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Recent developments

Katherine Cook

Use of force in immigration detention

Fourteen complaints about the use of force in immigration detention form the basis for a comprehensive thematic report by the Australian Human Rights Commission tabled in Parliament.

The report considers the practices of handcuffing detainees, use of physical force within centres including arm and elbow locks, operations conducted by the Emergency Response Team (ERT), and the use of face masks.

'The Department of Home Affairs has a duty of care to people in immigration detention. Force should only ever be used as a last resort where alternatives such as negotiation and de-escalation techniques have been exhausted. Any use of force should be limited to what is essential in the circumstances and should be used only for the shortest amount of time necessary', said Commission President, Emeritus Professor Rosalind Croucher.

In nine of the 14 complaints, the Commission found that the manner or degree of force used was contrary to the human rights of the detainees. In one case, handcuffs were applied to a detainee over a significant wrist wound for eight and a half hours while he was transferred between detention centres.

In another case, male ERT officers entered the bedroom of a young woman aged 19 years unannounced and refused her the opportunity to get dressed without them being present.

In a third case, a mother was separated from her husband and their one-month-old daughter for 32 hours during an operation that involved the transfer of a number of family groups from one detention centre to another.

In five of the 14 complaints, the Commission did not find that a breach of human rights had been established.

'There needs to be effective oversight of the use of force in immigration detention. This requires robust authorisation procedures, filming of all pre-planned uses of force in their entirety, and appropriate record keeping so that incidents can be properly assessed', said President Croucher.

The Commission made 24 recommendations, including recommendations aimed at reforming the way in which:

- security risk assessments are carried out;
- use of force incidents are recorded;
- handcuffs are used, including when medical issues arise; and
- transfers of detainees occur between detention centres.

The Department of Home Affairs said that it had made a number of changes to its internal policies since receiving a preliminary report of the Commission's findings. It also said that it would take further action in the future to implement other recommendations in the report.

<https://www.humanrights.gov.au/about/news/media-releases/media-statement-use-force-immigration-detention>

OAIC annual report on digital health

The national privacy regulator has released a snapshot of its activity across the digital health sector in 2018–19, including the My Health Record system.

The Office of the Australian Information Commissioner (OAIC) is the independent regulator of the privacy provisions under the *My Health Records Act 2012* (Cth) and the *Healthcare Identifiers Act 2010* (Cth).

The annual report of the Australian Information Commissioner's activities in relation to digital health 2018–19 shows an increase in privacy enquiries and complaints as the My Health Record system moved from a self-register model to an opt-out model in February 2019.

In 2018–19, the OAIC received 145 enquiries and 57 complaints about the My Health Record system, compared to 14 enquiries and eight complaints the previous financial year. Most complaints were received before the end of the opt-out period on 31 January 2019.

It also received 10 enquiries about the Healthcare Identifiers Service and five complaints.

During the reporting period, the OAIC provided detailed privacy advice on the My Health Record system to stakeholders including the Australian Digital Health Agency and to the Senate Community Affairs References Committee and Legislation Committee.

The OAIC also conducted privacy assessments of regulated entities in the digital health sector. In 2018–19, it opened three new assessments of digital health privacy practices, including assessments of private hospitals, pharmacies, and pathology and diagnostic imaging services.

In 2018–19, the OAIC received four mandatory data breach notifications from the My Health Record System Operator (the Agency):

- two notifications related to unauthorised access to a My Health Record by a third party conducting fraudulent Medicare-claiming activity;
- one notification involved incorrect Medicare enrolment resulting in unauthorised access to a My Health Record.

An enquiry into the fourth notification confirmed that a data breach had not occurred.

The OAIC received 31 mandatory notifications about data breaches involving Medicare records, including:

- 27 notifications that involved intertwined Medicare records, where healthcare recipients with similar demographic information shared the same Medicare record and Medicare provided data to the incorrect individual's My Health Record; and
- four notifications that resulted from findings under the Medicare compliance program, where Medicare claims made in the name of a healthcare recipient, but not by that healthcare recipient, were uploaded to their My Health Record.

The OAIC assesses each notification it receives to determine whether appropriate action has been taken by the notifying organisation and whether further action is required by the entity or the OAIC.

The OAIC also carries out proactive guidance and education activities relating to digital health. In 2018–19, this included:

- developing guidance material for healthcare providers about protecting patients' personal and health information;
- working with health sector organisations to promote good privacy practice and improve providers' understanding about preventing and responding to data breaches;
- developing online resources to help consumers make informed decisions about opting out of the My Health Record system; and
- promoting consumer awareness of the privacy controls available within their My Health Record through videos, a website and other resources.

More information is available in the 2018–19 Australian Digital Health Agency annual report.

<https://www.oaic.gov.au/updates/news-and-media/oaic-annual-report-on-digital-health/>

Investigation into FOI processing by the Department of Home Affairs

The Office of the Australian Information Commissioner (OAIC) has opened an investigation into the Department of Home Affairs' compliance with the *Freedom of Information Act 1982* (Cth) in processing requests for non-personal information.

Australian Government agencies and ministers have a statutory obligation to process FOI requests within 30 days. There are provisions which allow for extra time in certain circumstances.

In 2018–19, 56 per cent of the 734 FOI requests to the Department for non-personal information were not dealt with in the required timeframe.

The OAIC has received a number of FOI complaints and review applications related to the Department's compliance with statutory timeframes for processing requests for non-personal information.

One of the objects of the FOI Act is to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Under the FOI Act, the Information Commissioner may initiate an investigation into an agency's performance of FOI functions or exercise of powers.

Once the investigation is completed the OAIC will publish the outcomes.

<https://www.oaic.gov.au/updates/news-and-media/investigation-into-foi-processing-by-the-department-of-home-affairs/>

Statement relating to NSW mobile phone detection cameras

The *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) provides the overarching legislative framework for New South Wales (NSW) government agencies holding personal information. All NSW agencies are required to comply with the 12 Information Protection Principles (IPPs) which are set out in the PPIP Act. The PPIP Act also gives NSW citizens rights such as to complain about privacy breaches.

The NSW Privacy Commissioner's role is to provide advice and assistance to public sector agencies in adopting and complying with the IPPs and privacy codes of practice.

Following the initial notification by Transport for NSW of the proposed trial of mobile phone detection cameras the Privacy Commissioner raised a number of concerns, including:

- actions planned to be taken by Transport for NSW to mitigate privacy risks;
- the role of contractors in delivering the program; and
- ensuring the trial and any future rollout would be conducted in accordance with NSW privacy legislation.

The Privacy Commissioner supports the aim of using digital technology to protect the safety of citizens within a robust privacy-respectful framework.

The Privacy Commissioner provided advice and assistance to the agency to ensure that privacy rights were considered and appropriate risk mitigation strategies put in place to minimise privacy harm to the public such as:

- minimising the retention of images;
- cropping or pixilation of images when viewed for verification purposes;
- the use of strong encryption and other security measures; and
- the need for strong contractual requirements on any provider to comply with the PPIP Act.

The Privacy Commissioner also sought information on the enforcement phase of the program, including Transport for NSW's proposed privacy audit processes and policy and compliance arrangements. Transport for NSW has agreed to provide an update on the program after three months, including confirmation that the privacy controls are effective.

The Privacy Commissioner, Ms Samantha Gavel, said, 'It is important that Transport for NSW are transparent in communication and engagement with the community on the introduction of the cameras and that citizens are appropriately notified about the collection of their personal information, to assure the community about the value of and privacy protections in the program'.

<https://www.ipc.nsw.gov.au/media-releases/statement-relating-mobile-phone-detection-cameras>

Brisbane Council ban on Extinction Rebellion may contravene anti-discrimination laws

The Queensland Human Rights Commission has expressed its concern about decision by the Brisbane City Council last week to ban Extinction Rebellion from booking council meeting facilities and says the ban could contravene the *Anti-Discrimination Act 1991* (Qld). The urgency motion, put forward by Lord Mayor Adrian Schrinner and passed at last week's meeting, argues that council facilities are not 'suitable meeting places for organisations that advocate or incite illegal activities'. It goes on to state that 'the Extinction Rebellion organisation falls into this category and disallows them from booking council meeting facilities in the future'. The *Anti-Discrimination Act 1991* (Qld) prohibits discrimination on the basis of political belief or activity in areas including the provision of goods and services. Queensland Human Rights Commissioner, Scott McDougall, says the restriction on members of Extinction Rebellion may amount to unlawful discrimination.

'Denying access to Council services on the basis of someone's political belief or involvement in protest activity impedes several fundamental human rights that will be protected under the Human Rights Act from 1 January 2020', says Commissioner McDougall. 'However, existing discrimination laws already prohibit discrimination on the ground of political activity and, on the face of it, the ban would appear to be unlawful.'

Similar cases which have come before tribunals, such as an hotel refusing to host a gathering by a political party whose views the manager disagreed with (see *Vuga v Persal & Co Trading Pty Ltd* [2017] QCAT 368), have been found to breach the Act. The Commissioner spoke with the Lord Mayor last week, and the Lord Mayor is aware of the Commissioner's concerns. No complaints have yet been lodged at the Commission.

<https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0015/23244/2019.10.23-Council-ban-on-Extinction-Rebellion-may-contravene-anti-discrimination-laws.pdf>

ACT complaints rise and over $2 million paid to victims of crime: annual report

Complaints to the ACT Human Rights Commission are up by almost 10 per cent, according to the Commission's 2018–2019 annual report.

ACT Human Rights Commission President, Dr Helen Watchirs, said, 'We are assisting more Canberrans. The Commission has continued to expand its frontline services to complainants, victims of crime and people experiencing vulnerability. Commissioners and staff work hard, delivering training and informing people about our services, in more than 100 public activities and events'.

Highlights from this reporting period include:

- The percentage of complaints received rose almost 10 per cent compared to last year and 35 per cent compared to 2016–17.
- The number of complaints about children and young people doubled.
- Complaints about health services in the ACT rose by almost 8 per cent on last year.
- There was an increase in both the number of Aboriginal and Torres Strait Islander clients making complaints; and applying for financial assistance scheme (FAS) payments as victims of crime:
    - Complaints from Aboriginal and Torres Strait Islander clients, handled by the Discrimination, Health Services, Disability and Community Services Commissioner, rose to 54 in 2018–2019 (up from 40 in 2017–2018 and nine in 2016–2017).
    - Fifteen per cent of FAS applications received in 2018–19 were from Aboriginal and/or Torres Strait Islander applicants, up from 10 per cent in 2017–18.
- Eighty-eight per cent of people who completed a Commission survey at the closure of a complaint said the process was fair, accessible and understandable.
- The victim services team under the Victims of Crime Commissioner helped almost 1700 people affected by crime:
    - 453 new FAS applications were received;
    - $2.56 million in FAS payments was disbursed to over 350 Canberrans, including $2.2 million paid to victims in recognition of the harm cause by violent crime; and
    - the court support volunteer program provided over 250 hours of court support to almost 100 clients.
- The Public Advocate advocated for and/or monitored the situation of more than 1300 Canberrans.

'We provided over 50 comments on Cabinet submissions, pieces of legal advice or submissions to hearings. Through this work, we regularly advise government and other bodies on legal issues relevant to human rights; we review the effect of ACT laws, policies and practices on human rights; and remind authorities of their human rights obligations.

This year, we also launched the Commission's first cultural safety charter. With this charter, we have committed to providing Aboriginal and Torres Strait Islander peoples with a safe environment in which their cultural rights and spiritual values are accepted.'

<https://hrc.act.gov.au/media-release-complaints-rise-over-2million-paid-to-victims-of-crime-annual-report/>

Recent decisions

No secret evidence

HT v the Queen & Anor [2019] HCA 40 (13 November 2019) (Kiefel CJ; Bell, Keane, Nettle, Gordon and Edelman JJ)

The appellant pleaded guilty in the District Court of New South Wales to 11 counts of financial fraud offences, which each carried a maximum penalty of either five years' or 10 years' imprisonment. A factor of significance on sentencing was the assistance that the appellant had provided, and was anticipated to provide, to a law enforcement authority as a registered police informer. The sentencing judge was required by the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSP Act) to take such assistance into account.

An affidavit, Exhibit C, outlining the appellant's assistance was admitted into evidence in the sentencing proceedings. It included, among other things, criminal intelligence of a highly sensitive nature. The Crown saw Exhibit C, but the appellant's counsel was presented with two options: if he wished to be privy to the information, it would have to be highly redacted and consequently would be a lot shorter; if he was not privy to the information, it would be a lengthy document, inferentially one more favourable to the appellant. Unsurprisingly, the appellant's counsel chose the latter course and did not see Exhibit C.

After reading Exhibit C, the sentencing judge specified a combined discount of 35 per cent for the assistance and guilty pleas and sentenced the appellant to an aggregate sentence of three years and six months' imprisonment, with a non-parole period of 18 months. The sentencing judge indicated that his task in determining the discount was difficult given the defence counsel had no knowledge to enable him to make submissions.

The Crown appealed to the Criminal Court of Appeal on the ground that the sentence was manifestly inadequate. On appeal, the appellant's counsel sought access to Exhibit C. The NSW Commissioner of Police, supported by the Crown, opposed access to Exhibit C on the basis of public interest immunity (PII). The Court of Appeal upheld the PII claim, holding that the information came within a particular class of documents to which PII attaches. However, the Court of Appeal also allowed disclosure of one sentence from Exhibit C to the appellant's counsel, which concerned the evaluation by the police of the appellant's assistance. The Court of Appeal upheld the appeal and proceeded to determine the appropriate discount for the appellant's assistance under the *Criminal Appeal Act 1912* (NSW) (CA Act). It increased the combined discount for her assistance and guilty pleas to 40 per cent but also increased the aggregate sentence to six years and six months' imprisonment, with a non-parole period of three years and six months.

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

The respondents — the Crown and the Commissioner of Police — submitted that the appellant had not been denied procedural fairness because the appellant's counsel had consented to Exhibit C being dealt with as closed evidence during the sentencing proceedings and Exhibit C was not adverse to the appellant.

The appellant contended that no true choice had been made and the Crown was under a duty to provide material relevant to the sentence; and that material relating to mandatory considerations in the CSP Act, which is within the knowledge of the authorities and not the offender, should be placed before the court.

The High Court unanimously held that the appellant was denied procedural fairness by the Court of Appeal. The appellant and her legal representatives were denied access to confidential evidence which it had taken into account when deciding to allow the appeal and exercise its discretion under s 5D(1) of the CA Act to resentence the appellant. Having been denied access to Exhibit C, the appellant was denied a reasonable opportunity of being heard, including testing and responding to evidence which was relevant to whether the sentence was manifestly inadequate. The fact that the information in Exhibit C was not adverse to the appellant was not the point. The appellant had no way of knowing whether it detailed all the assistance that she had provided and the risks she had taken in providing that assistance.

The High Court further held that it is plainly correct that the appellant's counsel was given no real choice with regard to being privy to the information in Exhibit C. Additionally, the consent was given for the purposes of sentencing in the District Court, not for the proceedings in the Court of Appeal.

The High Court did not consider the denial of procedural fairness to be justified by PII, not least because PII procedure respects common law procedures of natural justice. If it is determined that documents are not to be produced then they are not available to either party and the court may not use them. The doctrine of PII does not extend to permitting material to be admitted in evidence in proceedings but kept confidential from one party to those proceedings.

In the circumstances of this case, the High Court held that the proper exercise of its discretion should have led the Court of Appeal to dismiss the Crown's appeal against sentence and that the denial of procedural fairness was, alone, a reason for doing so.

Procedural fairness in the IAA is not the same as in the AAT

BVD17 v Minister for Immigration and Border Protection & Anor [2019] HCA 34 (9 October 2019) (Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon, and Edelman JJ)

The appellant, a Sri Lankan citizen, arrived in Australia as an unauthorised maritime arrival in October 2012 and applied for a protection visa. The Minister for Immigration and Border Protection (the Minister) referred a decision by his delegate to refuse the application to the Immigration Assessment Authority (the Authority) for 'fast-track' review. The Authority affirmed the delegate's decision.

Relevantly, Pt 7AA of the *Migration Act 1958* (Cth) establishes a scheme for the ministerial referral of decisions refusing protection visas to certain applicants to the Authority for review. Within Pt 7AA, s 473GB relevantly applies to a document or information given to the Minister or an officer of the Department in confidence. Where s 473GB applies to a document or information given by the Secretary of the Department to the Authority, s 473GB(2)(a) obliges the Secretary to notify the Authority in writing that s 473GB applies in relation to the document or information. The Authority may then, under s 473GB(3), have

regard to any matter contained in the document or to the information and may, in certain circumstances, disclose any matter contained in the document, or the information, to the referred applicant. Section 473DA(1) provides that Div 3 of Pt 7AA, together with ss 473GA and 473GB, 'is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the [Authority]'.

In this case, in the Authority's statement of reasons it found that the appellant had fabricated his claims to have been of interest to authorities in Sri Lanka. The Authority placed weight on the absence of corroboration of one of the appellant's claims in the file of the Department of Immigration and Border Force (the Department) which related to an application for a protection visa which had been made by another member of the appellant's family (the relative's file).

The relative's file had been before the delegate at the time of making the decision to refuse the appellant a protection visa, but the delegate had not relied adversely on the contents of the file in making that decision. The relative's file had been included in the review material given to the Authority by the Secretary to the Department under s 473CB of the Migration Act and had been accompanied by a notification given to the Authority under s 473GB(2)(a) by a delegate of the Secretary. The notification stated that s 473GB applied to the documents and information in the relative's file and expressed the view of the delegate that the documents and information in the relative's file should not be disclosed to the appellant because they had been given to the Minister or to an officer of the Department in confidence. In the course of the review, the Authority did not disclose any of the documents or information in the relative's file to the appellant. The Authority also did not disclose the fact of having been given the notification under s 473GB(2) of the Act to the appellant.

The Authority's written statement of its reasons for decision records that the Authority had regard to the review material and to particular country information, which it specifically identified as 'new information', and that no further submissions or new information were provided to it. The statement made no reference to the notification under s 473GB(2)(a) of the Act and made no reference to the exercise of any discretion by the Authority under s 473GB(3) to refer the matter to the appellant.

The appellant then applied to the Federal Circuit Court for judicial review of the decision of the Authority on grounds that the Authority's failure to disclose the documents and information in the relative's file to him was both procedurally unfair and legally unreasonable. The Federal Circuit Court dismissed the application.

The appellant then appealed from the decision of the Federal Circuit Court to the Federal Court. The appeal was on a single ground, albeit the ground had two limbs. The ground was that the Federal Circuit Court erred in failing to find either that the Authority failed to consider the exercise of the discretion conferred by s 473GB(3)(b) at all; or that, if the Authority did consider exercising that discretion, the Authority's failure to exercise the discretion to disclose the documents and information was legally unreasonable. The Federal Court dismissed the appeal.

By special leave, the appellant appealed to the High Court. The thrust of the appellant's argument was that the reasoning in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 (*SZMTA*) concerning the operation of s 438(2)(a) that gives rise to an obligation of procedural fairness within the scheme of Pt 7 (that applies to the Administrative Appeals Tribunal (AAT)) is transferable to the operation of s 473GB(2)(a) within the equivalent scheme that applies to the Authority (Part 7AA). In *SZMTA* the High Court accepted that the giving of a notification under s 438(2)(a) of the Migration Act triggers an obligation of procedural fairness on the part of the AAT to disclose the fact of notification to an applicant for review under Pt 7.

By majority, the High Court found that s 473DA of the Migration Act precludes an equivalent procedural fairness obligation on the part of the Authority to disclose to a referred applicant in a review under Pt 7AA the fact of notification under s 473GB(2)(a). In defining the content of the Authority's obligation to afford procedural fairness, s 473DA(1) extends the exhaustiveness of its operation to the entirety of the performance of the overriding duty imposed on the Authority by s 473CC(1) to review a fast-track reviewable decision referred to it under s 473CA. The reasoning in *SZMTA*, that the obligation of procedural fairness which conditions performance of the overriding duty of the AAT to conduct a review under Pt 7 can arise outside the scope of the discrete subject matters of the provisions to which s 422B(1) and (2) (the equivalent to s 473DA that applies to the Authority) refer, can therefore have no application to the Authority. Unlike s 473DA, s 422B is not framed in a way that excludes common law procedural fairness from the conduct of an AAT review.

The High Court unanimously found there was insufficient evidence to infer that the Authority failed to consider exercising the discretion conferred by s 473GB(3)(b).

Reasons for decisions — perfection is not required

New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 (19 September 2019) (Bell P, Ward JA and McCallum JA)

The applicant landlord and respondent tenant were parties to a social housing tenancy agreement within the meaning of the *Residential Tenancies Act 2010* (NSW). The tenant was charged with and convicted of cultivating cannabis at the property she tenanted and put on a good behaviour bond. In response, the landlord applied to the New South Wales Civil and Administrative Tribunal (NCAT) to have the tenancy terminated on that basis. The NCAT found that s 154D(3)(b) of the Residential Tenancies Act was engaged because the tenant suffered a disability (post-traumatic stress disorder) for the purposes of the section and a termination order would likely result in her suffering undue hardship. The effect of this was that s 154D(1), which mandates a termination order, was not engaged and the NCAT had a discretion to terminate under s 91 of the Act. The NCAT did not exercise its discretion to terminate the tenancy.

The tenant was again charged with and convicted of cultivating cannabis at the property. The landlord applied again to the NCAT to have the tenancy terminated. The NCAT on this occasion found that s 154D(3)(b) was not engaged because the respondent would not suffer undue hardship by reason of termination. The NCAT proceeded on the basis, however, that, contrary to its conclusion, s 154D(3)(b) was in fact engaged. The NCAT then considered whether, on that basis, the s 91 discretion to terminate should be exercised. The NCAT determined that it should and the tenancy was terminated.

The tenant appealed to the NCAT Appeal Panel. The Appeal Panel found that, while the NCAT had erred in its interpretation of 'undue hardship' for the purposes of s 154D(3)(b), the NCAT had not erred in its exercise of its discretion under s 91.

The tenant then appealed to the NSW Supreme Court. The primary judge held that it was not apparent from the NCAT's reasons either *that* it took hardship (a mandatory relevant consideration) into account or *how* it took hardship into account in exercising the s 91 discretion. In particular, the primary judge held that it was questionable whether the NCAT could have exercised its s 91 discretion unaffected by the error in the meaning it gave to 'undue hardship' for the purposes of s 154D(3)(b). On these bases the primary judge allowed the appeal.

The landlord sought leave to appeal to the Court of Appeal. The issues on appeal were:

1. whether the NCAT had not considered a mandatory relevant consideration (namely, hardship) such that the discretion miscarried;

2. whether the NCAT failed to indicate that the process of evaluation for the purposes of s 91 had been properly carried out such that the discretion miscarried; and

3. whether the NCAT's reasons were inadequate for failing to indicate whether the errors in (1) and (2) occurred.

The majority of the Court of Appeal (Bell P and Ward JA) granted leave to appeal and held the NCAT did take hardship to the tenant into account in reaching its decision. The majority observed that the quality of a court or tribunal's reasons can vary immensely depending upon a range of considerations, including the experience and skill of a judicial officer or tribunal member, the complexity of the subject matter, the quality of the submissions made before the court or tribunal, the availability of transcript, the urgency of the matter and the time the judicial officer or tribunal member has to compose his or her reasons. Further, good judgment writing is an art, not a science (see TF Bathurst, 'Writing Better Judgments' (Speech delivered to the COAT NSW Annual Conference, Efficient, Informal and Fair: Tribunals Delivering Under Pressure)). In the context of appellate review of the adequacy of reasons, the function of an appellate court is to determine not the optimal level of detail required in reasons for a decision but, rather, the minimum acceptable standard: *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 [48]. The standard is not one of perfection: *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 40 ALR 233, 255. The question as to what constitutes adequacy of reasons from a tribunal such as NCAT, which, according to its annual report for 2017–2018, received and finalised over 66 000 applications that year alone, is also of general importance.

The majority noted its conclusion that hardship was taken into account is squarely rooted in the text of the NCAT's decision. The NCAT considered the evidence of hardship and found that the tenant may suffer hardship if the tenancy were terminated. The NCAT had remarked that the case was finely balanced: the two matters in the balance were hardship, on the one hand, and what the NCAT member considered to be the degree of the tenant's fault, on the other. The NCAT stated its consideration of whether 'in all the circumstances' it should exercise its discretion. The NCAT had given weight to reports in support of the tenant relating to hardship. Further, the NCAT had afforded to the tenant a two-month extension prior to termination in recognition of the hardship a termination order would occasion.

The majority further held that the NCAT's reasons did disclose to the requisite standard how the consideration of hardship was taken into account. While the consideration of fault in assessing 'undue hardship' was found to be erroneous, fault is a relevant, if not mandatory, consideration in the exercise of the s 91 discretion. Aspects of the tenant's case on hardship were not supported by evidence. The evidence of hardship was outweighed by other discretionary considerations.

Finally, the majority held that the NCAT's reasons did not fail to disclose reasoning that would have persuaded the primary judge that the discretion was not infected by the error that it was accepted had been made as to the test of 'undue hardship' (*Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378).

Committees of influence: The impact of parliamentary committees on law making and rights protection in Australia

Dr Sarah Moulds*

For many public and administrative lawyers, it is easy to take the process of parliamentary law-making for granted and to focus on the outcome rather than the process. However, the *process* of parliamentary law making is central to Australia's system of rights protection and constitutes one of the clearest practical expressions of the core values that underpin administrative law in Australia. For these reasons, evaluating the effectiveness and impact of different components of the parliamentary law making has relevance for public and administrative law scholars and rights advocates. Using two very different case studies, this article explores the federal parliamentary law-making landscape with a particular focus on the work of parliamentary committees and the impact they have on the content and development of federal laws. This in turn reveals new opportunities to improve the quality of parliamentary law making at the federal level and new insights into the way administrative law values shape (and can be shaped by) parliamentary scrutiny activities.

The article begins by briefly explaining the key features of the parliamentary committee system at the federal level and the value of assessing the effectiveness and impact of parliamentary committees in law making in Australia. It then briefly describes the evaluation framework with reference to features that seek to overcome the challenges identified by past scholars. The framework aims to provide a holistic account of the impact of the work of parliamentary committees on the content, development and implementation of federal laws. This includes consideration of the *legislative impact* of scrutiny on the content of the law, the role scrutiny plays in the *public and parliamentary debate* on the law, and the *hidden impact* scrutiny may be having on policy development and legislative drafting. This research also explicitly recognises that individual components of the legislative scrutiny system have distinct functions and goals, which allow them to contribute in different ways to the broader legislative scrutiny system.

The article then introduces two case studies — marriage equality reforms and counter-terrorism law making — and provides a brief overview of the impact that parliamentary committees had on these laws with reference to the evaluation framework that was introduced. The case studies chosen for this evaluation deliberately focus on laws that involve balancing the rights of minority groups in the community with broader public interests or values. This goes to the heart of parliamentary law making but also underscores the important role that administrative law principles and values play in the scrutiny, implementation and review of proposed new laws.

The article concludes with a discussion of the implications of this research for administrative law scholars, public servants, parliamentarians and those contemplating new models of rights protection in Australia. It does this by reflecting on three key administrative law values — the rule of law, accountability and engagement — and considering the way these values shape (and can be shaped by) parliamentary scrutiny activities. This part also offers practical insights for state and territory jurisdictions grappling with the challenges posed by a general lack of trust in existing accountability mechanisms and looking for ways to improve rights protection and the deliberative quality of law making at the parliamentary level.

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The importance of evaluating the impact of parliamentary committees on law making in Australia

For many, parliamentary committees are not inherently interesting institutions. However, a closer look reveals that they both reflect and feed into the key values underpinning administrative law, including values associated with rule of law, accountability and engagement between the governors and the governed (discussed further below). Parliamentary committees also give practical effect to key aspects of our parliamentary democracy. They provide a forum for all parliamentarians to play a role in the legislative process. Parliamentary committees also analyse proposed laws and policies and generate reports containing information about the purpose, effectiveness and impact of those laws and policies.[1] Moreover, they provide a forum for experts and members of the community to share their views on a proposed policy or law, and they document the views of a wide range of individuals and organisations on matters critical to the lives and rights of Australians. In this way, parliamentary committees have both *deliberative* attributes (facilitating forums for the public to engage in the law-making process) and *authoritative* attributes (the capacity to generate political support for legislative or policy change).

At the federal level, there is a sophisticated system of parliamentary committees that includes standing committees in both Houses, joint committees with members from both the House of Representatives and the Senate, and select committees established for particular purposes.[2] Within this system, there are committees with a broad mandate to conduct public inquiries into Bills and other matters (described as 'inquiry-based committees') and committees that scrutinise proposed laws with reference to certain prescribed criteria (described as the 'scrutiny committees'). Interestingly, the different attributes of individual committees often work in complementary ways to those of other committees within the system.[3] For example, this article focuses on the work of a pair of committees — the Senate Legal and Constitutional Affairs Legislation Committee (the LCA Legislation Committee) and the Senate Legal and Constitutional Affairs References Committee (the LCA References Committee), as well as the House Standing Committee on Social Policy and Legal Affairs (the House Committee). These committees are all inquiry-based committees with powers to conduct public inquiries into the Bills or issues referred to them by Parliament, including calling for written submissions and inviting witnesses to provide oral evidence and answer the committee members' questions. These committees have strong deliberative attributes and often develop very specific recommendations for legislative change, which they set out in comprehensive reports that also document the differing views of the key participants. The membership of these committees is prescribed by the relevant standing orders.[4] Membership sometimes includes a majority of government members (such as in the case of the House Committee[5]

1 See eg K Barton, 'Community Participation in Parliamentary Committees: Opportunities and Barriers', *Department of the Parliament Library Research Paper* No 10, 1999; Ian Marsh, 'Australia's Representation Gap: A Role for Parliamentary Committees?' (Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 26 November 2004) 5; P Lobban, 'Who Cares Wins: Parliamentary Committees and the Executive' (2012) 27(1) *Australasian Parliamentary Review* 190.

2 For an overview of the parliamentary committee systems at the state and territory level, see Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: Continuing to Lead by Example?' (2015) 26(1) *Public Law Review* 19.

3 This theme is explored further in Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *University of New South Wales Law Review* 40; Sarah Moulds, 'Committees of Influence: Parliamentary Committees with the Capacity to Change Australia's Counter-terrorism Laws' (2016) 31(2) *Australasian Parliamentary Review* 46.

4 For example, The Senate, *Standing Orders and Other Orders of the Senate* (Parliament of Australia, Canberra, 2018), Standing Order 25.

5 The House Standing Committee on Social Policy and Legal Affairs is established by House of Representatives, *Standing Orders* (Parliament of Australia, Canberra, 2019), Standing Orders 215 and 229. The committee has a government Chair and a majority of government members. The current membership of the committee can be seen at <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Committee_Membership>.

and the LCA Legislation Committee)[6] and sometimes includes a non-government majority (such as in the case of the LCA References Committee).[7] These committees can also include 'participating members'[8] — other members of Parliament who join the committee for a particular inquiry, making them politically diverse and dynamic forums for engaging with contested policy issues.

These inquiry-based committees work closely with the scrutiny-based committees in the federal system, which include the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Parliamentary Joint Committee on Human Rights (the Human Rights Committee).[9] These scrutiny-based committees are required to review every single Bill (and, in the case of the Human Rights Committee, all legislative instruments) for compliance with a range of scrutiny criteria, including criteria that relate to individual rights and liberties.[10]

These committees rarely hold public inquiries, but they regularly produce written reports and engage in correspondence with proponents of the Bill, highlighting any areas of concern or noncompliance with the scrutiny criteria. These scrutiny reports can then be used by the inquiry-based committees, or submission-makers to the inquiry-based committees, to draw attention to particularly concerning features of the proposed law or policy.

Whether specifically assigned a rights-protecting role (such as the Human Rights Committee) or performing a broader inquiry function (such as LCA References Committee), parliamentary committees are a key aspect of a parliamentary model of rights protection.[11] Within this model, parliamentary committees provide the most practical forum for detailed consideration of the purpose, content and rights impact of proposed new laws. They also provide a source of concrete recommendations for legislative or policy change that regularly have the effect of improving the rights compliance of proposed federal laws.[12] This is particularly apparent when committees work together in a *system* that allows for both committees with strong deliberative qualities (such as the LCA committees) to work together with committees with strong authoritative features (such as the Scrutiny of Bills Committee) to scrutinise proposed laws for their impact on individual rights and to develop alternative, less rights-intrusive legislative options for the Parliament to consider and

6 The Senate Legal and Constitutional Affairs Legislation Committee (LCA Legislation Committee) is established by The Senate, *Standing Orders and Other Orders of the Senate* (Parliament of Australia, Canberra, 2018), Standing Order 25. The committee has a government Chair and a majority of government members. The current membership of the committee can be seen at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Legislation_Committee_Membership>.

7 The Senate Legal and Constitutional Affairs References Committee (LCA References Committee) is established by The Senate, *Standing Orders and Other Orders of the Senate* (Parliament of Australia, Canberra, 2018), Standing Order 25. The committee has an opposition senator as Chair and a majority of non-government members. The current membership of the committee can be seen at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/References_Committee_Membership>.

8 See eg House of Representatives, *Standing Orders* (Parliament of Australia, Canberra, 2019) Standing Order 241.

9 The Senate Standing Committee on Regulations and Ordinances is also a scrutiny-based committee with a mandate to scrutinise delegated legislation.

10 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The scrutiny criteria applied by the Human Rights Committee is outlined in s 3 of the Act and includes the human rights and freedoms contained in seven core human rights treaties to which Australia is a party.

11 Under this model, judicial contribution to the conversation on rights is restricted and, provided it stays within its constitutional limits, Parliament is the branch of government with the 'final say' on how to protect and promote individual rights. See eg George Williams and Lisa Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 258.

12 For examples of the rights-enhancing effect of parliamentary committees see Grenfell and Moulds, above n 3; Moulds, above n 3. Cf the arguments explored by Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?', Ch 2, and George Williams and Daniel Reynolds, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime', Ch 3, in Julie Debeljak and Laura Grenfell (eds) *Law Making and Human Rights* (Thomson Reuters, 2019).

act upon. In this way, parliamentary committees 'sound the alarm' about laws that might impact on individual rights and provide the forum for interested members of the community to express their views on how Parliament should respond.

The contribution of the committee system to the process of law making can also enhance the *deliberative* quality of decision-making in the Australian Parliament, providing a vital connection between the 'governed and the governors'[13] on the development of laws and policies that may have a direct impact on their individual rights. As discussed further below, it is these characteristics that a number of parliamentary committees displayed during the case study examples and that add value to other participatory democracy mechanisms designed to gauge public interest in legal or social reform.

It is important not to overstate the impact of parliamentary committees on the law-making experiences covered in this article. As past studies have noted,[14] it is not easy to attribute a particular 'impact' to one component of a complex and dynamic system, such as parliamentary democracy, particularly when it comes to politically charged issues like counter-terrorism and marriage equality.[15] Political factors are also powerful catalysts for change,[16] and often recommendations are rejected or ignored by the government of the day.[17] Sometimes reports are issued too late to be of any direct influence on parliamentary debate on the Bill.[18] For these reasons, it is not argued that parliamentary committees played the *pivotal* or even most influential role in determining the contours of Australia's counter-terrorism legislation or the enactment of amendments to the *Marriage Act 1961* (Cth) in 2017. Rather, it is argued that the work of the parliamentary committees created the right conditions for legal and political change because of their particular capacity to provide meaningful deliberative forums for community members and parliamentarians to consider competing rights issues and due to their unique place in Australia's parliamentary model of rights protection.

This article aims to demonstrate that, when considered over time, the role these committees play in collecting, presenting, and analysing different views on the merits of proposed changes to the law can be significant and should not be ignored by those seeking to evaluate or reform Australia's parliamentary model of law making and rights protection. This makes studying the impact of parliamentary committees on the development of

13 P Cane, L McDonald, K Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 2–4 and Ch 12, particularly 306, 351–355.

14 See eg Meg Russell and Meghan Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (Paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009), cited in Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Hunt, Hooper and Yowell (eds), above n 11, 111, 131. See also George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

15 For example, many actors and institutions contributed to the marriage equality legislative reforms, including individuals directly affected by discrimination on the grounds of their sexual orientation or gender identity. The contribution of many of these groups and individuals is documented in detailed in Shirleene Robinson and Alex Greenwich, *Yes Yes Yes: Australia's Journey to Marriage Equality* (NewSouth Books, 2018).

16 For further discussion of these issues see John Hirst, 'A Chance to End the Mindless Allegiance of Party Discipline', *Sydney Morning Herald* (Sydney), 25 August 2010; Bruce Stone, 'Size and Executive-Legislative Relations in Australian Parliaments' (1998) 33(1) *Australian Journal of Political Science* 37; Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Hunt, Hooper and Yowell (eds), above n 11, 39; David Feldman, 'Democracy, Law and Human Rights: Politics and Challenge and Opportunity' in Hunt, Hooper and Yowell (eds), above n 11, 95; David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1.

17 See eg Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009* (2009).

18 The issue of delayed reporting (and in particular the problem of tabling reports *after* the second reading debate on the particular Bill has ended) has been a particular concern raised with respect to the Human Rights Committee. For further discussion of how this issue may impact on the overall effectiveness of the Human Rights Committee, see Williams and Reynolds, above n 14.

counter-terrorism laws and marriage equality reforms particularly relevant to public and administrative law scholars in Australia and elsewhere.

Outline of the evaluation framework

The federal parliamentary committee system is relatively sophisticated, particularly when compared with committee systems at the state and territory level.[19] However its legislative scrutiny function is still best described as 'ad hoc' in nature rather than systematic. While the scrutiny-based committees must undertake at least a preliminary review of all Bills, the legislative review activities of the other committees in the system are generally dependent on referrals from either the House of Representatives or the Senate. This gives rise to particular challenges when seeking to evaluate effectiveness and impact but also underscores the urgency and importance of this evaluation task.

As Russell and Benton observe in their work on legislative scrutiny in the United Kingdom (UK), the complex and dynamic nature of parliamentary committees and other legislative scrutiny bodies means evaluating their performance is not always straightforward.[20] Many scholars have grappled with these challenges when seeking to evaluate the performance of parliamentary committees in a range of different areas.[21] The evaluation framework aims to address these challenges. For example, it tests findings relating to the legislative impact of parliamentary committees against empirical evidence obtained through interviews with public servants, parliamentary staff, submission makers and parliamentarians. This is in line with the approach endorsed by Tolley,[22] Aldons,[23] and Benton and Russell,[24] who suggest that this kind of qualitative approach is crucial to making an objective and holistic assessment of a committee's impact.

The evaluation framework used in this research is also multi-staged and specifically designed to take account of the 'particular conceptual complexities of rights and the institutional peculiarities of legislatures'.[25] For example, the contextualised features of the assessment framework allow for considerations of what Campbell and Morris have described as the 'political approach' to human rights, where value is attributed to the political protection and promotion of human rights as an alternative to, or in addition to, specific legislative or judicial protection of legally enforceable rights.[26] The framework has also been developed with close regard to the international rights mechanism evaluation

19 Grenfell, above n 2, 19. See also Grenfell and Moulds, above n 3, 40.

20 Russell and Benton, above n 14, 111, 131. See Phillip Larkin, Andrew Hindmoor and Andrew Kenyon, 'Assessing the Influence of Select Committees in the UK: The Education and Skills Committee 1997–2005' (2009) 15(1) *Journal of Legislative Studies* 71; Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41; Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) *Public Law* 785; J Smookler, 'Making a Difference? The Effectiveness of Pre-Legislative Scrutiny' (2006) 59 *Parliamentary Affairs* 522. See also Williams and Reynolds, above n 14, 469.

21 See, eg, Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Hunt, Hooper and Yowell (eds), above n 11, 111; Gareth Griffith, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees' (Briefing Paper No 12/05, Parliamentary Library Research Service, New South Wales, 2005); John Halligan, 'Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level' (2008) 23(2) *Australasian Parliamentary Review* 135; Tolley, above n 20.

22 Tolley, above n 20, 48.

23 Malcolm Aldons, 'Rating the Effectiveness of Parliamentary Committee Reports: The Methodology' (2000) 15(1) *Legislative Studies* 22; Malcolm Aldons, 'Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?' (2003) 18(1) *Australasian Parliamentary Review* 79.

