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CONTENTS

Contemporary challenges in merits review: The AAT in a changing Australia

The Hon Justice David Thomas*

The introduction of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), together with the *Ombudsman Act 1976* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Freedom of Information Act 1982* (Cth), has long been recognised as signifying a shift in the relationship between the public and the government.[1] Forty-three years since the inception of the Administrative Appeals Tribunal (AAT), merits review is still 'entirely a creation of statute' and is not entrenched in the *Constitution*.[2] Despite this, it is safe to say that independent review of government decisions has been cemented as a fundamental aspect of our democratic society.

The development of the statutory objectives of the AAT reflects the maturation of the underlying jurisprudential values guiding the delivery of merits review. Prior to the amalgamation of the AAT with the former Migration and Refugee Review Tribunals and the Social Security Appeals Tribunal, the objective of all four tribunals was *simply* to provide a mechanism for review that was fair, just, economical, informal and quick.[3] I say 'simply' with hesitation, because, of course, there is nothing simple about it. However, the particular challenges this objective entails will not be the focus of this lecture. The statutory objective as it now stands in s 2A of the AAT Act provides:

> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:
>
> (a) is accessible; and
>
> (b) is fair, just, economical, informal and quick; and
>
> (c) is proportionate to the importance and complexity of the matter; and
>
> (d) promotes public trust and confidence in the decision-making of the Tribunal.

It is within the context of the last objective that we now face particular challenges which expose the inherent difficulty of balancing the interests of the individual and the interests of the public. Although on the face of it the sheer number of lodgements of applications for review before the AAT may indicate a healthy awareness amongst the community for exercising the right to challenge certain government decisions, in recent times the significance of the ability of people to do so and the role the AAT plays in this process seem to have been taken for granted or, perhaps, misunderstood.

To borrow a phrase from Sir Anthony Mason, the 'blancmange-like quality of the expression "merits review"'[4] does not adequately reflect the complexities inherent in the function the AAT undertakes when reviewing a decision on the merits. In particular, and in the context of this discussion, at the heart of merits review may be the choice between a number of legally correct decisions. In cases where the AAT is presented with such a choice, its task is to reach what it considers to be the *preferable* decision in the circumstances. It is this

* Justice Thomas is the President of the Administrative Appeals Tribunal. This is an edited version of the AIAL National Lecture on Administrative Law, delivered at AIAL National Administrative Law Conference, Canberra, on 18 July 2019.

1 See, for example, Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-five Year Mark* (The Centre for International and Public Law, the Australian National University, 1998) 1.

2 Justice Duncan Kerr, 'Challenges Facing Administrative Tribunals — The Complexity of Legislative Schemes and the Shrinking Space for Preferable Decision Making' (The National Lecture, Council of Australasian Tribunals Victoria Twilight Seminar, Administrative Appeals Tribunal, Melbourne, 18 November 2013).

3 See *Migration Act 1958* (Cth) ss 353 and 420; *Social Security (Administration) Act 1999* (Cth) s 141, as at 20 June 2015.

4 Sir Anthony Mason, 'Judicial Review: A View from Constitutional and Other Perspectives' (2000) 28(2) *Federal Law Review* 331, 333.

requirement to exercise a discretion in selecting the preferable outcome which is unique to merits review.

In some circumstances, there is an additional layer of complexity in exercising this discretion. Some decisions may involve government policy; others may involve a determination of community expectations. For example, in reviewing decisions to cancel visas, or refusals to revoke cancellations of visas, on character grounds under the *Migration Act 1958* (Cth),[5] a relevant consideration for the AAT member is the expectations of the Australian community. To what extent — and how — should the AAT be applying policy and attempting to encapsulate community expectations in its decision-making?

I consider this to be a contemporary challenge because of the level of attention these cases seem to have received in the media, which may partly be reflective of the approach of the community to decision-making bodies like the AAT. Deputy President Humphries has previously commented on the apparent wane in public trust in our social institutions and the need to demonstrate the AAT's relevance and credibility.[6]

Before I discuss the challenges the AAT faces in the task of exercising a discretion in choosing what is the preferable decision, it is worth reflecting on how the function of the AAT and its particular brand of merits review evolved in order to provide some context to the issues we face today.

The evolution of merits review

Every student and practitioner of administrative law will be familiar with the Commonwealth Administrative Review Committee, more commonly known as the Kerr Committee, and its seminal report.[7] A reading of the terms of reference set out at the beginning of the report belies the Kerr Committee's perception of its task and its subsequent recommendations, which went well beyond these terms and came to have quite far-reaching consequences. In particular, the report posited the foundational concepts of how the function of merits review was to be conducted and the appropriate repository of that function.

The Kerr Committee's findings were prefaced by the recognition that judicial review alone could not adequately provide for review of administrative decisions.[8] This was particularly so in terms of the remedies offered by judicial review, a survey of which led the Kerr Committee to conclude that:

> this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldly and unnecessary. The pattern is not fully understood by most lawyers; the layman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy ...[9]

The absence of any general legislative requirement to provide a statement of reasons for administrative decisions was also seen to be inhibitive of the courts' ability to correct an improper exercise of power or errors of law.[10] In addition, the Kerr Committee was of the view that, for constitutional reasons, the function of reviewing administrative decisions on their merits should not be conducted by a court of law. Citing the effect of Ch III of the *Commonwealth of Australian Constitution Act 1990* (Cth) (the *Constitution*) as interpreted in *The Queen v Kirby; Ex parte The Boilermakers' Society of Australia* (the *Boilermakers case*)[11]

5 *Migration Act 1958* (Cth) ss 501, 501CA.
6 Gary Humphries, 'Feeling the Heat: Challenges for 21st Century Tribunals' (2018) 91 *AIAL Forum* 61.
7 Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report* (Parliamentary Paper No 144, August 1971).
8 Ibid 1.
9 Ibid 20.
10 Ibid 30.
11 (1956) 94 CLR 254.

and subsequently upheld by the Privy Council,[12] the Kerr Committee emphasised that courts may only engage in those functions which are strictly judicial or are incidental to the exercise of judicial power, which, conversely, meant that administrative bodies could not exercise judicial functions.[13]

It was also recognised by the Kerr Committee that the increase of powers and discretions conferred on ministers, officers and statutory authorities[14] made it essential for 'corrective machinery' to be in place to remedy administrative error and 'improper exercise of power'.[15] Although some specialist tribunals already existed, it was noted that administrative review was not the general rule.[16] Other democratic avenues for resolving possible injustices, such as members of Parliament taking up the issue with the relevant Minister or department, were also considered inadequate because they depended upon concessions and did not ensure an independent review.[17] It was in this context that the Kerr Committee observed that 'the basic fault of the entire structure is … that review cannot as a general rule … be obtained "on the merits" — and this is usually what the aggrieved citizen is seeking'.[18]

In terms of the specialist tribunals that were already in existence at the time, there were no prescribed procedures to be followed, nor was there an overseeing authority which was supervising the adoption of rules and procedures. Each tribunal determined its own procedures having regard to what it considered to be suitable and in line with the rules of natural justice. Often, the Kerr Committee noted, procedures were settled ad hoc in a particular case.[19]

An interesting feature of the Kerr Committee's recommendations is that, while it recognised that judicial review alone was not fit for purpose, it still drew upon aspects of the judicial method when setting out its vision of how a new administrative review body would operate. There would be provision for, among other things, the exchange of documents, legal representation, the power to issue summonses, evidence to be given on oath and the cross-examination of witnesses.[20] It has been said that the Kerr Committee was 'overly influenced by the judicial model'[21] and, indeed, the Committee's recommendations were predicated on the recommendation that the new tribunal should be made up of 'chairmen' who were legally qualified, because, it was thought, people with legal experience conduct proceedings more effectively and fairly than others.[22]

In terms of membership, the Kerr Committee suggested that it comprise a judge plus two other members: one an officer of the department or authority that made the decision under review; the other a layperson drawn from a panel of people who had been chosen for their character and experience in practical affairs.[23] Having a member who was from the primary decision-making government department would, the Committee contended, ensure that the particular knowledge of the administration would be available.[24] As controversial as it is to suggest that an officer from the relevant government department should be included on the review panel, the point to take away from this is that members were to be chosen for their

12 *The Attorney-General for the Commonwealth v The Queen* (1957) 95 CLR 529.
13 Commonwealth Administrative Review Committee, above n 7, 22.
14 Ibid 5.
15 Ibid 107.
16 Ibid 5.
17 Ibid 8.
18 Ibid 20.
19 Ibid 26.
20 Ibid 87–9 and 97–9.
21 Robin Creyke, 'Tribunals: "Carving Out the Philosophy of their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19, 24.
22 Commonwealth Administrative Review Committee, above n 7, 96.
23 Ibid 86–7.
24 Ibid 86.

expertise in a particular field,[25] whether it be areas such as law, medicine, aviation or public administration.

The AAT was established a few years after the delivery of the Kerr Committee's report and the final report of the Bland Committee.[26] As Kirby J noted in *Shi v Migration Agents Registration Authority*[27] (*Shi*):

> it is essential to appreciate the radical objectives that lay behind the enactment of the AAT Act … The proposal to create such a tribunal, with the power to make decisions 'on the merits', represented a bold departure from the pre-existing law, with its focus on constitutional and statutory 'prerogative' remedies of judicial review.[28]

Although it was definitely a 'bold departure', the AAT Act was relatively silent in terms of the procedures the AAT should adopt and has also never defined the function of 'merits review'. The nature of the AAT's powers and functions was developed through its early decisions and by the courts.

Given the passage of time since the establishment of the AAT, it is perhaps not surprising that its relevance is being discussed and its once unique and groundbreaking role is not as appreciated as it once was.

The challenge of staying relevant

The requirement for the AAT to promote public trust and confidence in its decision-making was added to the AAT's statutory objectives by the *Tribunals Amalgamation Act 2015* (Cth). In the Explanatory Memorandum to the Tribunals Amalgamation Bill 2015, it was stated that this objective would reiterate 'the importance of the Tribunal continuing to be, and to be seen to be, an independent forum' for review of government decisions.[29]

Now, more than ever, it is vital that the AAT and similar bodies demonstrate their relevance not only to the public but also to those government departments, agencies and ministers from whom the reviewable decisions generate. I say this because the AAT can and should play a role in improving government decision-making.[30] The capacity for an independent review body to have a normative effect on improving the quality of administrative decision-making was recognised as a potential benefit by the Kerr Committee,[31] although its report did not explore that contention any further. Despite the difficulty in measuring any normative effect in an empirical sense, the AAT's role in upholding accountability and advocating for good government more broadly is essential to instilling public trust and confidence in its decision-making.[32]

The AAT's role in conducting merits review

The AAT Act has never defined the term 'merits review' or explicitly prescribed in detail the nature of the AAT's role in terms of criteria and rules to be followed.[33] A defining feature of merits review is the ability for decision-makers upon review to consider the entirety of the

25 Ibid 96.
26 Committee on Administrative Discretions, *Final Report of the Committee on Administrative Discretions* (Parliamentary Paper No 316, 1973).
27 [2008] HCA 31.
28 Ibid [30], [32] (Kirby J).
29 Explanatory Memorandum, Tribunals Amalgamation Bill 2015 [118].
30 See Explanatory Memorandum, Tribunals Amalgamation Bill 2015 [15], where it was stated that 'A strong, impartial and effective Tribunal … would strengthen government decision-making'.
31 Commonwealth Administrative Review Committee, above n 7, 3–4.
32 Narelle Bedford, Submission to the Honourable Ian Callinan, *Statutory Review of the Tribunals Amalgamation Act 2015* (24 August 2018) 4.
33 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 154 (Deane J).

administrative decision, which may include new evidence. It is now widely understood that the AAT must reach the correct or preferable decision based upon the evidence before it.

As mentioned earlier, the nature of the AAT's task was developed through the early decisions and court judgments. In *Re Becker and Minister for Immigration and Ethnic Affairs*[34] (*Becker*), Brennan J, then President of the AAT, considered an application for review of a decision to deport Mr Becker from Australia. Justice Brennan identified that it was his task to determine whether, 'on the facts of the case and having regard to any policy considerations which ought to be applied, is the Minister's decision the right or preferable decision?'[35] This function was later endorsed by the Full Federal Court in *Drake v Minister for Immigration and Ethnic Affairs*[36] (*Drake*) and then by the High Court in *Shi*. In *Drake*, Bowen CJ and Deane J stated that the question for the AAT is not whether the decision was the correct or preferable one on the material before the original decision-maker but whether the decision is the correct or preferable one on the evidence before the AAT.[37]

The temporal nexus is significant, because it is the AAT's ability to consider materials that were not before the original decision-maker that places it in a better position to be able to reach the correct or preferable decision. As seems evident from some media reporting, this point appears to create some confusion in understanding the decision-making process and, consequently, AAT decisions. The focus of the AAT merits review is not whether the original decision-maker was wrong or at fault in making the decision. That is not necessarily a relevant issue to consider. This temporal nexus means that the AAT may be, and indeed often is, considering a different case from that which confronted the original decision-maker.

In the recent High Court matter of *Frugtniet v Australian Securities and Investments Commission*[38] (*Frugtniet*), Kiefel CJ and Keane and Nettle JJ reiterated that this does not mean the AAT is 'at large'[39] in terms of how it determines the correct or preferable decision. Subject to a contrary statutory intention, the relevance of a particular piece of evidence is key to determining whether the AAT takes it into account.[40] A similar point was made in *Minister for Immigration and Citizenship v Li*[41] (*Li*) in the context of a consideration of legal unreasonableness, in which French CJ explained:

> After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusions about the correct or preferable decision. However, the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.[42]

So there are clear boundaries to the information which should be considered by the AAT.

Role of policy

Occasionally, the exercise of the AAT's discretion, and the balancing it entails, may involve an elucidation and application of government policy. In *Re Becker* Brennan J found that, as the AAT is empowered to undertake merits review, jurisdiction is conferred on it to look at not only the facts of the matter but also any lawful policy that has been applied or ought to

34 (1977) 1 ALD 158.
35 Ibid 162 (Brennan J).
36 (1979) 2 ALD 60.
37 Ibid 68 (Bowen CJ and Deane J).
38 [2019] HCA 16.
39 Ibid [14] (Kiefel CJ, Keane and Nettle JJ).
40 Ibid [15].
41 (2013) 249 CLR 332.
42 Ibid 351 (French CJ).

be applied.[43] But the most guidance on the issue of the consideration of policy is found in *Drake*, and *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[44] (*Re Drake (No 2)*).

Mr Daniel Drake arrived in Australia from the United States of America and was granted permanent residency. Some 10 years after his arrival, he was convicted on three drugs charges and was sentenced to 12 months' imprisonment. Upon his release, the Minister for Immigration made an order under the Migration Act that Mr Drake be deported from Australia. The AAT affirmed the decision and Mr Drake appealed to the Federal Court, submitting that the importance the AAT attached to a policy statement made by the Minister relating to deterrence of others resulted in a failure of the Deputy President to exercise his own independent judgment.[45]

Chief Justice Bowen and Deane J prefaced their consideration of this issue by outlining the different but related tasks undertaken by a court and a tribunal, noting the AAT is not restricted to considering whether a discretionary power has been validly exercised according to law. Its function is an administrative one. When determining what decision is correct or preferred, it can adjudicate upon the merits of the decision and, in doing so, the propriety of any permissible policy.[46] In terms of the role policy should play in the AAT's determinations, Bowen CJ and Deane J proffered the following:

- Even in cases where the statute does not specify particular criteria or relevant considerations, the AAT is still subject to the same constraints as the original decision-maker.[47]
- In the absence of a statutory preclusion, an administrative decision-maker is entitled to take into account government policy as a relevant consideration. This does not mean, though, that the AAT merely determines whether the decision made conformed with relevant policy.[48]
- The precise role which policy should play is a matter for the AAT itself to determine on a case-by-case basis, and in light of 'the need for compromise, in the interests of good Government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case'.[49]
- If the application of policy to the facts has informed the AAT's decision, it should make it clear that it has considered the propriety of the particular policy and expressly indicate the considerations that led to that conclusion.[50]

Following remittal of the matter to the AAT,[51] Brennan J thoroughly examined the considerations which govern the AAT's adoption of government policy in reaching a decision in a case such as this. The Minister had issued a policy statement setting out his approach, including reference to the best interests of Australia and the types of matters that were to be taken into account in considering whether to make a Deportation Order. Justice Brennan's points may be summarised as follows:

43 (1977) 1 ALD 158, 162 (Brennan J).
44 (1979) 2 ALD 60; (1979) 2 ALD 634.
45 (1979) 2 ALD 60.
46 Ibid 69.
47 Ibid.
48 Ibid 69.
49 Ibid 70.
50 Ibid.
51 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

- Policy can guide the making of decisions and show the sorts of standards and values which the Minister would usually apply. But a policy that seeks to create a fetter by purporting to limit the discretion conferred by a statute would be unlawful. A lawful policy, on the other hand, keeps the range of discretion intact.[52]
- The AAT is as free as the Minister to apply or not apply any lawful policy it chooses.[53]
- If the AAT chooses to apply policy, it is because that policy assists it in reaching the correct or preferable decision in the circumstances of the case.[54]
- There may be cogent reasons for not applying government policy — for example, where injustice would occur in a particular case.[55]
- Ministerial policy is subject to parliamentary scrutiny, and the Minister is responsible to Parliament for the policy the Minister adopts.[56] Administrative policies are best left to be formed and amended on political grounds and within that context.[57]

Justice Brennan identified the nuances which surround the AAT's task in situations such as these, where the AAT must always remain an independent decision-maker. His Honour recognised that the AAT enjoys certain procedural advantages which can result in its findings of fact being different from that of the primary decision-maker.[58] Of course, these procedural advantages as described by Brennan J include the fact that, as AAT decisions are based on the evidence before it, the AAT may be considering a materially different case.

Community expectations

When a consideration of community expectations is specified as a criterion, there is a separate and additional issue to consider. Brennan J's decision in *Re Drake (No 2)* recognised the inherent difficulty of achieving consistency in decision-making where a determination relates to considering people's perceptions of the best interests of the community and how offending conduct can affect those interests.[59]

There has been significant discussion in some media outlets surrounding the AAT's reasons when reviewing decisions to cancel visas, or refusing to revoke cancellations of visas, on character grounds under the Migration Act. Similar to the early deportation decisions which concerned an assessment of what would be in the public interest, these decisions involve taking into account community expectations, often in the context of serious criminal activity.

The terms of reference for the *Statutory Review of the Tribunals Amalgamation Act 2015*, when referring to whether the objective of promoting public trust and confidence in decision-making was being met, included a reference enquiring about the extent to which decisions of the AAT were meeting community expectations. While the term 'community expectations' does not appear in the AAT Act, its inclusion in these terms of reference reflects the contemporary significance of ensuring the AAT generates decisions that are in step with the expectations of the wider public.

52 Ibid 641.
53 Ibid 642.
54 Ibid 643.
55 Ibid 645.
56 Ibid 643.
57 Ibid 644.
58 Ibid 639.
59 Ibid.

Ministerial *Direction No 79* (the Direction)[60] is relevant in the context of the AAT's consideration of visa decisions based on character grounds. 'Expectations of the Australian Community' is listed in the Direction as a primary consideration in determining whether to exercise the discretion to cancel a visa.[61] Subparagraph 9.3(1) of the Direction provides:

> The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to cancel the visa held by such a person. Visa cancellation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not continue to hold a visa. Decision-makers should have due regard to the Government's views in this respect.

In the context of an earlier iteration of this part of the Direction, an observation was made in *YNQY v Minister for Immigration and Border Protection*[62] (*YNQY*) that this was in essence a 'deeming provision' about how the Minister and executive government wish to articulate community expectations, regardless of any objective basis for that belief, and that in substance this consideration is adverse to any applicant.[63] In the more recent case of *DKXY v Minister for Home Affairs*[64] (*DKXY*) the view was expressed that it would be 'plainly incorrect' if the expectations of the community were always to be regarded as adverse to the applicant.[65] Rather, a broader interpretation was preferred — namely, that it is the totality of relevant circumstances which inform the decision-maker's assessment and balancing of the primary and other considerations in the Direction.[66]

The articulation of what community expectations actually are in any given case is problematic. As Former Deputy President Block stated in *Re Jupp and Minister for Immigration and Indigenous Affairs*[67] (*Re Jupp*), the Direction 'assumes (incorrectly) that there is an Australian community which thinks as one'.[68] Such an assumption therefore wrongly assumes that it is easy to discern a homogenous set of community expectations.

How, then, should AAT members approach this task? A statement issued by Downes J, then President of the AAT, in connection with the AAT's decision in *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship*[69] (*VCA*) directly addressed what was considered to be the crux of the nature of discretionary administrative decision-making in cases where there is an obligation to consider community values. Justice Downes elucidated that it is not the 'personal or idiosyncratic' views of the decision-maker that are relevant but, rather, what the decision-maker determines will achieve the preferable decision in accordance with community values.[70] Significantly, whatever the relevant community values identified in a particular case, Downes J relevantly observed:

> [They will not be based on] transient or fashionable thinking. They will not be found in the publications of vocal minorities or the fulminations of the media, motivated by short term considerations and the improvement of circulation or ratings. They will not necessarily reflect the views of individual politicians. Community

60 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (20 February 2018).
61 Ibid para 9(1)(c).
62 [2017] FCA 1466.
63 Ibid [76].
64 [2019] FCA 495.
65 Ibid [30].
66 Ibid [31].
67 [2002] AATA 458.
68 Ibid [7(m)].
69 *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690. Justice Downes also reiterated points made in a decision handed down earlier that day: *Rent to Own (Aust) Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689.
70 [2011] AATA 690 [64] (Downes J and Senior Member McCabe).

> standards will be found in more permanent values. They will be informed in part by legislation of the parliaments, and especially legislation applicable to the decision-making.[71]

I consider the preferred (albeit still difficult) approach is that stated by former Deputy President Block in *Re Jupp*:

> [The reference to what the community would expect in the Direction relates to] middle-of-the-road reasonable members of the Australian community who do not hold extreme views one way or another. And … a further limiting factor … is that one must import into that Australian community, knowledge of the evidence before [the AAT].[72]

Justice Downes in *VCA* went on to say that community values could be discerned from ministerial statements that reflect a broad consensus, as well as the decision-maker's belief based on experience.[73]

Decision-makers do not have any latitude to impose their own personal views; rather, their experience may guide their assessment as to what community values should be considered relevant in a given situation, based upon all of the surrounding circumstances. The starting point to understanding what community expectations are should be the wide range of things put in place by Parliament. Members of Parliament are elected by the community and so are held accountable to the community on a regular basis by the electoral cycle. The election of a member of Parliament in itself is the balancing of the various disparate views of different sections of the community. If, in their actions or decision-making, they cease to reflect community expectations or community values, the democratic process allows the community to change the decision-maker at the next election.

The same cannot be said about a member of a tribunal such as the AAT, who is not elected at the will of the people and so is not accountable in the same direct way. In this context, the laws put in place by Parliament, the international Conventions to which Australia is a party, regulations put in place, and the contents of ministerial directions or official statements are the starting point and will guide the evaluation of what is expected by the community and consequently the exercise of the discretion.

Any focus based on the member's personal view also risks undermining the impartial nature of an AAT member's role.[74] It is the AAT's independence which is such a defining feature and allows it properly to exercise its function of reviewing government decisions.

Justice Downes observed that, although the AAT's establishment heralded an emphasis on notions of individual justice, 'ideals of individual justice do not … replace the demands of good administration'.[75] It is this inherent tension that often underlies criticisms levelled at AAT decisions.

Conclusion

The role of the AAT in promoting accountability in administrative decision-making, while still delivering justice to the individual, should not be understated and is an essential aspect of what the AAT must seek to achieve. In doing so, the AAT is part of a cycle of accountability:

- the public elects members of Parliament on the understanding they are in tune with their interests;

71 Ibid [79].
72 *Jupp and Minister for Immigration and Indigenous Affairs* [2002] AATA 458 [7(m)].
73 [2011] AATA 690 [79] (Downes J and Senior Member McCabe).
74 Madeleine Harkin, 'Balancing the Discretionary Seesaw: Are Community Values an Appropriate Guide for the AAT's "Preferable" Decisions?' (2017) 24(1) *Australian Journal of Administrative Law* 19.
75 [2011] AATA 690 [60] (Downes J and Senior Member McCabe).

- the Parliament enacts laws which reflect Australian values;
- the government makes policies accordingly;
- ministers issue policy statements and directions in line with the requirements of the legislation;
- government decision-makers apply these laws and policies; and
- tribunals undertake merits review of those decisions where a citizen believes the decision is not the correct or preferable decision.

All have an interest in ensuring the public has confidence in this cycle.

Whenever the review includes a consideration of relevant policy, the AAT must be 'fully informed as to the policy and the reasons for it'.[76] In the wide range of matters heard in the AAT, members are often required to interpret the meaning and requirements of legislation and regulations. Generally, the AAT's task is made easier by well-drafted and clear legislation and regulations. The same can be said for policy. Clearly articulated and explicit policy (including ministerial directions) and, importantly, reasons for the policy will enhance the effectiveness of the process — in providing more information and clarity for decision-makers. This is, of course, a good thing.

The latest version of the Direction, for example, is helpfully more specific and explicit in saying that crimes of a violent or sexual nature, particularly against women, children or vulnerable members of the community such as the elderly or disabled, are serious crimes.

Ideally, and particularly in matters of a more adversarial nature, where the primary decision-making body is represented and is actively involved in AAT proceedings, the department's and the government's position should be clearly put forward as part of the submissions made to the AAT.

Other important stakeholders with a responsibility in this process are those who report on AAT decisions. In the context of public discussion, the AAT's position is similar to that of a court. Chief Justice Holmes of the Supreme Court of Queensland has recently written about this,[77] and her points ring just as true for the AAT:

- members cannot defend their decisions;
- the AAT can sometimes become collateral damage during a wider discussion in a different context; and
- media criticism sometimes takes findings out of context.

While healthy and robust discussions about the AAT's decision-making are welcomed, I echo Holmes CJ's plea for criticisms to be better informed. The AAT cannot and does not defend its decisions; rather, the published statement of reasons stands as a full explanation of the AAT's determination in a particular matter. Recently, we have increased the volume of decisions we publish and offer plain English summaries of decisions of interest in our online publication, *The Review*. Improving the accessibility of our decisions is one step along the path to instilling public confidence and trust in our decision-making and ensuring we are transparent in the way in which we conduct our task of merits review.

76 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 162 (Brennan J).
77 Catherine Holmes, 'Declaration of Independence', *The Australian* (Australia), 14 June 2019.

The Kerr Committee acknowledged that 'different governments will make different decisions about the areas in which the administration or application of settled policies will be subject to administrative review'.[78] That is, of course, the government's prerogative. But the Kerr Committee also believed that their proposals would 'reconcile basic ideas of justice, acceptance of the wide and growing power of the administration and efficient and fair exercise of that power in a democratic society'.[79] As the availability of administrative review is now the general rule rather than the exception, it is clear that the process of merits review has become so entrenched that it is easy to lose sight of the complexity involved in reaching the correct or preferable decision, especially when policy and community expectations form part of the considerations.

At the time of the Kerr Committee's report, the balance between citizen and government had been altered in such a way as to threaten the ideals of accountability and administrative justice.[80] The reach of the government into every aspect of a citizen's life was increasing and there was a growth in the volume of legislation passing through Parliament — this created 'an immense bureaucracy with awesome discretionary powers'.[81] Since then this reach has grown. Now jurisdiction is conferred upon the AAT by over 400 pieces of legislation. I believe it is fair to conclude that the AAT has achieved what was envisaged by the Kerr Committee: assuming a pivotal position in the review process by facilitating 'administrative second thoughts.'[82]

78 Commonwealth Administrative Review Committee, above n 7, 105.
79 Ibid 107.
80 Creyke and McMillan, above n 1, iii.
81 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1975, 2285 (Robert Ellicott).
82 *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137, 141 (Senior Member Hall, Members Skermer and Woodley).

Recent developments

Katherine Cook

Statutory Review of the Amalgamated AAT tabled

The Commonwealth Government has tabled the Statutory Review of the Amalgamated Administrative Appeals Tribunal.

The review was a statutory requirement under the *Tribunals Amalgamation Act 2015* (Cth) and was conducted by former Justice of the High Court of Australia, the Hon Ian Callinan AC.

The Administrative Appeals Tribunal provides a one-stop shop for the independent review of a wide range of decisions made by the Australian Government.

The Administrative Appeals Tribunal was amalgamated with the former Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal following the commencement of the *Tribunals Amalgamation Act 2015* on 1 July 2015.

This was a significant reform to Australia's administrative law framework, designed to improve efficiency and reduce costs under the previous system, and the Act required a review to commence three years after the commencement of the amalgamated Tribunal.

Mr Callinan was asked to evaluate the amalgamated Tribunal and identify further improvements that could enhance the work of the Tribunal and Commonwealth merits review processes.

Since amalgamation, the Tribunal's workload has increased significantly, particularly in the Migration and Refugee Division. The government is carefully considering the recommendations from Mr Callinan's report and is committed to improving the efficiency of the Tribunal and maintaining the integrity of Australia's migration policy.

