —
>
> '(3) Nothing in this section requires the Commissioner to give the law practice or Australian legal practitioner an opportunity to be heard or make a submission to the Commissioner before the Commissioner determines how the complaint is to be dealt with.'.
>
> (2) After section 4.2.10(2) of the *Legal Profession Act 2004* insert —
>
> '(3) The Commissioner is not required to give a complainant, a law practice or an Australian legal practitioner an opportunity to be heard or make a submission to the Commissioner.'

This statutory exclusion to procedural fairness is somewhat exceptional (the *Byrne* exception). It is noted that generally it is hard to exclude procedural fairness,[43] and it might be expected that it would be harder where there is a human rights charter containing a due process right as there is in Victoria.[44] On this occasion, the amendments were proposed by the Attorney-General because the *Byrne* decision 'is not consistent with the policy intent of the *Legal Profession Act 2004* which was to create a consumer-friendly, efficient and cost effective complaint-handling system'.[45]

The Attorney-General submitted that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the right to a fair hearing were not engaged because 'the complaint-handling system is not a civil proceeding'.[46]

In 2015, new legislation was introduced regulating the legal profession in Victoria and New South Wales (NSW) — namely, the *Legal Profession Uniform Law Application Act 2014* (Vic) (Application Act). Within this large piece of legislation is the *Legal Profession Uniform Law* (Vic)[47] (Uniform Law), which sets out the LSC's[48] current complaints-handling process. It does this in three clear and separate stages: preliminary assessment; investigation or dispute resolution; and determination. The Uniform Law specifies when submissions are to be invited — notably, not at the preliminary assessment stage of complaint handling but at the latter two stages.[49]

The Uniform Law, then, has maintained the *Byrne* exception.[50] But the exception may be considered unjustified by those unfamiliar with the history of the legislation and the *Byrne* decision and in a context where there are multiple express references to procedural fairness.[51] So what is the purpose of procedural fairness? And is that purpose of such import to trump all other objectives of a regulator? Should the *Byrne* exception inserted into the LPA (and now in the Uniform Law) stand forevermore?

The purpose of procedural fairness

Is a purpose necessary?

There is no clear or set purpose for procedural fairness in Australian law. As noted by Groves, this is not necessarily a problem because other administrative law doctrines operate without a clear purpose.[52] Indeed, when and where procedural fairness applies is determined not by the purpose for procedural fairness but, rather, by whether the relevant decision directly affects an individual's interests. That said, in the context of regulation, where there are multiple objectives and considerations at play in decision-making, understanding the rationale for procedural fairness is valuable for at least three reasons.

First, regulatory decision-makers are not necessarily lawyers and an understanding of why procedural fairness applies will assist them in deciding whether and how to apply it.[53]

Secondly, regulation and regulatory power may be spread across and within organisations. Thus, it is hoped that improved clarity and understanding will promote consistency in decision-making. Consistency, like fairness, is also an important public law value.[54] Thirdly, a clear purpose for procedural fairness could help to explain when and why individual rights to fairness should trump other regulatory considerations and objectives, such as effectiveness and efficiency.

Case law

The purpose of the doctrine of procedural fairness is 'unsettled' in Australian administrative law.[55] While various rationales have been offered within the case law, there has been no set or accepted justification for the doctrine.[56] Indeed, as noted by Groves in his recent article about the unfolding purpose of fairness, the '[c]ourts have traditionally shied away from open discussions of the possible functions of fairness and fair procedures'.[57] That said, some judges have commented on the justifications for procedural fairness. The following dicta from Gageler J of the High Court is notable:

> Justifications for procedural fairness are both instrumental and intrinsic. To deny a court the ability to act fairly is not only to risk unsound conclusions and to generate justified feelings of resentment in those to whom fairness is denied. The effects go further. Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice.[58]

Other justifications have been offered by judges that, like Gageler J, also recognise a mixture of purposes for procedural fairness.[59]