24 Russell and Benton, above n 14, 793.

25 Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 *Human Rights Law Review* 546, 569.

26 Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the *Australian Human Rights (Parliamentary Scrutiny) Act 2011*' (2015) 34(1) *University of Queensland Law Journal* 7, 10; David Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999); David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58.

model developed by the Dickson Poon School of Law, which looks for three tiers of 'impacts' and has regard to the views of relevant stakeholders and constituencies.[27] The four key steps of the evaluation framework employed are summarised below.

Step 1: Set out the institutional context in which the scrutiny takes place

Understanding the institutional context in which models of legislative scrutiny operate allows the investigator to collect and reflect upon important contextual information about why and when a particular scrutiny body was established and the role the body plays within the broader parliamentary and political landscape.

Step 2: Identify the role, functions and objectives of the scrutiny body

This step requires the investigator clearly to articulate the role, function and objective of each of the scrutiny bodies studied and explain how these individual scrutiny bodies feed into the broader scrutiny system. This is important, as it demonstrates that not all scrutiny bodies have the same membership, functions, powers or priorities: some may be specifically designed to undertake post-legislative review or to consider the rights compatibility of proposed laws; others may have a range of different roles, only one of which is the power to review or inquire into the implementation of existing laws. As discussed below, these varying roles and priorities give rise to different attributes and relationships, which in turn offer important opportunities for individual components of the scrutiny system to work together and add value to the system as a whole.

Step 3: Identify key participants and determine legitimacy

The next step in the evaluation framework identifies the *key participants*[28] in the legislative scrutiny system and looks for evidence of whether components of this system are seen as *legitimate*[29] by some or all of these participants. This provides important insights into the strengths and weaknesses of each component of the scrutiny system and can offer important new perspectives from which to consider reforms, particularly those that aim to improve the breadth and diversity of community engagement with the legislative scrutiny process.

Step 4: Measure the impact of the scrutiny system

Step 4 is the most intensive and detailed step in the evaluation framework. It aims to determine what impact a particular component of the scrutiny system is having on the development and content of the law. It includes consideration of the following three 'tiers' of impact:

27 Philippa Webb and Kirsten Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness' (Paper presented at the Dickson Poon School of Law, King's College London, University of London, June 2014) 3.

28 For example, the key participants in the Australian parliamentary committee system include parliamentarians, elected members of the executive government, submission makers and witnesses to parliamentary committee inquiries, public servants and government officers, independent oversight bodies and the media.

29 A wealth of literature exists on the topic of political legitimacy, and the meaning attributed to this term has been contested and developed over time. It is beyond the scope of this article to explore these different articulations; however, the use of the term in this article is infused with both descriptive and normative aspects and has a clear connection to deliberative democracy theory, particularly in so far as it intersects with the above discussion relating to rates of participation. See, eg, David Beetham, *The Legitimation of Power* (Palgrave, 2002); Allan Buchanan, 'Political Legitimacy and Democracy' (2002) 112(4) *Ethics* 689; Immanuel Kant, *Practical Philosophy* (Mary J Gregor ed, Cambridge University Press, 1999); Jack Knight and James Johnson, 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy' (1994) 22 *Political Theory* 277; Bernard Manin, 'On Legitimacy and Political Deliberation' (1987) 15 *Political Theory* 338; Thomas Nagel, 'Moral Conflict and Political Legitimacy' (1987) 16(3) *Philosophy and Public Affairs* 215; Patrick Riley, *Will and Political Legitimacy* (Harvard University Press, 1982); Piers Norris Turner, '"Harm" and Mill's Harm Principle' (2014) 124(2) *Ethics* 299; Francis Fukuyama, 'Why Is Democracy Performing So Poorly?' (2015) 26(1) *Journal of Democracy* 11.

1. legislative impact (whether the scrutiny undertaken has directly changed the content of a law);

2. public impact (whether the work of the scrutiny has influenced or been considered in public or parliamentary debate on a Bill or in subsequent commentary or review of an Act); and

3. hidden impact (whether those at the coalface of developing and drafting counter-terrorism laws turn their mind to the work of legislative scrutiny bodies when undertaking their tasks).[30]

The next part of this article provides an illustration of how this evaluation framework was applied in the context of legislative scrutiny of Australia's counter-terrorism laws and in the legislative journey towards marriage equality.

Evaluating impact: two case studies

This section provides a brief snapshot of how the evaluation framework applies in practice by investigating the impact of the parliamentary committee system on:

1. a selection of counter-terrorism laws introduced between 2001 and 2018;[31] and

2. amendments to the *Marriage Act 1961* (Cth) between 2004 and 2017.[32]

These two legislative experiences provide a useful canvas for evaluating the effectiveness and impact of Australia's largely ad hoc system of legislative scrutiny and parliamentary model of rights protection. This is because both case studies can be described as 'rights engaging'[33] and both legislative experiences engage a large range of intra-parliamentary and extra-parliamentary participants. In addition, both legislative experiences captured the attention of the nation's media and, most importantly, resonated strongly with the Australian community, with direct rights implications for many individuals and families. Both areas of law making also demanded legal expertise, including the occasional opinion from the High Court of Australia and comparative analysis of other jurisdictions that had already enacted laws in this area. In addition, the marriage equality reforms saw Australian governments

30 Collecting evidence of the hidden impact of parliamentary committees can be challenging due to the need to look beyond documentary sources and consider more subjective material, including interviews, but, as Evans and Evans and Benton and Russell have shown in their empirically based work, it is not impossible. In Australia at least, much publicly available material exists that points to the hidden impacts of scrutiny, including training manuals, published guidelines, information in annual reports, and submissions and oral evidence given at parliamentary and other public inquiries and hearings. This material can then be tested against a range of targeted individual interviews conducted with key participants in the scrutiny process. Russell and Benton, above n 14; see eg Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 *Human Rights Law Review* 546.

31 The 14 case study Acts considered are the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth); *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth); *National Security Legislation Amendment Act 2010* (Cth); *Independent National Security Legislation Monitor Act 2010* (Cth); *Anti-Terrorism Act (No 2) 2005* (Cth); *National Security Information (Criminal Proceedings) Act 2004* (Cth); *Anti-terrorism Act 2004* (Cth); *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth); *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (Cth); *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (and related Acts); *Criminal Code Amendment (High Risk Offenders) Act 2016* (Cth); and *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth). One of the case study 'Acts', the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), is more correctly described as a 'Bill', as it was not enacted into legislation.

32 For a comprehensive overview of the legislative history of the marriage equality reforms see Robinson and Greenwich, above n 15; D McKeown, *A Chronology of Same-sex Marriage Bills Introduced into the Federal Parliament: A Quick Guide*, Research paper series, Parliamentary Library, Canberra, 2016–17, updated February 2018.

33 For example, the Anti-Terrorism Bill (No 2) 2005 (Cth) introduced a system of control orders and preventative detention orders available to law enforcement officers; and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003 introduced questioning and detention powers for ASIO officers.

experiment with novel ways of engaging directly with the community, including plebiscites and postal surveys, as well as utilising traditional parliamentary mechanisms, including parliamentary committees, to gauge the public's appetite for reform. The next section of this article outlines some of the key findings arising from these case studies, having regard to the key steps in the evaluation framework described later.

Participation and legitimacy

This research found that rates and diversity of participants in formal parliamentary scrutiny can be an important indicator of effectiveness and impact.[34] This is because a diverse range of participants in inquiries into proposed or existing laws provides 'an opportunity for proponents of divergent views to find common ground'[35] or, as Dalla-Pozza has explained, for parliamentarians to make good on their promise to 'strike the right balance' between safeguarding security and preserving individual liberty when enacting counter-terrorism laws.[36] This means that scrutiny bodies with the powers, functions and membership to attract a diverse range of participants have important strengths when it comes to contributing to the overall impact and effectiveness of the scrutiny system. A good example of a scrutiny body with these strengths is the Senate Legal and Constitutional Affairs Committee. This inquiry-based committee has a high overall participation rate, engaging a broad range of senators, public servants and submission-makers. For example, in two counter-terrorism Bill inquiries, the Legal and Constitutional Affairs Committee attracted over 400 submissions and heard from well over 20 witnesses.[37] This relatively high participation rate was dwarfed by the rates of participation experienced by the House Committee[38] in its inquiry into two cross-party marriage equality Bills in 2012,[39] which received 276 437 responses to its online survey, including 213 524 general comments and 86 991 comments on the legal and technical aspects of the Bills.[40] Never before had the Parliament provided a deliberative forum of this scale or attracted so many responses from interested members of the community.[41] Unlike some other parliamentary committees,

34 This is finding is consistent with the discussion in Kelly Paxman, *Referral of Bills to Senate Committees: An Evaluation*, Parliamentary Paper No 31 (1998) 76.

35 Harry Evans (ed), *Odgers' Australian Senate Procedure* (Commonwealth of Australia, 10th ed, 2001) 366; see also Anthony Marinac, 'The Usual Suspects? "Civil Society" and Senate Committees' (Paper submitted for the Senate Baker Prize, 2003) 129 <http://www.aph.gov.au/binaries/senate/pubs/pops/pop42/marinac.pdf>; see also Pauline Painter 'New Kids on the Block or the Usual Suspects? Is Public Engagement with Committees Changing or is Participation in Committee Inquiries Still Dominated by a Handful of Organisations and Academics?' (2016) 31(2) *Australasian Parliamentary Review*, 67–83.

36 Dominique Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?' (2016) 27(4) *Public Law Review* 271, 273.

37 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Matters* (2002). In this inquiry, the LCA Legislation Committee received 431 submissions and heard from 65 witnesses. See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Australian Security and Intelligence Organisation Amendment (Terrorism) Bill 2002 and Related Matters* (2002). In this inquiry the LCA References Committee received 435 submissions and heard from 22 organisations.

38 Like the LCA Legislation Committee, the House Committee has a government Chair and majority of government members. It also has broad powers to conduct public hearings into proposed legislation or other thematic issues referred to it by the House of Representatives and can include 'participating members' who can participate in proceedings without having a formal vote.

39 The Marriage Equality Amendment Bill 2012 (Cth) was introduced into the House of Representatives by Mr Adam Bandt MP and Mr Andrew Wilkie MP. The Marriage Equality Amendment Bill 2012 (Cth) was introduced into the House of Representatives by Mr Stephen Jones MP on 13 February 2012. Both of these Bills sought to amend the Marriage Act to remove reference to 'man and woman' and permit same-sex couples to marry. The Marriage Amendment Bill 2012 (Cth) also included proposed provisions that would have the effect of ensuring that authorised celebrants and ministers of religion are not required to solemnise a marriage where the parties to the marriage are of the same sex. Both Bills were referred to the House Standing Committee on Social Policy and Legal Affairs, which delivered its report on 18 June 2012. See House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012* (2012).

40 House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012* (2012) [1.1]–[1.7] and [33]–[37].

41 Ibid 34.

both the LCA committees and the House Committee were able to attract participation from a broader cross-section of the community rather than relying on 'the usual suspects' (such

groups or individuals who are already aware of the Bill's existence or who are contacted by politicians or their staff or by the committee secretariat).[42]

However, this research also found that scrutiny bodies that focused on preserving and strengthening relationships with a smaller, less diverse group of decision-makers also played an important role in the broader legislative scrutiny system, particularly when those relationships were with government agencies or expert advisers. This is illustrated by the influential nature of the recommendations made by the specialist Parliamentary Joint Committee on Intelligence and Security (the Intelligence and Security Committee), which has a tightly prescribed membership[43] and works closely with staff from law enforcement and intelligence agencies when inquiring into proposed or existing national security laws.[44]

This reveals an important tension in the role and impact of different types of scrutiny bodies. On the one hand, the ability to attract and reflect upon a diverse range of perspectives when inquiring into a particular law has positive deliberative implications for the capacity of the scrutiny system to improve the overall quality of the law-making process and to identify rights concerns or other problems with the content and implementation of the law. On the other hand, other committee attributes, such as specialist skills and trusted relationships with the executive, can also lead to a consistently strong legislative impact, which can also have important, positive results.

The extent to which key participants consider the legislative scrutiny system, or particular components of the system, to play a *legitimate* role within the broader institutional landscape is also critical to determining effectiveness and impact. At the federal level a spectrum of scrutiny experiences emerges. At one end are the parliamentary committees with tightly prescribed mandates and controlled membership (such as the Intelligence and Security Committee and the Scrutiny of Bills Committee), which are attributed high levels of legitimacy by almost all categories of participants and particularly by those directly involved in the law-making process. At the other end of the 'legitimacy spectrum' is the Human Rights Committee — a much newer scrutiny body with an international human rights law inspired mandate and broader policy focus, which is struggling to gain legitimacy in the eyes of a wide range of participants. In the middle of the spectrum are those scrutiny bodies such as the LCA committees, whose legitimacy is sometimes questioned by the government of the day but whose relatively broad and diverse range of participants consistently attribute at least moderate levels of legitimacy across a wide range of functions.

Legislative impact

One of the most surprising findings relates to the significant legislative impact that different components of the scrutiny system were able to have on the content of Australia's counter-terrorism law. In the context of the counter-terrorism case study, many of the recommendations for legislative change made by scrutiny bodies (and, in particular, parliamentary committees) were implemented in full by the Parliament in the form of amendments to the Bill or Act.[45] In addition, the types of changes recommended by these scrutiny bodies were generally rights *enhancing*. In other words, at least in the

42 Paxman, above n 34, 81.

43 *Intelligence Services Act 2001* (Cth) Pt 4, s 28 (2).

44 For further discussion of the role and impact of the Parliamentary Joint Committee of Intelligence and Security see Sarah Moulds, 'Forum of Choice? The Legislative Impact of the Parliamentary Joint Committee of Intelligence and Security' (2018) 29(4) *Public Law Review* 41.

45 Sarah Moulds, *The Rights Protecting Role of Parliamentary Committees: The Case of Australia's Counter-Terrorism Laws* (PhD Thesis, University of Adelaide, 2018) Ch 5 and Table 5.1.

counter-terrorism context, legislative scrutiny resulted in improvements in terms of the compliance with human rights standards. This is not to say that legislative scrutiny *removed* or *remedied* the full range of rights concerns associated with counter-terrorism laws (many rights concerns remained despite this scrutiny) — but the legislative changes made as a result of scrutiny were significant and positive from a rights perspective. For example, this research suggests that the work of parliamentary committees directly contributed to amendments that:

- narrowed the scope of a number of key definitions used in the counter-terrorism legislative framework, including the definition of 'terrorist act';[46]
- removed absolute liability and reverse onus of proof provisions from the terrorist act related offence;[47]
- inserted defences within the terrorist act offences for the provision of humanitarian aid;[48]
- ensured that the power to proscribe terrorist organisations is subject to parliamentary review;[49]
- subjected each new law enforcement and intelligence agency power to a raft of detailed reporting requirements and oversight by independent statutory officers;[50]
- ensured that persons detained under questioning and detention warrant have access to legal representation, are protected against self-incrimination and have access to judicial review of detention at regular intervals; [51]
- ensured that pre-charge detention of people thought to have information relevant to terrorist investigations is subject to judicial oversight and maximum time limits;[52]
- reinstated the court's discretion to ensure that a person receives a fair trial when certain national security information is handled in 'closed court' and limited the potential to exclude relevant information from the defendant in counter-terrorism trials;[53]

46 Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) and Related Bills, Items 5 and 8, in response to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 2.

47 Ibid, Items 11, 13, 14, in response to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 3.

48 Ibid, Item 4, in response to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 1.

49 See eg Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth). See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002).

50 Ibid. See also Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth).

51 See Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (Cth) and Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendations at viii–ix. See also ASIO Amendment (Terrorism) Bill 2003 (Cth).

52 See eg Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) Items 4, 5, 6, 7 and 8, which implement Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Anti-Terrorism Bill 2004* (2004) Recommendations 1–4.

53 Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth), 'General Outline' and Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004).

- ensured that people subject to control orders and preventative detention orders can understand and challenge the material relied upon to make the order and limited the regime to adults only;[54] and

- narrowed the circumstances in which a dual national can have their citizenship 'renounced' by doing something terrorist-related overseas, including by narrowing the range of conduct that can trigger the provisions; and making it clear that the laws cannot be applied to children under 14.[55]

As discussed further below, these findings are surprising because they challenge the orthodox view that governments generally resist making changes to legislation that they have already publicly committed to and introduced into Parliament.[56] Interestingly, the strength of this legislative impact varied from committee to committee. For example, the Intelligence and Security Committee was a particularly strong performer when it came to translating recommendations into legislative change (achieving an 100 per cent strike rate during the period from 2013 to 2018) and improving the rights compliance of the law.[57] The committees with broader mandates and more open membership, such as the LCA committees, had a less consistent legislative impact but were particularly active in the early period of counter-terrorism law making, generating popular and influential public inquiries that had important, rights-enhancing legislative outcomes.[58] This suggests that it was not just the inquiry-based committees that had a legislative influence on the case study Acts; the technical scrutiny committees (such as the Scrutiny of Bills Committee) also played an important, if less direct, role. It appears that the work of these committees armed the inquiry-based committees and their submission makers with the information and analysis they needed to substantiate and justify the legislative changes they recommended.

These observations are also apposite in the context of the marriage equality reforms, where there is also evidence that different parliamentary committees working together over time had a strong legislative impact. For example:

- The Marriage Legislation Amendment Bill 2015, supported by a cross-party group of parliamentarians,[59] directly incorporated the three key reforms that were supported by previous committee inquiries undertaken in 2009 and 2010[60] and became the legal template and political litmus test for the reforms that were ultimately passed by the Parliament in early 2017.

- The Exposure Draft Marriage Amendment (Same-Sex Marriage) Bill (the Exposure Draft Bill), introduced by the Hon George Brandis QC ahead of the failed attempt to establish

54 See Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 Bill and Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005).

55 See Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) amended clause 33AA(1); see also Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), and Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

56 As discussed below, this orthodox view suggests that, within Westminster systems, parliamentary committees — and, in particular, government-dominated committees — will be seriously compromised as a form of rights protection, especially when scrutinising laws that affect electorally unpopular groups, such as bikies and terrorists. See eg Janet Hiebert, 'Governing Like Judges' in Tom Campbell et al (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 40, 63; Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Hunt, Cooper and Yowell, above n 11, 39 at 52.

57 Moulds, above n 45, Ch 5 and Table 5.1.

58 Ibid.

59 This group comprised Warren Entsch MP (Lib); Teresa Gambaro MP (Lib); Terri Butler MP (ALP); Laurie Ferguson MP (ALP); Adam Bandt MP (Australian Greens); Cathy McGowan MP (Independent) and Andrew Wilkie MP (Independent).

60 This group comprised Warren Entsch MP (Lib); Teresa Gambaro MP (Lib); Terri Butler MP (ALP); Laurie Ferguson MP (ALP); Adam Bandt MP (Australian Greens); Cathy McGowan MP (Independent) and Andrew Wilkie MP (Independent). This Bill was preceded by the Marriage Amendment (Marriage Equality) Bill 2015 (Cth), which was introduced into the House of Representatives on 1 June 2015 by opposition leader Bill Shorten MP.

a plebiscite and the more successful voluntary postal vote on the issues of same-sex marriage,[61] also contained the three key legislative features previously recommended by the parliamentary committees, including a range of protections for religious freedoms.[62] This Exposure Draft Bill was later examined by a specially established Senate select committee,[63] which in turn directly influenced the content of the legislative amendments enacted in 2017.

- The Marriage Amendment (Definition and Religious Freedoms) Bill 2017, introduced by Liberal Senator Dean Smith,[64] contained the key legal features considered in detail by successive parliamentary committees,[65] including provisions that redefined marriage as 'a union of two people' regardless of gender; enabled same-sex marriages that have been, or will be, solemnised under the law of a foreign country to be recognised in Australia; and enabled ministers of religion, religious marriage celebrants, chaplains and bodies established for religious purposes to refuse to solemnise or provide facilities, goods and services for marriages on religious grounds.[66] This Bill was ultimately enacted in on 7 December 2017, reflecting a culmination of over a decade of intensive parliamentary engagement with the issue of marriage equality.

When taken together, these findings suggest that, when multiple components of the scrutiny system work together to scrutinise and review an existing or proposed law, a more

61 Following the defeat of the Marriage Equality Plebiscite Bill 2015 (Cth), the government announced that the Australian Bureau of Statistics would be directed to conduct a voluntary postal survey of all Australians on the electoral roll as to their views on 'whether or not the law should be changed to allow same-sex couples to marry': McKeown, above n 32.

62 For example, the Exposure Draft would insert a new definition of marriage into the Marriage Act: 'the union of two people, to the exclusion of all others, voluntarily entered into for life' and it would repeal the existing ban on the recognition of same-sex marriages solemnised overseas. The Exposure Draft would also provide exemptions for marriage celebrants (both religious and civil) who may have religious or conscience objections to solemnising same-sex marriages. Religious bodies and religious organisations would also be able to refuse to provide facilities, goods or services for the purpose of solemnisation of a same-sex marriage. See Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, Parliament of Australia, *Inquiry into Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, (2016) Executive Summary.

63 On 30 November 2016, the Senate resolved to establish the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill to inquire into the government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill. The select committee had a government Chair and three other government members, two opposition senators and two cross-bench senators, and attracted more than 20 senators as participating members. Members of the committee were Senator David Fawcett (Chair, Lib) Senator Louise Pratt (Deputy Chair, ALP), Senator Skye Kakoschke-Moore (Independent), Senator Kimberley Kitching (ALP), Senator James Paterson (Lib), Senator Janet Rice (Australian Greens), Senator Dean Smith (Lib), and Senator John Williams (Nationals). The committee also attracted a large number of participating members.

64 This Bill was introduced immediately following the outcome of the voluntary postal vote, where 79.5 per cent of Australians had answered the survey and the majority indicated that the law should be changed to allow same-sex couples to marry, with 7 817 247 (61.6 per cent) responding 'Yes' and 4 873 987 (38.4 per cent) responding 'No'. Australian Bureau of Statistics, 'Australian Marriage Law Postal Survey, 2017' (Media Release, 1800.0, 15 November 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>.

65 The Marriage Amendment (Definition and Religious Freedoms) Bill 2017 was described by Senator Penny Wong as 'a bill based on the consensus report of a cross-party Senate select committee, a committee which undertook extensive consultations with groups supportive of and opposed to marriage equality, and its recommendations sought to balance these interests'. Commonwealth, *Parliamentary Debates*, Senate, 16 November 2017, 18619 (Penny Wong). See also McKeown, above n 32.

66 This included making amendments contingent on the commencement of the proposed *Civil Law and Justice Legislation Amendment Act 2017* (Cth) and *Sex Discrimination Act 1984* (Cth) to provide that a refusal by a minister of religion, religious marriage celebrant or chaplain to solemnise marriage in prescribed circumstances does not constitute unlawful discrimination.

significant legislative impact is felt.[67] As discussed below, this has important implications for the types of changes that could be adopted in Australia and elsewhere to improve the overall effectiveness of legislative scrutiny systems.

Public impact

Examining the impact of legislative scrutiny on the way laws are debated in the Parliament and the community is particularly important for understanding how legislative scrutiny bodies — and, in particular, parliamentary committees — contribute to the parliamentary model of rights protection in Australia. This is because parliamentary committees can help to establish a 'culture of rights scrutiny' by providing a forum for parliamentarians to share their views on a proposed or existing law, including pointing out what they consider to be the rights implications of the proposed law. This can help to identify any unintended or unjustified rights implications arising from a proposed law and generate new, less rights-intrusive, legislative or policy options. Parliamentary committees can also help parliamentarians to weigh competing arguments or different policy options,[68] either through the public process conducted by the inquiry-based committees or through the consideration of written analysis provided by the technical scrutiny committees.

The strong public impact of the parliamentary committee system is particularly evident in the marriage equality case study, which demonstrates the potential capacity for parliamentary committees to provide a meaningful deliberative forum for community debate on contested rights issues that is subsequently reflected in (or reflects) the broader parliamentary and community debate on these matters. For example, almost immediately after the enactment of the Marriage Amendment Bill 2004, legislative efforts began to reverse or modify the changes to the definition of marriage, usually advanced in the form of private members' or private senators' Bills. These Bills attracted the support of many of the sophisticated submission makers to the 2004 LCA Legislation Committee inquiry.[69] These sophisticated submission makers include legal groups (such as the Castan Centre for Human Rights Law), human rights groups (such as Liberty Victoria) and religious groups (such as the Australian Christian Lobby), all of which have access to powerful and influential members and allies, as well as experience in engaging with the media and implementing advocacy campaigns.

As can be seen from the discussion below, by attracting and engaging with these types of submission makers, parliamentary committees can provide both a platform for these organisations to express their views and a source of information from which to launch future advocacy campaigns. This in turn can have an influence on how the relevant policy issues are debated in the media and provide incentives for parliamentarians to improve the deliberative quality of the law-making process. For example, the next year, Senator Hanson-Young introduced a similar Bill (the 2010 Bill), which was again referred to the

67 This is evident in both the early cases of the Anti-Terrorism Bill (No 2) 2005 (Cth) (the Control Order Bill) and the Australian Security and Intelligence Agency Legislation (Amendment Bill) 2002 (Cth) (the ASIO Bill 2002), which were considered by the Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on ASIO and the Senate Standing Committee on Legal and Constitutional Affairs Committees; and in the post-2013 Bills, which were considered by the Parliamentary Joint Committee on Intelligence and Security, Senate Standing Committee for the Scrutiny of Bills, and the Parliamentary Joint Committee on Human Rights. See also Sarah Moulds, 'Committees of Influence: Parliamentary Committees with the Capacity to Change Australia's Counter-Terrorism Laws' (Paper presented at the Australasian Parliamentary Study Group's Annual Conference, 'The Restoration and Enhancement of Parliaments' Reputation', Adelaide, October 2016).

68 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (CUP, 1998) 25; Dalla-Pozza, above n 37, 271, 274.

69 See eg those submission makers quoted extensively by the committee in Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009* (2009) Chs 3 and 4, which include Dr Paula Gerber from the Castan Centre for Human Rights Law; Mr Gardiner, Vice President of Liberty Victoria; Law Council of Australia; Australian Coalition for Equality; Catholic Dioceses of Sydney and Melbourne; Australian Christian Lobby; and Family Voice Australia.

LCA Legislation Committee for inquiry and report.[70] The committee received approximately 79 200 submissions: approximately 46 400 submissions in support of the 2010 Bill and approximately 32 800 submissions opposed.[71] The sheer volume of submissions received (regardless of the existence of 'form letter' style submissions) made this inquiry a powerful indicator of a shift in public support in favour of marriage equality. This shift was reflected in the observations of the majority of the LCA Legislation Committee, which concluded that:

> providing true equality means that all couples should be treated 'equally' — 'separate, but equal' is simply inadequate. Marriage is about two people in a committed and loving life-long relationship, and it has nothing to do with sex, sexual orientation or gender identity. The time has come for same-sex couples to have their relationships treated with the dignity and respect that they deserve: the Marriage Act should be amended, and marriage equality should be provided for all couples who wish to marry in Australia.[72]

In addition to providing a forum for citizens to share their views directly with parliamentarians, the numerous public hearings held in Sydney and Melbourne[73] provided an important opportunity for the media to hear directly from individuals with experiences of discrimination on the grounds of sexual orientation,[74] as well as those with strong views on the need to preserve marriage as a heterosexual institution.[75] These personal stories would also play an important role in advancing the case for legislative change in the lead-up to the 2017 reforms.[76]

The inquiry process also allowed for legal experts and rights advocates — both proponents and opponents of marriage equality — to articulate their arguments with reference to evidence and the experiences of other jurisdictions.[77] This proved to be particularly significant for the development of concrete legislative proposals designed to address both the growing public demand for marriage equality and concerns associated with the impact of reform on religious rights and freedoms. For example, a range of legal issues were explored by the LCA Legislation Committee, including whether the Bill was constitutionally valid; the adequacy of protections for ministers of religion under the Bill; and the merits of removing the existing prohibitions on the legal recognition of same-sex marriages

70 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012). The Bill was referred to committee on 8 February 2012. The committee issued its report on 25 June 2012.

71 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [1.32]. The committee received approximately 75 100 submissions by midnight on 2 April 2012 (the closing date for submissions): of these 43 800 supported the Bill and 31 300 opposed it. The committee received an additional 4100 submissions, of which 2600 supported the Bill and 1500 opposed it. This amounts to 79 200 submissions in total: 46 400, or approximately 59 per cent, supporting Senator Hanson-Young's Bill; and 32 800, or approximately 41 per cent, opposing it.

72 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [4.5].

73 A list of witnesses who appeared at the hearings is at Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) Appendix 3, and copies of the Hansard transcripts are available through the committee's website.

74 For example, Mr Justin Koonin from the NSW Gay and Lesbian Rights Lobby, Mr Malcolm McPherson from Australian Marriage Equality and Mrs Shelley Argent OAM, representing Parents and Friends of Lesbians and Gays, as quoted in Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [2.3]–[2.6].

75 For example, Australian Christian Lobby, Rabbinical Council of Victoria, Episcopal Assembly of Oceania, and Presbyterian Church of Queensland as quoted in Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [2.57]–[2.61].

76 See eg 'MP Stands with Son on Same-sex Marriage', *AAP Australian National News Wire* (Canberra) 10 October 2016; Sarah Whyte, 'Footballer's 10-minute Challenge to Change MPs' Views on Same-sex Marriage', *Sydney Morning Herald* (Sydney) 22 July 2015; Dan Harrison, 'Parents of Gays Make TV Pitch to Abbott on Same-sex Marriage Vote', *Sydney Morning Herald* (Sydney) 30 January 2012; Nina Lord, 'In Rainbow Families, the Kids are All Right', *The Age* (Melbourne) 28 September 2017.

77 At that time, marriage equality was recognised in the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland and Argentina, as well as several states in the United States and Mexico City. Legalisation of marriage equality was also under consideration in Denmark, the United Kingdom, Ireland, Brazil, Mexico, Colombia, Finland, Nepal, Slovenia, France, and Paraguay — see Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [2.52].

conducted overseas.[78] As explored below, these issues became the defining features of the future marriage equality debate and influenced the shape and content of the legislative amendments passed in 2017.

Another area of public impact relates to the way *intra-parliamentary* and *extra-parliamentary* components of the scrutiny system work together to effect legislative change. This involved evaluating the role parliamentary committees play in post-enactment review of the counter-terrorism Acts studied. For example, when reviewing proposed new sedition offences, the LCA Legislation Committee recommended that they be examined by the Australian Law Reform Commission (ALRC), which in turn made a number of recommendations for substantive changes to be made.[79] These ALRC recommendations were later implemented into law in the form of a new law, introduced some five years after the original offences were introduced.[80] The 2012 COAG Review of Counter Terrorism Legislation[81] also referred to past parliamentary committee scrutiny of the control order and preventative detention order regimes.[82] The COAG committee recommended 47 changes to a range of counter-terrorism provisions subject to the review, many of which reflected the recommendations previously made by parliamentary committees.[83] Although the federal government of the day only supported a handful of the COAG committee recommendations, the recommendation for the introduction of a nationwide system of 'Special Advocates'[84] to participate in control order proceedings has featured in many subsequent parliamentary committee inquiries into counter-terrorism laws, demonstrating how different components of the Australian ad hoc approach to legislative scrutiny can work together to generate appetite for significant, rights-enhancing legislative change.[85]

Hidden impact

As noted above, the evaluation framework looks to test findings of legislative and public impact with information gleaned from listening to those working 'behind the scenes' in the

78 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [3.1]

79 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006), particularly Recommendations 1, 2, 3 and 9.

80 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005). The LCA Legislation Committee's report on the Control Order Bill also featured prominently in the following inquiries into counter-terrorism laws: Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 6; COAG, *Review of Counter Terrorism Legislation* (2012); Bret Walker, *Independent National Security Legislation Monitor: Annual Report 2011* (2011); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006).

81 Council of Australian Governments (COAG), *Review of Counter Terrorism Legislation* (2012). The legislation covered by the COAG review included Divs 101, 102, 104 and 105 of the *Criminal Code Act 1995* (Cth), s 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), and ss 3C, 3D and Div 3A of the *Crimes Act 1914* (Cth) as well as a range of corresponding state and territory laws.

82 Ibid. For example, 33 references were made to the work of the Parliamentary Joint Committee on Intelligence and Security, with much less frequent reference being made to the Senate LCA committees. Other independent post-enactment reviews were also discussed, including the Security Legislation Review Committee, Commonwealth, *Report of the Security Legislation Review Committee* (2006) (Sheller Review).

83 Ibid. For example, the COAG committee recommended changes to clarify and narrow the scope of the definition of 'advocates' in the advocating terrorism offence in s 102.1(1A) of the Criminal Code (Recommendation 13). The Senate Legal and Constitutional Affairs Legislation Committee (Recommendation 31) made a similar recommendation in its report on the Control Order Bill: see Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005* (28 November 2005). The COAG committee also recommended the removal of strict liability elements in the terrorist organisation offences (Recommendation 18), similar to recommendations made by the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters (2002)* (Recommendations 3 and 4).

84 Ibid Recommendations 13.

85 Ibid Recommendations 19–24. See also Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the 'Declared Area' Provisions* (2018). See Independent National Security Legislation Monitor, Commonwealth, *Report on Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 51–52; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *ASIO's Questioning and Detention Powers* (2018) Recommendation 1 [2.22].

law-making and scrutiny process.[86] This type of impact is described as 'hidden', as it often occurs prior to a Bill or amendment being introduced into Parliament and concerns the activities of public servants and parliamentary counsel, outside of the public gaze.[87]

Investigations of the hidden impact of legislative scrutiny on Australia's counter-terrorism laws suggest that scrutiny bodies with high participation rates are in the minds of those responsible for developing and implementing legislation, and prudent proponents of Bills will adopt strategies to anticipate or avoid public criticism by such bodies. In this way, the inquiry-based parliamentary committees (like the Senate Legal and Constitutional Affairs Committees) can have a strong 'hidden impact' on the development of laws. The 'technical scrutiny' committees (such as the Scrutiny of Bills Committee) may also generate a strong hidden impact — not because of their capacity to generate public interest but, rather, because the 'technical scrutiny' criteria these bodies apply are entrenched in the practices of public servants and parliamentary counsel. In other words, the Scrutiny of Bills Committee commands political authority among this category of key participants precisely because it is seen to be removed from the political discourse on the Bill.

Investigating 'hidden impact' also reveals that written handbooks and other materials designed to assist parliamentary counsel and public servants to develop and draft proposed laws and amendments contain frequent references to the work of the 'technical' scrutiny bodies (such as the Scrutiny of Bills Committee) and some of these documents — in particular, the *Legislation Handbook*, Drafting Directions and Guide to Commonwealth Offences — translate the abstract principles underpinning the scrutiny bodies' mandates into practical checklists to be applied during particular stages of the legislation development process. In this way, these documents may help create a 'culture of rights compliance' within the Public Service. Over time, they also give rise to the shared view that the scrutiny criteria applied by these bodies reflect 'best practice' when it comes to developing laws. The interview material also suggests that the requirement to introduce all Bills with explanatory material and statements of compliance with human rights standards[88] has, at the very least, required policy officers to turn their minds to the human rights implications of the legislation they are developing, even if the quality of engagement with human rights concepts varies significantly across departments and ministerial portfolios. The interview material further suggests that the prospect of a public inquiry can sharpen policy officers' focus on the right implications of proposed new provisions and encourage them to develop safeguards or other rights protecting mechanisms when seeking to translate operational need into legislative form.

Understanding these different forms of 'hidden impact' helps uncover new opportunities to improve the effectiveness and impact of the scrutiny system, in addition to exposing some of the system's key challenges and weaknesses. In particular, these findings warn against reforms that radically alter the features of the scrutiny system that currently resonate strongly with those responsible for developing and drafting proposed laws. This suggests, for example, that, instead of relying on one particular scrutiny body, such as the Human Rights Committee, to generate a culture of rights compliance among law makers in

86 As part of this research, I interviewed public servants who were directly responsible for developing or drafting the case study Bills, including those from the Attorney-General's Department, the Department of Immigration and Border Protection, the Australian Federal Police and Office of Parliamentary Counsel. I also conducted interviews with current and past parliamentarians and parliamentary staff. Although not statistically representative, these interviews provide a useful insight into the role parliamentary committees play in the development of proposed laws from the perspective of a broad range of players in the legislative development and drafting process: Moulds, above n 45, Appendix A.

87 The political party room also plays a central role in this behind-the-scenes law-making process but remains 'off limits' to almost all researchers, due to its highly politically charged and confidential nature. This work focuses particularly on the role of public servants, parliamentary counsel and parliamentary committee staff and gathers evidence and insights from interviews with these key players in the process.

88 The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 6 also introduced the requirement for all Bills and disallowable instruments to be introduced with a Statement of Compatibility with Human Rights.

Australia, it may be more useful to consider how the *system* of legislative scrutiny could be adjusted or changed to encourage rights considerations at the pre-introduction phase.

While these findings are compelling, it is important to note that the interview material also reveals that the rights enhancing hidden impact of parliamentary committees remains vulnerable to a number of dynamic factors, including the degree to which the policy officers are able to present alternative policy and legislative options to the minister for consideration and the expertise and experience of the policy officers and parliamentary counsel involved in the development and drafting of the Bill. These factors point to significant limitations when it comes to generating a sufficiently strong rights scrutiny culture at the federal level, and it is important to emphasise that these findings, with their focus on rights-*enhancing* impact, do not go so far as to suggest that investing in the committee system *alone* has the capacity to provide comprehensive rights protection at the federal level in Australia. Broader structural reforms, such as the introduction of a more explicit role for the judiciary in rights protection, may still be necessary in addition to investment in the parliamentary committee system to guarantee comprehensive rights protection in Australia. However, at the very least, this suggests that understanding the rights-enhancing impact of the legislative scrutiny system is fundamental for any rights advocates developing or evaluating options for improving or replacing Australia's parliamentary model of rights protection and for any administrative lawyer looking to understand how administrative law values feature in the *parliamentary law-making process* as well as in the enacted law.

Relevance for administrative lawyers

The above findings give rise to a number of relevant observations for administrative lawyers. In particular, they suggest that the parliamentary committee system has the potential to improve the quality of law making at the federal level in line with administrative law values. These findings also provide practical insights for state and territory jurisdictions grappling with the challenges posed by a general lack of trust in existing accountability mechanisms.

The findings point to the benefits in investing in parliamentary committee *systems* — rather than individual committees — to enable both practical forums for citizen engagement and deliberation to occur and to facilitate the provision of clear, impartial, technical advice about the content of the proposed law or policy or its compliance with set criteria or standards. This is not to suggest that investment in parliamentary committee systems *alone* is enough to address problems of lack of trust in parliamentary law making or accountability mechanisms. Rather, the themes explored in this part of the article aim to highlight the *benefits* of investing in parliamentary committees in combination with other strategies to improve citizen engagement with parliamentary law making (such as direct democracy mechanisms including plebiscites) or more radical structural reforms to improve rights protection (such as statutory charters of rights). It is from this standpoint that the following two key themes are explored.

Parliamentary committees and improving trust in existing accountability mechanisms

Across the country, and indeed more broadly around the democratic world, parliaments have been criticised for failing to engage in a successful and meaningful way with the community when it comes to legislating for social change.[89] At the same time, there appears to be a growing demand for more deliberative law making,[90] including in Australia,

89 Richard Edelman, *2017 Edelman Trust Barometer*, 15 January 2017, executive summary.

90 See eg Matt Ryan, 'Can Belgium's Deliberative Democracy Experiment Work in Australia?' *The Mandarin*, 12 April 2019 <https://www.themandarin.com.au/107169-can-belgiums-deliberative-democracy-experiment-work-in-australia>. For further general discussion of these themes see Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018); Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016).

as a way to stem the 'implosion of trust' among citizens in their political institutions and law-making bodies.[91] As discussed above, the idea is that a more *engaged* electorate, with greater access to the law-making *process*, could improve the legitimacy of parliamentary law making and thus enhance the levels of trust associated with key political and law-making institutions.[92] As Mashaw has observed in the context of administrative decision-making:

> 'Kafkaesque' procedures take away the participants' ability to engage in rational planning about their situation, to make informed choices among options. The process implicitly defines the participants as objects, subject to infinite manipulation by 'the system'. To avoid contributing to this sense of alienation, terror and, ultimately, self-hatred, a decisional process must give participants adequate notice of the issues to be decided, of the evidence that is relevant to those issues and of how the decisional process itself works.[93]

The research set out in this article demonstrates how these comments can resonate equally within the legislative context. It suggests that, when key participants have the opportunity to express their views and 'be heard', they attribute greater legitimacy to the law-making process. This is because parliamentary committees can provide a meaningful *deliberative* forum for parliamentarians and community members to consider and debate competing rights issues.

