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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Make a date for the AIAL National Administrative Law Conference

The 2013 National Administrative Law Conference 'Administrative Law in an Interconnected World' will be held at the Hotel Realm, 18 National Circuit Barton, Canberra on Thursday 18 and Friday 19 July 2013.

Australian public law is increasingly influenced by developments overseas and in international law. Further, modern communications technologies, and the social changes they have helped to bring about, have had a major impact on the practice of Australian administrative law. Consideration will be given to these and general administrative law issues at the Conference, which will involve a mixture of practical sessions and more reflective thought-provoking presentations.

Reviews of counter-terrorism laws released

On 14 May 2013, the Attorney-General Mark Dreyfus QC tabled two important and detailed reviews of counter-terrorism and national security laws - the Council of Australian Governments (COAG) Review of Counter-Terrorism Laws and the second annual report of the Independent National Security Legislation Monitor.

'These reviews are part of the Gillard Government's commitment to protecting Australians, and ensuring national security and counter-terrorism laws are administered in a fair and balanced way,' Mr Dreyfus said.

The COAG Committee examined and made recommendations about the counter-terrorism laws enacted in the Commonwealth and the States and Territories following the 2005 London bombings.

The Independent National Security Legislation Monitor made separate recommendations about Commonwealth national security legislation, including the definition of a 'terrorist act', control orders, the preventative detention regime, and ASIO's powers.

There is some overlap of the provisions that the Monitor and the COAG Review Committee reviewed.

The Government will respond to the reports following consultation with the States and Territories.

'There is no greater responsibility for a Government than protecting its national security. The Gillard Government takes National Security matters extremely seriously,' Mr Dreyfus said.

'Under Australia's counter-terrorism framework four major terrorist attacks on Australian soil have been disrupted.

'In light of the recent terror attack in Boston, it is clear that it is as important now as it ever was to maintain strong capabilities in the fight against terrorism. Our counter-terrorism framework has held us in good stead so far, but we must remain vigilant.'

The Gillard Government created the Independent National Security Legislation Monitor to review Australia's national security laws and counter-terrorism laws on an ongoing basis and determine whether they remain necessary, effective, proportionate and consistent with our international human rights obligations.

The Reviews are available online at:

http://www.coagctreview.gov.au/Pages/default.aspx

http://www.dpmc.gov.au/inslm/

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/14May2013-Reviewsofcounterterrorismlawsreleasedtoday.aspx.

Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013

On 21 March 2013, the Commonwealth Attorney-General introduced the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 into Parliament.

The Bill will amend the *Sex Discrimination Act 1984* (Cth) to insert new protections from discrimination on the basis of sexual orientation, gender identity and intersex status, and extend the ground of marital status to marital or relationship status to provide protection from discrimination for same-sex de facto couples.

These amendments support the government's commitment to introduce new protections against discrimination on the basis of sexual orientation and gender identity.

The Senate Legal and Constitutional Affairs Committee's report on the draft Human Rights and Anti-Discrimination Bill recommended a number of policy, definitional and technical amendments which will require deeper consideration in the process of consolidating five bodies of anti-discrimination law into one.

The Bill and Explanatory Memorandum are available on the Parliament of Australia website – www.aph.gov.au.

http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx

ACMA issues formal warning to AAPT

The Australian Communications and Media Authority has formally warned AAPT Limited after it failed to protect the privacy of its customers' personal information as required by the Telecommunications Consumer Protections Code (TCP Code).

The ACMA started an investigation following media reports in July 2012 of a security incident involving AAPT customer information being stolen.

The ACMA found that AAPT did not protect the personal information of some of its small business customers whose billing and related personal information it had collected. The personal information was stored in a server offsite managed by a third party, and was the subject of a hacking incident.

'Consumers need to have confidence that the personal information they give their provider is treated appropriately, and is only accessed by those authorised,' said ACMA Chairman, Chris Chapman. 'They also want to know that their details are stored securely with appropriate access restrictions.'

Telecommunications providers are required to comply with the TCP Code and protect their customers' personal information from unauthorised use or disclosure, ensuring it is dealt with in compliance with all applicable privacy laws. This includes having robust procedures in relation to the storage and security of the personal information in their possession.

Since the incident, AAPT has taken steps to improve its processes and staff awareness of the provider's policies about information management and privacy to comply with the privacy requirements in the TCP Code.

Given the prompt action taken by AAPT to remedy the breach, the ACMA considers a formal warning is appropriate in the circumstances.

http://www.acma.gov.au/WEB/STANDARD/pc=PC_600202

Passage of the 'Excision Bill' undermines human rights

The Australian Human Rights Commission has expressed disappointment that the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 has been passed by the Federal Parliament.

This legislation extends the system of third country processing to all asylum seekers who arrive by boat anywhere in Australia. It effectively prevents those people from having their refugee claims assessed in Australia, unless the Minister for Immigration makes a personal decision to exempt them from transfer to a third country.

'By targeting "unauthorised maritime arrivals", the legislation discriminates against vulnerable people and penalises them because of the way they arrive in Australia,' Australian Human Rights Commission President, Professor Gillian Triggs said. 'This undermines Australia's obligations under the Refugee Convention.'

The Commission has repeatedly raised serious concerns about the fate of asylum seekers who are subjected to Australia's third country processing regime.

'Transferring asylum seekers to third countries may lead to breaches of their human rights, including the right to be free from arbitrary detention and the right of children to have their best interests treated as a primary consideration,' Professor Triggs said.

She said children should only ever be detained as a measure of last resort and for the shortest appropriate period of time.

'We have serious concerns about the ongoing detention of children on Manus Island in difficult conditions,' Professor Triggs said. 'We have recommended that the Australian

Government cease transferring asylum seekers to Manus Island, and that asylum seekers currently on Manus Island be returned to Australia.'

The Commission is also very concerned about the thousands of asylum seekers in immigration detention in Australia who remain subject to third country transfer and whose claims for refugee status are not being assessed.

'In the Commission's view, all asylum seekers who arrive in Australia should have their claims for protection processed under Australian law in a timely and efficient manner,' Professor Triggs said. 'They should be transferred into the Australian community unless they have been individually assessed as posing an unacceptable risk that justifies their detention.'

http://www.humanrights.gov.au/news/media-releases/passage-excision-bill-undermines-human-rights

Adverse ASIO security assessment process

The Australian Human Rights Commission has urged the federal Government to adopt two of the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs in its report on the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012.

'The Commission strongly supports the Committee's recommendation to extend the right to merits review in the Administrative Appeals Tribunal to refugees who have received an adverse security assessment,' said Commission President, Professor Gillian Triggs.

'We also whole-heartedly support enshrining the role, responsibilities and functions of the Independent Reviewer of Adverse Security Assessments in stand-alone legislation.'

Professor Triggs said the Commission has repeatedly raised concerns about the lack of transparency in the ASIO security assessment process.

'This lack of transparency is particularly troubling because refugees with adverse security assessments can face indefinite detention, potential removal from Australia, and separation from family members who may be released from detention into the community,' she said.

Professor Triggs said the Commission remained concerned about the ongoing indefinite detention of 55 refugees who have received adverse security assessments, noting there are currently seven young children of parents with adverse assessments who have spent prolonged periods of time in detention.

http://www.humanrights.gov.au/news/media-releases/adverse-asio-security-assessment-process

Privacy alerts to notify Australians of data breaches

New laws introduced into the Commonwealth Parliament will require businesses and government agencies to notify people when a data breach affecting their privacy occurs.

'With businesses and government agencies holding more information about Australians than ever before, it is essential that privacy is safeguarded,' Attorney-General Mark Dreyfus QC said.

'The new laws will alert consumers to breaches of their privacy, so that they can change passwords, improve security settings and make other changes as they see fit.'

Data breaches can be the result of hacking, poor security and sometimes carelessness.

'Some data breaches have exposed the personal information of tens of thousands of Australians,' Mr Dreyfus said.

'The laws are good for consumers because they protect privacy, and are good for business because they will help create openness and trust.'

The new laws will also require notification of data breaches to the Office of the Australian Information Commissioner.

'To make sure that the new laws have teeth, the Information Commissioner will be able to direct agencies and business to notify individuals of data breaches,' Mr Dreyfus said.

'Last year the Government made the biggest changes to the *Privacy Act 1988* since it began in 1989.

'The Government is serious about privacy and these new laws demonstrate our continuing commitment.'

The laws will apply to all entities covered by the *Privacy Act 1988* including many businesses, but they will not impose an unreasonable burden on business.

The notification requirements do not apply to all data breaches, only breaches that give rise to a risk of serious harm.

The Commissioner will be able to seek civil penalties if there is serious or repeated non-compliance with the notification requirements.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/28-May-2013---Privacy-alerts-to-notify-Australians-of-data-breaches.aspx

Recent Decisions

Natural Justice and the self represented car enthusiast

Hoe v Manningham City Council [2013] VSC 195 (22 April 2013)

Mr Alex Hoe is a car enthusiast. For the past five or six years, he has kept 8 to 10 motor vehicles in the open spaces of his home in Lower Templestowe without a permit. Since 2010, in response to complaints, the Manningham City Council has pursued a legal strategy to force Mr Hoe to reduce the number of vehicles kept at his home to a maximum of four.

The Council's most recent step was an application to the Victorian Civil and Administrative Tribunal (VCAT) under s 114 of the *Planning and Environment Act 1987* (*the Act*) for an enforcement order. The application alleged that Mr Hoe's land was being used for the additional use as a store or as a car park within s 2 of the Table of Uses, without the necessary planning permit. On 16 August 2012, Senior Member Wright made an

enforcement order requiring Mr Hoe to reduce the number of motor vehicles kept on his land at any one time to no more than four.

Mr Hoe commenced proceeding in the Victorian Supreme Court. Mr Hoe contended, among other things, that he was denied natural justice by VCAT. According to Mr Hoe, the Council's application to VCAT was based on the premise that his separate use of his land constituted either a store or a car park within s 2 of the Table of Uses, that this was the case that he had prepared to meet at the 2012 VCAT hearing, and he was taken by surprise and was unprepared to meet the alternative case that was introduced by VCAT itself based on an 'innominate use'.

The Council contended that, although the concept of an innominate use was introduced for the first time at the 2012 VCAT hearing, VCAT explained the concept to Mr Hoe at his request, Mr Hoe acknowledged that he understood the concept, and Mr Hoe was not disadvantaged in any way because VCAT did not ultimately make a finding on the characterisation of his additional use of his land. The Council added that VCAT's decision that Mr Hoe required a planning permit irrespective of the characterisation of the additional use was indisputably correct. This was because the additional use did not fall within either s 1 or s 3 of the Table of Uses and therefore it was a s 2 use which required a planning permit.

The Court found the introduction on VCAT's own initiative of the issue of an innominate use at the hearing without any prior notice either by the VCAT or the Council constituted a breach of the hearing rule of natural justice. Notwithstanding the Senior Member's explanation of the meaning of the phrase 'innominate use' and Mr Hoe's statement that he understood that explanation, in the circumstances of the present case, more was required of the Senior Member to comply with the hearing rule of natural justice. Of critical importance was:

(a) Mr Hoe was a self-represented litigant;

(b) having prepared to meet a case that the additional use of his land constituted either a store or a car park, Mr Hoe was confronted at the VCAT hearing with new terminology involving another provision of the Table of Uses;

(c) the phrase 'innominate use' does not appear in the Table of Uses and Mr Hoe did not understand its meaning;

(d) although Mr Hoe stated that he understood the Senior Member's explanation of the phrase 'innominate use', he failed to make any relevant submissions about the phrase. This indicates that Mr Hoe did not understand it. Further, based on Mr Hoe's written and oral submissions on appeal, the Court did not believe that Mr Hoe has ever understood the meaning of the phrase; and

(e) even if the Court was wrong and Mr Hoe did understand the meaning of the phrase 'innominate use', it is abundantly clear from the transcript of the 2012 VCAT hearing that Mr Hoe did not understand the legal implications of the additional use of his land constituting an innominate use rather than a store or a car park.

In these circumstances the Court held that it was incumbent on VCAT to take the following additional steps:

(a) to explain to Mr Hoe the legal implications of VCAT's introduction of the concept of innominate use;

(b) to verify that Mr Hoe understood that explanation; and

(c) to verify that Mr Hoe was in a position to continue with the hearing if the scope of the hearing extended to a consideration of whether the additional use of Mr Hoe's land constituted an innominate use.

By failing to take the additional these steps, VCAT breached the hearing rule of natural justice. However, even if there had been compliance with the hearing rule of natural justice, on the undisputed facts, VCAT would have been bound to conclude that Mr Hoe had contravened the Scheme. This is because the additional use of Mr Hoe's land could only fall within s 2 of the Table of Uses, which meant that he required a planning permit. As Mr Hoe has never applied for a planning permit for the additional use, it would be futile to set aside the VCAT's findings and to remit the proceeding to the VCAT to reconsider this issue, on this basis alone.

A new standard of reasonableness in administrative decision-making?

Minister for Immigration and Citizenship v Li [2013] HCA 18 (8 May 2013)

Ms Li was refused a skilled overseas student residence visa (Class DD) by a delegate of the Minister for Immigration and Citizenship (the Minister) on the basis that she failed to satisfied a time of decision criterion set out in cl 880.230(1) of schedule 2 to the Migration Regulations 1994 (Cth) namely:

> A relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and no evidence has become available that the information given or used as part of the assessment of the applicant's skills is false or misleading in a material particular.

The delegate found that some of the employment history provided by her former migration agent to support the assessment of her relevant skills was not genuine. Ms Li claimed that her former migration agent had provided that information without her knowledge or consent.

On 30 January 2009, Ms Li applied to the Migration Review Tribunal (the Tribunal) for a review of the delegate's decision. She also applied to Trades Recognition Australia (TRA) for a new skills assessment. Upon obtaining that assessment, Ms Li's migration agent informed the Tribunal that it was unfavourable but explained that because fundamental errors had been made in it, Ms Li was confident of succeeding on her application to TRA for a review of the assessment. Ms Li's migration agent requested that the Tribunal delay making a final decision on Ms Li's application until the skills assessment review was finalised and undertook to keep the Tribunal informed of the review's progress.

On 25 January 2010, without waiting for advice of the outcome of the migration agent's representations to TRA, the Tribunal affirmed the delegate's decision. The Tribunal acknowledged the migration agent's request for it to delay its decision but did not explain this decision to proceed to a determination beyond saying:

> The Tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further and in any event, considers that clause 880.230 necessarily covers each and every relevant assessing authority's assessment.

The TRA issued a favourable skills assessment some three months after the Tribunal affirmed the delegate's decision.

Ms Li successfully applied for review of the Tribunal's decision to the Federal Magistrates Court of Australia. The Full Court of the Federal Court unanimously dismissed the Minister's appeal. The Minister then appealed by special leave to the High Court.

The High Court held that the Tribunal's exercise of the discretion under s 363(1)(b) of the *Migration Act 1958* (Cth) not to adjourn the hearing was unreasonable. While Gageler J concluded that the standard to assess unreasonableness in the present context was *Wednesbury* unreasonableness, French CJ and the plurality adopted a wider view. The plurality held that the law presumes that a statutory discretion is intended to be exercised reasonably – ie according to the rules of reason and justice; and unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

The Tribunal's reasons failed to identify any consideration weighing in favour of the abrupt conclusion it brought to the review and none was suggested by the Minister on the appeal. The failure by the Tribunal to discharge its function under s 363(1)(b) of the *Migration Act* according to law meant that the Tribunal had acted beyond its jurisdiction in affirming the delegate's decision.

Non-refoulement and protection obligations

SZOQQ v the Minister for Immigration and Citizenship and Anor [2013] HCA 12 (10 April 2013)

The appellant, an Indonesian citizen from Irian Jaya, was active in the Free Papua Movement from a young age. In 1973 he was detained and tortured by Indonesian officials and, in 1975, he was seriously injured after being shot by Indonesian soldiers. In June 1985, the appellant was granted temporary entry into Australia and was subsequently granted a protection visa in January 1996. In September 1996, while travelling to Indonesia to visit his father, the appellant was detained and assaulted by members of the Indonesian military. The appellant escaped and returned to Australia.

After his return to Australia, the appellant was arrested on 27 May 2000 on a charge of having assaulted his de facto spouse. She died four days later as a result of the injuries inflicted by the appellant. The appellant subsequently pleaded guilty to a charge of manslaughter and was sentenced to seven years' imprisonment with a non-parole period of two years and six months. In March 2003, the Minister cancelled the appellant's protection visa, in accordance with section 501 of the *Migration Act 1958* (Cth). However, in December 2008, after a number of requests from the appellant, the Minister determined that it was in the public interest to allow the appellant to make a further application for a protection visa.

A delegate of the Minister considered that application, and determined that the appellant had a well-founded fear of political persecution should he be returned to Indonesia. However the delegate went on to find that Article 33(2) of the Convention applied to the appellant, such that he was not a person to whom 'protection obligations' were owed because he constituted a danger to the community, having been convicted of a 'particularly serious crime'.

The delegate's determination was affirmed by the Administrative Appeals Tribunal (AAT), and the appellant unsuccessfully appealed the AAT's decision to the Federal Court and the Full Federal Court.

Before the High Court the appellant contended that the proceedings below miscarried because, contrary to the assumption on which his case proceeded, the 'protection obligations' referred to in s 36(2)(a) of the Act are not limited to the non-refoulement obligation in Article 33(1) of the Convention. The appellant submitted that the decision in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (2 March 2005) (*NAGV*) means that he is a person in respect of whom Australia has 'protection obligations' under the Convention.

In *NAGV*, the High Court found that the fact the non-refoulement obligation in Article 33(1) of the Convention would not be breached by returning a refugee to his or her country of nationality in certain circumstances, does not mean that he or she is not a 'refugee' within Article 1 of the Convention, and is not a person to whom Australia owes protection obligations under that Convention.

Following *NAGV*, the High Court unanimously held that the proceedings in the AAT and the courts below miscarried and the appellant was a person to whom Australia has 'protection obligations'. It ordered the AAT to review, according to law, the original decision of the Minister's delegate to refuse the appellant a protection visa.

CCTV surveillance – a breach of privacy?

SF v Shoalhaven City Council [2013] NSWADT 94 (2 May 2013)

The applicant, SF, argued that the Shoalhaven City Council had contravened a number of Information Protection Principles (IPPs) set out in the *Privacy and Personal Information Protection Act 1998* (NSW) (*PIPP Act*) when operating a CCTV surveillance program in Nowra's CBD.

The CCTV cameras recorded images of Nowra's CBD that were retained on a computer hard drive located at Nowra Police Station. The cameras and computer equipment at the Police Station were owned and operated by the Council. Police officers at the Station were also able to view live feed footage captured from the cameras. The system required the duty officers at the Station to enter a generic user name and password at the commencement of their shift in order to log into the 'live feed' monitor.

The Council erected signs indicating the presence of CCTV camera coverage in the area where the cameras were located but not all cameras had signs near them.

SF did not consent to being filmed, and before the Administrative Decisions Tribunal (ADT) contended, among other things, that the cameras were intrusive and coercive.

The ADT found that although the Council had authority to collect personal information using CCTV cameras operating in a public place for crime prevention reasons, the Council had not complied with the IPPs when collecting and storing SF's images. Specifically, the ADT found that the Council had failed to comply with s 10, 11(a) and 12(c) of the *PPIP Act*:

- first, under s 10 of the *PPIP Act*, the Council was required to take such steps as are reasonable to ensure that the subject of the CCTV information collection was made aware of the implications for their privacy of the collection process, and of any protections that apply, before or at the time of collection. The ADT found that the Council failed to do this as the signage alerting the public to the presence of the cameras was insufficient.

- second, the ADT found that the Council had not complied with s 11 of the *PPIP Act*. The Council had not taken reasonable steps in the circumstances (having regard to the purpose for which the information is collected) to ensure that the CCTV information that is collected is relevant to that purpose, is not excessive and is accurate, up to date and complete. The ADT held that the vast majority of the information collected under the Council's CCTV program was poor quality, was collateral information and was not relevant to crime prevention.
- third, the Council had not taken reasonable security safeguards against loss, unauthorised access and misuse of the CCTV information as required by s 12(c) of the *PPIP Act*. The use of a generic password rather than an individual user name and password for each authorised user meant that there was no way of knowing which police officer had used the live monitor at the Nowra Police Station. The ADT held that, at a minimum, compliance with section 12(c) would require appropriate training and monitoring of the use of individual user names and passwords to provide an audit trail of users of the system.

The ADT ordered that the Council refrain from any conduct or action in contravention of the *PPIP Act*; and give SF a written apology for the breaches and advise him of the Council's steps to remove the possibility of similar breaches in the future.

Following this decision, the *Privacy and Personal Information Protection Amendment (CCTV) Regulation 2013* was proclaimed. Under this regulation local councils in NSW are now exempt from some obligations in the *PPIP Act* relating to the collection of personal information by using a CCTV camera installed for the purpose of filming in a public place, and the disclosure to NSW Police of that information by way of live transmission.

When is something public under a statutory requirement to make it public?

Lester v NSW Minister for Planning and Ashton Coal Operations Pty Ltd [2013] NSWCA 45

Ashton Coal Operations Pty Ltd (Ashton) runs a coal mining project in the Upper Hunter Valley under a development consent granted by the NSW Minister for Planning in 2002. On 28 February 2011, Ashton requested the Minister, pursuant to s 75W of the *Environmental Planning and Assessment Act 1979* (NSW) (the *Act*), to modify the approval. Relevantly, s 75W provides that a request for the Minister's approval is to be lodged with the Director-General of the Department of Planning.

Ashton's request was accompanied by an environmental assessment which comprised a report and eight appendices.

The Department of Planning posted Ashton's request on its website. The Department also made the environmental assessment available for viewing on its website. Separate links were provided to appendices 1 to 4 and to appendices 5 to 8. However, if a person accessing the Department's website clicked on the link to appendices 1 to 4, the person was provided electronic access to appendices 5 to 8, instead of appendices 1 to 4. The link to appendices 5 to 8 did provide electronic access to appendices 5 to 8. On the same page of the Department's website was a printed message: 'For further information, please contact the planner, Nicholas Hall, via email at Nicholas.Hall@planning.nsw.gov.au'.

Mr Lester appealed against the decision of the Land and Environment Court of NSW dismissing his application for judicial review of the Minister's modification of an approval for a coal mining project in the Upper Hunter Valley. Mr Lester contended, among other things, that the primary judge erred by dismissing his claim that the Director-General failed to

comply with s 75X(2) of the *Act* by failing to make public the environmental assessment which accompanied the request for modification. Section 75X(2)(f), relevantly, requires the Director-General, to make 'requests for modifications of approvals', and any modifications made by the Minister, publicly available.

The Court of Appeal found, among other things, that the environmental assessment which accompanied Ashton's request did not fall within s 75X(2). The Court of Appeal held that the expression 'requests for modifications of approvals' in s 75X(2)(f) must be interpreted not only in its own terms but also in the context of s 75X(2), the process of requesting and approving modifications of approvals in s 75W, and more generally the legislative scheme in Part 3A of the Act, for making applications, undertaking environmental assessment, considering applications and environmental assessments and approving applications. The text and context establishes that the expression 'requests for modifications of approvals' refers only to the request under s 75W(2) lodged with the Director-General and not to any documents (including an environmental assessment) that might accompany such a request.

Consequently, the Director-General was not required under s 75X(2) to make the environmental assessment publicly available. The fact that the Director-General endeavoured to do so, but was not successful in relation to appendices 1-4, cannot have the legal consequence of causing a non-compliance with s 75X(2) or invalidating the Minister's subsequent modification under s 75W(4).