The Attorney-General said he looked forward to continuing to work with his colleagues and the Tribunal to ensure the amalgamated Tribunal's success. The government will formally respond to the report in due course.

'I sincerely thank Mr Callinan and his counsel assisting for their dedication and hard work in undertaking this review', the Attorney-General said.

A copy of the report is available on the Attorney-General's Department website.

<https://www.attorneygeneral.gov.au/Media/Pages/statutory-review-of-the-amalgamated-aat-tabled-23-july-2019.aspx>

Respected judge to lead Victorian Law Reform Commission

The Andrews Labor government has announced the appointment of former Justice the Hon Anthony North as the Chairperson of the Victorian Law Reform Commission.

Mr North has had a distinguished career in law that spans more than four decades. He was admitted to practice in 1973 and was appointed Queen's Counsel in 1989. He practised as a barrister at the Victorian Bar until 1995.

In 1995, Mr North was made a judge of the Federal Court of Australia, where he served until his retirement in 2018. He was an additional judge of the Supreme Court of the Australian Capital Territory from 2004 to 2018.

Over his time as a judge, Mr North presided over cases that involved constitutional and commercial law, industrial and employment law, taxation, intellectual property and native title.

Mr North has a strong interest in legal education and has taught, mentored and worked with law students, including holding moot trials at universities.

He holds a Master of Laws from the University of London and a Bachelor of Laws (Honours) and a Bachelor of Arts from the University of Melbourne.

Mr North replaces Bruce Gardner, who was appointed as the Acting Chairperson of the commission in March 2019 following the death of Philip Cummins.

Mr Cummins made a significant contribution to the commission in his time as Chairperson, including in the areas of victims' rights, jury empanelment and medicinal cannabis.

<https://www.premier.vic.gov.au/respected-judge-to-lead-victorian-law-reform-commission/>

South Australia to get new Court of Appeal

The South Australian state government will establish a new dedicated Court of Appeal in South Australia, as a division of the Supreme Court.

With dedicated judges, the Court of Appeal will develop specific judicial expertise in appeals, leading to efficiencies and consistent, high-quality judgments.

'This new Court of Appeal will be a significant change to the way appeals are managed in the Supreme Court', Attorney-General Chapman said.

'Judges will be appointed to the Court of Appeal on a permanent basis and, as a result of only presiding over appeals, would develop specialist knowledge and skill.

'Presiding over an appeal is a different judicial function to that of a trial judge and this would allow for this expertise to be fully harnessed.

'Dedicated courts of appeal have been operating successfully in many other jurisdictions for several years', Ms Chapman said.

'Our interstate counterparts have advised us that this model is an effective way of delivering decisions promptly and efficiently.'

While targeted consultation will occur over the coming weeks, the proposed structure consists of:

- a General Division of the Supreme Court, which will consider civil and criminal matters; and
- the Court of Appeal, which will comprise a President and a number of other appointed judges.

It will replace the current system of appeals being heard by Supreme Court judges sitting on rotation on the Full Court of the Supreme Court (referred to as the Court of Criminal Appeal for criminal matters).

'The appeals system is an important part of keeping our justice system fair by ensuring there is a process to challenge decisions, where there are grounds to do so', Ms Chapman said.

'Appeal decisions are also a source of case or common law, setting precedents for the lower courts, so there are many potential benefits of this reform for our justice system.'

Consultation on the Supreme Court (Court of Appeal) Amendment Bill 2019 will occur with key stakeholders over the coming weeks.

<https://www.agd.sa.gov.au/newsroom/south-australia-get-new-court-appeal>

New protections for whistleblowers in South Australia

New laws to protect whistleblowers in South Australia come into effect 1 July 2019.

The new laws strengthen transparency and accountability in government, protect the identity of informants and allows them to pass on information to the relevant authorities without fear of reprisal.

The new *Public Interest Disclosure Act 2018* will commence on 1 July 1 2019, replacing the *Whistleblowers Protection Act 1993*.

It creates two types of protection — those for any person wishing to report public interest information on environmental and health matters, and protections purely for public servants wishing to disclose allegations of public sector maladministration, corruption or misconduct.

Protections under the new Act only apply for those cases where the disclosure is made to a relevant authority (this can include the allocated responsible officer for an agency who has been trained to receive the information and who must then take appropriate action, as well as the Office for Public Integrity and the Commissioner for Public Sector Employment).

If an informant has not been notified of proposed actions and the outcomes of those actions within the required time frames, they are entitled to disclose the information to the media or a member of Parliament with the same level of protection under the Act.

Attorney-General, Vickie Chapman, said the change would give the community confidence in their public officials and was an important — and overdue — reform for South Australia.

'This was a key recommendation from Commissioner Bruce Lander's review of whistleblower laws in 2014, and I am proud that this government has managed to introduce it', Ms Chapman said.

'We are now in a position where public sector employees who want to disclose information about public sector maladministration, corruption or misconduct can come forward and speak up, with the full protection of the law.'

Attorney-General Chapman said that, while new Act provides added protections for those who make an appropriate public interest disclosure, it also makes it a criminal offence to victimise these same people, carrying a maximum penalty of a $20,000 fine or imprisonment for two years.

'These are important changes, and we will be urging all public sector employees to familiarise themselves with the new Act, and their responsibilities, should they wish to disclose potential corruption, misconduct or maladministration', Ms Chapman said.

<https://www.agd.sa.gov.au/newsroom/new-protections-whistleblowers>

Improving openness and transparency

Improvements to Tasmania's right to information laws have been delivered with the passing of the *Right to Information Amendment (Applications for Review) Bill 2019*.

The Bill ensures applicants and external parties can apply to the Ombudsman for review of certain decisions in relation to applications for assessed disclosure under the *Right to Information Act 2009*.

A recent decision of the Supreme Court in Tasmania clarified that a decision made by a Minister or a Minister's delegate under the Act in respect of whether or not to release information in possession of the Minister is not currently reviewable by the Ombudsman.

These changes will further the objectives of the *Right to Information Act* by allowing both applicants and external parties to request the Ombudsman to review decisions on whether or not information should be provided under the Act, regardless of whether the application for that information is made to a Minister or a public authority.

The Hodgman majority Liberal government remains committed to improving the openness, accountability and transparency of the operations of government in Tasmania and has acted to address this matter in addition to adopting a number of other measures since coming to government.

<http://www.premier.tas.gov.au/releases/improving_openness_and_transparency>

Recent decisions

Khalil v Minister for Home Affairs

[2019] FCAFC 151 (30 August 2019) (Logan, Steward, and Jackson JJ)

The appellant, Mohamed Youssef Helmi Khalil, is a citizen of Egypt who applied for an Australian visa. His application was refused under s 501 of the *Migration Act 1958* (Cth) because a delegate of the Minister determined that he did not pass the character test for the purposes of that section. Mr Khalil applied to the Administrative Appeals Tribunal for review of that decision.

On 10 January 2018, the Tribunal listed the matter for hearing on 19 February 2018. Early on the morning of 19 February, Mr Rodgers (Mr Khalil's lawyer) emailed Mr Khalil saying that he (Mr Rodgers) would not be able to attend the hearing because of a commitment in the District Court of Western Australia. Mr Rodgers also emailed the Tribunal and the Minister's solicitors on the same morning asking 'that the hearing be deferred' and also saying 'given the position i [sic] am in with the current trial, I would have great difficulty in continuing to represent Mr Khalil'.

The hearing was adjourned by the presiding Deputy President for 24 hours to allow Mr Khalil to receive and consider papers for the hearing. When the hearing resumed, Mr Khalil protested that he had no time to consider the documents in any detail. The Deputy

President said that 'Unfortunately, because of the legislation a decision has to be handed down by Monday, so we have to proceed with the hearing today and try and make the best of an unhappy situation' and proceeded with the hearing.

The Tribunal dismissed the application on 26 February 2018. Mr Khalil applied to the Federal Court of Australia for judicial review of that dismissal. The primary judge dismissed the application for judicial review, and Mr Khalil then appealed to the Full Federal Court.

Although not contended before the primary judge, before the Full Federal Court it was argued that, among other things, there was a straightforward path of reasoning which leads to a finding of jurisdictional error.

The Court found that it is plain from the extracts from the transcript of the hearing that the Tribunal was proceeding on the basis that not only did it have to deliver its decision on the review by Monday, 26 February 2018, but it also needed to provide written reasons by that time. That is particularly clear from the transcript of the hearing on 20 February 2018 in which the Deputy President said that he would be 'delivering a written decision which will set out all the facts and the considerations, so he will get a written decision, and that has to be by next Monday'. The Tribunal equated the requirement that it make a decision by the following Monday with the requirement that it produce written reasons for the decision.

The Court found that the Tribunal was incorrect to proceed on that basis. The Court held that the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) draws a clear distinction between the decision of the Tribunal under s 43 — which is, relevantly, what causes the 84-day period to stop running — and the reasons for decision. Section 43(2) of the AAT Act, the Tribunal was only required it to give its reasons, oral or in writing, within a reasonable time of the decision. Therefore, it is clear that the Tribunal misdirected itself as to the law when it proceeded on the basis that it had to both deliver a decision and produce written reasons by 26 February 2018.

However, the Court noted that not every error of law is a jurisdictional error: see *Tsvetnenko v United States of America* [2019] FCAFC 74 at [33][40]. In a statutory decision-making process, jurisdictional error is a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 at [24] (Kiefel CJ, Gageler and Keane JJ): 'The question is always one of construction of the legislation: which breaches of a provision does the legislation, either expressly or, more commonly, impliedly, treat as depriving the decision maker of power?' (*Hossain* at [67] (Edelman J, Nettle J agreeing)).

The Court opined that it might be argued that the error was only one as to the timing of delivery of reasons, not the nature of the task. But in the Court's view, on the proper construction of the AAT Act, and in the context of the serious constraints imposed on the review by the combination of that 84-day limitation and Mr Rodgers' abandonment of Mr Khalil on the morning of the hearing, that was an error of such gravity (see *Hossain* at [25]) that it should be characterised as jurisdictional. No contrary intent appears in the AAT Act (or the Migration Act) and, in the absence of such intent, 'an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law' (*Craig v the State of South Australia* [1995] HCA 58, 179).

Further, in ascertaining the materiality of the error, it is necessary to keep in mind the distinction between the decision to adjourn and the decision that is challenged — namely, the outcome of the review. It is clear from the excerpts from the hearing of the Tribunal

quoted above that the Tribunal's error was material to the former decision. Was it also material to the latter? That is, could the decision made under s 43 of the AAT Act have been different if the Tribunal had appreciated that it did not need to deliver written reasons for the decision until a reasonable time after Monday, 26 February 2018?

In the Court's view it could have been. If the Deputy President had appreciated the true distinction between his obligation to make a decision and his obligation to give reasons, he could not have been fairly criticised if he had declined to hold the hearing on that day, so as to reserve sufficient time for consideration over the weekend. But it can be concluded on the basis of the common experience of courts and tribunals that writing out reasons in publishable form takes much longer than the mental process of identifying the correct decision and what the reasons for it will be. In fact, on 26 February 2018 the Tribunal delivered detailed written reasons some 25 pages long. In the Court's view it could be inferred from the concerns that the Deputy President did express about the time it was going to take to produce his reasons that, if he had been able to write reasons after 26 February, he would have adjourned the hearing at least until Thursday, 22 February, and quite possibly to Friday, 23 February.

It is true that, even then, Mr Khalil could not have presented any additional information orally at the hearing unless he had set it out in a written statement given to the Minister at least two business days before the hearing (Migration Act, s 500(6H)) and that he could not have relied on any further document in support of his case unless he gave a copy to the Minister at least two business days before the hearing (s 500(6H)). But those restrictions did not prevent him from making (at least) oral submissions based on the material that was before the Tribunal or, perhaps more to the point in the circumstances, having oral submissions made on his behalf (*Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123, [102][103]). While he would undoubtedly have faced difficulties in procuring an alternative legal representative as quickly as he needed to, and had been unable to do so within the 24 hours allocated to him, the possibility of securing such representation with a little extra time was not an unrealistic one. Any such representative would have to master a volume of material running to some 370 pages which, while not an insubstantial task, was eminently achievable for a hearing of this nature.

In the Court's view the possibility that the outcome would have been different if Mr Khalil had secured that new representation was a real one. His offending, while serious and undoubtedly of an extent which meant he did not pass the character test, was not at the extreme end of the scale. There was material which could have formed the basis for submissions about matters such as the interests of his minor children and his wife; and counselling and rehabilitation programs he had completed. Yet, in the circumstances, the hearing on 20 February 2018 consisted of little more than crossexamination by the solicitor acting for the Minister and a brief statement by Mr Khalil at the end of the hearing, consisting of emotively expressed generalities. Consistently with this, the Tribunal's reasons placed a great deal of emphasis on the seriousness of the offending and little emphasis on the interests of his children and other factors.

The Court held this is not to say that the Tribunal's decision on the merits was incorrect — that is not the question for present purposes. It is enough to say that a moderately skilled advocate would have been able to make significantly more of the material that Mr Khalil did in the circumstances. *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 is an example of a case where the manner in which a hearing is conducted on behalf of an applicant can affect relatively intangible factors, such as the impressions formed by a decision-maker and the coverage, detail and emphasis of submissions, in such a way as to potentially make a difference to the outcome of a hearing, so as to merit judicial review ([38] [44] (Kiefel, Bell and Keane JJ) and [66] (Gageler and Gordon JJ)).

In all the circumstances, the Court consider that, if the Tribunal had not misdirected itself on the subject of when it was required to produce reasons for its decision, the outcome for Mr Khalil could, realistically, have been different and a jurisdictional error is established.

Nursing and Midwifery Board of Australia v HSK

[2019] QCA 144 (26 July 2019) (Morrison and McMurdo JJA and Boddice J)

The appellant, Nursing and Midwifery Board of Australia (the Board) has regulatory responsibility for registered practitioners in the health profession comprising nursing and midwifery. A guiding principle in the performance of its regulatory functions is the protection of the public by ensuring that only suitably trained and qualified practitioners remain registered in that health profession.

The respondent, a 24-year-old nurse, was registered by the Board on 22 January 2016. While employed as a registered nurse at an acute mental health unit in regional Queensland, she engaged in behaviour which involved boundary violations with a male patient of the unit. The respondent admitted that conduct.

Upon notification of that boundary violation, the Health Ombudsman imposed conditions upon the respondent's registration. Subsequently, the Board removed those conditions and imposed further conditions on the respondent's registration on the basis the respondent has or may have an impairment within the meaning of s 178(1)(a)(ii) of the *Health Practitioner Regulation National Law 2009* (the National Law). The basis for those conditions was evidence that the respondent had been diagnosed with depression in 2012. In determining to impose conditions on the basis of impairment, the Board relied on the contents of a health assessment undertaken by a psychiatrist, Dr Prior, pursuant to a requirement of the Board issued pursuant to s 169 of the National Law.

At the time it imposed conditions, the Board also had a report from a psychiatrist, Dr Chung, who examined the respondent at the request of her legal representatives. Dr Chung formed a different opinion. In doing so, Dr Chung noted that a factual basis for Dr Prior's opinion was erroneous, on the history given to Dr Chung.

The respondent sought an administrative review by Queensland Civil and Administrative Tribunal (QCAT) of the Board's decision to impose conditions on her registration on the grounds that the respondent had an impairment within the definition of the National Law.

On the review, a central issue was the Board's acceptance of Dr Prior's opinion in imposing conditions on the respondent's registration. Having regard to the opinion of Dr Chung of the history relied upon by Dr Prior, the Board made application to QCAT for a direction that the respondent undergo a further health assessment by Dr Prior. The Board contended that a further health assessment would provide Dr Prior with an opportunity to assess changes in the respondent's condition and differences in the respondent's recollections as to the event in dispute. The Board further submitted a further assessment was important because both psychiatrists had concluded that the respondent suffered a major depressive disorder. Their different opinions as to the need for ongoing conditions was dependent upon an acceptance or rejection of the disputed history.

The respondent, who had refused to attend a further health assessment voluntarily, contended there was no power to compel such an examination in a review.

On 31 October 2018, QCAT dismissed the Board's application for a direction that the respondent attend a further health assessment. QCAT found it did not have power under the National Law to require a health practitioner to attend a medical examination. QCAT's very

broad power to make directions was procedural in nature. It did not give QCAT a power to direct attendance for a medical examination (the first decision).

On 12 December 2018, the review was heard by QCAT. Both Dr Prior and Dr Chung gave evidence at that hearing. On 19 December 2018, QCAT ordered the conditions imposed on the respondent's registration by the Board be set aside (the second decision). In doing so, QCAT accepted the evidence of the respondent that the history relied upon by Dr Prior was erroneous and concluded it was impossible to rely to any significant extent upon the opinions expressed by Dr Prior as to the respondent's ongoing impairment.

The Board then sought judicial review of QCAT's decision in the Court of Appeal. The central issue on the appeal was whether QCAT erred in law in holding there was no power, in the course of determining the administrative review, to direct that the respondent undergo a further health assessment.

The Court held that s 62 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that, in determining the review of a reviewable decision, QCAT may give a direction at any time in the proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding. The Board relied on this broad directions power to support its contention that QCAT had power to direct the respondent to attend a further health assessment. Alternatively, the Board also relied on s 169 of the National Law. That provision gives the Board the power to require a registered practitioner to undergo a health assessment. Finally, the Board submitted QCAT has the functions, and therefore the powers, of the Board in determining the review.

The Court held that, while s 62 of the Act contains a broad power, the power is to be exercised in the context of what is necessary for a speedy and fair conduct of the proceeding in question. That context supports a conclusion that the power is procedural. For example, if a registered practitioner refused to voluntarily consent to a further health assessment, procedural directions could include staying the proceeding until the registered practitioner voluntarily attended upon a health assessment.

A direction requiring an interference with the liberty of an individual litigant has generally been viewed as requiring specific statutory authority (*S v S* [1972] SC 24, 46–47). The need for a specific statutory power to make directions involving a compulsory act which interferes with an individual's liberty has been recognised in legislation concerning claims for the recovery of damages as a consequence of the sustaining of personal injuries (*WorkCover Queensland Act* 1996 (Qld) s 286).

As such the Court held there was no error of law in QCAT's finding that s 62 of the Act did not authorise the making of a direction that a registered practitioner undergo a further health assessment as part of a review of a reviewable decision.

The Court further found that QCAT also correctly concluded that s 169 of the National Law did not provide a power to order a further health assessment as part of the determination of a reviewable decision. A reading of that section, in the context of the National Law as a whole, supports the conclusion that the power given to the Board to require a registered practitioner to undergo a health assessment is limited to the investigative phase of the Board's concern that a registered practitioner has, or may have, an impairment.

Minister for Home Affairs v G

[2019] FCAFC 79 (21 May 2019) (Murphy, Moshinsky and O'Callaghan JJ)

G was born in Australia. G has a severe language disability, borderline low IQ and Autism

Spectrum Disorder. His parents are citizens of Albania. In 2004 and 2005 they applied for protection visas. They were unsuccessful and were therefore barred by s 48A of the *Migration Act 1958* (Cth) from applying again without a favourable exercise of the Minister's discretion under s 48B of the Migration Act.

G, however, made his own application for a protection visa. It was refused. On review, in September 2012, the then Refugee Review Tribunal (RRT) found that G faced a real chance of significant harm in Albania. The complementary protection basis for the grant of a protection visa was that the risk of harm arose as a consequence of a blood feud between G's family and another family. The RRT also made findings about the difficulty for G in accessing health and related services in Albania. G was granted a protection visa in January 2013, following the Tribunal findings.

Although G's claim for protection was in large part based on the circumstances of his parents, only G is the holder of a protection visa. G became a permanent resident, while his parents have remained with no certain migration status and, indeed, his father remained in immigration detention at the time of the hearing below. G's mother has a bridging visa which enables her to live in the community with G and his brother and to work.

The permanent residence status of G meant he was eligible to apply for Australian citizenship, which he did on 10 February 2015. On 16 July 2015, his application was refused by a delegate of the Minister. G applied to the Administrative Appeals Tribunal for review of the delegate's decision. The Tribunal affirmed the delegate's decision.

G then applied to the Federal Court for judicial review of the Tribunal's decision. The primary judge found that Australian citizenship instructions were inconsistent with the *Australian Citizenship Act 2007* (Cth) and unlawful. The Court declared:

> Part of section 5.12.5 of the Australian Citizenship Instructions (as re-issued on 1 July 2014) emphasised in bold below is inconsistent with the Australian Citizenship Act 2007 (Cth) and unlawful:
>
> Children under 16 applying individually in their own right would usually not be approved under s 24 unless they are permanent residents at the time of application and decision and also meet the following policy guidelines:
>
> ...
>
> - are under 16 when applying, living with a responsible parent who is not an Australian citizen and consents to the application, and the child would otherwise suffer significant hardship or disadvantage — see section 5.17 Ministerial discretion — significant hardship or disadvantage (s 22(6)) ...

The Minister appealed the primary judge's decision to the Full Federal Court.

The Full Court found that the primary judge erred in concluding that the Australian Citizenship Instructions are inconsistent with the Australian Citizenship Act and unlawful. The Full Court held that it is established that an executive policy relating to the exercise of a statutory discretion must be consistent with the relevant statute in the sense that it must allow the decision-maker to take into account relevant considerations; it must not require the decision-maker to take into account irrelevant considerations; and it must not serve a purpose foreign to the purpose for which the discretionary power was created (see *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 (*Drake (No 2)*), 640 (Brennan J); *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, [24] (Gleeson CJ)).

The Full Court further held that an executive policy will also be inconsistent with the relevant statute if it seeks to preclude consideration of relevant arguments running counter to the policy that might reasonably be advanced in particular cases (*Drake (No 2)*, 640). Thus,

an executive policy relating to the exercise of a statutory discretion must leave the decision-maker 'free to consider the unique circumstances of each case, and no part of a lawful policy can determine in advance the decision which the [decision-maker] will make in the circumstances of a given case' (*Drake (No 2)*, 641). However, as Brennan J stated in *Drake (No 2)* at 641, '[t]hat is not to deny the lawfulness of adopting an appropriate policy which guides but does not control the making of decisions, a policy which is informative of the standards and values which the [decision-maker] usually applies'.

Having regard to these principles, the Full Court's view was the primary judge erred in concluding that part of s 5.12.5 of the Australian Citizenship Instructions (namely, the words appearing in italics in the primary judge's declaration set out above) was inconsistent with the Australian Citizenship Act and unlawful. In this case the Australian Citizenship Act confers a broad and unfettered discretion in s 24(1) to approve or refuse to approve a person's application under s 21 to become an Australian citizen. The breadth of the discretion is confirmed by s 24(2), which provides that the Minister may refuse to approve a person's application to become an Australian citizen *despite* the person being eligible to become an Australian citizen under s 21(2), (3), (4), (5), (6) or (7). Further, the relevant eligibility category for present purposes — namely, that set out in s 21(5) — contains little by way of criteria. In contrast with the eligibility criteria in s 21(2), which are more detailed, s 21(5) provides that a person is eligible to become an Australian citizen if the Minister is satisfied that the person:

(a) is aged under 18 at the time the person made the application; and

(b) is a permanent resident at the time the person made the application and at the time of the Minister's decision on the application.

The Full Court therefore found the breadth of the discretion in s 24(1) is not inimical to the adoption of an executive policy, even a detailed executive policy, to guide the exercise of the discretion. To the contrary: the breadth of the discretion tends to support the view that there is no inconsistency between s 5.12.5 of the Australian Citizenship Instructions and the Australian Citizenship Act. Moreover, the adoption of a policy in such a case promotes values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike (see *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50, [54]).

Secondly, the Full Court held that s 5.12.5 of the Australian Citizenship Instructions allows the decision-maker to take into account relevant considerations and does not require the decision-maker to take into account irrelevant considerations. The primary judge focused on the reference, in the third bullet point in s 5.12.5, to the applicant suffering 'significant hardship or disadvantage' if not granted citizenship. This third bullet point relates to a limited class of applications under s 21(5): children under 16 who are living with a responsible parent who is *not* an Australian citizen. If and to the extent that the primary judge considered 'significant hardship or disadvantage' to be an irrelevant consideration (in the sense that it was impermissible for the Minister to take it into account when exercising the discretion to approve or refuse to approve an application for citizenship), the Full Court disagreed with the primary judge.

The Full Court held neither the text of the legislation nor the objects of the Act suggests that the Minister cannot take this matter into account in exercising the discretion. The use of the expression 'significant hardship or disadvantage' in s 22(6) should not be read as excluding consideration of this matter in the exercise of discretion under s 24(1). The Full Court did not infer that the use of the expression in one context, and its absence in the other, is explicable only on the basis that it was intended to be excluded from the latter.

The three forms of executive power and the consequences for administrative law review

David Patrick Hertzberg*

This article argues that, following the landmark decisions in *Pape v Commissioner of Taxation*[1] (*Pape*) and *Williams v Commonwealth of Australia*[2] (*Williams*), there are three key, discernible and functional forms of 'executive power' now accepted in Australian jurisprudence.

The first is as non-statutory executive power[3] or the 'inherent executive power'.[4] In this form the executive power is a power to act (including to contract or spend) without any legislation at all, but only where that action is:

- particularly characteristic of Australia as a sovereign nation;
- as a remnant of the Crown prerogative;[5] or
- in service of the ordinary functions of government.

It is in this form that the executive power is both at its most menial and at its most lofty in the sense that it supports both the power to give effect to the ordinary functions of government, including to purchase departmental stationary, and, for example, the power to enter into treaties, declare war and protect borders (as was accepted in the MV *Tampa* litigation in 2001).[6]

The second is as an independent head of legislative power, as if it were implied into the list in s 51 of the *Constitution*. In this form, as a head of legislative power, we are told that the executive power supports legislation that deals with matters that are inherent in Australia's status as a nation. It was this power that the High Court accepted, in *Pape*, supported legislation to make one-off payments to support the national economy and, in *Davis and Ors v Commonwealth*[7] (*Davis*), to support legislation to deal with Australia's bicentennial celebrations in the 1980s.[8]

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1 [2009] HCA 23; (2009) 238 CLR 1.

2 [2012] HCA 23; (2012) 248 CLR 156.

3 The term 'non-statutory executive power' is used by Hayne and Bell JJ in *CPCF v Minister for Immigration and Border Protection* (2015) 143 ALD 443 [150].

4 The term used in L Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279.

5 This functional form of non-statutory executive power encompasses a number of the categories listed by French J in *Williams v Commonwealth of Australia* [2012] HCA 23 [4] in respect of which the executive does not require specific legislation to spend or enter contracts: (a) in the administration of departments of state pursuant to s 64 of the *Constitution*; (b) in the execution and maintenance of the laws of the Commonwealth; (c) in the exercise of power conferred by or derived from an Act of the Parliament; (d) in the exercise of powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth; and (e) in the exercise of inherent authority derived from the character and status of the Commonwealth as the national government.

6 See note 33 below.

7 [1988] HCA 63; (1988) 166 CLR 79.

8 It may also be in this form, therefore, that the Parliament has power to abrogate executive power by statute (*CPCF v Minister for Immigration and Border Protection* (2015) 143 ALD 443 [279] (Kiefel J)).

The third is as a mechanical executive 'capacity'[9] to take actions necessary to give effect to legislation. It is in this form that executive power is subject to traditionally understood concepts of administrative law, both under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and by reference to jurisdictional error, in the sense that jurisdictional error asks whether an exercise of executive power is within the jurisdiction granted by law. It was also in this form, and not the non-statutory form, that the *Williams* decision insisted that the executive power to enter into funding contracts, in order to give effect to programs, existed or ought to exist.

This article considers the consequences that this three-tiered taxonomy has for administrative law.

The origins of the taxonomy

Noting this taxonomy of executive power, the revelation in *Williams* was not that the act of entering into a Commonwealth funding agreement was not actually an exercise of the executive power. It is also not correct to consider that *Williams* 'reduced' the scope of the executive power.[10] The revelation in *Williams* was that Commonwealth program spending was not an exercise of non-statutory executive power (the first form listed above); it was an exercise of executive power as *capacity* authorised under legislation (the third form). Executive power was not reduced; it was *reformulated* in its relationship to the legislature.

It might be possible to argue that these three, and quite distinct, forms of the executive power were in some respect inevitable in the sense that they necessarily derive from the terms of s 61 itself. Section 61 is stated in the following terms:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.

The reference to 'vesting' might suggest that there is a mysterious and pre-existing fundamental power, which, upon Australia's federation, was vested in the Queen (with respect to Australia as an independent nation rather than as a colony) as exercisable by the Governor-General, perhaps coextensive with an ancient notion of a Crown prerogative or at least consistent with those powers implied to have been acquired upon Australia's nationhood and sovereignty. It might be argued that this implies a mysterious and autonomous form of Commonwealth power that does not derive from either legislation or the common law: it precedes both. The reference to 'execution and maintenance of this *Constitution*' suggests that there are powers authorised by the *Constitution* which are to be executed; and functions established by it to be maintained. This may imply that the content and structure of the *Constitution*, as characterised by a separation of powers, authorises Parliament-made laws in relation to matters that are uniquely the province of the Commonwealth, consistent with a form of 'implied nationhood' power. And the final reference to execution and maintenance of (parliamentary)[11] laws reflects an executive capacity: Commonwealth officers doing what legislation says the executive government ought.