The reference to instrumental and intrinsic justifications for procedural fairness by Gageler J alludes to the debate about the basis for procedural fairness.[60] These justifications were expressly discussed in the English case of *R (Osborn) v Parole Board*[61] (*Osborn*), which concerned whether or not the Parole Board should hold an oral hearing. The Court of Appeal found that the purpose concerned the utility of the procedure for better decision-making and decided that an oral hearing was not required.[62] However, on appeal to the Supreme Court, Lord Reed acknowledged that, while utility is an important virtue of procedural fairness, there are two other important values that justified an oral hearing: first, the avoidance of a sense of injustice and the dignitarian ideal (see below at 'Dignitarian approach');[63] and, secondly, the rule of law and the 'importance of promoting a sense of congruence between the decision-maker and the affected person in the decision-making process'.[64]

It is clear, then, that the courts and judges are able to articulate a purpose for procedural fairness, but these are mixed and somewhat contested. What is also clear is that purpose can and does drive results, as it did in *Osborn*, where, ultimately, an oral hearing was required by the law. The purpose of procedural fairness is part of the reason for its application; there are good arguments as to why providing reasons for procedural fairness is also required by fairness.[65]

Philosophical justifications

There are, as identified by Holloway, 'at least five different' justifications for procedural fairness.[66] Chief Justice French (as he then was) claims that these rationales are compatible with all contexts — courts and administrators alike.[67] Two of these seem to dominate the current thinking of scholars and judges — namely, the dignitarian approach and the utilitarian justification.[68] As noted above, the English case of *Osborn* explicitly dealt with these two justifications and it was the values-based approach that seemed to tip the balance.[69] These two justifications will be considered next.

Dignitarian approach

One of the main and early advocates of the dignitarian approach is Jerry Mashaw from Yale Law School. He argues about the importance of a dignitarian rationale for due process in the context of the US Constitution.[70] His analysis is therefore within a rights-based context and discourse — a context that may differ from regulation and regulatory schemes. He writes:

> Although we cannot avoid consulting our feelings or intuitions as a source of ideas about procedural values, in the end our effort is to discover (or to construct) the process ideals that define a particular liberal-democratic constitutional culture.[71]

This is an important point. It situates the debate within the legal framework within which the doctrine applies as well as reflecting ideals and values. But what is required in a regulatory context? At base, these are effectiveness, efficiency and values that include fairness, justice and accountability.[72] Dignity fits within a regulatory context, but it is one consideration (albeit an important consideration) among many.

Another advocate of the dignitarian approach is TRS Allan. He argues that fair procedures have more than instrumental value and have some independent and intrinsic values.[73] He demonstrates this with the example of providing reasons, arguing that this does not necessarily affect a decision but allows people to understand their treatment and decide how to respond as a 'conscientious citizen'.[74] This is similar to how Jeremy Waldron approaches this matter.[75] He explains dignity as a 'status-concept'.[76] In his view, procedures that recognise an individual as 'capable of self-control, with a good sense of their own interests, and an ability to respond intelligently to its demands respects the dignity of the individual'.[77]

Rundle takes this further and argues that the dignitarian foundation for natural justice and the rules of procedural fairness should take precedence over any utilitarian justification.[78] This is because dignitarian approaches 'contribut[e] to an understanding of the exercise of administrative authority as a *relationship* between those who possess government power and those who are subject to it'.[79] This is important because, in her view, it has significance for how we 'think about conditions of authority in the contemporary administrative state more generally'.[80] Utilitarianism, by contrast, is concerned with outcomes and not relationships — it is not 'oriented towards' the experience of the subject who has 'no power to direct the outcome of the repository's exercise of authority'.[81]

There are at least two responses that can be made from the regulatory literature about Rundle's argument that the dignitarian approach should take precedence. First, it is hard to reconcile with a regulatory context where regulatory power can be dispersed and exercised through a number of agents who may or may not be recognised as part of the government.[82] Secondly, there are occasions when regulators are 'captured' by the very persons they are attempting to regulate.[83] When this occurs, it is not the case that the subject has 'no power' to direct the outcome of a decision. Indeed, it may be the regulator and decision-maker that has little or no power.[84]

Dignity and respect *are* important in the regulatory context. As noted by Freiberg:

> *How* people are treated *can change* their attitudes, or motivational postures, towards authorities. Where regulatees are treated in a procedurally fair manner they are more likely to *comply*.[85]

Similarly, as noted by Groves, studies have shown that when a person *perceives* that they have been treated fairly they are more likely to change their behaviour.[86] He calls this the 'fairness effect' and posits that the rationale for fairness may well be in its purpose.[87]

Couched this way, there is a clear link between dignity and respect and also utilitarian and regulatory purposes.