The Court of Appeal also opined that the requirement in s 75X(2) that documents 'are to be made public available' requires that state of affairs (the public availability of the documents) to exist presently, and it is not sufficient to establish the means by which that state of affairs could exist in the future. If the means by which a document is to be made publicly available is by posting the document on the Department's website, the document must be available for viewing by a member of the public when the person accesses the website. If a document is not able to be viewed on the Department's website when so accessed, it is not 'made publicly available' by identifying action a member of the public might take in order to be able to view the document in the future. That action, if taken, might make the document available in the future, but it does not alter the fact that the document was not publicly available at the time of accessing the Department's website.

Furthermore, the Court held that the making available of a document only to, and on request of, an individual member of the public is not making the document 'publicly available' to the public at large.

REFORM OF THE NSW TRIBUNAL SYSTEM

(Edited version of papers presented at seminar of AIAL (NSW Chapter))

In October 2011, the NSW Legislative Council Law and Justice Committee established an inquiry into the opportunity to consolidate Tribunals in NSW.

The report of the inquiry was published in March 2012 and in the same month the New South Wales Chapter of the Australian Institute of Administrative Law held a seminar 'The Reform of the NSW Tribunal System'. This paper is an edited version of the main presentations at the seminar.

Justice Alan Wilson, President of the Queensland Civil and Administrative Tribunal

It seemed to me, having read the standing committee's report and also having given evidence before it that, insofar as I could bring any value to you, it would be by firstly sharing some experiences of the process of creating and setting up a super tribunal and secondly, by sharing some views I, as someone who is not a citizen or voter in New South Wales, have about the report and some elements of it.

It might be best if I get the 'with respect' part out of the way early. With respect to the members of the Standing Committee and with respect to everybody who made submissions to it about whom I might inadvertently or impliedly make comments or suggestions, I always do so with respect.

QCAT absorbed virtually all the tribunals in Queensland except one, the Mental Health Review Tribunal, which remains a discrete little body conducted under the auspices of the Queensland Health Department. The only material difference, between QCAT and VCAT is that we did not absorb the planning and environment jurisdiction which, in Queensland – a state that is unique in so many ways – remains a little offshoot of our District Court.

The other significant difference between us and WA SAT is that we absorbed something that we call the minor civil disputes, formerly the Small Claims Tribunal, which is a major part of our jurisdiction - a little over half of our applications are minor civil disputes.

The tribunal has a Supreme Court judge as President, a District Court judge as its Deputy President, 4 senior members who have both a decision-making and an administrative role, 9 permanent members and about 92 sessional members distributed throughout Queensland. It has a registry of administrative support staff of about 110 people. It receives over 30,000 applications a year. It took over premises occupied by a number of smaller tribunals in a commercial building that already had some hearing rooms set up. Those premises were immediately seen to be and have remained inadequate.

All of the members of the previous tribunals and all the registry staff were offered jobs in the new tribunal. They brought expertise and tradition in terms of the way they did things; the way the new tribunal did things was sometimes exciting or alarming to them but after 2 years I think that has all settled down. We also allowed all of the sessional members of all of the previous tribunals to transition if they wished and of about 130, 126 did.

So there was a tranche of inherited sessional members. We did not have the scope to select or appoint any further members. Members moved straight into the new tribunal from previously discrete tribunals like the Guardianship Tribunal. Their transition term of 2 years

expired in October last year, which was the first opportunity we had to undertake a selection process. Of the 120, about 90 reapplied. Of the 90 who reapplied, about 40 were reappointed and we appointed about 50 new members to make up the 90 or so that we have throughout Queensland at the present time.

In our first year of operation, we received just under 40% more applications than all of our constituent tribunals in the previous year. What the state government did effectively was: advertise our existence, our location, our website, and how to reach us. Queenslanders found us immediately.

We immediately realised we did not have enough funds to deal with the extra 40% of applications. There is little point in spending a lot of money on advertising if you do not also think about its consequences and ensure that your new tribunal has sufficient means and resources to address the tsunami of work.

I would like to start with some aspects of the New South Wales Standing Committee's report. First, regarding the expert panel and its members, the report suggests a variety of different kinds of persons with different kinds of interests who ought to constitute that panel.

Ours was comprised of a retired Court of Appeal judge, a senior barrister who is now a Supreme Court judge, and the head of one of the tribunals. Effectively, all of the work was done by the retired Court of Appeal judge. His three reports were consistent, lucid and helpful and, in fact, they signposted, with an almost astonishing degree of accuracy, what the tribunal ought to be, what it would become, and how it would function over its first 5 years.

It seems to me that the panel suggested by the Standing Committee has an obvious inherent tension in that there may be too many voices in it.

The second thing I wanted to talk about is maintaining expertise. I have seen the submissions to the parliamentary committee and, unsurprisingly, there is real concern in existing tribunals that expertise be maintained. I think QCAT dealt with that very successfully, firstly by allowing all of the sessional members from the previous tribunals to transition if they wished to; secondly by choosing amongst the permanent members of QCAT (and using Guardianship as an example) the President and two Deputy Presidents of the Guardianship Tribunal, so we brought all of the expertise that they had into the tribunal.

In a practical sense, you need to think about the identity of your first president and deputy presidents. Traditionally in Australia they have been Supreme or District Court judges. There is an interesting aspect to that, which I can speak about from personal experience, which is whether or not your judicial members have had administrative experience.

I had the odd experience of listening to speeches at the time of my swearing in about how my work as a judge would greatly assist me in administering a new large super tribunal. My personal experience as a barrister for many years had been administering one-third of what was then called a secretary and, as a judge, administering one listings clerk, not an entire registry or a court. I came with no experience in administration.

Even if you choose judges or persons who do have administrative experience I think you ought to appoint them in sufficient time to allow them to undertake some kind of training and also to have the opportunity to work out their relationship with their administrative staff. The other critical issue is adequate initial resourcing. It is vital that the government makes a realistic estimate of the workload of this new tribunal. In Queensland there was a promise from the government that we would be revenue neutral compared to the cost of the eighteen

tribunals that we absorbed. That put tremendous restraint upon us that was unnecessary and unfortunate.

In another recent example, we were given what we call the Trees Jurisdiction, something that the NSW Land and Environment Court has. The Government said 'we think you'll have 190 applications about overhanging trees in Queensland each year'. Now, in Queensland in the last few years it has not stopped raining and new trees appear in the backyard momentarily! We have had the jurisdiction since 1 January this year. We already have 400 applications but the resourcing that was allocated to us was based upon the very much lower estimate.

It is also vital that premises be adequate and accessible. If you are going to have a single accessible doorway it has to be in one place, people have to be able to find it and it has to be close to major public transport links

It is also vital, in my opinion, that you resource new tribunals so that they can use modern digital technology effectively. I know that VCAT and WA SAT are doing this much better than we are. People need to be able to file and search online.

A vexed and interesting question is whether or not you give your new tribunal an internal appeals tribunal. Our internal appeals tribunal, which our Act said initially would be comprised of two judicial members, received a huge number of applications for leave to appeal from all of the jurisdictions in the first year and had only two people who could do it. I have now tapped a valuable resource - retired judges. They are an extraordinary asset. It is vital that the legislation, and ours was not originally, be set up in a way that allows us to use them.

My view is now different from the one I held at the end of 2010. A super tribunal ought to have an internal appeals tribunal. It is a question of access to justice and of accessibility. The number of appeals that are being brought to the internal appeals tribunal is far greater than the number that previously went from the old tribunals to the only places they could go, the Queensland Court of Appeal or the Queensland District Court.

There are practical and economic downsides to an internal appeals process in terms of workload and demand in resources, but I am satisfied that its presence has given the judicial members, the senior members of the tribunal, a valuable opportunity to oversee the work of the members and to correct errors quickly and inexpensively.

We do most of these things on the papers. It doesn't cost people much in terms of filing fees and if a case has gone seriously wrong, and our statistics show it only going seriously wrong in about 1 in 30 cases, we can fix it quickly and cheaply and we can fix things in cases where people would probably not have gone back if they had to go the Court of Appeal.

Every Australian tribunal is underpinned by legislation that contains some formula or phrase about being speedy, cheap and informal. We resolved from day one that we would be distinctly different from the courts; we would give those words 'speedy, inexpensive and informal' all of the meaning that we think Parliament plainly intended in the legislation and we would work hard to bring people justice in those terms.

One of the ways in which we have done that is through the use of compulsory conferences, which are both an ADR and a case management tool. It is a hybrid hearing conducted by a member with the parties to identify what the real issues are, what needs to be decided and the most effective and inexpensive way to do that. It has been spectacularly successful.

It has taken some time to introduce it in some jurisdictions. As mentioned earlier in relation to guardianship, we inherited highly qualified and experienced people. After I sat in on two or three guardianship hearings I could see that that is what they were doing anyhow. A guardianship hearing is very often a combination of an educative and informative process, a kind of therapeutic justice, an opportunity for people to deliver their narrative about family issues and a resolution of those in the most benign possible terms. We simply changed the terminology – it is now called a compulsory conference. It happens much faster than a hearing and most matters do not go past that stage.

Judge David Parry, Deputy President of the Western Australian State Administrative Tribunal

I was a barrister doing a great deal of administrative law, in particular planning and environmental law. In 2004 I saw an interesting proposal to set up a comprehensive tribunal in Western Australia which would have a planning component. I expressed an interest and, from the beginning of 2005 when it was established, I served as the senior member of the Development and Resources stream, one of the four streams of the Tribunal. In mid-2011, I was appointed to the District Court and in effect seconded back as one of the two Deputy Presidents of the Tribunal for a five year term.

The Tribunal has a 'cohesive jurisdiction'. The phrase comes from the second reading speech of the then Attorney General, who championed the legislation and the whole concept. It is a nice turn of phrase because the purpose of tribunal consolidation in Western Australia and, as I understand it from reading the Legislative Council report, as proposed in NSW, is to provide increased access to justice. My experience is that the cohesive nature of the jurisdiction, which the Attorney General recognised as an important component from the outset, has been very important in enhancing access to justice.

The SAT was established in 2005. It was intended to be not only a comprehensive tribunal in civil and administrative matters but also a cohesive tribunal, as I emphasised. It replaced a system that really, as recognised in the final report that lead to the legislation, was not much of a system at all. It comprised fifty different doors.

The reason for so many doors was partly because of the 25 vocational regulation boards that the SAT replaced. There were 25 other decision-makers of various sorts: the courts; a number of specialist tribunals; boards; ministers and so on. The SAT exercises broad jurisdiction under many different laws.

The SAT's work falls into three main categories. Probably 95% of administrative review rights actions in Western Australia come before the Tribunal. In addition, vocational regulation in relation to disciplinary matters and original jurisdiction in relation to a variety of specialist civil disputes such as building disputes, also come before the Tribunal. More recent additions are commercial matters, guardianship and administration, land compensation, and equal opportunity.

The Tribunal is required to achieve the resolution of questions, deal with the substantial merits of the case, act speedily with minimal cost and make appropriate use of the knowledge and experience of tribunal members.

These objectives are important but not unique to the SAT, nor are they unique to tribunals; one also sees these sort of objectives in modern court Acts. What is important in my experience is not just the expression of the objectives but their application at all levels of a tribunal, in the formulation of practice and procedures, in the decision-making, and in the very character of the place.

The structure of the Tribunal, like VCAT and QCAT, is a model that applies a judicial leadership. In my view, judicial leadership of a tribunal of this sort is critical to drive novel methods of dispute resolution and for there to be public and professional acceptance of those models.

The success of the tribunal depends on the leadership and the membership of the tribunal. The personalities of the members make an enormous difference in terms of the capacity of a tribunal to do that which the legislation requires. The accepted hallmarks of a tribunal: relative informality, avoidance of technicality, flexibility, proportionality and so on are well and good in legislation but their success on the ground depends on the conscious effort of members not only to create but then to maintain that character.

That is something that the tribunal, if there is to be a tribunal in NSW, should consider championing. Professions that are routinely involved in the work of the Tribunal have become champions of the processes, can see the benefits to their own clients, can see the benefits in terms of the wider administration of justice. They become not only active participants but 'suggesters' of how practices that have been developed can be enhanced for the Tribunal.

As with QCAT and many other tribunals that have replaced individual tribunals through consolidation, the SAT brought on board the experience and expertise of the various jurisdictions that were incorporated. That is critical but it is also very useful to see jurisdictions through a fresh set of eyes and it is the combination, I think, of the experience and the capacity to see how things might be done slightly differently to get an improved outcome that is one of the hallmarks of the SAT story. The benefits have been extraordinary in terms of the cross-pollination of ideas.

Both as a matter of flexibility within the Tribunal so as to make good use of its membership and also in terms of professional development, and because there were some members who had no background in guardianship but had an interest in the jurisdiction, the senior member of the Tribunal developed a training program to bring those people up to speed. They have been listed under very careful supervision of the senior member to do simple guardianship matters and have also been incorporated into panels on appeals. That sort of application of membership has, I think, resulted in a better jurisdiction, flexibility and ultimately better resolutions.

In my experience the nature of the Tribunal as a multi-disciplinary tribunal has been of enormous benefit to everyone, particularly to the administration of justice and also to the membership. We are required by the SAT Act to make 'appropriate use to the knowledge and experience of tribunal members' but that as you know can be something in an objective without application. An important part of the SAT story is that there is no hierarchy within the membership. There are senior members who run streams and judicial members who have particular roles but there is consciously no hierarchy between legally and non-legally qualified members.

Over a period of years the Tribunal adopted the phrase 'facilitative dispute resolution'. We do not talk about alternative dispute resolution or additional dispute resolution, for the very reason that it is regarded as core and mainstream. It refers to a suite of processes that are available under the Act. The processes are not unique to the SAT, they are available in all tribunals and in all courts as well. It is the way in which they have been applied which has been an interesting experience.

Directions hearings in the SAT are not primarily a case management tool. They are primarily a facilitative dispute resolution tool. So, in most areas across the Tribunal (guardianship

being an exception) all matters are listed for an initial directions hearing before a member within two to three weeks; that member then takes a hands-on approach as to what are the key issues, what are the methods towards resolution. The member begins developing the processes towards resolution that include judicial members.

The Tribunal has power under section 31 of the SAT Act to invite an original decision-maker to review proceedings at any stage and to reconsider its decision. This is generally done as an adjunct to mediation or a compulsory conference.

For example, in a planning case a mediation will more often than not result in amendments to a proposal or further information. Armed with those amendments or further information the Tribunal invites the original decision-maker to reconsider its decision and in 90% of those cases the matter is then resolved satisfactorily. It is the unsung hero of the SAT legislation and is a very useful adjunct to mediation in the review context.

Over five or six years these processes have come to be the core methods by which the Tribunal resolves disputes and, depending on the particular area, other than in guardianship, between two thirds and three quarters of applications are resolved by the active facilitation of members with a variety of processes rather than adjudication or direct negotiation between the parties.

Why have there been these results and this emphasis? I think that it is a product to some extent of this type of comprehensive tribunal that has the right judicial leadership that emphasises the importance of this being a core element, not simply an adjunct. Also in the SAT the people who would otherwise be decision-makers – the members – mediate, and so there is their experience. This comes through in empirical work that has been done in surveys – tribunal members are seen to have qualities of independence, credibility, knowledge and experience.

Linda Pearson, Commissioner, Land and Environment Court (NSW)

My comments are based on my broad experience as a member of a number of tribunals, not just my current experience at the Land and Environment Court which I note even though it wasn't discussed in the Legislative Council report, and even though it is housed in a court, the bulk of the work of the Commissioners of that Court is merits review jurisdiction which is exercised in other places in a tribunal, and it shares many common procedural features with that.

My experience covers a broad spectrum, from non-adversarial tribunals (social security, migration) where the department whose decisions are under review does not appear, to the more formal adversarial dispute resolution process where the issues are defined by the parties and where most of the parties are legally represented, and varying points in between. In terms of subject matter the tribunals that I have worked on have ranged from classic merits review of decisions of government agencies about benefits, entitlements etc to disciplinary or occupational licensing decision-making and, most particularly in the guardianship context, original jurisdiction that would otherwise be exercised by a court. I have two general comments before I move on to what I would characterise as my wish list.

The first is that it is very clear from the Legislative Council report that the question of whether to have separate specialist, stand-alone tribunals or to have an amalgamated super tribunal with different divisions was clearly significant for the committee and it would be significant for the panel if that is the way the government decides to go. It is obvious from our previous two speakers and other contexts, that New South Wales is not alone in grappling with this question. I think it might be useful in thinking about this to go back to some of the work that

Stephen Legomsky did in 1990 (*Specialized Justice: Courts, Administrative Tribunals and a Cross-national Theory of Specialization*, OUP) in which he looked at specialised adjudication both in courts and tribunals, and identified a number of factors that point either to specialist adjudication or to generalists dabbling in different areas.

I also note that it is not an 'either/or' situation. Ontario, for example, has come up with the notion of clustering tribunals, they have an executive chair who sits on top of a range of tribunals in vaguely analogous subject matter fields. The first was the environment and lands tribunal cluster, more recently there has been a social justice tribunals cluster.

A final point on this structural question is that it is clear that a divisional structure in a large tribunal can have significant benefits, in addition to the administrative benefits, in opening up ideas of different ways of doing things and cross fertilisation across divisions. However, I think it is misleading to assume that smaller specialist, stand-alone tribunals necessarily run the risk of becoming insular or self-referential. My experience is that there is a vast pool of part-time tribunal members who work on more than one tribunal, and cross fertilisation of ideas is already happening in New South Wales tribunals.

The second general point relates to Robin Creyke and Narelle Bedford's work on the inquisitorial/adversarial debate (*Inquisitorial Processes in Australian Tribunals*, AIJA, 2006); it is clear from that work that labels do not actually tell you very much. What is important is how the tribunal is constituted, how its objectives are framed in its statute, what powers are given to it, and what the obligations on the tribunal and on the parties who appear before it are.

So here is my wish list. The first item is, whether or not we have separate tribunals or a larger tribunal with different divisions, procedural flexibility is absolutely critical. It is critical that methods other than formal adjudication in a hearing process are not labelled 'alternative dispute resolution' processes but are integrated in the core work of the tribunal. Related to that is the need for resources, to be put up front into a triage process. It is misleading to assume that the amount of money at stake or the nature of the issue tells you anything very significant about how best to deal with it. The classic example is that some of the most ferociously complex legal issues arise in social security matters where the amount of money at stake is objectively relatively small.

A further point in procedural flexibility is that where you have both parties present in the process, conciliation is a valuable tool in the procedural armoury of any tribunal, and here I think the label does matter. I think it is unhelpful to describe this as a preliminary conference or a prehearing conference. I don't think it matters whether you call it a compulsory conference or a mediation, the fact that it is mainstream is what matters; these processes should be conducted by people who in other contexts will be making decisions at the end of a formal adjudication process.

There is benefit in having people who are familiar with how things might pan out in an adjudication doing it; there is also value in having the capacity for the parties to consent to whoever conducts the conciliation going on to make the decision, if that is appropriate. This saves everybody time and money and is a good way of making use of expertise. Those processes can perform both a dispute resolution function, getting to an outcome that is agreed between the parties, or performing a fairly good case management function, narrowing the issues, resolving what is actually there to be fought about if it goes to a hearing.

There are two other useful procedures. The first is the power to make a decision on the papers without having to have a formal oral process. In the migration tribunals this arises if

the tribunal thinks it can make a decision favourable to the applicant. The power given to the New South Wales ADT is more broadly framed: 'if it appears to the tribunal that the issues can be adequately determined in the absence of the parties' (s 76). A classic example, FOI exemption claims, involves sitting down with a whole bunch of documents and going through them; there is not a lot that an oral hearing can add in terms of value to that process.

The second procedure is the power to remit the matter back to the decision-maker. In New South Wales the provision is stronger than to 'invite the decision-maker to reconsider the decision'. The ADT has the power to remit the matter 'for reconsideration' (s 65). Often that occurs at the end of a process of planning meetings and discussion but I think there is a real value in having the agency or the decision-maker own the ultimate decision that comes out of the process.

In terms of the hearing process, there ought to be an obligation built into all tribunals to ensure that the parties understand the nature of the assertions that are made, the legal issues, what it is all about. We live in a world where increasingly we have self-represented applicants, and to impose a positive obligation on tribunals to be active in the hearing process is valuable. When you look at what the High Court has been doing recently on whether there is a duty on tribunals to inquire, the Court seems to be framing that in a fairly limited and narrow context, and I think one response to that might be to legislate to require the tribunal to ensure that it has all the relevant material it needs to dispose of the matter properly. If that means asking the government agency whose decision is under review to obtain a document or to provide information, an active tribunal can do that.

The second item on my wish list is resources. It will come as no surprise to you to hear that tribunals need to be resourced properly. That starts at the basic level: comfortable, proper hearing rooms and other facilities with sufficient technology - telephones and videoconferencing that work. In a state as large as New South Wales (I imagine exactly the same happens in Queensland and WA), the ability to go outside major metropolitan areas and expect that you can conduct tribunal conferences in adequate venues is important. Well-equipped websites, forms, information, resources and links are critical as is the presence of adequate registry staffing, particularly when dealing with a large number of self-represented applicants.

The third item on my wish list concerns the appointment, training and support of members. I think the best summary was given by Sue Tongue, formerly Principal Member of the Migration Review Tribunal, many years ago, when she said that 'a tribunal, like a court, is only as good as its worst member on their worst day'. I think there is a lesson for us all in that. Obviously, we start with an open, transparent and merit based process, with terms of appointment that are long enough to be attractive and also to justify the cost of training and mentoring tribunal members. If you have to choose between specialist expertise and generic decision-making skills, my view is that you go for the generic decision-making skills. Reasoning and analytical skills, independence, and oral and written communication skills are absolutely critical. Back that up with training, general training in the subject matter of the tribunal jurisdiction and also training in the specific skills that most lawyers and other professionals who may end up on tribunals do not necessarily have, such as working with interpreters and working with, talking to and understanding people with cognitive impairment or psychological conditions.

I think it actually saves money to have sufficient administrative and legal support for decision-makers. Decision-makers should be paid to think, not to format documents, and decision-makers with good legal support will more often than not produce a good decision that will withstand review or appeal.

The fourth point on the wish list is supervision and appeal. The High Court in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 has made it clear that judicial review is fundamental to any kind of administrative or other decision-making system, and has warned that we have to avoid creating what was rather nicely described as 'islands of power immune from supervision and restraint'. Clearly judicial review is essential, but I think that the model which QCAT and the ADT have of an internal appeal panel within the tribunal is a valuable mechanism in terms of providing accessibility, simplified procedures and decision-makers who understand the different types of jurisdiction.

Equally, there is merit in whatever tribunals stay outside the system having, what is described in the New South Wales ADT as 'external appeals', going to that body rather than the legal process which is rarely ever implemented in the reality of Supreme Court or other judicial scrutiny.

The fifth point is the statutory framework. There is a standard tribunal formula. For example, the Commonwealth formula refers to 'fair, just, economical, informal and quick'. Interestingly, QCAT has added 'accessible'. Clearly, any New South Wales tribunal that emerges from this process would have similar kinds of objectives; we know from the experience of more than 35 years of comprehensive merits review that it can be difficult to balance those different objectives. The courts have the same problem.

In New South Wales, the *Civil Procedure Act* says that the overriding purpose of the Act and the rules is to facilitate the 'just, quick and cheap resolution of the real issues in the proceedings'; we all have to cope with that tension. I think that tribunals can be assisted in doing that by some specific provisions in their constituting statutes; for example, a provision that both empowers and encourages the tribunal to engage in active case management by whatever process, whether you call it conciliation, mediation or something else.

In addition, the framework should impose an obligation on the parties to assist the tribunal to achieve its objectives. The AAT has such an obligation as do QCAT and WA SAT. Imposing an obligation on the tribunal to ensure that the parties understand the nature of the issues and the legal implications goes a long way towards empowering tribunals to be active in the management of their dispute resolution.