9 This is Anne Twomey's description of one of the 'classes' of executive power accepted by French J in *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1: see Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' [2010] MelbULawRw 9; (2010) 34 *Melbourne University Law Review* 313 (see Parts I and II of that article).

10 An argument made in G Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case' (2014) 39 *Monash University Law Review* 348.

11 In *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning and Weaving Company Limited* [1922] HCA 62; 31 CLR 42 (the *Wooltops case*), Knox CJ and Gavan Duffy J accepted that 'laws of the Commonwealth' probably means Acts of the Parliament of the Commonwealth.

In one of the earliest instances of High Court consideration of the executive power in 1922, *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning and Weaving Company Limited*[12] (the *Wooltops case*), the High Court had already cast significant doubt over whether Commonwealth agreements[13] to give effect to its policy and programs could be supported by the executive power alone without specific legislative authority. In the joint judgment of Knox CJ and Gavan Duffy J, and in the judgment of Isaacs J, the High Court had already accepted that s 61 'has three distinct functions':

> it vests the executive power of the Commonwealth in the Sovereign, it enables that power to be exercised by the Governor-General as the Sovereign's representative, and it delimits the area of that power by declaring that it extends to the execution and maintenance of the *Constitution* and of the laws of the Commonwealth ...[14]

Knox CJ and Gavan Duffy J held that, as the agreements at issue were not 'mediately or immediately authorized by any Act of the Parliament' and did not otherwise operate in 'execution or maintenance of the Constitution itself', they were not within the power of the Commonwealth executive to make.

Some 90 years later, in *Williams*, there was certainly a reversionary and originalist approach — particularly in the approach of French CJ, who took particular pains to have detailed and lengthy regard to 'prehistory and drafting history'[15] of the *Constitution* as well as to justify his reasoning by reference to the very early cases dealing with the executive power. Nevertheless, in 2012, *Williams* was not (nor was *Pape*) simply a return to the High Court's characterisation of the executive power in the early 1920s. Things had slowly changed. By the time *Williams* was decided in 2012, the High Court had accepted, or at least appeared to accept,[16] in *Victoria v The Commonwealth and Hayden*[17] (the *AAP case*), that certain spending programs for purposes particularly adapted to 'character and status of the Commonwealth as a national government'[18] may be supported by the executive and incidental power; and that measures taken to secure the national economy[19] and to incorporate a Bicentennial Authority for particularly national purposes were sourced from the executive power.[20] The difficult task for the High Court in *Williams* involved maintaining the appearance of literal construction of the terms and original intentions of the *Constitution* while accepting the practical reality that some form of evolutionary construction of the executive power was necessary to validate at least some measures characteristic of ageing nationhood.

On one view, tolerating a complex taxonomy of executive power was a necessary means to tread this line.

What *Williams* did not clarify was how the taxonomy of executive power might operate for administrative law litigants seeking to challenge acts, conduct and decisions of the Commonwealth. In particular:

- After *Williams*, will it remain the case that 'non-statutory' executive power is not meaningfully justiciable?

12 Ibid, note 11.

13 Described succinctly by French J in *Williams v Commonwealth of Australia* [2012] HCA 23 [65] as 'agreements, without statutory backing, under which it would give necessary regulatory consents for the acquisition of wool and sheepskins and the manufacture and sale of wool tops by the Colonial Combing, Spinning and Weaving Co Ltd'.

14 31 CLR 431 (Knox CJ and Gavan Duffy J).

15 [2012] HCA 23 — French CJ's own subheading from [40].

16 As stated by Dr Max Spry, 'The Executive Power of the Commonwealth: Its Scope and Limits', Research Paper 28, 1995–96 <www.aph.gov.au/binaries/library/pubs/rp/1995-96/96rp28.pdf>: 'It is a particularly difficult case with the Court divided in its reasons and the ultimate majority being determined by one judge's view on the issue of standing.'

17 (1975) 134 CLR 338.

18 Ibid 396 (Mason J).

19 As was the case in *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1.

20 *Davis and Ors v Commonwealth* [1988] HCA 63; (1988) 166 CLR 79.

- Where the Commonwealth administers funding contracts based on legislation enacted after *Williams*, are the executive actions involved in administering those arrangements susceptible to traditional grounds of administrative review? How, if at all, does jurisdictional error apply to characterise the scope of the Commonwealth's contract management when the source of power is a hybrid of private and public law sources?

Non-statutory executive power and jurisdictional error

There is, of course, a simple model of the executive power inherent in the separation of powers. Based on this model, the role of judiciary is to ensure that the executive acts according to law. This model is also a basic model of administrative law itself. It is, in a very important sense, this simple model that the High Court has in mind, at least since *Craig v South Australia*,[21] when it uses the elusive but thematic term 'jurisdictional error'. While, we are told, it is 'neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error',[22] the generality of the conception is at least clear: jurisdictional error is a description of executive action (or a decision of a lower court) that exceeds the authority granted it to act under law.

Former Chief Justice of the New South Wales Supreme Court, James Spigelman AC QC, emphasised the simplicity of the conception of jurisdictional error when he said:[23]

> It can readily be accepted that there is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined.
>
> Nevertheless, as Chief Justice Gleeson pointed out: 'Twilight does not invalidate the distinction between night and day'.[24]

Furthermore,[25] as Hayne J put it in *Re Refugee Review Tribunal; Ex parte Aala*:

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error when the decision-maker makes a decision outside the limits of the functions and powers conferred on her or him, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision-maker is authorised to decide is an error within jurisdiction … The former kind of error concerns departures from limits upon the exercise of the power. The latter does not.[26]

The concept of jurisdictional error has been developed through reiteration of a statement by Sir Gerard Brennan in 1990 that, as Stephen Gageler observes,[27] began to feature with increasing prominence in almost every administrative law decision of the High Court since the late 1990s:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.[28]

21 (1995) 184 CLR 163.
22 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.
23 The Hon JJ Spigelman AC, 'The Centrality of Jurisdictional Error' (Keynote address, AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010), available online at <http://archive.hrnicholls.com.au/articles/Other/spigelman250310%5b1%5d.pdf>.
24 Ibid 21–2.
25 Quoted by Spigelman, ibid 22.
26 [2000] HCA 57; (2000) 204 CLR 82 [163].
27 Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 9.
28 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

On this formulation, the role of a court when considering jurisdictional error is to consider only whether that action is permitted within the law. Jurisdictional error is therefore a conception of executive power itself, because it describes the scope of authority of the executive, as coextensive with the powers granted under Ch II of the *Constitution*, Commonwealth legislation and the common law.

Arguably it was no more than this simple model of executive power that the constitutional framers actually had in mind when drafting Ch II of the *Constitution*. Besides s 61 itself, Ch II, at least on its face, is simply concerned with the rather boring machinery of government administration, including by:

- clarifying the role of the Governor-General, who must only act on advice from the Federal Executive Council (ss 62–63, 70);
- dealing with appointment of ministers of departments of state (s 64), their number and salaries (ss 65–66); and
- dealing with appointment of 'civil servants' (s 67) and the transfer of roles from state departments (s 69).

While there is a possible implication in s 61 that the executive also embodies prerogatives reserved for the Crown, or at least powers reserved to the Commonwealth as a sovereign nation (which has become known as the implied nationhood power),[29] the remainder of Ch II contains no such *express* reference.

If the model of executive power espoused by Ch II were merely a description of the task of giving effect to laws, executive power would be coextensive with the sole object of administrative law and jurisdictional error in particular. However, this is not the case.

Jurisdictional error, so we are told by the High Court, implies a number of relatively familiar, if expanding, grounds, all of which relate to the express or implied scope of executive power understood as a capacity to give effect to laws. These are usefully traced from the landmark decision in *Craig v South Australia*[30] as including applying the incorrect legal test; ignoring relevant material; relying on irrelevant material; unreasonableness; making a decision without offering procedural fairness and so on. When such grounds are considered in the context of statutory decision-making, the statute, of course, provides the *substance* for consideration in the sense that the statute outlines the appropriate test to be applied, expressly sets out or implies the considerations to be considered and infers (and possibly ousts by express reference) the standard and procedure for offering procedural fairness. The statute therefore sets the bounds for jurisdiction.

This conception of jurisdictional error, however, appears to be reserved for executive power, understood merely as capacity. When the non-statutory executive power is purported to have been exercised as a manifestation of the so-called implied nationhood power or as a form of the prerogative or even to give effect to the ordinary functions of government, it would appear that courts consider that the substance of the power is not amenable to being tested on familiar administrative law grounds. Rather, it appears that courts accept that, where the non-statutory executive power is being utilised, the process and particular steps involved are not otherwise justiciable and are not subject to the familiar grounds of administrative review. This is illustrated by a number of cases, as discussed below.

29 See note 42 below.

30 (1995) 184 CLR 163; and see the exceptional commentary tracing the development of jurisdictional error in Kirsten Walker QC, 'Jurisdictional Error Since *Craig*' (2016) 86 *AIAL Forum* 35, 37–8.

The most vivid and most familiar manifestation of the executive power in its non-statutory form is the coercive force of the military acting under command — a power also possibly[31] supported by s 68 of the *Constitution*, as also contained in Ch II. This form of executive power, of course, is also known in many other countries and constitutional contexts, including, among many examples, in the United States, where it arguably supports presidential 'executive orders'; and in Fiji, where the 2006 coup d'état was initially justified on the basis of an unbounded executive power to act in national crisis.[32]

In Australia, the briefest background is suited to so well known a story: in August 2001 the MV *Tampa*, a Norwegian freighter which had rescued 433 asylum seekers, was intercepted and forcibly boarded by Australian Special Air Services troops, acting under the orders of the executive government, who took control of the vessel and stopped it approaching Australian territory.

Proceedings were taken to challenge the actions of the troops, culminating in an appeal before the Full Federal Court.[33] In these proceedings, it was accepted that the Australian Special Air Services troops had not been expressly authorised under the *Migration Act 1958* (Cth), or otherwise under a law of the Commonwealth Parliament, to take the actions they had taken. The issue was, rather, whether the actions of the troops were nevertheless authorised by the non-legislative form of the executive power derived under s 61 (and s 68) of the *Constitution*. Fascinatingly, French J, apparently unburdened by the same distrust in the scope of the executive power that characterised his judgment in *Williams*, in accepting that the executive power included the power to take action in relation to 'the exclusion of expulsion of a foreigner', stated:

> It is not necessary for present purposes to consider the full content of executive power ... In my opinion, absent statutory authority, there is such a power at least to prevent entry into Australia. It is not necessary, for present purposes, to consider its full extent.[34]

The essential finding was that, as the executive power encompassed a general right for the Australian military to take action to exclude non-citizens, the specific actions taken — to enter the vessel without any other authority, to take over control of the vessel, to change its course and ultimately to arrange for the detention of the asylum seekers offshore — were not otherwise justiciable. By implication, we were told, it was not necessary to consider the detailed substance of the executive power in the sense of the specific acts it could be taken to authorise. The Full Federal Court, with Black CJ in strong dissent, made clear that its key role was to confirm whether the mission of intercepting and re-routing the freighter, taken as a whole, was supported by executive power and did not characterise the question as being whether the separate coercive actions of the troops were authorised by reference to the scope of their jurisdiction to so act.

It was consistent with this approach that there was no identifiable administrative law issue raised. For example, there was no question of whether the troops acted unreasonably or whether the decision to give them orders was unreasonable. No recognisable administrative law question was raised as to what the mandatory considerations were for the decision (whether these included Australia's international law obligations in respect of refugees). No question was raised of any duty to offer procedural fairness. Perhaps even the suggestion that coercive military acts are subject to common administrative law grounds sounds awkward, if not absurd.

31 Or possibly not, given that s 68 arguably just reflects who is notionally in charge of the military by stating that 'The command in chief of the navel and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'.

32 See the discussion of the Fijian coup in Twomey, above n 9, Part I.

33 *Minister for Immigration and Multicultural Affairs v Vadarlis* (2001) 110 FCR 491.

34 Ibid 542.

Whether the High Court would have approached the question differently was never resolved: the High Court refused leave to appeal. The High Court's position on the scope of the coercive action that the executive power provides to the border force at sea was also not resolved in 2015 by *CPCF v Minister for Immigration and Border Protection*[35] (*CPFC*). While the majority in that case held that it was unnecessary to consider the scope of the executive power (because the actions taken to detain asylum seekers at sea were held to have been supported by statute), Hayne and Bell JJ, dissenting, appeared to offer a rebuke to the approach taken in the MV *Tampa* litigation. In Hayne and Bell JJ's joint judgment, the question was approached as follows:

> Does the executive power of the Commonwealth of itself provide legal authority for an officer of the Commonwealth to detain a person and thus commit a trespass?
>
> That question must be answered 'No'.
>
> [150] … why should an Australian court hold that an officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of an alien without judicial mandate can do so outside the territorial boundaries of Australia without any statutory authority? Reference to the so-called non-statutory executive power of the Commonwealth provides no answer to that question. Reference to the royal prerogative provides no answer. Reference to 'the defence and protection of the nation' is irrelevant, especially if it is intended to evoke echoes of the power to declare war and engage in war-like operations. Reference to an implied executive 'nationhood power' to respond to national emergencies is likewise irrelevant. Powers of those kinds are not engaged in this case. To hold that the Executive can act outside Australia's borders in a way that it cannot lawfully act within Australia would stand legal principle on its head.[36]

Although the judgments in the MV *Tampa* case from French J and the dissenting views in *CPFC* from Hayne and Bell JJ differ as to the scope of the executive power to take coercive action in relation to asylum seekers, what the two approaches have in common is that non-statutory executive power is not considered to be subject to the grounds of administrative review and is not susceptible to questions about possible jurisdictional error. The task of the Court, when faced with a purported exercise of non-statutory executive power, especially as carried out by the military, appears to be to confirm whether or not the general subject-matter of the activity (coercive detention, interception and so on) falls within the undefined bounds of the executive power deriving from a Crown prerogative or from the implications of nationhood itself.

This approach, of course, is fundamentally different from how a court approaches executive decision-making when made under an enactment of Parliament, where a decision may well be generally supported by the subject-matter and scope of the relevant constitutional head of power supporting the decision but may otherwise be made in jurisdictional error, or at least as an error of law on the face of the record, because of a failure in the decision-making process, such as a failure to have regard to mandatory consideration[37] or to not offer an affected person a hearing.[38]

Whether this approach to review of the non-statutory executive power is reserved for actions of the military is not clear. If not for a settlement that followed an appeal to the High Court, the High Court may have considered whether executive power is susceptible to jurisdictional error and familiar administrative law grounds of review, on appeal from *Acquista Investments Pty Ltd v Urban Renewal Authority*.[39] In that case a decision of the South Australian Cabinet directly to procure a developer was essentially held to be immune from

35 (2015) 143 ALD 443.
36 Ibid [147]–[150].
37 As was the case in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24.
38 *Kioa v West* [1985] HCA 81.
39 [2015] SASCFC 91.

judicial review as an exercise of its executive power.[40] As distinct from the detention and interception cases discussed above, the applicants in this case, fascinatingly, argued that the decision was *Wednesbury* unreasonable, which would have tested the High Court's views on whether executive power (albeit in its state manifestation) is subject to review on a familiar administrative law ground. How the High Court would have approached the issue of whether a commercial decision of Cabinet was susceptible to administrative review, and how the High Court considers that *Williams* applies to state contracts, remains to be seen.

The appeal would also have raised questions about the continuing applicability of *Minister for Arts, Heritage and the Environment v Peko-Wallsend Ltd*,[41] which arguably still stands for authority that Cabinet decisions are not justiciable.

Until the issue is raised before the High Court, it would seem that, in Australia, non-statutory executive power is essentially subject to a different standard of administrative review, as compared with decisions or actions taken under legislation.

This may appear incongruous, especially in view of the fact that, when non-statutory executive power is being exercised, it is often at its most coercive and at its most likely to affect individual rights.

Executive power as a head of power and administrative law

Executive power also continues to be referred to as incorporating a function as a head of power for legislation, apparently derived from a Crown prerogative, or at least as an 'implied nationhood' power.[42]

There is an anomaly inherent in that observation. The legislative heads of power set out in the shopping list at s 51 of the *Constitution* were precisely set out to prescribe the extent of the powers that the drafters intended ought to be reserved for the Commonwealth as a sovereign nation. On this view, an 'implied nationhood' power would be redundant, because the extent of matters reserved to the Commonwealth are already set out expressly. Why would the drafters have included powers so fundamental to sovereign nationhood as the 'trade and commerce with other countries' power, the 'external affairs' power, and the 'immigration' and 'naturalisation and aliens' powers in s 51 if those powers were already embedded into s 61 and implied as legislative heads of power under a broader 'implied nationhood power'?

The problem, of course, with this view is that the shopping list in s 51 is quaint and inevitably insufficient to deal with the evolution of matters that are likely to be considered particularly suited to a modern Commonwealth government. Notwithstanding a resurgence in 'originalist'[43] thinking in Australia and an ongoing valorisation of the *Constitution* as a living document,[44] it seems plain that the list in s 51 is dated, incomplete and, on its literal terms, not able to be taken to describe all the matters that are suited to a modern national government. While we see references to 'bounties', 'beacons' and 'buoys', for example, there is no express reference to housing affordability, universities, schools, health and aged care. The High Court therefore needs some way to read into the *Constitution* limited powers

40 Ibid [97]–[98] and [103] in particular, as well as the commentary in N Seddon, *Government Contracts* (Federation Press, 6th ed, 2018) 467–8.

41 (1987) FCR 274. Not to be confused with *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) HCA 40; 162 CLR 24, which raised a question about mandatory considerations required under statute, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

42 A notion deriving from Mason J's judgment in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 (the *AAP case*).

43 See, as a particularly strident example, J Goldsworthy, 'Originalism in Australia' (2017) 31 *DPCE Online* 607–15.

44 See the thorough criticism of this approach in M Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' [2000] MelbULawRw 1; (2000) 24 *Melbourne University Law Review* 1.

that are not expressly set out but are nevertheless particularly suited to the Commonwealth as a nation.

The High Court has, however, developed an implied nationhood power rather cautiously.

In *Pape* itself,[45] the High Court was very cautious about where it would be perceived to set the limits of an implied nationhood power. French CJ — who was no longer the French J who decided the MV *Tampa* litigation in 2001, when the capacity of the executive power to deal with matters of perceived national sovereignty was given a wide berth, and was not yet the French CJ who decided *Williams* in 2012, when the executive power was arguably significantly reformulated (and arguably reduced) — was particularly notable for wanting to achieve a suitable balance. His Honour said that the executive power, inasmuch as it could be perceived as a legislative head of power supporting the 'Tax Bonus' legislation at issue,[46] could extend to 'short term fiscal measures' to meet circumstances threatening the Australian economy (such as the Global Financial Crisis); however, he made clear that he was not to be interpreted as suggesting that the executive power supports 'a general power to manage the economy' or to react to any 'national emergency',[47] although Gummow, Crennan and Bell JJ appeared slightly more open to accepting the implied nationhood power inherent in the executive power might extend to 'national emergencies'.[48]

In *Davis*,[49] in 1988, the High Court was approached with a similar question about whether an implied nationhood power existed under s 61 and, if so, whether that extended to the incorporation of a Bicentennial Authority and whether broader measures to commemorate the Bicentenary set out in statute were supported by legislation, holding that, because commemoration of the Bicentenary was 'pre-eminently the business and concern of the Commonwealth as a national government [such measures fall] squarely within the federal executive power'.[50]

What are the administrative law repercussions of accepting that the executive power operates as a legislative head of power? Both *Davis* and *Pape* merely asked about the scope of the executive power as a question involving the validity of the relevant underlying legislation. Mr Pape, of course, did not frame his review as an administrative law challenge in respect to his specific payment: he had loftier goals in mind, seeking to invalidate the underlying legislation and the legitimacy of the enabling appropriation for all recipients of the Tax Bonus in Australia.

Where the executive power as legislative head of power may have administrative law consequences is hinted at in *Williams*. It would appear to follow from the reasoning in *Williams* that, while the Commonwealth may choose to legislate to support funding programs where there is executive power deriving from a prerogative or from a notion of an implied nationhood power, it may also validly choose not to. Chief Justice French took pains to clarify this by stating that his decision did 'involve' any question about the power of the Commonwealth to enter into contracts and expend moneys: 'in the exercise of powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth'; and in 'the exercise of inherent authority derived from the character and status of the Commonwealth as the national government'.[51]

45 See the useful overview in Twomey, above n 9.
46 The *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).
47 See *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 [133] and [10] (French CJ).
48 Ibid 91 [241].
49 *Davis and Ors v Commonwealth* [1988] HCA 63; (1988) 166 CLR 79.
50 Ibid 94 (Mason CJ and Deane and Gaudron JJ).
51 See note 5 above.

Williams appeared to accept, therefore, that, where the executive power itself would support legislation, legislation is optional. This was already known to an extent: why would the Parliament have chosen to pass the *Flags Act 1953* (Cth) and yet have chosen to leave the national anthem to a proclamation of the Governor-General?

Similarly, the one-off payments at issue in *Pape* could just as easily have been made based on a mere appropriation of funds, without specific further legislation setting out eligibility and payment matters.

Where the Commonwealth chooses legislation to give effect to matters falling within the executive power, it would seem that the administrative law review rights of affected individuals would be highly distinct from any rights that might exist under a non-statutory spending scheme, noting, as above, the reticence of courts to accept that executive power taken in its non-statutory form is meaningfully justiciable. I will discuss this further below.

Executive power as a mere capacity to administer contracts

The immediate conundrum for administrative law posed by the three-tiered taxonomy of executive power relates to why administrative law rights differ so significantly depending on the form of executive power being exercised. Further, following *Williams*, now that the executive power to spend in relation to funding programs is clearly statutory (executive power as *capacity* to give effect to legislation), it may be that administrative law remedies will be argued by litigants in circumstances affected by newly legislated spending decisions.

The Commonwealth statute books are obviously wide and varied, dealing generally with a range of matters that give effect to government policy. Significant new policy programs, such as the National Disability Insurance Scheme, changes to workplace relations laws, tax and welfare, among many other matters that have a clear basis in s 51 powers, are set out in clearly identifiable Acts of Parliament. New policies announced during the annual Budget process are often subject to not only the associated appropriation of money but also the passage of enabling and detailed legislation.

The Commonwealth's traditional wide-scale spending legislation, such as social welfare legislation, has never,[52] of course, operated on the basis of a single provision that says the Commonwealth is authorised to enter into, administer and vary agreements with individual welfare recipients, leaving it to an executive capacity to enter into those agreements. Rather, welfare and other wide-scale Commonwealth payments legislation typically contains details about recipients' eligibility circumstances; mandatory considerations for decision-makers granting payments; methods for payments; internal review rights; confidentiality and so on.

There were a number of programs run by the Commonwealth that, until *Williams*, had no foundation in legislation, even where the Commonwealth had the legislative power to enact legislation (derived from either s 51 or s 61) and, even where those programs were set up to make payments, administer subsidies and deal with other matters that were traditionally the subject of legislation.

Implicit in the thinking behind the High Court's approach in *Williams*, and possibly even in the *Wooltops case* 90 years earlier, is that many government spending or regulatory programs which had relied solely on a contract to set out the terms and conditions on which the Commonwealth makes payments or otherwise regulates, could, and potentially should, be based in legislation, where there is a sufficient legislative head of power. This would not only provide for parliamentary oversight of the way in which the spending

52 From at least 1908, when the *Invalid and Old-age Pensions Act 1908* (Cth) was enacted as the founding moment of Australian welfare legislation.

system is set up;[53] it would also clarify the rights of funding recipients or those affected by the program inasmuch as those rights would be based on existing principles and grounds of administrative law that apply to decisions and other actions that purport to be made under legislation. Even challenges mounted on the basis of 'jurisdictional error' in relation to decisions which do not need to be made 'under an enactment', in the ADJR sense,[54] generally involve questions about whether the decision-maker has exceeded the scope of jurisdiction granted under statute. Administrative law review rights are obviously fundamentally distinct from contractual rights that parties have under a contract and go far beyond rights inherent in the capacity to sue for breach of contract. Administrative law rights are also unconstrained by privity of contract such that disaffected third parties, who have standing, may be able to seek administrative review.

Further, it is also implicit in the reasons of the majority judgments in *Williams* that the High Court considered that there is nothing particularly clear about the method by which the Commonwealth chooses to administer some spending and regulatory programs through contract and some through legislation. While most forms of government purchasing and procurement (departmental expenses or capital acquisitions, for example) of the kind identified by *Williams*, in pursuance of the ordinary functions of government, are unavoidably suited to contract, many contractual grant programs or other regulatory measures are arguably just as suited to statute. When the Commonwealth outlined, by enacting a mechanism to list, through regulations, all of the existing spending programs it administered as potentially affected by the *Williams* decision by the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), the list of those programs was replete with examples of payments to individuals and other spending mechanisms where eligibility for payment had been set out in administrative guidelines which could just as well have been — and, prior to *Williams*, have been — set out in an Act.[55]

The legislation enacted following the *Williams* decision did not attempt to prescribe into legislation all the terms and conditions on which the range of those existing spending programs operated. Rather, that legislation only provided authority to enter into, vary and administer the relevant contracts or agreements.[56] Importantly, the legislation sought primarily to validate the formation of the underlying contracts by ensuring that the Commonwealth has executive capacity to enter into them and, as such, that legislation addressed the immediate issue identified in *Williams*.

However, it is not yet clear how and whether the new funding legislation provides a power based on legislation to Commonwealth officials in respect of ongoing administration of funding contracts, once they have been validly entered into.

In a case where a Commonwealth official makes a decision under a contract that incorporates eligibility terms that are set out in program guidelines, a number of basic questions arise as to whether that decision is subject to review only through breach of contract or whether there is a way to import the decision as being reviewable on administrative law grounds, including on the basis of jurisdictional error. One of the questions here is what form the power of the officer takes and which model of executive power is being exercised.

53 A complaint made by Anne Twomey in her article, 'Parliament's Abject Surrender to the Executive', 27 June 2012, was that the legislative mechanism utilised to react to *Williams* may not have afforded sufficient parliamentary oversight in any event (despite its bipartisan and cross-bench support).

54 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3 and 5.

55 To mention just a few, the list in Sch 1AA of the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) included disaster recovery assistance to individuals (402.028), ABSTUDY payment (407.068), and 'Working age payments' (407.058).

56 *Financial Framework (Supplementary Powers) Act 1997* (Cth) s 32B.

As I have argued above, the *Williams* decision did not reject that executive power was involved in administering funding contracts — the decision merely clarified that the executive power being exercised by Commonwealth officials was a mechanical form of executive power, as mere capacity to give effect to legislation. On this conception, after *Williams*, where programs remain administered under contracts which rely on legislative authority prescribed under the *Financial Framework (Supplementary Powers) Act 1997* (Cth), it is difficult to characterise whether the power to administer the program funding agreements is a power that arises solely under contract or under legislation or under both. The answer is probably both.

For example, if the agreements with the Scripture Union Queensland (SUQ) had survived *Williams v Commonwealth of Australia* (No 2)[57] — which they would have (just like numerous other funding agreements based on post-*Williams* legislation) if the High Court had agreed the legislative provision in the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) supporting them was sufficiently supported by a legislative head of power in s 51 of the *Constitution* — what kind of administrative law rights of review might have been exercised by:

- the SUQ if a decision was made to withhold funding on the basis that a milestone or deliverable set out in the contract was not met; or
- a concerned parent if a particular chaplain employed under the terms of the contract was not considered suitable.

Clearly, in the first case, SUQ would also have recourse to contractual remedies; however, would they be able to mount sensible proceedings in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) to argue that the decision to withhold funding was made in jurisdictional error? More uncertainly, would the parent in the second case, who, as a non-party to the relevant contract, clearly would have no standing to allege breach of contract, nevertheless be able to mount an administrative law challenge on the basis that the selection of the chaplain was reviewable on administrative law grounds? Plainly, review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) would not be possible (decisions made under s 32B of the *Financial Framework (Supplementary Powers) Act 1997* were specifically exempted from ADJR Act review).[58] However, it has been observed that there would be no procedural bar to commencing proceedings either under s 75(v) of the *Constitution* or under s 39B of the *Judiciary Act 1903* in the Federal Court.[59]

The *Williams* decision and, more crucially, the method through which it has been addressed in legislation means that it now appears that Commonwealth contract managers, and spending delegates, are arguably relying on a hybrid of legal sources when administering a funding contract: sources founded both in the terms of the contract (and therefore general principles of contract law) and as derived from their executive capacity to 'make, vary or administer' the arrangement, as now provided under statute.