The idea behind deliberative decision-making is that 'those subject to collective decisions should have voices in the process'.[94] When applied to the process of law making, the idea of deliberation implies that the final decision about what the law or policy should be is determined by 'an exchange of reasons in which participants persuade each other based on the force of the better argument'.[95] As Levy and Orr explain, deliberative law making requires an active search for a broad range of information, as well as a process for reflection by decision-makers and the opportunity to move towards a shared common ground.[96]

In modern parliaments, this deliberative task is generally undertaken by the inquiry-based committees (such as the LCA committees or select committees), which have broad powers to hold public hearings and call for submissions from the public; and flexible approaches to analysing and reporting on the rights impact of proposed laws or policies. The work of these committees can then be informed and supported by the work of the scrutiny committees (such as the Scrutiny of Bills Committee or Human Rights Committee), which can offer submission makers and parliamentarians detailed, technical advice about the compliance of the Bill with certain rights standards (described above as the 'authoritative' role of committees) and act as a forum for a public exchange of views on the impact of the proposed law on the rights of individuals or groups within the community (described above as the 'deliberative role' of committees).

Importantly, when the system of parliamentary committees works this way, it enhances the idea of engaged or deliberative decision-making. This is because the parliamentary committee system embodies the idea of democratic representation in both form and substance. The element of representation *informs not just the legislative outcome but also*

91 See eg Hugh MacKay, 'Distrustful Nation: Australians Lose Faith in Politics' *Sydney Morning Herald*, 18 January 2017 <http://www.smh.com.au/federal-politics/political-news/distrustful-nation-australians-lose-faith-in-politics-media-and-business-20170118-gttmpd.html>.

92 Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18(4) *Human Rights Law Review* 632, 633.

93 Jerry Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Review* 885, 901.

94 Graeme Orr and Ron Levy, 'Regulating Opinion Polling: A Deliberative Democratic Perspective' (2016) 39(1) *University of New South Wales Law Journal* 318; Jon Elster, 'Introduction' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press, 1998) 1, 8; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1996) 14.

95 See eg Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism' (1995) 92 *Journal of Philosophy* 109, 124; Orr and Levy, above n 94, 318.

96 See also Levy and Orr, above n 90, 76–80.

the decision-making process.[97] This is evident in the comments from the LCA Legislation Committee in its inquiry into the 2010 Marriage Equality Bill and the House Committee in its 2012 inquiry, where both committees emphasised the value of providing a forum for different voices within the community to be heard and the need to ensure that the content of the legislative reforms pay particular regard to the views of those individuals whose rights would be directly affected by the proposed reforms and the views of the broader community.[98] In other words, parliamentary committees are not just a conduit for the views of the people; they also play an important role in moderating or filtering those views, having regard to other public values or interests.[99]

The findings in this article also suggest that the dual characteristics of parliamentary committees (as both authoritative and deliberative forums) can improve the deliberative quality of law making in Australia in a way that holds distinct advantages over other mechanisms designed directly to engage with citizens, such as plebiscites or postal surveys. This is because parliamentary committees have the characteristics of constraint that are needed to enable deliberative decision-making and a nuanced consideration of competing rights and interests to take place. They also provide a 'safe space' for parliamentarians to adjust or even shift their public position on a Bill or amendment. As was reported at the time the legislative reforms to the Marriage Act were enacted:

> [Senator Dean] Smith's real brainwave was the Senate inquiry into Brandis' draft marriage bill. It produced close to a cross-party consensus position on marriage reform eliminating what could have been a messy partisan battle in the wake of the 'yes' vote.[100]

The marriage equality experience also demonstrates the potential for the parliamentary committee system to interact successfully with mechanisms designed to give community members a more direct say in the law-making process and, in the process, ameliorate some of the concerning features of applying direct democracy approaches to issues involving minority rights.[101] The complex, deliberative law-making experience facilitated by the parliamentary committee system is in contrast to the experience of other forms of decision-making on contested issues of social policy, such as plebiscites or postal votes. By narrowing the policy choices down to essential 'yes' or 'no' questions, these mechanisms provide far more limited opportunities for decision-makers to state reasons or demonstrate reflection and, if relied upon exclusively to resolve complex issues of social policy, can hamper efforts to develop nuanced responses or to provide meaningful protection for minority rights.[102] With the advantages of a strong legitimacy within the Australian parliamentary system, committees act as a mediator of ideas and positions, regardless of

97 This aligns with what Stephens has described as the 'pedagogical' element of representation — see ABC Radio National, 'The Problem with Plebiscites: The Limits of Democracy and the Nature of Representation', *Religion and Ethics*, 2 September 2016 (Scott Stephens).

98 For example, in its recommendations with respect to the 2010 Marriage Equality Bill, the majority of the LCA Legislation Committee said that 'The committee acknowledges the passionate and heartfelt arguments presented on both sides of the debate during the course of this inquiry. The issue of marriage equality for same-sex couples in Australia provokes an emotive response, and this is strongly evidenced by the unprecedented number of submissions received by the committee for the inquiry': Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [4.1].

99 For example, in the foreword to the House Committee's 2012 report, the committee Chair, Graham Perrett MP, said, 'To Members of Parliament, I encourage each of you to read this report before voting on the bills. I appreciate that there are many differences of opinion among us, as there is across the country. However, we have the weighty responsibility of upholding the views of the constituents who elected us to this position. We have a duty to lead as well as represent our constituents and to vote accordingly': House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012* (2012) Foreword.

100 Michael Koziol, 'Postal Survey Road to "Yes"': A History of Rebels and Heroes', *The Age* (Melbourne) 18 November 2017, 8–9, 9.

101 See eg ABC Radio National, above n 97 (Waleed Aly) <https://www.abc.net.au/religion/the-problem-with-plebiscites-the-limits-of-democracy-and-the-nat/10096592>; Philip Pettit, 'Deliberative Democracy and the Case for Depoliticising Government' (2001) 24(3) *University of New South Wales Law Journal* 724, [24]–[27].

102 Paul Kidrea, 'Constitutional and Regulatory Dimensions of Plebiscites in Australia' (2016) 27 *Public Law Review* 290, 292–3.

whether these ideas and positions come in the form of traditional written submissions or more innovative forms such as opinion polling results or other surveys of community members.

When taken together, these themes suggest that states and territories seeking to improve citizen engagement with parliamentary law making and enhance public trust in political institutions may benefit from investing in parliamentary committee systems with both deliberative and authoritative attributes. As the next section of this article explores, investment in the parliamentary committee system with these attributes can also enhance the capacity of the parliamentary law-making process to reflect and adhere to administrative law values.

Parliamentary committees and administrative law values

As Cane, McDonald and Rundle have observed, there are many different ways of formulating and articulating the values that underpin administrative law.[103] These values range from ideas associated with the rule of law, protection of rights and fairness to ideas associated with 'good governance', such as accountability,[104] efficiency, transparency and impartiality. Many of these values are reflected in grounds of judicial review and are designed to help delineate the proper boundaries between the court's supervisory jurisdiction over the use of administrative power by the executive and the need for the executive to be empowered to give effect to and implement the law.[105]

In this article, the focus is less on the court's supervisory jurisdiction and more on the way administrative law values inform the relationship between the *Parliament* and the executive, and the relationship between the *citizens* and the *state*, or the *governed* and the *governors*. It is within this context that the role of parliamentary committees becomes particularly interesting and relevant. The findings discussed above demonstrate, for example, that, when undertaking their broader legislative scrutiny role, parliamentary committees can:

- identify, articulate and recommend legislative provisions more precisely to define the limits of executive power and provide more 'trigger points' for parliamentary oversight of executive power (reflecting the rule of law value of administrative law);[106]
- reflect and reinforce the doctrine of parliamentary supremacy, described as a 'foundational value' of Australian administrative law,[107] by introducing changes to proposed legislation that place enforceable limits on executive powers and introducing

103 See Cane, McDonald and Rundle, above n 13, 2–4 and Ch 12, particularly 306, 351–5. The authors note that locating and describing the values of administrative law is complex and linked to a range of different inspirational and ideological theories. See also P Cane, *Controlling Administrative Power: A Historical Comparison* (Cambridge University Press, 2016).

104 The idea of 'accountability' itself can take many different forms. See eg Jerry Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in MW Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, Cambridge, 2006) 115–38; R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 9.

105 See eg M Fordham, 'Surveying the Grounds: Key Themes in Judicial Intervention' in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997) 199; Robin Creyke and John McMillan, 'The Operation of Judicial Review in Australia' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, Cambridge, 2004) 161–89; Maurice Sunkin, 'Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, Cambridge, 2004) 43–72.

106 See eg Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 (No 2) (Cth) and Related Bills, Items 5 and 8; in response to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Matters* (2002) Recommendation 2.

107 Cane, McDonald and Rundle, above n 13, 351. For further discussion of formal and substantive aspects of the rule of law see BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) Chs 7 and 8.

mechanisms to disallow delegated legislation or 'sunset' aspects of primary legislation;[108]

- improve political accountability by providing an evidence-based decision-making forum to test assumptions and generate new legislative options to achieve legitimate policy ends (reflecting the rule of law value of administrative law);[109]

- provide an opportunity for citizens and groups to 'engage in dialogues about the public interest'[110] by providing forums for written and oral submissions to be received and for decision makers to deliberate on contested rights issues or complex questions of social policy (reflecting the engagement value of administrative law).[111]

The case studies discussed above also reveal important insights into the culture of rights scrutiny that may be emerging at the federal level in Australia, which is informed by administrative law values and particularly influenced by the values and principles reflected in the criteria applied by Scrutiny of Bills Committee. For example, the Scrutiny of Bills Committee considers whether Bills or Acts:

- trespass unduly on personal rights and liberties;

- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

- inappropriately delegate legislative powers; or

- insufficiently subject the exercise of legislative power to parliamentary scrutiny.[112]

Similar scrutiny criteria are applied by scrutiny of Bills committees in Victoria, New South Wales, Queensland and the ACT, and some of these jurisdictions also require Bills to be introduced with statements of compatibility setting out their compliance or otherwise with these principles. A requirement to introduce Bills with statements of compatibility also now exists in the Northern Territory following changes to the Parliament's Sessional

108 See eg Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth). See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002).

109 For example, parliamentary committees can provide individual members of parliament (elected representatives) with a safe political space to change their view or position on a particular law or policy after having participated in a public inquiry process. See eg Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012), additional comments by Senator Birmingham and Senator Boyce [1.23]–[1.27].

110 Cane, McDonald and Rundle, above n 13, 353; M Seindenfeld, 'A Civic Republican Justification for the Bureaucratic State' (1992) 101 *Harvard Law Review* 1151, 1562–76.

111 For example, in its recommendations with respect to the 2010 Bill, the majority of the LCA Legislation Committee said that 'The committee acknowledges the passionate and heartfelt arguments presented on both sides of the debate during the course of this inquiry. The issue of marriage equality for same-sex couples in Australia provokes an emotive response, and this is strongly evidenced by the unprecedented number of submissions received by the committee for the inquiry': Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010* (2012) [4.1].

112 Unlike the Senate Standing Committee on Regulations and Ordinances, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) does not produce guidance material detailing the content of the scrutiny principles it applies; however, since 2015 it has published an online newsletter *Scrutiny News*, along with its regular alerts and reports to 'highlight key aspects of the Senate Scrutiny of Bills Committee's work'. Senate Standing Committee for the Scrutiny of Bills, *Scrutiny News* (2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News>.

Orders.[113] The Queensland Scrutiny of Legislation Committee[114] has particularly relevant features when it comes to the reflection of and contribution to administrative law values. Like the Scrutiny of Bills Committee, the Queensland committee tables an 'alert' report to Parliament at the beginning of every sitting week, canvassing any concerns that the committee has about the compliance of Bills (introduced into the House in the previous sitting week) with 'fundamental legislative principles'[115] that form part of its scrutiny mandate.[116] These principles take their lead from the Scrutiny of Bills Committee mandated detailed above[117] but also include a range of specific principles directly relevant to administrative law values, including whether the legislation 'makes rights and liberties, or obligations, dependent on administrative power' and, if so, whether that power is sufficiently defined and subject to appropriate review.[118] It also includes administrative law based criteria, including the extent to which the proposed law is consistent with principles of natural justice and only allows the delegation of administrative power 'in appropriate cases and to appropriate persons'.[119]

These scrutiny principles have the potential to have a significant influence on the 'culture of scrutiny' at the federal and state and territory levels. For example, 69 per cent of the 334 second reading speeches made on the counter-terrorism Act studied suggest an apparent preference for discussing rights with reference to the broad language featuring in the Scrutiny of Bills Committee's mandate (such as 'individual rights and liberties' and 'limits on executive power') compared with around 30 per cent referring directly to international human rights law (such as 'Article 14 of the ICCPR').[120] The evidence collected with respect to the counter-terrorism case study also suggests that it may be possible to identify a common set of scrutiny principles that a wide range of parliamentarians, public servants and submission makers consider to be important when evaluating the merits of a proposed law. It suggests, for example, that a certain type of 'rights scrutiny culture' may be emerging at the federal level that is informed by and reflects administrative law principles, including the need to ensure that:

- the expansion of executive power comes with procedural fairness guarantees, including access to legal representation, preservation of common law privileges and access to

113 In August 2017 the Northern Territory, through its Sessional Orders, put this system in place with reference to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which sets out seven core international human rights treaties by which to scrutinise Commonwealth laws.

114 The Scrutiny of Legislation Committee was established on 15 September 1995 pursuant to s 4 of the *Parliamentary Committees Act 1995* (Qld). It now operates under s 103 of the *Parliament of Queensland Act 2001* (Qld). It is an all-party committee made up of seven Queensland members of Parliament and is responsible for scrutinising both primary and subordinate legislation: <https://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC>.

115 *Legislative Standards Act 1992* (Qld) s 4.

116 See Queensland Parliament, 'Scrutiny of Legislation Committee', 2011 <https://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC>. The committee also examines subordinate legislation after it is made to assess its compliance with the fundamental legislative principles. Any concerns are raised with the relevant minister. Most problems are addressed by the provision of additional information or by undertakings from ministers to introduce amendments to the committee's satisfaction. If an issue remains unresolved, the committee may report to Parliament on the problem and/or move to disallow the instrument in question.

117 *Parliament of Queensland Act 2001* (Qld) s 93.

118 *Legislative Standards Act 1992* (Qld) s 4(3)

119 Ibid.

120 Interestingly, there was no dramatic increase in the number of references to international human rights concepts following the establishment of the Human Rights Committee, suggesting that, outside of a handful of human rights 'champions', the work of the Human Rights Committee was not able to generate a strong response from parliamentarians in the context of debating the case study Acts. This is consistent with the findings of George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

judicial review;[121]

- Parliament has access to information about how government departments and agencies are using their powers[122] and that, if the law is designed to respond to an extraordinary set of circumstances, Parliament should be required to revisit the law to determine whether it is still needed; and[123]
- any departure from established common law principles (such as the establishment of new criminal offences[124] or restrictions on free speech[125] or freedom of association[126]) must be clearly defined, justified and accompanied by safeguards and independent oversight.[127]

Of course, further research needs to be undertaken to confirm that these rights and scrutiny principles are applicable across a broad range of law-making areas in Australia.[128] However, these principles tell an important story about what forms of legislative scrutiny are likely to be seen as legitimate and deliver meaningful results and what reform proposals are likely to be rejected or sidelined due to their unnatural fit with this emerging scrutiny culture.

The case studies also suggest that the work of parliamentary committees reflects and contextualises the central value of 'procedural fairness' that infiltrates many aspects of

121 See eg Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 4; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005), Ch 3 [3.22]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (13 October 2014).

122 See eg Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) vii; Senate Legal And Constitutional Affairs Legislation Committee, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* (2008); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015) Recommendation 10.

123 See eg Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) Recommendation 13; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirteenth Report of 2014* (28 October 2014); Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendation 12.

124 See eg Anti-Terrorism Bill (No 2) 2005, schedule of the amendments made by the Senate, Items 68–72; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 13 of 2005* (9 November 2005) 8, 14–16; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (13 October 2014).

125 See eg Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 7 of 2015* (12 August 2015) 3, 10; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), Recommendations 27 and 28, also Ch 5; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

126 See eg Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifteenth Report of 44th Parliament* (14 November 2014) 10, 16–17; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) 32–44.

127 See eg Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifteenth Report of 44th Parliament* (14 November 2014) 10, 16–17; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) 32–44.

128 I have commenced the task of exploring whether similar principles may be present in other contexts. See eg Sarah Moulds, 'The Role of Commonwealth Parliamentary Committees in Facilitating Parliamentary Deliberation: A Case Study of Marriage Equality Reform ' in Laura Grenfell and Julie Debeljak (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thompson Reuteurs, forthcoming).

administrative law.[129] For example, the case studies reveal that parliamentary committees play an important role in:

- identifying the potential impact of the proposed grant of executive power on the rights and lives of citizens; and
- prescribing appropriate limits and safeguards to govern the exercise of the proposed executive power by administrative officers.

By providing a practical forum for citizens to present their views on a proposed law (the inquiry committees) or by equipping submission makers and parliamentarians with resources that articulate aspects of the law that fall short of rule of law or rights standards (the scrutiny committees), parliamentary committees give effect to the maxim underpinning the idea of procedural fairness: *audi alteram partem* ('hear the other side').[130] Parliamentary committees also allow space for legislators critically to assess government policies or legislative agendas and 'hear the other side'[131] and give effect to the essential element of fair administrative decision-making by providing citizens with 'an opportunity to participate in the decisions that will affect them, and — crucially — a chance of influencing the outcome of those decisions'.[132] This is not to suggest that *all* parliamentary committee processes embody the concept of procedural fairness. In fact, many parliamentary committee inquiries would be better described as partisan in nature rather than 'fair'. However, as demonstrated by the findings arising from the case studies, when different committees within the system work together it is possible to mitigate the potential for party politics to dominate law making by providing multiple forums — each with different attributes — in which legislative scrutiny can take place.

As discussed further below, it is this combination of *deliberative* attributes (visible in the case of the inquiry-based committees) and *authoritative* attributes (visible in the case of the Scrutiny of Bills Committee and the Intelligence and Security Committee) that give rise to particular strengths when it comes to giving practical effect to the administrative law value of 'procedural fairness' in the context of parliamentary law making. It means that the system is able to positively contribute to better quality decision-making by providing a clear pathway for relevant facts and arguments to be placed before legislative decision-makers, potentially acting as 'a counterweight to secret lobbying and influence-peddling'[133] in decision-making and enhancing the legitimacy of the law-making process.[134] As Tyler has explained in the administrative law context, this enhanced legitimacy can in turn generate 'greater public cooperation and compliance' with the outcome of the decision or, in the case of the work of parliamentary committees, with the legislation or policy ultimately enacted into law.[135]

129 While it is clear that when administrative lawyers talk about 'procedural fairness' they have in mind a standard of legal decision-making undertaken by administrative officers, the same concept can be readily applied to the legislative *process* of setting out the boundaries of executive decision-making power.

130 Tom Tyler, 'What is Procedural Justice? Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law and Society Review* 103; Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283; see also Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18(4) *Human Rights Law Review* 632.

131 Mashaw, above n 93, 901.

132 Tyler (1998), above n 130, 103; Tyler (2003), above n 130, 283; see also Liebenberg, above n 130.

133 Liebenberg, above n 130.

134 Tyler (1998), above n 130, 103; Tyler (2003), above n 130, 283.

135 Tyler (1998), above n 130, 103; Tyler (2003), above n 130, 283. Lienbenberg has noted that these types of observations of ways in which procedural fairness enhances the efficacy and legitimacy of public decision-making have been supported by empirical research. This research is considered in Liebenberg, above n 130. See also Silvia Sutea, 'The Scottish Independence Referendum and the Participatory Turn in UK Constitution-making: The Move Towards a Constitutional Convention' (2011) 6(2) *Global Constitutionalism: Human Rights, Democracy and the Rule of Law* 201.

Many of the attributes and practices observable at the federal level are also present in varying degrees at the state and territory level, where parliamentary committee systems vary in structure and sophistication.[136] However, not all jurisdictions have such systems in place and not all jurisdictions actively foster both deliberative and authoritative attributes within the committee systems. For example, there is no scrutiny of Bills committee or human rights committee in South Australia and no indications that rights implications are systematically considered in the pre-legislative stages: the internal development stages of policy development or legislative drafting.[137] Some rights consideration may take place during these stages but on an ad hoc basis.[138] This means that, for jurisdictions like South Australia, the federal experience — and that of other states and territories — offers a range of important insights into how to improve the quality of law making and rights scrutiny in Parliament.

Conclusion

The work of parliamentary committees is fundamental to Australia's parliamentary model of rights protection and to the law-making process at the federal level. The parliamentary committee system also forms a central part of a largely ad hoc system of legislative scrutiny that is a much-needed feature of our modern parliamentary democracy and provides a practical forum for administrative law values to be reflected and implemented in practice. With this in mind, it is critical that we carefully evaluate the effectiveness and impact of the work of parliamentary committees at the federal level. This article outlines a unique evaluation framework designed to achieve this task while also avoiding the pitfalls identified by past scholars of parliamentary scrutiny systems.

As can be seen from the discussion above, when applied to the two case studies of counter-terrorism law making and marriage equality reforms, the evaluation framework reveals a number of important insights into the effectiveness and impact of legislative scrutiny at the federal level with application and benefits for other jurisdictions. As this article documents, when parliamentary committees work together over time, they have the potential to enhance the rights compliance and overall quality of law making at the federal level in Australia. As the two case studies show in different ways, reports and recommendations of committees, even if initially ignored by the government of the day, can provide the basis for submission makers to contribute to future committee inquiries and are an important source of information for other review bodies, journalists and non-government organisations to draw upon when identifying and implementing reform options. This article has also explored the contribution the parliamentary committee system makes to the way individuals and groups engage with the parliamentary law-making process and highlights the benefits this system offers over other mechanisms designed to resolve contested rights issues, such as plebiscites or postal surveys.

As this article explores, these findings also highlight the role parliamentary committees play in helping to reflect and inform the relationship between the *Parliament* and the executive, and the relationship between the *citizens* and the *state*, or the *governed* and the *governors*. As result, this work has broad implications for administrative law scholars, public servants, parliamentarians and those contemplating new models of rights protection

136 Grenfell, above n 2, 19; see also Grenfell and Moulds, above n 3, 40.

137 The 2006 South Australian Legislation Handbook explains that, in giving drafting instructions to parliamentary counsel, close attention should be given to whether 'there is a proper balance between the enforcement provisions and the protection of civil liberties' (p 30). See South Australia, Department of the Premier and Cabinet and Office of the Parliamentary Counsel, *Legislation Handbook* (April 2006). Unlike at the federal level, there is no requirement that the Attorney-General be consulted when a proposed provision may be inconsistent with, or contrary to, an international instrument relating to human rights. Department of the Prime Minister and Cabinet, *Legislation Handbook* (February 2017) 5.52.

138 See Laura Grenfell and Sarah Moulds, 'Legislative Review: Youth Treatment Orders Bill Highlights Ad Hoc Approach to Rights-scrutiny of Bills' (2019) 41(4) *Bulletin (Law Society of South Australia)* 36–8.

in Australia. It also offers important practical insights for state and territory jurisdictions grappling with the challenges posed by a general lack of trust in existing accountability mechanisms and looking for ways to improve rights protection and the deliberative quality of law making at the parliamentary level.

Making sure that curiosity does not kill the CAT: The use of expert evidence in merits review fora where the rules of evidence do not apply

Justice Rachel Pepper and Amelia van Ewijk*

Expert evidence is an increasingly ubiquitous aspect of modern litigation, including in jurisdictions conducting merits review (that is, the function of evaluating and substituting the correct and preferable decision standing in the place of the decision-maker as opposed to enforcing a law that constrains and limits executive power, or judicial review) such as civil or administrative tribunals (CATs).[1]

In jurisdictions where the rules of evidence apply, these rules operate to restrict the material admitted into evidence, notwithstanding that it may be relevant.[2] In most CATs, however, the rules of evidence do not apply.

This article examines some of the issues which arise where expert evidence is relied upon in proceedings where the rules of evidence do not apply. Curiously, as remarked by the current President of the Administrative Appeals Tribunal (AAT), 'despite a vast underlying canvas of tribunal practice', little has been written about how a CAT not bound by the rules of evidence but obliged to afford procedural fairness can 'be best informed about facts and opinions relating to its functions'.[3]

Throughout this article the term 'CAT' is used as a convenient abbreviation to refer not only to the various state and Commonwealth civil and administrative tribunals but also to all merits review jurisdictions in which the rules of evidence do not apply. This includes commissions, tribunals, courts exercising administrative power and other arbitral fora.

The excluded rules of evidence

Identifying with precision which rules of evidence are excluded is not easy because the statutes creating CATs do not define what constitutes a 'rule of evidence' and, moreover, the line between the law of evidence and substantive law is often difficult to determine.[4]

As Mason P has noted, there are some rules which 'masquerade' as exclusionary rules of evidence but are in fact fundamental principles of law that cannot be ignored by a CAT absent unambiguous statutory exclusion.[5] These include legal professional privilege, public interest immunity, the privilege against self-incrimination,[6] and discretionary exclusions with respect to unfair evidence.[7] In addition, in New South Wales the *Evidence Act 1995* (NSW) provides for a privilege for a protected confidence made in the course of a professional relationship such as that between a doctor and a patient.[8] Properly characterised they are, as the High Court has emphasised, substantive legal rights, not

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1 Lee Aitken, 'Expert Evidence and *Makita* — "Gold standard" or Counsel of Perfection?' (2006) 28 *Australian Bar Review* 207, 207; Brian Preston, 'Specialised Court Procedures for Expert Evidence' (Speech presented at the Japan Federation of Bar Associations, Tokyo, 24 October 2014) 1.

2 See, for example, Ch 3 of the *Evidence Act 1995* (NSW).

3 Duncan Kerr, 'A Freedom to be Fair' (Speech presented at the Excellence in Government Decision-making Symposium, Canberra, 20–21 June 2013) 1.

4 Roger Giles, 'Dispensing with the Rules of Evidence' (1990) 7 *Australian Bar Review* 233, 234; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 610; see also the discussion of the definition of the law of evidence in Australian Law Reform Commission, *Evidence*, Report No 26 (1985) 13–23.

5 Keith Mason, 'The Bounds of Flexibility in Tribunals' (2003) 39 *AIAL Forum* 18.

6 Ibid.

7 See, for example, ss 90 and 135–137 of the *Evidence Act 1995*.

8 Ibid s 126B.

mere evidentiary rules.[9] They cannot be cast aside by a CAT pursuant to a legislative direction that a tribunal is not bound by the rules of evidence. This flows from the principle of legality which is an emanation of the rule of law.

Subject to the rights referred to above, the rules of evidence are contained in the various evidence Acts enacted by the states and the Commonwealth. Whether they also encompass the common law evidential rules remains less clear, but arguably they do.

Take, for example, the common law rule in *Browne v Dunn*.[10] The rule states that, if a party seeks to discredit or contradict evidence given by a witness, the party must first, as a matter of fairness, put the allegations to the witness for comment. Despite being 'an aspect of procedural fairness and, if breached, capable of vitiating a decision',[11] curiously, the rule applies in some administrative tribunals[12] but not all. For example, it does not apply in the AAT[13] or the Refugee Review Tribunal (RRT).[14]

Similarly, the rule in *Briginshaw v Briginshaw*[15] (*Briginshaw*) has been held not to apply in the AAT,[16] but it is ubiquitous in professional disciplinary tribunals concerning allegations of fraud, unlawful discrimination, conflicts of interest, and misleading or illegal conduct.[17]

Briginshaw stands for the proposition that, in matters involving the civil standard of proof (the balance of probabilities) where serious and grave allegations have been made, the decision-maker must have an 'actual persuasion' that the allegation has been established and not be 'oppressed by reasonable doubt'. The case is commonly cited as authority for the principle that the more severe the consequences of finding a fact, the stronger and more reliable the evidence must be to establish it.[18]

The Victorian Court of Appeal has held that, when a CAT is dealing with serious or contentious issues, the rules of evidence reflect 'common-sense notions' and 'it is entirely proper for the Tribunal to take them into account when considering allegations of serious misconduct'.[19] Presumably this would include the principle in *Briginshaw*.

But the decision in *Briginshaw* has been the subject of considerable debate in its application to merits review jurisdictions.[20] Its application in CATs has been perceived as problematic. Primarily it has been argued that the principle in *Briginshaw* is not required in merits review proceedings because administrative law has its own mechanisms to ensure that a decision-maker gives proper consideration to the seriousness of the consequences of making findings of fact — in particular, the requirement to afford procedural fairness.[21] Proper regard for the seriousness of the consequences of the proceedings is inherent in the

9 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 [10] in relation to legal professional privilege.
10 (1893) 6 R 67.
11 *Haberfield v Department of Veterans' Affairs* (2002) 121 FCR 233 [58] quoted in Jeff Kildea, *Land and Environment Court Law & Practice, New South Wales* (Law Book Co) [LECA.38.20].
12 *Hoskins v Repatriation Commission* (1991) 32 FCR 443, 446–7; *Dolan v Australian & Overseas Telecommunications Corp* (1993) 42 FCR 206; *Marelic v Comcare* (1993) 47 FCR 437; *Secretary, Department of Defence v Gorton* (2000) 98 FCR 497 [79].
13 Kildea, above n 11, [LECA.38.20]; *Lawrance v Centrelink* (2005) 88 ALD 664 [31]; *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002* (2003) 201 ALR 437 [56]–[57]; *Calvista Australia Pty Ltd v AAT* (2013) 216 FCR 32 [118]; *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 [149]–[151].
14 *Abebe v Commonwealth* (1999) 197 CLR 510 [187]; *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002* (2003) 201 ALR 437 [55]–[58]; *Lawrance v Centrelink* (2005) 88 ALD 664 [31].
15 (1938) 60 CLR 336.
16 *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 [121]–[122].
17 Kerr, above n 4, 11. See, for example, *In re A Solicitor; Ex parte the Prothonotary* (1939) 56 WN (NSW) 53; *Hobart v Medical Board of Victoria* [1966] VR 292; *Kerin v Legal Practitioners Complaints Committee* (1996) 67 SASR 149.
18 Kerr, above n 4, 11.
19 *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540 [26].
20 Kerr, above n 3, 11.
21 Ibid 12.

statutory duty a decision-maker in a CAT is under. There is therefore no policy reason for an administrative decision-maker to have recourse to the principle.

Significantly, a CAT's freedom from the rules of evidence does not extend to a freedom from the rules of procedural fairness,[22] and this has the effect of preserving and incorporating many rules of evidence codified today, including the rules in *Browne v Dunn* and *Briginshaw*, which are, in essence, no more than rules of fairness.

Should CATs be bound by the rules of evidence?

Almost all statutes establishing CATs contain provisions stating that the CAT is not bound by the rules of evidence.

Section 38 of the *Land and Environment Court Act 1979* (NSW) (LEC Act) is one such illustration. In specified proceedings (Class 1, 2 or 3) the Court exercises administrative power when, for example, granting development consents or determining the amount of compensation to be paid upon compulsory acquisition. Section 38(2) of the LEC Act provides the now formulaic recitation that 'in proceedings in Class 1, 2, or 3, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits'. This provision mirrors the wording contained in s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) and other acts establishing tribunals, commissions, and courts exercising administrative functions around Australia.[23]

The principal reason why the rules of evidence do not apply to CATs is to give effect to their overriding objectives of informality, efficiency, economy and flexibility. For example, s 3(d) of the *Civil and Administrative Tribunal Act 2013* (NSW) states that that Tribunal (the NSW Civil and Administrative Tribunal (NCAT)) is 'to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible'.[24] This is to be contrasted with the perception of courts as formal, inaccessible, costly and slow.

Some commentators claim that the inflexibility of the common law rules of evidence is one of the major reasons why tribunals have proliferated.[25] As Mason P put it:

> the law of evidence started off as judicial common sense practised in context. But by the mid-twentieth century it had hardened and atrophied. Its rules had become traps for the unwary rather than guideposts to facilitate the orderly gathering and testing of relevant information.[26]

Several additional reasons have been suggested as to why the rules of evidence ought not bind CATs:

1. It reduces the time and expense involved in proceedings. The rules of evidence are complex and technical. As early as 1947 they were described as 'calculated and supposedly helpful obstructionism'.[27] Having to determine the admissibility of each

22 Enid Campbell, 'Principles of Evidence and Administrative Tribunals' in Enid Campbell and Louis Waller (eds), *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (The Law Book Company, 1982) 36, 41; *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 [128].

23 See eg *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(b); *State Administrative Tribunal Act 2004* (WA) s 32(2); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 53(2)(b).

24 See also *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b); *State Administrative Tribunal Act 2004* (WA) s 9(b); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 10(d)–(g); and *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.

25 Neil Rees, 'Procedure and Evidence in "Court Substitute" Tribunals' (2006) 28 *Australian Bar Review* 41, 69.

26 Mason, above n 5, 21.

27 John Maguire, *Evidence: Common Sense and Common Law* (Foundation Press, 1st ed, 1947) 10–11.

piece of evidence according to these rules would cause undue delay in CAT proceedings and add to their expense.[28]

2. Because of the more specialist and supervisory function of CATs (whose members often possess a degree of expertise in the subject matter of the proceedings), CATs must be able to consider all of the evidence before them in order to make the correct decision.[29]

3. Administrative proceedings are not necessarily adversarial in nature. CATs often take a quasi-inquisitorial role guided by the legislative proscription to 'inform themselves in any manner they see fit' (including by using their specialist knowledge). The exclusionary rules of evidence are inconsistent with the role and function of a CAT.[30]

4. It is often not practicable to apply the rules of evidence in a CAT which, unlike courts, may comprise non-lawyers and often deal with parties who are not legally represented.[31] For example, in the Land and Environment Court, Class 1, 2, and 3 matters are heard by commissioners who possess qualifications and experience in a range of disciplines, such as land valuation, planning, architecture, engineering, or botany but who often have no legal qualifications. The NSW Law Reform Commission has observed that 'it was unreal to expect such an [legally unqualified] arbitrator to apply the laws of evidence as if he were a judge. It was oppressive as well as unreal to put on a conscientious arbitrator a duty which, to the knowledge of the parties, he was not equipped to perform'.[32]

5. A CAT hears a matter *de novo*, or afresh. This means that the CAT stands in the shoes of the original decision-maker and has available to it all of the discretions and powers of that decision-maker. If the original decision-maker was not bound by the rules of evidence when making the decision, why should the CAT be so constrained?

But the extent to which CATs ought nevertheless to have regard to the rules of evidence has been the subject of debate, both curial and non-curial. There is jurisprudence that both encourages the employment of, and cautions against adherence to, the rules of evidence when admitting evidence, especially expert evidence, in CATs.

In 1933, in the oft-quoted case of *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott*[33] (*Bott*) (cited with approval in the more recent 2010 case *Kostas v HIA Insurance Services Pty Ltd*),[34] Evatt J (albeit in dissent) stated that the fact that a tribunal is not bound by the rules of evidence 'does not mean that all rules of evidence may be ignored as of no account' because those rules 'represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth'.[35] His Honour emphasised the importance of ensuring that a CAT, even in the absence of the application of the rules of evidence, did not 'resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party'.[36]

In *Bott*, it was held that the War Pensions Entitlement Appeal Tribunal had failed to afford the appellant natural justice when deciding to dispense with the rule of evidence allowing the appellant to cross-examine two doctors who had provided a medical report which

28 Geoffrey Flick, *Natural Justice: Principles and Practical Applications* (Butterworths, 1979) 34–44, cited in Kildea, above n 11, [LECA.38.20].
29 Ibid.
30 Ibid.
31 Giles, above n 4, 236.
32 NSW Law Reform Commission, *Commercial Arbitration*, Report No 27 (1976) 134.
33 (1933) 50 CLR 228.
34 (2010) 241 CLR 390 [17].
35 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256.
36 Ibid.

contained opinions adverse to the appellant's case. The two doctors had based their report on a medical inspection of the appellant and a 'full summary' of the appellant's medical history; however, this 'full summary' was not disclosed in the certificate or presented to the Tribunal.[37]

Despite the attractive logic of the views expressed by Evatt J, in *Pochi v Minister for Immigration and Ethnic Affairs*,[38] Brennan J remarked that this 'does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule'.

In *Rodriguez v Telstra Corp Ltd*,[39] the Federal Court of Australia held that regard should be had to the rules of evidence notwithstanding that a tribunal may not be bound by them.[40] The case concerned an appeal from a decision of the AAT where the AAT had preferred its own opinion to that of the medical practitioners giving evidence before it. The applicant, Mr Rodriguez, had claimed that his major depressive disorder was caused by his employment with the respondent, Telstra Corp Ltd (Telstra), and had tendered medical evidence in support of his claim. The AAT accepted that his disorder arose out of, or in the course of, his employment at Telstra; however, it went on to find that after four years the disorder was no longer work related, despite no doctors having expressed this opinion.[41] The AAT made the finding as an inference based on evidence that Mr Rodriguez had stopped referring to his employment in discussions with his general practitioner. Mr Rodriguez appealed this finding to the Federal Court on the ground that the AAT had substituted its own opinion for that of the doctors. Telstra contended that matters of proof and causation did not apply to the AAT or, alternatively, that the AAT was permitted to arrive at its own conclusion because its members were medically qualified.[42]

The Federal Court upheld the appeal, holding that, although the AAT was not bound by the rules of evidence, this did not permit it to make decisions absent a basis in evidence having probative force.[43] The Court also noted that the AAT ought to have disclosed its intention to act on its own medical opinion to allow the parties the opportunity to comment upon it.[44]

Thus in *Sullivan v Civil Aviation Safety Authority*[45] the same Court remarked that the rules of evidence were 'founded on principles of common sense, reliability and fairness' (however, despite this uncontroversial pronouncement, the Court went on to hold that the AAT was not bound to apply the rule in *Browne v Dunn* or the principle in *Briginshaw*).

Similarly, the Victorian Supreme Court in *City of Springvale v Heda Nominees Pty Ltd*[46] held that, even if a CAT is not bound by rules of evidence, this does not mean that it is permitted to admit expert evidence on matters which would not constitute expert opinion under the rules of evidence.[47] Examples include matters of everyday common knowledge.[48] Expert opinion as to the whether the sky is blue will be inadmissible irrespective of the court or tribunal.

37 Ibid 255.
38 (1979) 36 FLR 482, 492.
39 (2002) 66 ALD 579.
40 *Rodriguez v Telstra Corp Ltd* (2002) 66 ALD 579 [25].
41 Ibid [20]–[21].
42 Ibid [10], [24].
43 Ibid [25].
44 Ibid [28].
45 (2014) 226 FCR 555 [93].
46 (1982) 57 LGRA 298. This case, however, predated the enactment of s 80 of the *Evidence Act 1995* (NSW), which provides that evidence of an opinion is not inadmissible simply because it is about a matter of common knowledge.
47 *City of Springvale v Heda Nominees Pty Ltd* (1982) 57 LGRA 298, 310.
48 *R v Healey* [1979] VicSC 482 (5 October 1979) 13.

Nevertheless, some superior courts and legal scholars have urged against deference to the rules of evidence by CATs. In *McDonald v Director-General of Social Security*,[49] Woodward J remarked that a CAT should determine matters with regard to 'the statutes under which it is operating, or … considerations of natural justice or common sense', rather than to 'the technical rules relating to onus of proof developed by the courts'.