The sixth point on my wish list is that I think tribunals have to add value to the system. There is a general acceptance that tribunals, internally, need to be consistent in their decision-making. Some, for example, QCAT, have that as one of the objects of the Act: to 'promote the quality and consistency of tribunal decisions'. There is also a function of providing guidance to decision-makers and others outside the tribunal, which is also present in the QCAT legislation.

There are different ways in which tribunals can promote internal consistency and provide guidance to others. In VCAT, for example, there is a statutory provision that VCAT can publish reports or bulletins of typical decisions for the guidance of those who wish to bring proceedings. I would go further than that and not limit it to those who wish to bring proceedings. I think that there is value in having a statutory authorisation for any tribunal that might emerge from this process to both ensure consistency of its own decision-making, in the context obviously of maintaining fairness and determining each case on its merits, and at the same time providing a mechanism to provide guidance to ensure that whatever emerges from that process can add value to agency decision-making, can make best use of the expertise in the tribunal, and can inform the community about what tribunals do. That general aim would both ensure fairness to the parties in the tribunal and the community generally and also justify the enormous public resources that tribunals have invested in them.

Kate Eastman, Barrister, Sydney

What I want to give this afternoon is the perspective of a practitioner. I estimate that I have appeared in or been involved in assisting at least 40 tribunals over the last 20 years. This has included appearing before tribunals such as the dental technicians review board (where you can complain about the quality of your false teeth) and appearing in complex AAT matters in which senior members of the Federal Court sit on the tribunal.

So, my focus is not to critique tribunals but to look at my experience over the last few years in appearing in VCAT, ACAT and QCAT versus appearing in the numerous tribunals that exist in New South Wales. I will highlight what, as a practitioner and a representative of applicants and respondents in the tribunals, I think are the features of a good tribunal. It perhaps follows that if these features are missing they undermine the quality of the tribunal.

My first point is that each tribunal has its own distinct culture and, if you are familiar with that culture, appearing in that tribunal will be a comfortable experience. If you are not familiar with that tribunal and its culture and the language and jargon used, it can be a daunting experience, particularly for most people who use tribunals, who tend to have little or no experience of courts or lawyers.

Their complaint might be about guardianship matters, they might have been discriminated against at work, they might want to have access to a document through an FOI process, they might be complaining about trees in their neighbours' back yards. They come to a tribunal to get justice, to get a sense that they are going to have their day in court, that someone will actually listen to them and that somebody who knows something about the topic will make a fair decision.

We spend a lot of time as lawyers focussing on how we think we can deliver justice, but we rarely listen to the people who actually use these tribunals and ask them what they want from the process. It is quite common for lawyers to tell their clients that 'well, if we're in this tribunal you should know this is a very applicant friendly tribunal' or, alternatively, 'if we've got this particular tribunal member in this jurisdiction we know that he or she is very respondent friendly'. Those preconceptions can affect the way in which matters are run.

It is important that whoever comes to a tribunal can have confidence that the tribunal will conduct itself professionally, that it will be a tribunal of integrity and that you will have a fair hearing regardless of what side of the case you are on.

If you are an unrepresented person coming to a tribunal, it is important that you have some idea of what to expect. More and more unrepresented litigants are quite well versed in using the internet and often will have 'surfed around' to look at who is on the tribunal and what decisions might be there. However, I find that tribunals really fail to provide information about the process to unrepresented or unsophisticated parties.

For example, sending someone 20 pages of a guide to how the tribunal works, when the person's English might be fairly limited or they are only really concerned about their case, is not particularly helpful. More helpful, as on some tribunal websites, is a flow chart that says: step one will be a meeting with so and so; step two will be this and this will happen; and step three is the time to ask for documents or whatever it might be. It is enormously helpful because it creates some equality between the parties at the beginning of the process, it empowers the unrepresented or unsophisticated parties to get information that will help them understand the process. You should assume that lawyers and parties represented by lawyers should be able to find this out for themselves, nevertheless sometimes they also need to be assisted in the process.

What goes hand in hand with this is efficient and responsive registry staff. In some tribunals even ringing the bell on the front desk to get anybody to pay any attention to you can be difficult. QCAT has, or had, a system where you press a button for what type of matter you are on and get a ticket or a number. I found that quite an efficient way of helping people. VCAT also has a good system, at the entry point there is an office where people can find out where their case is being held and all the information that they need.

The other critical aspect for a good tribunal is consistency in decision-making of procedural rulings. For those of us familiar with working, for example, in the Federal Court with a docket system, once the judge has a matter allocated to him or her, you are fairly confident that the judge is going to have a working knowledge of that particular proceeding and will see it through. With many tribunals, if the directions hearings or case conferences are before sessional members (and there might be 4 or 5 case conferences before a final hearing), it is not uncommon for each sessional member to take a slightly different approach to procedural rulings; this can be an enormous frustration to litigants.

The other frustration is that if you have different tribunal members dealing with the preliminary steps and they don't know the history of the matter or the tribunal file doesn't make that clear, litigants are constantly having to tell their story over and over again as to what happened on the previous occasion and, invariably, they are not going to agree as to what happened on the previous occasion. An enormous amount of time can be spent by tribunal members and litigants in trying to work out 'well how do we actually organise this matter for a hearing' and 'didn't last time we say that I could have a summons issued, but today you are saying I can't have a summons issued'; all of which adds significantly to the cost of tribunals.

The issue of cost is a vexed question for tribunals. As a practitioner my personal view is that the ability to make costs orders can operate as a very important discipline for all parties in a proceeding – if, for example, the tribunal has the ability to make a costs order, to keep in check procedural processes or evidence collecting processes or actual conduct of the trial.

If it is a no-cost jurisdiction then you often see terrible cases of applicants being represented by lawyers who incur enormous amounts of costs that will never be recovered; in the ADT in the EOT Equal Opportunity Division, there are cases where the damages awarded might be $10,000 but the applicant will have costs in the order of $90,000. That seems to me to be a completely unjust result and, obviously, having a capacity to control the costs and the amount that is spent by litigants in these processes is enormously important.

Better support for unsophisticated and unrepresented parties is important; I am a big fan of having referral systems or duty solicitors so that those individuals can have appropriate assistance.

The last thing on my wish list is that there be internal appeals processes and also judicial oversight. We assume that most of the time the tribunals will get their decisions right – if not they will be corrected by an internal appeal – but there are occasionally cases where because of procedural problems or substantive questions of law, there is a need to go to superior courts.

One feature of the NSW ADT, which I think is excellent, is the right to appeal to the Court of Appeal from an appeal panel decision. It does not happen often but having that facility is important because guidance from superior courts on issues of procedure and substance can be enormously helpful in reinforcing consistent decision-making among the tribunal members.

Justice Roger Boland, President, Industrial Relations Commission (NSW)

I am going to talk about the Industrial Relations Commission and the implications of this Committee report for my Tribunal and Court.

The Committee's main recommendations were first of all to pursue the establishment of a new tribunal that consolidates existing tribunals, that is, a super tribunal, but where appropriate. It was not saying categorically that we had to have the super tribunal and all existing tribunals had to be folded into it.

The second main recommendation was to appoint an expert panel to pursue consolidation, formulation and an appropriate structure of this consolidated tribunal.

The third main recommendation was that there should be specialised lists or divisions to be created within a consolidated tribunal.

The fourth main recommendation was to consolidate facilities, office space, registries, court and tribunal rooms and, in effect, establish a one-stop shop in metropolitan and regional centres.

And finally the CTTT, for the reasons that the Committee expressed, should stand alone.

The Minister responsible for industrial relations has said that as far as the Industrial Relations Commission is concerned, he has not yet determined whether he would support the idea of the Commission becoming part of this super tribunal.

What are the implications of that for the Industrial Relations Commission? It is undoubtedly the case that the Commission's workload has declined. The Industrial Relations Commission's jurisdiction is now confined to about 500,000 employees in the public sector in NSW and about 50,000 employees in the local government sector. As well there are a range of both large and small companies who are corporations – constitutional corporations – but who have elected to stay with the NSW Commission as it provides what they must obviously consider to be appropriate dispute resolution functions.

It seems to me that the main rationale for the Committee's recommendation that the Industrial Relations Commission be included in the expert panel's deliberations in relation to a super tribunal is that the Commission's workload has declined. I find that a somewhat strange basis upon which to base a recommendation that the IRC should be part of a super tribunal but, in any event, that seems to be the recommendation.

Whether or not the Commission will become part of a super tribunal is of course a matter for the expert panel in the first instance and, ultimately, for the Parliament but, if you have read the report, there was negligible support among stakeholders for the Commission to be part of a super tribunal. Perhaps this is because the stakeholders were very satisfied with the services the Commission provides, but I also think it is based on the fact that the Commission has characteristics that you won't find in any other tribunals.

For example, the Commission operates as a combination of a court and a tribunal and it can switch easily from one to the other. It performs conciliation, arbitral and judicial functions. It has both a civil and criminal jurisdiction. It has an internal appeal mechanism. The seven judges of the Commission have the Supreme Court's rank and status. It deals with both individual and collective disputes. Industrial organisations have standing in a representative capacity as well as in their own right. It regulates the affairs of all the industrial organisations in New South Wales. It has a very strong regional presence. It has dual appointments with

the federal body, Fair Work Australia. The Industrial Court exercises federal jurisdiction and the Industrial Relations Commission is a dispute resolution provider under the *Fair Work Act*. These are some of the characteristics that set us apart.

Although the language was somewhat muted, it was clear from the stakeholders who had anything to say about the Industrial Relations Commission, who made submissions to the Committee, that they preferred option 1 and were seriously against the Commission becoming part of a super tribunal.

Option 1 was the transfer of functions of other tribunals to the Commission and re-naming the Commission the Employment and Professional Services Commission. The other tribunals that could conceivably be transferred to the Industrial Relations Commission are the Medical Tribunal – judges of the Industrial Court already act as chairpersons of the Medical Tribunal – and the nine other health professional tribunals.

The anti-discrimination division and professional discipline functions in relation to lawyers from the ADT would be a neat fit with the Industrial Relations Commission. The common law employment contract matters currently dealt with in the District and Supreme Courts could easily constitute part of the jurisdiction of the Commission. The Vocational Training Tribunal would fit easily. The Racing Appeals Tribunal was recently presided over by a member of the Industrial Court. The Local Government Pecuniary Interest Tribunal is another neat fit and, of course, the Parliamentary Remuneration Tribunal (where, already, a judge of my Court constitutes that tribunal).

So there is clearly an alternative, in my view, to amalgamating the Commission or making the Commission a part of any super tribunal and in that respect, I make some observations about the Committee's report.

The six member Committee was divided over the Industrial Relations Commission becoming part of a super tribunal. It had been moved in the Committee that an additional paragraph be included at the end of Chapter 6 of the Report to the following effect:

> The Committee recognises that the nature of the IRC's jurisdiction, dealing with wide ranging industrial disputes that can affect key sectors of the economy, together with the making of new rights through industrial awards, is a unique jurisdiction that must be very carefully dealt with in any review of tribunals in NSW.

On the casting vote of the Chair the motion was defeated. This led to three members of the six-member Committee making a Dissenting Statement. That Statement was in the following terms:

> The committee's report is, for the very large part, a product of consensus amongst the committee membership. There is, however, one aspect of the committee report on which the members of the committee did not reach consensus.
>
> We dissent on the decision by the majority in relation to committee comment on page 72, not to include additional commentary, reflective of the evidence before the committee regarding the unique jurisdiction of the Industrial Relations Commission. That evidence raised concerns that amalgamation could pose a threat to its critical and historic role in regional areas and in oversighting crucial parts of the state economy, such as its hospitals, police, the public service and railways.
>
> Evidence, for instance from the Hunter Business Chamber (the Newcastle Branch of the Industrial Relations Society), Unions NSW and others all detailed the likely dilution of industrial relations expertise and negative economic consequences for the Hunter of moving the IRC into a consolidated tribunal. The majority cited no evidence to justify dismissing these concerns.
>
> The balance of the evidence before the committee was that the Industrial Relations Commission is a unique jurisdiction that must be very carefully considered in any more detailed review of tribunals here

> in NSW. It is unique in that it is the only tribunal that deals with wide ranging industrial disputes that can affect key sectors of the economy, together with the making of new rights through industrial awards. It does this whilst also exercising judicial powers, a factor not found in any other tribunal reviewed by the committee.
>
> In its century long history, the Industrial Relations Commission has developed a distinct set of skills and a well-recognised institutional capacity that is not found in any other tribunal that was reviewed by the committee. This allows the Industrial Relations Commission to effectively maintain a public sector awards system; co-operatively and competently resolve complex industrial disputes; and address broader issues that go beyond the immediate interests of the parties before it, such as the public interest in an efficient and productive State economy, equal remuneration, non-discrimination and industrial democracy.
>
> In submitting this dissenting report we recognise that it is not a matter the subject of a substantive recommendation from the committee. Nevertheless, it is a matter that we considered of sufficient importance to warrant this brief dissenting report.

Seventeen of the eighteen submissions referring to the Commission indicated strong support for a continuing role for the Commission and maintenance of its current powers and functions. The Committee I think, reading the report, placed fairly heavy reliance on super tribunals in other states to justify one in NSW and certainly it was entitled to do that. There are good models in the other states, there is no doubt about that, but no other state - none - has the Industrial Relations Commission as part of the State's super tribunal.

The stakeholders described the current tribunal system as complex and bewildering. No stakeholder described the Commission as complex and bewildering. The Committee considered that amalgamating the tribunals would improve access to justice. There was no complaint at all about difficult access to the Commission, indeed the submissions made quite the opposite point including in rural and regional areas.

But, nevertheless, if the view is taken by the Parliament that the Commission should be part of a super tribunal, there are a number of considerations I think for the expert panel. Will the hybrid nature of the Commission, in which it exercises both judicial, arbitral and conciliation powers, be retained in order to maintain the effectiveness of the Commission?

It was a very strong and very common point amongst those who made submissions about the Commission that the hybrid nature of the Commission had been enormously effective for nearly 100 years, and that there was a very good argument to retain it – will it be retained? Will the Commission's current powers and functions be retained across the 27 pieces of legislation that we administer? What will be the system of appeals? Will it be an internal appeal mechanism? Will it be one that involves appeals going off to the Supreme Court? How will six judges – because we have a judge retiring at the end of this year and I imagine this is not going to be put in place before then – how will six judges of Supreme Court rank be accommodated? Will appointments to the Industrial Relations Division of the Super Tribunal be full time?

The idea that we would have sessional members managing industrial relations matters does not seem to me to be the appropriate way to go. One of the great advantages in dealing with industrial disputes – particularly collective disputes – is the fact that members of the Commission have continuity. They know the industries, they know the people in the industries, and to have sessional members come in on an ad hoc basis to be confronted with a collective industrial dispute – I cannot imagine how that would work. What will be the timeline for implementing a super tribunal, given that 70% of the Commission's judges' work will be gone by the end of this year? I cannot imagine a super tribunal being ready to go by the end of 2013. What steps is the government going to take to provide judges with work pending the implementation of a super tribunal? There has been no indication to me of that being a consideration at all on the part of the relevant Ministers.

There are a host of other considerations that I won't go through this afternoon. Will Commissioners, for example, retain their status as judicial officers for the purpose of the *Judicial Officers Act* and be subject to the authority of the Judicial Commission? There are all sorts of incidental issues that will have to be considered if we are to move to a Super Tribunal. But I think I should make my position clear: I do not support the idea of the Commission becoming part of a Super Tribunal.

Associate Professor Matthew Groves, Monash University

My topic is Merits Appeals of Government Decisions which I will essentially get to at the end because one of the things that struck me about the report was that there was not really any discussion of the core function that this super tribunal was supposed to perform.

The first thing that strikes me is the notion of precisely what is being consolidated. In Victoria particularly we take the view that VCAT is a world leader and it essentially was in its day but I think this also pre-supposes that there is a particular notion of a super tribunal. VCAT is one possible example of such a tribunal. It has always been and will always be quite different to whatever ends up being created in New South Wales because, for example, we do not have a separate land and environment court. VCAT has long had a planning division which essentially does what the New South Wales Land and Environment Court does. So, if there is an NCAT, it will probably have at least one striking difference to VCAT.

I do not think many people in Victoria would concede that consolidation of planning and environment matters within VCAT has improved or enhanced that jurisdiction. I think it is fair to say that the New South Wales Land and Environment Court – particularly in view of the special nature of planning and development decisions in New South Wales – really is a leader in its field. It is difficult to see how consolidating that planning and environmental expertise would be enhanced by its inclusion within a super tribunal. The Land and Environment Court seems fine as it is.

The other thing to note of course is that VCAT has never had an industrial relations jurisdiction because Jeff Kennett legislated away most or all of that in his time by the referral of powers to the Commonwealth. Industrial relations was therefore simply never something that fell within the Victorian tribunal framework and I was interested to hear the last speaker refer to this wider notion of the suggestion in the Legislative Council's report that makes perfect sense within the VCAT model simply because there is no Industrial Relations Commission jurisdiction. This difference between Victoria and New South Wales is similar to that taken in planning and environmental issues because it seems natural within one's own jurisdiction but quite different to what an outsider might expect within a single enhanced tribunal.

So there are several things that come out of this notion of a CAT whatever it is; the first is that there is potentially a fairly flexible approach to any model of a consolidated tribunal and I think we can see that this is what the ARC proposed at the federal level in its Better Decisions Report. That, necessarily for constitutional reasons, did not include a civil division.

I think the other thing we need to mention in all of this is that *Kirk* has made clear that tribunals will always be subject to supervisory review by the courts. What *Kirk* said about tribunals was not surprising because the High Court had been saying those sorts of things at the federal level about supervisory review over federal tribunals for a long time. Whatever we end up with in New South Wales will be emphatically subject to the Supreme Court and the Court of Appeal.

What is unusual and could be quite important in *Kirk* is that one of the many throw away lines in that case was in paragraph 69, where the High Court essentially said 'well, we anticipate that there will be some level of difference between tribunals at the federal and state level'. This is interesting because the position of federal and state superior courts is aligned but there is an anticipation of continued difference in state and federal tribunals. One immediate consequence of that is that tribunals like VCAT can have powers which are clearly unconstitutional at the federal level. VCAT can make self-enforcing orders of the type that were declared unconstitutional in *Brandy* and more generally exercise judicial powers that would be prohibited in a federal tribunal.

There are all sorts of quirky differences between various tribunals at the federal and state level. What I am not sure about and I see as a major sticking point is any sort of notion such as that referred to by Justice Boland about merging judicial and arbitral and other functions in what may be called a tribunal but is somehow a unique blend of all of them.

The licence that *Kirk* gave to divergence between federal and state tribunals, should not necessarily be taken as a signal to allow that kind of innovation. If there is one recent lesson that we can take from the High Court in recent times it is from *Lane v Morrison*, in which in the Australian Military Court the Federal Parliament designated that Court as a superior court of record and essentially said 'it's this kind of creature because we say it is'. The High Court held otherwise and declared the operative provisions of the Military Court legislation invalid.

To transfer that logic to this occasion, I think it would be a grave mistake for the New South Wales Parliament to think along the lines of the privative clause that was read narrowly in s 157. It would be a grave mistake of the Parliament to think that the words that it enacted actually meant what they said before the High Court, because the High Court might take quite a different view for constitutional reasons. So the extent to which some unusual changes could be made in industrial relations and survive constitutional muster is a difficult issue.

In 1998, VCAT basically collapsed all of the Victorian tribunals into one; this was not a particularly radical step. We had had a Victorian AAT for over a decade so VCAT was the natural successor. The other reason that I think VCAT was fairly well received was that it was preceded by a very intelligent discussion paper about two years earlier, so there was a lengthy and informed timeframe.

It introduced some sensible reforms, the first of which was that we have a single procedural statute which governs all of our tribunals. One of the unnoticed advantages of VCAT is that there is a single test of appeal. There is procedural uniformity and simplicity. We do not have divergence between the various jurisdictions in the test for standing, in the procedural powers, or in the question for appeal; there is essentially a single legislative test that applies to everything. This is particularly useful for the profession as I was reminded when I tried to understand some recent Court of Appeal of New South Wales decisions on the scope of the appeal provisions in the CTTT jurisdiction. One benefit of this is the relatively small number of appeals to the Court of Appeal over procedural issues.

The other benefit of VCAT is that we have a single building, a single registry, a single form; there is uniformity in terms of where to go.

Probably one of the greatest downsides of VCAT was resources. VCAT was part of a cost cutting exercise so, while there was useful legislative reform in the single statute, VCAT was placed in a small, cramped and out dated building which, over a decade later, is even less suited and less able to manage its jurisdiction.

So, one of the lessons to be learned from VCAT is that if you physically collapse the jurisdiction of a tribunal into a single forum, what can be problematic in a whole range of jurisdictions in little out of date ill fitted tribunals, can become worse in a single very bad building.

A completely different model called the *Adjudicative Tribunals Accountability Governance and Appointments Act* of 2009 from Ontario allows for the potential of cluster models; the interesting thing about the Ontario statute is that it essentially sets out a list of standards for all tribunals and at its very end there are a couple of provisions in which it allows the tribunals to be clustered. So it does not create a super tribunal but it does create a single set of standards with which all adjudicative tribunals have to comply. These include: every adjudicative tribunal shall develop a mandate and a mission statement.

The useful thing about this and other features of the Ontario model is that they provide a collective set of requirements for tribunals in that jurisdiction to articulate their key goals, performance standards and achievements. This informs the tribunals in question, their users, the government and the wider public.

In the Legislative Council report there was no clear articulation of what they wanted this NSW tribunal to do.

Another notable issue that was not covered by the Legislative Council report, but which has become a thorn in the side of VCAT, is the position of unrepresented parties. The original VCAT legislation did not anticipate the rise of unrepresented applicants, many of whom appear in quite complex matters. That is no criticism of the VCAT legislation because this problem arose due to a combination of factors, particularly the lack of legal aid or other assistance for those who cannot afford lawyers. It is possible that the creation of a single super tribunal with the simplified procedures of VCAT has played a role in the growth of unrepresented parties, if only because such a user friendly and simplified jurisdiction enables unrepresented people to appear relatively easily.

The issue has never been addressed with systematic legislative reform. It has instead been tackled by ongoing reform within VCAT and a surprising number of appeals to the Court of Appeal, which has expounded principles for hearings involving unrepresented people. From 2002 to 2009 there were a great number of cases in the trial division and the Court of Appeal about how to wrestle with unrepresented applicants.

One of the things that came out of the President's Review is that the Victorian Bar offered to make VCAT part of its duty barrister scheme. That was a commendable suggestion but one wonders why VCAT had to endure so much in the meantime. It beggars belief that that had to go on for 10 years and that many cases in the Supreme Court and Court of Appeal never gave rise to that suggestion. So, not only do unrepresented parties present great difficulties to VCAT but VCAT's response to a lot of these things is quite reactive. That is a problem of resourcing.

Many users complain about a ‘clubby’ atmosphere (see page 22 of the VCAT review report), but the planning division was singled out, where, it was said by many, if you are not one of the lawyers you seem to be on the outer. How do you balance dealing with litigants whom you only ever see once, and lawyers whom you see a lot? What is informality to a lawyer is invariably in-house to an unrepresented person.

VCAT performs a merits review function which, as in all other merits review tribunals, is not spelt out in the legislation. One of the astonishing things about the President's Review in VCAT is that for the first time that I can recall the head of the Tribunal explained why some

functions and some powers were suitable for merits review. He essentially said, 'this is how I think we should decide this action should be amenable to merits review'. The statement of the President on this issue is sensible and clear but I wonder why such criteria have not always existed.

I am surprised that VCAT had existed for over 10 years and neither the Victorian Government nor VCAT had developed an equivalent to the document that the Administrative Review Council has, which is the guidelines to decide whether or not something is suitable to merits review. There does not seem to have been any coherent or guiding principle by which VCAT was granted or denied jurisdiction. This issue is really down to the government because, while it was sensible for VCAT to articulate how and why things ought to be subject to merits review, one has to ask why successive governments have not been doing this by reference to transparent criteria for a long time.