This opens the possibility for administrative law principles to begin to shape Commonwealth contracting in ways not previously foreseen. Until *Williams*, a body of law had already been established dealing with the circumstances in which failure to observe statutory preconditions associated with a government contract may invalidate the contract or render it void. The law in this area focuses on whether any statutory preconditions to contract formation are directory (not essential) or mandatory.[60] However, *Williams* and the legislation

57 *Williams v Commonwealth of Australia* [2014] HCA 23.
58 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) Sch 1, para (he).
59 See the discussion in R Creyke, M Groves, J McMillan, and M Smyth, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 5th ed, 2019) 556.
60 See Seddon, above n 40, 464–84.

made to react to it may open the possibility for litigants to argue that specific acts or decisions made under a funding program are amenable to administrative law review, even where there is no suggestion that the contract is invalid, such as where is step is taken to withhold money, make a payment, or exercise a regulatory discretion based on discretion set out in the funding agreement or in incorporated terms set out in program guidelines.

It remains to be seen whether the model recently embodied by the *Government Procurement (Judicial Review) Act 2018* (Cth) may, for instance, be adopted in some form to deal with funding programs or 'grant' agreements of the Commonwealth. As initially enacted, that Act only covers certain 'covered procurements', which are likely to fall within the ordinary functions of government in the context of the *Williams* decision and therefore which do not require specific legislative authority. That Act, apart from theoretical rights that already existed for potential administrative law litigants under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903*, establishes a codified complaints and injunction process associated with alleged breaches of the *Commonwealth Procurement Rules* which are likely to be associated with the initial procurement process rather than ongoing administration on resultant contracts. Further judicial review legislation outlining the rights of persons seeking review of the administration of funding programs which are administered through contract might also be within the capacity of future parliaments.

Conclusion

The three forms of executive power that appear to be accepted following the *Pape* and *Williams* decisions discussed in this article are:

- non-statutory;
- head of legislative power; and
- capacity to give effect to legislation.

They raise significant and complex questions for administrative lawyers and the future of administrative law. This is especially the case in relation to whether administrative law grounds will begin to be accepted to apply to review of the exercise of non-statutory executive power; and whether administrative law grounds will start to be argued by litigants seeking to challenge grant funding decisions associated with government contracts which are authorised by legislation.

The judgment in *Williams* did not address these questions, as it attempted walk a difficult line between an originalist understanding of the *Constitution* and the slow development of an implied nationhood power that implies more into nationhood than had been foreseen in 1901. In so doing, it has raised new, and unresolved, questions about the appropriate relationship between executive power and administrative law and about the appropriate form of legislation the Commonwealth should consider enacting to authorise, and to administer, its spending and regulatory programs.

Dealing with self-represented parties

Graeme Neate*

In most matters before the ACT Civil and Administrative Tribunal (ACAT), parties represent themselves. Some parties are represented or assisted by family members or friends. Few have legal representation.

Although the rise in the number of self-represented parties has been the source of much comment and some concern in courts (including appellate courts), it has always been the case that most parties before tribunals such as the ACAT have represented themselves.

The explanation for that is, in part, found by reference to the nature of the disputes that ACAT has jurisdiction to hear and resolve — for example, relatively small civil claims and disputes with energy utilities and some licensing authorities; and residential tenancy matters.

Some key provisions of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) (ACAT Act) also provide the context in which self-representation is encouraged.

The objects of the ACAT Act, set out in s 6, include:

> (a) ...
>
> (b) to ensure that access to the tribunal is simple and inexpensive, for all people who need to deal with the tribunal; and
>
> (c) to ensure that applications to the tribunal are resolved as quickly as is consistent with achieving justice; and
>
> (d) to ensure that decisions of the tribunal are fair ...

Section 7 provides:

> In exercising its functions under this Act, the tribunal must —
>
> (a) ensure the procedures of the tribunal are as simple, quick, inexpensive and informal as is consistent with achieving justice; and
>
> (b) observe natural justice and procedural fairness.

Section 8 states:

> To remove any doubt, the tribunal need not comply with the rules of evidence applying in the ACT.

Section 30 deals with the representation of parties who appear before ACAT. It states:

> A person may, in relation to an application before the tribunal, appear in person or be represented by a lawyer or someone else (other than a person prescribed under the rules).
>
> Note The rules may make provision about when the tribunal may stop a person representing another person before the tribunal (see s 25(1)(b)).

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Another significant practical provision is that, generally speaking, the parties bear their own costs. ACAT has very limited discretion to make awards of costs.[1] Consequently, a party who has incurred the costs of legal representation cannot expect to receive these costs if they are successful.

Observations on the experience of some self-represented parties

It seems to me that, despite the best endeavours of ACAT members and staff, and the professional assistance of representatives of other parties, some self-represented parties go through the entire process before ACAT without any real understanding of what is happening or the reason for the outcome.

Their bewilderment and lack of comprehension is evident in many ways. They say that they are confused and that they did not realise that they had to prepare in a particular way for a specific type of hearing. Rather than responding effectively, they proceed to disregard evidence that the other party has provided or a key submission sent to them in advance of the hearing because it does not fit with the case they want to put.[2] The ultimate indication of this confusion is when people seek to appeal from decisions in their favour, including from decisions which have been made with their consent.

For some, it seems, the proceedings in which they are involved sweep them along, making momentary or periodic sense but, overall, lacking any cohesion.

Rather than referring to the writings of Franz Kafka at this point, let me illustrate with a poem that some of you will know but might not have linked to ACAT proceedings:

'Twas brillig, and the slithy toves

Did gyre and gimble in the wabe:

All mimsy were the borogoves,

And the mome raths outgrabe.

'Beware the Jabberwock, my son!

The jaws that bite, the claws that catch!

Beware the Jubjub bird, and shun

The frumious Bandersnatch!'

He took his vorpal sword in hand;

Long time the manxome foe he sought —

So rested he by the Tumtum tree

And stood awhile in thought.

And, as in uffish thought he stood,

The Jabberwock, with eyes of flame,

Came whiffling through the tulgey wood,

1 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48.
2 See, for example, *Gore v QBE Insurance*, AA 10 of 2018, decision delivered orally on 31 July 2018.

And burbled as it came!

One, two! One, two! And through and through

The vorpal blade went snicker-snack!

He left it dead, and with its head

He went galumphing back.

'And hast thou slain the Jabberwock?

Come to my arms, my beamish boy!

O frabjous day! Callooh! Callay!'

He chortled in his joy.

'Twas brillig, and the slithy toves

Did gyre and gimble in the wabe:

All mimsy were the borogoves,

And the mome raths outgrabe.[3]

To me, this poem illustrates what I discern to be some self-represented parties' experience. There is a contest in which they are involved. People are gyring and gimbling around them. The terminology is unfamiliar and, at times, incomprehensible. They are alert to, or imagine, jaws that bite and claws that catch, sometimes attributing them to ACAT. Finally, after periods of uffish thought and the quest for the manxome foe, a person wields a vorpal sword, whatever that is, and snicker-snack there is a result. Someone is defeated, and the other side goes galumphing away to be greeted by family, friends and sometimes lawyers who are pleased that they have slain the Jabberwock.

The issues

There are many challenges facing parties, lawyers and ACAT when one or more of the parties is self-represented.

In this article I will discuss:

- why some parties represent themselves;
- 13 of the practical challenges facing self-represented parties in proceedings before ACAT;
- some of the challenges faced by other parties, particularly when they are represented by lawyers, where a party to the proceedings is self-represented;
- some of the challenges for ACAT when one or more of the parties is self-represented; and
- in what circumstances ACAT might determine that a self-represented party is not capable of conducting the proceedings and a litigation guardian should be appointed.

3 Lewis Carroll, *Jabberwocky*, from Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (1871).

Various suggestions are made about how ACAT can attempt to overcome, or at least minimise, the difficulties that often arise when one or more of the parties represents themselves (see 'Possible ACAT action' sections in each topic).

Much of the discussion draws on personal experience and observations, as well as decisions of courts and some useful guidelines for barristers and solicitors in New South Wales and Queensland, and the *Equal Treatment Benchbook* of the Supreme Court of Queensland.[4]

Why do people represent themselves?

There are, broadly speaking, two reasons that a party would represent themself rather than have legal representation.

First, the party *cannot* afford legal representation and is unable to obtain legal aid (for example, because the amount in issue is below the threshold for the provision of legal aid). In some instances, people represent themselves without knowing that they are eligible for legal aid.

Second, the person *can* afford legal representation but chooses not to do so because, for example, they consider that the amount in issue does not warrant the expense of a lawyer or their case is so obviously meritorious that it would be a waste of money to engage legal representation. Some people are disillusioned with, or suspicious of, lawyers and do not seek their advice.

In some instances, a party has sought and obtained legal advice but proceeds without legal representation — for example, because they did not accept the advice they obtained (including advice that they cannot win) or the lawyer is unwilling to act for them. Some people might simply think that they can do a better job than a lawyer.

In some instances, a lawyer might be unwilling to act as a result of perceived difficulties with the person's conduct or behaviour, which might be the result of a disability, mental illness or inability to communicate effectively in English.

Possible ACAT action

In the course of a conference or directions hearing, ACAT might encourage a party to seek legal advice and possible representation, having regard to relevant features of the case and, perhaps, the legal resources marshalled by the other party or parties. Where cost is a factor, ACAT might suggest seeking legal services for discrete parts of the matter. For example, a lawyer might assist in settling witness statements or submissions.

ACAT correspondence regularly suggests that a party make enquiries about obtaining legal advice and provides a guide to where information about free legal assistance can be obtained. In any case, parties should be provided with or referred to ACAT's *Guide to Parties* documents on the website.

On occasion, ACAT will 'warm refer' a person to an appropriate organisation for legal advice. ACAT has arrangements in place with the Tenants' Union, Canberra Community Law, the Debt Enforcement Clinic (as part of the Consumer Law Centre of the ACT), and Legal Aid for this purpose.

4 Supreme Court of Queensland, *Equal Treatment Benchbook* (Supreme Court Library Queensland, 2nd ed, 2016).

Possible reforms for other courts and tribunals

In the final report of the Justice Project,[5] the Law Council of Australia recommended, among other things, that, as a minimum standard, every tribunal have the power to allow a party to be represented in proceedings where it is deemed necessary to ensure a fair outcome in the proceedings — for example, in situations where:

- there is a power imbalance between the parties — for example, the other party is evidently a repeat player or a professional advocate;
- a party clearly lacks legal capability;
- a party is particularly vulnerable — such as a potential victim of family violence or elder abuse; and
- the consequences of decision-making are highly significant to individual lives (recommendation 4.2).

It was also recommended that guidelines be developed to assist tribunals to exercise this power consistently with the minimum standard.

There is a recommendation that guidelines regarding the applicability and use of fee exemptions and waivers be made clearer and, as much as possible, publicly known to court participants. Exemption categories and court discretion to grant exemptions should also be reviewed and broadened in certain jurisdictions. Transcript fee waivers should be generally available to clients of legal assistance services and pro bono services (recommendation 4.3).

There are already fee exemptions and waivers that assist many of the people who make applications to ACAT. Transcript fee waivers also apply to such people.

Challenges for self-represented parties

People who are unfamiliar with legal processes but who are seeking justice in relation to their own particular circumstances have a number of hurdles to overcome, particularly when matters go to a hearing.

The difficulties they face will vary depending on factors such as the person's capabilities, the nature and complexity of the proceedings, the type of party they are (for example, applicant, respondent, party joined or appellant) and the extent of assistance available to them.

Let me make it clear that I am not speaking particularly about vexatious or querulous litigants, although there are plenty of those. They are a subset of people who, for whatever reason, choose or are forced to represent themselves in an unfamiliar legal setting. They also provide particular challenges for ACAT members and registry staff. Some of those challenges and how to deal with them have been discussed in other presentations — for example, in Dr Grant Lester's presentation, 'The Unreasonable, Querulant and Vexatious as Self Represented Litigants'.[6]

Also, I will not be dealing with the difficulties faced by people for whom English is not their first language; or people with disabilities that affect their capacity to engage readily with ACAT. That subset of people requires additional assistance to participate fully in a hearing, and ACAT needs to make appropriate arrangements for them on a case-by-case basis.

5 Law Council of Australia, *The Justice Project Final Report: Overarching Themes* (Law Council of Australia, 2018).

6 Dr Grant Lester, 'The Unreasonable, Querulant and Vexatious as Self Represented Litigants' (Presentation to ACAT members, 21 August 2018).

Rather, this article deals with 13 issues that self-represented parties generally confront and which ACAT members and registry staff, as well as other parties and their representatives, try to ameliorate or accommodate.

Putting to one side those particular types and needs of parties, it should be recognised that self-represented parties do not form a homogeneous class in terms of their needs and attitudes. Indeed, as the Victorian Court of Appeal noted recently:

> Their needs, and their attitudes towards the court, vary across a wide spectrum. At one end of the spectrum, the litigant may be inarticulate, or anxious, or distressed, and in need of considerable assistance in order simply to understand the process in which he/she is involved. At the other end, there are litigants who are variously articulate, strong-minded, stubborn, dismissive of legal advice and, very often, unwilling to accept judicial authority.[7]

Understanding and coping with the personal effects of conducting litigation

Apparently, most research indicates that self-represented litigants experience stress, frustration, desperation, heightened emotions and feelings of intimidation and fear. They can also feel disadvantaged, angry, anxious and bitter.[8]

A lack of familiarity with procedures inside and outside ACAT might lead to a sense of frustration at the perceived rigidity of the legal system and the length of time proceedings take to finalise.

Also, whatever the reason for representing themselves, parties who have a strong sense of their stake in the proceedings and even a sense of entitlement to a particular outcome often feel fear, frustration, bewilderment and disadvantage, particularly when they appear against a represented party. This might lead to inappropriate behaviour such as aggression toward, or interruption of, the other party.

Although self-represented parties bring a range of emotions and attitudes to a hearing, the Western Australian Court of Appeal has observed that:

> Being unrepresented is not a free pass to misbehave, flout the legal or procedural rules, ignore the law of evidence or treat the trial judge and witnesses with disrespect or contempt. Where an unrepresented [person] acts or attempts to act in any of these ways, a trial judge must fairly and, if necessary, firmly deal with such behaviour.[9]

With appropriate adjustment for the different role of courts and tribunals, those observations are apposite to people appearing before ACAT.

Possible ACAT actions

Assuming that most self-represented parties experience at least some of those feelings before and during ACAT proceedings, ACAT needs to be alert to what it can do to create a calm, orderly environment in which matters can proceed at an appropriate pace. That might involve giving clear guidance to the parties about how the conference or hearing will be conducted (a matter dealt with in more detail later in this article).

The presiding member should not assume that their calm and reassuring presence will necessarily be appreciated by the self-represented party. Apparently self-represented parties are often suspicious of the independence of judicial officers and lawyers and are

7 *Doughty-Cowell v Kyriazis* [2018] VSCA 216 [1].
8 See New South Wales Bar Association, *Guidelines for Barristers on Dealing With Self-represented Litigants* (New South Wales Bar Association, 2001) [12].
9 *O'Connell v The State of Western Australia* [2012] WASCA 96 [109] (Mazza JA; Martin CJ and Buss JA agreeing).

resentful that they are unable to receive help from legal aid, the legal profession or the court or tribunal (which is sometimes perceived as a publicly funded body which should be there to provide such assistance).

Understanding ACAT's procedures

The challenges can include:

- understanding the nature and features of ACAT's proceedings on a particular occasion — a conference, a directions hearing, an application for interim or other relief, a substantive hearing, or an appeal. Confusion about the nature and purpose of a particular type of proceeding can lead to a party being unprepared and, consequently, to potential delay at the hearing or an application for an adjournment;
- understanding that ACAT offers alternative dispute resolution procedures for resolving the dispute without the need for a hearing;
- understanding and complying with any directions made previously in relation to the hearing of their case (for example, the production and exchange of witness statements and submissions);
- knowing how to address the presiding member or members;
- knowing whether to stand or sit when the party speaks;
- knowing when to speak (and when not to speak) — even understanding that there is some structure to the proceedings and it is not just a free-flowing conversation where participants speak at will; and
- understanding the respective roles of the persons present in the hearing and that the presiding member decides who speaks and when.

Possible ACAT action

ACAT can attempt to minimise these problems by:

- providing useful information on our website and registry counter;
- giving procedural advice in correspondence and in conversations by telephone or in person;
- offering or directing mediation or other alternative dispute resolution as appropriate; and
- making clear directions; and explaining the reasons for the directions and the consequences of not complying with them.

Performing roles that more than one person would perform if the party was legally represented

This observation is best illustrated by a comparison with proceedings where a party is represented by counsel and an instructing solicitor and might have other people (such as clerks or departmental officers) involved. One sometimes observes from the bench that, in the course of the proceedings, notes are written and a person excuses themself from the hearing. It later becomes apparent that something has been mentioned in evidence and a person has departed the hearing to seek instructions or obtain evidence in reply, which is then introduced at a later stage in the proceedings. There is no interruption to the flow

of the proceedings because one or more people can deal with that issue outside the room while counsel proceeds to examine or cross-examine witnesses or make submissions.

By contrast, a self-represented party is, at the one time, the equivalent of the advocate, instructing solicitor, client and witness. While it might be difficult enough for one person to readily distinguish between those roles, it is impossible to perform them all concurrently. Consequently, a self-represented party often has to use lunch and other breaks to follow up the requests from other parties or an ACAT member or search for documents identified in the proceedings, as well as obtaining sustenance and refreshment and perhaps gaining some relief from the stress of the proceedings.

Possible ACAT action

The presiding member can encourage the party to make a note of what they need to do, ask them how and when they might be able to do those tasks, allow sufficient time for that to occur, and at the relevant break remind them of what they need to do.

Understanding what is relevant or not relevant to their case and that more material is not necessarily better for that case

As noted earlier, ACAT need not comply with the rules of evidence applying in the ACT. But ACAT has to make decisions based on evidence that is both relevant and probative.[10] That means that a party needs to provide the other party (or parties) and ACAT with the evidence on which that party relies.

That evidence needs to be relevant to the case before ACAT. If it is not relevant, ACAT should not accept it and have it clutter the file and add to the material to be considered then set aside when making a decision. I recognise, however, that it is sometimes easier and more time-effective to receive material to which no weight will be given rather than explain in detail why you will accept some material but not other material. In those circumstances, ACAT should make clear the basis on which the material is received and not create an expectation in the mind of the party providing it that the material might influence the outcome.

If the material is relevant but of little probative value, ACAT might accept it as evidence but give it relatively little weight.

The practical issue for each party is identifying, from the range of material which they have or could obtain, the material that is relevant to their case. That might not be an easy task, particularly in those instances where the self-represented party is the applicant or appellant, and the application or appeal document filed in the Tribunal does not clearly set out the reasons for bringing the proceedings or what outcome is being sought. If the outcome sought and reasons for it are not clear, the task of identifying relevant evidence becomes more difficult.

Some self-represented parties seem to consider that by providing numerous documents their case will be bolstered. Having numerous documents does not, of itself, enhance the prospects of success, particularly if:

(a) the documents do not address the matter in issue; or

(b) the other side concedes the point and hence the documentation does not advance the resolution of what remains in dispute.

10 That is, the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Parties should be encouraged to focus on what they need to prove their case and not attempt to swamp ACAT and the other party or parties in the hope that the weight of paper will ensure victory.

Possible ACAT action

ACAT might assist, in a conference or directions hearing, to clarify what the issues are (and are not) so that the self-represented party can focus on obtaining relevant evidence.

If the legal issues are clear and the applicable law is straightforward, it can be useful for ACAT to set out the principles and what the party must show to make their case. If the law is not clear, it might be useful to set out what is unclear and why.

Knowing what evidence to adduce and the best forms the evidence should take

Even where a party has a clear understanding of the issue or issues in their case, they might not appreciate the nature and extent of the evidence that should be provided to ACAT.

What might seem obvious to an experienced ACAT member might not occur to the party.

Some people seem to think that, if they tell their story to ACAT, that will be sufficient. The other party (whether they be a landlord, used car salesman, disgruntled employee or estranged partner) is clearly at fault. That should be enough to resolve the case.

Some parties fail to recognise, or perhaps even contemplate, that there might be another side to the story — or even a plausible alternative — and that, faced with conflicting assertions, ACAT will need more than each party's account of the sequence of events to make a reasoned decision. Parties take a real risk if, in the absence of documentation or corroboration from witnesses, the decision in the case depends entirely on each party's credibility as a witness.[11]

It is important that self-represented parties understand that ACAT proceeds only on the basis of the evidence before it. If there is no evidence in relation to a fact then no finding can be made.

That proposition might seem obvious to people involved regularly in court or tribunal proceedings. However, it is not unusual for a person who is extremely familiar with their own case to fail to identify one or more material facts and hence not call evidence in relation to that fact or those facts. Indeed, there have been instances of appeals being lodged alleging errors of fact on the basis that the original Tribunal did not take into account a particular fact or facts and for a search of the record before the original Tribunal to disclose that the existence of that fact was not raised at the original hearing and no evidence was called in relation to it.

The evidence might take the form of documents (for example, a residential tenancy agreement, a condition report, a set of accounts or bank statements, invoices, a published advertisement, emails, text messages, photographs or plans) and corroborating oral evidence from a witness or witnesses, a written summary of which should be provided to ACAT and the other party or parties. Each witness should be available at the hearing, preferably in person but otherwise by telephone.

11 See *Sarbandi v Sharif* [2017] ACAT 57.

Possible ACAT action

ACAT could discuss with each party the form the relevant evidence might take (for example, photographs attached to a witness statement) and should encourage each party:

(a) depending on the type of case, either to:

  (i) prepare a timeline of events and note which document or documents can be provided in respect of each event in the sequence (a useful means of getting a party's story in order and a useful resource for ACAT when assessing the case and preparing reasons for decision); or

  (ii) prepare a written outline of their case and the submissions they intend to make to ACAT and prepare a list of what evidence they might need to provide in order to prove each point that they intend to make;

(b) try to locate or obtain relevant documents and contact potential witnesses to ascertain whether they are willing to give evidence of what they saw, heard or did; and

(c) if those people are willing to give evidence, obtain a witness statement from each of them and confirm their availability to attend the hearing.

Ensuring that the evidence has been provided before the hearing and that evidence (including a witness or witnesses) is available at the hearing

It is sometimes surprising that, despite directions having been given and other procedural advice provided to a party, the party appears at a hearing without relevant documents (even of the most basic kind) or witnesses.

On one occasion, a woman who had commenced proceedings against a tenant for unpaid rent appeared at hearing without any documentary evidence of the specific amounts unpaid and the dates on which they fell due. When asked by the ACAT member for documentary evidence, the woman (who said she had been letting premises in the ACT for about 30 years) said that no one had told her that she had to bring that material to the hearing.

Possible ACAT action

The risk of parties arriving without relevant documentary evidence or witnesses might be reduced if clear directions are given at directions hearings or at conferences to assist people in preparing their case by identifying what they have to prove, and how best to prove it by what forms of evidence, and reminding them that everything needs to be prepared well in advance of the hearing and provided to the other side. Parties could be provided with a copy of ACAT's *Guide to Parties: What to Expect at Hearing* and/or encouraged to access such information on ACAT's website.

They should be encouraged to follow practical steps outlined earlier, such as putting documents in chronological order and clearly identifying and possibly paginating them. ACAT does not proceed on a 'trial by ambush' basis, nor will it readily grant adjournments if people arrive ill-prepared despite ACAT having given appropriate directions and provided guidance to a party or parties.

Self-represented parties are sometimes ignorant of, ignore or are contemptuous of directions (for example, directions for the exchange of evidence before a hearing) made by ACAT as part of its case management. It is not for parties to pick and choose which directions they will obey or when they might comply with them. If they choose to ignore or only partially comply with directions, they take the risk that the hearing will proceed and no

adjournment or other accommodation will be made for them. Evidence provided late might not be considered. For that reason, the relevant ACAT member or registry staff should take reasonable steps to explain what the directions mean and the importance of complying with them, while not giving legal advice (including how a person should prepare and run their case).

ACAT will be concerned to ensure that self-represented parties are given every opportunity to assert the rights which they might appear to have. However, a request for an adjournment prior to or during proceedings in circumstances where the reason for the adjournment is very much the fault of the self-represented party is unlikely to be treated favourably by ACAT. In such circumstances, it can be useful for the presiding ACAT member to check the file before a hearing and, in particular, trace previous directions and other applications made by the self-represented party to get a sense of the history of the matter and how a party has conducted themself.

Knowing how to ask questions when examining or cross-examining witnesses

There are at least three traps into which self-represented parties often fall when asking questions of witnesses.

First, when asking questions of their own witnesses, they give the answer to the question in the course of asking a question. In other words, they lead the witness. All the witness needs to do is to answer 'yes' to the questions. Strictly speaking, little weight should be given to such evidence. Yet many self-represented parties do not know how (or why) to ask a non-leading question.

Second, some people ask more than one question at a time so that when they pause it is not clear to the witness, or ACAT, what the witness is being asked or how best to answer.

Third, sometimes questions are preceded by long explanations or statements which (apart from potentially leading the witness to a particular answer) can sometimes leave the witness wondering whether they have been asked a question and, if so, what was the question.

Possible ACAT action

Although leading questions can enable non-contentious matters to be covered relatively quickly, the Tribunal might intervene to ask questions around contested matters or simply ask the witness questions like 'What happened next?'

ACAT might assist a party to break down long, multi-barrel questions into a series of shorter single questions so that the witness knows exactly what they are being asked and the Tribunal has a clear idea of their evidence.

On occasion, it might be in the interests of moving proceedings along for the Tribunal to put the questions to a witness, at least to the extent of establishing relatively uncontroversial factual circumstances which lay the foundation for other questions to be put by the self-represented party.

Distinguishing evidence from submissions

A recurring issue is the failure to distinguish between evidence on which a case is based and submissions to convince ACAT that a particular conclusion should be drawn from that evidence.

Most self-represented parties do not understand the distinction. Consequently, some oral and written statements are not really evidence at all but in the nature of argument. On the other hand, some submissions refer to evidence which has not been given previously in the proceedings. It is sometimes difficult to separate evidence and submissions in the flow of the proceedings. Indeed, sometimes when asked what evidence supports their final submissions, a party will produce material which has not previously been provided to the other party or ACAT. Such last-minute production can occur even when the Tribunal has earlier asked the party whether all their material is in evidence and there is nothing extra on which they seek to rely.

Possible ACAT action

ACAT should take the opportunity to point out the difference between evidence and submissions in order to assist one or more of the parties to provide first the factual information (and, where appropriate, expert opinion evidence) on which the case can be made. ACAT should point out that the parties will have the opportunity later in the proceedings to make arguments to about what that evidence means and the extent of its reliability.

Although ACAT proceedings are often conducted in an informal fashion, it is preferable not to allow a party in person to say what they want to say by way of evidence from the bar table without making an oath or affirmation. Rather, each party should give their evidence under oath or affirmation. ACAT should advise the party that potentially the person will be subject to questioning by the other party or parties to test whatever the self-represented party has said by way of evidence. A relevant statement or ruling to that effect might need to be made early in the proceedings, rather than after the person has, in effect, given evidence in relation to the case from the bar table.

I recognise that such an approach is preferable but may not be practicable in very busy lists, such as the Termination and Possession list and the Assessment list, where there is rarely time for such a process and it is most efficient simply to hear each party's story.

Knowing when, how and why to object to some evidence

Sometimes a party will want to object to evidence that is adduced by another party, either orally or in writing. Sometimes the objection is made simply because the evidence is contrary to the party's case.

Given that ACAT is not bound by the rules of evidence, the guiding principle must be whether the evidence sought to be tendered is relevant to the matter in dispute and has some probative value.

There is a risk that a lack of experience and confidence might result in a self-represented party being bluffed by another party. An important procedural point is whether a party should be invited or encouraged to object to evidence that is irrelevant or of little weight.

Possible ACAT action

Depending on whether any side is legally represented, it might fall to ACAT to either reject the tender of material or advise the parties that the material will be accepted but little weight will be given to it unless the party tendering it can convince ACAT that the evidence is significant.

There are judgments to the effect that:

(a) a judge is entitled to object to evidence on behalf of a self-represented litigant rather than simply advising the self-represented litigant of the right to object;[12] and

(b) a judge may provide general advice to a self-represented litigant that the person has the right to object to inadmissible evidence, and to enquire whether the person so objects, but is not obliged to provide advice on each occasion that particular questions or documents arise.[13]

Given that ACAT is not bound by the rules of evidence, Tribunal members might have fewer occasions on which to make such rulings or provide indications to self-represented parties. However, it seems that a presiding ACAT member has to be alert to the possibility of objectionable material being admitted into evidence unless ACAT identifies that it might be objectionable and provides at least an opportunity for the self-represented party to make some objection to it. ACAT's power to control its own proceedings,[14] adverted to earlier, might also allow it proactively to question the relevance of material submitted without objection by the other party.

Not relying on irrelevant or distinguishable extracts from judgments or ACAT decisions and understanding the significance of the other party's authorities

Some parties will find and rely on statements in decisions of courts or tribunals to support their case without reference to the context in which the statement is made and, in some instances, without realising that the decision is entirely distinguishable from the subject proceedings (for example, because it involved different circumstances or legal issues).