In *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002*[50] (*S154*), Gummow and Heydon JJ (with Gleeson CJ agreeing) held that provisions excluding the rules of evidence are intended to 'free' decision-makers 'from certain constraints otherwise applicable in courts of law'. Accordingly, the RRT was not obliged to apply the rule in *Browne v Dunn*. In *S154*, the Tribunal used the absence of a reference to rape in a psychologist's report as a step in rejecting the appeal but failed to ask the psychologist for an explanation for the omission. The High Court held that the Tribunal's failure to follow *Browne v Dunn* did not constitute an error of law because of the RRT's inquisitorial role and because the rules of evidence did not apply.[51]

Learned authors Mark Aronson, Matthew Groves and Greg Weeks caution that CATs not bound by the rules of evidence should not 'adopt them in a *de facto* way', particularly where the rule might 'distract attention from the core review function' of the CAT.[52]

Further, acclaimed administrative law scholar Professor Enid Campbell has opined that, if CATs were bound by the rules of evidence, they would not be able to receive and act upon evidence which was logically probative. In her view, the process of determining what evidence is relevant or logically probative ought to take place after all of the evidence is admitted.[53]

It is perhaps for these reasons that NCAT is expressly prohibited from rejecting expert evidence which would otherwise be inadmissible if the rules of evidence applied.[54]

The use and abuse of expert evidence when the rules of evidence do not apply

In evidence-based jurisdictions, expert opinion evidence is permitted as an exception to the opinion rule contained in s 79(1) of the *Evidence Act 1995* (NSW), which states that, 'if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'.

The provision provides for a two-part test for expert evidence: first, that the person giving it must have 'specialised knowledge' by reason of their training, study, or experience; and, secondly, that the opinion must be wholly or substantially based on that knowledge. Over time, statutory rules governing the form and content of expert evidence have been developed and are now commonplace in most courts. These are often in the form of expert codes of conduct.[55]

49 (1984) 1 FCR 354, 356.
50 (2003) 201 ALR 437 [56].
51 *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002* (2003) 201 ALR 437 [55]–[58].
52 Aronson, Groves and Weeks, above n 4, 611.
53 Campbell, above n 22, 36, 84.
54 *NCAT Procedural Direction 3 — Expert Evidence*, 28 February 2018, cl 3.
55 See, for example, *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Uniform Civil Procedure Rules 2005*, Pt 31, Div 2.

Section 79(1) of the Evidence Act is a rule of evidence and is therefore not applicable to CATs. Has this had the effect of diminishing the quality of the expert evidence sought to be adduced in CATs?[56]

Even though the rules of evidence do not apply, CATs are subject to rules, practice notes, directions or guidelines regarding the content and form of expert evidence.

In the Land and Environment Court, for example, proceedings in Classes 1, 2, and 3 are subject to the provisions contained within Pt 31, Div 2 of the *Uniform Civil Procedure Act 2005* (UCPR), which prescribe the form and content of expert evidence and require expert witnesses to comply with the expert witness code of conduct. Similar rules exist in NCAT (*NCAT Procedural Direction 3 — Expert Evidence*[57] (NCAT Procedural Direction)), the Victorian Civil and Administrative Tribunal (VCAT) (*Practice Note — PNVCAT2 — Expert Evidence*[58] (VCAT Practice Note)), and the AAT (*Persons Giving Expert and Opinion Evidence Guideline*[59] (AAT Guideline)).

Although not identical, each contains the following general elements:[60]

(a) the imposition of an overriding duty to the CAT and a declaration by the expert witness acknowledging this duty;[61]

(b) a requirement that the expert report contain the following information:

  (i) details of the expert's qualification and/or expertise;[62]

  (ii) the letter of instruction from the party engaging the expert witness;[63]

  (iii) details of any documents, materials or literature that the expert relied upon in the preparation of the report and the formulation of the expert's opinions;[64]

  (iv) details of any examinations, tests or investigations that the expert has undertaken;[65]

  (v) details of any facts or assumptions upon which the opinion is based and the sources of those facts and assumptions;[66]

  (vi) the reasoning for the opinion;[67] and

(c) the imposition of a duty to declare relevant information to the CAT that could affect the reliability of the evidence — for example, whether the expert witness has changed his or her opinion; whether the

56 Geoffrey Code, Russell Byard and Sarah Porritt, *Planning and Environment Vic* (LexisNexis Australia) [434,685.50].
57 *NCAT Procedural Direction 3 — Expert Evidence*, 28 February 2018.
58 VCAT, *Practice Note — PNVCAT2 — Expert Evidence*, 1 October 2014.
59 AAT, *Guideline — Persons Giving Expert and Opinion Evidence*, 30 June 2015.
60 The NCAT Procedural Direction and the UCPR contain an expert code of conduct. The AAT Guideline and VCAT Practice Note do not.
61 AAT Guideline, cll 3.1 and 4.5; NCAT Procedural Direction, cll 14–17; UCPR, Sch 7, cl 2; VCAT Practice Note, cll 8–10.
62 AAT Guideline, cl 4.1(a); NCAT Procedural Direction, cl 19(b); UCPR, r 31.27(1)(a) and Sch 7, cl 3(c); VCAT Practice Note, cll 11(b) and (c).
63 AAT Guideline, cl 4.1(b); NCAT Procedural Direction, cl 19(c); UCPR, r 31.27(1)(b) and Sch 7, cl 3(d); VCAT Practice Note, cl 11(e). Note cl 19(c) of the NCAT procedural direction and r 31.27(1)(b) of the UCPR do not require a letter of instruction to be included in the report but provide that 'a letter of instruction may be annexed'.
64 AAT Guideline, cll 4.1(b) and 4.2(b); NCAT Procedural Direction, cll 19(c) and (f); UCPR, r 31.27(1)(e) and Sch 7, cll 3(e) and (h); VCAT Practice Note, cl 11(g).
65 AAT Guideline, cl 4.2(a); NCAT Procedural Direction, cl 19(g); UCPR, r 31.27(1)(f) and Sch 7, cl 3(g); VCAT Practice Note, cl 11(h).
66 AAT Guideline, cl 4.1(c); NCAT Procedural Direction, cl 19(c); UCPR, r 31.27(1)(b) and Sch 7, cl 3(d); VCAT Practice Note, cl 11(f).
67 AAT Guideline, cl 4.1(d); NCAT Procedural Direction, cl 19(d); UCPR, r 31.27(1)(c) and Sch 7, cl 3(e). The VCAT Practice Note does not specifically refer to a requirement to provide reasons for the opinion.

expert witness has a conflict of interest; whether the opinion is outside the expert's field of expertise; or whether the opinion is incomplete, inconclusive, or based on insufficient data.[68]

These rules are important. Their effect is to ensure that, whether or not the rules of evidence apply, expert evidence is capable of being assessed by the decision-maker (necessary to fulfil their function) and capable of being tested by the parties (necessary for procedural fairness).

The common law principles determining whether or not an expert report is capable of being assessed by a decision-maker were set out in the seminal case of *Makita (Australia) Pty Ltd v Sprowles*[69] (*Makita*). The principles can be summarised as follows:[70]

a. that the duty of expert witnesses is to furnish the court with the necessary criteria for testing the accuracy of their conclusions, so as to enable the court to form its own judgment by the application of these criteria to the facts proven in evidence;

b. that the bare *ipse dixit* of an expert upon the issue in controversy is likely to carry little weight because it cannot be tested by cross-examination or independently appraised;

c. that the report must identify the criteria by reference to which a court can test the quality of the expert's opinions. Examining the content of an opinion cannot occur unless a court knows what the essential elements of the opinion are;

d. that it is important that a court be placed in a position to test the validity of the process by which an opinion has been formed in order to be in a position to adjudicate upon the value and cogency of the opinion evidence;

e. that the hallmarks of unreliable science and the unqualified expert are an inability to articulate the central principles that need to be understood or to describe in everyday language the methods used and the reasons that led to a particular conclusion; and

f. that the expert opinion evidence must be comprehensible and reach conclusions that are rational. The process of inference that leads to the conclusions must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about their reliability.

The rules referred to above and the principles in *Makita* provide guidance as to what ought to constitute expert evidence in jurisdictions where the rules of evidence do not apply. When distilled, they are no more than rules of fairness for the court or tribunal and the parties.

Unlike evidence rules based jurisdictions,[71] in a CAT a failure to comply with these rules will not necessarily result in a report being inadmissible.

For example, the NCAT Procedural Direction and the AAT Guideline specify that a noncompliant report is still admissible. Noncompliance merely constitutes a factor to be considered in determining the weight afforded to the report.[72] Having said this, in the merits

68 AAT Guideline, cll 5 and 4.7; NCAT Procedural Direction, cll 20–22; UCPR, r 31.27(2)–(4) and Sch 7, cll 3(j)–(k) and 4; VCAT Practice Note, cl 11(d).

69 (2001) 52 NSWLR 705.

70 As summarised in *UTSG Pty Ltd v Sydney Metro (No 3)* [2019] NSWLEC 49 [33].

71 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 [85]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 [60]–[137]; *Ray Fitzpatrick Pty Ltd v Minister for Planning* (2007) 157 LGERA 100 [29]–[30]; *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District; Sydney Local Health District v Macquarie Health Corp Ltd (No 3)* [2014] NSWSC 828 [22]–[23]; *Walker Corp Pty Ltd v Liu* [2013] NSWSC 1480 [42]–[55]. However, see also the discussion in *Wood v The Queen* (2012) 84 NSWLR 581 [719]–[730].

72 NCAT Procedural Direction, cl 7; AAT Guideline, cl 1.6.

review jurisdictions of the Land and Environment Court and VCAT, a failure to comply can result in expert evidence being inadmissible, albeit at the discretion of the decision-maker.[73]

Where the noncompliance is resolved as a matter of the weight to be afforded to the expert report, this may be justified on the basis that a decision-maker will not always have all the evidence before them prior to being required to rule on the admissibility of an expert report.[74] Moreover, to require strict adherence to the *Makita* principles in CATs would result in expert reports reaching 'an unmanageable length (and cost even larger amounts of money)'.[75]

Other considerations include the prejudice to the parties if the expert report is admitted or rejected[76] and whether other measures can be implemented to overcome any unfairness occasioned by reliance on a deficient expert report. For example, can the default be cured by supplementary oral evidence or additional joint reporting?

Case study: *UTSG (No 3)* and *UTSG (No 4)*

The question of the admissibility of flawed expert accounting reports in the course of a Class 3 compensation for compulsory land acquisition proceeding (where the rules of evidence do not apply) arose in *UTSG Pty Ltd v Sydney Metro (No 3)*[77] (*UTSG (No 3)*) and *UTSG Pty Ltd v Sydney Metro (No 4)*[78] (*UTSG (No 4)*). The matter concerned an appeal by UTSG Pty Ltd (UTSG) against the amount of compensation offered by the Valuer-General for the compulsory acquisition of a commercial property in the Sydney CBD. The acquisition was required to make way for the construction of a metro system. UTSG held a five-year lease over the premises, from which it operated a health centre. UTSG claimed compensation for the acquisition of this interest as well as substantial disturbance costs relating to the relocation of its business.[79]

UTSG sought to rely upon two expert reports, both of which were objected to by the respondent, Sydney Metro. The reports contained serious breaches of the UCPR expert witness code of conduct as well as the principles in *Makita*. The Court received one report into evidence while rejecting the other.

UTSG (No 3) related to an expert business valuation report (the Mullins report) by Mr David Mullins, who was engaged by UTSG. Sydney Metro objected to the report on two bases — first, because Mr Mullins had breached his requirements under the UCPR by withdrawing his report and failing to provide a supplementary one as required under r 31.27(4) of the UCPR:

> **31.27 Experts' reports**
>
> (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subrule (1) as is appropriate.

73 UCPR, r 31.23 and Sch 1. While the language of the VCAT Practice Note suggests that its application is mandatory in all proceedings, it is silent on the effect of noncompliance. However, in the Victorian Supreme Court Case *Aquilina v Transport Accident Commission* [2015] VSC 117 concerning the appeal of a VCAT decision, the Court upheld the approach taken by VCAT at first instance whereby expert evidence which was noncompliant with the VCAT Practice Note was nevertheless admitted into evidence after alternative arrangements were made to comply with the requirements of procedural fairness.

74 *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 234 FCR 549.

75 Aitken, above n 1, 207, 217.

76 *UTSG Pty Ltd v Sydney Metro* (No 3) [2019] NSWLEC 49 [45].

77 [2019] NSWLEC 49.

78 [2019] NSWLEC 51.

79 *UTSG Pty Ltd v Sydney Metro* [2018] NSWLEC 128 [5]–[9], [17].

Mr Mullins withdrew his report after receiving additional material which rendered unreliable the financial records that he had used as a basis for his expert opinion because they were incomplete. He subsequently participated in joint conferencing and produced two joint reports with Sydney Metro's valuation expert. In the joint reports, Mr Mullins made reference to his withdrawn report.

Sydney Metro's second basis of objection was that Mr Mullins had failed to fully disclose the relevant financial materials that he used to calculate UTSG's financial loss.

Unlike r 31.23 of the UCPR (which requires an expert to explicitly acknowledge their obligations under the expert witness code of conduct), there was no discretion to waive r 31.27. Therefore, Mr Mullins was required to disclose the information upon which his opinion was based and issue a supplementary report.[80] What followed from Mr Mullins's failure to do so was another matter.

Shortly after the Mullins report was withdrawn, UTSG became legally unrepresented. The Court held that it was doubtful whether the applicant or Mr Mullins were aware of the requirement to obtain or provide a supplementary expert report.[81]

The Court also accepted that, while there were deficiencies in Mr Mullins's report with respect to the disclosure of documents that he relied upon, some disclosure had nevertheless been made and his conclusions were not 'wholly impenetrable'.[82]

In determining whether or not to admit the report, the Court had regard to the principles in *Makita* outlined above, as well as cases which considered the application of *Makita* in jurisdictions where the rules of evidence do not apply.[83] These cases made it clear that the principles in *Makita* were nonetheless relevant to a CAT assessing the admissibility of expert evidence; however, they did not necessarily operate to restrict receipt of the evidence.[84] Instead, 'the question of the acceptability of expert evidence will … be one … of weight'.[85]

The Court found that there were alternative measures which could be used to overcome the deficiencies in the Mullins report. Mr Mullins could be cross-examined on the content of his report.[86] In addition, Sydney Metro's valuation expert had participated in two joint conferences with Mr Mullins and had been able to express opinions as to the reliability of UTSG's financial records and comment upon the content of the Mullins report.[87] In other words, Mr Mullins's report was amenable to challenge.[88]

Finally, the Court placed substantial weight on the significant prejudice that would be occasioned to UTSG if the report was not admitted into evidence. UTSG's claim for compensation for financial loss as a result of the acquisition by Sydney Metro was in the order of $15 million (albeit reduced from its initial claim of approximately $50 million). The evidence of Mr Mullins went directly to the loss occasioned by UTSG by the acquisition and therefore was central to UTSG's case. Without it, UTSG's case would have failed and UTSG would have faced the very real prospect of an adverse costs order of over $2 million.[89]

80 [2019] NSWLEC 49 [29].
81 Ibid [39].
82 Ibid [42]; see also *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 [42].
83 *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282.
84 Ibid [82]–[83]; *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 [82]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 [42].
85 *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 [83]; see also *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 [83]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 [42].
86 [2019] NSWLEC 49 [42].
87 Ibid [43].
88 Ibid [42].
89 Ibid [7].

Ultimately, the Court held that it was not appropriate to reject the Mullins report given the fatal consequences to UTSG's case of doing so and the nature of the breaches of the UCPR (which were not overly serious) and because the report's deficiencies could be addressed in cross-examination.[90] These factors would, however, have to be taken into account when assessing the weight to be afforded to the Mullins report.[91]

UTSG (No 4) concerned the admissibility of a forensic accounting report (the Watts report) prepared by Mr Gambhir Watts on behalf of UTSG. The Watts report had been prepared in response to an expert report (the KPMG report) of Sydney Metro's expert forensic accountant, Mr Luke Howman-Giles of KPMG. The opinions expressed in the KPMG report cast doubt on UTSG's financial statements, upon which Mr Mullins had based his expert opinion. The Watts report was relied upon by UTSG to rebuke the KPMG report and contained a series of 'scandalous and intemperate allegations'[92] (to use the words of Sydney Metro) against the KMPG report's assertions. These included phrases such as:

> The writer has provided a biased report containing inconsistent and inaccurate comparison of financials.
>
> The KPMG report has been manipulated to suit their client's outcome.
>
> The KPMG report lacks common basic understanding of the industry practices and way the Health Care industry especially in the small business sector functions.
>
> The KPMG report demonstrate [sic] a lack of appreciation of accounting methods and financial year end practices of business in Australia.[93]

Mr Watts had failed to identify the facts and assumptions on which the scandalous allegations were based, articulate his reasoning or disclose the materials upon which he relied in expressing his opinions. For example, Mr Watts prefaced several of his allegations with phrases such as 'to the best of my investigations and sources of information provided to me by UTSG, I am of firm belief that', without disclosing what these investigations and sources of information were.[94]

In addition, it was apparent from his report that Mr Watts was neither an independent nor an impartial witness because he had previously provided advisory business, accounting and taxation services for UTSG.[95] The content of the Watts report strongly suggested that Mr Watts had impermissibly 'crossed over the Rubicon from objective and impartial expert witness to partisan advocate for UTSG'.[96] The Court noted, however, that impartiality only goes to the weight to be accorded to an expert's evidence and therefore the Watts report could not be rejected on this basis alone.[97]

The Court held that the provocative language contained throughout the Watts report, together with the unsupported and unprofessional allegations made against KPMG and the KPMG report, and Mr Watts's lack of independence and impartiality were deficiencies which could not be remediated. As the Court said, 'even if the Watts report was admitted into evidence, the weight the Court would accord to the report because of its manifest

90 Ibid [45]–[46].
91 *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 [83]; *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 [83]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 [42].
92 [2019] NSWLEC 51 [6(d)].
93 Ibid [34].
94 Ibid [24]–[25].
95 Ibid [43].
96 Ibid [46].
97 Ibid [44] citing *Lake Macquarie City Council v Australian Native Landscapes Pty Ltd* [2015] NSWLEC 92 [9]–[15] and the authorities referred to thereat.

deficiencies would be so low that its receipt would be rendered nugatory'.[98] In other words, its content had become irrelevant. The report was therefore rejected.

While both reports contained breaches of the UCPR expert code of conduct, the principal differences in the result between the *UTSG (No 3)* and *UTSG (No 4)* were that:

a. the Mullins report was crucial to substantiate UTSG's compensation claim, whereas the Watts report operated as a rebuttal to the KPMG report. In other words, the prejudice to UTSG if the Mullins report was rejected was far greater than the prejudice to UTSG if the Watts report was rejected; and

b. the deficiencies in the Mullins report were not so egregious as to render negligible the weight to be accorded to it, unlike those in the Watts report.

UTSG (No 3) and *UTSG (No 4)* demonstrate the balancing act a CAT must undertake in deciding whether or not to admit an expert report which would be otherwise inadmissible if the rules of evidence applied. In short, the CAT must weigh up the need for reliability with the desire to maintain procedural flexibility while ensuring that procedural fairness is afforded to all parties.

The decisions also highlight a critical limit on a CAT's freedom to depart from the rules concerning the admissibility of evidence — namely, that of relevance.[99] Only evidence that is relevant is admissible, irrespective of the jurisdiction.[100] It is strongly arguable that the prohibition upon receiving irrelevant evidence is a matter that goes to jurisdiction and not a mere rule of evidence. A CAT may commit jurisdictional error by taking into account evidence that is not relevant to the issues before it. Furthermore, a CAT may deny a party procedural fairness if it considers evidence which is not relevant to the issues before it.[101]

Of course, it is not always possible immediately to determine the relevance of expert evidence, especially in the absence of pleadings and in circumstances where the parties may not be legally represented. Determining whether or not evidence is relevant to the facts and issues in dispute may be difficult because those facts and issues may not be readily apparent until the CAT has heard all of the evidence and identified the gravamen of the claim.[102] It may therefore be more prudent to admit first and ask questions later.

Assessing the probative value of expert evidence where the rules of evidence do not apply

To assess the probative value, including the reliability, of expert evidence, and therefore what weight to attribute to it, a CAT must be aware of some of the common problems associated with expert reports where the rules of evidence do not apply.

As Cripps CJ in *King v Great Lakes Shire Council* noted:

> For example, the common law requirement that the facts relied upon by an expert must be proved by admissible evidence is frequently ignored. The hearsay rules are rarely enforced and experts, not infrequently, are invited to express opinion evidence on matters not calling for specialised knowledge. The distinction between inferences from observed facts and opinion evidence strictly so called is rarely adverted to.

98 [2019] NSWLEC 51 [38].
99 As was succinctly put by Hill J in *Casey v Repatriation Commission* (1995) 60 FCR 510, 514, merits review tribunals should be determined exclusively by the 'limits of relevance' and not 'the interstices of the rules of evidence'.
100 *Papakosmas v The Queen* (1999) 196 CLR 297 [23].
101 Rees, above n 25, 74.
102 Ibid 74–5.

> Furthermore, it is common, although not often helpful, for planning experts to be asked to express opinions on matters which the court itself must decide.[103]

Determining the probative value of an expert report at the commencement of a hearing can prove fraught. It may instead require 'careful assessment after the testing of the expert's evidence in cross-examination'.[104] Once admitted, if it is found wanting, less weight can be placed on it.[105] Therefore, where uncertainty exists about the probative value of an expert report, CATs should likewise err on the side of caution and admit it into evidence where its contents can be tested.

Blurred lines of expertise

The blurred lines of expertise problem arises when an expert gives evidence on an issue that is related to, but not squarely within, the expert's field of expertise. It commonly arises when the lines between specialised fields of expertise are blurred or when the field of expertise is broad or general (for example, ecology or town planning).

In jurisdictions where the rules of evidence apply, the evidence is usually impermissible as opinion evidence contrary to s 79 of the Evidence Act, which mandates a relationship between the expert's specialised knowledge and the opinion expressed.

In circumstances where s 79 of the Evidence Act does not apply, rather than reject the expert opinion, a CAT can place little or no weight on any opinion proffered outside the expert's field of specialised knowledge.[106]

Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation[107] concerned an application by the Ocean Grove Bowling Club (the Club) for review of a decision of the Victorian Commission of Gambling Regulation (the Gambling Commission) refusing to permit an increase in the number of gambling machines at the Club from 45 to 60. At the hearing, the Club sought to adduce evidence from a qualified and experienced town planner, Ms Peterson, on, among other topics, the social and economic impacts of the proposed increase in the number of machines. The Gambling Commission objected on the basis that Ms Peterson, as a planner, was not qualified to give this evidence.

In deciding to admit Ms Peterson's evidence, VCAT held that fields of expertise were not to be thought of in black and white terms but, rather, 'black fading to white'[108] and that experts in a particular field often have more specialised knowledge than a lay person in the 'allied areas that are outside their discipline'.[109] VCAT gave the example of a neurologist being likely to know more about the orthopaedic structure of the body than a layperson or a town planner being likely to know more about spatial economics.[110]

VCAT also noted that town planning was a generalist profession which involved balancing physical, environmental, social and economic considerations and that town planners, therefore, 'tend to know a little about a lot'. VCAT went on to state that, although 'it is easy to disparage those who know a little about a lot', this quality allows town planners to make

103 (1986) 58 LGRA 366, 371.
104 *Noetel v Quealey* (2005) 34 Fam LR 190 [106], quoted in Aitken, above n 1, 212.
105 Code, Byard and Porritt, above n 56, [434,685.50]; *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 [83]; *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 [83]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 [42].
106 See eg *Re Healthy Cities Illawarra Inc and Commissioner of Taxation* (2006) ATR 1165 [7]; *Re No Ship Action Group Inc and Minister for Sustainability, Environment, Water, Population and Communities* (2010) 117 ALD 622 [46(j)]; *Ocean Grove Bowling Club Inc v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 [7]–[8].
107 [2006] VCAT 1422.
108 *Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 [8].
109 Ibid.
110 Ibid.

'rounded, balanced' decisions.[111] Accordingly, the evidence was admissible, albeit that it was afforded less weight.

As ever, the touchstone is that of relevance. As one judge opined extrajudicially, 'where the opinion is that of an expert outside his expertise, or outside any recognised field of knowledge, the test of relevance may be thought to provide sufficient control'.[112]

Expert evidence on the ultimate issue

At common law an expert cannot give an opinion on the ultimate question or issue in dispute.[113] Although this rule has since been abrogated by s 80 of the Evidence Act, in jurisdictions where the rules of evidence apply, decision-makers retain control over the admissibility of such evidence, especially where the ultimate issue is a matter of law (see the various discretions contained in Pt 3.11 of the Evidence Act — for example, s 135). Evidence going to an ultimate issue can be, and is, routinely rejected by courts and tribunals alike.[114]

Expert evidence on ultimate issues is common in generalist fields of expertise such as town planning.[115] Town planners, as part of their professional duties, determine the overall merit of a given development application, the same function that a planning appeals tribunal fulfils when conducting merits review in determining whether to grant or refuse development consent.

The issue is particularly problematic in complex technical cases where an expert's knowledge is likely to be superior to that of the decision-maker, potentially resulting in the expert evidence having a disproportionate influence on the outcome of the proceedings.

Although the ultimate issue rule has been abolished, this does not mean experts will always be permitted to give their opinion on ultimate issues. As Preston J observed in *Pyramid Pacific Pty Ltd v Ku-ring-gai Council*:

> 79. It is a misunderstanding of the role of the ... expert in a planning appeal to look only at the ultimate opinion that the expert expresses. Expert evidence, whether of a court appointed expert or other expert, is designed to assist the Court to draw conclusions in relation to the issues that are within the expertise of the expert. Although the prohibition on an expert giving an opinion about the ultimate issue has been abolished by s 80 of the *Evidence Act 1985* (NSW) in proceedings where the rules of evidence apply, it is not the role of the expert in a planning appeal to express an opinion on the ultimate issue as to whether development consent should be granted. Such an opinion is of no assistance to the Court. The ultimate issue as to whether development consent should be granted is for the Court to determine, exercising the functions of the consent authority.[116]

Nevertheless, in *Venus Enterprises Pty Ltd v Parramatta City Council*,[117] in a Class 1 development appeal, the Land and Environment Court allowed evidence from a town planner on the ultimate issue of whether or not the development should be approved. In deciding not to reject the evidence, Cripps J relied on s 38 of the LEC Act and stated that:

111 Ibid [9].
112 Giles, above n 5, 241.
113 John Dyson Heydon AC, *Cross on Evidence* (LexisNexis Australia) [29105].
114 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006).
115 *Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 [9]; *ULV Pty Ltd v Scott* (1990) 19 NSWLR 190, 202.
116 [2006] NSWLEC 522 [79].
117 (1981) 43 LGRA 67.

> In this case I am not prepared to reject the opinion of an expert town planner merely because he is expressing an opinion on a question that the Court itself must decide. The Court is always free to accept or reject an opinion and I do not think its function would be usurped by the reception of this evidence. It would be difficult for a town planner to prepare a report without stating his opinion about some matters of law (or, at least, without making assumptions as to what the law was). It is, of course, for the Court to determine these questions and such statements of law are, at worst, irrelevant.[118]

Thus it has been observed that:

> To the extent that there is an 'ultimate issue' exclusion, there does not seem to be any good reason why a tribunal not bound by the rules of evidence should not receive the opinion of an expert on the ultimate (factual) issue for its decision. Often the tribunal will be composed of an expert or experts in the relevant field of knowledge, and the supposed danger of a court paying undue regard to the expert's opinion on the ultimate issue will not exist. Where the opinion is that of a non-expert, involving no more than an inference from facts of which he can give direct evidence which the tribunal can just as readily make, there are said to be good reasons to permit the evidence to be received, namely that freeing the witness from artificial constraints lets him express his thoughts rationally and that 'the expression of inferences and opinions by lay witnesses when they are in a position to contribute informed ideas not in the traditional form of facts can assist the court considerably'.[119]

A CAT can therefore accept expert opinion on an ultimate issue, but it should exercise caution when considering what weight, if any, to afford it. Even where the expert evidence is uncontradicted, a CAT is not bound to decide the case in conformity with it. This is especially so in tribunals with specialist members who have expertise in the relevant subject matter.[120] A CAT cannot abdicate its duty to decide the case for itself.[121]

Adversarial and preconception bias

There exists a dilemma faced by courts and tribunals relating to expert evidence:

> On the one hand: it permits parties to present their case as they wish; and it can help courts and tribunals to ascertain the truth and to exercise discretionary powers. On the other hand: ... true independence of the witness is nearly always in question.[122]

The issue of biased expert witnesses is one that affects all courts and tribunals irrespective of whether or not the rules of evidence apply. However, without the application of the rules of evidence, which emphasise the importance of neutrality and independence,[123] the capacity of CATs to manage this bias is more limited. In this context, bias means adversarial and preconception bias.

Preconception bias arises from the expert's personal preconceptions. This bias exists because every expert witness is likely to base their opinions on a particular set of assumptions or beliefs. For example, a psychiatrist may prefer a behaviourist approach rather than a psychoanalyst approach.[124]

Although difficult to detect, preconception bias can be managed through the application of rules and codes of conduct governing the preparation of expert reports. Requirements such

118 *Venus Enterprises Pty Ltd v Parramatta City Council* (1981) 43 LGRA 67, 69.
119 Giles, above n 4, 240–1 (footnotes omitted); and *South Australian Housing Trust v Lee* (1993) 81 LGERA 378, 384–5.
120 *South Australian Housing Trust v Lee* (1993) 81 LGERA 378, 384–5; *Pyramid Pacific Pty Ltd v Ku-ring-gai Council* (2006) NSWLEC 522 [78].
121 Kildea, above n 11, [LECA.38.20]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 [43].
122 Stuart Morris, 'Getting Real About Expert Evidence' (Speech presented at the National Environmental Law Association Conference, Canberra, 13–15 July 2005) 1.
123 Ibid 2.
124 NSW Law Reform Commission, *Expert Witnesses*, Report No 109 (2005) 70.

as the disclosure of the assumptions and materials upon which an expert opinion is based will assist a CAT in detecting when an expert is expressing a particular preconception, thereby allowing that preconception to be challenged.

Adversarial bias results from the operation of the adversarial system. It arises in circumstances where an expert is engaged (and remunerated) by a party, causing them to express an opinion which favours that party. In these circumstances, the expert witness becomes an advocate for a particular party in contravention of their overriding duty to the CAT.[125]

This is what Sir George Jessell referred to as early as 1873 as the phenomenon of 'paid agents':

> Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him.
>
> Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias. I have known the same thing apply to other professional men, and have warned young counsel against that bias in advising on an ordinary case. Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.[126]

Similar comments have been made about a 'breed of expert witnesses' who act as a 'hired gun,' appearing time and time again for the same client.[127] In *Dasreef Pty Ltd v Hawchar* the High Court commented upon on the emergence of a market for experts appearing in legal proceedings.[128]

The NSW Law Reform Commission has divided adversarial bias into three types:[129]

a. deliberate adversarial bias, which occurs when an expert deliberately tailors their evidence to advantage the party engaging them;

b. unconscious adversarial bias, which occurs when the expert is unconsciously influenced by the fact that they are paid or appointed by a single party and reflexively tends towards opinions that support that party; and

c. selection adversarial bias, which occurs when a party to the proceedings reviews multiple experts in a field and deliberately chooses one whose interpretations and opinions support their case.

The need to ensure that expert witnesses act objectively when providing evidence to a CAT is paramount. Evidence tainted by bias can result in a flawed CAT decision being made, especially given the function being performed by the decision-maker. Irrespective of the species of adversarial bias, its corrosive effect undermines the administration of justice in all decision-making fora.

The practice notes, procedural directions and guidelines imposed on experts serve to mitigate the existence of adversarial bias. But, as was pessimistically remarked by one judicial officer:

125 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 [56].
126 *Abinger v Ashton* (1873) LR 17 Eq 358, 374.
127 Morris, above n 122, 3.
128 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 [56].
129 NSW Law Reform Commission, above n 124, 72–3.

> It is one thing to impose a theory of neutrality upon experts. But I doubt that an assertion that experts must be independent from those paying for their evidence will ever work.[130]

Nevertheless, by reason of their inquisitorial character and their ability to 'inform themselves in any manner they see fit', CATs have a distinct advantage over courts, as they need not rely upon exposure of bias through cross-examination.

For example, in *Lowe v Kerang Shire Council*,[131] an expert acoustic consultant gave evidence that a proposed salt processing plant in rural Victoria would have had unacceptable noise impacts on the adjoining property. The expert deliberately avoided making any reference to potential noise mitigation measures which could have been incorporated into the proposed design. The AAT questioned him on the issue, revealing that there was a range of reasonable, practical and effective noise mitigation measures available to the proponent. When asked why he had not disclosed these earlier, he candidly stated that he felt that he was not under an obligation to do so because he had been called to give evidence on behalf of the adjoining property owner. The AAT rejected the expert's opinion on the adverse noise impacts, finding it biased and unfair.

There is more than one way to skin a CAT

So how should CATs assess the probative value of expert evidence in order to determine whether or not to admit it? According to the Council of Australasian Tribunals' *Practice Manual for Tribunals*,[132] it should be done by adopting a common-sense approach[133] and by recourse to the rules of evidence as a guide.[134]

In this context, Aronson, Groves and Weeks have identified some useful principles for CATs to apply:[135]

a. the rules of evidence are best regarded as facultative;

b. an exemption from the rules of evidence is intended to provide procedural flexibility but not to displace logic or reasons;

c. a decision-maker freed from the rules of evidence must still consider whether the material it can take into account should be taken into account;

d. the touchstone for admitting evidence is usually whether the material is rationally probative (which will include whether it is relevant);

e. provisions which free tribunals from the rules of evidence do not allow them to draw inferences or jump to conclusions which the available material does not adequately support; and

f. while the exclusionary rules of evidence may not apply to exclude the evidence from being admitted, the specific rationale for that exclusionary rule can be taken into account in determining what weight, if any, to give to the evidence. In *Kevin v Minister for the Capital Territory*,[136] the Senior Member opined that s 33 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the provision exempting the AAT from the rules of evidence), when read as a whole, required the Tribunal 'to consider that at least the principles

130 Morris, above n 122, 3.
131 Unreported, 1993, summarised in Code, Byard and Porritt, above n 56, [434,685.50].
132 Pamela O'Connor, Ian Freckleton and Peter Sallmann, *Council of Australasian Tribunals Practice Manual for Tribunals* (Council of Australasian Tribunals, 4th ed, 2017).
133 Ibid 138.
134 Ibid 117; *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492.
135 Aronson, Groves and Weeks, above n 4, 609–10.
136 (1979) 37 FLR 1, 2.

underlying a rule of evidence, if not the strict rule itself, may offer clear guidance as to how it should inform itself'.

There are three additional factors that CATs should consider in assessing the probative value of any expert evidence. First, they should consider the expert's qualification to give the evidence,[137] as demonstrated by their training or practical experience in the relevant discipline. Whether academic qualifications or practical experience is more important will depend largely on the subject matter of their evidence. For example, where the evidence concerns the attitudes of a particular community, personal experience with that community may be sufficient to constitute specialised knowledge.[138] Conversely, more technical or scientific expert evidence will be more likely to demand demonstrated academic endeavour.

CATs should, however, be aware of the dangers of over-reliance on an expert's qualifications as an indicator of the probative value of their evidence. Direct evidence of the reliability of professed expertise, such as a clear reasoning process based on proven facts, will invariably carry more weight than employment history and academic qualifications.[139] This issue is likely to be less problematic in CATs where members often possess specialist qualifications in the subject matter of the dispute they are adjudicating.

Secondly, CATs should consider whether the field of knowledge is sufficiently advanced for the evidence to be reliable.[140] This is particularly important where a CAT is hearing expert evidence in new and emerging fields of expertise. For example, a decade ago the reliability of facial recognition software to identify a suspect in a criminal trial due would have been questionable. Today this technology is used widely (for example, to identify inbound travellers arriving into Australia). By contrast, bite mark evidence has now been thoroughly discredited.[141]

Thirdly, CATs should consider whether the theory underpinning the expert opinion has general acceptance within the relevant scientific community.[142] It may be necessary for a CAT to defer to a community of experts in a particular discipline. For example, it is generally accepted by the climate science community that human-induced climate change is a reality. An expert opinion to the contrary proffered to a CAT would therefore carry little weight.

Finally, early and often, case management is essential. Case management can manage expert evidence in a manner which proactively seeks to mitigate many of the issues described above.[143] Through case management a CAT can avoid irrelevant expert evidence or limit the extent to which expert evidence of low probative value is sought to be relied upon by the parties, resulting in savings in time and costs to the CAT and the parties. Similarly, orders can also be made mandating joint reports, the use of concurrent evidence, or court appointed experts.[144]

137 Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts* (LexisNexis Butterworths, 6th ed, 2017) 762; Brian Preston, 'Science and the Law: Evaluating Evidentiary Reliability' (2003) 23 *Australian Bar Review* 263, 291.

138 *R v Yildiz* (1983) 11 A Crim R 115.

139 Ligertwood and Edmond, above n 137, 760.

140 Ibid 763.

141 *R v Carroll* (1985) 19 A Crim R 410; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521.

142 Ligertwood and Edmond, above n 137, 765.

143 Case management directions relating to expert evidence can be made in NCAT under cl 23 of the NCAT Procedural Direction and in the Land and Environment Court under a combination of s 38(4) of the LEC Act and the Practice Notes for proceedings in Classes 1, 2 and 3. VCAT may appoint its own expert under cl 7 of Sch 3 of the *Victorian Civil and Administrative Tribunal Act 1998* or a special referee under s 95 of that Act.

144 See, for example, Preston, above n 1; Peter Rose, 'The Evolution of the Expert Witness' (2009) 23 *Australian Journal of Family Law* 1; Gary Downes, 'Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?' (2006) 15 *Journal of Judicial Administration* 185.

A CAT always lands on its feet

Given the increasingly high cost of litigation and the diminishing allocation of judicial resources resulting in stagnation in the final resolution of matters in the court system, CATs will continue to play an indispensable role in the administration of justice in New South Wales and other states and at the Commonwealth level. In enacting freedom from the confining strictures of the rules of evidence, legislatures have mandated that form ought not trump substance in reviewing the exercise of administrative power in CATs. Were it otherwise, the overriding objectives of their creation would be subverted.

Contrary to the initial fears of courts and commentators alike, an evidential free-for-all has not resulted. Rather, through the development of appropriately calibrated practice notes, guidelines and directions, supported by evolving sympathetic case law, the rules of evidence have continued to inform CAT practice and procedure — especially that relating to the receipt and use of expert evidence — in a manner that seeks to guarantee fairness to all.

In short, if a CAT finds itself falling, provided that the principles discussed above are adhered to, rather than bounce, the CAT will find that it always lands on its feet.

Remedies for government liability: Beyond administrative law

Janina Boughey, Ellen Rock and Greg Weeks*

Control of government power is traditionally regarded as the province of administrative law. To the extent that other causes of action (such as claims in equity, contract and tort) can be brought against government, such claims are typically treated as a secondary, rather than primary, function of the law. The topic of government liability outside traditional public law parameters is in turn treated as something of a specialist topic, rather than a core area of legal doctrine. Placing the law into spheres of 'public' and 'private' — and the further subcategorisation of causes of action within those spheres — offers the promise of neat categories that can be deployed to study legal doctrine in the abstract. However, legal practitioners, particularly those involved in litigation, learn quickly that clients are rarely interested in the intricacies of legal doctrine that might be thrown up by their case. Lawyers are interested in the law; clients want to know about outcomes: what remedy they might get, their chances of getting it and what seeking it will cost them. On that reckoning, there are few things as useful for a practitioner to know in detail as the various remedies that might assist their clients. Where the case is one that involves harm occasioned by a government defendant, one unfortunate symptom of academic attraction to 'public' and 'private' law categories is to obscure the many and varied ways in which the law might respond to that harm.

Approaching legal doctrine through this dichotomous lens is not only a limitation from a practical perspective. Rather than treating government liability as a specialist topic, there is much to be gained from gathering together the various 'public' and 'private' claims that can be made against government. By adopting a wholesale view of the field of 'government liability', we are better able to identify common themes and connections between areas of law. While it is true that the capacity to obtain remedies against government is full of specialist doctrine that does not apply directly to private bodies, we can learn much about these general doctrines by painting a comprehensive picture of government liability across the realms of public and private law. This article explores the main public and private law 'remedies' available against governments, their benefits and limitations, and the links between them.