My final point concerns the *Drake* and *Becker* issue that came out of the earlier policy cases in the AAT. VCAT is subject to a specific provision, section 57 of the VCAT Act, which says, 'if there is a policy, and if it is publically available, and if the applicant was aware of it, and if it was tendered, and if it was gazetted, and if it is relevant to the case, VCAT has to apply it'. In simple terms what that means is that there is the legislative override in VCAT of the *Drake* and *Becker* decisions. I have never been able to find a single recorded use of this provision.

At the Federal level the role of merits review tribunals in reviewing government policy á la *Drake* and *Becker* is one of their really important functions; or at least it was in the early merits review cases of migration decisions, which gave rise to a conception of merits review that allowed a level of independence in the review of decisions that were affected by a relevant government policy.

This issue seems to have been completely by-passed in VCAT and what we instead seem to have is essentially a simple, single adjudicative tribunal in which government policy is never questioned or tackled head-on. VCAT essentially functions as a low level court of summary administrative and civil jurisdiction without ever tackling the big government policy issues that might make the executive feel much more threatened. For that reason I think the government has always remained quite comfortable with VCAT but the extent to which it has challenged the government in its merits review function could be argued to be really quite narrow.

OVERVIEW OF THE STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA

Judge David Parry*

The State Administrative Tribunal of Western Australia was established on 1 January 2005 as a comprehensive and cohesive civil and administrative review tribunal for the State. The Tribunal replaced or took over work from approximately 50 courts, tribunals, boards, ministers and other adjudicators. The Tribunal exercises jurisdiction under approximately 150 Acts and Regulations, as well as under subsidiary legislation, such as planning schemes and local laws, in areas including building disputes, firearms licensing, strata titles, revenue, town planning, land compensation, land valuation, guardianship and administration, equal opportunity, and vocational regulation

'A cohesive new jurisdiction'

When commending the legislation that established and conferred jurisdiction on the State Administrative Tribunal (SAT or Tribunal) to the WA Parliament, the Attorney General Hon Jim McGinty MLA described SAT as 'a cohesive new jurisdiction' and the fulfillment of an important commitment to the people of the State 'to establish a modern, efficient and accessible system of administrative law decision-making across a wide range of areas'.[1]

SAT commenced on 1 January 2005 and replaced or took over work from approximately 50 courts, tribunals, boards, ministers and other adjudicators. SAT exercises broad review and original jurisdiction under approximately 150 State Acts and Regulations, as well as under subsidiary legislation, such as planning schemes and local laws. SAT's work involves:

- the review of the vast majority of administrative decisions made by State and local government authorities and officials, in respect of which administrative review (formerly known as 'appeal') rights are conferred, such as firearms, State revenue, town planning, land valuation, and mental health matters;
- vocational regulation, involving disciplinary proceedings concerning allegations of misconduct or incompetence, and licensing disputes, in relation to most professions, occupations and trades which are licensed under State law; and
- original jurisdiction in relation to specialist civil matters, such as building disputes, commercial tenancy, strata titles, land compensation, guardianship and administration, and equal opportunity proceedings.

The Tribunal has 20 full-time members consisting of a President,[2] two Deputy Presidents,[3] five legally-qualified senior members[4] and 12 ordinary members, including six lawyers, two town planners, an architect, a social worker/lawyer, a social worker/accountant and a social worker.[5] The Tribunal also has more than 80 sessional members, including builders, architects, town planners, an environmental scientist, engineers, surveyors, land valuers,

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social workers, medical practitioners, lawyers and members of other vocations regulated by SAT.

Because of the breadth of SAT's jurisdiction, and in order to make appropriate use of the knowledge and experience of members, each of the enabling Acts conferring jurisdiction on the Tribunal is allocated to one of four 'streams', namely:

- commercial and civil;
- development and resources;
- human rights; and
- vocational regulation.[6]

While SAT is modeled on the Victorian Civil and Administrative Tribunal (VCAT), there are two important differences. First, whereas VCAT comprises 'divisions', SAT comprises 'streams' which are, as that title implies, more flexible administrative arrangements. Second, whereas VCAT members are appointed to one or more specific divisions and therefore do not hear matters in other divisions, in SAT members are appointed to the Tribunal as a whole and then principally allocated by the President to one or more streams. Members are therefore able to sit and mediate across streams.

SAT's main statutory objectives, powers and procedures

Section 9 of the *State Administrative Tribunal Act 2004* (WA) (*SAT Act*) sets out the Tribunal's main objectives as follows:

(a) to achieve the resolution of questions, complaints or disputes, and to make or review decisions, fairly and according to the substantial merits of the case;

(b) to act as speedily and with as little formality and technicality as is practicable, and to minimise the costs to the parties; and

(c) to make appropriate use of the knowledge and experience of Tribunal members.

The Supreme Court of Western Australia has recognised that the Tribunal has 'specialist expertise in the areas of jurisdiction which it administers and by s 9 of the *SAT Act* is required to discharge that jurisdiction by reference to the objectives that are specified'.[7] The Court observed that it would be 'hazardous to the achievement of those objectives if the Supreme Court were to be too ready to impose its view on SAT as to the procedures of SAT and as to case management decisions that are made by SAT within its specialist areas of jurisdiction and which are taken for the achievement of the objectives set out in s 9 of the *SAT Act*'.

Consistent with its s 9 objectives, the Tribunal:

- is bound by the rules of natural justice;[8]
- is not bound by the rules of evidence and is to act 'according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms';[9]
- is to generally conduct hearings in public;[10]
- is to ensure that parties understand the nature of the assertions made in the proceeding and the legal implications of those assertions and is to explain to the parties, if requested to do so, any aspect of procedure or any decision;[11]
- may inform itself on any matter as it sees fit;[12]

- is to ensure that all relevant material is disclosed to it;[13]
- in administrative review proceedings, has all functions and discretions corresponding to the original decision-maker in making the reviewable decision;[14]
- may conduct all or part of a proceeding entirely on the basis of documents without an oral hearing;[15]
- is required, in administrative review proceedings, to produce 'the correct and preferable decision at the time of the decision upon the review';[16]
- is required to give reasons for final decisions including findings on material questions of fact, referring to the evidence or other material on which those findings are based;[17] and
- if it reserves a decision, is required to give the decision within 90 days of the day on which it is reserved.[18]

The Tribunal has adopted practices and terminology that reflect its statutory objectives and character as a civil and administrative tribunal, rather than a court. Parties, legal practitioners, agents and other persons attending a hearing do not stand or bow when the member or members (including a judicial member) enter or leave the hearing room. Parties, legal practitioners, agents and other persons attending a hearing do not bow when entering the hearing room during a hearing. Parties, legal practitioners and agents do not stand when examining or cross-examining a witness or when addressing the Tribunal.

The Tribunal has an 'executive officer', who performs functions under the *SAT Act* and assists in the administration of the Act, rather than a 'registrar', as in courts. The Tribunal has an 'office' at which documents are filed, rather than a 'registry', as in courts. SAT decisions are cited as [Applicant] and [Respondent], rather than as [Applicant] v [Respondent], as in courts.

The nature of SAT proceedings and their general character is fairly consistent and relatively informal, in comparison to courts and some tribunals, and could be described as a hybrid inquisitorial/adversarial approach to dispute resolution, under which the parties may generally (subject to the Tribunal's objectives in s 9 of the *SAT Act* and the practices and procedures which have been developed in light of those objectives) present their cases as they wish, but in which SAT adopts an active and inquisitorial approach to the resolution of the dispute.

Commencement and management of proceedings

Proceedings are commenced by filing a simple document, known as an 'application', which is generated on the SAT web site[19] using the 'SAT Wizard'. This programme has a drop down menu with each of over 900 enabling provisions that confer jurisdiction on the Tribunal. When an applicant selects the relevant enabling provision, the programme creates the application form and identifies the documents that must accompany the application.

Other than in guardianship and administration proceedings (which are listed for a final hearing within 8 weeks) and certain commercial tenancy proceedings (which are determined on the documents), all proceedings are listed for a first directions hearing before a member within two to three weeks of the filing of the application and are then actively case managed by the member. The directions hearing is not simply a case management tool. Rather, it involves a proactive and interactive process conducted by a member to identify the key issues in dispute and to begin developing options to achieve the resolution of the matter. Proceedings are often resolved through facilitative dispute resolution at the directions hearing itself. Otherwise, there is a presumption that cases will be referred from the directions hearing for mediation or listed for a compulsory conference.

The member conducting the directions hearing tailors directions to maximise the prospects of success of the mediation or compulsory conference. The member conducting the directions hearing considers which member or members should be listed to conduct the mediation or compulsory conference, having regard to the issues in dispute and the qualifications and experience of members. Where appropriate, the parties are told the professional background of the member or members who will conduct the process. The member also considers the location where the mediation or compulsory conference should most appropriately be held, having regard to the issues in dispute and the convenience of the participants. Mediations are often held on-site or include an on-site meeting. In addition, the member considers whether any third parties should be invited to attend the mediation or compulsory conference. For example in town planning cases, the Tribunal may invite the mayor or president of the local government respondent to attend and/or to nominate one or more councillors to attend the mediation or compulsory conference.

Identification of issues in dispute and relevant documents

Where a matter is referred to mediation or a compulsory conference, the Tribunal usually orders the parties to produce points for mediation or in administrative review cases requires the respondent to produce a statement of issues for mediation or, in some complex cases, a statement of issues, facts and contentions. This document usually provides the agenda for the mediation or compulsory conference.

Where a matter is listed for final hearing or determination on documents, the Tribunal usually orders:

- the applicant in original proceedings and the respondent in review proceedings to produce a statement of issues, facts and contentions; and
- the other parties to produce their own responsive statements of issues, facts and contentions, setting out whether the party accepts or rejects each issue, fact or contention and any other issues, facts and contentions it says are relevant.[20]

Section 24 of the *SAT Act* requires the original decision-maker in review cases (the respondent) to provide to the Tribunal, in accordance with the SAT Rules:

- a statement of the reasons for the decision; and
- other documents and other material in its possession or under its control which are relevant to the Tribunal's review of the decision.

These documents are commonly referred to as 'the s 24 documents'. The rules specify that the respondent must provide the s 24 documents to the Tribunal in accordance with any order made by the Tribunal.[21] The rules also enable the Tribunal to order the respondent to provide a copy of these documents to the applicant or any other party.[22] In order to minimise costs, the Tribunal's usual practice is to only order the respondent to file and provide the s 24 documents to the other parties if the proceeding is listed for final hearing or determination on documents.[23] As discussed below, across the Tribunal, other than in guardianship and administration proceedings, approximately two-thirds to three-quarters of proceedings are resolved by facilitative dispute resolution, without the need for a final hearing or determination on documents. The s 24 documents (and the applicant's bundle of documents) are not generally required to be produced in those cases.

In original proceedings, when a matter is listed for final hearing, the applicant is usually required to file and serve a bundle of documents, followed by the respondent. The Tribunal also has power under s 35 of the *SAT Act* to order third parties to produce documents and may issue summonses under s 66 of the *SAT Act*.

Facilitative dispute resolution

The Tribunal has adopted the term 'facilitative dispute resolution' (FDR) to refer to a suite of non-adjudicative dispute resolution processes that it employs. Across the Tribunal, other than in guardianship and administration and commercial tenancy proceedings, approximately two-thirds to three-quarters of proceedings are resolved by facilitative dispute resolution, without the need for a final hearing or determination on documents. In addition, FDR processes are regularly used to reduce the scope of the dispute in cases that require Tribunal adjudication.

Specifically, in SAT, FDR processes involve:

- directions hearings in which issues are identified, options are developed and, in certain types of applications, alternatives to the proposal are discussed;
- mediations;
- compulsory conferences; and
- in review proceedings, invitations by the Tribunal to respondents to reconsider their decisions under s 31 of the *SAT Act*, often in light of further information or clarification provided, or modifications or amendments made, by applicants through the other FDR processes.[24]

The FDR processes are applied in SAT in a co-ordinated and determined fashion, one leading to another, in order to achieve a non-adjudicative result, if at all possible. Thus, a review proceeding in SAT is typically resolved through the combination and progression of:

- a directions hearing; leading to
- one, two or three mediation sessions; leading to
- consent orders or the withdrawal of the application; or
- in review proceedings, an invitation by SAT to the respondent to reconsider its decision; leading, if necessary[25], to
- a further directions hearing or mediation session to resolve any outstanding aspect of the varied or substituted decision, such as a disputed condition of approval.

Expert evidence

As the Tribunal has said in its pamphlet *A guide for experts giving evidence in the State Administrative Tribunal* published in 2007:

> The quality and presentation of expert evidence is important in assisting the Tribunal to make reliable and correct decisions in the many areas of its jurisdiction.[26]

Consistent with its objectives, and in order to maximise the value of evidence given by expert witnesses to the Tribunal, SAT has adopted a model for expert evidence comprising the following four principal elements:

- Articulation of expert witnesses' obligations to the Tribunal.
- Written statements of expert witnesses' evidence.
- Conferral and joint statement of expert witnesses.
- Concurrent evidence of expert witnesses at the final hearing.

The pamphlet *A guide for experts giving evidence in the State Administrative Tribunal* states:

> Experience shows that, when expert witnesses understand and observe their obligation to bring to proceedings an objective assessment of the issues within their expertise, their evidence is of great assistance. When expert witnesses are not objective, and assume the role of advocate for a party, their credibility suffers.

With these observations in mind, SAT has articulated expert witnesses' obligations to the Tribunal in identical or similar terms to other tribunals and courts:

- An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert's area of expertise.
- An expert witness' paramount duty is to the Tribunal and not to the party engaging the expert.
- An expert witness is not an advocate for a party.[27]

The pamphlet recognises that an expert may have been engaged by a party before the proceedings were commenced or may have been engaged by a party in another capacity, for example, as an advocate, in addition to being engaged to give expert evidence. Nevertheless, as stated in the pamphlet:

> When the expert is giving evidence in the Tribunal, he or she must appreciate and acknowledge the obligations set out above.

Where a matter that is likely to involve expert evidence is listed for final hearing or determination on documents, the Tribunal usually orders:

- each party to give any expert witness it retains a copy of the pamphlet and a copy of the programming orders;[28] and
- each expert witness to acknowledge in his or her statement of evidence that he or she has read the pamphlet and agrees to be bound by the expert's obligations stated in that document.[29]

Parties in SAT proceedings are generally required to file and exchange experts' witness statements by a specified date, usually two weeks before the final hearing.[30] Except in cases where the expense involved would be disproportionate to the subject matter of the proceeding or where it would not be productive, the Tribunal usually makes the following programming orders:

> By [specified date usually 7 days before the hearing date] the expert witnesses in each field of expertise must confer with one another in the absence of the parties and their representatives and must prepare a joint statement of:
>
> (a) the issues arising in the proceeding which are within their expertise;
> (b) the matters upon which they agree in relation to those issues;
> (c) the matters upon which they disagree in relation to those issues; and
> (d) the reasons for any disagreement.
>
> The expert witnesses much each sign the joint statement at the conclusion of their conference. If the statement is in handwriting the expert witnesses must appoint one of them to generate a typed version of it and each must sign the typed document. The expert witnesses must file the joint statement with the Tribunal and give copies of it to the parties by [specified date usually 5 days before the hearing date].[31]

The pamphlet states that it will 'usually be desirable for the experts to meet face to face and to work through the issues together', although, 'in some cases, where the issues are

relatively narrow, it may be adequate for them to confer by telephone'. The pamphlet also states:

> It is expected that, consistently with their obligations to the Tribunal, the experts will make a genuine attempt to identify the matters of agreement between them and to clearly state their respective reasons for disagreement. … An expert must exercise his or her independent professional judgment in relation to the conferral and joint statement and must not act on any instructions or request by a party … to withhold or avoid agreement.

Expert witnesses in each field of expertise are generally required to give evidence concurrently at the hearing. Concurrent evidence involves the witnesses:

- sitting together as an expert panel;
- being asked questions by the Tribunal, generally on the basis of the joint statement;
- being encouraged to respond directly to each other's evidence;
- being given an opportunity to ask each other any questions they think might assist the Tribunal; and
- being asked questions by the parties or their representatives.[32]

Usually after discussion with the parties, the Tribunal nominates the topics and then leads what has been correctly described by the New South Wales Law Reform Commission as 'a structured professional discussion between peers in the relevant field.'[33] The process is akin to the way in which issues involving expertise are analysed and resolved in the 'real world'.[34]

Conduct of hearings

Due to the Tribunal's success in the use of FDR processes, in most areas of the Tribunal's jurisdiction, only 20% to 30% of cases need to be listed for a final hearing or determination on documents. When a matter is listed for final hearing or determination on documents the member usually makes programming orders based on the standard orders in relation to:

- identification of issues in dispute and relevant documents;[35]
- requirements for the presentation of documents;[36]
- expert evidence;[37]
- filing and exchange of witness statements;[38]
- conferral and joint statement of expert witnesses;[39]
- concurrent evidence of expert witnesses;[40] and
- filing and exchange of draft 'without prejudice' conditions of approval in refusal and deemed refusal review cases.[41]

The member may also schedule a further directions hearing to review preparation for the final hearing at an appropriate point in the process.[42]

Oral hearings are flexible and relatively informal. The primary evidence of both lay and expert witnesses is in the form of written witness statements that are filed and exchanged prior to the hearing. The Tribunal usually allows the party calling a witness to ask the witness questions to explain key evidence or in response to other evidence. The Tribunal also often asks questions and the other party is entitled to cross-examine.

Other than in disciplinary proceedings, in order to minimise the formality of hearings, evidence is generally not given on oath or affirmation, unless there is a material dispute as to fact or credit.[43] Also, for this reason, there is no standing or bowing in any Tribunal hearings.

Most final hearings take one day or less.[44] The length of hearings is minimised by the use of FDR to reduce the scope of disputes and by the conferral and joint statements and concurrent evidence of expert witnesses.

Determinations on documents

The Tribunal may conduct all or part of a proceeding entirely on the basis of documents without an oral hearing.[45] Determinations on documents minimise costs to the parties and may therefore appear attractive. However, a self-represented party may have greater difficulty in presenting their case in writing. In deciding whether to list a matter for determination on documents, the member would usually consider:

- Whether any party may be disadvantaged by not having an oral hearing.
- Whether the issues for determination are sufficiently limited and/or identified for determination on documents.
- Whether there is likely to be a material dispute as to facts.
- Whether any difference of expert opinion can be resolved satisfactorily without oral evidence.
- Whether it would be more cost effective to deal with the matter on the papers.

Costs

Section 87(1) of the *SAT Act* provides that, unless otherwise specified in that Act, the enabling Act or an order of the Tribunal under s 87, parties bear their own costs in Tribunal proceedings. It is apparent from the terms of this section that the starting proposition in the Tribunal is that parties bear their own costs in proceedings. However, s 87(2) of the *SAT Act* confers discretion on the Tribunal to make an order for the payment by a party of all or any of the costs of another party unless otherwise specified in an enabling Act.[46] Sections 87(1) and 87(2) of the *SAT Act* together indicate that there is a presumption that there will not be an award of costs in the Tribunal except in special circumstances. This presumption is desirable because it promotes access to civil and administrative justice through the Tribunal.[47] SAT can therefore be characterised as a generally 'no costs' or 'costs-neutral' jurisdiction.[48]

In exercising its discretion as to costs under s 87(2) of the *SAT Act*, the Tribunal has regard to policy considerations relevant to the particular type of proceedings in question. The Tribunal has developed and established practices in relation to the exercise of its discretion as to costs in various areas of its jurisdiction. In review and most other areas of jurisdiction, the Tribunal's established practice is that normally each party should bear its own costs of the proceedings.[49] As Barker J observed, SAT was established with its review jurisdiction as part of the system of public administration of the State to ensure that citizens and other entities may seek administrative justice in relation to decisions that affect their personal, proprietary and financial interests.[50] An applicant should not be discouraged from seeking administrative justice by the prospect of having to pay the decision-maker's costs if they do not succeed. Conversely, an applicant is not entitled to award of costs if they succeed.

Endnotes

1 *Hansard*, 24 June 2003, p 9104.
2 The President must be a Judge of the Supreme Court of WA: *State Administrative Tribunal Act 2004* (WA) (*SAT Act*) s 108(3).
3 The Deputy Presidents must be Judges of the District Court of WA: *SAT Act* s 112(3).
4 Senior members must have at least eight years' legal experience or extensive knowledge of, or experience with, any class of matter involved in the exercise of the Tribunal's jurisdiction: *SAT Act* s 117(4).

5 Ordinary members must have at least five years legal experience or extensive knowledge of, or experience with, any class of matter involved in the exercise of the Tribunal's jurisdiction: *SAT Act* s 117(3).
6 The streams are not prescribed or referred to in the SAT legislation, but are established by the President as part of the administration of the Tribunal.
7 *Dalton v Commissioner of Police* [2009] WASC 9 at [28] *per* Martin CJ. See also, to the same effect, *Commissioner of State Revenue v Artistic Pty Ltd* 2008] WASCA 24; 2008 ATC ¶20-004; (2008) 70 ATR 818 at [16] *per* Martin CJ with whom Buss JA (at [37]) and Newnes AJA (at [38]) agreed.
8 Except to the extent that the enabling Act conferring jurisdiction in the matter authorises a departure from those rules: *SAT Act* s 32(1).
9 *SAT Act* s 32(2).
10 *SAT Act* s 61, other than a compulsory conference (s 52(4)) or a mediation (s 54(6)) which are conducted in private unless SAT determines otherwise.
11 *SAT* Act s 32(6).
12 *SAT* Act s 32(4).
13 *SAT Act* s 32(7)(a).
14 *SAT* Act s 29(1).
15 *SAT* Act s 60(2).
16 *SAT* Act s 27(2).
17 *SAT* Act s 77. Reasons for final decisions can be oral although a party may request written reasons for any decision which must be provided within 90 days of the request or within an extension of that period given by the President: *SAT Act* s 78.
18 *SAT Act* s 76. The President can grant an extension of this period: ibid.
19 http://www.sat.justice.wa.gov.au.
20 *Standard orders made at directions hearings, mediations and compulsory conferences*, standard orders 11(a) and 12 (original proceedings) and 7(a) and 9 (review proceedings), http://www.sat.justice.wa.gov.au/_files/standard_orders.pdf.
21 *State Administrative Tribunal Rules 2004* (WA) (SAT Rules) r 12.
22 SAT Rules r 12.
23 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard order 7(b).
24 See DR Parry, 'The Use of Facilitative Dispute Resolution in the State Administrative Tribunal of Western Australia – Central Rather than Alternative Dispute Resolution in Planning Cases' (2010) 27 EPLJ 113.
25 The Tribunal's practice is to schedule a directions hearing shortly after the date by which the respondent has been invited to reconsider its decision. However, applicants usually write to the Tribunal following reconsideration seeking leave to withdraw the application and respondents usually write to the Tribunal consenting to leave being granted to withdraw the application. The Tribunal then vacates the directions hearing and issues an order allowing the withdrawal without attendance by either party. The Tribunal's leave to withdraw an application is required by s 46(1) of the *SAT Act*.
26 *A guide for experts giving evidence in the State Administrative Tribunal* http://www.sat.justice.wa.gov.au/_files/Expert_Evidence_Brochure.pdf.
27 The obligations are stated in *A guide for experts giving evidence in the State Administrative Tribunal* and are based on expert witness' general obligations articulated by the NSW Land and Environment Court in its *Practice Direction: Expert Witnesses*, Sch 1.
28 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard order 41.
29 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard order 42.
30 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard order 43.
31 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard orders 46 and 48. In appropriate cases, the Tribunal will list a compulsory conference in order for a member to chair the expert witness' conferral: see standard order 47. If the member conducted a mediation in the matter, the compulsory conference can only take place before the member with the parties' agreement: *SAT Act* s 54(10).
32 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard order 49.
33 New South Wales Law Reform Commission, *Expert Witnesses*, NSWLRC Report 109 (NSWLRC, Sydney, 2005) http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r109toc [6.56].
34 See DR Parry, 'Concurrent Expert Evidence' (*Brief* Vol 37 No 7 August 2010 pp 9 - 12).
35 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard orders 7 – 10.
36 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard orders 39 and 40.
37 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard orders 41 and 42.
38 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard orders 43 – 44.