On the other hand, a party might receive and read the authorities provided by the other side and consider them completely irrelevant because the self-represented party is not able to discern the legal principle being relied on. In one case recently, a self-represented party declared that all the other side's judicial authorities were irrelevant. Having read the decisions carefully, I found not only that they were relevant but also that they supported the self-represented party's case rather than the case put by the party who proffered the authorities.[15]

Possible ACAT action

In such cases, it falls to the ACAT member to read the authorities cited in order to determine which, if any, of them are relevant to the matter in dispute. To the extent that it is necessary or appropriate to do so, those authorities should be referred to in the decision. If the authorities are largely irrelevant, that can be pointed out politely to the party or parties.

Understanding the role of lawyers in the conduct of a hearing

Sometimes the other party is legally represented and the lawyer objects to the admissibility of some evidence (for example, on the basis of relevance) or cross-examines witnesses by putting propositions to them that contradict their evidence but give them an opportunity to respond to evidence that will be given by the other party's witnesses. Even if the lawyer is acting appropriately, including in the context of ACAT not being bound by the rules of evidence, a self-represented party might misunderstand, and hence misconstrue, what

12 *National Australia Bank v Rusu* (1999) 47 NSWLR 309, 311.
13 *Re F: Litigants in Person Guidelines* [2001] 27 Fam LR 544, 551.
14 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 23.
15 See, for example, *Hedgecoe v Abdel-Massih* (AA 41 of 2017, 4 May 2018).

the lawyer is doing. That can delay the proceeding and might ultimately lead to an appeal against ACAT's decision.

Those concerns are illustrated in *Kuenstner v Workers' Compensation Regulator*[16] — a decision of the Queensland Industrial Relations Commission. In that case the appellant was represented by his father, who was not a lawyer. The Regulator was represented by experienced counsel. The following extracts from the reasons for decision illustrate some of the issues:

> [54] The Respondent is meant to behave as a model litigant in proceedings such as these. Counsel for the Respondent … took appropriate objections to questions (and to the tender of some documents) but otherwise provided a level of assistance in relation to the procedures before the Commission consistent with his client's model litigant role.
>
> [55] It is appropriate to make that observation because the written submissions made on behalf of the Appellant contained numerous and sometimes vitriolic criticisms of Counsel for the Respondent and his instructing officer in relation to aspects of their conduct during the course of the hearing. A careful analysis of those criticisms indicates that many of them arise from a misunderstanding of the role of Counsel …
>
> [56] The Appellant's written submissions contended, for example, that Counsel for the Respondent put words in people's mouths and manipulated facts. It was clear, however, that in the course of cross-examination, counsel was testing the evidence of witnesses and putting propositions to them that reflected evidence called by the Respondent. That was in accordance with the rule that counsel are obliged when cross-examining to provide the witness with the opportunity to deny the evidence of that Counsel's own witnesses. A failure to cross-examine a witness on the evidence of that other witness may be taken as an admission of the truth of that evidence.[17] In that context, I reject the Appellant's contentions in this case that counsel was putting words into the mouths of witnesses or manipulating facts.
>
> [57] The Appellant (or at least Mr Kuenstner Snr) appeared to allege that a witness (or witnesses) called by the Respondent was 'coached' by Counsel for the Respondent in relation to the evidence they would give to the Commission. In apparently equating a barrister having a conference with a witness as them coaching the witness, the Appellant misunderstood the process of preparing for a hearing and made unsubstantiated allegations against Counsel for the Respondent.[18]

Experienced counsel should be able to meet their obligations to test evidence while also adapting their style and manner to the more informal nature of ACAT proceedings, particularly as ACAT tends to adopt a more inquisitorial approach to hearing disputes.

Other issues arise when a self-represented party who is unsuccessful appeals the decision on the basis that they were not represented by a lawyer. I dealt with such an appeal recently.[19] In his application for appeal lodged with the ACAT registry, the appellant gave the following reasons for appealing:

> I wish to appeal the decision as I was at a disadvantage as I had no legal representation with me at the time of both hearings. I was not aware that I could apply for legal representation at Legal Aid and I am not in a financial situation to obtain private legal aid. Now that I have been informed that I am able to receive help through legal aid I would like the opportunity to put my case before you this time with Legal representation.

That ground of appeal was dismissed for three reasons.

16 *Kuenstner v Workers' Compensation Regulator* [2016] QIRC 083 [54]–[57].
17 *Browne v Dunn* (1894) 6 R 67; *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1; (1983) 44 ALR 607.
18 [2016] QIRC 083 [54]–[57].
19 *Campbell v Whale* (AA 46/2018, 13 December 2018).

First, it did not identify any error of fact or law in the decision of the original Tribunal.

Second, at most, it suggested that the appellant thought that his prospects of success might have been improved had he been legally represented. It would be inappropriate to speculate as to whether that might have been so, particularly in the absence of a transcript of the hearing before the original Tribunal. In any case, the appellant should have been aware of free legal assistance providers because the conference notice sent to him by ACAT stated that 'You should ensure that you have made any enquiries about obtaining legal advice or representation prior to the conference. Information about free legal assistance providers can be found on the Tribunal's website'.

The fact that he did not have (and might not have been entitled to) free legal assistance does not create a basis for the appeal. In *Wsol v John James Memorial Hospital*, the ACT Supreme Court confirmed that 'It is not an error of law for the ACAT to proceed with a hearing where a party is unrepresented'.[20]

Third, not only does the ACAT Act not require parties to have legal representation but it is also implicit in parts of the ACAT Act, and explicit in the experience of ACAT, that people will often represent themselves in proceedings before it. As noted earlier, s 30 of the ACAT Act provides:

> A person may, in relation to an application before the tribunal, appear in person or be represented by a lawyer or someone else (other than a person prescribed under the rules).

Other elements of the legislative scheme (such as ss 6 and 7, quoted at the start of this article) focus on procedural fairness, not on whether or not a party is legally represented. The appellant did not contend that the original Tribunal denied him a fair hearing.

Possible ACAT action

Where appropriate, ACAT might explain in general terms the role of a legal representative in a hearing or, if a self-represented party appears concerned about (or objects to) a line of questioning from a lawyer, ACAT might explain the purpose of the questions in the context of a contested hearing.

Having sufficient mental and emotional distance from their case to understand points at which some advantage can be gained or lost by what they do or do not say

A combination of factors, including the range of emotions, their stake in a particular outcome and the understandable apprehension of conducting litigation in an unfamiliar environment, coupled with a lack of independent appraisal of the self-represented party's case, can result in a person having no sense of proportionality about the importance of their case. An inability to assess the merits of their case objectively, and a lack of emotional distance from the ACAT proceedings, can impair the party's tactical judgment about when to object or intervene or assess situations in which it is best to say nothing and let a point pass. In other words, it is sometimes difficult for people to stand back and observe how the proceedings are going in order to assess the nature and extent of the responses that they should make (or not make) from time to time.

Sometimes it will be apparent to the ACAT member (and presumably to the other side) when a self-represented party is effectively undermining their case by the way in which they conduct themselves or the approach they take to their evidence and the evidence provided by the other party or parties.

20 [2015] ACTSC 378 [53].

Possible ACAT action

It might be appropriate, on some occasions, for ACAT to caution a self-represented party about their conduct or a line of questioning, although such interventions by ACAT should be made sparingly in order to avoid any apprehension that ACAT is improperly assisting one party in the conduct of their case.

Understanding any hints or guidance from the presiding member

This point follows from, and is related to, the previous point. Sometimes self-represented parties are so close to the case they are presenting and so fixed on the way in which they are presenting it that they fail to understand or appreciate the significance of guidance from the ACAT member.

I have received occasional complaints from parties about the conduct of a presiding member on the basis that the member was biased in favour of the other party. When I reviewed the sound recording and/or the transcript, it was apparent to me that, if anything, the criticised member was attempting to assist the complainant rather than favouring the other side and that the assistance, by way of comment or suggestion, was not understood or appreciated, if it was heard at all.

Possible ACAT action

It goes without saying that the presiding ACAT member cannot and should not run any party's case for them. Procedural assistance is appropriate. Some other forms of assistance might not be appropriate. We all take a risk that, by offering some forms of assistance within the range of what is permissible, those attempts will be misunderstood, ignored or completely missed.

Where procedural assistance is given to one party, it can be helpful to also direct attention (even if briefly) to the other party to confirm that party's procedural next steps. This even-handedness promotes the sense of equal hearing and equal treatment.

Challenges for other parties

There are challenges for other parties, particularly where they are legally represented. On the one hand, lawyers must advance the interests of their client and can quite properly take issue with ill-founded, imprecise or otherwise objectionable statements or questions from the unrepresented party. On the other hand, it can sometimes be in the represented party's interests to allow considerable latitude in order to not delay further the conduct of the conference or hearing.

The New South Wales Bar Association has published *Guidelines for Barristers on Dealing With Self-represented Litigants*. Those guidelines include practical suggestions, some of which are paraphrased as follows:

- Although a barrister's primary duty is to the client, the long-term interests of clients are best served by a barrister observing rules which facilitate a fair hearing. There is little point for a client in achieving a result which, for example, is set aside on appeal on the basis that the self-represented litigant was denied natural justice.[21]

- In a case where inflammatory material has been filed, or belligerent or offensive behaviour has previously been manifested, a barrister should prepare the client

21 New South Wales Bar Association, above n 8, [2].

in advance on the desirability of not over-reacting to questions clearly designed to antagonise or upset the client.[22]

- A barrister should be aware of a possible resentment by the client that the person is having to pay legal fees (which are often increased by the activities and attitudes of the self-represented litigant) while the court is perceived as bending over backwards to be more than fair to the self-represented litigant. These perceptions, and questions from the client such as 'Why is the judge helping them so much?', can be minimised by proper communication with the client at the first available opportunity.[23]

- There can be frustration and annoyance over the fact that settlement chances are usually significantly reduced in cases where a self-represented litigant is involved.[24]

- Some tribunals were established to deal with significant numbers of people who are not expected to obtain legal advice and representation before approaching the tribunal. Such tribunals have often designed different systems specifically for cases involving self-represented litigants. One of the rules for survival for any barrister is to be aware of the culture, systems, expectations and rules (written and unwritten) for the tribunal in which the barrister appears. It is important for a barrister venturing into a tribunal where opposed by a self-represented litigant to check whether there are any different approaches or systems for self-represented litigants which might affect the conduct of the case.[25]

- Generally, cases involving self-represented litigants are more difficult and require more interpersonal skills of patience and adaptability on the part of the barrister. Barristers need to retain their objectivity and commitment to their various duties and obligations notwithstanding the frustration experienced. For example, where a self-represented litigant might be obsessed by the litigation and is unable to exercise rational judgment in relation to the dispute, great care needs to be taken not to become embroiled in apparently personal attacks or criticisms which may emanate. In such circumstances, any refutations of comments made should occur in as professional and non-personalised way as is possible.[26]

- The best service a barrister can render to their client when opposed to a self-represented litigant is to ensure that every stage of the litigation is meticulously prepared and presented. It might be appropriate to advise the self-represented litigant in advance of submissions which may be made or evidentiary matters which might arise. Common sense would dictate that a trial judge is likely to grant an adjournment where the submission or issue, when raised, will obviously be new to the self-represented litigant. Similarly, the barrister should have their solicitor provide the self-represented litigant with an advance copy of any authorities to be relied on to forestall an inevitable adjournment for the self-represented litigant to consider the authority.[27]

- A barrister should avoid conduct and language which indicate a familiarity with the judge to an extent that there is an appearance of unfairness or imbalance. Similarly, care needs to be taken to ensure that the language used (for example, the use of abbreviated terms and legal jargon) does not confuse a self-represented litigant and

22 Ibid [9].
23 Ibid [10].
24 Ibid [11].
25 Ibid [16].
26 Ibid [19], [20].
27 Ibid [30], [31].

> potentially incur resentment towards the party and the judge who has to translate the jargon into comprehensible language.[28]

The Queensland Law Society has published *Self-represented Litigants: Guidelines for Solicitors — Practice Support*, which provides a range of practical suggestions for solicitors.

For present purposes I note that those guidelines make two general observations. The first general observation is:

> The same high standards which apply to your conduct towards other practitioners and your duties to the court, should apply equally when dealing with people who are self-represented. In other words, your conduct as a solicitor should in no way be affected by the fact that the other party to a matter is self-represented. However, the way in which you discharge your duty to your client and the court may require you to be more creative and thoughtful in your approach and communication style when dealing with a self-represented person.[29]

The second general observation is:

> Better communication between solicitors and people who are self-represented is likely to benefit solicitors, their clients and the courts. It could assist to reduce stress associated with legal disputes, facilitate an amicable, speedy and cost-effective solution, reduce matters that have unnecessarily progressed to trial, and improve the quality of hearings when disputes do come before the courts. It could also increase public confidence in the legal profession and improve the way solicitors are perceived through their dealings with people who are self-represented.[30]

Challenges for ACAT

The challenges are not confined to the parties. Those who adjudicate face a separate but equally complex suite of challenges.

The appearance of self-represented parties can affect the capacity of ACAT to administer justice fairly and efficiently and to ensure that (in the words of s 7 of the ACAT Act) ACAT's procedures are as 'simple, quick, inexpensive and informal as is consistent with achieving justice'.

Despite the difficulties described earlier, all parties have the right to a fair hearing (whether at a conference or a hearing). Consequently, ACAT members and registry staff often need to take particular care to ensure that the Tribunal is aware of all matters relevant to the proceedings and that justice between the parties is achieved.

Each ACAT member has given an undertaking to the ACT to 'do right to all people, according to law, without fear or favour, affection or ill will'.[31] That undertaking, like other judicial oaths and affirmations of office, imports the notion of impartiality, which requires members to be fair, even-handed, patient and attentive to all parties.

On the one hand, ACAT cannot enter the arena and assist a party in ways that give rise to an apprehension that the Tribunal is running the case for one party. On the other hand, it is equally irresponsible and counterproductive for a presiding member to sit mute while a party in person struggles to present their case in a sensible way, produce evidence from their own witnesses, respond to objections from the other side, cross-examine the other party's witnesses and make submissions which are coherent, relevant to the legal issues to be decided and in a logical sequence.

28 Ibid [60], [61].
29 Queensland Law Society, *Self-represented Litigants: Guidelines for Solicitors — Practice Support* (November 2017) 4.
30 Ibid.
31 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 109, Sch 1.

In order that parties in person can have some appreciation that they have been treated fairly by the system, the system sometimes needs to assist them, irrespective of the merits of their case.

The *Australia and New Zealand Tribunal Excellence Framework*, published by the Council of Australasian Tribunals (COAT), states that a central obligation of a tribunal is the provision of a fair hearing:

> An important element of this obligation is the duty to provide assistance to self-represented parties (sometimes called litigants in person). Members and staff should identify the difficulties experienced by any party. … A tribunal has an obligation to assist litigants in person to overcome these disadvantages to the extent necessary to ensure a fair hearing.[32]

The recently published fourth edition of the COAT *Practice Manual for Tribunals* (Practice Manual) refers to the need for clear and calm communication to parties by tribunal members about matters such as:

- the nature and legal limits of the tribunal's role;
- what is expected and permitted of parties;
- how the proceedings will be conducted; and
- parties' appeal rights.[33]

The Practice Manual notes that the absence of representation for parties imposes upon tribunal members additional responsibilities to enable parties to participate effectively in proceedings. These extend to:

- providing additional information to self-represented parties;
- giving guidance about the posing of questions to witnesses;
- exploring technical matters of which self-represented parties may be unaware; and
- posing questions in raising issues which have not been canvassed by parties.[34]

The Practice Manual acknowledges that, in such circumstances,

> tribunal members may need to be more detailed in their explanations of tribunal procedures than they would otherwise be and to extend a measure of latitude to non-legally-trained persons who wish to ask questions and make submissions. It can also necessitate tribunal members being more involved in asking questions that self-represented persons are not able to formulate and in assisting parties than they otherwise would be where effective legal representation was involved.[35]

What ACAT must do to assist a self-represented party depends on the individual, the nature of the proceedings and the person's intelligence, abilities and understanding of the case.

While that is accepted, there can be difficulties for ACAT in a particular case where only one party is self-represented. ACAT must maintain a perception of impartiality and ensure that no party feels that the Tribunal is taking sides.

32 Council of Australasian Tribunals, *Australia and New Zealand Tribunal Excellence Framework* (COAT, 2nd ed, 2017) 16.
33 Council of Australasian Tribunals, *Practice Manual for Tribunals* (COAT, 4th ed, 2017) 109.
34 Ibid.
35 Ibid 110.

The perceptions can go either way and sometimes both ways simultaneously. Some self-represented parties might perceive the ACAT member to be partial towards the represented party simply because lawyers and ACAT members are seen to be part of the same system from which the self-represented party is excluded.

Those misperceptions might not be excluded entirely. However, an ACAT member can assist all the parties at a hearing by making some introductory statements which clearly set the context in which the hearing occurs and spell out the procedures to be followed.

At the beginning of the hearing, the presiding member should identify and, if possible, have the self-represented party and other parties agree upon the real issues in the case. A careful explanation might ensure that the self-represented party appreciates which issues are to be addressed and why the hearing is confined to those issues. That might help shorten the proceedings by focusing attention on the real issues and avoid irrelevant arguments.

The ACAT member should also explain to the self-represented party matters such as:[36]

- the purpose of the hearing and the particular issue on which a decision is to be made;
- that the issue will be decided on the oral and documentary evidence before ACAT;
- the manner in which the hearing will proceed;
- the order of the calling of witnesses and the party's right to ask questions of witnesses;
- the procedural rules that seek to ensure that parties receive a fair hearing;
- the self-represented party's right to object to certain matters, such as evidence or the taking of a particular procedural course; and
- the role of case law as precedent or persuasive authority.

It might be necessary to repeat some explanations during the hearing as issues arise.

It might be advisable to inform the self-represented party at the outset to speak slowly and take time in the presentation of their case. That may reduce some pressure on that party and enable them to articulate their case more clearly.

When oral evidence is being taken, the ACAT member might assist the self-represented parties to obtain basic information from witnesses such as their name, address and occupation.

At the end of the hearing, if the decision is reserved, it might be useful to advise the self-represented party of the period within which decisions are usually released and the process by which the reasons for decision will be made available to each party. It might relieve the self-represented party of some anxiety to know that the time frame for decision is not indeterminate and will also temper any expectations of an immediate decision. The effect of such communications could reduce unnecessary contact between the party and ACAT. Indeed, all parties should be advised that they should not contact ACAT after the decision is reserved unless they have contacted the other parties or their representatives, providing a copy of the proposed written communication.

One consequence of dealing appropriately with some self-represented parties is that the mediation or hearing of matters takes less time when the parties or their representatives

36 The following suggestions are adapted from the *Equal Treatment Benchbook*: Supreme Court of Queensland, above n 5, 142–3.

can identify and narrow issues and focus on them. When matters are not settled in mediation or conference, realistic amounts of time need to be allocated for the hearing to allow for the hearing to be completed as scheduled (not adjourned for conclusion at a later date) and to ensure that sufficient member time is scheduled to avoid overlap with other cases.

The flow-on effect of some matters involving self-represented parties is that other matters cannot be dealt with in a timely fashion or members have less time to write reasons for decisions in other matters. As the Victorian Court of Appeal stated recently:

> The management of cases involving unrepresented litigants is a source of continuing difficulty for judicial officers. They are required to balance the interests of justice in the particular case with the competing public interest in the efficient use of public resources and in access to justice for other litigants waiting to have their cases heard. What is required is a combination of patience and judgment and an ability to discriminate between those cases where the interests of justice demand a prolongation or adjournment of the hearing — so that the unrepresented litigant's case can be fairly presented — and those where the interests of justice call for expeditious disposal.[37]

The New South Wales Bar Association's *Guidelines for Barristers on Dealing With Self-represented Litigants* make the following observations about the impact on judicial officers of having self-represented litigants before them:

> The principal effect on the judicial officer of a matter involving a self-represented litigant is to increase the time spent on the case before and during the hearing. Other effects reported … include more delays, more adjournments, more judicial work, cases not being heard, frustration, anger at staff (errors in documents, lost documents) increased stress and raised blood pressure for judges.[38]

Recent court decisions

The challenges for ACAT in conducting proceedings which are simple and quick but observe natural justice and procedural fairness are outlined above. In that context, it is appropriate to look at two recent superior court decisions which give some practical guidance to courts and hence tribunals about how the appropriate balance is to be struck when seeking to conduct fair hearings in circumstances where the self-represented party is difficult and, in particular, refuses to accept the procedural rulings of the court.

On 28 August 2018, the Victorian Court of Appeal (President Maxwell and Beach and Niall JJ) allowed two appeals against findings that self-represented litigants had been denied procedural fairness in cases before the Magistrates Court (*Roberts v Harkness*[39] (*Harkness*)) and the County Court (*Doughty-Cowell v Kyriazis*[40] (*Kyriazis*)).[41]

In both matters the Court of Appeal discussed the fundamental obligation of every court to ensure a fair hearing.

In determining whether the requirements of procedural fairness were met, the question was whether each party was given a reasonable opportunity to present their case. It was held, in both cases, that the court had done all that was reasonably necessary to ensure a fair hearing.

37 *Roberts v Harkness* [2018] VSCA 215 [66].
38 New South Wales Bar Association, above n 8, [12].
39 *Roberts v Harkness* [2018] VSCA 215.
40 *Doughty-Cowell v Kyriazis* [2018] VSCA 216.
41 The following discussion of these cases draws and expands upon the Summary of Judgment issued by the Supreme Court of Victoria on 28 August 2018.

In *Harkness*, the Court said:

> Axiomatically, what is 'reasonable' for this purpose will depend on the circumstances of the case. Matters to be taken into account in determining the practical content of fairness in the particular case will include
>
> - the nature of the decision to be made;
> - the nature and complexity of the issues in dispute;
> - the nature and complexity of the submissions which the party wishes to advance;
> - the significance to that party of an adverse decision ('what is at stake'); and
> - the competing demands on the time and resources of the court or tribunal.[42]

Harkness

Mr Harkness was charged with summary offences listed for hearing in the Magistrates Court. In documents filed prior to the hearing, he outlined objections to the jurisdiction of the Court. At the commencement of the hearing, the magistrate informed Mr Harkness that she would dismiss his objection, refusing his requests to make oral submissions.

Following a persistent refusal to accept that ruling, and disrespectful and disruptive behaviour, Mr Harkness was excluded from the hearing and the charges were heard and determined in his absence. On appeal to the Supreme Court, it was held that the magistrate had breached the rules of natural justice by failing to hear oral submissions as to jurisdiction and failing to provide Mr Harkness with due assistance in relation to those submissions.

The Court of Appeal reversed that decision, saying:

> Especially given that the objection to jurisdiction was only a preliminary point, it was perfectly appropriate for the Magistrates' Court to have directed the filing of argument in advance. That is a procedure routinely adopted by courts. It serves the interests of justice, by giving parties time to formulate their arguments in writing and by enabling judicial officers to prepare for hearings by reading the written arguments before going to court.
>
> It was readily apparent from both of the documents which Mr Harkness had filed with the court that he was able to articulate, fully and clearly, the basis of his objection to jurisdiction. It was equally clear that the objection had no foundation whatsoever in law and that no amount of elaboration could have altered that position.[43]

Kyriazis

Mr Kyriazis had been convicted of summary offences in the Magistrates Court. He represented himself before the County Court on an appeal against his convictions. Following a ruling by the judge that the proceeding could be sound-recorded but not videotaped, Mr Kyriazis refused to participate in the proceeding. He was convicted and discharged. He sought judicial review of the decision in the Supreme Court, where it was found that the County Court judge had breached the rules of natural justice and was guilty of 'ostensible bias'.

The Court of Appeal reversed that decision. It found that Mr Kyriazis had been provocative and confrontational in pre-hearing correspondence and, from the first moment of the

42 *Roberts v Harkness* [2018] VSCA 215 [49].
43 Ibid [11], [12].

hearing, had refused to accept the judge's ruling on the question of whether he could record the proceeding.

The Court said:

> The hearing [before the County Court judge] was remarkable for the level of hostility, anger and aggression directed by Mr Kyriazis (and some of his supporters) towards the Court. The judge for the most part remained calm and patient, although — unsurprisingly — he did occasionally raise his voice in his requests that Mr Kyriazis keep quiet.[44]

The Court reiterated that the content of the judge's obligation to provide assistance in order to ensure a fair hearing varies with the circumstances of the case and, in particular, the capabilities and attitudes of the self-represented litigant.

The Court concluded as follows:

> [T]his was not a case where the judge was obliged to take extra measures to provide assistance to Mr Kyriazis. On the contrary, it was Mr Kyriazis who — for no good reason — decided to withdraw from his own appeal and who thereafter engaged in what can only be described as disgraceful conduct towards the judge. There was nothing more his Honour could have done to ensure a fair hearing.[45]

Does a self-represented party need a litigation guardian for the proceedings?

In some instances, ACAT might have concerns about whether a self-represented party is capable of conducting their proceedings and, hence, whether that party needs a litigation guardian for those proceedings.

ACAT considered this question in detail in *Complainant 201717 v The Australian Capital Territory*.[46]

At common law there is a rebuttable presumption that an adult is legally competent to bring or defend legal proceedings.[47] Where a person is not legally competent, a litigation guardian may be appointed to protect the person, the other parties to the proceedings and the legal process.

The ACAT Act sets out who may apply to ACAT[48] and who are the parties to an application,[49] and provides that a party may appear in person.[50] These provisions do not replace the common-law principles about legal competence but work in conjunction with them. Procedural Direction 8 of the ACT Civil and Administrative Tribunal Procedural Directions 2010 (No 1) (Procedural Directions) provides:[51]

> **8. The Representation of people under a legal disability**
>
> 8.1 A person who is under a legal disability may only be a party to an application if they are represented by a litigation guardian unless the Act or an authorising law or these Directions provide otherwise.

44 [2018] VSCA 216 [4].
45 Ibid [8].
46 *Complainant 201717 v The Australian Capital Territory* [2019] ACAT 1. The following discussion draws on the reasons for decision in that case: [44]–[52].
47 *Murphy v Doman* [2003] NSWCA 249.
48 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 9.
49 Ibid s 29.
50 Ibid s 30.
51 Procedural Direction 9 then provides for a process of appointing a litigation guardian by way of affidavit.

The term 'legal disability' is defined in the Procedural Directions as follows:

> 'a person with a legal disability' means a child or a person who is not legally competent to be a party to an application because of a mental disability ...

ACAT may in its discretion dispense with the requirements of the Procedural Directions.

Where a question as to the legal competence of a party arises, ACAT should consider the implications of that issue for the particular case before proceeding further. It should do so even if the other party does not wish to raise any point about competence but ACAT has serious doubts about the party's capacity.[52]

Hearing the matter when one party lacks the requisite capacity, even to determine preliminary points, may be to provide to that party no hearing at all.[53] This would be a breach of the requirements of procedural fairness.[54]

Nevertheless, in some cases it will be appropriate to proceed to hear and decide a matter without determining the question of legal competence, or even where satisfied that one party is not legally competent.[55] Whether ACAT should proceed or not will depend upon the 'need' for a litigation guardian in the circumstances of the case.

In some situations, the utter hopelessness of an action may make it a proper case for summary dismissal, without there being any need to consider the party's capacity to conduct it. The appropriate course for ACAT to take will, of course, inevitably depend on the circumstances of the case, bearing in mind that the threshold for the summary dismissal of a proceeding is a high one.[56]

The approach to determining competence for legal proceedings, and particularly for a self-represented litigant, was summarised by Kyrou J in *Slaveski v State of Victoria*[57] (*Slaveksi*) as follows:

> 25. There is a presumption that a person of full age is capable of managing his or her own affairs, which must include the management of litigation to which he or she is a party. The person who alleges the contrary bears the onus.
>
> 26. There is no universal test for determining whether a person is capable of managing his or her affairs. Lack of capacity is usually denoted by a person's inability to understand the nature of an event or transaction when it is explained. In relation to litigation in which a person is a party, the person must be able to understand the nature of the litigation, its purpose and its possible outcomes, including the risks in costs.
>
> ...
>
> 31. Where a person is a self-represented party to a proceeding, the level of mental capacity required to be a 'capable' litigant will be greater than that required to instruct a lawyer because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.

52 *L v Human Rights & Equal Opportunity Commission* [2006] FCAFC 114 [33].
53 *Murphy v Doman* [2003] NSWCA 249 [47]–[51].
54 ACAT is required by its legislation to perform its functions in a way which is procedurally fair but also to aspire to being 'quick' and 'efficient'. Sometimes there is a tension between these imperatives. A failure to provide procedural fairness will not make the decision of ACAT a nullity but may be an appellable error: *Legal Practitioner v Council of the Law Society (No 2)* [2014] ACTSC 352.
55 See *Clarey v Permanent Trustee Co Limited* [2005] VSCA 128.
56 *L v Human Rights & Equal Opportunity Commission* [2006] FCAFC 114 [35].
57 [2009] VSC 596.