Dividing 'public law' and 'private law'

Collecting doctrines and remedies under the broad 'compendium' headings of 'public law' and 'private law' is a recent development,[1] albeit one which makes a distinction lacking a conceptual basis.[2] Beneath each compendium heading, smaller subheadings are included as 'silos'. These subheadings — which in private law include contracts, torts,[3] equity, restitution and civil practice in litigation — are older than the compendium headings above them but are still of relatively recent origin.[4] They belong within 'private law' on the

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1 See Jason NE Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 39, 41.

2 Carol Harlow, '"Public" and "Private" Law: Definition Without Distinction' (1980) 43 *Modern Law Review* 241.

3 Prior to the middle of the 20th century, 'tort law was conceived of and practised as a collection of unrelated writs': David W Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 770. It remains preferable to refer to the law of *torts*, since the legal doctrines under that heading cannot truly be unified in the sense that talking of a law of *tort* might suggest.

4 For example, restitution has a history going back to *Moses v Macferlan* (1760) 2 Burr 1005. However, its arrangement as a body of law has only relatively recently been acknowledged widely: see Robert Goff and Gareth H Jones, *The Law of Restitution* (Sweet and Maxwell, 1966); Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985). The same is true of public law, in which administrative law is a relatively recent invention: Varuhas, above n 1, 42–3.

basis that they create, regulate and enforce relationships between individuals, or between individuals and government where the latter derives no special position or privilege from its status; by contrast, 'administrative law and criminal law [belong] entirely to the sphere of public law'.[5]

Like private law, public law also includes 'silo' subheadings within which writs and forms of action might be classified, such as administrative law.[6] However, as Allsop CJ warned in his 2019 Whitmore Lecture:

> [To speak of 'administrative law'] may for some purposes be too narrow and too evocative of the abstraction of administration. Administrative law is better conceptualised as part of the law that controls and shapes public power. It is not separate and distinct from fields of law, principle and conceptions that likewise deal with public power, such as the criminal law and the law of bankruptcy. One only needs to recall that one of the most influential judgments of the High Court in examining the exercise of discretionary power[7] was a sentencing appeal to appreciate this proposition'.[8]

Private law subjects are joined by a 'through-line': they are at base about relationships and obligations. It is harder to draw a 'through-line' so neatly between subjects under the heading 'public law'. Indeed, that term tends only to describe administrative law and constitutional law. Criminal law and bankruptcy and insolvency law each has its own concerns; and taxation law and industrial law both sit between public and private law as much as they do under either heading. The involvement of government, even marginally, is the point that these subjects have in common. It is hard to connect them more specifically than that.

Adherents of the public–private dichotomy view the principles, rules, procedures and remedies available in public and private law as being informed by different rationales and serving different purposes. A common example is that, if Person A punches Person B, there is more than one possible legal response. Public law proceedings might follow, in which the state prosecutes Person A for criminal assault (no doubt calling Person B as a witness), and the considerations in passing sentence include Person A's rehabilitation, the protection of the public and the need to punish Person A. There might also be private law proceedings relating to the same incident, in which Person B brings an action for the tort of battery and seeks damages to compensate them for their injuries. It is usually necessary to determine whether a particular situation should be governed according to public or private law principles, as one will usually be more apt than the other. Considerations in the example above might include the likelihood that Person A has sufficient money to meet an order for damages.

Notwithstanding the limitations of the approach which separates public from private,[9] the modern law school curriculum is broken up into the 'silos' that fall under the compendium headings of private and public law.[10] Hence, a student will study torts, contracts, criminal law, administrative law and so forth. Organisation of the curriculum in law schools has, of

5 *Wake v Northern Territory* (1996) 5 NTLR 170, 182 (Martin CJ and Mildren J); citing the definition of 'private law' in the *Oxford Companion to Law* (Clarendon Press, 1980).

6 Mark Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179, 183–4.

7 *House v R* (1936) 55 CLR 499.

8 Chief Justice James Allsop, 'The Foundations of Administrative Law' (Speech delivered at the 12th Annual Whitmore Lecture, Council of Australasian Tribunals, NSW Chapter, 4 April 2019).

9 Illustrated by the fact that evidence and procedure subjects cannot be said to fit into either public or private law.

10 A discussion paper called 'Redrafting the Academic Requirements for Admission', circulated by the Law Admissions Consultative Committee (LACC) during 2019, called for 'revised descriptions' of the standard 'Priestley 11' subjects developed for LACC by a committee chaired by Justice LJ Priestley of the NSW Court of Appeal for LACC in 1992.

course, changed over time, as have the names of these subjects.[11] However, many of the subjects which have been taught consistently for over a century were initially developed for the benefit of only one category of people: the authors of textbooks.[12] Collecting certain doctrines and causes of action together under a generic name had much to recommend it, not least that it created a convenient way of organising classes for lecturers. We are not here to knock the use of convenient labels, provided we do not forget what the labels obscure.

What was lost when legal subjects started to take their now familiar form was the understanding that practitioners had always had (and the best of them still have) that the law does not really work only as a collection of 'silos'. Students who go on to careers in legal practice learn quickly that there is rarely a case which is solely about property law or contains only questions of evidence law.[13] Public lawyers can go further and say that there has never been a case that is *only* about judicial review. Administrative law almost universally shares the stage with some other legal subject matter. This might be criminal law (for example, was I prosecuted under a properly enacted law?);[14] or property law (for example, do my proprietary rights protect me from statutorily approved destruction of my property without a hearing?);[15] or contract law (for example, can a public authority breach its contract with me and not be liable for damages?).[16] Legal invalidity is an element of causes of action in tort[17] and restitution.[18] Administrative law and equity have deep and abiding links that go back centuries.[19] Countless administrative law points have arisen in matters about migration issues and social security. Our point is that there is virtually no area of law that administrative law cannot and does not touch.

It does not follow that administrative law provides all the answers where government liability is alleged. There is an important distinction between establishing that a public authority has exceeded its authority and obtaining the remedy or remedies from public authorities that are most advantageous to one's client. Government liability comes in various forms and the remedies by which it is addressed are also various. Each remedy is a tool, designed to perform a specific, specialised task. Judicial review's remedies are important tools, adapted to perform a certain set of tasks, and extremely effective in specific circumstances. They are also inherently limited: their effectiveness where a public authority acts beyond the scope of its legal powers is undoubted but does not operate far

11 For example, the first Australian textbook on administrative law appeared years after textbooks in comparable subjects and was only 118 pages long: Wolfgang Friedmann, *Principles of Australian Administrative Law* (Melbourne University Press, 1950). One of the reasons for this was that administrative law was taught until at least the 1970s in most Australian law schools as an add-on to the constitutional law course.

12 For a detailed history of the writing of legal treatises, see AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *University of Chicago Law Review* 632.

13 Criminal law is arguably an exception, although there are abiding connections between criminal law and torts, especially intentional torts. Their objects are different, as are the parties to any litigation, but many acts which lead to tort actions might also lead to criminal prosecutions. Some torts and criminal offences even go by the same name — eg assault, misfeasance in public office. This is in part a hangover from the fact that, early in the development of the common law, 'crime and tort were not sharply distinguished': Kenneth W Simons, 'The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives' (2008) 17 *Widener Law Journal* 719, 719.

14 See Mark Aronson, 'Criteria for Restricting Collateral Challenge' (1998) 9 *Public Law Review* 237. There were formerly explicit procedural links between criminal and administrative law: see eg John Shortt, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition* (Wm Clowes and Sons Ltd, 1887).

15 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

16 *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454.

17 In false imprisonment, where one of the elements is that the defendant lacked legal authority: see eg *Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637.

18 In an action under the 'Woolwich' reason for restitution: see *R v Inland Revenue Commissioners; ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400 and *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

19 See JJ Spigelman, 'The Equitable Origins of the Improper Purpose Ground' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 147; PD Finn, 'Public Trusts, Public Fiduciaries' (2010) 38 *Federal Law Review* 335.

beyond that. Furthermore, they have developed from highly technical writs but not any principled or normative basis.[20]

Government liability in 'public law'

Public law is a contestable heading. It is sometimes defined as the laws governing the relationships between government and individuals, which would certainly include criminal law, taxation and a wide range of other topics.[21] If, however, it is defined as the legal principles concerned with the scope and limits of public power[22] then many aspects of criminal law would not fall within its scope. In law schools and textbooks, the latter, narrower definition tends to prevail: 'public law' subjects include constitutional law and administrative law, and commonly now an introductory course set out on more theoretical lines. In the section which follows, we take this approach, though use the term both more narrowly (we claim no expertise in either constitutional law or theory) and more broadly, to include certain subject matter that commonly falls outside the scope of administrative law as it is taught.

Tribunal justice

There is a belief in some parts of the profession and the academy that tribunals and merits review do not deserve to be taken as seriously, or warrant as much attention, as judicial review by courts.[23] Tribunals are creatures of statute, built around the provision of appeals against decisions of public authorities on their merits. Notwithstanding their long history,[24] tribunals do not have the same common law pedigree enjoyed by state Supreme Courts or the legitimacy bestowed on the High Court by the *Constitution*.[25] There is consequently a view that they provide a forum for review which is somehow inferior. Tribunals and their members nonetheless tend to be happy in their own skins,[26] largely perhaps because they are too busy to be concerned with the way they are perceived by those not directly involved in their processes.

Year after year, however, tribunals settle many times more cases than courts, in addition to which they are more accessible and it is easier to establish the basis for relief. Tribunals have immense practical utility that does not rely on the sort of legitimacy enjoyed by courts.[27] Furthermore, the importance of tribunals has only increased with time. Take, for example, Robertson J's observation from before the existence of the Federal Court of Australia, when the Administrative Appeals Tribunal (AAT) was in its infancy:

20 Aronson, above n 6, 185; Stephen Gageler, 'Administrative Law Judicial Remedies' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 368, 368.

21 Chief Justice James Allsop, 'Values in Public Law' (Speech delivered at James Spigelman Oration, Sydney, 27 October 2015).

22 Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) 1; Chief Justice Robert French 'Public Law — An Australian Perspective' (Speech delivered at Scottish Public Law Group, 6 July 2012).

23 This is demonstrated in many important ways but also some which are no more than symbolic — for example, the fact that as many administrative law courses teach tribunal justice and merits review *before* judicial review as *after* it, suggesting disagreement about its proper place.

24 The General Commissioners of Income Tax was created by Pitt the Younger through the *Income Tax Act 1799* (UK) and functioned for over 200 years, becoming the oldest extant tribunal in the UK: Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge University Press, 2006) 2. It was eventually replaced by the Tax Chamber of the First-tier Tribunal. There were also many merits review tribunals in Australia prior to the creation of the Administrative Appeals Tribunal (AAT): see Justice JR Kerr et al, *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 (1971) (Kerr Committee Report) 6–8 [18].

25 Nor, however, does the Federal Court of Australia, which is nonetheless of vital importance: see Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018).

26 Although the AAT, in particular, tends to be a target for political attack: see eg Greg Weeks, 'Attacks on Integrity Offices: A Separation of Powers Riddle' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 25, 34–5.

27 The AAT is said to have represented 'a new and substantially unprecedented regime of administrative merits review': *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629, [14] (Kiefel CJ, Keane and Nettle JJ); citing DC Pearce, 'The Australian Government Administrative Appeals Tribunal' (1976) 1 *University of New South Wales Law Journal* 193, 193.

> Which courts were hearing federal administrative law cases as the Federal Court was being established and being given judicial review jurisdiction? First, there were very few such cases. Second, such cases as were brought were heard by either the High Court or by the State Supreme Courts exercising federal jurisdiction. By my count in 1976 the High Court decided only two federal administrative law cases and those were in its original jurisdiction …[28] It now seems remarkable that there was only one case under the *Migration Act* [*1958* (Cth)] in the High Court in a calendar year. In 1977 that Court decided only three federal administrative law cases …[29]

As remarkable as the dearth of migration matters might seem looking back over 40 years, it is also notable that two of the cases to which Robertson J referred were heard by a High Court judge sitting alone — Stephen J in both cases.[30] The Federal Court eventually saw to it that High Court judges sit alone in a very limited number of circumstances and has picked up a great proportion of matters in federal jurisdiction. For example, the Court's Annual Report for 2017–18 reported:

> In 2017–18, the total number of filings (including appeals) in the Court increased by 4 per cent to 5,921. Filings in the Court's original jurisdiction (excluding appeals) remained consistent at 4,659.[31]

By contrast:

> [The number of applications lodged with the AAT in 2017–18] was 14 per cent higher than the number lodged in 2016–17, which was 24 per cent higher than the number of lodgements in the previous year. Finalisations in the reporting period fell by five per cent from the 42,224 applications finalised in 2016–17. The overall number of applications on hand at 30 June 2018 is 54 per cent higher than at 30 June 2017.[32]

By sheer weight of numbers, the AAT deals with many times more matters in a year than the court with the equivalent jurisdiction.[33] The significance of tribunals is also marked at state and territory level, given that, with the exception of Tasmania, each now has a single dominant tribunal.[34] Tribunals do not conduct judicial review and are not limited to seeking legal (or jurisdictional) error as a basis for granting relief. They provide the 'correct or preferable' decision on the facts before them — an expression the definition of which was expressed by Kiefel J to be based on the following distinction:

28 *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475; *Salemi v MacKellar (No 1)* (1976) 137 CLR 388. Two other cases decided in 1976 are familiar to most Australian administrative lawyers — namely, *Paull v Munday* (1976) 9 ALR 245 and *Buck v Bavone* (1976) 135 CLR 110. However, both were appeals from South Australia and *Buck v Bavone* is probably better understood as a constitutional matter. Similar reasoning excludes from a reckoning of 1977 cases matters such as *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 and *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487.

29 *Green v Daniels* (1977) 13 ALR 1; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396; *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461. See Justice Alan Robertson, 'The Federal Court and Administrative Law: How Does the Court Deal with Findings of Fact on Judicial Review?' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 83, 90.

30 *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475; *Green v Daniels* (1977) 13 ALR 1.

31 Federal Court of Australia, *Annual Report 2017–18*, 17 <http://www.fedcourt.gov.au/__data/assets/pdf_file/0003/52716/AR-2017-18.pdf>. The Federal Circuit Court of Australia finalised over 95 000 matters in the same period, but an overwhelming majority (87 015) were in family law, with the remainder spread across bankruptcy, migration, industrial law and other general federal law matters: Federal Circuit Court of Australia, *Annual Report 2017–18*, 8 <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fc867070-55d9-423b-a1ea-c747d671456c/2941-FCC_AnnualReport_2017-18_WEB.pdf?MOD=AJPERES&CVID=>.

32 Administrative Appeals Tribunal, *Annual Report 2017–18*, 24 <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201718/AAT-Annual-Report-2017-18.pdf>.

33 The AAT's workload varies significantly between divisions: see AAT, *Annual Report 2017–18*, 25.

34 *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act); *State Administrative Tribunal Act 2004* (WA) (SATWA Act); *ACT Civil and Administrative Tribunal Act 2008* (ACT) (ACAT Act); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act); *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act); *South Australian Civil and Administrative Tribunal Act 2013* (SA) (SACAT Act); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (NTCAT Act).

> 'Preferable' is apt to refer to a decision which involves discretionary considerations. A 'correct' decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the [AAT] agrees.[35]

By necessity, such an approach requires tribunals to have regard to the relevant statutory provisions in determining what is correct or preferable in a given case.

We are also told that a tribunal's 'function and duty … is to review administrative decisions *on their merits*'.[36] Like 'correct or preferable', the 'merits' does not owe its provenance to legislation[37] but is a turn of phrase that developed through the common law. However, in contrast, the 'merits' of a matter is a metaphorical concept that is not apt to be defined in the way that 'correct or preferable' was by Kiefel J in *Shi v Migration Agents' Registration Authority*. As a method of decision-making distinct from that performed by judicial review courts (where establishing a legal or jurisdictional error is a prerequisite to obtaining a remedy), tribunals can facilitate greater access to justice. To put it simply, the hallmark of tribunal justice is the capacity to ask for (and stand a chance of obtaining) the thing you want: the licence, or the visa, and so forth. While it is an oversimplification, there is nonetheless some truth to the statement that judicial review only gives a successful applicant the chance to go back to the start and do it all again.

Judicial review

Many would regard judicial review as the centrepiece of administrative law. Its importance is reflected in modern law school curriculums, academic commentary and texts, which tend to pay it far more attention than other 'administrative law' review mechanisms. To some degree, the focus of lawyers and academics on judicial review is understandable given its constitutional entrenchment[38] and complexity relative to other forms of administrative law review (meaning that more time and attention are needed to unpick that legal complexity). However, such a view does not reflect the practical utility of judicial review remedies compared with other forms of relief; nor does it reflect the many significant limitations of judicial review and its remedies.

Judicial review remedies are overly technical, complicated and limited in application. As Professor Kenneth Culp Davis famously wrote of American judicial review in the first edition of his *Administrative Law Treatise*, published in 1958:

> An imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between the remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generality, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.[39]

Several Australian governments have sought to address these issues by enacting judicial review statutes and by simplifying the process for applying for judicial review remedies.

35 *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286, 327 [140] (citations omitted).
36 *Re Control Investments Pty Ltd & Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88, 91 (emphasis added).
37 Although, as Kiefel J explained, 'it is often used to explain that the function of the [AAT] extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision': *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286, 327 [140].
38 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
39 Kenneth Culp Davis, *Administrative Law Treatise* (West Publishing Company, 1958) 388.

These attempts have been only partially successful.[40] They have undoubtedly made aspects of judicial review simpler and fairer — in particular, the availability of reasons and standing to seek review. But some new problems have also been created, such as the limits associated with the jurisdictional formula set out in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).[41] Furthermore, as recent cases such as *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*,[42] *Hossain v Minister for Immigration and Border Protection*[43] and *Kaldas v Barbour*[44] demonstrate, there remain many aspects of judicial review remedies that are yet to be resolved.[45] This is in part due to the fact that judicial review also contains many holes: areas into which its principles and remedies do not seem to reach.[46] These include its limited recognition of 'soft law'[47] and the fact that privatised and outsourced public powers are not (yet) subject to its remedial reach.[48]

Perhaps most importantly from a client's perspective, judicial review remedies will often be deeply unsatisfying. Where a government official has acted unlawfully in making a decision to deny a person a benefit, such as a social security payment, visa or licence, a reviewing court cannot order the government to give the person that benefit. Where government has unlawfully revoked a person's benefit or entitlement, a reviewing court can quash that decision but cannot ordinarily make an order preventing the government from remaking its decision to the same effect, provided that the government acts according to law in doing so. Similarly, courts can order a government official to exercise a power that they are under a duty to exercise but cannot direct the official as to *how* that power must be exercised. All of this tells us that, from the perspective of the wronged individual, restoration via judicial review is largely a matter of coincidence rather than design.[49] By contrast, tribunals usually can provide clients with the substantive outcomes they actually want.

Despite its many limitations, judicial review plays a pivotal role in ensuring that governments are held to account for their actions. It ensures, at the very least, that governments do not exceed the legal limits of their powers, and the principles and presumptions that courts apply to the exercise of government powers reflect important values including fairness and rationality.[50] The constitutional entrenchment of judicial review also means that judicial review and its principles play a symbolic role in defining the relationships between the three branches of Australian government.[51] In the words of the High Court, the constitutional entrenchment of judicial review ensures that there cannot be 'islands of [government] power immune from judicial supervision and restraint'.[52]

40 See generally Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79; Matthew Groves, 'Should We Follow the Gospel of the ADJR Act?' (2010) 34 *Melbourne University Law Review* 452; Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (September 2012) 72–7.

41 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Griffith University v Tang* (2005) 221 CLR 99.

42 (2018) 92 ALJR 248.

43 (2018) 92 ALJR 780.

44 (2017) 326 FLR 122.

45 See Lisa Burton Crawford and Janina Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30 *Public Law Review* 18.

46 Adrian Vermeule has discussed administrative law's 'black' and 'grey' holes in the US context: 'Our Schmittian Administrative Law' (2008–2009) 122 *Harvard Law Review* 1095.

47 See Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016).

48 See Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *UNSW Law Journal* 316.

49 Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24 *Australian Journal of Administrative Law* 189, 198–9.

50 Chief Justice RS French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 25.

51 See generally Stephen Gageler, 'The Constitutional Dimension' in Groves (ed), above n 50, 166.

52 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581.

Remedies under human rights statutes

Over the past two decades, three Australian jurisdictions have enacted human rights statutes. The Australian Capital Territory (ACT) was first in 2004,[53] followed by Victoria in 2006,[54] and most recently Queensland in 2019.[55] These are different from the bills of rights in the United States and Canada in that the Australian human rights statutes do not give courts the power to strike down legislation that disproportionately infringes individual rights. What the Australian statutes do, however, is provide for human rights based legal limits on administrative powers. Specifically, the statutes provide that public authorities are required to give due consideration to human rights when making decisions and to act in a way that is compatible with human rights when exercising their powers.[56]

These are legal limits on administrative power like any other imposed by statute. Accordingly, the remedies for a public authority breaching their human rights obligations will be the same as if they breach any other legal limit on their power. Judicial review remedies will be available with respect to unlawful actions, and other remedies may be available should the breach of rights fulfil the requirements of the relevant cause of action. However, private law remedies are somewhat different, since all the statutes prohibit courts from awarding damages where a public authority has breached an individual's rights.[57]

The Victorian and Queensland human rights statutes expressly 'piggy-back' human rights claims onto other, existing legal remedies, while the ACT statute has a little more remedial flexibility. The new Queensland legislation confers a conciliation function on the Queensland Human Rights Commissioner.[58] Thus, determining what remedies might be available where the ACT, Victorian or Queensland government has breached a client's rights requires an understanding of the human rights statutes as well as other common law and statutory remedies available to remedy unlawful government actions.

Government liability in 'private law'

Relief under various 'public law' doctrines for 'private law' matters can be difficult to obtain. A prominent example is that judicial review has generally shied away from coverage of 'decisions to make or not to make a contract, or decisions under a contract',[59] either at common law[60] or under the ADJR Act.[61] Broadly speaking, there is a good reason for such a division: contractual power, while much used by government,[62] is not a 'governmental' power but one that governments share with natural persons. For that reason it fits ill with a remedial system hinged on the presence of an excess of power.

53 *Human Rights Act 2004* (ACT).
54 *Charter of Human Rights and Responsibilities Act* 2006 (Vic).
55 *Human Rights Act 2019* (Qld). The Commonwealth Parliament has enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), but it does not seem to have any remedial consequences. See generally Lisa Burton Crawford, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019).
56 *Human Rights Act 2004* (ACT) s 40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2019* (Qld) s 58.
57 *Human Rights Act 2004* (ACT) s 40C(4); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3); *Human Rights Act 2019* (Qld) s 59(3).
58 *Human Rights Act 2019* (Qld) Pt 4.
59 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [2.560].
60 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164.
61 *Griffith University v Tang* (2005) 221 CLR 99. See generally Aronson, Groves and Weeks, above n 59, [3.150].
62 Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 6th ed, 2018).

Another example is that Australian courts have all but totally rejected the possibility of obtaining an estoppel against a public entity,[63] except where a private individual would be treated in the same way.[64] It has done so not because it is a private law doctrine but because it fits poorly with other aspects of public law doctrine.[65]

While it is often impossible to force private law remedies onto public law doctrines, it does not follow that private law cannot operate in a public space. Four examples follow of private law remedies that operate in respect of government.

Equitable relief

While equity texts say much about equitable relief,[66] judicial review texts tend to focus only on injunctive and declaratory relief.[67] In its acquisitive way, judicial review has grasped both the injunction and the declaration and decided that they fit within the standard suite of judicial review remedies.[68] It has been aided in this by two circumstances. The first is that injunctive relief is available within the High Court's original jurisdiction under s 75(v) of the *Constitution*. The second is the more recent acceptance that grants of declaratory relief lie within the inherent competence of superior courts.[69] Much has been written about both of these remedies within the scope of public law and we do not intend to rehearse that commentary.

Less has been written about a remedy which, 'once moribund',[70] has subsequently been 'recognised … as an important component of the judiciary's remedial armoury'.[71] Equitable compensation is a remedy which courts of equitable jurisdiction have an inherent power to grant. While it was historically assumed that equity had very little interest in providing compensation for loss, given that it already provided a 'panoply of remedies',[72] Viscount Haldane's speech in *Nocton v Lord Ashburton*[73] in 1914 is considered to have first 'exposed the error of thinking that equity lacked power to award compensation' for the infringement of an equitable right.[74]

Although complex, the scope of this remedial doctrine can be set out briefly. It attaches to breach of one or more equitable duties. In practice, this has often meant those owed by trustees or fiduciaries[75] but more recently 'modern equity has recognised an increased range of equitable duties'.[76] The defendant's liability to pay equitable compensation extends to all loss suffered as a result of the defendant's breach of duty.[77]

63 See *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 210 (Gummow J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 17 (Mason CJ).
64 See eg *Commonwealth v Verwayen* (1990) 170 CLR 394.
65 See Weeks, above n 47, Ch 7.
66 See, eg, JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2014) 605–996; Wayne Covell, Keith Lupton and Louise Parsons, *Covell and Lupton's Principles of Remedies* (LexisNexis Butterworths, 7th ed, 2019) 217–518.
67 See, eg, Aronson, Groves and Weeks, above n 59, Chs 15 and 16; Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 5th ed, 2014) 237–302.
68 Although many books categorise declaratory relief as an equitable remedy (see eg Heydon et al, above n 66, [19-010]), we prefer the view that declarations are a statutory remedy, having been made under statute as long ago as 1850. See Aronson, Groves and Weeks, above n 59, [15.20].
69 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581 (Mason CJ, Dawson, Toohey and Gaudron JJ).
70 Lee Aitken, 'Developments in Equitable Compensation: Opportunity or Danger?' (1993) 67 *Australian Law Journal* 596, 596.
71 Charles EF Rickett, 'Equitable Compensation: Towards a Blueprint?' (2003) 25 *Sydney Law Review* 31, 31.
72 Charles EF Rickett and Tim Gardner, 'Compensating for Loss in Equity: The Evolution of a Remedy' (1994) 24 *Victoria University of Wellington Law Review* 19, 19.
73 [1914] AC 932.
74 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 323 [124] (Mason P).
75 See, eg, the lists included in Heydon et al, above n 66, Ch 23; Covell, Lupton and Parsons, above n 66, Ch 11.
76 Rickett, above n 71, 32.
77 Heydon et al, above n 66, 801 and 869. The authors also consider how a defendant might reduce his or her liability: ibid.

Restitution

While restitutionary doctrine includes both equitable and common law principles,[78] Gummow J has observed that the 'notions derived from equity have been worked into and in that sense have become part of the fabric of the common law'.[79] It applies generally to private law matters, but the English House of Lords (as it was) developed an application of the standard restitution doctrine which applies particularly to the ultra vires exaction of taxation.[80] The *Woolwich* doctrine, as it is called, has not been adopted expressly in Australia. That development may take some time, given that legislation displaces any possibility of applying *Woolwich* in the vast bulk of revenue matters.[81] It is in any case worthwhile to understand that restitution does apply to both private and public bodies generally and to be aware of its specific taxonomy.

Tortious remedies

Government liability in tort has a venerable history. In fact, a claim in damages was historically the primary remedy available to an individual who wished to challenge the legality of government activity.[82] For example, the plaintiff in *Fawcett v Fowlis*,[83] who wished to test the validity of a conviction for failure to contribute to the upkeep of roads, brought proceedings in trespass against the two magistrates responsible for the conviction.[84] The private law cause of action operated as a vehicle to challenge the legality of the exercise of public power and, in this respect, we can regard the private law of tort as a precursor to modern public law of judicial review. The High Court has acknowledged this legacy on a number of occasions[85] and, as Gummow J has urged, this history 'demonstrates the need to avoid a narrow classification of what is involved in "administrative law" litigation'.[86]

The subjection of the government to liability in tort is relatively straightforward in cases where the government stands in an analogous position to that of a private party. So, for example, it is generally uncontroversial that the government can be held liable in negligence where an employee suffers injury in an unsafe government workplace or where a legal entrant suffers injury on government-owned land. Even in those seemingly straightforward cases, however, it is necessary to bear in mind that the government does not stand in precisely the same position as a private individual. Its damages payments are made out of public funds rather than privately amassed resources, it may have responsibilities that are more wide-ranging than those of private individuals,[87] and its motives may be constrained in ways that those of private parties are not.[88] The position becomes even more complex in circumstances where government activities lack a private sphere analogue; the government crafts policy, designs and implements regulatory regimes, and exercises coercive powers in ways that are generally beyond the reach of private individuals. These realities justify a move

78 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 3, citing Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1966). See also Justice Keith Mason, 'What Has Equity To Do With Restitution? Does It Matter?' (Speech delivered at the Chancery Bar Association, Inner Temple London, 27 November 2006).

79 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 554.

80 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (Woolwich).

81 *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509, 538 [87] (Gageler J).

82 Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41(4) *University of New South Wales Law Journal* 1159, 1168–69.

83 (1827) 7 B & C 394; 108 ER 770.

84 The real purpose of the proceeding was 'to try the question of liability': ibid 771 (Lord Tenterden CJ).

85 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 143–44 [17] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *New South Wales v Ibbett* (2006) 229 CLR 638, 648 [38] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *A v New South Wales* (2007) 230 CLR 500, 532 [94] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

86 *Commissioner of Australian Federal Police v Propend Finance Pty* Ltd (1997) 188 CLR 501, 558 (Gummow J).

87 *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 459 [116] (Hayne J).

88 Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 80.

away from Dicey's equality principle,[89] allowing the modification of the ordinary principles of tort to take into account the unique position of government defendants.

There are a number of torts that are particularly well adapted to provide a remedy against government officials. Though rarely fruitful, it is convenient to begin with the tort of misfeasance in public office, which stands alone amongst private law causes of action in applying *only* to public officials.[90] The reason for the rarity of success pursuant to this tort is its high-grade fault elements, which limit its application to cases where a public official intentionally (or recklessly) abuses their powers while intending to (or being reckless as to whether they would) cause harm to the plaintiff. Despite its low rates of success in practice, this cause of action remains symbolically important from the perspective of maintaining government accountability.[91] Other torts that perform particularly well in connection with the misdirected exercise of public power include the intentional torts of battery, assault, false imprisonment and malicious prosecution, which provide remedies in response to threats, physical contact, detention and unwarranted subjection to legal process. While private individuals may equally engage in conduct that engages these torts, the coercive powers and responsibilities afforded to government officials means that we readily see a role for use of these private law causes of action against government.

Liability for these categories of torts generally turns on the legality of a government official's acts, meaning that excess of public power plays a key role in defining the scope of liability in private law. A key example is the tort of false imprisonment, which provides a remedy in cases where the defendant detains the plaintiff without legal authority, with the result that the legality of the detention provides a complete answer to liability. For example, in *Ruddock v Taylor*, the High Court found that immigration officers' power to detain Mr Taylor on the basis of 'reasonable suspicion' that he was an unlawful non-citizen was to be read separately from the invalidity of the underlying visa cancellation decisions; the suspicion informed by the cancellation decisions could be reasonable even though it was subsequently discovered that this basis was legally unsound.[92]

The law of negligence offers a further example of the utility of private law in controlling government power. Unlike the foregoing categories of torts, however, it is capable of imposing liability independently of concepts of public law illegality. As confirmed by McHugh J in *Crimmins v Stevedoring Industry Finance Committee*, 'the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires'.[93] But this does not mean that the public status of a government defendant is irrelevant to the negligence inquiry. Rather than adopting threshold rules or distinctions to limit liability, the Australian courts prefer to take into account a defendant's public status within the scope of the ordinary principles of negligence. So, for example, in favour of imposing a duty of care on a public authority, the courts may take into account a range of factors referable to the power dynamic between government and citizen.[94] The defendant's public status is also relevant in the factors that

89 JWF Allison (ed) and AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Oxford University Press, Oxford, 2013) 100.

90 See eg Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1; Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427; Ellen Rock, 'Misfeasance in Public Office: A Tort in Tension' (2019) 43(1) *Melbourne University Law Review* (forthcoming).

91 Rock, above n 90.

92 *Ruddock v Taylor* (2005) 222 CLR 612, 626 [40] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

93 *Crimmins v Stevedoring Industry Finance Committee* (2000) 200 CLR 1, 35 [82] (McHugh J). Statutory reform may also have muddied the waters in some Australian states: see eg *Civil Liability Act 2002* (NSW) s 43A.

94 See eg *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 254 [114] (Gummow, Hayne and Heydon JJ), 261 [136] (Crennan and Kiefel JJ) (degree of control over the risk); *Crimmins v Stevedoring Industry Finance Committee* (2000) 200 CLR 1, 39 [93] (McHugh J), 85 [233] (Kirby J) (knowledge of the risk); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 597 [149] (Gummow and Hayne JJ) (vulnerability of the plaintiff); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 421 [247] (Kirby J) (plaintiff's reliance on the defendant to prevent the harm).

may tend against the imposition of a duty of care.[95] Again, determining whether liability arises at private law requires attention to the factors which justify treating government defendants differently from private individuals.

Against this background, it is also necessary to consider the impact of statute, which operates to limit government liability in a number of ways. First, we can point to civil liability statutes enacted in the early 2000s, with government liability standing as a key target.[96] Secondly, there are various statutory provisions enacted for the purpose of protecting government bodies and officials from liability. Some operate to protect an official from liability for acts done in good faith,[97] while others shift liability from the individual to the Crown.[98] The effect of such provisions is to confer a degree of immunity for conduct which might otherwise attract liability in tort. Thirdly, and perhaps most relevantly for present purposes, is the more pervasive influence of statute on liability which is said to arise in the context of the exercise of statutory powers. In such cases, statutory interpretation may play a key role in defining the nature of the obligations imposed on a public body or agency, and defining the circumstances in which it will be able to rely on 'legal authority' for its actions.[99]

Relief for breach of contract

The power to enter into contracts is not an area in which governments exercise special 'public' or 'governmental' powers; it is a power that governments share in common with private individuals and corporations. For this reason, the law has generally treated governments as no different from individuals and private companies when it comes to the law of contract. However, there are several important ways in which governments are different from other contracting parties, some of which Australian law has only relatively recently begun to acknowledge.

The first is that the *Constitution* limits the powers of the Commonwealth government to enter into contracts,[100] something which *might* also have implications for the states and territories.[101] The High Court held in the School Chaplains Cases that Commonwealth contracts must be authorised either by legislation or by non-statutory executive power and that legislation purporting to authorise contracting must be within the Commonwealth Parliament's authority. As Nick Seddon has argued, the cases have created considerable uncertainty about when legislation is required to authorise government contracts and what type of legislation will suffice.[102]

Secondly, the officials negotiating contracts on behalf of government are in a different position from private individuals because they are not spending their own money but that of taxpayers. Therefore, the inherent incentives to negotiate the best possible terms do not necessarily apply to government officials. There is also a risk of corruption, which recent

95 See eg *Sullivan v Moody* (2001) 207 CLR 562, 582 [62] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Crimmins v Stevedoring Industry Finance Committee* (2000) 200 CLR 1, 37 [87] (McHugh J), 62 [170] (Gummow J).

96 As per the Terms of Reference, one of the tasks of the Panel of Eminent Persons headed by the Hon Justice David Ipp was to 'address the principles applied in negligence to limit the liability of public authorities': Panel of Eminent Persons, *Review of the Law of Negligence* (Final Report, 2002) Terms of Reference 3(a), ix. For a useful overview, see Mark Leeming, *Statutory Foundations of Negligence*, (Federation Press, 2019).

97 See eg *Imported Food Control Act 1992* (Cth) s 38.

98 See eg *Law Reform (Vicarious Liability) Act 1983* (NSW) s 9B.

99 See eg *Ruddock v Taylor* (2005) 222 CLR 612.

100 *Williams v Commonwealth [No 1]* (2012) 248 CLR 156 (Williams No 1); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 (Williams No 2); known together as the 'School Chaplains Cases'.

101 See Selena Bateman, 'Constitutional Dimensions of State Executive Power: An Analysis of the Power to Contract and Spend' (2015) 26 *Public Law Review* 255.

102 See Nick Seddon, 'Commonwealth Government Contracts, the "Common Assumption" and Statutory Backing' (2018) 25 *Australian Journal of Administrative Law* 157; Nick Seddon, 'Statutory Backing of Commonwealth Government Contracts' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2019) (forthcoming).

experience in New South Wales has highlighted.[103] Australian governments have responded by making procurement rules setting our principles and practices which government officials are required to follow in contract negotiations. At the Commonwealth level these are contained in a legislative instrument,[104] while in the states and territories they are largely contained in policy documents.[105] The source of the rules is significant because it will determine whether a breach has legally remediable consequences. Courts have also found that, where governments invite tenders, this can constitute an offer for a process contract, a term of which may be that the government undertakes to deal fairly and reasonably with tenderers.[106] Breach of these obligations can give rise to damages.[107]

The third way in which governments differ from private contractors is in their greater capacity to terminate, breach or void contracts as a result of the rules against fettering future legislative and executive action.[108] The general principle is that governments and legislatures must be free to govern for the public good and so a government cannot confine its ability to carry out future policies or impede the legislature's powers to enact whatever legislation it wishes. The result is that, in certain circumstances, the government and legislature are, in effect, empowered to break a contractual obligation.[109]

A final issue that arises in relation to some government contracts is their potential to have wide-ranging and significant impacts on the rights, interests and obligations of members of the public who are not party to the contract. For example, where government outsources the provision of public services, such as visa processing or social security decision-making, there is a contract between government and the provider but generally not between the provider and the citizens affected by the service. Both the government and the service provider can sue one another in contract if either breaches the terms of the contract.[110] But can an asylum seeker or social security recipient challenge the actions of the private provider directly? Despite having been the subject of considerable commentary and numerous government reports since the 1980s,[111] the question of when administrative law remedies can and should apply to contractors has not been resolved in Australia.[112] In a few circumstances, parliaments have provided for merits review or ombudsman oversight

103 See *Obeid v R* (2015) 334 ALR 161; *Obeid v R* (2017) 96 NSWLR 155.

104 The Commonwealth Procurement Rules made under the *Public Governance Performance and Accountability Act 2013* (Cth) s 105B.

105 See eg NSW Procurement Policy Framework for NSW Government Agencies, Issued by the NSW Procurement Board, July 2015; Victorian Government Purchasing Board policies <http://www.procurement.vic.gov.au/Buyers/Policies-Guides-and-Tools>; Department of Housing and Public Works, Queensland Procurement Policy 2018.

106 See *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; Ipex ITG Ltd (in liq) v Victoria [2010] VSC 480.

107 See Seddon (2018), above n 102, 388–90.

108 Government contracts which fetter future action are generally said in law to be 'void', and not breached, but there are strong arguments that this may lead to unfair results and that doctrines of severance, frustration or breach might be better approaches: see Seddon (2018), above n 102, 284–6.

109 See eg *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 74 (Mason J); *A v Hayden (No 2)* (1984) 156 CLR 532, 543 (Gibbs CJ), 587–8 (Brennan J); *Northern Territory v Skywest Airlines Pty Ltd* (1987) 90 FLR 270, 294; *NSW Rifle Association v Commonwealth* (2012) 266 FLR 13, 35–6 [96]–[97] (executive necessity); *McGrath v Commonwealth* (1944) 69 CLR 156, 169–70 (Rich J); *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1, 16–19 (Latham CJ) (legislative supremacy).

110 Though it may be difficult to assess damages suffered by a government as a result of a contractor's breach where the damage is to a third party.

111 See eg Administrative Review Council, *The Contracting Out of Government Services*, Report No 42 (1998); Senate Standing Committee on Finance and Public Administration, *Contracting Out of Government Services*, Second Report (1998); Margaret Allars, 'Administrative Law, Government Contracts and the Level Playing Field' (1989) 12 *UNSW Law Journal* 114; Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (Hart, 1997); Mark R Freedland, 'Government by Contract and Public Law' [1994] *Public Law* 86; Michael Taggart, 'The Nature and Functions of the State' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP, 2005) 101.