39 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard orders 46 – 48.
40 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard order 49.
41 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard orders 50 and 51.
42 *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard order 55.
43 Witnesses are sometimes reminded that knowingly giving false or misleading information to the Tribunal is an offence: *SAT Act* s 98.
44 For example, in the development and resources stream in 2009-2010, 82% one day or less, 97% two days or less and 100% three days or less and in 2010-2011, 83% one day or less, 96% two days or less, 97% in three days or less and 100% in four days or less.
45 *SAT Act* s 60(2). See *Standard orders made at directions hearings, mediations and compulsory conferences*, note 20, standard orders 35 – 38.
46 *Citygate Properties Pty Ltd and City of Bunbury* [2005] WASAT 53; (2005) 38 SR (WA) 247 at [28]; see also *Springmist Pty Ltd and Shire of Augusta-Margaret River* [2005] WASAT 143 (S); (2005) 41 SR (WA) 219 at [32] and *Uniting Church Homes (Inc) and City of Stirling* [2005] WASAT 341 at [12].
47 *Pearce & Anor and Germain* [2007] WASAT 291 (S) at [17].
48 *Clifford and Shire of Busselton* [2007] WASAT 89 (S); (2007) 44 SR (WA) 174 at [39]; see also *Chew and Director-General of the Department of Education and Training* [2006] WASAT 248; (2006) 44 SR (WA) 174; *Summerville and Department of Education and Training* [2006] WASAT 368 (S).
49 *Citygate Properties Pty Ltd and City of Bunbury* [2005] WASAT 53; (2005) 38 SR (WA) 246; *Shark Bay Tuna Farms Pty Ltd and Executive Director, Department of Fisheries* [2005] WASAT 206; *Aydogan and Town of Cambridge* [2007] WASAT 19; (2007) 48 SR (WA) 239.
50 *Shark Bay Tuna Farms Pty Ltd and Executive Director, Department of Fisheries* [2005] WASAT 206 at [36].

AMENDMENTS TO THE COMMONWEALTH *ACTS INTERPRETATION ACT*

Anna Lehane and Robert Orr*

The *Acts Interpretation Act 1901* (Cth) was recently amended by the *Acts Interpretation Amendment Act 2011* (Cth) (the *2011 Amendment Act*), which commenced on 27 December 2011. These amendments are the most substantial made to the Act since its enactment in 1901, and will be of considerable importance in the interpretation of Commonwealth legislation and for Commonwealth government administration. This article discusses the background to the changes, and the purpose and effect of some of the more significant amendments.

Role of the *Acts Interpretation Act* in interpreting legislation

The former Chief Justice of the Supreme Court of NSW, James Spigelman, has written:[1]

> The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification. It is, perhaps, a little ironic that one of the areas of the law least affected by statutory modification is, in fact, the law of statutory interpretation.

This comment raises several important preliminary points.

First, statute law has clearly become important in almost all areas of law and pre-eminent in many public law areas; therefore interpreting statutes is a core skill for public lawyers, and a key task for decision-makers, those affected by decisions, tribunal members and judges.

Secondly, it is true that some of the basic principles of statutory interpretation remain subject to the common law, not statute law. The *Acts Interpretation Act* sets out some key principles, such as preferring an interpretation that would best achieve the purpose of the Act (s 15AA), and providing for the use of extrinsic materials in interpretation (s 15AB). But, it does not seek to codify the principles of statutory interpretation. Many decisions of superior courts therefore turn on a sophisticated, perhaps intuitive, application of the common law principles, such as:

- the principle that a statute is to be interpreted in light of established rules of international law,[2] particularly an international agreement which the statute seeks to give effect to;[3]
- the principle of legality, namely the presumption that Parliament does not intend to interfere with common law rights except by clear language.[4] Unlike the position under Victorian and the ACT law,[5] there is no related Commonwealth statutory requirement that legislation needs to be interpreted, so far as possible, consistently with human rights, although s 10 of the *Racial Discrimination Act 1975* affects the operation of legislation;[6] and
- the principle that legislation must be read as a whole.[7]

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But, thirdly, interpretation legislation plays a very significant role in the drafting of legislation, and in much statutory interpretation by lawyers, decision-makers and those affected by decisions, and tribunals and courts. The resort by superior courts to common law principles to resolve some of the most difficult cases should not distract from the pivotal role which this legislation plays in the interpretation of legislation. This legislation also performs a range of other important functions in relation to legislation and the machinery of government.

Background to the reforms

The *Acts Interpretation Act* was the first Commonwealth Bill to be introduced into the new House of Representatives and the second Commonwealth Act to be made. It was based on the then English,[8] New South Wales[9] and Victorian[10] precedents.[11] Since 1901, it has been subject to numerous amendments but it had not (until the recent amendments) been comprehensively restructured and modernised.

In 1993, the House of Representatives Standing Committee on Legal and Constitutional Affairs published a report on the drafting of Commonwealth legislation, entitled *Clearer Commonwealth Law* (the Report). The Report recognised the importance of interpretation legislation in legislative drafting and in promoting clear legislation. However, it noted that the *Acts Interpretation Act* was 'an amalgam of provisions based on the oldest Commonwealth legislation still in force' and that many of its provisions were not expressed in plain English. The Report recommended that the Attorney-General's Department and the Office of Parliamentary Counsel publicly review and rewrite the *Acts Interpretation Act*.[12]

In response, the Attorney-General's Department and the Office of Parliamentary Counsel issued a discussion paper entitled *Review of the Commonwealth Acts Interpretation Act 1901* in 1998 (the Discussion Paper).[13] The Discussion Paper considered some of the key conceptual issues about the *Acts Interpretation Act* and interpretation legislation generally. It discussed whether different users have different, and sometimes competing, needs in relation to legislation; whether users are better served by shorter Acts relying on interpretation legislation, or by self-contained legislation; and whether standard provisions, or tailor-made ones, are more appropriate in meeting various policy objectives.[14] The Paper also noted the range of functions that interpretation legislation performed, namely:

- providing a technical framework to support legislation;
- shortening and simplifying general legislation;
- codifying or changing the rules of statutory interpretation;
- maintaining consistency in law and administration; and
- providing for legislation to be updated or corrected without recourse to Parliament.[15]

In light of these considerations a number of specific issues were raised and suggestions made, about how to amend the Act to promote legislative clarity. Many of these issues have now been addressed in the *2011 Amendment Act*.

Brief outline of the amendments

The *2011 Amendment Act* effected three types of changes to the *Acts Interpretation Act*:

- It made the Act more user-friendly and, in particular, it improved the readability and the structure of the Act. There is now a simplified outline in s 1A, a feature of much modern legislation. Definitions that previously appeared throughout the Act have been co-located. (A number of new definitions have also been inserted, such as a definition of 'Australian citizen', which is a term that appears in many Commonwealth

Acts.) Provisions dealing with similar subject matters have been co-located, to provide a stronger structure, as summarised in s 1A, and to minimise the risk that a relevant provision will be inadvertently overlooked. Further, a number of provisions, including s 36 dealing with calculation of time, have been drafted to make them easier to apply. Section 36 now includes a table setting out a range of time-related expressions and what they mean, along with examples for each expression.

- It modernised various concepts in the Act to allow for advances in technology; for example s 33B dealing with participation in meetings by telephone and other methods of communication has been amended to clarify that people who participate by such means can be considered to form part of any quorum for the meeting and to allow for meetings to be held in two or more places at the same time.
- It made a number of more significant amendments which are the focus of this paper, relating to (1) the application of the *Acts Interpretation Act*, (2) what forms part of an Act, (3) the status of examples in an Act, (4) construing legislation with regard to purpose, (5) references in legislation to Ministers, (6) making, varying and revoking instruments, (7) the effect of things done pursuant to a defective appointment, and (8) the effect of new powers on existing delegations.

The amendments commenced on 27 December 2011 and apply to both existing and new Acts.[16]

The more significant amendments:

1. What the Act applies to

Section 2 of the *Acts Interpretation Act* has been amended to make it clearer what the Act applies to. The *Acts Interpretation Act* continues to apply to all Commonwealth Acts. As indicated in a new note included under s 2(1), it also continues to apply to legislative instruments made under an Act by virtue of s 13(1) of the *Legislative Instruments Act 2003*. It also applies to other instruments mentioned in s 46 of the *Acts Interpretation Act* — namely, instruments made under an Act that are not legislative instruments or rules of court.[17]

New s 2(2) provides that all provisions of the *Acts Interpretation Act* are subject to a contrary intention. Specific references to 'contrary intention' in individual provisions of the *Acts Interpretation Act* have been removed by the amendments.

2. What forms part of an Act

Before the amendments, certain things in Acts were treated as not forming part of an Act. Section 13(3) of the *Acts Interpretation Act* said that marginal notes, footnotes or endnotes to an Act, and section headings, were not to be taken to be part of an Act. Significant difficulties with this provision were identified by the Discussion Paper.[18]

The reason for the elements listed in s 13(3) being excluded from forming part of the Act was that this reflected a common law rule, which was based principally on the fact that historically, in England, these elements were added to the text of a Bill by drafters after its passage through Parliament.[19] However, this is not the modern practice in England[20] or in Australia. In Commonwealth Bills, marginal notes, which became section headings from 1980,[21] have always been included in the text of the Bill presented to and considered by the Parliament. For example, the original Acts Interpretation Bill included marginal notes; for cl 14 about such notes, the marginal note stated: 'Headings, marginal notes and footnotes', and included a reference to s 21 of the *Acts Interpretation Act 1890* (Vic) from which it, in part, derived. The incorporation of the common law rule as a statutory rule in the *Acts*

Interpretation Act was therefore always somewhat anomalous. As noted by Street CJ in *Ombudsman v Moroney*,[22] 'from the public's point of view, it would seem to be bordering on the mischievous to insist that, although the marginal note was there on the clause, although it was there on the section when assented to, and although it appears in the publicly available print of the statute, nevertheless it must be wholly disregarded'.

The effect of former s 13(3) was that the elements mentioned in s 13(3), notwithstanding that they were placed before the Parliament, had to be treated as extrinsic material to the Act. Regard could be had to them in interpreting the legislation in accordance with s 15AB of the *Acts Interpretation Act* to confirm that the meaning of the provision was the ordinary meaning conveyed by the text or to determine the meaning of the provision if it was ambiguous or led to an unreasonable result.[23] Section 15AB(2)(a) provided, and still provides, that 'all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer' can be taken into account as relevant extrinsic material.

However while the old s 13(3) stated that section headings were not to be taken to be part of the Act, the headings for parts, divisions and subdivisions were part of the Act (s 13(1)), and chapter or subsection headings were not referred to, leaving their position unclear. It was uncertain how these provisions flowed through to legislative instruments, where generally all elements of the instrument are before the maker.

The changes to s 13 remove these anomalies. All headings and notes are treated in the same way, as part of the Act. The changes recognise that all these elements are in fact included in the text of Bills presented to Parliament and enacted by Parliament, and that it is therefore not appropriate to treat them as extrinsic material.

Section 13 now says that all material from and including the first section of an Act to the end of the last section of the Act, or the last Schedule to the Act if there are Schedules, is part of the Act. Long titles, preambles, enacting words and headings appearing before the first section of the Act are also part of the Act.

This makes it clear that section headings (and all other headings) and explanatory notes within an Act are part of the Act and can be given appropriate weight in interpreting a provision. It is no longer necessary to rely on s 15AB of the *Acts Interpretation Act* in order to use section headings and relevant notes as aids to the interpretation of an Act. However, this should not mean that headings are given the same weight as the substantive provision. As Street CJ noted in *Ombudsman v Moroney*, such matter 'cannot control the meaning of the section'.[24] Francis Bennion has suggested this statement of principle: 'the significance attached to each type of component of the Act containing the enactment must be assessed in conformity with its legislative function as a component of that type'.[25] Headings are only very brief summaries of the content of parts, divisions, sections and subsections of an Act; they are used to structure the Act and assist the reader to find the substantive provisions. Their use in interpreting the substantive provision should recognise this limited role.

As mentioned above, the amendments introduced by the *2011 Amendment Act*, including the amendments to s 13, apply to existing Acts as well as new Acts. As such, section headings and notes which were not previously treated as part of the Act in which they appear came to form part of the Act from 27 December 2011.

There is some variation in the provisions of the State and Territory Interpretation Acts regarding what forms part of an Act and what does not. In some jurisdictions, it continues to be the case that elements such as section headings and footnotes or explanatory notes do not form part of an Act.[26] In other jurisdictions, section headings (at least those enacted after

a certain date) and explanatory notes are expressed to form part of an Act.[27] In the ACT, section headings enacted after a specified date are part of an Act but footnotes are not.[28]

3. Examples in an Act

Prior to the commencement of the amendments, s 15AD of the *Acts Interpretation Act* provided that examples of the operation of a provision in an Act were not to be taken to be exhaustive and that, where the example was inconsistent with the operative provision, the provision prevailed. Examples were therefore legitimate aids to the interpretation of a provision but had to give way where they were inconsistent with the provision itself. The Discussion Paper noted the concern of the Report that the fact that a provision prevailed over an example 'undermined the value of examples in legislation', but noted that inconsistencies were likely to occur only rarely, and neither supported change.[29]

Section 15AD as amended now similarly provides that examples are not exhaustive. However, it also now provides that examples may extend the operation of the operative provision. This means that examples that are inconsistent with the operative provision or that otherwise do not fall within the terms of the operative provision can have effect, rather than the example giving way to the provision as was previously required. The policy behind this change is stated in the Explanatory Memorandum to the Amendment Bill:[30] by enacting an example in an Act, the Parliament has demonstrated an intention that the example should be covered whether or not it strictly falls within the scope of the provision. That is, a specific example is likely to reflect the policy intention behind the legislation more precisely than a general statement.

Section 15AD as amended does not simply say that the example has effect, even if it is inconsistent with the provision. It says that the example may extend the operation of the provision itself. This means that an example may expand the principal provision so that the provision includes the example and possibly other similar examples. The use of the word 'may' in 'the example may extend the operation of the provision' is intended to ensure that a court can assess whether it is in fact appropriate for an example to extend the operation of the provision in a particular case.[31] Of course, s 15AD, like all other provisions of the *Acts Interpretation Act*, is also subject to a contrary intention by virtue of new s 2(2) of the Act.

Section 15AD as amended is similar to the equivalent provisions of the ACT, South Australian and Victorian Interpretation Acts.[32] The Northern Territory and Queensland Interpretation Acts have provisions similar to the previous version of s 15AD, which specify that the substantive provision prevails where the example is inconsistent.[33] The NSW, Western Australian and Tasmanian Interpretation Acts do not contain provisions dealing with the effect of examples.

4. Purpose

Section 15AA of the *Acts Interpretation Act* previously provided that, in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act was to be preferred to a construction that would not promote that purpose or object.

Former s 15AA did not address the situation where there was a choice between two or more constructions that would promote the purpose or object underlying the Act. It just required a construction that would promote the purpose of the Act to be preferred to one that would not. This limitation had been mentioned in a number of cases.[34]

The amendments to 15AA address this limitation. Section 15AA now provides that the interpretation that would best achieve the purpose or object of the Act is to be preferred to

each other interpretation. This makes it clear that a court can weigh up alternative constructions that would all promote the purpose of the Act, and prefer the construction that would best achieve that purpose.

Apart from making this change to address the situation where there are multiple constructions available that would promote the purpose of the Act, s 15AA should continue to operate in the same way. Judicial consideration of the former s 15AA, and the related common law principle, will continue to be relevant in applying s 15AA as amended. In particular, the purpose of legislation is to be ascertained by regard to the text and context of the provision, its history and extrinsic materials.[35] Section 15AA establishes the importance of this purpose, so ascertained, in determining the meaning of a provision. But, regard must also be had to the text, context, history, extrinsic materials and other relevant common law and statutory principles in determining that meaning, or the range of possible meanings upon which new s 15AA operates.

Section 15AA is now similar to the equivalent provisions in the ACT and Queensland Interpretation Acts, which also refer to interpretations that best achieve the Act's purpose.[36] The other jurisdictions have provisions similar to s 15AA as it was before it was amended.[37]

5. References to Ministers

It has been the policy for some time for Commonwealth legislation to refer simply to 'the Minister', rather than to a specific Minister.[38] This modern practice makes it necessary to determine which Minister is being referred to. Section 19A of the *Acts Interpretation Act* sets out how to do so.

Ministers are appointed under s 64 of the Constitution, to administer departments of State. Their appointment is generally as Minister for a particular subject matter and to administer a particular Department. More detailed provision is set out in the Administrative Arrangements Order (AAO), which is made and amended from time to time by the Governor-General.[39] This Order is organised on a departmental basis and lists matters dealt with by each Department and the legislation administered by the Minister for the Department. So, for example, the AAO provides that the *Acts Interpretation Act* is administered by the Minister administering the Attorney-General's Department.

Section 19A uses this concept of a Minister who 'administers' an Act. In the simplest case, where there is only one Minister administering a Department, s 19A(1) provides that references to a Minister in a provision of an Act are references to the Minister who is administering that provision (s 19A(1)(c)). Many Departments are however now administered by more than one Minister.[40] Where there are 2 or more Ministers administering a provision, a reference to 'the Minister' means any one of those Ministers (s 19A(1)(b)).[41] The section also deals with more complicated arrangements. These provisions also operate where the relevant reference is to a Minister who administers a specific Act or enactment (s 19A(2)).

Historically there have been and, occasionally, even today there need to be, provisions which identify a particular Minister in legislation, for example 'the Treasurer'. Clearly, the presumption is that these functions will be exercised by the person who is appointed as the specified Minister, that is, the Treasurer. Section 19A of the *Acts Interpretation Act* enables even these references to be read as references to the Minister, or any one of the Ministers, responsible for administering the provision or Act at the relevant time (s 19A(1)(ab)). By an amendment made by the *2011 Amendment Act*, this was extended to cover expressly the situation of a specific reference to a Minister even where there is no longer any such Minister

(s 19A(1)(ab)). This provides a mechanism for updating specific historical references in accordance with the AAO.

Most of the State and Territory Interpretation Acts contain similar provisions, although not all of these deal with the situation where legislation refers to a particular Minister where there is no longer any such Minister.[42]

Section 19A(3) makes similar provision in relation to references to Departments. This subsection has been amended to bring it into line with s 19A(1) relating to Ministers.

However, administrative changes cannot always be addressed by these mechanisms. *The Acts Interpretation Act* therefore provides for orders to be made dealing with the position where:

- there is a reference in legislation to a specific Minister or Department or Secretary; and
- there is no longer any such Minister or Department or Secretary — in this situation, s 19B orders can substitute a new reference; or
- the reference is inconsistent with changed administrative arrangements — in this situation, s 19BA orders can substitute a new reference.

Such orders are often made after an election and at other times when there is a change in Ministerial responsibility. They provide clarity about the meaning of specific, but in view of administrative changes now inappropriate, references. They currently take the form of consolidated Orders for s 19B and s 19BA which are amended from time to time: see the *Acts Interpretation (Substituted References — Section 19B) Order 1997* and the *Acts Interpretation (Substituted References — Section 19BA) Order 2004*, which are registered on the Federal Register of Legislative Instruments.

The 2011 amendments now allow these s 19B and s 19BA orders to be made with retrospective effect. This will usefully enable gaps in past orders, or lack of clarity in the operation of past orders, to be remedied.

Section 19A, and orders made under ss 19B and 19BA, do not formally change the relevant references to Ministers in legislation, that is, they do not authorise the reprinting of affected Acts with the references updated. As noted in the Discussion Paper, this can be misleading or confusing for readers. Some Australian jurisdictions provide for Acts to be formally amended to deal with such matters without parliamentary consideration. While such an approach was considered in the Discussion Paper,[43] it has not been adopted.

New s 19BD has been added to provide a safety net against the complexities and challenges of modern government administration. It states that if a Minister purports to exercise a power or perform a function that is actually conferred by an Act on another Minister, the exercise of that power or the performance of that function is not invalid merely because the power or function was conferred on the other Minister.

The provision draws on the distinction discussed in *Project Blue Sky Inc v Australian Broadcasting Authority*,[44] between those statutory requirements which go to the validity of an action and those which do not. In that case the Court rejected the traditional formulation of mandatory or directory statutory requirements and the related concept of 'substantial compliance' and stated:[45]

> A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. … In determining the question of

purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'.

Noting the centrality of interpretation principles, the *Acts Interpretation Act* expresses a general purpose or legislative rule that where the wrong Minister exercises a power, for example due to a misunderstanding about the allocation of responsibilities under the AAO, this does not result in the invalidity of that exercise.

The policy behind this provision is that invalidity is not an appropriate result for a failure to comply with internal government administrative arrangements.[46] These can be matters of some complexity, relying in some cases on s 19B or s 19BA orders going back many years, and invalidity flowing from a wrong identification of the relevant Minister could cause very significant public inconvenience.[47]

Of course, this is only a presumption, and it remains important that the correct Minister (having regard to the AAO and provisions discussed above) exercises a statutory power.[48] Section 19BD simply seeks to make clear the legal effect if a Minister exercises powers technically conferred on another Minister by an Act. It of course does not relieve whoever makes the decision of compliance with relevant administrative law principles.

There is no equivalent of s 19BD in State or Territory Interpretation Acts.

6. Power to revoke and vary instruments

Section 33(3) establishes a presumption that, where an Act confers a power to make, grant or issue an instrument, the power includes a power to revoke or vary the instrument (among other things). It is a very relevant provision for much government administration, and assists greatly in providing for simplified drafting.

However its operation has been clouded by a view expressed in some cases that it only operates in relation to legislative instruments.[49] This has not been the majority view in recent case law,[50] and s 33(3) has been amended to confirm that the provision can apply to an instrument of a legislative or administrative character.

The section provides for any such power to revoke or vary to be exercised 'in the like manner and subject to the like conditions' as the power to make the instrument. Another issue which has affected the utility of this provision is that there are some requirements for making an instrument, such as the requirement that a permission be given to a person of good character, where that requirement can cease to exist, and where it would be appropriate to revoke the instrument for this very reason. New s 33(3AA) has been inserted to make it clear that the 'like conditions' requirement does not operate to prevent this, but rather the instrument can be revoked on this basis.

Most of the State and Territory Interpretation Acts have an equivalent to s 33(3) (although they do not have an equivalent to new s 33(3AA)). Some of these apply to instruments whether or not they are legislative in nature,[51] while others apply only in relation to a more limited category of instruments such as regulations and by-laws.[52]

7. Things done under a defective appointment

The *2011 Amendment Act* inserted new s 33AB, which provides that things done by a person purporting to act under an appointment — whether an acting appointment or otherwise — are not invalid merely on the basis that there was a defect or irregularity in connection with the appointment,[53] the occasion for the appointment or the occasion to act

had not arisen, or the appointment had ceased to have effect. The section also applies to things done *in relation to* a person purporting to act under a defective appointment. As explained in the Explanatory Memorandum to the Amendment Bill,[54] this is intended to ensure that, for example, payments for services rendered by such an appointee are not invalid.