Utilitarian justifications

DJ Galligan mounts a powerful critique of the dignitarian approach in his book on due process and fair procedures.[88] In brief, Galligan asserts that:

> [p]rocedures are instruments for fair treatment; they are inherently neither fair nor unfair, but take on a quality of fairness to the degree that they are conducive to a person being treated properly according to authoritative standards and the values which ground such standards.[89]

He considers that any account of procedural fairness which emphasises the inherent value of procedural rules to the 'neglect of their instrumental role' is erroneous.[90] Indeed, he claims that whatever non-instrumental value they have is subsidiary to their instrumental role.[91]

Justice Edelman notes that the utilitarian rationale is 'perhaps the most commonly advanced' alternative philosophical basis for the rules of procedural fairness.[92] His Honour explains that this rationale for procedural fairness 'is that better procedure will be more likely to lead to a better result'.[93] He also notes that 'a utilitarian calculus is something about which Parliament is well suited to engage, but that a court should only ever deal with principle'.[94] This insight is relevant to regulation and regulatory schemes created by legislation. Where regulatory schemes are created by Parliament, it may be that the utilitarian rationale for procedural fairness is more suited.[95]

Indeed, Nettle JA in *Byrne* found 'practical merit' in providing lawyers with an opportunity to be heard at the pre-investigation stage of the complaint-handling process. His Honour explained it as follows:

> there is practical merit in providing the solicitor with an opportunity to make a submission or adduce facts to the commissioner before the commissioner determines that the complaint is a disciplinary complaint which needs to be investigated. The right to be heard at that stage affords the solicitor the opportunity to head off the complaint *in limine*, by persuading the commissioner not to treat it as a disciplinary complaint or to dismiss it or not proceed with it under [the LPA].[96]

Put this way, the *Byrne* procedural fairness step had instrumental and utilitarian purposes. It could have assisted in the effective and efficient processing of complaints. Accordingly, at least on paper, procedural fairness and regulatory objectives were consistent.

Exclusion of procedural fairness

Generally, procedural fairness is difficult for parliaments to exclude.[97] The courts require clear and express words of exclusion in a statute before they will accept that Parliament intended to exclude procedural fairness.[98] Parliament too is often reluctant to exclude procedural fairness — for obvious reasons.[99] However, as suggested by Groves, when procedural fairness is excluded these instances may 'shed light' on the purpose of procedural fairness.[100]

In *Byrne*, the Victorian Government moved an amendment to the LPA for the following reasons:

> [The *Byrne* decision] has an adverse impact including that:
>
> the commissioner may be perceived as *biased* in favour of practitioners by providing practitioners (and not complainants) with the right to make submissions on complaints and in making a decision whether to accept a complaint or dismiss it without reference to the complainant;
>
> practitioners may make *full submissions* on the content of the complaint rather than the preliminary issue of how the commissioner should deal with it, in effect *rehearsing* their arguments for later;
>
> the complaints-handling *process will take longer*, have an adverse impact on *efficiency* and will be more *costly*;
>
> the process will not *add value* to the system, as practitioners are *already given the right* to make full submissions as part of the investigation of a complaint.[101]

There are numerous reasons identified here for excluding procedural fairness. They mostly concern the utility, or lack thereof, of the *Byrne* procedural fairness step. This is contra the views of Nettle JA and the potential he saw for procedural fairness to assist in the efficient and effective handling of complaints. It demonstrates how utility is very much in the 'eye of the beholder'. But, given that utility concerns practical and instrumental values, it is surely more appropriately adjudged by those who administer it?

Justice Edelman has argued that Parliament is more suited to assessing the utility of a procedural fairness step. Indeed, the reasoning above could be described as an example of Parliament engaging in a 'utilitarian calculus'.[102] That is not to say that the arguments for the *Byrne* exclusion were without values. The first consideration above concerns bias towards lawyers to the exclusion of consumers — this concerns equality between the affected parties (and even rule of law considerations such as those put in *Osborn* about creating a sense of congruence between the decision-maker and the affected parties).