112 See generally, Aronson, Groves and Weeks, above n 59, 51; Matthew Groves, 'Outsourcing and Non-Delegable Duties' (2005) 16 *Public Law Review* 265; Boughey and Weeks, above n 48, 316.

of outsourced decisions.[113] However, these are ad hoc and far from a systemic or uniform approach to the issue, the significance of which is only likely to increase.

Remedies beyond public and private law

Determining the best remedy for a client who has been adversely affected by some government action may require a practitioner to draw on knowledge from virtually every 'subject' they studied at law school, as well as several topics that many lawyers will not have studied. For instance, in some circumstances, the most effective 'remedy' for a client will not be a strictly legal one delivered by a court or tribunal.

Ombudsman-recommended relief

For an individual who suffers harm at the hands of the government, one of the most powerful practical remedies that may be available is to complain to an ombudsman. The Ombudsman for the Commonwealth commenced operation in 1977,[114] following the Kerr and Bland Committee reports.[115] But this was not the first ombudsman in Australia: Western Australia,[116] South Australia,[117] Victoria,[118] Queensland[119] and New South Wales[120] created ombudsmen's offices before the office of the Commonwealth Ombudsman was established. The remaining states and territories followed quickly,[121] with the result that, a mere 12 years after no Australian jurisdiction had had an ombudsman, all of them did.[122] Harlow and Rawlings described the equivalent phenomenon in the United Kingdom as 'ombudsmania'.[123]

Ombudsmen are 'non-judicial accountability bodies'[124] which have an extremely limited capacity to *require* anything of entities within their statutory jurisdiction, relating either to their complaint-handling or systemic investigation functions. They are nonetheless remarkably effective at dealing with maladministration by such entities. They have the capacity to recommend outcomes that lie beyond the jurisdiction of courts and can therefore frame responses to a broad range of problems to which judicial remedies are ill adapted.[125] More subtly, the processes of ombudsmen and their capacity to investigate and influence administrative behaviour encourage greater cooperation from public officers than judicial remedies, which can even 'encourage parties to adopt an adversarial approach'.[126] The power to compel adherence to determinations cannot be exercised alongside influence, but the latter is not be undervalued. Indeed, government officials may be more inclined to cooperate with investigations and to respond to feedback about areas for improvement where there is no possibility of coercive sanctions being imposed.[127]

113 See eg *Ombudsman Act* 1976 (Cth) ss 3BA, 3(4B), 8, 9, 14.
114 Under the *Ombudsman Act 1976* (Cth).
115 Kerr Committee Report (1971) Parliamentary Paper No 144 of 1971; Sir Henry Bland, H Whitmore and PH Bailey, *Interim Report of the Committee on Administrative Discretions*, Parliamentary Paper No 53 (1973) (Bland Committee Interim Report) 26 [109].
116 *Parliamentary Commissioner Act 1971* (WA).
117 *Ombudsman Act 1972* (SA).
118 *Ombudsman Act 1973* (Vic).
119 *Parliamentary Commissioner Act 1974* (Qld). The office now uses the name of Ombudsman: *Ombudsman Act 2001* (Qld).
120 *Ombudsman Act 1974* (NSW).
121 The Northern Territory passed the Ombudsman Act in 1977, followed by Tasmania's *Ombudsman Act 1978* (Tas).
122 The position of Ombudsman for the ACT was created in 1983 and is performed by the Commonwealth Ombudsman: see *Ombudsman Act 1989* (ACT).
123 Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009), 480–1.
124 John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423, 423.
125 John McMillan, 'Future Directions 2009 — The Ombudsman' (2010) 63 *AIAL Forum* 13, 17.
126 Matthew Groves, 'Ombudsmen's Jurisdiction in Prisons' (2002) 28 *Monash University Law Review* 181, 202.
127 See eg Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 97; Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) 122; Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13(4) *European Law Journal* 542, 555.

The recommendatory powers of ombudsmen are manifested in a number of ways, but one of their foremost remedial strengths is to recommend payments of compensation under discretionary schemes.[128] It is counterintuitive but nonetheless true that ombudsmen recommend the payment of monetary compensation far more often than courts, and they do so in circumstances in which courts could not prescribe a damages remedy.[129] As with most recommendations by ombudsmen,[130] recommendations to pay an amount in compensation are usually complied with.[131] This sometimes includes payments of very large amounts[132] and in circumstances where legal liability is either difficult to prove and/or expressly denied by the government.[133] While the detail of ombudsmen's recommendations for compensation is sometimes reported,[134] the specific figures recommended and agreed upon are often not cited.

Investigative agencies

Another non-legal mechanism that may offer recourse to a wronged individual is the investigative agencies that perform important accountability roles in all Australian jurisdictions. These agencies take one of two forms — standing and ad hoc commissions of inquiry. Ad hoc commissions, most commonly Royal Commissions, are established by government to investigate matters of public controversy. After an ad hoc commission has performed its function, it is disbanded. Standing commissions, in contrast, perform an ongoing role in monitoring public sector failings. Such bodies have a long history in Australia, with one of the most longstanding being the NSW Independent Commission Against Corruption. All Australian states have followed suit in establishing generalist anti-corruption agencies,[135] although many also have specialist agencies that target law enforcement or public service employees.[136] The position at the Commonwealth level is less straightforward. Its anti-corruption detection activities are presently confined to the Australian Commission for Law Enforcement Integrity and Australian Public Service Commission, although discussions about the introduction of a generalist anti-corruption agency have been underway for some time.[137]

The remit of investigative agencies differs widely. Royal Commissions can be established into almost any subject matter[138] and, while such matters may encompass private sector or social issues, Royal Commissions have played important roles in connection with failings in the public sector, such as the 2013 Royal Commission into the Home Insulation Program and the 2017 Royal Commission into the Detention and Protection of Children in the Northern Territory. Standing commissions have an ongoing investigative brief which differs

128 See Weeks, above n 47, Ch 12.

129 Peter Cane, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489, 514; citing Paul Brown, 'The Ombudsmen: Remedies for Misinformation' in Genevra Richardson and Hazel Genn (eds), *Administrative Law and Government Action: the Courts and Alternative Mechanisms of Review* (Clarendon Press, 1994) 309.

130 Annual reports by the Commonwealth Ombudsman routinely indicate that executive bodies are responsive to the Ombudsman's recommendations.

131 See Rock and Weeks, above n 82.

132 Groves, above n 126, 201–2.

133 See Gavin Drewry and Roy Gregory, 'Barlow Clowes and the Ombudsman: Part 1' [1991] *Public Law* 192, 200; see also Gavin Drewry and Roy Gregory, 'Barlow Clowes and the Ombudsman: Part 2' [1991] *Public Law* 408.

134 See eg Commonwealth Ombudsman, *Investigation into the Circumstances of the Detention of Mr G*, Report No 2 (2018).

135 For example, the Victorian Independent Broad-Based Anti-Corruption Commission, Queensland Crime and Corruption Commission, South Australian Independent Commissioner Against Corruption, Western Australian Corruption and Crime Commission, Integrity Commission Tasmania, ACT Integrity Commission, and NT Independent Commissioner Against Corruption.

136 For example, New South Wales has the NSW Law Enforcement Conduct Commission and Public Service Commission.

137 Prior to the 2019 federal election, the coalition government released a consultation paper relating to the introduction of a Commonwealth Integrity Commission: Attorney-General's Department, 'A Commonwealth Integrity Commission — Proposed Reforms', December 2018.

138 An inquiry must be tied to a government purpose as opposed to matters of 'idle curiosity' (*Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 156). Constitutional limitations may also arise at the Commonwealth level (eg *Lockwood v Commonwealth* (1954) 90 CLR 177).

as between jurisdictions in terms of the individuals and entities that may be investigated,[139] the circumstances in which an investigation may be commenced,[140] and the conduct that may be investigated.[141]

Both standing and ad hoc commissions of inquiry have wide-ranging investigative powers, including coercive powers to apply for search warrants, summon witnesses to give evidence and produce documents, take evidence on oath or affirmation at a hearing and cross-examine witnesses.[142] For present purposes, the most relevant point of interest is the outcomes that can be achieved by investigative agencies, with the primary outcome being the production of a report. For Royal Commissions, the content of a report is dictated by the relevant terms of reference and may include findings in relation to the matter investigated and recommendations for reform or restoration of harm.[143] Anti-corruption commissions are also empowered to report on their findings, although there are restrictions as to the nature of the findings that can be made.[144]

Discretionary compensation schemes

Non-statutory compensation schemes may offer a particularly valuable non-legal remedy to individuals who have suffered harm at the hands of government. Such schemes exist across Australian jurisdictions both in the context of specific types of harm[145] and in cases of government maladministration.[146] These schemes exist alongside more general powers to make ex gratia or act of grace payments.[147]

All such schemes are crafted in inherently discretionary terms. So, for example, the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) allows a decision-maker to make a payment to an individual who suffers harm as a consequence of 'defective administration', which includes failure to comply with or institute applicable administrative procedures and the provision of incorrect or ambiguous advice.[148] Even more broad is the power to make an act of grace payment in 'special circumstances',[149] which is described in applicable guidelines as a 'permissive' power that may be deployed where the government activity results in 'an unintended and inequitable result' or where a government policy has 'an unintended, anomalous,

139 For example, some agencies can investigate conduct by private individuals as well as public officials (eg *Independent Commission Against Corruption Act 1988* (NSW) s 8) and some can investigate conduct by public agencies (*Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 4).

140 For example, complaints-based and own-motion investigative functions (*Independent Commission Against Corruption Act 1988* (NSW) ss 10, 20(1)).

141 See eg *Independent Commission Against Corruption Act 1988* (NSW) ss 8, 9(1). In contrast, in South Australia, the definition of 'corrupt conduct' is confined to criminal offences and 'serious and systemic misconduct' (*Independent Commissioner Against Corruption Act 2012* (SA) ss 4(2), 5(1), 5(3), 7(1)(a), 7(1)(ca)).

142 *Royal Commissions Act 1902* (Cth) ss 2, 4, 5, 6FA (without such legislation Royal Commissions cannot enjoy coercive powers: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 98–9 (Dixon J)). For standing commissions, see eg *Independent Commission Against Corruption Act 1988* (NSW) Pt 4, Divs 2–4. As to the power to conduct public hearings, compare *Independent Commission Against Corruption Act 1988* (NSW) s 31(2); *Crime and Corruption Act 2001* (Qld) s 177; *Independent Commissioner Against Corruption Act 2012* (SA) Sch 2, cl 3.

143 For example, Ian Hanger AM QC, *Report of the Royal Commission into the Home Insulation Program* (August 2014) [13.6.4].

144 See eg *Independent Commission Against Corruption Act 1988* (NSW) s 74A and 74BA.

145 See eg schemes established to compensate victims of crime (see eg *Victims' Rights and Support Act 2013* (NSW)) and institutional sexual abuse (the establishment of such a scheme was recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse).

146 The relevant scheme at the Commonwealth level is the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme).

147 At the Commonwealth level, the *Public Governance, Performance and Accountability Act 2013* (Cth) permits the payment of act of grace payments (s 65), the waiver and set-off of debts owing to the Commonwealth (ss 63 ad 64).

148 Department of Finance (Cth), *Scheme for Compensation for Detriment Caused by Defective Administration*, Resource Management Guide No 409 (November 2018) [17].

149 *Public Governance, Performance and Accountability Act 2013* (Cth) s 65(1).

inequitable or otherwise unacceptable impact'.[150] There are also significant limits on the ability to challenge decisions made pursuant to these schemes.[151]

The various discretionary schemes which provide a remedy against government are generally intended to operate as remedies of 'last resort', in the grey areas where legal liability is unable to provide an adequate remedy to a wronged individual.[152] Notwithstanding their limitations, it is important to note that these 'non-legal' remedies may fill critical gaps in the legal remedial system, and should therefore be considered a relevant part of the remedial armoury that might be deployed where an individual seeks legal advice about government-caused loss.

Conclusion

Remedies against government arise from a variety of sources, running the gamut of the public–private law divide and into areas that we might not traditionally conceive of as 'legal' at all. Acknowledging this breadth is essential from the practical perspective of practitioners and litigants, who must identify the most appropriate forum and remedy to target in a particular case. However, there is also benefit in moving away from an approach to the law which groups doctrines somewhat artificially into 'silos'. As demonstrated in this article, we can better understand the scope of government liability if we adopt a wholesale view of the various means by which the government can be held to account, rather than looking at public and private law causes of action in isolation. When viewed from above, rather than from within, it is easier to observe recurring themes (such as the courts' reluctance to second-guess political decisions) and to identify connections between areas of law (such as the interplay between concepts of legality and liability in the context of tort claims against government defendants). The tendency to treat government liability as a specialist topic within the sphere of private law denies us the opportunity to better understand these connections. Government liability should not be seen as an island,[153] an area of inquiry entire of itself and separate from 'private law'. Instead, the liability of public authorities must be understood on the basis that it involves the law as a whole.[154]

150 Department of Finance (Cth), *Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act 2013*, Resource Management Guide No 401 (April 2018) [10].

151 See Weeks, above n 47, Ch 12.

152 Department of Finance (Cth), above n 148 [23]; Department of Finance (Cth), above n 150 [6].

153 The High Court has expressed its distaste for the distorted positions which follow the creation of 'islands of power immune from supervision and restraint': *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99].

154 See John Donne, 'Meditation XVII', *Devotions upon Emergent Occasions* (1623).

Reasonable likelihood in practice

Jaala Hinchcliffe*

Since 2017, the Commonwealth Ombudsman in its role as the Defence Force Ombudsman, and since 2019 as the VET Student Loans Ombudsman, can make recommendations to Australian Government agencies on the basis that it is 'reasonably likely' that an event that is being complained of has occurred. These recommendations can include reparation payments and the cancellation of student debts. However, the term 'reasonable likelihood' is not widely used in Australian law. It involves the concept that reasonable enquiries have been made to form the belief that the event occurred. This article will highlight the Ombudsman's use of 'reasonable likelihood' tests in both the Defence Force Ombudsman and VET Student Loans Ombudsman jurisdiction, to provide real and practical remedies for individuals.

Summary of 'reasonable likelihood' in other jurisdictions

Although 'reasonable likelihood' is not a widely used standard in Australia, it does arise in a range of subject matters from criminal law, wills and succession, racial discrimination, trademarks and conduct of the legal profession. Each state and federal court has generated various descriptions of reasonable likelihood which, for the most part, do not differ significantly. The most commonly cited definition comes from a Victorian Supreme Court case, *Department of Agriculture and Rural Affairs v Binnie*[1] (*Binnie*). Various state courts across Australia have since relied on this definition:

> [Reasonable likelihood is] a chance of an event occurring or not occurring which is real — *not fanciful or remote*. It does not refer to a chance which is more likely than not to occur, that is, one which is "odds on" or where between nil and certainty it should be placed. A chance which in common parlance is described as 'reasonable' is one that is *'fair,' 'sufficient' or 'worth noting'* ...[2]

> The word 'likelihood' in reasonable likelihood was held to infer a standard which is less definite than probable.[3]

Notably, this jurisprudence on reasonable likelihood has primarily arisen in the context of respective state and territory legislation on the legal profession (for example, misconduct of lawyers) and might not be directly transferable to the meaning of reasonable likelihood within the *Ombudsman Regulations 2017*. However, a number of Federal Court cases have also relied on *Binnie* in different contexts — for example, racial discrimination[4] and federal court rules.[5]

Defence abuse reporting function — *Ombudsman Regulations 2017*

The *Ombudsman Regulations 2017* confer on the Defence Force Ombudsman the function of taking appropriate action to respond to a complaint of abuse if the Defence Force Ombudsman is satisfied that the abuse is reasonably likely to have occurred. The regulations define 'abuse' in relation to a complainant to include sexual abuse of

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* Jaala Hinchcliffe is the Deputy Commonwealth Ombudsman. This is an edited version of a paper presented at the Australian Institute of Administrative Law National Conference in Canberra on 19 July 2019.

1 [1989] VR 836.

2 *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 842.

3 Ibid.

4 *Eatock v Bolt and Another* (2011) 283 ALR 505 [259].

5 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Emergency Transport Technology Pty Ltd* (2011) 277 ALR 388 [19].

the complainant; serious physical abuse of the complainant; and serious bullying or harassment of the complainant.

The regulations specify that appropriate actions include facilitating counselling for the complainant; facilitating a restorative engagement conference; making recommendations to the Australian Defence Force (Defence) in respect of the complaint; and making recommendations to the Defence Secretary that a reparation payment be made. A reparation payment recommendation may include a payment of $45 000 be made to the complainant if the Defence Force Ombudsman is satisfied the abuse involved the most serious forms of abuse; or $20 000 if satisfied the abuse involved unlawful interference with the complainant accompanied by some element of indecency. A further payment of $5000 may be recommended if the Defence Force Ombudsman is reasonably satisfied that Defence did not respond appropriately to the abuse. Reparation payments can only be recommended for abuse that allegedly occurred on or before 30 June 2014, as this is a key date from which people could have confidence in the advances being made by Defence in reforming culture and in Defence's ability to appropriately address complaints of abuse where it occurred.

There are two elements to an assessment of reports of abuse:

- Is it abuse as defined by the regulations?
- Are we satisfied the abuse is reasonably likely to have occurred?

In the cases of reported sexual abuse, the regulations do not include the adjective 'serious' before this type of abuse. If sexual abuse is reported we move to assessing reasonable likelihood. However, in the case of non-sexual abuse — for example, physical abuse and bullying and harassment — we first assess whether the abuse meets the threshold of seriousness and then turn to whether it was reasonably likely to have occurred.

To establish the 'seriousness' of physical abuse or bullying and harassment, we assess whether the abuse is significant and consequential. It is the conduct or behaviour which must be significant rather than the effect on the person on whom it is inflicted. Once we have established that a report of abuse meets the threshold of seriousness, we then assess whether the abuse was *reasonably likely* to have occurred.

To determine reasonable likelihood, we undertake an objective assessment of the information provided by the reportee and information obtained by making reasonable inquiries, including of Defence. We are conscious that determining 'reasonable likelihood' is a very different threshold from that of determining the balance of probabilities for administrative complaints, which requires fact-finding and investigation. People making reports are required to give the information through making a statutory declaration, and the majority of the reports we have received are historical. Our assessments are also informed by whether the persons were in the locations and relevant roles at the time, what information is already known about incidents and reports of abuse in those circumstances — that is, referencing corroborating information which includes similar complaints of abuse made at the same time in the same, or similar, locations. These may involve reference to published reports and reviews, such as the Defence Abuse Response Taskforce and the Royal Commission into Institutional Responses to Child Sexual Abuse, and internal inquiries conducted by Defence. Other Defence information, such as medical records, may also be relevant.

Having regard to the nature of the abuse, an absence of any further or corroborating information will not prevent the Ombudsman from being satisfied the abuse was reasonably likely to have occurred. This is a difficult concept for traditional investigation officers to

come to terms with at times, and some ask how we can make an assessment without more substantial evidence.

Being satisfied there is a reasonable likelihood that serious abuse occurred is not definitive proof that it occurred. Rather, it reflects that the legislation is intended to be beneficial, recognising that this scheme is intended to cover historical abuse, which is often difficult to determine at the normal administrative standard of balance of probabilities.

Indicators of reasonable likelihood in this context can take into account factors such as the time that has passed since the abuse is alleged to have occurred and the amount of detail contained in the report of abuse. For example, in a report of sexual assault occurring at night, it may be reasonable that a complainant has not been able to provide the name of the abuser, as they may have been unable to see the face of the abuser while they were the subject of the sexual assault. In a report involving a hazing and initiation ritual perpetrated in 1969 culminating in an indecent assault, in which there were multiple perpetrators, it is reasonable to expect the person making the report may not remember the names of the perpetrators. A person may also be severely traumatised by an event, resulting in difficulties in memory recall.

In the more than two years since we have been administering this function, we have received 1087 reports of abuse (as at 19 June 2019). To date, 689 reports have been assessed, with 525 accepted and 164 assessed as out of jurisdiction. We have made 355 recommendations to the Secretary of Defence to make reparation payments worth $14.43 million.

If a reportee is not satisfied with our decision, they can request an internal review, and a different decision-maker will review the matter and inform the reportee of the outcome.

To date, there have been no applications for review by the courts of any administrative decisions or recommendations made by the Defence Force Ombudsman under these regulations. We are also not aware of any legal challenges to the Defence Secretary's decisions on our recommendations for reparation payments.

VET Student Loans Ombudsman

The VET FEE-HELP scheme operated from 2009 to 2016. It assisted students with the cost of their studies through an income-contingent loan repayable through the tax system. VET FEE-HELP was substantially expanded in late 2012 to support growth in the vocational education and training (VET) sector by relaxing many of the constraints applied to training providers. However, this expansion led to a number of training providers and their agents targeting vulnerable people and signing them up to VET courses, in many cases inducing students to enrol despite unsuitability for the course. Having signed students up, the Commonwealth funded the course and raised a debt against the student. As a result of this poor provider behaviour, the scheme left many students with large debts and in most cases few or no training outcomes.

The VET FEE-HELP scheme was replaced in 2016 with VET Student Loans, with a higher bar for entry for training organisations, increased student protections and strengthened regulatory control. Additionally, on 1 July 2017, the VET Student Loans Ombudsman (VSLO) was established, within the Office of the Commonwealth Ombudsman, to assist students with complaints about their VET FEE-HELP or VET Student Loans provider.

Data collated by the VSLO demonstrated there was a significant number of individual cases that could not be remedied under the legislation in force at the time. Furthermore, most of the complaints being assessed by the VSLO involved closed providers, where there is little

student-level information available. This meant the VSLO was unable to investigate using the office's normal processes.

The VSLO and then Department of Education and Training (Education)[6] worked closely with government and industry stakeholders to design and recommend legislative reforms to the Commonwealth.

The VET FEE-HELP Student Redress Measures (redress measures) were passed in the *Higher Education Support Amendment (VET FEE-HELP Student Protection) Act 2018* (Cth). The redress measures were introduced from 1 January 2019 to provide broader redress and ensure inappropriate VET FEE-HELP debts are removed for all of those affected. The redress measures currently extend to 31 December 2020.

The VSLO's role in the redress measures is to assess and make a recommendation to the Secretary of the Department of Employment, Skills, Small and Family Business (Employment) or their delegate on whether a student's loan should be re-credited and the relevant debt removed. The VSLO will assess the existing case load of over 5000 complaints received before the redress measures were introduced and new complaints received over the two years of the sunset period.

Acknowledging that information may not be available for individual students, the redress measures use the threshold of reasonable likelihood when determining whether a VET FEE-HELP debt should be removed. The use of reasonable likelihood addresses the issue of limited available information for individual students and the need to assess a large number of complaints in a relatively short period. The VSLO makes reasonable enquiries to obtain information from third parties, including Employment, regulators, and liquidators of closed providers, when assessing whether it is reasonably likely that inappropriate conduct occurred.

The VSLO, Education and now Employment had to think 'outside' their usual processes to ensure a joined-up approach that had the needs of the student at its core. For example, while the Secretary of Employment remains responsible for all decisions to re-credit students, they take a risk-based approach to VSLO recommendations — working closely with the VSLO to approve assessment processes and models and then relying upon the VSLO to act in accordance with these agreed processes. This innovative approach maximises the benefits of redress given the time-limited nature of the measures.

The VSLO has developed 'provider profiles' that outline the established conduct of a provider, based on the large amount of audit and compliance information gathered about the conduct and behaviour of these providers. This is used as a source of evidence to satisfy reasonable likelihood where information specific to a student is not available. The VSLO has also developed 'assessment models' that outline the process for assessing complaints and the criteria that must be met before a recommendation is made to the Secretary of Employment to remove a VET FEE-HELP debt.

The provider profile and assessment models are developed in collaboration with Employment and are the agreed process for assessments. This removes the need for the VSLO to send supporting evidence and a statement of reasons to Employment for every recommendation, streamlining the process.

A specialised Intelligence Team comprising staff with law enforcement and administrative investigation experience and strong content knowledge reviewed provider information and

6 Responsibility for the redress measures transferred from the Education to Employment on 11 July 2019 as part of the machinery of government changes for vocational education and training and skills. The VSLO worked with Education on initial implementation of the redress measures, with recommendations now made to Employment.

information from third parties to develop the provider profiles and assessment models. By concentrating expertise in a small team and using processes and guidance material to achieve consistency across assessment, the VSLO has developed a staffing model that allows for rapid expansion when needed.

The use of reasonable likelihood means that assessment staff do not need to investigate each complaint in detail, reducing the level of training required and time taken to assess each complaint.

In practice, assessment staff conduct an investigative interview with the complainant to identify the issues of the complaint, compare these to the known conduct outlined in the provider profile, and check if there is contradictory or supporting evidence available from third parties. In some instances, the only information assessment staff have available when assessing a complaint are the complainant's statements and the provider profile.

As at 9 July 2019, the VSLO has recommended the removal of VET FEE-HELP debts for 610 people, for a total debt amount of $14.3 million.

Conclusion

While each scheme is different and designed to address either abusive behaviour or misconduct, both schemes rely on what is objectively known about a provider or a particular area of Defence at the time, to make an informed and discretionary decision about whether it is 'reasonably likely' that an event complained of occurred.

Furthermore, both the Defence Force Ombudsman and VSLO jurisdictions demonstrate how the administrative law framework can provide real and practical remedies for individuals who have been on the receiving end of abuse or misconduct that is criminal in nature through the application of the test of reasonable likelihood. In doing so, the Ombudsman is contributing to keeping a significant body of work away from the courts and tribunals and achieving beneficial outcomes for people.

The participant in the national disability insurance scheme: A paradigm shift for administrative law

Thomas Liu*

The *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) established the National Disability Insurance Scheme (NDIS). One of the objectives of the NDIS Act is to give effect to Australia's international obligations with respect to persons with disabilities. In doing so, the NDIS Act enacts new concepts and principles around decision-making, planning and funding of supports for persons with disabilities. One of the key principles is that the NDIS Act puts the participant at the heart of the NDIS and centrally involves the participant in decision-making.

In this article, I look at the intersection of the NDIS Act (especially the role of the participant in decision-making) and the mechanism for merits review in Commonwealth administrative law. I analyse this intersection in the context of one type of decision under the NDIS Act: a decision to approve a statement of participant supports in a participant's plan under s 33(2). Decisions under s 33(2) are important because they are a critical step in operationalising the principles in the NDIS Act through the preparation and approval of a statement of participant supports. The statement of participant supports, which forms part of a participant's plan, specifies the reasonable and necessary supports that will be funded for the participant. Perhaps not surprisingly, then, the Commonwealth Ombudsman notes that '[w]hile there are many types of decisions that are subject to internal review, the bulk of the complaints to our Office involve decisions to approve a statement of participant supports (s 33(2))'.[1] Decisions under s 33(2) of the NDIS Act are also reviewed by the Administrative Appeals Tribunal (AAT).

The chief proposition advanced in this article is that decision-making under s 33(2) does not entirely harmonise with the existing mechanisms for merits review through the AAT. This creates incongruities in the administration of the NDIS Act and in AAT proceedings reviewing decisions under s 33(2) of that Act. However, observing these incongruities also provides opportunities for adopting more suitable procedures for the AAT and for participants.

This article addresses these issues in four sections. The first section provides an overview of the NDIS focusing on the centrality of the participant within the legislative scheme. The second section looks at the mechanism for merits review in the AAT and how it maps onto the NDIS. The third section identifies potential incongruities and challenges that emerge from the intersection of decision-making under the NDIS Act and the mechanism for merits review. The fourth section sets out possible solutions to the identified issues.

The National Disability Insurance Scheme — the participant and the legislative scheme

Background

The NDIS Act commenced in 2013. A useful and common starting point for understanding the background to the introduction of the NDIS and its core principles appears in the Explanatory Memorandum to the Bill which became the Act. The Explanatory Memorandum sets out the background to the NDIS Act as follows:[2]

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1 Commonwealth Ombudsman, *Administration of Reviews under the National Disability Insurance Scheme Act 2013 — Report on the National Disability Insurance Agency's Handling of Reviews* (Report No 03, 2018).

2 Explanatory Memorandum, National Disability Insurance Scheme Bill 2013 (Cth) 1.

In August 2011, the Prime Minister released the Productivity Commission Inquiry Report, *Disability Care and Support*, which identified that disability care and support in Australia was 'underfunded, unfair, fragmented and inefficient', and that major reform was needed.

Since the release of this report, the Commonwealth and all state and territory governments have agreed on the need for major reform in the form of a National Disability Insurance Scheme, which:

- will take an insurance approach that shares the costs of disability services and supports across the community;
- will fund reasonable and necessary services and supports directly related to an eligible person's individual ongoing disability support needs; and
- will enable people with disability to exercise more choice and control in their lives, through a person-centred, self-directed approach, with individualised funding.

The Bill establishes a scheme that gives effect to these critical principles, and gives effect in part to Australia's obligations under the United Nations *Convention on the Rights of Persons with Disabilities*.

Objects and principles of the NDIS Act

Section 3 of the NDIS Act sets out the objects of the Act. Unique to social services legislation, s 3(1)(a) of the Act provides as its first objective to, 'in conjunction with other laws, give effect to Australia's obligations under the *Convention on the Rights of Persons with Disabilities* done at New York on 13 December 2006 ([2008] ATS 12)'. This is significant because it supports the view that the objects of the NDIS Act 'reflect the paradigm shift signalled in the *United Nations Convention on the Rights of People with Disabilities* (CPRD) to recognise people with disabilities as persons before the law and their right to make choices for themselves'.[3]

In *Mulligan v National Disability Insurance Agency*[4] (*Mulligan*) Mortimer J observed that '[t]he remainder of the objectives in s 3(1) have common themes: enhancing supports for people with a disability in a way which promotes their autonomy over their lives and full inclusion in the Australian community; and doing so in a nationally coordinated way'.

Section 4 of the Act sets out 17 '[g]eneral principles guiding actions under this Act'. The following general principles are particularly relevant for present purposes:

(1) People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.

(2) People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.

(3) People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.

(4) People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.

(5) People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.

3 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 2014) 63 [3.3]. Although the report makes this comment in the context of the 'National Decision-Making Principles', the notion that the Convention signals a 'paradigm shift' is equally applicable to the NDIS Act.

4 [2015] FCA 544; 233 FCR 201 [14].

(6) People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation.

(7) People with disability have the same right as other members of Australian society to pursue any grievance.

(8) People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.

(9) People with disability should be supported in all their dealings and communications with the Agency and the Commission so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs.

(10) People with disability should have their privacy and dignity respected.

(11) Reasonable and necessary supports for people with disability should:

(a) support people with disability to pursue their goals and maximise their independence; and

(b) support people with disability to live independently and to be included in the community as fully participating citizens; and

(c) develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.

...

(17) It is the intention of the Parliament that the Ministerial Council, the Minister, the Board, the CEO, the Commissioner and any other person or body is to perform functions and exercise powers under this Act in accordance with these principles, having regard to:

(a) the progressive implementation of the National Disability Insurance Scheme; and

(b) the need to ensure the financial sustainability of the National Disability Insurance Scheme.

These general principles in the NDIS Act mirror key recitals in the preamble to the *United Nations Convention on the Rights of People with Disabilities* (the Convention), which include:

> *Recognizing* the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,
>
> *Considering* that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them ...[5]

Article 4(3) of the Convention provides that one of the 'general obligations' of States Parties is that:

> In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

The general principles in the NDIS Act together with the relevant provisions of the Convention indicate the paradigm shift contemplated in decision-making processes

5 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 13 December 2006).

affecting persons with disabilities. As explained further below, these principles distil into the concept of the participant and the participant's plan as well as the decision-making framework concerning a participant's plan.

Participants and their plans

The objects and general principles of the NDIS Act set out above refer to 'people with disability' rather than 'participants'. This reflects the so-called 'tiered' approach which informed the establishment of the NDIS. Section 8 of the NDIS Act, which provides a 'simplified outline' of the Act, follows this tiered approach. Insofar as it is relevant, s 8 provides that the 'National Disability Insurance Scheme comprises':

(a) the provision of services or activities that are in the nature of coordination, strategic or referral services or activities (Chapters 2 and 3); and

(b) funding to persons or entities to enable them to assist people with disability to participate in economic and social life (Chapter 2); and

(c) individual plans under which reasonable and necessary supports will be funded for certain people, called participants (Chapter 3).

In *Re Mulligan and National Disability Insurance Agency*,[6] the AAT observed the following about the different 'tiers' under the NDIS, and the operation of the NDIS Act with respect to persons at each tier:

[9] These forms of support correspond with the three main functions of the NDIS recommended by the Productivity Commission in its report, *Disability Care and Support*, Report No 54, 31 July 2011 and the 'three different populations of 'customers' and costs' associated with them (at 158). The NDIS is modelled on the Commission's recommendations.

[10] The Commission observed (at 158) that '[p]eople with a disability have different needs and aspirations and encounter different barriers' and it was not intended that the NDIS address the care and support needs of all individuals. Rather, the scheme should focus on those whose needs are greatest. To this end, the Commission recommended (Recommendation 3.1) it should:

- cost-effectively minimise the impacts of disability, maximise the social and economic participation of people with a disability, create community awareness of the issues that affect people with disabilities and facilitate community capacity building. These measures should be targeted at all Australians
- provide information and referral services, which should be targeted at people with, or affected by, a disability
- provide individually tailored, tax-payer funded support, which should be targeted at people with significant disabilities who are assessed as needing such support...

[11] These functions of the NDIS were described by the Commission (at 158-159) in terms of 'tiers':

- Tier 1: Everyone
- Tier 2: People with, or affected by, disability
- Tier 3: People with disability for whom NDIS-funded, individualised supports would be appropriate

6 [2015] AATA 974; 149 ALD 408 [9]–[13].

[12] Tiers 1 and 2 are reflected in the provisions of Chapter 2 as well as in Chapter 3 of the Act. In particular, s 13 provides for general supports for persons who are not participants in the NDIS, and funding to individuals and organisations to help people with disability participate in social and economic life. Tier 3 is reflected in the provisions of Chapter 3 which concerns Participants and their plans.

[13] A person who meets the access criteria in s 21 of the Act becomes a participant in the NDIS: s 28(1). The access criteria comprise age, residence, and disability or early intervention requirements: s 21(1). A person who becomes a participant is eligible for funding for 'reasonable and necessary supports' in accordance with s 34(1).

In *Mulligan* before the Federal Court, Mortimer J also observed the following about the concept of the participant within the statutory scheme:

[23] A key concept to the operation of relevant provisions of the Act in the current proceeding is the concept of a 'participant', which is defined in s 9 (read with ss 28, 29 and 30) to mean a person who is a participant in the NDIS launch. By s 28, a person becomes a participant on the day the CEO of the NDIA decides that the person meets the access criteria in ss 22 to 25.[7]

A person (or prospective participant under s 20) can become a participant by satisfying the access criteria in ss 22 to 23 and either s 24 (the disability requirements) or s 25 (the early intervention requirements).[8] In cases before the AAT concerning a decision about whether a person meets the access criteria, the most commonly litigated provisions are ss 24 and 25. In *Mulligan*, Mortimer J observed the following about the decision-making processes concerning participants:

[34] It is clear from the legislative scheme that the decision whether a person is or is not a participant is the threshold decision under the scheme, and the decision which enables access to the majority of benefits and funding available under the NDIS. However, what benefits and supports are provided, and how they are funded is subject to a separate decision-making process.[9]

The 'separate decision-making process' described in the above passage from *Mulligan* is the focus of this article. That decision-making process concerning 'what benefits and supports are provided' to a participant appears in Pt 2 of Ch 3 of the NDIS Act. An important but sometimes overlooked provision in the statutory scheme is s 31, which appears in Div 1, Pt 2, of Ch 3. Unlike s 4 (which refers to 'persons with disabilities'), s 31 contains principles specific to participants' plans in the following terms:

31 Principles relating to plans

The preparation, review and replacement of a participant's plan, and the management of the funding for supports under a participant's plan, should so far as reasonably practicable:

(a) be individualised; and

(b) be directed by the participant; and

(c) where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant; and

(d) where possible, strengthen and build capacity of families and carers to support participants who are children; and

7 [2015] FCA 544; 233 FCR 201 [23].
8 See NDIS Act, s 21(1).
9 [2015] FCA 544; 233 FCR 201 [34].

(da) if the participant and the participant's carers agree—strengthen and build the capacity of families and carers to support the participant in adult life; and

(e) consider the availability to the participant of informal support and other support services generally available to any person in the community; and

(f) support communities to respond to the individual goals and needs of participants; and

(g) be underpinned by the right of the participant to exercise control over his or her own life; and

(h) advance the inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations; and

(i) maximise the choice and independence of the participant; and

(j) facilitate tailored and flexible responses to the individual goals and needs of the participant; and

(k) provide the context for the provision of disability services to the participant and, where appropriate, coordinate the delivery of disability services where there is more than one disability service provider.

There are clear overlaps between the principles set out in s 31 and those expressed in ss 3 and 4 of the NDIS Act. However, the principles in s 31 operationalise (through their direct application to actions relating to participants' plans) the 'paradigm shift' signalled by the Convention, including the principles of self-determination, equality before the law, choice and inclusion, and the participant's right to be at the centre of decision-making.

Division 2 in Pt 2, Ch 3, of the NDIS Act concerns the preparation of participants' plans. Once a person becomes a participant, the Chief Executive Officer (CEO)[10] of the National Disability Insurance Agency (the Agency) 'must facilitate the preparation of the participants' plan'.[11] Section 33 then gives operative content to a participant's plan and provides, insofar as it is relevant, that:

33 Matters that must be included in a participant's plan

(1) A participant's plan must include a statement (the *participant's statement of goals and aspirations*) prepared by the participant that specifies:

(a) the goals, objectives and aspirations of the participant; and

(b) the environmental and personal context of the participant's living, including the participant's:

(i) living arrangements; and

(ii) informal community supports and other community supports; and

(iii) social and economic participation.

(2) A participant's plan must include a statement (the *statement of participant supports*), prepared with the participant and approved by the CEO, that specifies:

(a) the general supports (if any) that will be provided to, or in relation to, the participant; and

(b) the reasonable and necessary supports (if any) that will be funded under the National Disability Insurance Scheme; and

10 The 'CEO may, in writing, delegate to an Agency officer any or all of his or her powers or functions' pursuant to s 202 of the NDIS Act.

11 NDIS Act, s 32(1).

(c) the date by which, or the circumstances in which, the Agency must review the plan under Division 4; and

(d) the management of the funding for supports under the plan (see also Division 3); and

(e) the management of other aspects of the plan.

...

(5) In deciding whether or not to approve a statement of participant supports under subsection (2), the CEO must:

(a) have regard to the participant's statement of goals and aspirations; and

(b) have regard to relevant assessments conducted in relation to the participant; and

(c) be satisfied as mentioned in section 34 in relation to the reasonable and necessary supports that will be funded and the general supports that will be provided; and

(d) apply the National Disability Insurance Scheme rules (if any) made for the purposes of section 35; and

(e) have regard to the principle that a participant should manage his or her plan to the extent that he or she wishes to do so; and

(f) have regard to the operation and effectiveness of any previous plans of the participant ...

The following observations concerning the operation of s 33 emerge for present purposes.

First, every participant's plan must have two components: a participant's statement of goals and aspirations; and a statement of participant supports. The two components together constitute a 'participant's plan' for the purposes of the NDIS Act. This distinction is not unimportant to the statutory scheme and the participant's role at different stages of decision-making.

Secondly, the NDIS Act does not require that 'a plan must be prepared *for*' a participant.[12] One half of the plan, being the participant's statement of goals and aspirations, is 'prepared *by* the participant'.[13] The CEO and the Agency have no determinative role in the preparation of a participant's statement of goals and aspirations.[14] This approach is consistent with the principles in s 4, s 17A and s 31 of the NDIS Act, which emphasise autonomy, the central role of the participant in decision-making, and that a participant's plan should maximise choice and independence.

Thirdly, the other half of the plan, being the statement of participant supports, and the CEO's function to 'approve' the statement of participant supports under s 33(2), is qualified in an important respect. The CEO's function to approve a statement of participant supports is part of a broader function to 'facilitate the preparation the participant's plan'.[15] Section 33(2) also requires the CEO to prepare the statement of participant supports 'with the participant'. Another way of reading s 33(2) is that it requires the decision-maker to approve a statement of participant supports that is prepared with the participant.