32. In my opinion, where a plaintiff is self-represented, the following issues are potentially relevant in determining whether he or she is a person under disability for the purposes of r 15.01 of the [Supreme Court (General Civil Procedure) Rules 2005 (Vic)]:

    (a) Does the plaintiff understand the factual framework for his or her claims and the type of evidence required to succeed in his or her claims?

    (b) Is the plaintiff capable of understanding what is relevant to the proceeding and what is not relevant when these matters are explained to him or her?

    (c) Is the plaintiff capable of assessing the impact of particular evidence on his or her case?

    (d) Is the plaintiff able to understand the Court processes and the basic rules for conducting his or her case when these matters are explained to him or her?

    (e) Is the plaintiff able to understand Court rulings made during the trial when they are explained to him or her?

    (f) Assuming the plaintiff is able to understand Court processes, the basic rules of conducting his or her case and Court rulings, is he or she capable of complying with them and directions given by the judge?

    (g) Does the plaintiff understand the roles of counsel for the defendant, witnesses and the judge and is he or she capable of respecting those roles and allowing the relevant individuals to discharge their duties without inappropriate interference or abuse?

    (h) Is the plaintiff able to control his or her emotions and behave in a non-abusive and non-threatening manner when events do not go his or her way during the trial (such as when adverse rulings are made by the judge, questions are asked in cross-examination on sensitive issues or unfavourable answers are given by witnesses)?

    (i) Does the plaintiff have an insight into the possible adverse consequences of his or her behaviour in court, including delay in the resolution of the claims, the defendant incurring additional costs that the plaintiff might have to pay if the claims are unsuccessful and the tying up of scarce judicial resources when these matters are explained to him or her?

    (j) Does the plaintiff understand that he or she could possibly lose the case in whole or in part when this matter is explained to him or her?

    (k) If the cumulative effect of the evidence is such that a lay person of reasonable intelligence and common sense would form the view that a particular claim will fail, would the plaintiff be capable of forming such a view?

    (l) Is the plaintiff capable of assessing any settlement proposal on its merits, having regard to the state of the evidence, the parties' submissions and other developments in the proceeding as at the time the proposal is made?

    (m) If the trial is long and complex, is there a risk that the stress and pressure of the litigation might harm the plaintiff's physical or mental health?

33. A self-represented person who is incapable of continuing to act as his or her own advocate is not necessarily incapable of managing his or her affairs in relation to the relevant proceeding, as that person may be capable of retaining legal representatives to continue to conduct the proceeding.

...

35. A decision on whether to appoint a litigation guardian is usually made after giving the party affected and the other parties to the proceeding an opportunity to be heard on the matter. However, the party affected will not need to be heard personally where it is incontrovertible that he or she is incapable of making any meaningful submissions on the matter.[58]

The factors described in *Slaveski* can be usefully applied in ACAT context, subject to the qualification that in that case the Court was considering a litigant attempting to represent himself in a court, faced with the rules of evidence and civil procedure. It should be expected that a self-represented party would find the processes of a tribunal that is not bound by the rules of evidence and conducted informally less intimidating.

The question whether a self-represented party needs a litigation guardian might be raised by a party to the proceedings. The Queensland Law Society's *Self-represented Litigants: Guidelines for Solicitors* states:

> If a party to litigation may have impaired capacity and if the issue of capacity is raised and found to exist by the Court or QCAT [Queensland Civil and Administrative Tribunal[, the UCPR [*Uniform Civil Procedure Rules*] requires that the matter can only proceed if a litigation guardian is appointed. If you are acting for a plaintiff in the matter and there is a finding that the defendant has impaired capacity, then unless a litigation guardian is appointed your client will not be able to continue the proceedings. If your client is defending a matter where the plaintiff has impaired capacity, then the matter may sit unresolved, indefinitely, until a litigation guardian can be appointed. Where you suspect that the self-represented person may have impaired capacity the question arises as to whether you or your client has an obligation to make the court aware of your suspicions. Further, there is a risk that the validity of any settlement agreement could subsequently be challenged on the grounds of impaired capacity.[59]

What is more important — a fair process or a legally exemplary outcome?

Although a tribunal will focus on reaching a fair and legally sound outcome, it is not necessarily the case that the parties judge the process by reference only to that outcome. In a review of the literature about the factors driving public and participant satisfaction with courts and tribunals, the authors concluded:

> the suggestion that satisfaction is simply dependent upon outcome, driven solely by the self-interest of each participant, and somehow anathema to justice, is challenged by the evidence. Even losing parties may gain some satisfaction from a process which is palpably just.[60]

Participant and public perceptions about the fairness of process (that is, about procedural justice) depend upon a complex mix of factors. The authors of that review of the literature found that five process-oriented factors contributed to the perception of fairness and hence satisfaction:

- the expectations of, and information provided to, participants;
- the quality of participation granted to participants (that is, the extent to which, and the process through which, participants are able to get their story out in a way they view as accurate and fair);
- the quality of treatment and, in particular, the respect shown to the participant during their time at the tribunal;
- issues of convenience and comfort including timeliness and efficiency; and

58 Ibid [25]–[35] (footnotes omitted).
59 Queensland Law Society, above n 29, 8.
60 RL Moorhead, M Sefton and I Scanlan, *Just Satisfaction? What Drives Public and Participant Satisfaction With Courts and Tribunals — A Review of Recent Evidence* (Cardiff Law School, Cardiff University, 2008) 7.

- judgments about tribunal members and staff — whether they were perceived as helpful and empathetic.[61]

Tribunals also have an obligation to provide a fair and efficient dispute resolution service, such as mediation and conciliation conferences, where the tribunal controls the process but the parties control the outcome. Those forums provide an opportunity for the parties to fashion outcomes they can live with rather than have one imposed upon them after a hearing.

I note that, although such processes might be inherently fair to the parties and provide the context in which just outcomes might be reached, there will be a proportion of parties who will seek to use whatever processes are available to advance their interests. They might use the system to delay any decision or other outcome that might require them to take action — for example, by paying a sum of money to the other party. Such users of the system necessarily result in costs to ACAT in staff and member time and a diversion of scarce resources away from more productive activities.

Conclusion

ACAT needs to prepare on the basis that one or more of the parties will represent themselves in most of the proceedings before it, whether at mediation, preliminary conference or hearing.

The involvement of self-represented parties raises numerous challenges for those parties and for other parties, as well as for ACAT.

We need to bear that in mind as we seek to refine our ways of doing our work on a case-by-case basis, while remembering the implications of giving intense attention to one case for the overall disposition of many other matters before ACAT.

It might be that some parties cannot, or will not, be helped procedurally. We have to ensure that, to the best of our ability, each matter is resolved 'as quickly as is consistent with achieving justice' while ensuring that the 'decisions of the tribunal are fair'.

However, there are some self-represented parties for whom ACAT might need to take a significant extra step.

We need to be alert to the needs of the parties in each case and the nuances of individual cases in fashioning appropriate procedures and adjusting our individual approaches for and during the proceedings.

Sometimes that will feel like we are doing at least as much work as the parties to bring the proceedings to an appropriate conclusion. So be it. That is part of the challenge, and sometimes the satisfaction, of being a member of ACAT.

61 Quoted in Council of Australasian Tribunals, above n 33, 8.

Adventures on the administrative decision-making continuum: Reframing the role of the Administrative Appeals Tribunal

Matthew Paterson*

Although it has existed since 1975, the precise role played by the Administrative Appeals Tribunal (AAT) in the Australian legal landscape has never been as clear as it should be. This lack of clarity lends credence to the recent calls for the AAT to be abolished entirely,[1] regardless of the void it would leave.[2] This article seeks to clarify the role of the AAT and thereby restate its importance. It will do this through the lens of the 'administrative decision-making continuum' — a phrase coined by Davies J in *Jebb v Repatriation Commission*[3] (*Jebb*). Like the role of the AAT itself, the continuum has remained an ethereal concept, with no clear bounds beyond those first developed in *Jebb*. This article seeks to change that.

Even if one only views the 'administrative decision-making continuum' through the lens of *Jebb*, this article will show that the view that the continuum 'is relevant only where the issue before it is of a continuing nature' understates its significance as a way of understanding the role of the AAT.[4] Indeed, looking beyond the words used in *Jebb*, 'continuum' is apt to describe the complex interrelationships between different administrative decision-makers. One of the most significant — and most forgotten — elements of this is just how radical the AAT's creation was.[5] However, if that history, alongside more recent jurisprudential developments and the text of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) itself are all taken into account, it becomes evident that the AAT's approach is meant to be informed, on the one hand, by the institutional knowledge of a decision-maker in relation to a given applicant and, on the other, by the knowledge that it is meant to sit as a model of good governance *for the primary decision-maker to follow*. Thus the 'administrative decision-making continuum' is not constrained to circumstances where the issue before the AAT 'is of a continuing nature'.[6] Rather, it is apt to describe, on a fundamental level, the role of the AAT.

As a part of the administrative decision-making continuum, the AAT lies within 'an integrated, coherent system of administrative law'.[7] Thus it is not the case that the AAT is 'undermining the work [government agencies are] doing'.[8] Rather, it is best viewed as working alongside them in pursuit of the ultimate goal of good governance. Justice Logan, sitting as President of the AAT, noted that, 'if each element of our system of government understands and respects the role of the other',[9] the tension between them will be much lessened. By clarifying the administrative decision-making continuum, this article strives to play a role in easing that tension.

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1 See 'Blitz on AAT visa appeals boom', *The Australian* (Sydney), 26 February 2019.

2 See, for example, *Singh* [2017] AATA 850.

3 (1988) 80 ALR 329.

4 Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis, 4th ed, 2015) 294.

5 Administrative Review Council, *Administrative Review Council Annual Report 1976–77* (1977) Foreword; Justice Duncan Kerr, 'Reviewing the Reviewer: the Administrative Appeals Tribunal, Administrative Review Council and the Road Ahead' (Speech delivered at the Annual Jack Richardson Oration, National Portrait Gallery, 15 September 2015) <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kerr/kerr-j-20150915#_ftnref51>.

6 Pearce, above n 4, 294.

7 Robin Creyke, 'Administrative Justice — Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705, 730.

8 Cf 'Dutton slams AAT decisions after staff enjoy $600k "tax-funded" trip', *Starts at 60* (online), 30 May 2018 <https://startsat60.com/discover/news/peter-dutton-slams-administrative-appeals-tribunal-600k-tax-funded-conference>.

9 *Singh* [2017] AATA 850 [17].

The traditional conception of the administrative decision-making continuum

In order properly to understand the nature of the phrase 'administrative decision-making continuum', it is important to understand its origins, specifically the Federal Court judgment in *Jebb*.

Mr Jebb, a veteran of the Second World War, was already receiving a disability pension for conditions he acquired as a result of his service when he lodged with the Repatriation Commission a claim for 'cervical spondylosis and osteoarthritis and rotator cuff degeneration in the right and left shoulders'.[10] This claim was rejected in part and was ultimately appealed to the AAT.[11] Before the AAT made its decision, however, Mr Jebb lodged another, separate, claim for 'the acceptance of lumbar spondylosis and chronic dyspepsia'.[12] In assessing this claim, an officer of the Repatriation Commission accepted that Mr Jebb's anxiety was also attributable to his war service.[13] Although the officer's decision was brought to the AAT's attention, the AAT formed the view that it was restricted in the scope of its review to assessing Mr Jebb's incapacity for work as at the date he lodged the claim which was the subject of review before it.[14]

On appeal before Davies J, the critical question was whether the AAT erred in constraining its review to the question of Mr Jebb's entitlement to the pension as at the date his claim was lodged.[15] In considering this question, his Honour made the following comments:

> *the general approach of the tribunal has been to regard the administrative decision-making process as a continuum and to look upon the tribunal's function as a part of that continuum* so that, within the limits of a reconsideration of the decision under review, the tribunal considers the applicant's entitlement from the date of application, or other proper commencing date, to the date of the tribunal's decision. That function was enunciated in *Re Tiknaz and Director-General of Social Services* (1981) 4 ALN No 44. The approach there taken has since been generally adopted. In the repatriation jurisdiction, it was applied after *Banovich* in *Re Easton and Repatriation Commission* (1987) 12 ALD 777 where (at 778) the tribunal discussed the decisions in *Banovich; Delkou v Repatriation Commission* (1986) 69 ALR 406 and *Lucas v Repatriation Commission* (1986) 69 ALR 415 and said:
>
> > The ambit of a review by the tribunal is necessarily influenced by the ambit of the steps and proceedings that have taken place prior to its review, for the function of the tribunal is to review a decision. But provided that the matter is within the ambit of its jurisdiction as a review authority, the general practice of the tribunal is to take account of events that have occurred up to the date of the decision. Indeed, s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) expressly states, 'For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision …'.[16]

While *obiter*, this passage has been widely cited, including by Kirby J on the High Court in *Shi v Migration Agents Registration Authority*[17] (*Shi*) and by Bell, Gageler, Gordon and Edelman JJ in *Frugtniet v Australian Securities and Investments Commission*[18] (*Frugtniet*).

From a contextual understanding of Davies J's judgment in *Jebb*, it is evident that the 'continuum' as understood and described by his Honour has two key aspects. First, while the AAT's jurisdiction may be invoked in relation to a single application to a decision-maker,

10 (1988) 80 ALR 329, 331.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid 331–2.
15 Ibid 333.
16 Ibid 333–4 (emphasis added).
17 (2008) 235 CLR 286 [45]–[46].
18 (2019) 93 ALJR 629 [53].

that does not preclude the decision-maker from making other, related, decisions. Rather, a person is entitled to lodge fresh claims with the primary decision-maker, particularly as a 'decision of the [primary decision-maker] speaks *in futuro*'.[19] This is distinct from the realm of s 26 of the AAT Act, which prevents a primary decision-maker from remaking a decision while AAT proceedings are on foot.

It is evident that this restriction is not limited to making other decisions of the same kind as the one before the AAT, only in relation to different claimed conditions. It is uncontentious that an administrative decision-maker can exercise a power subject to review by the AAT and exercise other powers in relation to the same person, such as an information-gathering power it may have, at the same time. While they would be precluded from exercising the information-gathering power while their decision is under judicial review,[20] no such preclusion operates before the AAT.[21] The reasoning for this, as acknowledged by Northrop J in *Saunders v Federal Commissioner of Taxation (Cth)*,[22] is that the AAT 'is in the shoes of the Commissioner and may use any material put before it in reaching its decision',[23] in the same way as would the primary decision-maker. The one restriction to this is that the AAT is limited in conducting its review to considering the decision in respect of which an application is lodged.[24]

Secondly, it is evident that Davies J was referring to a 'continuum' primarily out of deference to the notion that a person's circumstances — including their legal status before the decision-maker — may change over time. This is the continuum in its 'chronological' sense. Thus, unless restricted by statute,[25] *Jebb* would indicate that the AAT's decision ought not be limited to addressing circumstances as they stood at the time of an applicant's first claim. While obviously dependent upon the relevant statutory scheme, this seems to be akin to the 'progressive and evolving decision-making' referred to by Conti J (with whom Heerey and Dowsett JJ agreed) in *Telstra Corporation Ltd v Hannaford*.[26]

There is some dispute as to whether or not this second aspect of the continuum is of a general nature. In *Shi*,[27] Kiefel J (with whom Crennan J agreed on this point) considered that it is appropriate for Davies J's judgment in *Jebb* to be juxtaposed against his Honour's judgment in *Freeman v Secretary, Department of Social Security*[28] (*Freeman*). In *Freeman*, the applicant was in receipt of the widow's pension, but her pension was cancelled after she subsequently entered into a new de facto relationship.[29] This new relationship ended at some 'impossible to determine' date after the cancellation of her pension but before the AAT completed its review.[30]

Although counsel for Mrs Freeman referred to *Jebb* and submitted that the AAT could consider her entitlement for the pension after the end of her de facto relationship, Davies J disagreed. His Honour instead thought that 'the present appeal extends [the *Jebb*] principle beyond its scope', as the effect of the relevant legislative scheme was 'that once a pension

19 *Jebb v Repatriation Commission* (1988) 80 ALR 329, 336.
20 See *Huddart, Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330; *R v Associated Northern Collieries* (1911) 14 CLR 387; *Melbourne Steamship Company v Moorehead* (1912) 15 CLR 333; and *Brambles Holdings Ltd v Trade Practices Commission (No 2)* (1980) 44 FLR 182, 186–9.
21 *Watson v Federal Commissioner of Taxation* (1999) 96 FCR 48 [29]–[32]; *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224 [32].
22 (1988) 15 ALD 353.
23 Ibid 358.
24 *Administrative Appeals Tribunal Act 1975* (Cth) s 25; *Freeman v Secretary, Department of Social Security* (1988) 15 ALD 671, 674.
25 Cf *Social Security (Administration) Act 1999* (Cth) ss 41–42, Sch 2 cl 4.
26 (2006) 151 FCR 253, 274, recently reaffirmed in *Commonwealth of Australia v Snell* [2019] FCAFC 57 [63].
27 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 [144]–[145].
28 (1988) 15 ALD 671.
29 Ibid 672.
30 Ibid.

or benefit has been cancelled, the previous recipient has no entitlement to restoration thereof until he or she has lodged a further claim'.[31] It followed that:

> The ambit of the jurisdiction of the Administrative Appeals Tribunal in relation to the review of a decision to cancel a pension or benefit is therefore less than would be the jurisdiction of the Tribunal in respect of a refusal to grant a pension or benefit or a decision suspending the payment of a pension or benefit. In the latter cases, there may well be an on-going entitlement to a pension or benefit which the Tribunal should recognise when formulating its decision.[32]

In the view of Kiefel J, in *Freeman*:

> [Justice Davies] did not suggest, by this comparison, that the ambit of the decision to be reviewed was to be determined by a general description of what the decision concerned — a grant or a cancellation of an entitlement. In each case what is entailed in a decision is to be ascertained by reference to the statute providing for it.[33]

Conversely, Kirby J was explicit in concluding that a rule of general application can be derived from *Jebb*:

> There is thus a *general* approach deriving in particular from the statutory function of substituting one administrative decision for another. Nevertheless, the *particular* nature of the 'decision' in question may sometimes, exceptionally, confine the Tribunal's attention to the state of the evidence as at a particular time.[34]

While not couched in this language, it is apparent that Hayne and Heydon JJ agreed:

> Once it is accepted that the Tribunal is not confined to the record before the primary decision-maker, it follows that, unless there is some statutory basis for confining that further material to such as would bear upon circumstances as they existed at the time of the initial decision, the material before the Tribunal will include information about conduct and events that occurred after the decision under review. If there is any such statutory limitation, it would be found in the legislation which empowered the primary decision-maker to act; there is nothing in the AAT Act which would provide such a limitation.[35]

The crucial link for the purposes of the continuum was made in a slightly different way by Kirby J and by Hayne and Heydon JJ. Ultimately, though, the point is that, when it is undertaking its review, 'the Tribunal's task is "to do over again" what the original decision-maker did'.[36] In so doing, it must act as a diligent administrative decision-maker should and, unless barred from doing so by statute, take into account information that postdates the decision under review.[37] In this way, the administrative task of the AAT is fundamentally distinct from the judicial task of the courts. Whereas courts exercising appellate jurisdiction are limited in how far they can stray from findings of fact made by primary decision-makers,[38] the AAT must in all but 'the most exceptional cases' consider 'the relevant and probative material which the parties place before it or which it acquires for itself'.[39]

31 Ibid 673–4.
32 Ibid 674.
33 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 [145].
34 Ibid [46] (emphasis in the original; footnotes omitted).
35 Ibid [99].
36 Ibid 100 (footnotes omitted).
37 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [14] (Kiefel CJ and Keane and Nettle JJ), although the minority seemed to resile from this and prefer Kiefel J's approach in *Shi* in the next paragraph: [15].
38 *Aldi Foods Pty Ltd v Moroccanoil Israel Pty Ltd* (2018) 358 ALR 693 [2]–[10]; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 [24]–[30].
39 *Commonwealth of Australia v Snell* [2019] FCAFC 57 [72]; *Morales v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 374; *Re Tarrant and Australian Securities and Investments Commission* (2013) 62 AAR 192 [77].

Even if the conception of the administrative decision-making continuum is not progressed any further than these two points, it establishes important lessons about the role of the AAT. These lessons are, somewhat obviously, sourced in the explicit statement in the AAT Act that the AAT 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision':[40] subject to its own procedure, the AAT must make its decision in the same manner as the primary decision-maker.[41] While this is most often viewed in the negative sense, where the AAT errs by trying to exercise powers which were not available to the primary decision-maker[42] or where it takes into consideration matters which the primary decision-maker was prohibited from taking into account,[43] it also exists in a positive sense.

There are two elements to this positive sense. First, where the primary decision-maker has to take into account all the material put before it at the time of making its decision, so too does the AAT have to take into account all the material put before it at the time of making *its* decision.[44] That is so even if that material or information relates to events that could only have taken place after the decision under review was made.[45] In the words of the Full Court of the Federal Court, 'so long as the exercise of power and discretions by the Tribunal is for the purpose of reviewing a decision, all of the powers and discretions conferred by *any relevant enactment* on the decision-maker who made the decision, can be exercised by the Tribunal'.[46] Thus, the AAT, as an administrative decision-maker, acts as the primary decision-maker would, both in terms of the powers it exercises and in terms of what it can take into account.[47]

Secondly — and perhaps more significantly — while the AAT is making its decision then, other than by virtue of s 26 of the AAT Act, the primary decision-maker is not precluded from making other decisions in relation to the individual in respect of whom it made the decision under review. Thus, where the primary decision-maker could exercise its information-gathering powers prior to making its decision, it can exercise those powers while the AAT is undertaking its review.[48] Similarly, as in *Jebb*, it can exercise its powers in respect of other claims made by an applicant.[49] That the results of these decisions may then feed into the AAT proceedings only highlights the notion of contiguous and coherent administrative decision-making which is inherent to the administrative decision-making continuum.

Clearly, then, the idea, endorsed by Pearce, that 'the notion of a tribunal being part of the continuum of decision-making is relevant only where the issue before it is of a continuing nature'[50] should be rejected. While that is one sense of the continuum as envisaged in *Jebb* — and one lesson to be learned from it — so too is the broader notion that the AAT is only one administrative decision-making body on a broader continuum. That much is clear from the majority judgment in *Frugtniet*.[51] Its exercising powers on review does not preclude the

40 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).
41 *State of Queensland (Department of Agriculture and Fisheries) v Humane Society International (Australia) Inc* [2019] FCA 534 [15].
42 See, for example, *Walker v Secretary, Department of Social Security* (1997) 75 FCR 493; *Fletcher v Federal Commissioner of Taxation* (1988) 19 FCR 442, 452; *Re Rayson and Repatriation Commissioner* (2008) 109 ALD 137 [76]–[99]; *Re Secretary, Department of Social Services and Twentyman* [2014] AATA 582.
43 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [53].
44 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 [45], [145].
45 *Jebb v Repatriation Commission* (1988) 80 ALR 329.
46 *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Commissioner of Taxation* (2005) 148 FCR 472 [30] (emphasis in the original).
47 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [53].
48 *Watson v Federal Commissioner of Taxation* (1999) 96 FCR 48 [29]–[32]; *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224 [32].
49 *Jebb v Repatriation Commission* (1988) 80 ALR 329.
50 Pearce, above n 4, 294.
51 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [53].

primary decision-maker from exercising other powers in relation to the applicant, so long as it is not precluded from doing so by s 26 of the AAT Act.

Looking beyond *Jebb*

So much can be — and has been — extracted directly from the judgment in *Jebb*. However, if one goes a step further, it becomes apparent that the concept of the AAT being 'part of' the continuum takes on greater significance. While *Jebb* firmly establishes the notion of a 'chronological' continuum and that the AAT is but one element of the continuum, it is imperative that one looks beyond *Jebb* truly to understand the size and nature of the continuum. The starting place for this is the almost trite saying that the AAT 'is to be considered as being in the shoes of the person whose decision is in question'.[52] However, that is only the starting place of this inquiry. When read alongside the historical origins of the AAT, the notion of the AAT being 'part of' the continuum and the unique manner in which the AAT makes its decisions, the ideas given voice to in *Jebb* are refined. As refined, it becomes clear that the role of the AAT within the continuum is not just as a decision-maker but as a norm-maker for the entirety of the continuum. Further, it does not execute this role in a vacuum; its approach is informed by the administrative history of the matter before it. Consequently, it is evident that the continuum is much broader than a strict reading of *Jebb* would suggest.

The AAT as an administrative norm-maker

Perhaps one source of confusion in respect of the way the AAT makes its decisions lies in the way the AAT seems to stand apart from other administrative decision-makers. Not only does one 'appeal' decisions to the AAT but it also goes about the business of decision-making in a strikingly judicial way. There are almost invariably at least two parties before the AAT — the agency which made the primary decision and the person about whom the decision was made.[53] They are often legally represented,[54] and the AAT hears submissions and evidence from them in a public hearing.[55] The AAT also has broad procedural powers in addition to those available to the primary decision-maker.[56]

Despite bearing these hallmarks of judicial decision-making, it is nevertheless said that the 'tribunal performs an administrative function and not a judicial function, and the proceedings in the tribunal are not *inter partes*'.[57] Indeed, it is a matter of constitutional necessity that the AAT performs an administrative, not a judicial, function.[58] Nevertheless, without consideration of the broader 'administrative decision-making continuum', the administrative role played by the AAT is complicated by the manner in which it determines cases. Justice Brennan, when serving as President of the AAT, described the AAT's role:

> The legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the Executive (see Pt II of the Act). Its function is to decide appeals, not to advise the Executive.[59]

52 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 671 (Smithers J).
53 *Administrative Appeals Tribunal Act 1975* (Cth) s 30. This, of course, holds true primarily for the General & Taxation and Commercial Divisions of the AAT.
54 Ibid s 31.
55 Ibid ss 35, 40.
56 Ibid ss 33, 40A, 42A, 42B.
57 *Re Lees and Repatriation Commission* (2004) 82 ALD 150, 161 [32].
58 *Commonwealth of Australia v Snell* [2019] FCAFC 57 [42].
59 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161.

Further, decisions of the AAT, whilst ostensibly not *inter partes*, are nevertheless binding between the primary decision-maker and the applicant. As described by Pincus J in *Bogaards v McMahon*:[60]

> It is necessarily implicit in the provisions relating to the first class of decision just discussed (that is, those where the tribunal substitutes a new decision for that challenged) that the tribunal's decision is at least as binding as that which was challenged. The binding quality of decisions of the other sort, where the matter is merely remitted for reconsideration, is not so obvious. Whatever may be the position as to 'recommendations' of the tribunal, in my opinion the word 'directions' imports a binding quality. The intention is that the directions shall constrain the decision-maker in making his new decision, and that the new decision may not lawfully be made in a way which conflicts with the directions.[61]

This is a commonsense, and necessary, consequence of the inclusion of the AAT in the administrative decision-making continuum. If its decisions did not bind the primary decision-maker then, unless one were to try to argue that an estoppel lies against the primary decision-maker, there would be little point in appealing to the AAT. Given the dubious availability of estoppel against public authorities in Australia,[62] even though it exists on the same administrative decision-making continuum, the AAT must be able to bind the primary decision-maker.

On its face, there seems to be a tension between the idea that the AAT stands in the shoes of the primary decision-maker and the reality that it can bind that decision-maker. If extrapolated, this could support the proposition that, although the AAT exercises administrative power, its task is of a fundamentally different nature from that of the primary decision-maker. Thus, the AAT would not sit upon a common continuum with the primary decision-maker. Rather, it would stand apart from other administrative decision-making bodies in much the same way as do the courts.

However, this tension dissipates when one considers the historical role of the AAT as an instrument for good governance. It was uncontentious in the early days of the AAT that it was interposed upon existing structures of administrative decision-making. So much was recognised by Brennan J when his Honour described the revolutionary aspects of the creation of the AAT and of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act):

> *the lines of bureaucratic authority are intersected by the Tribunal* or the Ombudsman; the traditional reticence of the administrative decision-maker is replaced by his written expression of reasons; access to the Court is simplified and facilitated. The citizen is thus enabled to challenge, and to challenge effectively, administrative action which affects his interests.[63]

This early view of the AAT hardly meshes with the idea of it being but one point on the continuum. Rather, it appears from the early sources that the introduction of the AAT was very much intended to be — as indeed it was — an 'awesome leap towards changing its whole legal structure with regard to public administration'.[64] This leap was taken alongside other public accountability measures, including the establishment of the Commonwealth Ombudsman, the Federal Court, the ADJR Act and, ultimately, a freedom of information regime.[65]

60 *Bogaards v McMahon* (1988) 80 ALR 342.
61 Ibid 349.
62 G Pagone, 'Estoppel in Public Law: Theory, Fact and Diction' (1984) *University of New South Wales Law Journal* 267, 274–5; cf J Jackson, 'Towards an Administrative Estoppel' (2015) 81 *AIAL Forum* 62.
63 Administrative Review Council, *Administrative Review Council Annual Report 1976–77* (1977) Foreword; Kerr, above n 5 (emphasis added).
64 Law Reform Commission of Canada, *Seventh Annual Report* (1978) 14.
65 See, for example, Creyke, above n 7.