Final observations

The *Byrne* decision had a significant impact on the office of the LSC.[103] This was arguably out of proportion to the issue at hand — the first step in the complaint-handling process about lawyers. It raised for consideration the purpose of procedural fairness and whether and how that fits with the objectives of regulation. While the objectives of regulation are somewhat settled and concern effectiveness and efficiency, the rationales offered for procedural fairness are numerous and variable. They are nonetheless important considerations because they can determine outcomes and assist in explaining those outcomes.

The most fitting justification for procedural fairness in a regulatory context concerns utility and how procedural fairness assists the regulatory regime meet its objectives. The Victorian Court of Appeal in *Byrne* decided that the LPA imposed a requirement that procedural fairness is required at the pre-investigation stage of the complaint-handling process about lawyers. Justice Nettle thought that this had 'practical merit' and therefore utility. It was part of the Court's reasons for deciding that procedural fairness was implied by the LPA. Viewed this way, the purpose of procedural fairness is not necessarily incompatible with regulatory objectives.

Whether or not the purpose of procedural fairness is compatible with regulation and regulatory objectives also depends on perspective. The LSC found that the *Byrne* additional procedural fairness step 'elongated' the complaint-handling process.[104] This detrimentally affected the efficient and effective processing of complaints[105] — a key objective of the LSC.[106] The regulator's perspective is particularly relevant when the

underlying purpose of procedural fairness concerns utility and practical considerations for better decision-making. The lens through which procedural fairness and its rationales are appraised therefore has implications for the purpose and role of procedural fairness.

The *Byrne* exception and the exclusion of procedural fairness at the pre-investigation stage of the complaint-handling process about lawyers stands for now. Whether utility requires the *Byrne* exception to stand forevermore depends on the utility that procedural fairness may or may not serve the legislative scheme and regulatory framework. It also depends on the perspective from which it is assessed. Accordingly, further reflection (and consultation with the relevant stakeholders) on this issue in the future may justify an amendment to the *Byrne* exception.

Endnotes

1 *Professional Standards and Legal Profession Acts Amendment Act 2008* (Vic) s 23. This Act was assented to on 11 December 2008 and commenced the day after it was assented.
2 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2008, 4308 (Rob Hulls, Attorney-General). The second reading speech details the reasons for the amendments.
3 *Legal Profession Act 2004* (Vic) s 1.1.1.
4 Ibid Ch 4.
5 Ibid s 4.2.1 (2).
6 Ibid Pt 4.4.
7 (2008) 19 VR 612.
8 I say 'unexpectedly' because procedural fairness was only raised as a ground on appeal: *Byrne* (2008) 19 VR 612, 633 [73].
9 The terms 'natural justice' and 'procedural fairness' are generally used interchangeably: see *Kioa v West* (1985) 159 CLR 550, 585 (Mason J). There are good arguments as to why the term 'procedural fairness' fits better with bureaucracy and regulation and is the preferred term here: see Westlaw AU, *The Laws of Australia*, 2 Administrative Law, [2.5] Judicial Review of Administrative Action: Procedural Fairness, [2.5.10] (1 March 2014).
10 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2008, 4307–9 (Rob Hulls, Attorney-General).
11 The case of *Byrne* and this article concern the hearing rule of procedural fairness and do not touch on the bias rule.
12 Matthew Groves 'The Unfolding Purpose of Fairness' (2017) 45 *Federal Law Review* 653.
13 While there is a lot of case law and analysis of the doctrine of procedural fairness in the context of commercial regulation and migration law, there is a dearth of material in the specific context of the regulation of lawyers. See, for example, Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 129 (2015); Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003); Joanna Bird, 'Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 *Melbourne University Law Review* 739; Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92. Yeung also notes that there is not much discussion in the regulatory literature about procedural fairness: Karen Yeung, *Securing Compliance — A Principled Approach* (Hart Publishing, 2004) 46.
14 See generally Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2012–2013) 39 *Monash University Law Review* 285.
15 See, for example, Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) 1; Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 2.
16 Commissioner for Better Regulation, *Victorian Guide to Regulation: A Hand-Book for Policy Makers in Victoria* (2016) 1 (emphasis added).
17 Section 4.1.1 of the LPA set out the objectives of the complaints (and discipline) chapter. This included to promote and enforce the competence, honesty and professional standards of the legal profession: s 4.1.1(b).
18 This is something with which most regulatory scholars agree: See, for example, Baldwin, Cave and Lodge, above n 15, 2–4; Freiberg, above n 15, 2–4; Yeung, above n 13, 30.
19 Arie Freiberg, *The Tools of Regulation* (The Federation Press, 2010) 283–5.
20 Ibid 286.
21 Freiberg, above n 15, 482.
22 Ibid 157–69.
23 Yeung, above n 13, 36.
24 *Byrne* (2008) 19 VR 612, 638 [90].