This section seeks to confirm the availability of the common law de facto officers doctrine, which states that in certain circumstances, even though an officer's appointment is defective, his/her actions can be operative.[55] In *Cassell v The Queen*,[56] the joint judgment referred to the 'the principle of the common law that where an office exists but the title to it of a particular person is defective the "acts of a de facto public officer done in apparent execution of [their] office cannot be challenged on the ground that [they have] no title to the office."'

Enid Campbell has summarised the requirements for the operation of the de facto officer's doctrine,[57] which we have reformulated as follows:

- the office must exist in law;
- the acts of the person must have been within the scope of the authority of that office; and
- the person must have the reputation of being in that office, or the defect in his/her title must be unknown to members of the public.

So for example in *Jamieson v McKenna*[58] the Supreme Court of Western Australia held that the decisions of a magistrate who had passed the statutory age of retirement were nonetheless valid.

The doctrine has however been questioned or given a limited operation in other cases. Most recently, in *Kutlu v Director of Professional Services Review*,[59] the Full Court of the Federal Court held that, in the context where a legislative requirement for consultation before an appointment had not been met, the doctrine did not operate to cure decisions of the appointee. Flick J held that the doctrine should only be applied with caution and that, as a common law doctrine, it must yield to either the terms of an express legislative provision or a sufficiently clear legislative intention precluding its operation.[60] Section 33AB of the *Acts Interpretation Act* now bolsters the doctrine by giving it express legislative form.

The Queensland and ACT Interpretation Acts contain similar provisions, although unlike s 33AB they are expressed to validate the appointment itself, whether an acting appointment or otherwise.[61] The New South Wales and Western Australian Interpretation Acts also contain similar provisions that apply in more limited circumstances, eg in relation only to defects in the appointment of members of statutory bodies.[62]

8. Effect of new or altered powers on existing delegations

One of the key things the *Acts Interpretation Act* does is to deal with a number of substantive issues concerning delegations (see ss 34AA, 34AB and 34A). New s 34AB(2) and (3) have been inserted by the *2011 Amendment Act*. These provisions seek to clarify that references to powers and functions in delegations can be read as in force 'from time to time'.

Section 34AB(2) provides that, where a delegator has delegated *all* of his/her functions (or duties or powers) to a person under an Act, and the Act is amended to give the delegator additional functions, the delegation is taken to include those additional functions. Section 34AB(3) provides that, where a delegator has delegated one or more functions under an Act, and the Act is amended to alter the scope of one or more of those functions, the delegation is taken to include those functions as altered.

The State and Territory Interpretation Acts all contain rules relating to delegation, however they do not include provisions along the lines of new s 34AB(2) and (3) of the *Acts Interpretation Act*.

Conclusion

The *Acts Interpretation Act* is a key tool in statutory interpretation. The Act does not codify the principles of statutory interpretation; many of these remain as common law principles. Nevertheless, consideration of the *Acts Interpretation Act* should be part of all statutory interpretation. The Act also performs a range of other functions: providing a technical framework to support legislation; shortening, simplifying and promoting the consistency of general legislation; and facilitating the machinery of government. Given these key roles, the recent amendments to the *Acts Interpretation Act* seek to ensure that it remains relevant, by making important substantive changes, and accessible, through a significant restructuring of the Act.

Endnotes

1 James Spigelman, *Statutory Interpretation and Human Rights: The McPherson Lecture Series, Volume 3* (2008) University of Queensland Press, 62.
2 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*Malaysian Declaration case*), 234 [247] (Kiefel J); *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J).
3 *Malaysian Declaration case* (2011) 244 CLR 144, 189 [90] (Gummow, Hayne, Crennan and Bell JJ).
4 *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013), [42]-[43] (French CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ); *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
5 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2004* (ACT) s 30; see also *New Zealand Bill of Rights Act 1990* (NZ) s 6; *Human Rights Act 1998* (UK) s 3.
6 See generally 'Human Rights in Commonwealth Policy Development and Decision-making' *AGS Legal Briefing*, forthcoming, 2013.
7 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372, 1410 [162], 1413 [173] (Hayne J).
8 *Interpretation Act 1889*, 52 & 53 Vict, c 63.
9 *Interpretation Act 1897* (NSW).
10 *Acts Interpretation Act 1890* (Vic).
11 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 6 June 1901, 789-791, Mr Deakin, Attorney-General.
12 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (1993), 123.
13 Attorney-General's Department and Office of Parliamentary Counsel *Review of the Commonwealth Acts Interpretation Act 1901* (1998).
14 Ibid 1.4-1.47.
15 Ibid 2.1-2.42.
16 2011 Amendment Act, sch 3 item 1.
17 There are specific provisions, in the legislation providing for rules of court to be made, for these rules to be treated as legislative instruments for the purposes of the majority of provisions of the *Legislative Instruments Act 2003* (Cth) (including s 13 about the application of the *Acts Interpretation Act*), subject to modifications or adaptations provided for in the regulations: see the *Judiciary Act 1903* (Cth) s 86(2); *Federal Court of Australia Act 1976* (Cth) s 59(4); *Family Law Act 1975* (Cth) ss 26E, 37A(14), 123(2); *Federal Circuit Court of Australia Act 1999* (Cth) s 81(3). The *Acts Interpretation Act* therefore also applies to these rules (subject to any modifications specified in regulations).
18 Discussion Paper at 3.36-3.38.
19 This understanding was reflected in *R v Hare* [1934] 1 KB 354, 355, where Avory J said that headings and marginal notes are not to be looked at because they 'are inserted after the Bill has become law'; and *Re Woking UDC* [1914] 1 Ch 300, 322 where Phillimore LJ stated that marginal notes 'are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons'. See Francis Bennion, *Statutory Interpretation* (LexisNexis, 5th ed, 2008) 715 as to the incorrectness of these statements.
Another possible reason for, or more likely an effect of, excluding elements such as marginal notes from forming part of the Act was that they could be amended by a parliamentary clerk, where necessary or desirable by reason of amendments made to the Bill, and were not otherwise subject to amendment by Parliament. But Bennion at 715 states of parliamentary clerks that, '[far] from being irresponsible, they are subject to the authority of Parliament' and that '[t]o suppose that the components of a Bill which are subject to printing corrections cannot be looked at in interpretation of the ensuing Act is to treat them as being in

some way 'unreliable'. No other ground could possibly justify their being ignored. Yet this goes against another principle of law, ...- all things are presumed to be rightly and duly performed unless the contrary is proved.' Commonwealth legislation can also be subject to such corrections by the authority of Parliament: see *House of Representatives Standing Orders*, standing order 156; *Senate Standing Orders*, standing order 124.

20 Francis Bennion, *Statutory Interpretation* (LexisNexis, 5th ed, 2008) 748-9: 'with occasional trifling exceptions, the marginal notes in an Act [now section headings] ... are contained either in the Bill as introduced or in new clauses added by amendment' . At 714, Bennion states that '[a]ny suggestion that certain components of an Act are to be treated, for reasons connected with their parliamentary history, as not being part of the Act is unsound and contrary to principle'. See also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 1.37 and 4.54.

21 Discussion Paper at 3.36-3.38.

22 [1983] 1 NSWLR 317, 325.

23 See, eg, *Shuster v Minister for Immigration and Citizenship* (2008) 167 FCR 186, 188-9 [10]-[14] (Bennett J); *Clement v Comcare* (2011) 194 FCR 24, 29-30 [35]-[38] (Cowdroy J).

24 [1983] 1 NSWLR 317, 325.

25 Francis Bennion, *Statutory Interpretation* (LexisNexis, 5th ed, 2008) 713, s 238.

26 *Interpretation Act 1987* (NSW) s 35; *Acts Interpretation Act 1915* (SA) s 19; *Interpretation Act 1984* (WA) s 32; *Acts Interpretation Act 1931* (Tas) s 6.

27 *Interpretation Act* (NT) s 55; *Interpretation of Legislation Act 1984* (Vic) s 36; *Acts Interpretation Act 1954* (Qld) s 14.

28 *Legislation Act 2001* (ACT) ss 126, 127.

29 Discussion Paper at 3.47-3.48.

30 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 19.

31 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 19.

32 *Legislation Act 2001* (ACT) s 132; *Acts Interpretation Act 1915* (SA) s 19A; *Interpretation of Legislation Act 1984* (Vic) s 36A.

33 *Interpretation Act* (NT) s 62D; *Acts Interpretation Act 1954* (Qld) s 14D.

34 See, eg, *Chugg v Pacific Dunlop Pty Ltd* (1990) 170 CLR 249, 262 (Dawson, Toohey and Gaudron JJ), discussing the equivalent Victorian provision.

35 *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 649 [5] and 651 [9] (French CJ and Bell J), 661-3 [38]-[45] (Crennan and Kiefel JJ).

36 *Legislation Act 2001* (ACT) s 139; *Acts Interpretation Act 1954* (Qld) s 14A.

37 *Interpretation Act 1987* (NSW) s 33; *Interpretation Act* (NT) s 62A; *Acts Interpretation Act 1915* (SA) s 22; *Interpretation Act 1984* (WA) s 18; *Interpretation of Legislation Act 1984* (Vic) s 35; *Acts Interpretation Act 1931* (Tas) s 8A.

38 Department of the Prime Minister and Cabinet, *Legislation Handbook* (1999) 6.36.

39 The current AAO, available on ComLaw (www.comlaw.gov.au), was made on 9 February 2012, and incorporates amendments made on 25 March 2013.

40 For example, 8 Ministers have been appointed to administer the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, including 2 designated as parliamentary secretaries. There are multiple Ministers responsible for particular subject matters dealt with by the Department. For example, the Hon Greg Combet AM MP is Minister for Climate Change, Industry and Innovation, Senator the Hon Kate Lundy is Minister Assisting on Industry and Innovation, and The Hon Yvette D'Ath MP is Parliamentary Secretary for Climate Change, Industry and Innovation. The High Court upheld the practice of appointing multiple Ministers for a Department in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

41 This is subject to s 19A(1)(a) applying. That paragraph deals with the situation where different Ministers administer the same provision in respect of different matters.

42 *Interpretation Act 1987* (NSW) s 15; *Legislation Act 2001* (ACT) s 162; *Interpretation Act* (NT) s 19; *Acts Interpretation Act 1915* (SA) s 4; *Interpretation Act 1984* (WA) s 12; *Interpretation of Legislation Act 1984* (Vic) s 38; *Acts Interpretation Act 1954* (Qld) s 33.

43 Discussion Paper, 2.28-2.38 and 3.65-3.69.

44 (1998) 194 CLR 355.

45 (1998) 194 CLR 355, 390-1 [93] (McHugh, Gummow, Kirby and Hayne JJ), footnotes omitted.

46 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 24.

47 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392-3 [97]-[100] (McHugh, Gummow, Kirby and Hayne JJ).

48 The Minister referred to in the Act (having regard to the AAO and relevant provisions of the *Acts Interpretation Act* discussed above) may authorise another Minister to exercise the function or power, in which case that power could properly be exercised by that other Minister (see s 34AAB of the *Acts Interpretation Act*).

49 See *Australian Capital Equity v Beale* (1993) 41 FCR 242.

50 See *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167; *Heslehurst v Government of New Zealand* (2002) 117 FCR 104 (Emmett J); *X v Australian Crime Commission* (2004) 139 FCR 413 (Finn J); *Laurence v Chief of Navy* (2004) 139 FCR 555 (Wilcox J); *Nicholson-Brown v Jennings* (2007) 162 FCR 337 (Middleton J); *R v Ng* (2002) 5 VR 257.

51 See the *Legislation Act 2001* (ACT) s 46; *Interpretation Act* (NT) s 43 (and the definitions of 'statutory instrument' in those Acts); *Acts Interpretation Act 1954* (Qld) s 24AA; *Interpretation of Legislation Act 1984* (Vic) ss 27, 41A.

52 *Acts Interpretation Act 1915* (SA) s 39; *Interpretation Act 1984* (WA) s 43(4); *Acts Interpretation Act 1931* (Tas) s 22.

53 As set out in the Explanatory Memorandum to the Acts Interpretation Amendment Bill 2011 at page 31, there are a range of circumstances in which such a defect may arise, including where the appointer failed to observe a statutory procedure in making the appointment.

54 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 31.

55 Enid Campbell, 'De Facto Officers' (1994) 2 *Australian Journal of Administrative Law* 5; Owen Dixon, 'De Facto Officers' (1938) 1 *Res Judicatae* 285.

56 (2000) 201 CLR 189, 193 [19] (Gleeson CJ, Gaudron, McHugh and Gummow JJ), quoting from *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503, 525 (McHugh JA).

57 Enid Campbell, 'De Facto Officers' (1994) 2 *Australian Journal of Administrative Law* 5, 7-13.

58 (2002) 136 A Crim R 82.

59 (2011) 197 FCR 177. Special leave to appeal to the High Court was granted (Transcript of Proceedings, *Commonwealth v Kutlu* [2012] HCATrans 35 (10 February 2012)), but the proceedings were discontinued.

60 (2011) 197 FCR 177, 215-216 [119]-[121]. See also at 193 [47] (Rares and Katzmann JJ). Both of the judgments drew on comments by Spigelman CJ in *R v Janceski* (2005) 64 NSWLR 10, [132], who in turn referred back to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

61 See the *Legislation Act 2001* (ACT) ss 212 and 225 (see also s 242 dealing with defective delegations); *Acts Interpretation Act 1954* (Qld) s 26.

62 See the *Interpretation Act 1987* (NSW) s 52; *Interpretation Act 1984* (WA) ss 57 and 52(3).

THE CONCEPT OF 'DEFERENCE' IN JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS IN AUSTRALIA – PART 1

Alan Freckelton*

Since the year 2000, the Australian High Court has twice considered – once in detail and once briefly – whether a North American concept of 'deference' to administrative decision-makers should be introduced into Australian law. In *Corporation of the City of Enfield v Development Assessment Commission*[1] the High Court roundly rejected any endorsement of a common law principle of deference, claiming that such an approach involves an abdication of the court's responsibility, a theme later taken up by commentators.[2] The *Enfield* judgment, criticising any notion of deference to administrative decision-makers, was a direct response to the arguments raised by counsel. However, in *Minister for Immigration and Citizenship v SZMDS*[3], the issue was raised again, this time seemingly on the volition of Gummow ACJ and Kiefel J. Although the deference approach was rejected again, the concept this time was not dismissed out of hand.

Canadian administrative law has included a doctrine of deference to administrative decision-makers on judicial review of administrative decisions at least since the 1979 decision of *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*[4] (hence *CUPE*), although the approach may actually have a much longer lineage.[5] The deference approach has been restated and updated in the seminal case of *Dunsmuir v New Brunswick*, where the term was defined as follows:[6]

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference 'is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers'[7] … Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers.

Deference is an approach to judicial review taken by the courts, and effectively acts as a form of reconciliation between the rule of law and Parliamentary supremacy. That is, deference to administrative decision-makers balances the courts' constitutional requirement to review the decisions of administrative decision-makers to ensure that they are both constitutionally valid and within the decision-maker's power to make, and the power of the Parliament to allocate certain decision-making powers to persons authorised by or bodies created by statute.

Australian courts claim that they do not engage in merits review. Canadian courts do not make this argument and instead simply focus on whether an administrative decision is 'reasonable' or 'correct', depending on the applicable standard of review. Australian courts would regard this as a form of merits review. However, I will argue that Australian courts

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already engage in review of the merits of a decision, regardless of their protestations to the contrary, especially when one considers that *Wednesbury* unreasonableness[8] *is* accepted as a ground of judicial review in Australia. I will argue that the only difference between review of the merits of a decision and *Wednesbury* unreasonableness is the degree of deference afforded to the decision-maker – a difference of degree and not substance.

This article is in two parts. The first part will consider the rejection of the deference approach in *Enfield*, and a consideration of some of the reasons for this rejection, including an examination of the concept of the 'judicial power of the Commonwealth'. The second part will examine the judicial treatment of privative clauses in Australia, and examine academic arguments for and against a concept of deference in Australian administrative law. I will argue that Australia should move to a Canadian and UK type of substantive review of administrative decisions, rather than relying on an artificial and unsustainable distinction between errors of law and errors of fact, or, even worse, 'jurisdictional' and 'non-jurisdictional' errors of law.

Judicial review in Australia

Australia is somewhat of an 'outlier' in matters of judicial review of administrative decisions in contemporary common law jurisdictions. Michael Taggart has described the Australian approach to judicial review as follows[9]:

> There is a sharp distinction between questions of law – meaning the correct interpretation of statutory text and common law rules – and exercise of discretionary power. As regards the former … the Australian courts insist on having the last word on 'correctness' (there is no deference: *Marbury v Madison*[10] and all that). As regards discretion, the courts could not defer more, in theory at least. Within the four corners of the power the decision-maker is free to decide as he or she likes. Once the decision-maker has applied the right legal test, the application of that test and the weight given to the relevant factors are a matter solely for the decision-maker … The court would not second-guess (or judge) under the guise of judicial review questions of fact, policy, weight or otherwise intrude into the merits.

The *Enfield* decision

Prelude – Chevron

Before examining the *Enfield* decision, it is necessary to briefly examine the decision of the US Supreme Court in *Chevron USA Inc v Natural Resources Defense Council Inc.*[11] When an attempt was made to create an express deference approach for Australian judicial review in 2000, this was the case referred to, rather than extant Canadian authority such as *CUPE*.

The facts in *Chevron* were fairly complex, but can be summarised as follows. Amendments made to the federal *Clean Air Act* in 1977[12] required certain states to establish a program whereby polluting industries were required to purchase permits for 'new or modified major stationary sources' of air pollution. However, regulations issued by the Environmental Protection Authority (EPA) allowed a polluter to make certain modifications to its plant without applying for a permit, if the overall pollution level was not increased as a result. The issue before the court was whether a corporate group could be regarded as a 'stationary source' of air pollution – Chevron had argued that although it had increased pollution at one site, it had reduced it by a comparable amount at another site in the same state, and therefore did not require a permit.

Stevens J, writing for the court, commented that '[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations',[13] clearly demonstrating the use of the *word* 'deference'.[14]

Stevens J then found that the EPA had been given a broad discretion in deciding how the 1977 amendments should be implemented.[15] The key passage of the judgment is as follows:[16]

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Stevens J remarked further that 'a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency'.[17] That is, an administrative decision should not be disturbed if the enabling statute is 'silent or ambiguous' with respect to a particular issue, and the administrative decision-maker's finding is based on a 'permissible' or 'reasonable' construction of the statute. Stevens J ultimately found that the EPA's interpretation of the *Clean Air Act*, permitting Chevron to take the action it did, was reasonable, and upheld its decision.[18]

Enfield – the facts[19]

In *Enfield*, a waste management company applied to the Development Assessment Commission (DAC) in South Australia for approval to alter a waste treatment plant in the local government area of Enfield Council. In the absence of approval by the DAC the development was prohibited. Before assessing the development against the relevant development plan, the DAC was required by subregulation 16(1) of the *Development Regulations* (SA) to 'determine the nature of the development'. A development for 'special industry', defined in part as one causing fumes or producing conditions which may become offensive, would be a 'non-complying' development for the purposes of the *Development Act 1993* (SA). If the proposed waste plant was a non-complying development, s 35(3)(a) of that Act prohibited the DAC from granting provisional development plan consent unless the Minister and relevant council consented.

Enfield Council claimed that the application was properly classified as a 'non-complying' development, attracting the requirement specified under s 35(3)(a) of the Act that the consent of the Minister and the Council be obtained. However, the DAC decided that the application was for general industry rather than special industry and therefore was not a non-complying development, meaning that the consent of the Enfield Council would not be required. The DAC granted the waste management company provisional consent.

Enfield Council sought a declaration that the provisional consent was *ultra vires* and an injunction to restrain action was taken upon it. At first instance, the Supreme Court of South Australia granted the relief sought.[20] The primary judge (Debelle J) held that the development fell within the definition of 'special industry' because the industry involved would produce conditions which could be 'offensive'. The Full Court of the Supreme Court of South Australia reversed the decision,[21] holding that it was inappropriate for the Court to admit evidence as to whether the development was properly classified as 'special industry' and that the Court should defer 'in grey areas of uncertainty to the practical judgment of the planning authority'.[22] The Court should only interfere if the DAC had made an obvious and clear departure from the requirements of the planning legislation.[23] The primary judge should not have 'descend[ed] into the planning merits'[24] since 'without such an obvious and clear departure, the court on judicial review will defer to the judgment of the planning authority on planning issues'.[25]

High Court decision

Majority judgment

The majority of the High Court consisted of Gleeson CJ and Gummow, Kirby and Hayne JJ. After reviewing the legislation and the decisions of the lower courts, their Honours turned their attention to the concept of 'deference'. Their Honours introduced the concept as follows:[26]

> In the written submissions, reference was made to the applicability to a case such as the present of the doctrine of 'deference' which has developed in the United States. However, this *Chevron* doctrine, even on its own terms, is not addressed to the situation such as that which was before Debelle J. *Chevron* is concerned with competing interpretations of a statutory provision not, as here, jurisdictional fact-finding at the administrative and judicial levels.

The majority here drew a distinction between cases such as *Chevron* (and *CUPE*), where the issue was the interpretation of legislation by an administrative decision-maker with the delegated responsibility to make decisions under that legislation, and findings of 'jurisdictional facts'. In the next paragraph, the majority elaborates on this, saying that '*Chevron* applies in the United States where the statute administered by a federal agency or regulatory authority is susceptible of several constructions, each of which may be seen to be (as it is put) a reasonable representation of Congressional intent'.[27] The High Court here seems to be saying that it will have the final say on any matter going to a tribunal's jurisdiction, but what if the legislation conferring the decision-maker's jurisdiction is itself capable of a number of reasonable interpretations? Will any credence be given to the decision-maker's finding on its own jurisdiction, in interpreting legislation with which it is no doubt familiar?

The majority then turned to a theme that is common in Australian discussion of deference – the idea that giving any deference to an administrative decision-maker is somehow an abdication of judicial responsibility. At paragraph 41, the majority cited an extrajudicial article by Breyer J of the US Court of Appeal for the First Circuit, in which his Honour stated that the deference doctrine amounts to 'a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective'.[28] At paragraph 42, their Honours cited Professor Keith Werhan as stating that:[29]

> Before *Chevron*, the traditional approach viewed the interpretation of ambiguous laws to be a 'question of law'; after *Chevron*, this task became simply a 'policy choice'.[30] Having transformed the legal into the political, the Justices ceded interpretative authority to the agencies.

Again, I contend that if an agency makes a completely unreasonable interpretation of even its own enabling statute, no-one would argue that the courts should not intervene, to ensure that the agency acts within the power given to it by Parliament. Is it really 'ceding' authority, however, to give a reasonable degree of 'weight' to an agency's interpretation of its 'home' statute?

The High Court made the following observation at paragraph 42:

> An undesirable consequence of the *Chevron* doctrine may be its encouragement to decision-makers to adopt one of several competing reasonable interpretations of the statute in question, so as to fit the facts to the desired result. In a situation such as the present, the undesirable consequence would be that the decision-maker might be tempted to mould the facts and to express findings about them so as to establish jurisdiction and thus to insulate that finding of jurisdiction from judicial examination.

One would have thought that administrative decision-makers have an incentive of this kind with or without any concept of deference. The situation could actually be made worse in a situation where an administrative decision-maker believes that a court will only accept one

interpretation of a decision-making power. As one example, in the Full Federal Court decision in *Guo v Minister for Immigration and Ethnic Affairs*, amongst many other things, the Court found that a decision-maker should not come to an adverse view of an applicant's credibility unless he or she was in a 'positive state of disbelief'[31] about his or her claims, as opposed to being merely doubtful about them. Between 26 February 1996, when this decision was handed down, and 13 June 1997, when the High Court overturned the Federal Court in a rare 7-0 judgment,[32] the phrase 'positive state of disbelief' occurred in no less than 315 reported decisions of the Refugee Review Tribunal (RRT), of a total of 5,705 reported in that period. In the 16 years since the High Court's decision, the phrase has occurred less than 200 times in published decisions.[33] This appears to me to be an attempt by members of the RRT to 'mould the facts and to express findings about them' and so 'avoid judicial examination'.