Although its initial effect was to impose outside structures on Commonwealth administrative decision-making, the ultimate point of these measures was to create a new, open form of government administration. Without this historical understanding and holistic view of Commonwealth government administration, it is impossible properly to define the Commonwealth administrative decision-making continuum. However, with this understanding, it becomes apparent that the continuum is not just limited to a particular government agency and its distinct decision-making processes. Rather, the continuum encompasses the AAT, the Ombudsman and other external accountability agencies such as the Information Commissioner.

Seen in this light, the reason the AAT was 'constituted upon the judicial model' is that, even though it is engaged in an administrative decision-making task,[66] it had to adopt 'features of the judicial model so as to address the deficiencies' which had previously been seen as plaguing administrative decision-making.[67] Thus, with the assistance of input from the parties, the AAT is meant to make the 'correct or preferable' decision.[68] Essentially, the manner in which the AAT engages in its enquiries is designed to reflect a higher level of decision-making than primary decision-makers are able to enjoy. This is derived from the myriad procedures of the AAT as well as the intention that it be a specialist tribunal.

The ultimate point is that administrative decision-making is not meant to comprise a series of siloed processes. Rather, it is meant to represent a symbiotic relationship between different levels — and kinds — of decision-making. While processes such as those of the AAT were interposed upon the existing system, the ultimate goal was the establishment of 'an integrated, coherent system of administrative law'.[69] The purpose of this system is to provide for open and transparent decision-making by government agencies, and the purpose of the AAT is to create and cement the norms which underlie this system.

In the recent case of *Williams and Members of the Companies Auditors and Liquidators Disciplinary Board*,[70] Deputy President McCabe aptly described the importance of the AAT as a tool for better government decision-making:

> Public hearings also enable the Tribunal to play its important systemic role as a tool of good government. That aspect of the role is sometimes forgotten amidst all the discussion about backlogs and case finalisations and other measures of efficiency which are applied to the Tribunal's work. The Tribunal is assigned a unique role in Australia's system of administrative law. It is not simply a dispute resolution mechanism. *It is also a cultural institution designed to promote a bureaucracy-wide commitment to better decision-making for the benefit of all Australians.* The Tribunal does that by modelling good decision-making behaviour in particular cases. *Its decision-making creates norms and educates primary decision-makers and other stakeholders dealing with similar issues in the future*.[71]

It is notable that Deputy President McCabe was referring to open hearings, which are an important part of the AAT's processes and which, as noted above, constitute but one of the more judicial elements of decision-making adopted by the AAT.

Although the results reached by the AAT — or even the approaches used to reach them — may differ from those of primary decision-makers, those differences lie in the AAT's role as 'an independent generalist decision-maker informed by its expertise in good government'.[72]

66 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161.
67 *Singh* [2017] AATA 850 [12]–[13].
68 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 78.
69 Creyke, above n 7, 730.
70 [2019] AATA 504 (emphasis added).
71 Ibid [25].
72 *RBPK and Innovation and Science Australia* [2018] AATA 1404 [14] per Thomas J, sitting as President.

More than merely exercising the powers of upstream decision-makers, the AAT is meant to serve as a paragon of good decision-making for them to follow.

Consequently, it is no surprise that the AAT seems to stand apart from other administrative decision-makers: this was a deliberate policy choice made by Parliament in the way it created the AAT. The AAT's historical purpose was to provide a paragon of good governance. To do this, it had to repudiate or move away from the traditional, closed system of administrative decision-making which had theretofore existed.

The AAT could — and can — only fulfil the norm-creating and educational role which was intended if it borrowed elements from judicial decision-making. Consequently, the presence of these features does not mean that the AAT does not belong on the administrative decision-making continuum or that the continuum should be viewed in an abbreviated form. Rather, it was intended that these unique features, alongside the unique features of other bodies such as the Ombudsman and the Office of the Information Commissioner, would help to pull the whole administrative decision-making continuum into the open. In this way, the administrative decision-making continuum is not restricted to being a chronological continuum; it is a normative continuum too.

Tribunal review and open justice

In *JWTT and Commissioner of Taxation*[73] (*JWTT*), Deputy President McCabe observed:

> the Tribunal is not simply — or even primarily — a means of ensuring individual justice. The Tribunal also has a normative role. It is concerned with promoting good government … The Tribunal uses its decisions in individual cases to model behaviour that promotes the integrity and quality of government decision-making more generally. The normative role becomes much harder if those decisions are not accessible. It is difficult to communicate lessons for future decision-makers if the reasons for decision are censored or suppressed.[74]

While the norm-creating role of the AAT within the continuum has been discussed above, it is clear from Deputy President McCabe's comments in *JWTT* that it relies on the concept of open justice to achieve this.

Although it may seem counterintuitive, it is open justice that explains the presence of s 26 of the AAT Act. As only one decision-maker can exercise the jurisdiction granted to it by Parliament at any one time, s 26 gives priority to the AAT, which was equipped, through its quasi-judicial procedures, with the tools to make the correct or preferable decision. The purpose of justice being seen to be done by public hearings and published decisions only cements this practical reality.[75]

Thus, the Full Court of the Federal Court's judgment in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*[76] (*Brian Lawlor*) takes on a new importance. In *Brian Lawlor*, the Collector of Customs revoked Brian Lawlor's warehouse licence. In the appeal to the AAT, Brian Lawlor argued that there was no general power to cancel a warehouse licence. In the AAT, Brennan J agreed.[77] The difficulty was that, if the Collector of Customs had acted in excess of jurisdiction and if its decision were taken to be a nullity,[78] there was no substantive decision upon which to base the AAT's jurisdiction.[79] Justice Brennan, however, found that

73 (2017) 73 AAR 192.
74 Ibid [16].
75 *Administrative Appeals Tribunal Act 1975* (Cth) s 35(1); Administrative Appeals Tribunal, *Policy — Publication of decisions* (1 March 2019) <https://www.aat.gov.au/landing-pages/policies/publication-of-decisions-policy>.
76 (1979) 2 ALD 1.
77 *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 175.
78 See the later decision of *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 [51].
79 Cf *Administrative Appeals Tribunal Act 1975* (Cth) s 25; *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 175.

this was no bar to the AAT exercising its power under s 43 of the AAT Act, as the presence of what is on its face a decision subject to review is a sufficient jurisdictional fact upon which to ground the AAT's jurisdiction.[80] The Full Court agreed on this point, although its reasoning differed slightly from that of Brennan J.[81]

Critical to Brennan J's reasoning was that the power exercised under s 43(1) of the AAT Act — particularly to affirm or set aside the decision under review — is a unique power that is separate from the independent exercise of the powers of the original decision-maker.[82] The reason for this is truly to enable the AAT to serve as a paragon of good decision-making. This point was not dealt with on appeal. However, as later noted by Brennan J:

> Part of the Tribunal's function in securing sound administration consists in confining the administrator to the powers conferred upon him and to the lawful mode of exercising those powers; and the effectiveness of the Tribunal's function would be grievously weakened if it were impotent to check excess of power.[83]

Both Brennan J and the majority on appeal were united in considering that the AAT is a tool of good government:

> In essence the Tribunal is an instrument of government administration and designed to act where decisions have been made in the course of government administration but which are in the view of the Tribunal not acceptable when tested against the requirements of good government.[84]

Were a primary decision-maker able to remake its decision without a jurisdictional error exposed in the AAT process *before the AAT could make its decision*, this accountability mechanism would be lost. So, too, would another element of the AAT's capacity, as described by Brennan J — to secure sound administration through the creation of norms. Consequently, the elements of open justice incorporated into the AAT's procedure in fact serve a purpose for the whole administrative decision-making continuum: they allow the AAT to establish the norms which underlie the continuum.

This also points to an interesting additional aspect of the administrative decision-making continuum: executive power in relation to one issue can be wielded by only one decision-making body at any one time. That is, the continuum is not just a chronological or normative continuum; it is also one of power. The same power — as augmented by the AAT Act — is wielded by the AAT as by the primary decision-maker when it made the decision under review. Thus, *that power* cannot simultaneously be re-exercised by the primary decision-maker.[85] However, different powers, including the power under the same legislative provision but in relation to a different issue, *can* be exercised at the same time.[86] In a similar vein, different powers, even in relation to similar issues, can be utilised concurrently with the powers being exercised by the AAT in conducting a review.[87]

Integrated decision-making

The above illustrates that, most often, the role the AAT exercises on the continuum is prospective: its approaches and decision-making have downstream consequences for the way the relevant primary decision-maker acts. However, its presence on the continuum also shapes what the AAT can and should take into account in exercising its powers. As a matter of principle, this ought to include things other than changes in an applicant's circumstances

80 *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 176–7.
81 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1.
82 *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 175–6.
83 Ibid 177.
84 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1, 23 (Smithers J).
85 *Administrative Appeals Tribunal Act 1975* (Cth) s 26.
86 *Jebb v Repatriation Commission* (1988) 80 ALR 329.
87 *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224 [32].

since the decision under review was made. Rather, it should also look to the other dealings 'the applicant has had with the primary decision-maker. As stated by Logan J, sitting as acting President of the Tribunal:'

> even though the Tribunal is obliged to consider afresh the merits of a decision under review, the particular issues which arise before the Tribunal in a given review are necessarily influenced by the course of earlier stages in that continuum and by the positions adopted in respect of the review by any party to it or, as the case may be, any person entitled to make a submission in respect of the review who makes such a submission.[88]

That the AAT's approach to a matter should be informed by the course taken by the primary decision-maker (or, as the case may be, decision-makers) is concordant with the High Court's approach in *SZBEL v Minster for Immigration and Multicultural and Indigenous Affairs*[89] (*SZBEL*). There, the High Court unanimously held that 'ordinarily … on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant'.[90] It found that to make a decision on a matter other than those grounds, without otherwise giving warning to an applicant, would constitute a breach of procedural fairness.[91] Consequently, it is clear that the conduct of the AAT is at least in part informed by the conduct of upstream decision-makers. Although it can, within the confines of the relevant statutory power, look to issues beyond those addressed by the primary decision-maker,[92] that does not detract from this principle.

This point is only reinforced by the High Court's recent judgment in *Frugtniet*:

> The AAT and the primary decision-maker exist within an administrative continuum. The AAT has no jurisdiction to make a decision on the material before it taking into account a consideration which could not have been taken into account by the primary decision-maker in making the decision under review and which could not be taken into account by the primary decision-maker were the AAT to remit the matter to the primary decision-maker for reconsideration.[93]

This principle is augmented by the rules which provide that, over the course of a review by the AAT, the primary decision-maker has a positive obligation to lodge 'every … document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal'.[94] This requirement is ongoing.[95] The reasons for these rules are twofold. The first — and in the spirit of open justice — is to ensure the AAT is aware of all the relevant documents.[96] After all, '[j]ustice will not be done to applicants unless respondents, who are aware of the facts, or who can readily ascertain the facts, bring to the notice of the tribunal all matters which the tribunal ought to take into account'.[97]

However, that is not the only reason underlying this rule. As a matter of practice, it is not uncommon for previous and relevant decisions of the primary decision-maker and of the AAT, other than the decision directly under review, to be provided to the AAT alongside other documents provided under s 37 of the AAT Act. In light of the Full Court of the Federal Court's recent statement in in *Commonwealth of Australia v Snell*,[98] that 'the doctrine of issue estoppel is not apposite to the constitutional and statutory context of the Tribunal, and

88 *Singh* [2017] AATA 850 [19] (footnotes omitted).
89 (2006) 228 CLR 152.
90 Ibid [35].
91 Ibid [43].
92 *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32, 39.
93 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [53] (footnotes omitted).
94 *Administrative Appeals Tribunal Act 1975* (Cth) s 37(1)(b).
95 Ibid s 38AA.
96 *Re Wertheim and Department of Health* (1984) 7 ALD 121, 154.
97 Ibid.
98 [2019] FCAFC 57.

ought not to be extended to it',[99] it is clear that they are not relevant because of any issue of estoppel that may arise from them.

A better explanation is that these documents provide important context to the way issues have developed as between the primary decision-maker and the applicant in any given case. In some circumstances, this may be persuasive, as in the case of *Re Cremona and Comcare*.[100] Indeed, the Full Court of the Federal Court has previously held that:

> the Tribunal may have regard to findings of fact made between the same parties in earlier proceedings before the same or a differently constituted Tribunal. Although a Tribunal may not be bound to make the same findings of fact, findings previously made — especially after a contested hearing — may appropriately be adopted in subsequent proceedings. Its freedom to do so may well depend upon the facts and circumstances of each individual case.[101]

Such findings would, of course, be evidenced by written reasons furnished for these earlier decisions.

This supports the notion that not only should the Tribunal be informed by events as they develop as between the parties before it but it should also have regard to events as they *have* developed. Viewed through this lens, one can see the final element of the continuum: that the AAT should also be informed by the actions and decisions of other bodies on the continuum. How much weight it gives them — or, indeed, whether it departs from them — is a matter for the AAT in each individual case. Thus, the continuum further implies that the AAT does not sit in a vacuum. Its decision-making not only influences other decision-makers in its norm-setting capacity but also should be influenced by the decision-makers it sits beside on the administrative decision-making continuum.

Conclusions: The role of the AAT

In *Singh*,[102] Logan J, sitting as acting President of the Tribunal in the Migration & Refugee Division, observed that:

> The very existence of the Tribunal and the independent, quasi-judicial model adopted for it means that, inevitably, there will be tension from time to time between Ministers and others whose decisions are under review … The same type of tension can occur as between Ministers and others and the courts in relation to judicial review of administrative decisions. These are inherent features of any checks on the exercise of arbitrary power. They can be lessened if each element of our system of government understands and respects the role of the other.[103]

By approaching the role of the AAT through the lens of the administrative decision-making continuum, this article has sought to shed light on the role of the AAT and the way it relates to other administrative decision-makers. In the result, it is evident that describing the AAT as sitting upon a continuum with other administrative decision-makers is not limited to the continuum which can be gleaned from *Jebb* and *Shi*. Considering the continuum merely to refer to an obligation to take into account things that only occurred after the primary decision was made needlessly restricts the conception of the continuum, particularly after *Shi* and *Frugtniet*.

The continuum is best viewed as being fundamentally expansive. It refers not only to the AAT and the primary decision-maker but also to other accountability mechanisms such as the

99 Ibid [51].
100 (2017) 72 AAR 481.
101 *Rana v Military Rehabilitation and Compensation Commission* (2011) 55 AAR 300 [27].
102 [2017] AATA 850.
103 Ibid [17] (footnotes omitted).

Ombudsman and the Information Commissioner. The relationship between the AAT and the primary decision-maker, in this continuum, is symbiotic. The AAT can draw upon the facts and issues as found in previous decisions and reviews in conducting its reviews. Similarly, once a review is completed, the primary decision-maker can draw upon the AAT's reasons as a source of norms to help shape its decision-making practices. All of this is done with the united aim of contributing to the 'good government of the people of Australia'.[104]

Viewed in this light, it is not just that the AAT is a part of the administrative decision-making continuum; it is an essential part of it. Without the AAT, the continuum would lose its central norm-creating mechanism. This would, surely, lead to less effective governance and administrative decision-making. On the other side of the coin, were it not to be a part of the continuum, the AAT would be hampered in its task of making the correct or preferable decision. In order to undertake that task — especially as non-governmental parties before it are often legally unsophisticated — it is imperative that the AAT be influenced by the information and issues as framed by the primary decision-maker and by subsequent developments. Thus, being a part of the administrative decision-making continuum is central to the AAT's role and the way it undertakes the task of decision-making. Simply, it is essential to the modern administrative decision-making continuum.

104 Justice Michael Kirby, 'The AAT 20 Years Forward' (Speech delivered at AAT Back to the Future, Australian National University, 1–2 July 1996) <www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_aat.htm>.

Defining the boundaries of non-statutory executive power in Australia: A migration law perspective

Laura Butler*

[E]ven if it were to be accepted that it is necessary or appropriate (or even, if relevant, convenient) that the government have such a power, observations of that kind would not answer the questions about the scope of the power and the organ or organs of government which must exercise it.[1]

This article explores the boundaries of non-statutory executive power in the context of Australian migration law. Migration litigation has long been a vehicle for the development of administrative law in Australia. Controversy surrounding boat arrivals in the last two decades has continued this trend and makes it a helpful context in which to posit ideas as to how case law may develop in the future to clarify the scope and limits of non-statutory executive power.

At the outset, the article begins by reviewing the history of executive power in Australia, delineating between statutory and non-statutory powers. It explores some of the innate characteristics of non-statutory power and articulates common concerns about its exercise. The article then describes the recognition in *Ruddock v Vadarlis*[2] (*Tampa*) and subsequent cases of a non-statutory executive power to prevent the entry of non-citizens into Australia, with ancillary powers of detention and expulsion. The article discusses how the power has been described by courts and highlights the reasons for the lack of guidance about its limits.

The article addresses critics' comments that non-statutory power is unchecked, ever-expanding and at risk of undermining individuals' rights. It demonstrates the constraints on the power's expansion, including the government's preference to rely on powers conferred by legislation.

Several hypothetical scenarios are put forward to propose possible boundaries of non-statutory power. First, the article briefly examines how far the power extends to authorise patrolling Australia's border. Second, it considers whether the non-statutory executive power extends to authorise the detention of non-citizens and whether government contractors can validly exercise the power. Third, it explores whether the power can be relied upon to remove lawful non-citizens from Australia.

In conclusion, the article emphasises the importance of exploring the limits of non-statutory power. In recent years, the Commonwealth's position has been that this non-statutory power extends to the interception and prevention of entry, and detention and expulsion of non-citizens for that purpose. Given the flexibility afforded by the exercise of non-statutory executive power, one should expect the power to be used in future in those circumstances. The writer suggests it is possible the power would also authorise action beyond those limited circumstances. However, largely due to uncertainty as to the availability of the power, the executive government will prefer to rely on statutory powers. Therefore, the power's confines will be identified slowly over time.

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1 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 565–6 (Hayne and Bell JJ).

2 (2001) 110 FCR 491.

What is executive power anyway?

Prerogative powers

Historically, the sovereign, as the head of the British monarchy, also known as 'the Crown', exercised law-making, decision-making and adjudicating powers.[3] The Glorious Revolution in 1688–1689 and the years following saw 'a King … executed and a civil war … waged to limit the scope of the prerogative and to assert the supremacy of parliament'.[4] The responsibility for exercising power on behalf of the polity remained with the monarch as an executive body.[5] This 'residue of discretionary or arbitrary authority … legally left in the hands of the Crown' were non-statutory powers described as 'prerogative powers'.[6] Examples of prerogative powers include declaring war, conducting foreign relations, granting mercy, and bestowing honours.[7] These powers all entail the inherently 'executive' act of the polity taking action on behalf of, or protecting, the state.

Executive power in Australia

The *Australian Constitution* reflects the doctrine of the separation of powers by separating core government functions across different institutions.[8] Section 1 of the *Constitution* vests legislative power in the Parliament.[9] Section 61 vests executive power in the Queen, exercisable by the Governor-General.[10] Section 71 vests judicial power in the High Court of Australia and other courts created by Parliament.[11] While the separation of the judicial arm of government is strict, under Australia's system of responsible government 'the legislature and executive are effectively united'.[12]

For present purposes, it is fitting to more closely examine s 61, which provides:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.[13]

While the power to 'maintain' the *Constitution* was 'an exceptional innovation' at the time,[14] the phrase lacked precision in that it merely described, but failed to define, the nature of executive power.[15] As a result, it has been somewhat of a 'mystery', with 'debateable' boundaries.[16] The drafters of the *Constitution* considered executive acts would either be exercised by the prerogative or stem from statute.[17] That view was imported from Britain

3 D Meagher, A Simpson, J Stellios and F Wheeler, *Hanks' Australian Constitutional Law* (Lexis Nexis, 10th ed, 2016) 3, 737.
4 Chief Justice JJ Spigelman AC, 'Public Law and the Executive' (2010) 69(4) *Australian Journal of Public Administration* 345, 351.
5 Meagher et al, above n 3, 737.
6 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 354; George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 27; Meagher et al, above n 3, 801–2.
7 Winterton, ibid, 35.
8 Meagher et al, above n 3, 67.
9 *Constitution* s 1; Meagher et al, above n 3, 61, 67.
10 *Constitution* s 61; Meagher et al, above n 3, 67.
11 *Constitution* s 71; Meagher et al, above n 3, 68.
12 Meagher et al, above n 3, 68.
13 *Constitution* s 61.
14 Winterton, above n 6, 23, 35.
15 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437, 440 (Isaacs J); *Davis v Commonwealth* (1988) 82 ALR 633, 640.
16 See Winterton, above n 6, 21; and *R v Hughes* (2000) 202 CLR 535, 555 [39].
17 *Official Report of the Australasian Federal Convention Debates*, (Adelaide, 19 April 1897) (*Edmund Barton*); Spigelman, above n 4, 351.

into the Australian colonies[18] and consequently into s 61, which vests statutory power ('laws of the Commonwealth') and non-statutory power ('maintenance of this *Constitution*').

Non-statutory executive power

Development

The power to 'maintain' the *Constitution* tends to suggest the *Constitution* imported those residual, prerogative powers from Britain and has been 'interpreted to mean a power to act without legislative authorisation'.[19] Traditionally, it was thought that the power in s 61 to 'maintain' the *Constitution* was only to the extent allowed by the Crown's prerogative powers.[20] This orthodox view declined in popularity throughout the 20th century, as the High Court preferred what Condylis terms the 'inherent' view[21] — namely, that non-statutory executive power in s 61 is derived directly from the *Constitution* in light of Australia's status as a national government.[22] This acknowledged that, while non-statutory power in the *Constitution* had its history in the British prerogatives, s 61 had to be considered in light of the newly formed unique federal constitutional context.[23] This included that Australian executive power had derived at least in part from the powers transferred from the states to the Commonwealth at federation.[24] The shift began in the cases of *Barton v Commonwealth*[25] (*Barton*) and *Davis v Commonwealth*[26] (*Davis*).

Barton concerned the exercise of extradition powers by the executive in the absence of an extradition treaty between Australia and Brazil or legislative authority.[27] The High Court considered extradition was a 'purely executive act', part of the executive's 'inherent' prerogative power, and an 'essential attribute of … a sovereign nation'.[28] Justice Mason explained that s 61 enabled the executive to undertake all action for the Commonwealth which fell within the spheres of responsibility vested in it by the *Constitution*, including prerogative powers.[29] This explanation demonstrates that the Court considered prerogative powers comprised only *part* of the non-statutory power in s 61.[30]

As Parliament had legislated with respect to extradition, the application of which was limited to circumstances where there existed an extradition treaty with another nation state, the Court considered whether non-statutory power had been abrogated by legislation.[31] The Court found that Parliament had not evidenced a 'clear and unambiguous' intention to abrogate non-statutory executive power stemming from the prerogative.[32] That is, non-statutory power could coexist with legislation to the extent that it was not intended to be abrogated.

18 Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 321.
19 Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-statutory Executive Power' (2015) 39 *Melbourne University Law Review* 385, 386.
20 Ibid, 387–8; Winterton, above n 6, 30.
21 Condylis, above n 19, 387.
22 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 63–4 [133] (French CJ), 89 [232]–[233] (Gummow, Crennan and Bell JJ).
23 Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 279; Winterton, above n 6, 26; Condylis, above n 19, 423–4.
24 Robert R Garran, *The Coming Constitution* (Angus and Robertson, 1897) 152.
25 (1974) 3 ALR 70.
26 (1988) 82 ALR 633.
27 (1974) 3 ALR 70, 79 (McTiernan and Menzies JJ), 80 (Mason J).
28 Ibid 79–80 (McTiernan and Menzies JJ), 83, 86–7 (Mason J), 92–3 (Jacobs J).
29 (1974) 3 ALR 70, 86 (Mason J).
30 The Hon Robert French AC, 'Executive Power in Australia — Nurtured and Bound in Anxiety' (2018) 43 *University of Western Australia Law Review* 16, 28.
31 (1974) 3 ALR 70, 93.
32 (1974) 3 ALR 70, 77 (Barwick CJ), 89 (Mason J), 95 (Jacobs J).

In *Davis*, 14 years later, the High Court again considered the nature and source of non-statutory executive power in s 61, this time in the context of the incorporation of a company to commemorate Australia's Bicentenary. The majority referred to Mason J's comments in *Barton* regarding non-statutory power extending to the spheres of responsibility under the *Constitution*.[33] The Court concluded that s 61 conferred all of the prerogative powers on the Commonwealth unless they had been allocated by the *Constitution* to the states.[34] Here, the commemoration of the Bicentenary fell 'fairly and squarely within the federal executive power'.[35] Justice Brennan, in a separate judgment, helpfully clarified that executive power can be exercised in one of three capacities: a 'statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity'.[36]

Today, the Court's view is that, in determining the ambit of non-statutory executive power in Australia, British usages of prerogative power should not be the starting point[37] but, rather, merely inform our understanding of the *Constitution*.[38] Executive power should be viewed from the context of Australia's independence as a modern polity with its own federal Constitution.[39] Despite its former prominence in Australia, 'the prerogative … is now only an "important" consideration when interpreting s 61'.[40]

Characteristics and concerns

Non-statutory power is quite attractive to the executive; it provides an ability to act responsively to serious issues with limited constraints or oversight. For this reason, some have expressed concern about the 'expansion' of executive power.[41] Zines went so far as to say that, 'if the existence of a coercive prerogative power is uncertain, it is better, in an "age of statutes" and vigorous parliamentary government, to deny the prerogative'.[42]

As discussed above, non-statutory executive power should be understood in the context of Australia's constitutional system but continues to be informed by its historical roots. As Lord Diplock remarked in respect of the expansion of prerogative power, '[i]t is 350 years and a civil war too late for the Queen's courts to broaden the prerogative'.[43] While this is not directly translatable to non-statutory power in Australia, it seems unlikely that courts would permit non-statutory power to expand unchecked. The courts' identification of a 'nationhood power' in *Pape v Commissioner of Taxation*[44] (*Pape*) and the non-statutory power in *Tampa* are examples of courts applying existing concepts of inherent executive power linked to sovereignty and interpreting them in light of the *Constitution* and the fundamental assumptions underlying it, such as the rule of law and responsible government.[45] In the writer's view, it is more correct to say that new, limited circumstances will be identified in

33 (1988) 82 ALR 633, 640.
34 Ibid.
35 Ibid 641.
36 (1988) 82 ALR 633, 651–2.
37 French, above n 30, 29, 41; *Williams v Commonwealth* (No 2) (2014) 252 CLR 416; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 123.
38 Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power Through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 281.
39 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 60 [127] (French CJ), 83 [215] (Gummow, Crennan and Bell JJ); Condylis, above n 19, 396; see the Hon Duncan Kerr SC, 'Executive Power and the Theory of its Limits' (2011) 13(2) *Constitutional Law and Policy* 22, 26.
40 Condylis, above n 19, 409, citing *Williams v Commonwealth (No 2)* (2014) 252 CLR 416, 468–9 [80].
41 Pauline Maillet, Alison Mountz and Kira Williams, 'Exclusion Through *Imperio*: Entanglements of Law and Geography in the Waiting Zone, Excised Territory and Search and Rescue Region' (2018) 27 *Social and Legal Studies* 142, 144.
42 Zines, above n 23, 292.
43 *British Broadcasting Corporation v Johns* [1965] Ch 32.
44 (2009) 238 CLR 1.
45 Spigelman, above n 4, 351; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 538.

the future where non-statutory executive power can lawfully be exercised where it has not been previously.

Another concern relating to the use of non-statutory executive power is that it reduces accountability in Australia's representative democracy; while the executive is answerable to Parliament for the exercise of the powers, it is not responsible for their existence.[46] Legislating also promotes 'greater openness, scrutiny and democratic deliberation' than non-statutory executive power.[47] However, legislation takes time to develop. Proposed legislation may be amended by Parliament, subject to criticism by the public and critique by the media. Non-statutory executive power, on the other hand, allows the executive to respond quickly and decisively to new issues or crises as they emerge, without public or political weigh-in.