[25] The LSC had two other key functions under the LPA — namely, education of the community; and education of the legal profession: LPA ss 6.3.2(b)–(c).
[26] LPA s 6.3.2(a).
[27] See below, 'Exclusion of procedural fairness'.
[28] While the LPA was enacted in 2004, most of the LPA did not commence operation until December 2005: LPA s 1.1.2.
[29] Under s 4.4.9 of the LPA, the LSC could refer disciplinary complaints to the LIV for investigation.
[30] *Byrne v Marles and Law Institute of Victoria Limited* [2007] VSC 63.
[31] *Byrne* (2008) 19 VR 612, 638 [90].
[32] Ibid 638 [87].
[33] Ibid 639 [93].
[34] Ibid 634 [78]. The Court also referred to the other line of authorities supporting the application of procedural fairness to preliminary decisions in a multi-stage process: at 634 [77].
[35] Ibid.
[36] *Byrne* (2008) 19 VR 612, 638 [88].
[37] Ibid.
[38] Ibid 638 [89] (citations omitted; emphasis added).
[39] See LSC, *Annual Report* (2008) 35, 39; LSC, *Annual Report* (2009) 16–17, 19, 54, 109, 112.
[40] LSC, *Newsletter*, Ed 1 (April 2009).
[41] Ibid.
[42] LPA s 6.3.2(a).
[43] See generally Groves, above n 14, 285.
[44] The *Charter of Human Rights and Responsibilities Act 2006* (Vic) commenced operation on 1 January 2008.
[45] Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2008, 4308–9 (Rob Hulls, Attorney-General).
[46] Ibid 4307. But see subsequent discussions about breadth of the 'fair hearing' right in Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Hart Publishing, 2017) 117. Note also that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) has no application to the Uniform Law: Application Act s 6.
[47] The Uniform Law is Schedule 1 to the Application Act. Section 4 of the Application Act provides that the Uniform Law applies as if it were an Act and may be referred to as the *Legal Profession Uniform Law* (Vic).
[48] The LSC was renamed the Victorian Legal Services Commissioner or Victorian Commissioner by the Application Act but for ease of reference will be continued to be called the LSC here. See s 3(1) of the Application Act.
[49] Section 277(4) of the Uniform Law provides that there is no right to be heard before a decision to close a complaint following preliminary assessment. Section 279(1)(a) provides that the designated local authority may (but not must) after receiving a complaint notify a respondent. It is only after a decision is made to investigate a complaint and/or make a determination that the right to make submissions is enlivened: at ss 279(b)–(c).
[50] This is in accordance with the LSC's submission on the draft Uniform Law: Legal Services Commissioner, *National Legal Profession Reform — Response to Taskforce Discussion Paper*, National Legal Services Ombudsman, January 2010, 7. I also assisted with this submission.
[51] See, for example, ss 279, 299(2), 319.
[52] Groves, above n 12, 667. Groves refers to Stephen Gageler's paper on jurisdictional error in support of the view that doctrines can competently operate without a clear purpose: see Gageler, above n 13.
[53] Similarly, an understanding of the doctrine's purpose can help to explain court decisions. See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 408.
[54] Freiberg, above n 19, 286–91.
[55] Groves, above n 12, 653.
[56] See, generally, Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate Publishing, 2002). Holloway, writing in 2001, noted that the doctrine has suffered from under-theorisation: at 294.
[57] Groves, above n 12, 668.
[58] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 107 [186] (citations omitted).
[59] See, for example, *International Finance Trust Co Ltd v Crime Commission (NSW)* (2009) 240 CLR 319 (Heydon J), where Heydon J describes four justifications for hearings: 1. adversarial system requires it; 2. risks unsound conclusions (injustice and inefficiency); 3. respects dignity; 4. argument from political liberty. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 95 [154]–[155], where Heydon J refers to effectiveness, efficiency and economy as well as a restatement of Megarry J's quote in *John v Rees* [1970] Ch 345, 42, about the resentment a person may feel if they are not given an opportunity to participate in decision-making about them.
[60] See Paul Craig, *Administrative Law* (Sweet & Maxwell, 7th ed, 2012) 340. While Craig separates these two concepts, he does so for explanatory reasons.
[61] *Osborn* [2014] AC 1115.
[62] Ibid 1148 [66].
[63] Ibid 1149 [68].