12 Compare [2015] FCA 544; 233 FCR 201 [32].
13 NDIS Act, s 33(1).
14 Section 32(1) of the NDIS Act provides that 'the CEO must facilitate the preparation of the participant's plan'.
15 NDIS Act, s 32(1).

Fourthly, there are no decisions of the Federal Court or the AAT which analyse what 'prepared with the participant' means in this context. The decided cases in this area focus on whether the material before the AAT allows it to be satisfied that a particular support meets the criteria in s 34(1). However, s 33(2) contemplates a form of decision-making 'with the participant' combined with approval of the statement of participant supports by the CEO. The meaning of 'prepared with the participant' in this context must require the decision-maker to take into account the participant's circumstances in line with the principles in s 4 (general principles), s 17A (principles relating to the participation of people with disability), and s 31 (principles relating to plans) of the NDIS Act.

In practice, the Agency performs both parts of the s 33(2) function through 'planning meetings' which, according to the NDIS website, are 'either in person, or over the phone, [and are] the best way for [the Agency] to gather all [the participant's] information so together, [the Agency] can develop the best plan for [the participant]'.[16] The NDIS website also invites participants at the planning meeting to 'discuss the goals/activities/tasks [the participant] want[s] to achieve with [the participant's] ECEI Coordinator, LAC or NDIA planner'.

In theory, this form of 'planning' should satisfy:

a. the principles in, for example, s 31(i) (to maximise the choice and independence of the participant) and (j) (to facilitate tailored and flexible responses to the individual goals and needs of the participant);

b. the requirement in s 32 that the CEO 'must facilitate' the preparation of a participant's plan;

c. the requirement in s 33(2) that the CEO prepare a statement of participant supports 'with the participant', which the CEO then approves.

In 'deciding whether or not to approve a statement of participant supports under subsection (2)', s 33(5)(c) requires a decision-maker to 'be satisfied as mentioned in section 34 in relation to the reasonable and necessary supports that will be funded'. Section 34, therefore, provides a number of mandatory relevant considerations in the following terms:

> **34 Reasonable and necessary supports**
>
> (1) For the purposes of specifying, in a statement of participant supports, the general supports that will be provided, and the reasonable and necessary supports that will be funded, the CEO must be satisfied of all of the following in relation to the funding or provision of each such support:
>
> (a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;
>
> (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;
>
> (c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
>
> (d) the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;

16 NDIS, *How the Planning Process Works* (11 June 2019) <https://www.ndis.gov.au/participants/how-planning-process-works>.

(e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;

(f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:

(i) as part of a universal service obligation; or

(ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability ...

Section 34 is important because it is the central provision upon which decisions about funding of specifics supports ultimately hinge. Section 33(2)(b) makes this so. It provides that a statement of participant supports must specify 'the reasonable and necessary supports (if any) that will be funded'. Section 34 also gives practical content to the principles of the NDIS Act as relevant to preparing and approving a statement of participant supports. For example, s 34(1)(a) provides that, in determining what are reasonable and necessary supports that will be funded, the decision-maker must be satisfied that the funding or provision of the 'support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations'. This is significant because, as s 33(1) makes clear, the participant's statement of goals and aspirations is entirely a matter for the participant and is not subject to any approval by the CEO.

A plan comes into effect once the CEO has received the participant's statement of goals and aspirations and approved the statement of participant's supports.[17] In *McGarrigle v National Disability Insurance Agency*[18] (*McGarrigle*), Mortimer J explained that:

> [31] Approval of a plan by the CEO (or a delegate of the CEO — see s 202 of the Act) is, by reason of s 37(1)(b) one of the two steps which brings a plan into effect. A plan cannot be varied but can be replaced: see s 37(2) and (3).[19]

Once a plan is in effect for a participant, the Agency must comply with the statement of supports in the plan.[20]

A participant can seek internal review of a decision under s 33(2) to approve a statement of participant supports by a 'reviewer' who must confirm, vary or set aside the reviewable decision.[21] Section 99 sets out in a table all the 'reviewable decisions' under the NDIS Act. Section 103 allows a participant to apply to the AAT for review of a decision made by a reviewer under s 100(6).

Administrative law and merits review of decisions under s 33(2)

Once a participant goes through the merits review gateway provided by s 103 of the NDIS Act, the participant also becomes an 'Applicant for Review'[22] in a proceeding before the AAT. This has a number of implications. Before I consider those implications, I outline in this part of the article key features of the AAT's structure, process and procedure. This

17 NDIS Act, s 37.
18 [2017] FCA 308; 252 FCR 121.
19 Ibid [31].
20 NDIS Act, s 39.
21 NDIS Act, s 99 and s 100.
22 Term used in Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis, 4th ed, 2015) Ch 5.

outline contextualises the later discussion concerning the suitability of merits review in the AAT of decisions under s 33(2) of the NDIS Act.

The *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) established the AAT,[23] which commenced operation on 1 July 1976. The AAT was the product of a number of reports and recommendations made in the 1970s which resulted in fundamental reforms of Australian administrative law.[24] Pearce notes that the 'basis for these recommendations was a concern that review of government decisions through the parliament and the courts was inadequate as to its content and inaccessible to most persons affected'.[25] Pearce also notes that '[w]hat was needed … was an accessible, informal and relatively cheap means of obtaining a review of the merits of a decision, not just its legality'.[26]

Since the amalgamation of a number of Commonwealth tribunals with the AAT in 2015, the objective of the AAT Act in s 2A is as follows:[27]

> **2A Tribunal's objective**
>
> 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.

Division 1 of Pt II of the AAT Act contains s 5, which establishes the AAT; and s 5A, which provides that the AAT consists of four categories of members. Division 2 of Pt II concerns the appointment, qualifications, terms and remuneration of members.

Section 17A in Subdiv A within Div 1 of Pt III of the AAT Act sets out the divisions of the AAT. Section 17A(c) refers to the 'National Disability Insurance Scheme Division'. Section 17E concerns assignment of a member to the NDIS Division of the AAT.

The President of the AAT (who must be a Federal Court judge)[28] may give 'written directions in relation to … (b) the procedure of the Tribunal; [and] (c) the conduct of reviews by the Tribunal' under s 18B of the AAT Act.[29] There is a current practice direction in place for the NDIS Division.[30] However, the AAT website notes that the 'practice direction is currently under review'.[31]

Section 25 of the AAT Act does not confer jurisdiction on the AAT but facilitates provisions such as s 103 of the NDIS Act to operate in conferring jurisdiction on the AAT. Section 25(3) states, for example, what an enactment allowing an application to be made to the AAT must provide.

23 AAT Act, s 5.
24 See Commonwealth, *Administrative Review Committee report 1971* (Kerr Committee Report), Parliamentary Paper No 14 (1971); Commonwealth, *Final report of the Committee on Administrative Discretions* (Bland Committee Final Report), Parliamentary Paper No 316 (1973).
25 Pearce, above n 22, 1.
26 Ibid.
27 See *Tribunals Amalgamation Act 2015* (Cth) Sch 1.
28 AAT Act, s 7(1).
29 AAT Act, s 18B.
30 Administrative Appeals Tribunal, *Practice Direction for Review of National Disability Insurance Scheme Decisions*, 30 June 2015.
31 Administrative Appeals Tribunal, *Practice Directions, Guides and Guidelines* (1 March 2019) <https://www.aat.gov.au/resources/practice-directions-guides-and-guidelines>.

The key procedural provisions relevant for present purposes are ss 33 and 39 of the AAT Act. Section 33 sets out the basic procedure for reviews by the AAT and includes the following features:

(d) The procedure of the Tribunal is, subject to the AAT Act and Regulations, and any other enactment, within the discretion of the Tribunal (s 33(1)(a));

(e) The proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of the AAT Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit (s 33(1)(b));

(f) The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate (s 33(1)(c));

(g) The person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding (s 33(1AA));

(h) A party to a proceeding before the Tribunal, and any person representing such a party, must use his or her best endeavours to assist the Tribunal to fulfil the objective in s 2A of the AAT Act (s 33(1AB)).

Section 39(1) relevantly provides that:

> the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.

In *Sullivan v Department of Transport*[32] (*Sullivan*), Deane J made the following observations about the operation of ss 33 and 39, as they stood at the time, which remain apposite today:

> Section 39 of the Administrative Appeals Tribunal Act provides, for present purposes, that 'the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his case'. In dealing with an application for review, the Tribunal is plainly under a duty to act judicially, that is to say, with judicial fairness and detachment. In these circumstances, the requirement contained in s 39 that the Tribunal shall ensure that a party to the proceedings before it be given a reasonable opportunity to present his case constitutes statutory recognition of an obligation which the law would, in any event, imply. Where a Tribunal is under a duty to act judicially, the principle that a party must be given a reasonable opportunity to present his case is at the heart of the requirements of natural justice which it is obliged to observe (see *R v Moodie* (1977) 17 ALR 219 at 225) ...
>
> Section 33(1)(b) of the Act requires that the proceedings of the Tribunal shall be conducted with as little formality and technicality, and with as much expedition as the requirements of the Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit. It is apparent that the objectives of expedition and of lack of formality or technicality and the requirements of fairness will ordinarily be best achieved by a ready identification of the issues which are, in truth, in dispute between the parties in a particular application for review. In the ordinary case, a tribunal which is under a duty to act judicially and which has the relevant parties before it will be best advised to be guided by the parties in identifying the issues and to permit the parties to present their respective cases in the manner which they think appropriate. Circumstances may, of course, arise in which such a statutory tribunal, in the proper performance of its functions, will be obliged to raise issues which the parties do not wish to dispute and to interfere, either by giving guidance or by adverse ruling, with the manner in which a particular party wishes to present his case. Ordinarily, however, in the absence of a request for assistance or guidance by a party who is appearing in person, a tribunal under a duty to act judicially should be conscious of the fact that undue interference in the manner in which a party conducts his case may, no matter how well intentioned, be

32 (1978) 20 ALR 323.

> counter-productive and, indeed, even overawe and distract a party appearing in person to the extent that it leads to a failure to extend to him an adequate opportunity of presenting his case.[33]

Justice Smithers in *Sullivan* expressed a somewhat different view of the operation of ss 33 and 39. His Honour said:

> [The proper performance of the AAT's function] depends upon the Tribunal having the wide powers and flexible procedures with which it is provided: see in particular s 33 of the [AAT Act]. For the performance of its function it would seem appropriate, according to the circumstances, for the Tribunal to take certain initiatives, and to regard itself as unfettered by the strict rules of the adversary system. And s 39 is to be seen as imposing a duty upon the Tribunal consistent with this conception of its function.[34]

Despite the injunction in s 33 that the AAT should conduct proceedings with as little formality and technicality as the case permits, several commentators describe the effect and judicial interpretation of s 39 of the AAT Act (together with other provisions) as importing a 'judicial model',[35] 'judicial paradigm',[36] 'creeping legalism',[37] and 'adversarial bias'.[38] Hall summarises a number of these views through the following observations:

> Although characterised as an administrative Tribunal, the business of the Tribunal in its practical operation involves the resolution of disputes between a citizen and the administration. To enable it to discharge that function effectively, the Administrative Appeals Tribunal Act confers upon the Tribunal many trappings of judicial power. The requirements for public hearings (section 35); the right to representation of a party in a proceeding before the Tribunal (section 32); the right to an opportunity to present one's case and make submissions (section 39); the power to take evidence on oath or affirmation, to proceed in the absence of a party who had had reasonable notice of the proceeding and to adjourn the proceeding from time to time (section 40) all point inescapably to the judicial model.[39]

Allars makes similar observations about the same provisions of the AAT Act, with the addition of s 43(2) and (2B) (duty to give reasons for decision which include finding on material questions of fact). She describes these provisions as being '[o]f an adversarial nature' and containing 'features of formal procedure'.[40]

Many proceedings in the AAT, including the NDIS Division, substantiate these observations once they reach the hearing stage. Counsel not uncommonly appear for both the applicant and the respondent in NDIS proceedings before the AAT and legal aid funding is available to applicants in certain cases — for example, those that raise a 'complex or novel legal issue'.[41]

Moreover, in appropriate circumstances, the AAT, in observing the requirements of procedural fairness, may allow cross-examination but is not required to do so in all cases.[42]

33 Ibid 342–3. See also Deane J's comments on the 'duty to act judicially' in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, where his Honour noted that the formulation created 'a potential for confusion' and that the duty is no more than a requirement to accord procedural fairness.

34 (1978) 20 ALR 323, 326 (citations omitted).

35 AN Hall, 'Administrative Review Before the Administrative Appeals Tribunal — A Fresh Approach to Dispute Resolution? Part I' (1981) 12 *Federal Law Review* 71, 78, 88.

36 M Allars, 'Neutrality, the Judicial Paradigm and Tribunal Procedure' (1991) 13(3) *Sydney Law Review* 377, 410. Although Allars notes (at 405) that the AAT cannot be classified as formal/adversarial and of the judicial paradigm, she notes (at 410) that the judicial paradigm dominates in key decisions such as *Sullivan* which interpret the application of the procedural provisions in the AAT Act.

37 R Creyke, 'Tribunal Amalgamation 2015: An Opportunity Lost?' (2016) 84 *AIAL Forum* 54, 67.

38 J Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20(2) *Federal Law Review* 252.

39 Hall, above n 35, 78 (citations omitted).

40 Allars, above n 36, 410.

41 See, for example, Legal Aid NSW, *Legal Aid NSW Guidelines on Civil Law Matters* [3.18].

42 See *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; 322 ALR 581 [175], citing *O'Rourke v Miller* (1985) 156 CLR 342, 353 (Gibbs CJ); and *Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26 at [73], (2013) 296 ALR 307 (Jessup J).

In practice, proceedings before the AAT concerning decisions under s 33(2) of the NDIS Act which involve the question of what are reasonable and necessary supports (pursuant to s 34(1)) often involve cross-examination of experts as well as the participants (or close family members of the participants).

In addition to the procedural features of a review conducted by the AAT, the general principles concerning merits review are also relevant. The AAT's function in conducting a merits review is to make the correct or preferable decision on the material before it.[43] In doing so, the AAT generally conducts a *de novo* hearing but stands in the shoes of the original decision-maker.[44] However, as Hall notes, 'like many aphorisms, this is only partially true'.[45] For reasons I will come to, this may be particularly so in the context of a decision under s 33(2) of the NDIS Act.

Finally, the role of the respondent Agency in proceedings before the AAT is another important and relevant feature for present purposes. Section 33(1AA) requires the decision-maker to use his or her best endeavours to assist the AAT in relation to the proceeding. Earlier decisions of the Tribunal relied on s 37 as providing the foundation for the principle that the respondent should assist the AAT and not place it in a position of disadvantage whereby it is not 'properly and fully informed when it reviews the decision'.[46] Moreover, the AAT expects assistance by respondents and has suggested that without such appropriate assistance '[t]he review procedure will not function fairly'.[47] In *Re Wertheim and Department of Health*, the AAT observed that:

> The Administrative Appeals Tribunal Act 1975 provides that in every case the decision-maker is to be a party to the review: see s 30. This provision is not aimed solely at permitting a decision-maker to defend his or her decision. Part of its aim is to ensure that the Tribunal is fully informed.[48]

These observations assume a heightened significance in reviews before the AAT concerning a decision under s 33(2). This is because the approval decision under s 33(2) requires the existence of a statement of participant supports 'prepared with the participant' by the decision-maker. This poses difficult questions about which party should prepare the statement of participant supports and how that should take place in the context of a contested AAT proceeding. Justice Downes, a former President of the AAT, said in an extra-curial address that '[o]nce the Tribunal notionally becomes the decision-maker, it follows that the decision-maker's interest is for the correct or preferable decision to be made'.[49] While that conception of the respondent's role helps to harmonise the roles of AAT and decision-maker in a merits review proceeding, it does not answer the question of how to prepare a substituted or new statement of participant supports 'with the participant', and who is to help to prepare it, in the context of reviewing a decision under s 33(2). I consider the implications of this issue in greater detail below.

The upshot of the preceding analysis is, as Allars puts it, that '[t]he undisputed emphasis in practice, and in judicial interpretation of the [AAT Act], is upon formal and adversarial

43 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68; see also *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424–5.

44 *Bramwell v Repatriation Commission* (1998) 51 ALD 56, 60; *Repatriation Commission v Maloney* (1993) 45 FCR 563, 568; *Budworth v Repatriation Commission* (2001) 63 ALD 422 [44]. See also AAT Act, s 43(1).

45 Hall, above n 35, 78.

46 *Re Hungerford and Repatriation Commission* (1990) 21 ALD 568, 577.

47 *Re Wertheim and Department of Health* (1984) 7 ALD 121, 154. See also Dwyer, above n 38, 255–6, citing *Re Cimino and Director-General of Social Services* (1982) 4 ALN N 106; *Re Lockley and Commonwealth* (1986) 11 ALN N 139; *Re Ermolaeff and Commonwealth* (1989) 17 ALD 686; *Cinkovic and Repatriation Commission* (1990) 20 ALD 131, 137–8.

48 (1984) 7 ALD 121, 154.

49 Justice Garry Downes AM, 'Future Directions' (Paper presented at the Australian Institute of Administrative Law Forum, Canberra, 1 July 2005).

procedure'.[50] Moreover, as Creyke observes, 'tribunals are sited in an adjudicative system the final tiers of which traditionally operate in an adversarial fashion'.[51] Although these views about AAT procedure are well established, the following part of this article identifies distinct and acute issues that arise in the application of AAT procedure in merits review of decisions to approve a participant's plan under s 33(2) of the NDIS Act.

Incongruities and issues from the intersection of the NDIS and administrative law

The first and second sections of this article set out key features of the statutory scheme created by the NDIS Act and analyse the existing Commonwealth administrative law framework for merits review in the context of decisions to approve a statement of participant supports under s 33(2).

In this part of the article I focus on two specific incongruities that appear from the intersection of the decision-making principles in the NDIS Act and the process of merits review in the AAT. First, I consider the centrality of the participant within the NDIS and how the principles concerning decision-making with the participant sit with the procedural requirements of the AAT. Secondly, I consider the suitability of the existing merits review mechanism for reviewing decisions under s 33(2) of the NDIS Act.

The centrality of the participant

The NDIS Act puts the participant at the centre of decision-making through the process of preparing a participant's plan. This reflects the 'paradigm shift' which the NDIS Act gives effect to in enacting certain principles under the Convention. This method of decision-making, planning and funding of participant supports also reflects and operationalises the 'transformational approach to the provision of disability services in this country'.[52] That transformational approach, however, results in an incongruity when mapped onto the existing administrative law framework, which has not undergone a similar transformation. The incongruity is first evident at the point where a participant seeks merits review by the AAT of a decision to approve a statement of participant supports under s 33(2). Once a participant commences a merits review proceeding in the AAT, the participant also becomes an applicant for review who is subject to the AAT's procedures as well as the decision-making principles in the NDIS Act.

Notwithstanding this incongruity, there is a basis for the view that a participant who also becomes an applicant for review in an AAT proceeding should be subject to the AAT's procedure even where that involves some level of formality not contemplated by the substantive legal framework that empowered the original decision. This is because, once an applicant invokes the AAT's jurisdiction to conduct a review, such an act also potentially brings into play the AAT's whole range of powers. This includes the power to take evidence on oath or affirmation,[53] the power to compel the attendance of a witness or production of a document,[54] and the power to grant a stay of the original decision pending the review.[55] These powers support the AAT's function of having a de novo hearing and arriving at the correct or preferable decision on the material before it. On one view, adherence to the AAT's procedures is a necessary price for a party invoking its powers and having an opportunity to persuade the AAT to make the correct or preferable decision. However, recognising this as so should not detract from the objective of bringing two incongruous decision-making

50 Allars, above n 36, 404.
51 Robin Creyke, 'Administrative Tribunals' in Matthew Groves and HP Lee (eds), *Australian Administrative Law* (Cambridge University Press, 2007) 93.
52 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2012, 13878 (Julia Gillard).
53 AAT Act, s 40(1)(a).
54 AAT Act, s 40A.
55 AAT Act, s 41.

frameworks into greater harmony where appropriate and achievable.

Merits review of decisions under s 33(2) of the NDIS Act

The key point in this article is that the process of merits review in the AAT does not operate harmoniously in the context of decisions concerning participant supports under s 33(2) of the NDIS Act. This is because s 33(2) requires the CEO or delegate to approve a statement of participant supports prepared with the participant. As outlined above, the AAT's procedures do not easily allow it to give effect to a mode of decision-making 'with the participant' — and certainly not in the way that the Agency, through planning meetings, would exercise the power under s 33(2).

Section 103 of the NDIS Act provides the AAT with jurisdiction to 'review a decision made by a reviewer under subsection 100(6)'. Section 100(6) provides that a reviewer (who cannot be the original decision-maker) must confirm, vary or set aside and substitute a 'reviewable decision' if a person affected by the original decision requests a review. Item 4 of the table at s 99(1) specifies that the 'reviewable decision' under s 33(2) is 'a decision to approve the statement of participant supports in a participant's plan' and identifies the CEO as the relevant decision-maker.

As a matter of statutory interpretation, it is plausible to construe s 99(1), item 4, as limiting the reviewer's and thereby the AAT's function to reviewing only the approval component in s 33(2) and not extending to the 'prepared with the participant' requirement. However, there are two main reasons why the AAT's function in conducting a review of a decision under s 33(2) should not be read as limited in this way.

Section 43(1) of the AAT Act provides that, in conducting a review, 'the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'. In the context of reviewing a decision made under s 33(2), this must include the power to prepare the statement of participant supports with the participant as well as the express provision in s 99(1), item 4, which refers to 'a decision to approve'. The Agency's publicly available material given to participants indicates that a reviewer conducting an internal review 'may want to talk to you [the participant] as part of this process'.[56]

Inclusion of the participant in decision-making is an essential feature of the statutory scheme, particularly with respect to participants' plans.[57] Therefore, not limiting the AAT's review function to merely approving a statement of participant supports under s 33(2) but requiring it, as the relevant decision-maker, centrally to involve the participant in the decision-making process is consonant with the principles of the NDIS Act. Moreover, s 4(17) provides, in essence, that any person or body 'is to perform functions and exercise powers under this Act in accordance with these principles [in s 4]'. This would include the principle in s 4(8) that '[p]eople with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity'.

The better view seems to be that s 99(1), item 4, does not limit the AAT's functions in reviewing a decision under s 33(2) and that the AAT has power to approve a statement of participant supports that is prepared with the participant. Moreover, in exercising that power, the AAT must give effect to the general principles in s 4 as well as the specific principles concerning participants' plans under s 31 of the NDIS Act.

56 National Disability Insurance Agency, 'Booklet 2 — Planning', 14 <https://www.ndis.gov.au/about-us/publications/booklets-and-factsheets>.

57 See NDIS Act, s 31.

Assuming the correctness of this view, the simplest way of illustrating the incongruity between the requirements of decision-making under s 33(2) of the NDIS Act and the procedure for merits review in the AAT is to point to the incompatibility between the requirement to prepare a statement of participant supports 'with the participant' under s 33(2) of the NDIS Act and the requirement in s 39 of the AAT Act that the 'Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case'. Two recent decisions of the Tribunal illustrate the incompatibility of decision-making 'with the participant' and the conduct of merits review through an adversarial and adjudicative process.

Re FRCT National Disability Insurance Agency[58] (*FRCT*) involved twin brothers under four years of age, both diagnosed with autism spectrum disorder. The boys' mother on their behalf sought approval in their statements of participant supports for 20 hours a week of Applied Behaviour Analysis (ABA) therapy. The plan approved by the original decision-maker contained funding for ABA therapy at about one-third of what the participants had sought.

At the hearing before the AAT, the applicants maintained their request for funding for 20 hours a week of ABA therapy. The respondent put forward a very different alternative position which focused on 'capacity building supports for early childhood intervention through keyworker model' and a 'six month transition from ABA therapy'.[59] The AAT noted that '[i]t is these two proposed support plans that I consider in relation to the evidence and the requirements of the NDIS Act'.[60]

In urging the AAT to adopt one of the two alternative positions, both parties put on extensive expert evidence. The applicants relied on expert evidence from the ABA therapy provider for the twins as well as the boys' speech pathologist. The respondent 'commissioned a report from Association Professor "D" who has clinically specialised in the area of developmental and behavioural paediatrics'.[61] The respondent also relied on reports prepared by an occupational therapist and a speech pathologist which supported the 'keyworker model' put forward as the centrepiece of its alternative position. The AAT heard oral evidence in chief from the mother of the twins and five expert witnesses. There was cross-examination of each witness who gave oral evidence.

Ultimately, the AAT found that ABA therapy at 18 hours a week was a reasonable and necessary support for the two boys. In doing so, the AAT gave particular weight to the fact that the parents of the participants wished 'to continue with ABA therapy' and found that:

> the proposal by the Agency to transition FRCT from ABA therapy is completely inconsistent with the objects and principles of the NDIS Act, which reinforce the exercise of choice in the planning and delivery of supports, and acknowledge the role of families in this process. This approach is also inconsistent with section 31 of the NDIS Act that outlines principles relating to participants' plans including respecting and strengthening the capacity of families to support participants who are children, and enabling participants to exercise control and maximise choice and independence.[62]

This case illustrates the practical difficulties of simultaneously giving effect to both the procedural obligations in s 39 of the AAT Act and the requirement in s 33(2) while adhering to the objects and principles of the NDIS Act. Under s 39 of the AAT Act, the respondent Agency was entitled to put its alternative case to try to satisfy the AAT that its proposed supports were reasonable and necessary within the meaning of s 34(1) of the NDIS Act. However, being satisfied that a particular support is reasonable and necessary having

58 [2019] AATA 1478. See also the accompanying decision in *WKZQ and National Disability Insurance Agency* [2019] AATA 1480.
59 [2019] AATA 1478 [21].
60 Ibid [22].
61 Ibid [55].
62 Ibid [172].

regard to the criteria set out in s 34(1) is not the end of the matter. The AAT (standing in the shoes of the CEO) must ultimately exercise the power in s 33(2) to approve a statement of participant supports prepared with the participant (specifying, amongst other things, the reasonable and necessary supports that will be funded).[63] The AAT must perform that function in a way that is consonant with the NDIS Act as a whole and the principles that underpin it. Having alternative cases put to it may allow the AAT to make findings that enable it to specify a reasonable and necessary support that satisfies s 34(1), but it does not necessarily give effect to the requirement that decision-making about plans must involve the participant in a central and collaborative way. By making this observation I intend no criticism whatsoever of the AAT or the respondent Agency, either in a specific case or generally. The AAT and the respondent each engaged in the process in a way that was consistent with the AAT's procedure. The real issue is one of structural incongruity between that procedure and the 'paradigm shift' in the mode of decision-making under s 33(2) of the NDIS Act.

The second case that illustrates this incongruity is the decision in *Re Burchell and National Disability Insurance Agency*[64] (*Burchell*). In *Burchell*, the participant asked for nutritional support products and thickened fluids to be specified as reasonable and necessary supports in his statement of participant supports and funded by the NDIS. He asked for these supports to be included as reasonable and necessary because, on his case, they addressed his functional impairment in being unable safely to swallow unmodified food and drink as a result of his dysphagia, which was caused by his cerebral palsy. Before the AAT, 'the agency contended as a principal submission that the support requested is health-related, and that health-related supports will not be funded under the [NDIS Act], even if the health system does not make it available'.[65]

The main issue in *Burchell* was whether the requested supports met the criterion in s 34(1)(f) in that they were most appropriately funded or provided by the NDIS and were not more appropriately funded or provided through another general system, particularly the health system. Prior to the decision in *Burchell*, a line of decisions developed in the AAT which considered the parameters of the NDIS by reference to s 34(1)(f) of the NDIS Act.[66]

In *Re Fear by his mother Vanda Fear and National Disability Insurance Agency*[67] (*Fear*) the AAT found that:

> [73] ... the bedside and portable oral suctioning equipment are supports more closely related to the clinical treatment of Mr Fear's health needs than to his independence and social or economic participation. Their principal purpose relates to managing his health and preventing illness rather than to supporting him to undertake activities that enable him to participate in the community. Put very bluntly again, they help to keep him alive. The fact that they enable him to remain living at home and to go out with his family and others does not change that, in our view, their principal purpose is to manage his health.[68]

The AAT in *Burchell*, constituted by Deputy President Rayment QC, set aside the reviewable decision and declined to follow the reasoning in *Fear* to the extent it upheld the proposition that, pursuant to s 34(1)(f), 'health related expenditure not funded elsewhere will not be funded under the NDIS'.[69] The Deputy President also found that the proposed supports did

63 NDIS Act, s 33(2)(b).
64 [2019] AATA 1256.
65 Ibid [5].
66 See *Fear by his mother Vanda Fear and National Disability Insurance Agency* [2015] AATA 706; and *Gordon Young and National Disability Insurance Agency* [2014] AATA 401; 140 ALD 694.
67 Ibid.
68 Ibid [73].
69 [2019] AATA 1256 [43].

not fall within the definition of clinical treatment, as 'the support is not an activity or service, and is neither a pharmaceutical nor any other universal entitlement'.[70]

The point from *Burchell* that is presently relevant is not about the difference in opinion within the AAT regarding the application of s 34(1)(f) of the NDIS Act. What the decision in *Burchell* illustrates is that the AAT, in carrying out its review function, particularly during these relatively early days of the NDIS, often needs to resolve fundamental contests over what the NDIS will be responsible for and what the NDIS will not be responsible for and how those responsibilities interact with other support systems.[71] Resolving these issues invariably involves, as Deputy President Rayment observed, 'questions of law about the statute, which have not hitherto been examined in the courts, in regard to the Act'.[72] Although undeniably important, statutory construction forms only part of the panoply of the decision-maker's functions under Div 2, Pt 2, of Ch 3 of the NDIS Act. In particular, s 33(2), which was the relevant decision-making power in each of the cases analysed above, contemplates more from the decision-maker before arriving at a decision. In other words, s 33(2) requires more than an adjudication. The need for adjudication in these cases further highlights the practical difficulty of decision-making 'with the participant' in circumstances where the decision-maker and the participant approach the exercise under s 33(2) with fundamentally different conceptions about the nature and effect of the participant's disability and different characterisations of a particular support as 'health' or 'disability' related.

Adjudicating in these cases and producing written decisions resolving these issues are part of the 'normative effect on administration' of AAT decisions.[73] This is an important principle underpinning the merits review system. The Agency often incorporates significant AAT decisions into its Operational Guidelines for primary decision-makers. However, the adjudicative and adversarial process undertaken to arrive at these decisions remains in tension with the different mode of decision-making contemplated by s 33(2) of the NDIS Act.

Possible solutions

The final part of this article sets out possible solutions to the issues identified above. In particular, I consider in this section possible solutions to the disjunction between the requirement for the decision-maker to prepare a statement of participant supports with the participant and the approval function ultimately exercised by the AAT. I also consider the role of a participant's statement of goals and aspirations and how a participant might use the power of goal setting.

Solutions under the AAT Act

The starting point in the search for solutions must be the AAT Act. However, as Allars points out, '[t]he AAT Act gives little guidance on how a clash of formal/informal or adversarial/inquisitorial in the application of these provisions is to be resolved'.[74] Although that comment addresses the issue in a more conceptual way about how the AAT operates generally, it highlights the point that the AAT Act does not have much to say about how the AAT will deploy the most appropriate procedure in each case. Moreover, Creyke observes that post-amalgamation:

> the different procedures of the chief divisions are enshrined in legislation and will be difficult to change. This is inimical to the development of a more user-friendly, accessible tribunal which avoids confusion and

70 Ibid [49].
71 See, for example, *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, Sch 1, cll 7.4 and 7.5.
72 [2019] AATA 1256 [5].
73 Gerard Brennan, 'Twentieth Anniversary of the AAT' in J McMillan (ed), *The AAT — Twenty Years Forward* (AIAL, 1998) 11–12.
74 Allars, above n 36, 410.

enhances accessibility. More careful attention to this issue was needed and will be needed to avoid these consequences of the status quo.[75]

This observation arguably applies with even greater force to cases in the NDIS Division.

Short of amending the AAT Act and the statutory procedures applicable to the NDIS Division, Creyke suggests that the power under s 18B of the AAT Act to issue presidential directions may be one way to 'provide review which is proportionate to the importance and complexity of the matter'.[76] Creyke's suggestion originates in the context of limiting the levels of representation in proceedings before the AAT; however, it alludes to the possibility of using a s 18B direction in other ways to make decision-making under the NDIS Act more appropriate to its context. The current *Practice Direction for Review of National Disability Insurance Scheme Decisions* made under s 18B essentially summarises in plain English the parties' procedural obligations under the AAT Act. For example, the practice direction tells applicants that '[t]he hearing is an opportunity for you and the Agency to tell your sides of the case to an AAT Member who will make a decision'.[77]

The AAT's website notes that the practice direction is currently under review but does not indicate the status of that review or when it might finish and result in a new practice direction. Whatever the outcome of the review, a new practice direction is unlikely to be a panacea for all of the potential incongruities. However, it is an opportunity for the AAT to recognise the unique requirements of decisions made under s 33(2) of the NDIS Act, which comprehends the approval of a statement of participant supports prepared with the participant and the consequence of that particular power in combination with the principles applicable to participant plans on the conduct of a review by the AAT. Although the NDIS Division reviews many different types of decisions made under the NDIS Act, it may be appropriate to have a practice direction, or a part of a practice direction, that specifically addresses the conduct of reviews of decisions made under s 33(2) which alludes to the need for involving the participant in decision-making in a way that extends beyond merely being a litigant with a right to be heard.

There are also other procedural mechanisms available to the Tribunal under the AAT Act to address this incongruity. The most obvious is s 33(1)(b) of the AAT Act. The AAT may be able to rely on this provision to adopt a procedure which would allow it to make a decision 'with the participant' in an appropriate case. Another option under the AAT Act relates to the appointment power under ss 6 and 7 in conjunction with the division assignment power under s 17E (concerning assignment to the NDIS Division). None of those provisions require the appointment of lawyers and there is at least a credible argument that the government should consider appointing some non-lawyers with specialist expertise relevant to the NDIS and its administration.[78] One difficulty with this approach may be the requirement, under s 28 of the AAT Act, to give written reasons for decisions which, by virtue of s 44, may be scrutinised by the Federal Court on a question of law. The AAT may ameliorate such a difficulty by constituting itself with two or three members with different but complementary expertise under s 19B of the AAT Act.[79]

Where the AAT cannot through its procedure give effect to the requirements of s 33(2) by approving a statement of participant supports made with the participant, the Tribunal may need carefully to evaluate in an appropriate case how it exercises its powers under s 43(1)

75 Creyke, above n 37, 66.
76 Ibid 68.
77 Administrative Appeals Tribunal, *Practice Direction for Review of National Disability Insurance Scheme Decisions*, 30 June 2015, [7.1].
78 Compare the recommendation in IDF Callinan AC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (2019) [10.34].
79 However, again, compare the recommendation in Callinan, ibid, [10.36].

of the AAT Act. This may arise where the AAT determines that the statement of participant supports should include further funding for certain reasonable and necessary supports that it finds satisfy the criteria in s 34(1) of the NDIS Act but can only arrive at such a decision following a hotly contested hearing. In such a case, it may be appropriate for the AAT to 'remit the matter for reconsideration with any direction or recommendation' under s 43(1)(c)(ii) of the AAT Act rather than 'make a decision in substitution' under s 43(1)(c)(i). In this way, the AAT can make appropriate findings about what are reasonable and necessary supports for the purposes of s 33(5) and s 34(1) but ultimately leave the CEO or the CEO's delegate to approve the statement of participant supports prepared with the participant in the form of, for example, planning conversations, with the benefit of the AAT's direction. This course would also allow the approval of the statement of participant supports and the preparation of a participant's plan to better fulfil the principles in s 31 of the NDIS Act.

Another solution to address the prospect of a participant's merits review proceedings becoming an adjudicative vehicle for resolving important but technical issues concerning the application of the NDIS Act, but which have little bearing on the participant's choice and self-determination, is s 45 of the AAT Act. Section 45(1) provides that the AAT may refer a question of law to the Federal Court for decision. The AAT may do so on its own initiative or at the request of a party. Resolving discrete threshold issues of statutory construction separately from the decision-making framework under s 33(2) of the NDIS Act may be a solution which allows the AAT better to adhere to the principles under the NDIS Act.

Considering the role of the respondent Agency

Another possible solution that may address the incongruity between merits review procedure and the requirements of decision-making under s 33(2) of the NDIS Act is to reconsider the role of the respondent Agency and those who represent them in AAT proceedings. The most obvious starting point is to embrace the proposition that '[i]t is complementary to the function of the Tribunal itself, that the role of the decision-maker in proceedings before the Tribunal may be different from that of an adversary in litigation'.[80] Allars further notes that '[i]n some social security and compensation cases AAT members have suggested non-adversarial roles for departmental advocates and have criticised counsel who adopt unnecessarily adversarial attitudes to hearings'.[81]

In making a similar point, Dwyer refers to the decision in *Re Cimino and Director-General of Social Services*,[82] where the AAT said, 'I think it is very important that representatives of the department should approach their task in this way, as it were as counsel for the Crown, ensuring only that all the facts are before the Tribunal and not placing emphasis on defeat of the application'.[83] I doubt whether this proposition can be laid down as a rule that lawyers representing respondent agencies in AAT proceedings must act in this way in all cases, particularly where s 33(1AA) of the AAT Act only requires the decision-maker to 'use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding'. The Commonwealth's model litigant obligation says substantively the same thing.[84]

There are limits to how much the Agency's lawyers can do in this context. Nonetheless, a less adversarial approach to NDIS proceedings is likely to help the AAT better to meet the requirements of the NDIS Act with respect to the preparation of participants' plans when conducting a review of a decision under s 33(2).

80 Hall, above n 35, 90.
81 Allars, n 36 above, 411.
82 (1982) 4 ALN 106.
83 Quoted in Dwyer, above n 38, 256.
84 See *Legal Services Directions 2017* (Cth), Appendix B, cl 4.

The participant's statement of goals and aspirations

The ability for participants to set their own goals through the participant's statement of goals and aspirations under s 33(1) of the NDIS Act has important implications for the administration of the NDIS Act. This is particularly so in the context of s 33(2)(b), which is the 'gateway established by the legislative scheme'[85] and directs the decision-maker to the requirements in s 33(5)(c) requiring satisfaction 'as mentioned in section 34 in relation to the reasonable and necessary supports that will be funded'. Section 34(1) then provides six mandatory considerations, the first of which is 'the participant's statement of goals and aspirations'.

In *McGarrigle*, Mortimer J made the following observations about the significance of a participant's goals and aspirations:

> [103] The question whether five return trips were a reasonable and necessary support for Mr McGarrigle (as opposed to a lesser number) would have required a detailed assessment of Mr McGarrigle's needs, and the benefits he received, from the activities for which he required the transport. This would have included (for example) whether he could be transported by others (family, carers, etc). But the Tribunal would have had to find, on the evidence and as a matter of fact, that this could reasonably be done. Then there may have been a probative basis to be satisfied that only three days a week transport costs were reasonable and necessary. For example, as senior counsel for Mr McGarrigle submitted, *the goals, objective and aspirations of a person with disability are a core aspect of the participant plan* and, I have found, the supports which are approved are intended by the scheme to 'support' pursuit of those goals, objectives and aspirations. That would appear to be one of the reasons Parliament has used the word 'support'. On the evidence, *independence is important for Mr McGarrigle, so having others transport him may not pursue that goal*. To find five days transport was not reasonable and necessary, *the Tribunal would have had to confront this issue on the merits*.[86]

The effect of s 33(1) and s 34(1)(a) is that a participant can create mandatory relevant considerations for the decision-maker by setting goals, without approval by the decision-maker, and which are entirely unique to that participant. This is a unique power in administrative law. Goal setting in the statement of participant's goals and aspirations is different from, for example, an asylum applicant making a 'claim'. In asylum cases, an applicant's claim is a factual matter put forward as satisfying a criterion for a protection visa, which the decision-maker must consider in exercising the jurisdiction to grant or refuse to grant a visa.[87] The statement of participant's goals and aspirations is much more than that. It actually creates and gives content to a unique criterion in every participant's case which, although not dispositive, is 'a core aspect of the participant plan'[88] and must be taken into account generally pursuant to s 31(j),[89] specifically in the context of determining what are reasonable and necessary supports under s 34(1)(a).