The High Court then turned to the scope of judicial review in Australia, and in particular the prohibition on merits review.[34] The majority referred to ss 75(iii), 75(v) and 76(i) of the Australian *Constitution* as the sources of power for the High Court and other Federal Courts to review administrative decisions and the constitutionality of legislation and administrative action, and distinguished the prohibition on review of the merits from any kind of 'deference' principle. Refusal to engage in merits review is not a form of deference, it simply represents the limit, as the High Court sees it, of judicial power in Australia.[35]

Oddly, the High Court went on to state that 'in a proceeding in the original jurisdiction of a court on 'appeal' from that tribunal, the 'court should attach great weight to the opinion of the [tribunal]',[36] and that 'the weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances'.[37] The majority stated that these circumstances 'will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning'.[38] These considerations appear to inform, at paragraph 46, a 'deference to expertise' argument. The majority cited the following passage from *Eclipse Sleep Products Inc v Registrar of Trade Marks*[39] in support:

> By reason of his familiarity with trade usages in this country, a familiarity which stems not only from an examination of marks applied for and of the many trade journals which he sees, but from the perusal and consideration of trade declarations and the hearing of applications or oppositions, the *Registrar* is peculiarly well fitted to assess the standards by which the trade and public must be expected to estimate the uniqueness of particular indications of trade origin.

This line of reasoning would not look out of place in Canadian decisions! Margaret Allars also sees the development of a principle of deference to expertise in the High Court in this and preceding cases, even though the judges themselves reject the use of such a term.[40]

Ultimately, the majority set aside the decision of the Court of Appeal, thereby restoring the decision of Debelle J. Their Honours stated at paragraph 50 as follows:

> However, it was the task of Debelle J to determine the question of the jurisdiction of the Commission upon the evidence as to 'special industry' before him, as opposed to the probative material which had been before the Commission, and upon his construction of the relevant provision. His Honour did so … If, at the end of the day, Debelle J had been in doubt upon a particular factual matter, it would have been open to his Honour to resolve that doubt by giving weight to any determination upon it by the Commission.

Gaudron J

Gaudron J wrote a concurring judgment, focusing on the 'jurisdictional fact' concept. In her Honour's view, 'once it is appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of

executive and administrative powers exercise them only in accordance with the laws which govern their exercise, it follows that there is very limited scope for the notion of "judicial deference" with respect to findings by an administrative body of jurisdictional facts'.[41] That is, in the opinion of Gaudron J, if a statute requires certain facts to exist before an administrative body has jurisdiction, it is up to the courts alone to determine whether those facts exist and whether the decision-maker may lawfully embark on the inquiry.[42] However, Gaudron J also discusses the 'weight' to be given to the opinion of the decision-maker:[43]

> Where, as here, the legality of an executive or administrative decision or of action taken pursuant to a decision of that kind depends on the existence of a particular fact or factual situation, it is the function of a court, when its jurisdiction is invoked, to determine, for itself, whether the fact or the factual situation does or does not exist. To do less is to abdicate judicial responsibility. However, there may be situations where the evidence before the court is the same or substantially the same as that before the primary decision-maker and minds might reasonably differ as to the finding properly to be made on that evidence. In that situation a court may, but need not, decline to make a different finding from that made by the primary decision-maker, particularly if the latter possesses expertise in the area concerned. Even so, in that situation, the question is not so much one of 'judicial deference' as whether different weight should be given to the evidence from that given by the primary decision-maker.

Is there really any difference between 'weight' and 'deference' in this context? Surely according more or less weight to the opinion of a decision-maker, particularly one with a particular expertise, is precisely the same thing as allowing a greater or lesser degree of deference? It looks more and more as if the Australian courts are tying themselves up in semantic knots trying to avoid use of the word 'deference'.

Academic comment

Margaret Allars specifies three reasons why the High Court rejected the *Chevron* approach for Australia. Firstly, *Chevron*, even on its own terms, was not applicable to the situation. *Chevron* was concerned with competing interpretations of a statute, while *Enfield* was concerned with 'the existence of a jurisdictional fact which was a precondition to the jurisdiction of the agency'.[44] Secondly, an application of *Chevron* may have the result that 'an agency decision maker may be encouraged to adopt the competing interpretation which the facts will satisfy so as to produce the desired result, rather than determine the interpretation on the basis of proper principles of statutory interpretation'.[45] Finally, the *Chevron* approach would be antithetical to fundamental Australian principles of judicial review. Australia, following *Marbury v Madison,*[46] has taken the view that it is the role of court to declare and enforce the law: 'This determines the limits of the function of courts in judicial review, requiring that they do not intrude upon the merits of administrative decisions.'[47]

Merits review in Australian courts

The judicial power of the Commonwealth

A striking feature of Chapter III of the Australian *Constitution* is that the term 'judicial power' is nowhere defined. It must, therefore, have been intended to be left to the High Court itself to determine what is 'judicial power'. There is, however, a marked lack of authority on this point. Stephen Gageler SC, now Gageler J of the High Court, has commented that '[t]he largest and most emphatic words in the *Constitution* – take 'judicial power' and 'absolutely free' as well-worn examples – have no fixed or intrinsic meaning and it would be vain to attempt to search for one'.[48] Tony Blackshield and George Williams QC[49] state that the 'classic' definition of judicial power is still that given by Griffith CJ in *Huddart, Parker and Co Ltd v Moorehead*, in which his Honour found as follows:[50]

> I am of the opinion that the words 'judicial power' as used in sec 71 of the *Constitution* mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

That is, unless there is a final determination of existing rights to be made, there is no exercise of 'judicial power'. The High Court has also made clear a number of propositions in relation to what is or is not judicial review. For example, unlike in Canada, the High Court has found that giving an advisory opinion is not an exercise of judicial power,[51] but the making of control orders applied to terrorism suspects[52] and persons convicted of sexual offences after their release from prison[53] is the exercise of judicial power.

Australian courts have also made it clear that judicial power may not be exercised by a body other than a Chapter III court, and a judicial body may not exercise executive power. This principle has been enunciated many times by the High Court, most notably in *R v Kirby; Ex parte Boilermakers' Society of Australia,*[54] which found that the Court of Conciliation and Arbitration could not exercise both the power to impose an award on the parties to an industrial dispute, and provide a final and binding legal interpretation of that award. The *Boilermakers'* decision also makes clear that Chapter III is an *exhaustive* statement of the judicial power of the Commonwealth. The majority judges, Dixon CJ and McTiernan, Fullagar and Kitto JJ stated that Chapter III is 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested ... No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III'.[55]

An interesting illustration of this principle can be seen in *Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[56] In that case, the applicant argued that a number of provisions of the *Migration Act 1958* which provided for the mandatory detention of 'designated persons' (persons who arrived in Australia by boat without a visa or entry permit and were given a 'designation' by the Department) were unconstitutional on a number of grounds, including the ground that orders for detention were inherently punitive in nature and therefore amounted to an exercise of the judicial power of the Commonwealth. The High Court found that s 54L, which provided that a designated person must not be released from detention unless granted a visa or removed from Australia, and s 54N, which required an 'officer' to detain a person reasonably suspected of being a designated person, without a warrant, were valid, as they were powers exercised incidentally to s 51(xix) of the *Constitution*, and were not an exercise of judicial power. They could therefore be exercised by administrative decision-makers.

'Judicial power' and merits review

There have been many cases in which courts have stated that they are not to interfere in the merits of a decision, but the reasons *why* this is the case are obscure. A frequently cited statement of the rule against merits review can be found in *Attorney-General (NSW) v Quin*, in which Brennan J (as he then was) stated as follows:[57]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The key phrase is, of course, 'to the extent that they [the merits] can be distinguished from legality'. Margaret Allars makes the following points on that issue:[58]

> Three principles of judicial review qualify the operation of the legality/merits distinction. First, review for abuse of power where a decision is *Wednesbury* unreasonable is in practical terms review of the factual basis of the decision. The *Wednesbury* test of abuse of power permits the court to strike down a decision which is so unreasonable that no reasonable decision-maker could have reached it. This ground effectively sanctions as review for legality what is review of the merits in extreme cases of disproportionate decisions. Second, according to the 'no evidence' principle, an agency makes an error of law in the course of making a finding of fact if there is a complete absence of evidence to support the factual inference. The third qualification to the legality/merits distinction is the jurisdictional fact doctrine.

Allars cites in support of her proposition that the *Wednesbury* test allows for review of 'extreme cases of disproportionate decisions' the following passage from the judgment of Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:[59]

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned ... It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power ... I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'.

Mason J starts with an orthodox statement that a court must not simply substitute its own opinion for that of an administrative decision-maker, but his Honour then admits that a court may set aside a decision on the basis that a decision-maker has given too little 'weight' to a 'relevant factor of great importance'. This is a clear admission that Australian courts do engage in review of the merits of a decision, even if only in limited circumstances. In fact, it could be argued that, given the prohibition on 'reweighing' factors in the decision-making process in *Suresh v Canada (Minister of Citizenship and Immigration),*[60] that Australian courts actually permit a greater intrusion into the merits of a case than Canada, in this area at least.

In my opinion, the only difference distinguishing *Wednesbury* unreasonableness, 'variegated unreasonableness',[61] proportionality[62] and full review of the merits is the degree of deference provided to the decision-maker. That is, in Australia *Wednesbury* unreasonableness equates to the old 'patent unreasonableness' standard of review in Canada, while a correctness standard is applied to questions of law, for example. The judicial analysis is identical in each case, and the only difference is the *degree* of unreasonableness that must be demonstrated before the decision will be quashed. Australian courts simply provide a high degree of deference on findings of fact and matters of policy.

David Bennett QC, having defended the orthodox line early in his article, then makes a similar admission:[63]

> The main problem arising in the application of the ground of unreasonableness is the subjectivity involved in drawing the line at which the merits of a decision end and the legality of the decision begins. The courts have made it clear that the ground of unreasonableness is extremely confined and requires something overwhelming, so that it should only be in exceptional circumstances that a court should interfere with the exercise of discretion by the decision-maker.

Stating that administrative discretion should only be interfered with in 'exceptional circumstances' is the same thing as saying that a high degree of deference should be provided when reviewing the exercise of discretion. It is a review of the merits of the decision.

Merits review and 'review of the merits' distinguished

In my opinion, much of the difficulty in this area can be resolved by carefully distinguishing the terms 'merits review' and 'review of the merits'. David Bennett has defined the terms 'merits review' and 'judicial review' as follows:[64]

> A merits review body will 'stand in the shoes' of the primary decision-maker, and will make a fresh decision based upon all the evidence available to it. The object of merits review is to ensure that the 'correct or preferable'[65] decision is made on the material before the review body. The object of judicial review, on the other hand, is to ensure that the decision made by the primary decision-maker was properly made within the legal limits of the relevant power.

That is, it is the role of a primary decision-maker, or review tribunal, to make a new decision on the evidence before it. This is the same principle that the House of Lords enunciated in *Huang v Secretary of State for the Home Department,*[66] in which it found that in reviewing a primary decision the administrative adjudicator had not fulfilled his/her role and had focused on whether there was an error in the primary decision. It was the adjudicator's role to make a new decision on the basis of all the evidence before him/her, including evidence that may not have been available to the Home Department. It does not, however, follow that there is therefore no role in examining the merits of a case for a court. The court's role is one of judicial *review* – it is not the role of a court to simply reopen a case and make any order it sees fit. If the court refrains from substantive decision-making and limits itself to a review of the decision and, if the decision is to be set aside, remits it to the appropriate decision-maker for reconsideration, this is an exercise of judicial and not executive power, even if the 'substance' or the 'merits' of the decision are in question. It does not offend the *Boilermakers'* principle.

<u>*Sun v MIEA*</u>

A consideration of two Australian cases illustrates this point. In *Sun v Minister for Immigration and Ethnic Affairs*[67] the full court of the Federal Court, in my view, correctly exercised judicial power and not merits review. The applicant in *Sun* had been before the Refugee Review Tribunal (RRT) three times. The first decision, made by Member Fordham, accepted the truth of most of the applicant's claims, but found that he was not a refugee. As the Department prepared to remove Mr Sun from Australia, the Chinese consulate refused to issue him with a passport, claiming they could not identify him. Mr Sun took this as further evidence of persecution, and applied again for refugee status.[68] This second application was also refused by the Department, and then by a different member of the RRT, Ms Ransome. Ms Ransome's decision was ultimately set aside by consent, on the fairly technical basis that she had referred to an incorrect provision of the *Migration Act 1958* in her decision.

The matter then went back for a third time to the RRT, this time before Member Smidt. Ms Smidt, unlike Mr Fordham, found that Mr Sun had fabricated most of his claims and again refused his application for review. The Full Federal Court, however, set Ms Smidt's decision aside on procedural fairness grounds. The question that remained was what to do with Mr Sun. There was uncontradicted evidence before the court (and Ms Smidt) that Mr Sun was suffering from post-traumatic stress disorder,[69] and the court was clearly concerned about putting him through another RRT hearing. The leading judgment was given by Wilcox and Burchett JJ, but North J, who concurred in the result, added as follows on the disposal of the case in the final paragraph of the judgment:[70]

> Finally, I wish to refer to the observation by Wilcox J that the Minister should consider exercising his power under s 417[71] in favour of the appellant. As the comprehensive analysis made by Wilcox J in his judgment reveals, the Court has had the opportunity to examine the entire history of the appellant's involvement in the review system. The circumstances of this case are exceptional and call for a quick and humane conclusion in favour of the appellant ... A number of errors make it oppressive to require the appellant to have to face another hearing.

North J seemed sorely tempted to make some kind of declaration that Mr Sun was a refugee, but declined to do so. Making an order to this effect would go beyond judicial review of an administrative decision, and would be an exercise of executive power.

The *Guo* litigation

Sun should be compared to the *Guo* cases in the full Federal Court and then the High Court. In the Full Federal Court, Einfeld J, having first ruled that an asylum-seeker should be found to be a refugee unless the contrary could be proved beyond reasonable doubt,[72] then made orders to the effect that Mr Guo and his wife Ms Pan were refugees and 'entitled to the appropriate entry visas'.[73] Foster J agreed with the orders proposed by Einfeld J.[74]

In a rare 7-0 judgment, the High Court[75] overturned both the 'beyond reasonable doubt' approach to refugee decision-making proposed by Einfeld J, and the orders his Honour proposed. The majority judges (Brennan CJ and Dawson, Toohey, Gaudron, McHugh and Gummow JJ) found on the first point that '[i]ngenious as his Honour's approach may be, it is not supported by the terms of the Convention or the proper approach to administrative decision making in this context'.[76] On the power to make orders, the majority stated as follows:[77]

> The orders of the Full Court included a declaration 'that both appellants are refugees and are entitled to the appropriate entry visas'. A declaration in these terms lacked utility because it did not specify with reference to the legislation the 'appropriate entry visas' nor did it indicate any ready means of identification thereof. A declaration so loosely framed is objectionable in form.
>
> Moreover, a declaration, even if drawn in specific terms, should not have been made. The Tribunal was empowered by s 166BC(1) of the Act to exercise all the powers and discretions conferred upon the primary decision-maker. The Act provided (s 22AA) for determination by the Minister that a person was a refugee, but this power was exercisable upon the Minister being satisfied that a person had that status or character. The rights of the appellants to the issue of visas, which the Full Court purported to declare with present effect, would only arise upon satisfaction of statutory conditions including the determination by the Minister under s 22AA or by the Tribunal under s 166BC. In those circumstances, the appropriate course would have been for the Full Court to set aside the orders of Sackville J and to return the matter to the Tribunal for determination in accordance with law.

Kirby J concurred as follows:[78]

> [I]t is sufficient in my view to say that it was not appropriate for the Federal Court to adopt the course which the majority did. The proper course, legal error having been found, was to return the matter to the Tribunal. In that way, each of the relevant organs of government performs the functions proper to it. The Judicial Branch authoritatively clarifies and declares the law as it applies to the facts found. The Executive Branch, by power vested in it by the Legislature, performs its functions according to the law as so clarified and declared. Neither branch usurps or intrudes upon the functions proper to the other.

It is no part of the judicial function to make a decision of an administrative nature such as the grant of a visa. This is indeed a breach of the principle of separation of powers. This does not mean, however, that a court has no place in *reviewing* the merits of a decision, and leaving the substantive decision to the duly designated administrative decision-maker. This kind of reasoning complies with the admonition of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* that '[i]t is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator'[79] while still ensuring that the courts can truly *review* the merits of the decision.

Kirby J also noted in *Guo* as follows:[80]

> [C]are must be exercised in applying decisions about the available and appropriate remedy apt to an appeal when the process before the Court is that of judicial review. Whereas on appeal a court will often enjoy the power and responsibility of substituting its decision for that under appeal, judicial review is designed, fundamentally, to uphold the lawfulness, fairness and reasonableness (rationality)

> of the process under review. It is thus ordinarily an adjunct to, and not a substitution for, the decision of the relevant administrator.

The appeal to 'fairness' and 'rationality' in his Honour's judgment is a reference to 'review of the merits', as opposed to 'merits review'. The point that the court is an 'adjunct' to administrative decision-making is an important one – the court is not to simply substitute its view for that of the decision-maker, a sentiment similar to that expressed in the UK in *A v Secretary of State for the Home Department*[81] and in Canada in *CUPE*[82], amongst other cases. Stating that a court should not simply substitute its opinion for that of the decision-maker is simply another way of stating that deference should be afforded.

Deference and standards of review in Australia

Jurisdictional facts – definition

One particular kind of interpretation of law on which the High Court has firmly imposed a standard of correctness is the interpretation by an administrative body of 'jurisdictional facts'. The term 'jurisdictional fact' was defined in *Enfield* as a 'criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion'.[83] More recently, in *M70/2011 and M106/2011 v Minister for Immigration and Citizenship*, the High Court described the term as follows:[84]

> The term 'jurisdictional fact' applied to the exercise of a statutory power is often used to designate a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion. The criterion may be 'a complex of elements'.[85] When a criterion conditioning the exercise of statutory power involves assessment and value judgments on the part of the decision-maker, it is difficult to characterise the criterion as a jurisdictional fact, the existence or non-existence of which may be reviewed by a court.[86] The decision-maker's assessment or evaluation may be an element of the criterion or it may be the criterion itself. Where a power is expressly conditioned upon the formation of a state of mind by the decision-maker, be it an opinion, belief, state of satisfaction or suspicion, the existence of the state of mind itself will constitute a jurisdictional fact. If by necessary implication the power is conditioned upon the formation of an opinion or belief on the part of the decision-maker then the existence of that opinion or belief can also be viewed as a jurisdictional fact.

M70 was concerned with s 198A of the *Migration Act 1958*, and in particular with the government's so-called 'Malaysia solution', which involved processing of asylum-seekers who arrived illegally in Australia in Malaysia, in return for Australia accepting persons from Malaysia who had been determined by the United Nations High Commission for Refugees (UNHCR) as having refugee status. Subsection 198A(1) provided that 'an officer may take an offshore entry person[87] from Australia to a country in respect of which a declaration is in force under subsection (3)'. Subsection 198A(3) then provided as follows:

> The Minister may:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
> (iv) meets relevant human rights standards in providing that protection; and
>
> (b) in writing, revoke a declaration made under paragraph (a).

The Minister made a declaration on 25 July 2011 providing that Malaysia was a 'declared country'. The applicants sought a declaration that the declaration was invalid on the basis that ss 198A(3)(a)(i) – (iv) were each jurisdictional facts that did not exist, or alternatively that

the Minister had misconstrued the meaning of the provisions. The Minister argued that as long as he made a declaration in good faith, that was sufficient – in other words, ss 198A(3)(a)(i) – (iv) were simply relevant considerations for the Minister, not jurisdictional facts.

The majority, consisting of Gummow, Hayne, Crennan and Bell JJ, found that ss 198A(3)(a)(i) – (iv) were jurisdictional facts. At paragraph 109 their Honours noted as follows:

> It may readily be accepted that requirements to exercise the power in good faith and within the scope and for the purposes of the Act constrain the exercise of the Minister's power. But the submissions on behalf of the Minister and the Commonwealth that sub-pars (i) to (iv) of s 198A(3)(a) are not jurisdictional facts should not be accepted. To read s 198A(3)(a) in that way would read it as validly engaged whenever the Minister bona fide thought or believed that the relevant criteria were met. So to read the provision would pay insufficient regard to its text, context and evident purpose. Text, context and purpose point to the need to identify the relevant criteria with particularity.

At paragraph 118 their Honours stated that a country could only meet the requirements of s 198A(3) if that country was a signatory to the Convention Relating to the Status of Refugees, which Malaysia was (and is) not. Since the jurisdictional facts that allowed the Minister to make a declaration under s 198A(3) did not exist, the declaration could not be lawfully made and was invalid.

French CJ and Kiefel J gave separate concurring judgments. Kiefel J found that ss 198A(3)(a)(i) – (iv) were jurisdictional facts[88], but that even if they were not, the Minister had misconceived his power under s 198A(3) by relying on an undertaking by the Malaysian government to comply with certain human rights requirements, stating that 'the enquiry under s 198A(3)(a) is as to the state of the laws of the country proposed to be the subject of a declaration and it is to be undertaken at the date of such declaration'.[89]

French CJ found that ss 198A(3)(a)(i) – (iv) were not jurisdictional facts, but took a similar view to the alternative approach of Kiefel J, finding that 'the declaration must be a declaration about continuing circumstances in the specified country ... [i]t cannot therefore be a declaration based upon, and therefore a declaration of, a hope or belief or expectation that the specified country will meet the criteria at some time in the future even if that time be imminent'.[90] As Malaysia was not a signatory to the Convention, it could not meet the requirements of s 198A(3)(a) at the time the declaration was made.[91] Heydon J dissented.

This is a clear example of a correctness standard of review being applied to an executive decision. Whether or not the Minister's interpretation of s 198A was reasonable or not was not even discussed. In the view of five of the seven judges, the 'jurisdictional facts' simply did not exist and that was the end of the matter. No deference was given. The obvious result is that Australian courts, despite stressing the difference between judicial and merits review, have now adopted a quite intrusive standard of judicial review. Michael Tolley explains the situation as follows:[92]

> In Australia, the High Court explicitly rejected the *Chevron* doctrine and has adopted an approach that favours wider judicial control of administrative action. The approach, based on the doctrine of 'jurisdictional fact,' allows courts to review administrative action authorised by statute. Parliament can, and often does, stipulate that any action that it authorizes depends on the existence of various preconditions. Where the power depends on the existence of objective facts, the court on review is given the final say as to whether the required facts exist. This doctrine of jurisdictional fact has been used (manipulated some critics would say) by courts to justify a wide range of review of administrative interpretation of statutes.

While Tolley's article was published well before the decision in *M70*, I think that the current Australian government would certainly count as one of his 'critics' after this judgment.

Jurisdictional facts – 'The Minister is satisfied that ...'

Another possibility is that legislation will provide that a decision-maker may not undertake a certain action unless he or she is 'satisfied' that certain circumstances exist. In that case, the 'satisfaction' can be construed as a jurisdictional fact. The obvious question that follows is whether that 'satisfaction' has to be reasonable in some sense.

The most recent pronouncement on this subject came in *Minister for Immigration and Citizenship v SZMDS.*[93] The case involved a Pakistani applicant for a Protection Visa,[94] who claimed a well-founded fear of persecution on the basis of his membership of a particular social group, namely homosexuals. The RRT rejected his claim, refusing to accept that he was even homosexual. Section 65 of the *Migration Act 1958* provided (and still provides) that if the Minister is 'satisfied' that the applicant meets all criteria for the grant of a visa then he or she must grant it, and if not, the application must be refused.