64 Ibid 1150 [71].
65 See, for example, Carol Harlow and Richard Rawlings, *Law and Administration* (Butterworths, 3rd ed, 2009) 630–5.
66 Holloway, above n 56, 286–94. The five are in his order as follows: 1. instrumental (utilitarian); 2. rule of law; 3. libertarian or rhetorical; 4. dignitarian; 5. participatory or republican purpose.
67 Robert S French, 'Procedural Fairness — Indispensable to Justice?' (Sir Anthony Mason Lecture, The University of Melbourne Law School, 7 October 2010) 3.
68 See, for example, James Edelman, 'Why Do We Have Rules of Procedural Fairness?' (2016) 23 *Australian Journal of Administrative Law* 144; Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position' (2016) 23 *Australian Journal of Administrative Law* 164; *Osborn* [2014] AC 1115.
69 Aronson, Groves and Weeks, above n 53, 407 [7.45].
70 See, generally, Jerry L Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985).
71 Ibid 171.
72 Freiberg, above n 15, 482.
73 TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497, 498.
74 Ibid 499.
75 See *Osborn* [2014] AC 1115, 1149 [68], where Lord Reed refers to an unpublished paper by Waldron with approval.
76 Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) *The Cambridge Law Journal* 200, 201.
77 Ibid 200.
78 Rundle, above n 68, 167.
79 Ibid 165.
80 Ibid.
81 Ibid 167.
82 See concept of 'regulatory space' in Freiberg, above n 15, 99–101. But see Rundle, above n 68, 173. Rundle does acknowledge that new conditions for the exercise of government power may lead to different debates than those entertained by her.
83 See Baldwin, Cave and Lodge, above n 15, 43–5. See also Freiberg, above n 15, 492.
84 Freiberg, above n 15, 492–3. I acknowledge, however, that regulatory capture is complex and is not suggested to apply here.
85 Ibid 492 (emphasis added).
86 Groves, above n 12, 675–9. See also Toni Makkai and John Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20 *Law and Human Behaviour* 83.
87 Groves, above n 12, 675–9.
88 DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996).
89 Ibid xviii.
90 Ibid 93.
91 Ibid.
92 Edelman, above n 68, 148.
93 Ibid.
94 Ibid 152. Edelman says this in the context of discussing an area of administrative law where 'legal doctrine would not fit a conception of principle based on natural justice', which concerns where an appeal would not be allowed because the ultimate decision would be no different.
95 It is notable that following the case of *R v Osborn* the English legislature reinstated the utilitarian rationale. See Rundle, above n 68, 172 n 48.
96 *Byrne* (2008) 19 VR 612, 637 [86].
97 See, generally, Groves, above n 14, 285.
98 See *Kioa v West* (1985) 159 CLR 550, 584 (Mason J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
99 Groves, above n 14, 318.
100 Groves, above n 12, 659–62.
101 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2008, 4307–9 (Rob Hulls, Attorney-General) 4309 (emphasis added).
102 Edelman, above n 68, 152.
103 See LSC, *Annual Report* (2008) 35, 39; LSC, *Annual Report* (2009) 16–17, 19, 54, 109, 112.
104 LSC, *Annual Report* (2009) 16–17, 19.
105 Ibid.
106 LPA s 6.3.2(a).