How the AAT 'confront[s] this issue on the merits' on a case-by-case basis has important implications for the administration of the NDIS and for participants. There is no reason why a participant could not specify a goal with particularity and detail and use a specifically identified goal as the basis for seeking approval of a specific support directed toward that goal.

85 [2017] FCA 308; 252 FCR 121 [95].
86 Ibid [103] (emphasis added).
87 See *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 [55], [58]. See also *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 214 CLR 496 [24].
88 [2017] FCA 308; 252 FCR 121 [103].
89 Section 31(j) of the NDIS Act relevantly provides that the 'preparation, review and replacement of a participant's plan … should so far as reasonably practicable: … (j) facilitate tailored and flexible responses to the individual goals and needs of the participant'.

Indeed, a major quantitative study of the implementation of NDIS by Mavromaras et al found that '[t]here was evidence that NDIS participants had become more knowledgeable about using the language and philosophy of the NDIA in order to include previously unsupported services and supports in their plans'.[90] Published decisions of the AAT in s 33(2) cases indicate that most participants still identify their goals and aspirations at a fairly generally level. A more targeted approach to a participant's statement of goals and aspirations would appear to be one area where growing knowledge of the NDIS could be deployed with great effect. It may also minimise the incongruities between the NDIS Act and AAT procedure by ensuring that the participant's wishes remain central to the AAT's decision.

Conclusion

The NDIS Act, in giving effect to Australia's obligations under the Convention, introduced new concepts and principles relevant to persons with disability but also to administrative law. The most important concept introduced by the NDIS Act is that of the participant. The concept of the participant and the principles underpinning the NDIS have (not without difficulty) mapped onto a pre-existing administrative law framework for merits review. This article has analysed some of the challenges that emerge from the intersection of the NDIS and merits review in the AAT in the context of decisions to approve a statement of participant supports under s 33(2) of the NDIS Act. The main point is that there are real difficulties in simultaneously conducting a review in accordance with the AAT's procedures while adhering to the requirements of decision-making under the NDIS Act, and the principles of the NDIS Act, which contemplate the central and not necessarily adversarial involvement of the participant in decision-making.

The solutions are not straightforward. They require adapting an established mechanism for merits review to new modes of decision-making. In a related context, the Australian Law Reform Commission said that 'hard cases should not, however, be treated as a barrier to building law and legal frameworks that signal the paradigm shift of the [Convention]'.[91] Going forward, decision-makers, practitioners, participants and participants' advocates will need to consider how best to navigate these challenges, mindful that the paradigm has shifted.

90 Mavromaras et al, *Evaluation of the NDIS — Final Report* (National Institute of Labour Studies, Flinders University, 2018) 144.
91 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 2014) 63 [2.116].

Second actor theory: A principled and practical resolution to the legality of domino effect administrative decision-making

Ethan Heywood*

Nullity may be public law's great equalizer,[1] but it has become one of its most vexing puzzles.[2] The conceptual difficulty associated with the nature of invalid administrative decisions is that they otherwise appear to be valid unless and until they are set aside by a court of competent jurisdiction. In the words of Lord Radcliffe, the invalid decision 'bears no brand of invalidity upon its forehead'.[3] For this reason invalid decisions can often support further administrative decisions that are (otherwise) legally valid. This has been aptly described as the 'domino effect'.[4] At face value, an initial invalid decision would appear to render the second decision invalid. Therein lies the main controversy: how should the courts approach (otherwise) valid decisions taken in reliance upon invalid administrative action? The validity of the second decision will depend upon an application of Professor Christopher Forsyth's Theory of the Second Actor. The theory provides a principled and practical solution to resolving the question of the validity of the subsequent decision. The validity of the second act will turn upon the proper construction of the act empowering the 'second actor', diverting attention from the initial invalid decision. Such an approach should be adopted in Australia, where its theoretical underpinnings are already widely accepted.

This article has four key parts. Its scope is limited to consideration of administrative decisions taken pursuant to statutory powers; it does not extend to judicial decision-makers. The first part will discuss the concepts of jurisdiction and the problem of invalidity. The second part will articulate second actor theory and outline the principles that should guide its application. The third part will explain that an invalid administrative decision that is void *ab initio* remains a decision in fact, which can have legal consequences. The fourth part will discuss judicial treatment of second actor theory. The article will conclude with a discussion of a recent case example from Western Australia, because of its effective application of the principles and demonstration of second actor theory's practical utility.

Jurisdictional error and the problem of invalidity

An administrative act is invalid when it is taken outside of jurisdiction and thus vitiated by jurisdictional error.[5] 'Jurisdiction' refers to the authority to decide,[6] and jurisdictional error arises where a decision-maker makes a decision outside the limits of the authority conferred upon them by statute.[7] The concepts of jurisdiction and jurisdictional error are somewhat deceptive.[8] This is particularly emphasised at the margins, where the line between what constitutes jurisdictional error and what does not is incapable of definition.[9]

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1 Mark Aronson, 'Nullity' (2004) 40 *Australian Institute of Administrative Law Forum* 19, 19.

2 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 [101] (Kirby J) (*Bhardwaj*).

3 *Smith v East Elloe Rural District Council* [1956] AC 736, 769.

4 Jack Beatson, Martin Matthews and Mark Elliott, *Administrative Law: Text and Materials* (Oxford University Press, 2011) 97.

5 *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 [24] (Kiefel CJ; Gageler and Keane JJ) (*Hossain*).

6 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 [6] (Gleeson CJ and McHugh J); Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139, 140.

7 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 (Hayne J) (*Aala*).

8 See generally *Bros Bins Systems Pty Ltd v Industrial Relations Commission of New South Wales* (2008) 74 NSWLR 257 [36] (Spigelman CJ) citing *City of Yonkers v United States* (1944) 320 US 685, 695, in which Frankfurter J referred to the use of the word 'jurisdiction' as one of the most deceptive legal pitfalls.

9 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 [71] (French CJ; Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*Kirk*).

In *Hossain v Minister for Immigration and Border Protection*[10] (*Hossain*), the High Court sought to clarify the concepts of jurisdiction and jurisdictional error. Explaining the concept of jurisdiction, Kiefel CJ and Gageler and Keane JJ observed:

> Jurisdiction, in the most generic sense in which it has come to be used in the field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences.[11]

Their Honours then went on to observe that jurisdictional error refers to a failure to comply with one or more statutory preconditions or conditions, to an extent which results in a decision that has been made in fact but that lacks characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.[12] I will return to the notion of 'made in fact' shortly.

It is clear from *Hossain*, and other decisions of the High Court, that the distinction between jurisdictional and non-jurisdictional error of law must be maintained in Australia.[13] So, while the distinction has essentially ceased to exist in the United Kingdom,[14] in Australia it persists in light of its constitutional function.[15] In Australia, an administrative decision taken without jurisdiction is regarded, in law, as no decision at all.[16] The position is similar to, and inherited from, the United Kingdom, where there is ample judicial authority for that proposition.[17] Accordingly, a decision affected by jurisdictional error is said to be invalid.[18] The vexing puzzle at the centre of our inquiry is the status of invalid administrative decisions. They are legally invalid, but the nature of this invalidity is unclear. Accordingly, the idea of 'invalidity' suggests that a decision has no legal consequence. Unless and until the decision is set aside, however, it will not necessarily appear to be unlawful. Understandably, this poses difficulty for other decision-makers relying upon the validity of the decision, as there is often no immediate indication that the decision is unsupported by a legal norm. Therefore, the question becomes: what is the status of administrative decisions that are otherwise lawful but taken in reliance upon invalid administrative decisions? The appropriate approach to resolving the question is to apply second actor theory.

Professor Forsyth's Theory of the Second Actor

Professor Forsyth's Theory of the Second Actor rests principally on the foundation that an administrative decision or act may be invalid at law though nonetheless exist in fact.[19] The

10 *Hossain* (2018) 92 ALJR 780.
11 Ibid [23].
12 Ibid [24].
13 Ibid [17]; *Kirk* (2010) 239 CLR 531 [100] (French CJ; Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Plaintiff S157 v The Commonwealth* (2003) 211 CLR 476 [80]–[81] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (*Plaintiff S157*); *Craig v South Australia* (1995) 184 CLR 163, 179; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132, 141, 149, 165.
14 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170 (Lord Reid); *R v Hull University Visitor; Ex parte Page* [1993] AC 682, 701–2 (Lord Browne-Wilkinson); *R (Cart) v Upper Tribunal* [2012] 1 AC 663 [39] (Baroness Hale of Richmond), [110] (Lord Dyson); Lord Diplock, 'Administrative Law: Judicial Review Reviewed' (1974) 33 *Cambridge Law Journal* 233, 242–3.
15 Jurisdictional error marks the limits of the legislature's constitutional authority to oust judicial review of administrative decision-making. The constitutional writs of mandamus and prohibition (and the writ of certiorari as ancillary relief) are only available to correct jurisdictional errors of law; the power to exclude non-jurisdictional errors of law from review is permissible. On this point see generally *Plaintiff S157/2002* (2003) 211 CLR 476 [71]–[83].
16 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 [51] (Gaudron and Gummow JJ) [63] (McHugh J) [152] (Hayne J); *Plaintiff S157/2002* (2003) 211 CLR 476 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
17 See, eg, *Ridge v Baldwin* [1946] AC 40; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783.
18 *Hossain* (2018) 92 ALJR 780 [24] (Kiefel CJ; Gageler and Keane JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 [63] (*Probuild*); *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 157.
19 Benjamin Coles, 'The Effect of Legally Infirm Administrative and Judicial Decisions' (2017) 24 *Australian Journal of Administrative Law* 158, 162.

second actor theory can be expressed as the theory that the validity of the 'second act' (the act taken in reliance upon the validity of the invalid administrative act) will depend upon the powers of the second actor as prescribed by the law. Forsyth articulates this theory as follows:

> [U]nlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether the second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.[20]

The theory itself cannot provide the answer to the question of whether the second actor has power — according to second actor theory, the focus of the inquiry must fall upon the relevant statutory provision that gives rise to the second actor's decision-making authority. This point was made forcefully in Forsyth's most recent enunciation of the theory.[21] Second actor theory only offers guidance in ascertaining the legal authority of the second actor. In effect, the principle directs the focus of the inquiry; its resolution will depend upon a process of statutory construction, set against a number of principles to be borne in mind.

Whether the second actor had the power to make the decision they made, notwithstanding the invalidity of the first act, will turn upon an application of the following principles. First, the powers of the second actor are to be determined by law, which is fundamental to the inquiry. The principal exercise is statutory construction. The exercise of statutory construction should begin and end with the text of the legislation, but that text should be considered in light of the context and purpose of the statute.[22] That is, the ordinary language of the statute is paramount, but that meaning is ascertained in light of the context and purpose of the relevant Act. The legislation empowering the second actor must contemplate that the validity of the initial decision is not a necessary precondition to the exercise of the second actor's power.

Secondly, the presumption in favour of a person's right to have access to a court to correct errors of law should apply less strongly in circumstances where the administrative decision affects only an individual rather than cross-sections of the population. In *Boddington v British Transport Police*[23] (*Boddington*), which will be discussed in detail below, Lord Irvine pointed out that the presumption in favour of collateral challenge applies less strongly when the relevant administrative act applies to an individual as opposed to the broader public.[24] Forsyth adopted the observations of Lord Irvine.[25] It can be further reasoned that if legislation provides for alternative avenues of appeal and review then the Act itself provides for redress to individuals affected by unlawful decisions. In such circumstances, the strength of the presumption that the legislature did not intend to preclude an

20 Christopher Forsyth, 'The Metaphysics of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, 1998) 159.

21 Christopher Forsyth, 'Showing the Fly the Way Out of the Fly Bottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66(2) *Cambridge Law Journal* 325, 341.

22 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 [69]; *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 [14], [37]; *Probuild* (2018) 92 CLJR 248 [34]; *Theiss v Collector of Customs* (2014) 250 CLR 664 [22]–[23].

23 *Boddington v British Transport Police* [1999] 2 AC 143 (*Boddington*).

24 Ibid 161–2.

25 Christopher Forsyth, 'The Theory of the Second Actor Revisited' (2006) 1 *Acta Juridica* 209, 220.

individual from accessing a court to correct legal errors applies much less strongly.[26] The consequences of the weakened presumption are that the second act is more likely to be valid in circumstances where the administrative decision targeted an individual and there was ample opportunity to remedy the error.

Lastly, it is relevant to consider the nature of the collateral attack and consequence of its success. Forsyth draws attention to the Canadian Supreme Court decision of *R v Consolidated Mayrbun Mines Ltd*.[27] Here their Honours applied a set of criteria and an approach to resolving a second actor question in an almost identical manner to that which Forsyth proposes. The Supreme Court affirmed the decision of the Court of Appeal, and among the factors that were identified as guiding the determination of whether collateral challenge was available were the nature of the collateral attack and the penalty on conviction for failing to comply with the order.[28] This second aspect can be adapted to a more general principle that involves consideration of the consequences attributable to the second (otherwise) lawful decision being invalid. This consideration is necessary because, depending on the extent of the domino effect, there may be a need to place great weight on the difficulty associated with unravelling the chaos that would ensue if the subsequent decision is invalid.

Mark Elliott notes that practical considerations, such as the amount of chaos that would result if the actions of the second actor are to be undone, might well indicate to some that the theory is highly discretionary.[29] However, regard must be had to the nature of the collateral attack and its consequences because they form part of background against which the process of statutory construction must take place. The determination of the validity of the second act cannot take place in a vacuum. The nature of the challenge and the consequences of its success form part of the broader factual circumstances to which the appropriate construction applies. That is, whether a second actor's decision is valid will depend on whether the proper construction of the Act contemplates the validity of the initial act as a precondition to the validity of the second act, set against the background of the nature of the collateral attack and consequence of its invalidity. The significance of these factors will depend on the proper construction of the Act in question. For this theory to have any merit, however, it must be shown that legal consequences are capable of attaching to invalid decisions.

The status of administrative decisions vitiated by jurisdictional error

As indicated above, the High Court has made plain that the position in Australia is that an administrative decision affected by jurisdictional error is, at law, no decision at all.[30] The extent to which the decision is 'non-existent' is the puzzling feature of invalidity. In this part I will explain why administrative decisions vitiated by jurisdictional error must be considered void, although they nonetheless continue to exist in fact.

26 As an analogy, see Edelman J's discussion of the narrow approach to the construction of privative clauses in the context of non-jurisdictional error of law where the narrow approach is much less strictly applied because the decision-maker is not exercising unrestrained power. Such a proposition is analogous to this one because the restriction of collateral challenge on the basis that statutory review rights are available is in the context of an environment where the restriction of unrestrained power is otherwise provided for — there is much less need for the presumption: *Probuild* (2018) 92 CLJR 248 [86]–[87]; see also *Bhardwaj* (2002) 209 CLR 597 [48] (Gaudron and Gummow JJ).

27 [1998] 1 SCR 706.

28 Ibid [45], [52] (L'Heureux-Dubè J delivering the English version of the judgment of the Court).

29 Beatson, Matthews and Elliott, above n 4, 100.

30 *Bhardwaj* (2002) 209 CLR 597 [51] (Gaudron and Gummow JJ); see also *Plaintiff S157/2002* (2003) 211 CLR 476 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Hossain* (2018) 92 ALJR 780 [24] (Kiefel CJ; Gageler and Keane JJ).

Void or voidable and the presumption of validity

The characterisation of unlawful administrative decisions as 'voidable' is an import from the law of contract and is an unsatisfactory conclusion. The conclusion that invalid decisions are void, not voidable, is necessary for the continued functionality of administrative law generally. Unlawful administrative decisions cannot be considered voidable because that conclusion presupposes that the decision is in some way supported by the statute from which the power to make a decision arose. If the decision is vitiated by jurisdictional error the decision is, by definition, unsupported by a legal norm. On this point, Sir William Wade made the following observation:

> There is clear meaning in statements ... that a contract is voidable by a party misled by fraudulent misrepresentation ... In [the contractual context] 'void' means that neither party is contractually bound, and 'voidable' means that both parties are contractually bound, but that one of them is empowered to disclaim his obligation. But there is no comparable situation in relation to the exercise of statutory powers by public authorities. In that field the distinctions matter, and [those] which the courts have been using [in] a clear cut fashion for centuries, are between acts that are authorised by statute and acts which are void; between acts which are *intra vires* and acts which are not ...[31]

The only utility that classifying administrative decisions as voidable *may* have in Australian administrative law is in the case of a non-jurisdictional error of law on the face of the record. In the case of a non-jurisdictional error of law, the decision is taken within jurisdiction but involves an error of law.[32] Wade conceded that there may be a place for characterisation of an administrative decision as voidable in the narrow context of error of law on the face of the record.[33] Australia has maintained the distinction between jurisdictional and non-jurisdictional error of law. A non-jurisdictional error of law is an error of law that is within jurisdiction and is supported by a legal norm arising pursuant to the statute under which the decision was made. In the case of a jurisdictional error, however, the decision has no legal foundation at all. Such a decision then cannot be classed as voidable because that conclusion suggests that some legal basis exists in support of it. To give legal effect to a decision which is beyond power would, in effect, allow decision-makers to exercise power that is unrestricted — an authoritarian conclusion. This is inconsistent with the most fundamental rule of law principles.

A second common approach to resolving the controversy at the centre of this essay is the presumption of validity. This proposition must also be rejected. In *Minister for Immigration and Multicultural Affairs v Bhardwaj*[34] (*Bhardwaj*), Gaudron and Gummow JJ, with whom McHugh J agreed, observed that administrative decisions, if we are to continue to uphold the rule of law, must not be given greater force and effect than is strictly necessary.[35] The presumption of validity is more appropriately understood as an evidentiary presumption.[36] Such a presumption is inadequate to resolve the puzzle that surrounds the nature of invalidity. Lord Irvine observed, in *Boddington*, that administrative decisions are sometimes presumed to be lawful but that this does not mean that such an act is valid until quashed; rather, the decision is presumed to be valid until recognised as unlawful and never having any legal effect at all.[37] This conclusion is essential for the function of our system of government. Chaos would follow if administrative decisions could be safely ignored on the basis that individuals thought them invalid.

31 HWR Wade, 'Unlawful Administrative Action: Void or Voidable?' (1967) 83 *Law Quarterly Review* 499, 519.
32 *Aala* (2000) 204 CLR 82, 141 (Hayne J).
33 Wade, above n 31, 519–20.
34 (2002) 209 CLR 597.
35 Ibid [63] (Gaudron and Gummow JJ).
36 *R v Wicks* [1998] AC 92 (*Wicks*), 115 (Lord Hoffmann); *Boddington* [1999] 2 AC 143, 174 (Lord Steyn).
37 *Boddington* [1999] 2 AC 143, 147–8.

In any event, the desire to classify administrative decisions that are unlawful as either 'void' or 'voidable' or 'valid' or 'invalid' was described in *Bhardwaj* as potentially being the result of a need to treat a decision as having at least sufficient effect to ground an appeal or other legal proceedings.[38] This need is resolved by the observation that the decision exists in fact, independent of any existence at law and by the observation that the question of legal consequence is contextual. In *Bhardwaj*, their Honours went on to say that the terms 'void' and 'voidable' were neither necessary nor helpful and to categorise decisions in such a way ignores the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision.[39]

Void administrative decisions continue to exist in fact

Invalidity is not absolute. Absolute invalidity posits that the decision can never have existed at all and can be ignored. The dicta of Dixon J, in *Posner v Collector of Interstate Destitute Persons (Vic)*,[40] is often cited in support of that proposition. His Honour said of truly invalid decisions that they 'may safely [be ignored], at all events, for most purposes'.[41] It is clear, however, that his Honour did consider that invalidity involved some relativity (hence, 'most'). However, in any event, the complete non-existence of invalid decisions is self-evidently an incorrect proposition. As Kirby J points out in *Bhardwaj*, if the invalid decision does not exist then it cannot support an appeal or proceedings for judicial review.[42] The High Court has rejected absolute invalidity as an appropriate conceptual understanding of the invalidity of administrative decisions.[43] Rather, invalidity is variable depending on context. A decision is invalid insofar as the court and individuals can treat the decision as if it had not been made — an observation which, notably, underscores the fact that invalidity is variable. The proper question, as Sir William Wade put it, is 'void against whom?'[44] The legal consequences associated with invalid decisions are perhaps best understood in the manner enunciated by Professor Mark Aronson, who classifies invalidity as a 'bundle of legal consequences'.[45]

The proper position is that a decision vitiated by jurisdictional error is void but must be properly regarded as valid by the law and by individuals unless and until set aside by a court of competent jurisdiction.[46] This is not to contradict the point made above — as noted, chaos would follow if administrative decisions could be safely ignored on the basis that individuals thought them invalid. The proper position is that they are to be treated as valid unless and until set aside, but that does not alter the legal consequences that attach to the decision.

Bhardwaj is authority for the proposition that a decision affected by jurisdictional error is, at law, no decision at all. However, it is not a logical extension of that conclusion that the invalid decision itself can have no legal consequence. In *Bhardwaj*, Gaudron and Gummow JJ did not explore the consequences of an invalid decision and whether its factual existence could attract any legal consequences. This observation was made by Gray and Downes JJ in *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*[47] (*Jadwan*), where their Honours observed that no explanation was provided for whether the factual and legal consequences of an invalid decision might be distinct:

38 *Bhardwaj* (2002) 209 CLR 597 [45] (Gaudron and Gummow JJ).
39 Ibid [46] (Gaudron and Gummow JJ).
40 (1946) 74 CLR 461.
41 Ibid 483 (Dixon J).
42 *Bhardwaj* (2002) 209 CLR 597 [101]–[102] (Kirby J).
43 For example, orders of superior courts of record, although they might be vitiated by jurisdictional error, are valid unless and until set aside: see, eg, *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 [77] (Kirby J); *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 185 [52] (Gaudron J); see also *Bhardwaj* (2002) 209 CLR 597 [107] (Kirby J).
44 Wade, above n 31, 501.
45 Mark Aronson, Matthew Groves and Greg Weeks *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 2017) [10.120]; Aronson, above n 1, 23.
46 See generally the observations of Sir William Wade in Wade, above n 31, 508.
47 (2003) 145 FLR 1.

> Gaudron and Gummow JJ did not explain in detail the consequences of the proposition that the decision has no legal effect. They did not deal with issues such as the status of the first decision of the IRT if the IRT had not chosen to ignore it and make another. Indeed, their Honours did not discuss what might be the factual, as distinct from the legal, consequences attaching to an administrative decision if no challenge to its validity is ever made.[48]

Their Honours went on to observe that *Bhardwaj* cannot be taken as authority for the proposition that jurisdictional error will lead to the decision having no consequences at all but, rather, that the legal and factual consequences of the decision will depend on the particular statute.[49] Those observations have been cited with approval in a number of intermediate courts of appeal[50] and in the Supreme Court of Western Australia.[51]

In developing second actor theory, Forsyth drew upon Hans Kelsen's Pure Theory of Law. In 'The Metaphysic of Nullity', Forsyth discusses and relies upon Kelsen's distinction between the *Sein* (the Is) and the *Sollen* (the Ought)[52] — the distinction between the realm of facts and the realm of norms. The invalid decision is incapable of existing as a legally valid act because it is unsupported by a legal norm. However, this cannot alter the observation that the decision exists in fact (having in fact been made). This factual existence can, therefore, attract legal consequences. An act or decision taken in reliance on an unlawful administrative decision may then be supported by a valid legal norm if the factual existence of the unlawful decision is all that is necessary to support the lawfulness of the second act.

In 2018, in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*[53] (*Plaintiff M174*), a plurality of the High Court gave a strong indication that the distinction to be drawn between a decision made in law and a decision made in fact indeed existed. Their Honours determined that there was no need to ascertain whether a decision to refuse or grant a visa made in noncompliance with s 57 of the *Migration Act 2001* (Cth) was a valid decision because it was sufficient to proceed on the basis that it was 'a decision that is made in fact'.[54] Justice Gageler (who contributed to the plurality's observations in *Plaintiff M174*) said, in *New South Wales v Kable*,[55] that a thing done in the purported but invalid exercise of power remains a decision in fact:

> [A] thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences.[56]

In making those remarks, his Honour relied upon Forsyth's 'The Metaphysic of Nullity' as authority.

Finally, in *Hossain*, a majority of the High Court clearly indicated that an invalid decision had some existence in fact. Their Honours stated unequivocally that a decision made outside of

48 Ibid [40].
49 [2003] FCAFC 288; (2003) 145 FLR 1 [42] (Gray and Downes JJ), [64] (Kenny J).
50 See, eg, *Minister for Immigration and Border Protection v Hossain* [2017] FCAFC 82 [22]; *Minister for Immigration and Citizenship v Maman* (2010) 200 FCR 30 [44]; *R v Rapolti* [2016] NSWCCA 264 [137]; *Director of Public Prosecutions v Edwards* [2012] VSCA 293 [181].
51 *Tulloh v Chief Executive Officer of Corrective Services* [2018] WASC 105 [23]–[27] (Le Miere J) (*Tulloh*); *Wintawari Guruma Aboriginal Corporation RNTBC v The Hon Benjamin Sana Wyatt* [2019] WASC 33 [90] (Kenneth Martin J) (*Wintawari*).
52 Forsyth, above n 20, 147; Forsyth, above n 21, 340; see also the discussion in Coles, above n 19, 162.
53 (2018) 92 ALJR 481.
54 Ibid [12] (Gageler, Keane and Nettle JJ).
55 (2013) 252 CLR 118.
56 Ibid 138–139 [52] (Gageler J) citing Forsyth, above n 20, 147–8.

jurisdiction is a decision made in fact.[57] The relative nature of invalidity and the observation that an invalid decision, although invalid in law, remains in existence in fact provides the conceptual foundation for second actor theory. The legal consequences that attach to decisions taken in reliance on invalid decisions will turn upon the legal authority of the second actor.

Judicial appetite for second actor theory

Second actor theory has been specifically considered and applied in the United Kingdom and South Africa. There are two important cases where second actor theory was applied that require discussion — namely, *Boddington*[58] and *Oudekraal Estates (Pty) Ltd v The City of Cape Town*[59] (*Oudekraal Estates*). Examination of these cases is informative because they demonstrate judicial support for second actor theory and, in reliance upon these cases (amongst others, but these two in particular), Forsyth developed a more nuanced approach to the application of second actor theory. A number of other cases will also be touched on briefly, including *R (on the application of Shoesmith) v Ofsted*,[60] *D v Home Office*,[61] *R v Wicks*[62] (*Wicks*) and *Director of Public Prosecutions v Head*[63] (*Head*).

In *Boddington*, the House of Lords was tasked with determining whether a collateral challenge to a by-law or administrative act could be brought as a defence to a criminal charge and, if so, whether the defence would be successful if the by-law or administrative act was proven to be invalid. The appellant, Mr Boddington, had been charged with an offence contrary to the British Railways Board by-laws — in particular, smoking on a carriage in which smoking was prohibited. The by-laws were enacted pursuant to s 67(1) of the *Transport Act 1962* (UK). The British Railways Board enacted a by-law prohibiting smoking where there were signs displayed prohibiting the behaviour. Mr Boddington argued that s 67(1) of the *Transport Act 1962* (UK) only empowered the making of by-laws for the use of the railway in respect of smoking on carriages and that complete prohibition of smoking on all carriages by the posting of no smoking notices in all carriages went beyond permissible regulation.

The House of Lords dismissed the appeal, finding that, although collateral challenge was a valid defence to a criminal charge, it was no defence in this case because the British Railway Board acted within their powers. Lord Steyn, with whom Lord Browne-Wilkinson and Lord Hoffman agreed, cited with approval Forsyth's Theory of the Second Actor. In reliance upon Forsyth's 'The Metaphysic of Nullity', Lord Steyn observed that an unlawful by-law is a fact and may have legal consequences depending on the circumstances.[64] In *Boddington*, the first actor was the British Railway Board in making the by-law and the second act was the administrative decision to ban smoking on all carriages, relying upon the validity of the by-law. Notwithstanding any reference to second actor theory, the initial making of the by-law was valid and so the prosecution was lawful.

Oudekraal Estates involved the provincial administrator granting Oudekraal Estates' predecessor in title permission to establish a township. The land that was the subject of the approval had been a refuge for slaves who had escaped the colonial authorities after the turn of the 18th century. Buried among them were prominent religious figures. The decision of the provincial administrator to grant approval ignored the existence of sacred sites of

57 *Hossain* (2018) 92 ALJR 780 [24].
58 [1998] 2 WLR 639.
59 2004 (6) SA 222 (SCA).
60 [2011] EWCA Civ 642.
61 [2005] EWCA Civ 38; [2006] 1 WLR 1003.
62 [1998] AC 92.
63 [1959] AC 83.
64 *Boddington* [1998] 2 WLR 639, 172.

spiritual significance on the land and, accordingly, the decision was invalid. The question then arose as to whether the subsequent granting of approval for engineering services by the Cape Metropolitan Council (in reliance upon the administrator's approval) was also void. The decision of the South African Supreme Court of Appeal was that the approval granted by the council was valid. In reliance upon second actor theory, Howie P and Nugent JA (Cameron and Brand JJA and Southwood AJA agreed) said the following:

> Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question ...[65]

> [T]he proper enquiry in each case — at least at first — is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of the consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect will have legal effect for so long as the initial act is not set aside by a competent court.[66]

The South African Supreme Court of Appeal explicitly relied upon second actor theory in coming to those conclusions.

The Court of Appeal in the United Kingdom was faced with a 'domino effect' problem in 2011. In *R (on the application of Shoesmith) v Ofsted*,[67] it was observed by Maurice Kay LJ, with whom the rest of the House of Lords agreed, that no authoritative principle could necessarily be gleaned from *Boddington*.[68] His Lordship then went on to rely upon *Mossell (Jamaica) Limited v Office of Utilities Regulation*,[69] where Lord Phillips had applied the approach of Lord Irvine in *Boddington*. Lord Irvine argued that invalid decisions are to be presumed valid and that they may have legal consequences until they are declared invalid by a court.[70] However, Lord Irvine's approach is not inconsistent with Forsyth's formulation. Second actor theory was also cited with approval by Brooke LJ (Thomas and Jacob LJ agreeing) in the earlier decision of *D v Home Office*.[71]

In *Wicks*, a planning authority issued an enforcement notice that required the defendant to remove parts of the building he had constructed on the basis that it breached planning control regulations, having exceeded a particular height. The notice was found to have been void. The House of Lords was required to determine whether a prosecution could still take place, notwithstanding the invalidity of the notice. Lord Hoffman took the view that the answer lay in construction of the statute under which the prosecution was to be brought.[72] The conclusion reached by the House of Lords was that the legislation only contemplated an enforcement notice that appeared to be valid. The second act could be lawfully performed despite the invalidity of the first act. *Wicks* was decided before 'The Metaphysic of Nullity' was published, so Lord Hoffman did not apply second actor theory in name, but his Lordship applied a principled approach that resembles second actor theory.

In *Head*, a similar circumstance emerged, with the opposite conclusion. The criminal liability of the accused depended upon the validity of the first act. The first act was an order

65 2004 (6) SA 222 (SCA) [26].
66 Ibid [31].
67 [2011] EWCA Civ 642.
68 Ibid [116], [136] (Stanley Burton LJ) [140] (Master of the Rolls).
69 [2010] UKPC 1.
70 [2011] EWCA Civ 642 [117] (Maurice Kay LJ).
71 [2005] EWCA Civ 38; [2006] 1 WLR 1003.
72 *Wicks* [1998] AC 92, 117.

for the institutionalisation of the alleged victim. If the prosecution of the defendant (for carnal knowledge of a 'mental defective') was to be valid as a second act, it necessitated the validity of the first order. The key difference between *Wicks* and *Head* was to be found in the proper construction of the relevant provisions of the legislation. In *Wicks*, the legislation supported a valid prosecution where the first act was made in fact and in *Head* the legislation did not. The approach taken resembles the approach advanced by Forsyth, and its practical utility is observable in the way in which it can guide judicial determination of the validity of second acts. The law benefits from certainty and consistency, which are obtained by the application of rules which guide judicial decision-making. The status of administrative decisions benefits from the application of consistent rules which can provide that certainty and consistency; second actor theory provides such certainty by providing an overarching principle for the determination of the validity of second acts.

It is clear from the brief outline of authorities above that there is significant judicial appetite for second actor theory and the principles that underpin it. The approach has substantial utility as a principle to guide judges in their consideration of domino effect questions. However, as I have mentioned, the theory has not yet been approved by the High Court of Australia or intermediate courts of appeal. The theory has, though, recently received support in Western Australia in circumstances that offer further insight into the utility of the theory.

Tulloh: A local illustration of the utility of second actor theory

I have chosen to explore the recent application of second actor theory in Western Australia because, at this stage, it is the only overt acceptance of the theory in Australia, and the application of the theory in *Tulloh v Chief Executive Officer of the Department of Corrective Services*[73] (*Tulloh*) is a simple and elegant local example of the theoretical and practical benefits of second actor theory. I will also draw upon the comments of Kenneth Martin J in *Wintawari Guruma Aboriginal Corporation RNTBC v The Hon Benjamin Sana Wyatt*[74] (*Wintawari*). In both cases second actor theory was applied to ascertain whether lawful administrative action (taken in reliance upon an unlawful administrative decision) was invalid by virtue of the jurisdictional error underlying the initial decision. In both cases, second actor theory provided a reasoned and practical solution to the question, and in both cases the second act was found to have been a valid exercise of power notwithstanding the initial unlawful decision.

Facts

On 13 December 2002, Mr Tulloh was sentenced to 15 years in prison. On 25 November 2010, Mr Tulloh was granted parole and then released on 8 December 2010. A urine test provided by Mr Tulloh in August 2012 was positive for methamphetamine use and on 30 August 2012 Mr Tulloh's parole was cancelled by order of the Prisoner's Review Board. Mr Tulloh requested a review of the Board's decision and later, on 12 September 2012, the Board confirmed its decision and Mr Tulloh was returned to custody. He then applied to the Supreme Court of Western Australia for judicial review of the Board's decision. Ultimately, on 4 July 2014, the Court found that the decision of the Board to cancel Mr Tulloh's parole consisted of jurisdictional errors of law and the decision was quashed.[75] Subsequently, Mr Tulloh had his sentence status updated and he was advised that he would serve the whole of his sentence, to be released on 8 December 2017. Mr Tulloh then applied for a writ

73 [2018] WASC 105.
74 [2019] WASC 33.
75 See generally *Tulloh v Prisoner's Review Board (No 1)* [2014] WASC 239.

of habeas corpus, which was granted by Chaney J, and Mr Tulloh was released on 22 September 2014.[76]

Relevantly, on the basis of his unlawful imprisonment, Mr Tulloh then brought an action for damages for false imprisonment for the period 8 December 2012 to 22 September 2014. The issue at hand was the determination of a preliminary question of law. The question for Le Miere J was: was the detention of the plaintiff by the first defendant between 8 December 2012 and 4 July 2014 done without lawful authority?

The first decision is the decision of the Board to cancel Mr Tulloh's parole — a decision which is vitiated by jurisdictional error and is invalid. The second act is the Chief Executive Officer's (CEO's) detention of Mr Tulloh in reliance upon the cancellation order made by the Board (which, at the time of the CEO's decision, appeared to be a valid exercise of power by the Board).

Finding

In consideration of the question, Le Miere J canvassed the leading Australian authorities on the question of jurisdictional error and invalidity. Crucially, coming to the conclusion that, while their Honours in *Bhardwaj* and *Plaintiff S157/2002*[77] found that a decision tainted by jurisdictional error is, at law, no decision at all, it does not follow (in reliance upon Gray and Downes JJ in *Jadwan*) that a legally invalid decision can have no legal consequences.[78] His Honour's observations were cited with approval and adopted by Kenneth Martin J in *Wintawari*.[79] Justice Le Miere concluded that the question of whether a legally invalid decision has any legal effect until it is set aside or declared to be invalid depends upon the statutory framework under which the decision is made.[80] Justice Le Miere proceeded to enunciate and rely upon Forsyth's Theory of the Second Actor. His Honour said:

> The apparent anomaly that a legally invalid act can produce legally effective consequences is explained by Professor Forsyth's distinction between what exists in law and what exists in fact. While a void administrative act is not an act in law, it is an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts ... The proper inquiry is not whether the initial act was valid but rather whether its substantive validity is a precondition for the validity of the consequent act.[81]

Justice Le Miere guided his application of the second actor theory largely by reference to the principles discussed above. In *Wintawari*, Kenneth Martin J took the same approach.[82] In concluding that the detention of Mr Tulloh was lawful, Le Miere J outlined a number of characteristics of the *Sentence Administration Act 2003* (WA) (SAA) that indicated that an invalid decision of the Board was still to be regarded as having legal consequence.

First, the decision was a 'reviewable decision' for the purposes of s 115 of the SAA, under which a prisoner could request a review of the Board's decision; accordingly, an invalid decision must continue to have some effect as a 'reviewable decision'. Secondly, and related to the previous point, under s 49 of the SAA the CEO could apply to a judge of the Supreme Court for an order resolving any doubt or difficulty. Thirdly, the SAA intended for the cancellation order to be relied and acted upon by people other than the Board; in s 70(1) the SAA provides that when a cancellation order is made the original warrant of commitment

76 See generally *Tulloh v Chief Executive Officer, Department of Corrective Services* [2014] WASC 368.
77 2002 (2003) 211 CLR 476.
78 *Tulloh* [2018] WASC 105 [28] (Le Miere J).
79 *Wintawari* [2019] WASC 33 [91].
80 *Tulloh* [2018] WASC 105 [28] (Le Miere J).
81 Ibid [38] (Le Miere J).
82 *Wintawari* [2019] WASC 33 [71]–[91].

is once again in force, and s 70(2) of the SAA mandates that a judge of the Supreme Court must issue a warrant for the detention of the person who is the subject of the cancellation order.

Justice Le Miere further identified a number of characteristics relevant for consideration, including the fact that the CEO could not know that the cancellation order was invalid (except in extreme cases) and that the legislature, upon the proper construction of the SAA and the context of the subject matter, could not have intended the CEO to inquire about the validity of every cancellation order before acting on it.[83] Lastly, drawing upon the comments of Lord Steyn in *Boddington*, the cancellation order was aimed at an individual, not a cross-section of the population; therefore, it was much less likely that the legislature intended for collateral challenge to be available. Accordingly, the existence of the cancellation order in fact was sufficient to form the basis of the lawful detention of Mr Tulloh, up to the point at which the writ for habeas corpus was issued by Chaney J on 22 September 2014.

Concluding remarks

Tulloh is a good illustration of the utility of second actor theory. While the application of second actor theory involves some exercise of discretion, it is fundamentally a question to be answered through a principled examination of the legal authority of the second actor. The authority of the second actor will only extend so far as the proper construction of the statute permits. This area of the law is naturally imbued with elements of pragmatism — as Lord Slynn pointed out in *Boddington*, the law surrounding the validity of administrative acts has developed in a pragmatic way on a case-by-case basis.[84] The Theory of the Second Actor is a pragmatic approach, guided by principle, to resolving the puzzle of the domino effect.

In a similar vein, Mark Elliott described second actor theory as an elegant solution to the problem of second actors relying upon administrative decisions that are subsequently identified as being invalid.[85] The broader judicial treatment of second actor theory, illustrated above, demonstrates Elliott's point. The puzzle of the domino effect is resolved by turning attention toward the legal powers of the second actor. The validity of the second act is then determined by process of statutory construction. The test to be applied, guided by the principles explained above, is to ask whether the validity of the initial decision is a necessary precondition to the valid exercise of the second actor's power. The conceptual foundation for second actor theory — that an invalid administrative decision exists in fact — is widely acknowledged in Australia. Given the utility of second actor theory as a solution to domino effect controversies, courts in Australia should go further and adopt the theory as a principled and practical solution to the problem of the domino effect.

83 *Tulloh* [2018] WASC 105 [40] (Le Miere J).
84 *Boddington* [1999] 2 AC 143.
85 Beatson, Matthews and Elliott, above n 4, 99.