Legislation also commonly prescribes the processes required validly to exercise a power. Absent legislative backing, 'legal limits to non-statutory powers are not as readily apparent'.[48] It can therefore be difficult to glean the subject-matter, purpose or scope of non-statutory powers.[49] Their exercise is also not a decision or conduct 'under an enactment', meaning that judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is unavailable.[50] Depending on the particular topic, judicial review *may* be available in the Federal Court and/or the High Court, which retains original jurisdiction under s 75(v) of the *Constitution*. However, being successful in such a review is more difficult, as the exercise of some non-statutory executive powers will not be justiciable.[51] This is because of the 'sensitive political and public policy considerations' which arise in matters relating to border protection, defence, and international relations.[52]

It appears the requirements of natural justice may apply to the exercise of non-statutory power.[53] However, the nature and scope of procedural fairness obligations will always depend on the circumstances. In the exercise of statutory power, this will include the relevant legislative context.[54] In *Plaintiff M61 of 2010 v The Commonwealth*,[55] in relation to a non-statutory scheme for decision-making in respect of protection visa applications on Christmas Island, the High Court held that the Minister had made a decision to consider the exercise of his non-compellable powers. In those circumstances, an obligation to afford procedural fairness attached to the non-statutory process. However, the High Court recently held that procedural fairness was not owed to an applicant in connection with the exercise of non-statutory power.[56] This is unsurprising, as it is not uncommon for exercises of power under the *Migration Act 1958* (Cth) and the *Australian Citizenship Act 2007* (Cth) expressly to exclude, or not provide for, procedural fairness in circumstances where those legislative schemes aim to protect the community from serious risks or preserve the Commonwealth's interests.[57]

46 Meagher et al, above n 3, 806.
47 Simon Evans, 'The Rule of Law, Constitutionalism and the MV *Tampa*' (2002) 13 *Public Law Review* 94, 99; see also Zines, above n 23, 293.
48 Aronson, Groves and Weeks, above n 37, 125.
49 French, above n 30, 16.
50 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5–6.
51 Aronson, Groves and Weeks, above n 37, 126; see Amanda Sapienza, 'Justiciability of Non-statutory Executive Action: A Message for Immigration Policy Makers' (2015) *AIAL Forum* 79, 70; Kerr, above n 39, 29.
52 See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 654.
53 Aronson, Groves and Weeks, above n 37, 135–6.
54 Jamie Fellows, 'Non-statutory Executive Powers and the Exclusion of Procedural Fairness: When Procedural Fairness Doesn't Matter' (2016) <https://researchonline.jcu.edu.au/42886/>.
55 (2010) 243 CLR 319.
56 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 654–6 [508], [509], [513] (Keane J).
57 See, for example, s 501(1) of the Migration Act or s 45B of the *Australian Citizenship Act 2007* (Cth).

Excluding, detaining and expelling aliens

A non-statutory executive power identified in Australia is the power to prevent the entry of non-citizens into Australia, effect their removal and detain them to achieve that purpose. The exercise of this power was first considered by the Federal Court in 2001 in *Tampa* at a time when there was intense public debate about boat arrivals in Australia.[58] This section explores the use of the power by the executive, its consideration by the courts and the potential for its future use.

Tampa

These proceedings were commenced by a Melbourne lawyer on behalf of 433 asylum seekers who had been rescued from a fishing boat travelling to Australia from Indonesia by the MV *Tampa*, a Norwegian vessel, at the Australian Government's request.[59] The government directed the MV *Tampa* to return the asylum seekers to Indonesia, but when they protested the captain set course for Christmas Island.[60] The government sent troops to secure the vessel and provide humanitarian assistance to those on board.[61] It arranged for the port at Christmas Island to be closed. The government then boarded the MV *Tampa*, detained the asylum seekers, and steered the vessel away from Australia.[62] All the preceding actions were taken in the absence of legislative authority. The question before the Federal Court of Australia at first instance and Full Court on appeal was whether the executive had the power to do so.[63]

Justice North at first instance held the executive had engaged in an unlawful non-statutory process outside the powers contained in the Migration Act and made an order for the release of the asylum seekers.[64] On appeal, Black CJ found the power to exclude aliens, and the related powers of detention and expulsion, could be derived solely from statute, and the prerogative power to exclude aliens had likely been extinguished.[65] Justice French (with whom Beaumont J agreed) distinguished the 'gatekeeping cases' from the context of executive power under s 61 of the *Constitution*.[66] The Court referred favourably to the ratio in *Barton* and *Davis*, as well as Jacob J's remarks in *Victoria v Commonwealth*[67] (the *AAP case*) that 'maintenance of this *Constitution*' conjured up 'the idea of Australia as a nation within itself and in its relationship with the external world'.[68]

In the absence of a statutory power, the majority held that executive power extended to preventing non-citizens from entering Australia and the power to do things ancillary to that, including detaining and removing them.[69] This was because a nation's ability to determine who may enter its territory was 'so central to its sovereignty' that it could not be the case that the executive did not have the power under the *Constitution* to prevent the entry of non-citizens into Australia.[70] That was the case 'irrespective of whether there was a traditional common law prerogative in this respect'.[71]

58 Vaishakhi Rajanayagam, 'The Tampa Decision: Refugee Rights Versus the Executive's Power to Detain and Expel Unlawful Non-citizens' (2002) 22(1) *University of Queensland Law Journal* 142, 146.
59 *Ruddock v Vadarlis* (2001) 110 FCR 491, 522.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid 533.
64 Rajanayagam, above n 58, 143; *Ruddock v Vadarlis* (2001) 110 FCR 491, 532.
65 Rajanayagam, ibid; *Ruddock v Vadarlis* (2001) 110 FCR 491, 498–9.
66 *Ruddock v Vadarlis* (2001) 110 FCR 491, 540–2.
67 *Victoria v Commonwealth* (1975) 134 CLR 338.
68 Ibid 406.
69 *Ruddock v Vadarlis* (2001) 110 FCR 491, 543.
70 Ibid.
71 Spigelman, above n 4, 351.

At that time, the Migration Act regulated the travel of non-citizens to Australia and provided powers to detain and remove non-citizens in Australia without a valid visa. The Court acknowledged that '[t]he executive power can be abrogated, modified or regulated by laws of the Commonwealth'.[72] Whether legislation displaced non-statutory power was a matter for statutory construction,[73] and clear legislative intent was necessary.[74] In this case, the mere fact that Parliament had legislated in the Migration Act in respect of the entry of persons into Australia did not make the non-statutory power inconsistent with the Migration Act; nor did it show Parliament's intention to abrogate the non-statutory power.[75]

Justice French suggested the power would extend to preventing a vessel from docking at an Australian port, restraining a person or vessel from entering Australia or compelling it to leave.[76] Aside from providing these examples, the Court did not identify the limits of the power, as it was unnecessary to do so.[77] It is noteworthy that in *Pape* French CJ similarly referred to *Davis* and analysed the breadth of non-statutory executive power. There, French CJ found that 'the executive power extends … to short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government'.[78]

Following *Tampa*, the government legislated the 'Pacific Solution' to support the interception and tow-back of boats with legislation. This had the flow-on effect of denying the High Court the opportunity to consider the existence and parameters of the relevant non-statutory power.[79] It should be noted that Zines strongly disagreed with the majority's reasoning in *Tampa*. Zines' view is that s 61 does not confer on the executive inherent power beyond that already possessed by it at common law.[80] Specifically, he argued there is no inherent power to deport, extradite or detain aliens.[81] However, this mischaracterises the Court's interpretation of the power under s 61 in light of Australia's unique federal context. As Kerr explained in relation to the Court's findings in *Tampa*, it was 'immaterial whether or not a prerogative power to expel aliens had ever existed, still existed or had been lost through disuse. The prerogative did not constrain s 61's bounds'.[82]

CPCF

CPCF v Minister for Immigration and Border Protection[83] (*CPCF*) concerned the exercise of powers under the *Maritime Powers Act 2013* (Cth) (MPA). The MPA provided a legislative basis for Operation Sovereign Borders (OSB), a 'military-led border security operation',[84] giving effect to the coalition government's agenda of 'stopping the boats'.[85]

The MPA conferred maritime powers on maritime officers, granting them legal authority to do certain things at certain times.[86] The Australian Navy intercepted an Indian vessel in Australia's contiguous zone 16 nautical miles from Christmas Island. The vessel carried

72 *Ruddock v Vadarlis* (2001) 110 FCR 491, 539.
73 Ibid.
74 Ibid 540.
75 Ibid 540, 545.
76 Ibid 544; French, above n 30, 33.
77 *Ruddock v Vadarlis* (2001) 110 FCR 491, 544.
78 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 60–4 — in particular, [127], [133]–[134].
79 Winterton, above n 6, 49–50.
80 Zines, above n 23, 281.
81 Ibid 286.
82 Kerr, above n 39, 24.
83 (2015) 255 CLR 514.
84 Department of Home Affairs, 'Operation Sovereign Borders (OSB)' *Department of Home Affairs* <https://osb.homeaffairs.gov.au/>.
85 Liberal Party of Australia, 'Our Plan — Issue 10: Securing Australia's Borders', *Liberal Party of Australia* <https://www.liberal.org.au/our-plan/border-protection>.
86 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 535–6, 620.

157 Sri Lankan asylum seekers heading for Australia.[87] The asylum seekers were taken on board the Australian Navy vessel and detained by maritime officers, and the vessel set course for India.[88] One of the asylum seekers, CPCF, argued his detention on the Navy vessel was unlawful.[89] The question for the Court was whether the executive's actions, including detention, were authorised by either the MPA or the non-statutory power under s 61.[90]

Justices Crennan and Gageler both acknowledged the MPA scheme was 'designed to ensure "flexibility" in the exercise of maritime powers and "to assist maritime officers to deal with quickly changing circumstances and often difficult and dangerous situations"'.[91] The chain of command for the exercise of the relevant powers in the MPA ultimately extended to the Governor-General, who exercised non-statutory executive power.[92] In practice, though, the powers were exercised by the relevant ministers and, in accordance with contemporary government practice, by the National Security Committee of Cabinet.[93]

On behalf of the Commonwealth it was submitted that, if the Court found the actions were not supported by legislation, they had nevertheless been authorised by non-statutory executive power.[94] The Commonwealth also submitted that the exercise of the non-statutory executive power was probably not amenable to judicial review.[95] If it was, the Court was unsuited to undertake such considerations because they involved sensitive political and public policy considerations.[96]

The majority of the High Court (French CJ and Crennan, Gageler and Keane JJ) held that s 72(4) of the MPA had authorised the detention of the Sri Lankans on the Commonwealth vessel at all material times and authorised their removal to India.[97] Because there was a legislative basis for the exercise of power, it was unnecessary for the Court to consider whether those actions would have been authorised by a non-statutory executive power.[98] Perhaps surprisingly, French CJ did not refer to his judgment in *Tampa* or speculate as to the availability of the non-statutory power in the circumstances of this case,[99] but his Honour did confirm that the history of prerogative powers informs the limits of non-statutory power under s 61 but does not do so comprehensively.[100]

Justice Keane, who was part of the majority, did consider whether, absent the MPA, the non-statutory power would have authorised the actions taken and concluded in the affirmative.[101] Justice Keane noted the power was 'an incident of Australia's sovereign power as a nation'.[102] Having been well accepted that non-statutory executive power extended to the power to declare war and to enter into agreements with other nation states, Keane J considered it would hardly be controversial to extend it to preventing non-citizens

87 Ibid 524, 630.
88 Ibid 524.
89 Ibid 525.
90 Ibid.
91 Ibid 581 (Crennan J) and 614 (Gageler J).
92 Ibid 620.
93 Ibid.
94 Ibid 564.
95 Ibid 654.
96 Ibid.
97 French, above n 30, 34.
98 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 538–9 (French CJ); 587 [228] (Crennan J), 613 [336] and 630 [392]–[393] (Gageler J), 647 [476] (Keane J); French, above n 30, 34.
99 Amanda Sapienza, 'Chief Justice French on Non-statutory Executive Power: A Timely Reflection', *Australian Public Law* <https://auspublaw.org/2016/12/chief-justice-french-a-timely-reflection/>.
100 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 538; Sapienza, ibid.
101 French, above n 30, 34; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 647.
102 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 647.

from entering Australian waters and authorising their removal.[103] Finally, neither the MPA nor the Migration Act was inconsistent with the non-statutory power and the power had not been abrogated.[104]

In dissent were Hayne, Kiefel and Bell JJ. In a joint judgment, Hayne and Bell JJ were critical of the idea that non-statutory executive power could support the action taken by the government in this case, noting that '[t]o hold that the Executive can act outside Australia's borders in a way that it cannot lawfully act within Australia would stand legal principle on its head'.[105] Their Honours disagreed with French CJ that the content of non-statutory executive power could be gleaned by reference to the royal prerogative.[106]

Justice Kiefel referred to Black CJ's 'detailed analysis' in *Tampa* as to whether there existed a prerogative power to expel, deport or detain.[107] Her Honour identified that for some time legislation had conferred on the executive powers of expulsion and detention and referred to the 'constitutional principle that any prerogative power is to be regarded as displaced, or abrogated, where the Parliament has legislated on the same topic'.[108] Here, Kiefel J considered the MPA regulated the relevant powers;[109] however, her Honour ultimately found the Commonwealth's expulsion and detention of CPCF had not been authorised by the MPA.[110]

As is evident from the High Court's 4:3 split and the delivery of six separate judgments, *CPCF* was a complex case. The judgment contains divergent views on non-statutory executive power. As the majority ultimately found CPCF's detention was authorised by the MPA, the judgment provides no definitive position on the breadth or exercise of the power.

The limits of non-statutory executive power

Border patrol

The non-statutory power articulated by French J in *Tampa* envisages that it be used in the context of patrolling Australia's extra-territorial borders. However, does it make a difference which body within the executive exercises the power? In *Tampa*, it was the Australian Navy that boarded the vessel and detained the asylum seekers.[111] In *CPCF*, the maritime officers (including members of the Australian Defence Force (ADF), Australian Customs and Border Protection Service (ACBPS) and Australian Federal Police officers) would have exercised the power had the MPA not authorised the action taken.[112] If, for example, the ADF had not been involved, could the other executive officers exercise this inherently executive non-statutory power? Having regard to the fact that all of those agencies played a role in patrolling Australia's borders to protect Australia's sovereignty as part of OSB, it is likely they could do so here under s 61. It seems as if the involvement of the ADF is not necessary, although they are obviously equipped with good resources to assist operations.

It is also worth considering how far from Australia's coast the non-statutory power under s 61 would give the executive the power to patrol. It is potentially 'helpful and informative' to

103 Ibid.
104 Ibid 651.
105 Ibid 568 [150].
106 Ibid.
107 Ibid 597 [266].
108 Ibid 600 [277], [279].
109 Ibid 601–2 [280]–[285].
110 Ibid 610 [323].
111 *Ruddock v Vadarlis* (2001) 110 FCR 491, 524.
112 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 526.

consider constitutional powers in the context of norms of international law.[113] It seems the power would extend, at the very least, to patrolling within Australia's contiguous zone under international law, which is presently 24 nautical miles from the coast.[114] If that definition as agreed by nation states changes at the international level, it is reasonable to expect that the area in which the executive would be authorised to patrol under the non-statutory power correspondingly would grow or contract.[115]

Regardless of the source of the power to patrol Australia's borders, the importance of maintaining an awareness of the location of the border was highlighted following an incident between Australia and Indonesia. Between 1 December 2013 and 20 January 2014, ADF and ACBPS vessels inadvertently entered Indonesian waters while patrolling Australia's borders.[116] This occurred due to a miscalculation of the Indonesian maritime boundaries by Australian crew and breached the executive's OSB policy and operational instructions.[117] As a result, international relations were adversely affected.[118] The Senate inquiry launched after the events found that there was a possible breach of international law.[119] If non-statutory power had been relied upon, and the borders were similarly encroached, it seems clear that those actions would have been beyond power. If the exercise of non-statutory executive power involved towing asylum seeker vessels or the use of orange lifeboats to return asylum seekers to Indonesia, possible consequences of an incursion on the border could theoretically include a successful action in wrongful imprisonment for the period they were in Indonesian waters or a challenge to the validity of the whole operation, requiring the detainees to be returned to Australia (presumably then to be removed once more).

Government contracting

If the executive contracted with a third party — for example, Wilson or Broadspectrum — to conduct patrols of the Australian border, could the third party exercise the non-statutory power in s 61? In the context of appropriation of moneys, the High Court has held that there must be legislative support for a contract; the executive cannot simply rely on ss 81 and 83 of the *Constitution* to authorise appropriation under the contract.[120] In *Williams v Commonwealth (No 2)*[121] (*Williams No 2*), the High Court held that executive power did not extend 'to any and every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys'.[122]

In this example, the third-party contractors would in all probability not be Commonwealth officers and therefore would be unable to exercise executive power under s 61 of the *Constitution*. They would also be providing a service to the government under contract rather than exercising any pure executive power as their main function. As the actions would have the potential to affect the rights of individuals, any such government contract would likely need to be supported by legislation,[123] which could then confer powers to the contractors.

113 Michael Kirby, 'Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?' (Speech delivered at the twenty-ninth annual Philip A Hart Memorial Lecture, Georgetown University Law Center, 16 April 2009) 441–2; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 627 [385] (Gageler J) and the cases cited therein.

114 Geoscience Australia, 'Maritime Boundary Definitions', *Geoscience Australia* <http://www.ga.gov.au/scientific-topics/marine/jurisdiction/maritime-boundary-definitions>.

115 See Maillet, Mountz and Williams, above n 41.

116 Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Breaches of Indonesian Territorial Waters* (2014) 23.

117 Ibid 2, 16.

118 Lenore Taylor, 'Indonesia Demands Suspension of Australia's Asylum Operations', *The Guardian* <https://www.theguardian.com/world/2014/jan/17/australia-apologises-patrol-boats-indonesian-waters>.

119 Senate Foreign Affairs, Defence and Trade References Committee, above n 116, 24.

120 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 42; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 [87].

121 *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

122 Ibid 470.

123 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

The delegation of non-statutory power under s 61 to private contractors does not seem tenable. It appears the High Court's findings in *Pape* and *Williams No 2* have implications for the scope and constraints of non-statutory executive power more broadly than the appropriation of moneys.[124]

Power to detain offshore

The non-statutory executive power to prevent the entry of non-citizens into Australia includes the power to detain for an ancillary purpose. The Full Federal Court in *Tampa* emphasised the executive's role in protecting Australia's sovereignty as a nation state.[125] Could the detention aspect of the power be used by itself? For example, could it authorise large-scale detention of asylum seekers offshore — that is, regional processing? In *M68 of 2015 v Minister for Immigration and Border Protection*,[126] the plaintiff argued their detention on Nauru, provided for by a memorandum of understanding (MOU), was not authorised by any valid law or non-statutory executive power.[127] The Commonwealth argued s 198AHA of the Migration Act contemplated the executive entering into an MOU with Nauru regarding the processing of asylum seekers, but in any event the executive was authorised by s 61 of the *Constitution* to enter into the MOU.[128] The Court agreed it was within the scope of the executive power relating to aliens for it to enter into the MOU.[129]

In respect of the plaintiff's detention, because the Court found s 198AHA authorised the plaintiff's detention, it was unnecessary for it to consider 'the hypothetical question' of whether detention would have been authorised by non-statutory power under s 61.[130] The Court confirmed Brennan J's tripartite categorisation in *Davis* when it stated that '[n]on-prerogative executive capacities … are within the non-statutory executive power of the Commonwealth which is constitutionally conferred by s 61 of the *Constitution*'.[131] The Court explained that non-statutory power in s 61 was limited by the *Constitution*, which was 'to be understood … in light of the purpose of Ch II being to establish the Executive Government as a national responsible government and in light of constitutional history and the tradition of the common law'.[132]

Hypothetically, could detention of asylum seekers on Nauru be authorised by the non-statutory power? The essence of the power is protecting Australia's sovereignty from the entry of non-citizens into the territory. Justice French, in *Tampa*, suggested detention of non-citizens was *ancillary* to the prevention of entry. Here, it could be said that an offshore detention arrangement would principally be calculated to achieve the purpose of deterrence and that preventing the entry of non-citizens was secondary. It may be less likely that the power would extend to authorise offshore processing arrangements in these circumstances.

Power to detain onshore

The recent Federal Court decision of *Tanioria v Commonwealth (No 3)*[133] (*Tanioria No 3*) provides some useful commentary on the interaction of s 61 with legislative power. In *Tanioria No 3*, the plaintiff claimed false imprisonment on the basis of his detention by Serco

124 French, above n 30, 21.
125 *Ruddock v Vadarlis* (2001) 110 FCR 491, 540.
126 (2016) 90 ALR 297.
127 Ibid 374.
128 Ibid 375.
129 Ibid [163], [355].
130 Ibid 378.
131 Ibid 400.
132 Ibid.
133 *Tanioria v Commonwealth of Australia (No 3)* (2018) 162 ALD 176.

officers.[134] The Commonwealth submitted that Serco officers kept the plaintiff in detention on behalf, and at the direction, of Commonwealth officers and that, where an action was authorised by legislation, no further authorisation was needed from s 61.[135] Under s 189 of the Migration Act, the executive was required to detain the plaintiff if he did not hold a valid visa. Conversely, the applicant contended there was an implied limitation in s 61, which limited the exercise of that power to officers of the Commonwealth.[136] Because the Court accepted the Commonwealth's submission that in this case the statutory executive power had been exercised by an officer of the Commonwealth, it was unnecessary for the Court to determine whether s 61 of the *Constitution* contained the implied limitation as contended by the applicant.[137] Nevertheless, in the event his Honour was wrong, Thawley J went on to address the Commonwealth's arguments and find that there was no such implied limitation in s 61.[138]

The Commonwealth also submitted that, if the plaintiff's detention had involved the power under s 61, there was nothing preventing legislation from separately conferring the power to detain on a person who was not an officer of the Commonwealth — here, Serco.[139] This is illuminating, as it raises two points: first, the Commonwealth's view that non-statutory executive power and legislation on the same subject-matter can coexist; and, second, that non-statutory executive power likely cannot be delegated to private contractors.

The legislative regime for managing the detention and removal of unlawful non-citizens in the Migration Act is complex and unlikely ever to be entirely repealed. In those circumstances, it appears there will be little for the non-statutory under s 61 to do and the executive is more likely to rely on legislative powers. Further research is required to consider whether the non-statutory power articulated in *Tampa* would permit the detention of non-citizens who have already entered Australia, as opposed to detaining persons to *prevent* entry.

Removal of non-citizens from Australia

The last issue for discussion is whether the non-statutory power identified in *Tampa* extends to authorise the removal of non-citizens from Australia. While the Migration Act comprehensively regulates the grant and cancellation of visas, that does not necessarily mean that it and non-statutory power cannot peacefully coexist.

It may seem a stretch to consider the power's application here, but the idea of the protection of sovereignty ties closely to the removal of non-citizens who are no longer wanted in the Australian community, such as character cancellations under s 501 of the Migration Act or the power to cancel dual citizens' Australian citizenship while overseas under foreign fighters legislation.[140] Picture a situation where there has been a terrorist incident in an Australian capital city. The Department of Home Affairs, in connection with other central executive agencies, has intelligence that the person responsible is a non-citizen. Ordinarily, under the Migration Act, the Minister for Home Affairs or the delegate would need to cancel the non-citizen's visa if they wished to remove the person from Australia. What if the ongoing threat posed by the person were so extreme that giving the person notice of the cancellation of their visa, or procedural fairness in the case of cancellation by a delegate, would place Australia at risk? If the security of the nation is within the spheres of responsibility vested in the non-statutory executive power in s 61,

134 Ibid 177 [1].
135 Ibid 181 [28].
136 Ibid 181 [27].
137 Ibid 187 [54].
138 Ibid 187–8 [55], [59].
139 Ibid 181 [28].
140 See Liberal Party of Australia, above n 85.

could the executive use the power to detain and remove the person while they held a valid visa and were a lawful non-citizen under the Migration Act?

These questions would also arise in a different scenario involving national security. For example, imagine that a network of lawful non-citizens resident in Australia are members of the Islamic State of Iraq and the Levant / Islamic State of Iraq and Syria (Islamic State). They perpetrate a cyber attack on the Department of Defence, bringing down its information technology systems. The systems have not yet been reinstated and there is intelligence that the perpetrators have links overseas who are awaiting a signal to launch further attacks on other federal government agencies. It is arguable that non-citizens posing a security threat to the nation would no longer be friendly aliens. It could be argued that these circumstances would enliven the non-statutory power to expel the persons from Australia in order to maintain the *Constitution*. For incidents involving a national security element such as these and, in a time of emergency, it would potentially be open to the executive to utilise the 'nationhood power'.[141] Where there is overlap between the protection of the border and sovereignty and protection of the nation's interests, reliance on the nationhood power, which has only recently been articulated, and in more detail than the power in *Tampa*, seems more likely.

Supposing that the Migration Act intends to cover the field of the removal of aliens from Australia.[142] A real barrier to the removal of lawful non-citizens from Australia under non-statutory executive power in these scenarios is that to do so would be inconsistent with the Migration Act. That legislation only provides for the detention and removal of *unlawful* non-citizens — that is, persons without a valid visa in effect. In the absence of statutory authority to do so, the writer considers the executive could not detain or remove a person relying on non-statutory executive power without first following the procedures under the Migration Act to cancel their visa. Of course, the counterargument to this is that, because the Migration Act is silent on the removal of *lawful* non-citizens, there could be room for the non-statutory executive power to operate. This issue merits further exploration.

Where to next?

To an extent, it is unknown how non-statutory executive power might be exercised in the future in the migration context. While in several cases the Commonwealth has submitted the power is available, the executive's infrequent reliance on the power in practice has made it unnecessary for the courts clearly to determine the power's ambit. In light of the division of the High Court in *CPCF* as to the existence of the non-statutory power, many questions remain.[143]

There have been a number of changes to the composition of the High Court in recent years. Since *CPCF* was decided in 2015, French CJ, Hayne and Crennan JJ have retired; Nettle, Gordon and Edelman JJ have been appointed in their place; and Kiefel CJ has been appointed Chief Justice.[144] In respect of these recent changes, two points are noteworthy. First, in *CPCF* Kiefel J did not accept the existence of the non-statutory power. Second, having regard to his age at the time of his appointment, Edelman J may remain on the bench of the High Court until 2044.[145] This places Edelman J in a prime position to be at the forefront of the future development of Australian constitutional law.[146] At the time of

141 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1; French, above n 30, 35–6, 39.
142 See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 599 [271] (Kiefel J).
143 Anna Olijnyk, 'Public Law Blog: *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1', *University of Adelaide* <https://blogs.adelaide.edu.au/law/2015/03/02/cpcf-v-minister-for-immigration-and-border-protection-2015-hca-1/>.
144 High Court of Australia, 'About the Justices' <http://www.hcourt.gov.au/justices/about-the-justices>.
145 *Constitution* s 72.
146 Julian R Murphy, 'Justice Edelman's Originalism, or Hints Of It' *Australian Public Law* <https://auspublaw.org/2017/11/justice-edelmans-originalism/>.

writing, Edelman J has been a Justice of the High Court for two years and three months,[147] and early indications are that his Honour will take a conservative approach to constitutional construction. In his first year on the bench, Edelman J dissented in two constitutional cases: first, in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection*,[148] where the rest of the Court delivered a joint judgment; and, second, in *Brown v Tasmania*[149] (*Brown*).[150] The only other dissent of the Court in a 2017 constitutional case was Gordon J, also in *Brown*.[151] Justice Edelman's more conservative approach to constitutional interpretation tends to suggest his Honour may be less likely to identify new areas where non-statutory executive power could be relied upon.[152] On the other hand, one of the features of Kiefel CJ's Court has been to encourage agreement among the members of the bench, and the rate of dissent in constitutional cases in 2017 was the lowest since 2003.[153] It is clear that future changes to the composition of the bench of the High Court will undoubtedly affect whether the power continues to be articulated or its ambit is curtailed.

Further, given the level of uncertainty about the limits of this power, the executive will be very cautious to rely on it, preferring instead to legislate sources of power.[154] Therefore, its boundaries will be revealed gradually over time on a case-by-case basis as the executive exercises non-statutory power and the courts consider the availability of the power and validity of its purported exercise.[155] The confines of the power will continue to be informed by historical prerogative powers but will be interpreted in the context of the *Constitution* and come to be referred to just as 'executive power' over time.[156]

Concluding remarks

This article has considered the history of non-statutory executive power and its interpretation in the context of the *Australian Constitution*. The use of non-statutory executive power in the migration context has been discussed, including through the analysis of case law identifying the existence of a non-statutory executive power to prevent the entry into Australia of non-citizens and to detain and expel them for that purpose. The possible boundaries of the power were explored by hypothesising the potential future use of the power in the migration context. As the limits of the power identified in *Tampa* have not been articulated in detail by the courts, it is possible that the power will be able to be exercised in new circumstances in the future. Presently, the existence of legislation — namely, the Migration Act and MPA — is a barrier to the use by the executive and further articulation by the courts of the power in these situations. The presence of legislation will see the executive rely on statutory powers and, where powers are validly exercised under legislation, it will be unnecessary for the courts to consider if non-statutory power would have authorised the actions.

It appears unlikely that the executive will seek to rely frequently on the non-statutory power in the near future. Nevertheless, having regard to the Commonwealth's submissions in recent cases as to the existence of the power, and the reduced protections for individuals offered by non-statutory power when compared to legislation, continued efforts to articulate the power's existence, nature and ambit are warranted.

147 High Court of Australia, 'James Edelman' <http://www.hcourt.gov.au/justices/current/justice-james-edelman>.
148 [2017] HCA 33.
149 (2017) 261 CLR 328.
150 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2017 Statistics' (2018) 41(4) *UNSW Law Journal* 1134.
151 Ibid.
152 Murphy, above n 142.
153 Lynch and Williams, above n 144.
154 See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 599 [271] (Kiefel J).
155 Condylis, above n 19, 405; Spigelman, above n 4, 351; French, above n 30, 41; Kerr, above n 39, 29.
156 *Ruddock v Vadarlis* (2001) 110 FCR 491, 202; French, above n 30, 41; Spigelman, above n 4.