The RRT decision was set aside by the Federal Court, which found that the 'Tribunal's conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning'.[95] On appeal to the High Court, the Minister argued that the RRT's findings were not illogical, and that even if they were, this did not amount to a 'jurisdictional error'.

The leading judgment was given by Crennan and Bell JJ, with whom Heydon J agreed. Gummow ACJ and Kiefel J gave separate reasons, concurring on this point. Crennan and Bell JJ started by referring to *Minister for Immigration and Multicultural Affairs v SGLB,*[96] which had found that the Minister's satisfaction, referred to in s 65, was a jurisdictional fact. The key passage in the judgment relating to jurisdictional facts is as follows:

> 119. Whilst the first respondent accepted that not every instance of illogicality or irrationality in reasoning could give rise to jurisdictional error, it was contended that if illogicality or irrationality occurs at the point of satisfaction (for the purposes of s 65 of the Act) then this is a jurisdictional fact and a jurisdictional error is established. This submission should be accepted ...
>
> 120. An erroneously determined jurisdictional fact may give rise to jurisdictional error. The decision maker might, for example, have asked the wrong question or may have mistaken or exceeded the statutory specification or prescription in relation to the relevant jurisdictional fact. Equally, entertaining a matter in the absence of a jurisdictional fact will constitute jurisdictional error.

While Australian courts will generally give deference to findings of fact by administrative decision-makers, this is not the case with findings of *jurisdictional* facts. Therefore, illogicality or irrationality in finding of jurisdictional facts is a jurisdictional error and will result in the decision under review being set aside. However, Crennan and Bell JJ found that the RRT's findings were open to it on the evidence before it, and that 'a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker'.[97] The Federal Court decision was therefore set aside and the RRT decision restored.

Expertise

Despite the considerations mentioned above, there is a judicial trend in Australia to defer, at least on matters of fact and discretion, to expert decision-makers. This reasoning seems to have been clearly expressed for the first time in *Collector of Customs v Agfa-Gevaert Ltd,*[98] in which the High Court was concerned with the assessment by the Collector that certain goods imported by Agfa were subject to duty. The case turned on the interpretation of a Commercial Tariff Concession Order (CTCO), which was an instrument made under s 269C of the *Custom Tariff Act 1987* (Cth). The effect of a CTCO was that goods that would otherwise be subject to import duty were exempted.

Agfa sought exemption from duty of products it called 'types 8 and 9 photographic paper'. A CTCO exempted such products if they used a 'silver dye bleach reversal process' and operated by 'having the image dyes incorporated in the emulsion layers'. The High Court, in a unanimous judgment, found that the individual words in these terms should be defined in terms of their 'trade meaning', and stated as follows:[99]

> [C]ontrary to Agfa's submission, using the trade meaning of individual words in a composite phrase having no special meaning as a whole does not involve a failure to construe the phrase 'as a whole'. It simply does not follow, as a matter of logic or common-sense, that the division of a composite expression into parts which are interpreted by reference to their trade meaning, ordinary meaning or a combination thereof necessarily means that a court or tribunal has failed to construe an expression by reference to its meaning as a whole … It remains to determine whether the finding of the Tribunal was permissible as a matter of law. We think that it was.

Even though the words 'deference' and 'expertise' do not appear in the judgment, this decision reads very much as if the High Court reasoned that it should accept the interpretation given to the CTCO by the Controller of Customs, as that officer had expertise in the interpretation of technical terms such as 'silver dye bleach reversal process' that the court did not.

Australian courts tend to refer to the 'weight' to be given to certain findings of an administrative decision-maker, rather than 'deference to expertise'. However, the two formulations lead to much the same result. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*, Kirby J, who wrote a separate judgment from the majority but concurred in the result, commented as follows:[100]

> [T]here are additional reasons for restraint and resistance to any temptation to turn a case of judicial review into, effectively, a reconsideration of the merits. Often, the decision-maker will have more experience in the consistent application of applicable administrative rules to achieve fairness to a wider range of people than typically come before the courts … In reviewing reasons and decisions of the delegates of the Minister, such as are in contest in this appeal, it is appropriate to take into account the fact that they were not untrained laymen. They had obvious expertise for the performance of their functions. By the evidence, they also had legal advice available to them.

Kirby J links the requirement not to engage in 'merits review' with respect for the expertise of decision-makers. Similarly, Gummow J stated as follows in *Minister for Immigration and Ethnic Affairs v Eshetu:*[101]

> [W]hilst it is for this Court to determine independently for itself whether in a particular case a specialist tribunal has or lacks jurisdiction, weight is to be given, on questions of fact and usage, to the tribunal's decision, the weight to vary with the circumstances. The circumstances will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions and the extent to which its decisions are supported by disclosed processes of reasoning.

It is interesting that Gummow J would not automatically *assume* an administrative decision-maker or tribunal to be expert in its field, and would instead look for 'corroborative' evidence. The focus on the means by which a tribunal's members are appointed is particularly interesting, and may go some way towards addressing David Mullan's concern about 'political hacks' being appointed to tribunals.[102] In *Enfield* itself, the majority stated as follows:[103]

> Questions may arise, within the jurisdiction of an administrative tribunal and upon a settled construction of the applicable legislation, as to the side of the line on which a case falls. The question may be one to be decided on the particular primary facts which are largely undisputed and where little can be gained from a detailed examination of previous decisions. In such instances, this Court has said that, in a proceeding in the original jurisdiction of a court on 'appeal' from that tribunal, the 'court should attach great weight to the opinion of the [tribunal]'.[104]

At paragraph 47 the majority made comments very similar[105] to those of Gummow J in *Eshetu*:

> The weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning. A similar view appears to be taken by the Supreme Court of Canada.

Gaudron J noted that 'there may be situations where the evidence before the court is the same or substantially the same as that before the primary decision-maker and minds might reasonably differ as to the finding properly to be made on that evidence'.[106] Her Honour added that '[i]n that situation a court may, but need not, decline to make a different finding from that made by the primary decision-maker, particularly if the latter possesses expertise in the area concerned'.[107]

Finally, *Osland v Secretary to the Department of Justice*[108] involved an application under the *Freedom of Information Act 1982* (Vic) for access to documents relating to a decision to refuse the applicant's request for an executive pardon. Heather Osland had been convicted of the murder of her violent and abusive husband, in a case that resulted in an (unsuccessful) appeal to the High Court.[109] The Victorian Department of Justice had refused her FOI application on the basis that the documents she sought were protected by Legal Professional Privilege and this decision was upheld by the Victorian Civil and Administrative Tribunal (VCAT). At paragraph 12 of the judgment, the majority (Gleeson CJ and Gummow, Heydon and Kiefel JJ) noted that the response to Mrs Osland's petition was informed by its legal professionals, 'their legal expertise being relevant to the weight to be attached to their opinions'. However, in this case the High Court found that the Victorian Court of Appeal should have examined the relevant documents itself to determine if privilege applied, and remitted the matter to the court for reconsideration.[110]

In summary, *Enfield* saw the majority of the High Court adopt a form of deference to expertise, at least in relation to findings of fact and exercise of discretion. The High Court has specifically referred to (pre-*Dunsmuir*) Canadian jurisprudence to support this line of reasoning, and the refusal to formally move to a Canadian approach of substantive review in *SZMDS*[111] does not appear to have altered this reasoning.

Discretion and fact-finding generally

On the other hand, lower courts have been regularly warned by the High Court to defer to the written reasons of administrative decision-makers, on matters of fact and discretion, as far as possible. The best-known instance of the High Court making such a pronouncement was in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang,*[112] a case involving a failed asylum-seeker. The Full Federal Court[113] had found, despite the fact that the decision-maker had clearly stated that he found that the applicants did not have a 'well-founded fear of persecution', that the decision-maker had in fact decided the matter on a balance of probabilities standard, and not on the 'real chance' test propounded by *Chan v Minister for Immigration and Ethnic Affairs*.[114]

On appeal, the majority of the High Court (Brennan CJ and Toohey, McHugh and Gummow JJ) stated that 'the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed',[115] and found that the Full Federal Court had erred in reading the reasons of the decision-maker in the way it had. Kirby J concurred, noting that '[i]t is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law',[116] and

that '[t]his admonition has particular application to the review of decisions which, by law, are committed to lay decision-makers, ie tribunals, administrators and others'.[117] This form of reasoning is quite apparent in the Supreme Court of Canada decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, where Abella J, writing for the court, emphasised that the purpose of reasons is to enable a court to follow the reasoning of the decision-maker, and to determine whether the decision reached falls within the *Dunsmuir* 'possible, acceptable outcomes'.[118] Reasons are not required to be perfect.[119]

Wu is the best example of a long line of judicial reasoning on this point. For example, in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* the Full Federal Court stated that '[t]he Court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts ... [t]he reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error'.[120] Finally, in a passage that appears frequently in Department of Immigration and Citizenship training materials, the Federal Court stated in *Obejas v Minister for Immigration and Ethnic Affairs* that '[t]he reasons of the Tribunal are not a Statute ... [t]hey are not to be parsed and analysed as if they were'.[121]

Kirby J has also noted that there is a distinct similarity between the North American approach to deference and the *Wu Shan Liang* principle. In *Minister for Immigration and Multicultural Affairs v Singh*[122] the Minister had argued that a reviewing court should show deference to the expertise of the Administrative Appeals Tribunal (AAT) in making a finding that an applicant for a Protection Visa was excluded from refugee status under Article 1F(b) of the Convention. Kirby J observed as follows:[123]

> Where a repository of statutory power has been designated by the Parliament as the decision-maker, required to determine whether critical facts do or do not exist, courts, without clear authority to go further, should restrict their intervention to cases that fall within the categories that have been identified as evidencing legal error. In the United States, such restraint upon appellate intervention is often described in terms of the 'deference' owed by courts of law to administrators entrusted with primary decision-making in that country. This principle is especially applicable in the context of immigration decisions. In this Court there are suggestions of a similar approach in the repeated expressions of caution against over-zealous scrutiny of administrative reasons, nominally for error of law, that finds such error in infelicitously expressed or otherwise imperfect reasons.[124]

Kirby J, however, found that the AAT member had misconstrued the meaning of Article 1F(b) and had therefore made an error of law. His Honour noted that 'where the decision-maker has given reasons that indicate that the finding was arrived at by a misunderstanding of the applicable legal test, or where the finding resulted from a failure to apply correctly the language of that phrase to the facts as found, a court reviewing for error of law is entitled to intervene'.[125] The Minister's appeal was therefore dismissed.

Endnotes

1 (2000) 199 CLR 135.
2 See in particular Justice Kenneth Hayne, 'Deference: an Australian Perspective', [2011] *Public Law* 75.
3 [2010] HCA 16.
4 [1979] 2 SCR 227.
5 David Mullan, 'Supreme Court of Canada and Tribunals – Deference to the Administrative Process: a Recent Phenomenon or a Return to Basics?', (2001) 80 *Canadian Bar Review* 399.
6 [2008] 1 SCR 190 at paragraph 47.
7 Referring to *Canada (Attorney General) v Mossop* [1993] 1 SCR 554 at 596.
8 *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
9 Michael Taggart, 'Australian Exceptionalism in Judicial Review', (2008) 36 *Federal Law Review* 1 at 13.
10 (1803) 5 US (1 Cranch) 137.
11 (1984) 467 US 837.

12 Pub. L 95-95, 91 Stat 685.
13 Supra n11 at 844.
14 It is also notable that later US cases have even used the phrase '*Chevron* deference' – *US v Mead Corporation* (2001) 533 US 218 at 226.
15 Supra n11 at 862.
16 Ibid at 842-3.
17 Ibid at 844.
18 Ibid at 866.
19 Much of this section is paraphrased from Margaret Allars, '*Chevron* in Australia: A Duplicitous Rejection?', (2002) 54 *Administrative Law Review* 569 at 581-2.
20 *Enfield City v Development Assessment Commission* (1996) 91 LGERA 277.
21 *Enfield City Corporation v Development Assessment Commission* (1997) 69 SASR 99.
22 Ibid at 119.
23 Ibid at 115.
24 Ibid at 121.
25 Ibid.
26 Supra n1 at paragraph 40.
27 Ibid at paragraph 41.
28 Justice Stephen Breyer, 'Judicial Review of Questions of Law and Policy', (1986) 38 *Administrative Law Review* 363 at 381.
29 Keith Werhan, 'Delegalizing Administrative Law', (1996) *University of Illinois Law Review* 423 at 457.
30 *Chevron*, supra n11 at 844-5.
31 (1996) 135 ALR 421 at paragraph 20 of the judgment of Foster J.
32 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.
33 These figures are taken from the RRT decisions database at http://www.austlii.edu.au/au/cases/cth/RRTA/.
34 *Enfield*, supra n1 at paragraph 43.
35 The majority cites in support of this proposition *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 and *Attorney-General (New South Wales) v Quin* (1990) 170 CLR 1.
36 *Enfield*, supra n1 at paragraph 45, citing *Registrar of Trade Marks v Muller* (1980) 144 CLR 37 at 41.
37 Ibid at paragraph 47.
38 Citing Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 655.
39 (1957) 99 CLR 300 at 321-322.
40 Allars, supra n19 at 585-7.
41 Supra n1 at paragraph 59.
42 This approach closely resembles the Canadian pre-*CUPE* 'preliminary question' doctrine.
43 Supra n1 at paragraph 60.
44 Allars, supra n19 at 584.
45 Ibid.
46 Supra n10.
47 Allars, supra n19 at 585.
48 Stephen Gageler SC, 'Beyond the Text: A Vision for the Structure and Function of the *Constitution*', (2009) 32 *Australian Bar Review* 138 at 141.
49 Tony Blackshield and George Williams QC, *Australian Constitutional Law and Theory: Cases and Materials*, Federation Press, 2006 at 662.
50 (1909) 8 CLR 330 at 357.
51 *Re Judiciary Act 1903-1920 and In re Navigation Act 1912-1920* (1921) 29 CLR 257 (the Advisory Opinions Case').
52 *Thomas v Mowbray* [2007] HCA 33.
53 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575.
54 (1956) 94 CLR 254.
55 Ibid at 270, cited with approval by *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at paragraph 21.
56 Supra n55.
57 Supra n35 at 36.
58 Allars, supra n19 at 583-4.
59 Supra n35 at 42.
60 [2002] 1 SCR 3. Note the apparent reconsideration of this position, at least in relation to Charter rights, in *Doré v Barreau du Québec* [2012] SCC 12.
61 This is a commonly-used term in UK decisions, especially prior to the passage of the *Human Rights Act 1998*, and originated in *Budgaycay v Secretary of State for the Home Department* [1987] AC 514.
62 This is the term used in relation to consideration of s 1 of the Charter of Rights and Freedoms in Canada (*R v Oakes* [1986] 1 SCR 103), and in relation to decisions under the UK *Human Rights Act 1998* (*R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532).
63 David Bennett QC, 'Balancing Judicial Review and Merits Review', (2000) 53 *Administrative Review* 3 at 11.
64 Ibid at 7.
65 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68.
66 [2007] 2 AC 167.

67 (1997) 81 FCR 71.
68 This course of action would now be prohibited by s 48A of the *Migration Act 1958*, which, broadly speaking, prohibits repeat claims for refugee status onshore. Section 48A did not exist at the time of Mr Sun's second application.
69 Supra n67 at 81-3.
70 Ibid at 137.
71 Section 417 of the *Migration Act 1958* gives the Minister a non-compellable power to grant a visa to a person who is refused refugee status by the RRT, on humanitarian grounds.
72 *Guo* (Full Federal Court), supra n31, paragraph 25 of the judgment of Einfeld J.
73 Ibid at paragraphs 63 and 68. Incidentally, there is not and never has been such a thing as an 'entry visa' – Einfeld J apparently conflated the terms 'visa' and 'entry permit'. The latter kind of document was abolished with the passage of the *Migration Reform Act 1992*, which came into effect on 1 September 1994, and the visa has been the sole authority for entry to Australia by a non-citizen since that date.
74 Ibid at paragraph 54 of the judgment of Foster J.
75 *Guo* (High Court), supra n32.
76 Ibid at 574.
77 Ibid at 579.
78 Ibid at 600.
79 Supra n35 at 42.
80 Supra n32 at 600.
81 *A v Secretary of State for the Home Department* [2004] UKHL 56.
82 Supra n4.
83 Supra n1 at paragraph 28.
84 [2011] HCA 32 at paragraph 57.
85 *Enfield*, supra n1 at paragraph 28.
86 *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303-304.
87 An 'offshore entry person' is a non-citizen who arrived without a visa at an 'excised offshore place' – these terms are defined in s 5 of the *Migration Act 1958*. Both plaintiffs had arrived without a visa at Christmas Island, which is an excised offshore place under paragraph (a) of the definition of 'excised offshore place' in s 5(1).
88 Supra n84 at paragraph 155.
89 Ibid at paragraph 156.
90 Ibid at paragraph 62.
91 Ibid at paragraphs 66-7.
92 Michael Tolley, 'Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective', (2003) 31 *Policy Studies Journal* 421 at 427.
93 Supra n3.
94 Under s 36 of the *Migration Act 1958*, the key criterion for the grant of a Protection Visa is that the applicant has been found to be a refugee as defined by the *Convention Relating to the Status of Refugees*.
95 *SZMDS v Minister for Immigration and Citizenship* [2009] FCA 210 at paragraph 29.
96 (2004) 207 ALR 12.
97 Supra n3 at paragraph 135.
98 (1996) 186 CLR 389.
99 Ibid at 409-10.
100 (1996) 185 CLR 259 at paragraph 25 of the judgment of Kirby J.
101 Supra n38 at 655.
102 David Mullan, 'Deference: is it Useful Outside Canada?', (2006) *Acta Juridica* 42 at 52.
103 *Enfield*, supra n1 at paragraph 45.
104 Referring to *Muller*, supra n37 at 41.
105 Margaret Allars views the two tests as identical – see Allars, supra n19 at 587.
106 *Enfield*, supra n1 at paragraph 60.
107 Ibid.
108 [2008] HCA 37.
109 *Osland v The Queen* (1998) 197 CLR 316.
110 Supra n108 at paragraph 58.
111 Supra n3 at paragraph 28.
112 Supra n100.
113 *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 367.
114 (1989) 169 CLR 379.
115 Supra n100 at paragraph 31 of the majority judgment.
116 Ibid at paragraph 24 of the judgment of Kirby J.
117 Ibid.
118 [2011] SCC 62 at paragraph 16.
119 Ibid at paragraph 18.
120 (1993) 43 FCR 280 at 287.
121 [1995] FCA 1458 at paragraph 21.
122 (2002) 209 CLR 533.

123 Ibid at paragraphs 131 and 132.
124 Referring to *Wu Shan Liang*, supra n100 at 271-272, 291.
125 Supra n122 at paragraph 134.

LIMITING THE SCOPE FOR EXECUTIVE DISCRETION: RELEVANT CONSIDERATIONS IN EXERCISING THE DISCRETION TO NOT COLLECT TAX

Rodney Fisher*

Under Australian income tax law, the Federal Commissioner of Taxation is charged with responsibility for assessing the tax liability of a taxpayer, and collection and recovery of the tax due and owing. However, there are also statutory provisions which authorise the Commissioner and the responsible Minister, or their delegates, to not collect tax in certain circumstances, in particular where the collection of the tax due and owing would cause serious financial hardship to the taxpayer. In these circumstances there is a discretion to waive rather than collect the tax debt.

Sources of power

The Australian Commissioner of Taxation has legislative responsibility for the general administration of the taxation system,[1] encompassing the responsibility for assessment of tax due and owing, and the collection of tax which has been validly assessed. Further, as Chief Executive of a Commonwealth agency, the Commissioner must manage the affairs of the Australian Taxation Office (ATO) in a way which promotes proper use of Commonwealth resources,[2] and pursue recovery of debts for which the Commissioner is responsible,[3] which would include taxation debts.

However, there are a number of legislative provisions which also provide a statutory imprimatur for the Commissioner or relevant Minister to not collect tax which has been validly assessed and which is due and owing.

Arguably the most significant of these statutory exceptions to the requirement to collect tax is provided in the *Tax Administration Act 1953* (Cth) (*TAA*) s 340-5(3) Sch 1, which provides the Commissioner of Taxation with the power to release an individual taxpayer, or a trustee of a deceased estate, from the liability to meet a taxation debt if meeting the tax liability would cause hardship. Taxpayers must make application for release from a tax liability,[4] with the release provisions applying to tax liabilities arising from income tax, fringe benefits tax (FBT), Medicare levy, pay as you go (PAYG) instalments, and additional taxes, penalties and interest charges associated with these taxes.[5]

The threshold test to attract the operative provision is establishing that serious hardship would result from the payment of a tax liability, and while this is a necessary condition to attract relief from the tax burden, alone it is not a sufficient condition, with the Commissioner then having to determine whether the hardship circumstances were such as to warrant the release of the taxpayer from the obligation to pay. If the Commissioner fails to provide relief from the taxation liability, taxpayers are able to object against that decision under the objection procedures in Part IVC of the *TAA*.[6]

Another statutory exception to collection vests the Finance Minister with a discretionary power to waive an amount owing to the Commonwealth,[7] and as assessed tax is an amount due and owing to the Commonwealth, the Minister has power to waive the tax owing. Again, the onus is on the taxpayer to make application for waiver, and to establish why a waiver

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would be appropriate in the circumstances, with waiver being an appropriate remedy if seeking recovery of the debt would be seen as inequitable or would cause ongoing financial hardship.[8] Again, financial hardship may be seen as a necessary but not sufficient condition for waiver, as the Minister must then exercise a discretion as to whether to waive the debt.

A further provision allowing non-collection of a tax debt vests in the Commissioner as Chief Executive for the purposes of the *Financial Management and Accountability Act 1997* (Cth) (*FMAA*), and imposes a responsibility to pursue recovery of debts for which the Commissioner is responsible,[9] including taxation debts. However, the legislation also allows for circumstances when recovery of a debt need not be pursued, these circumstances include when the Chief Executive considers that it is not economic to pursue recovery of the debt.[10]

The Commissioner can determine that it would be uneconomical to pursue recovery of a tax debt where the taxpayer has no assets or funds, and little chance of improved financial circumstances.[11] While couched in different terms, this consideration is analogous to a claim of financial hardship, and in such circumstances the Commissioner is vested with further discretion to not pursue a taxation debt.

Establishing the serious hardship threshold

In each circumstance involving a power to not collect tax, the threshold condition is that collection of tax due would cause serious financial hardship. There is no legislative guidance as to establishing what constitutes serious financial hardship, and Hill J, in the case of *Powell v Evreniades,*[12] suggested that it would be inappropriate to attempt an abstract test:

> It is inappropriate to endeavour in the abstract to state tests of what will and what will not constitute serious hardship ... Clearly there would be severe financial hardship if the dependants of a deceased person were left destitute without any means of support. That is not to say that in any particular case something less than that will not constitute serious hardship.[13]

FCT v A Taxpayer[14] was a test case in which Stone J of the Federal Court considered the meaning that should attach to 'serious hardship.' Like the findings of Hill J, her Honour did not exclude the possibility that something less than destitution would constitute serious financial hardship.[15]

In judging financial hardship, the benchmark developed by courts and tribunals has been comparison with 'normal community standards', rather than the standard of living to which the taxpayer may have been accustomed. The AAT in *Re Ferguson and Ferguson v Commissioner of Taxation* looked to whether there was established '...hardship of a significant kind in terms of normal community standards.'[16] In a similar finding, Stone J, in *FCT v A Taxpayer,* noted that '(i)mplicitly, the Tribunal was assessing the respondent's individual circumstances by reference to normal community standards.'[17]

The ATO has provided further guidance on the determination of serious hardship in the *Law Administration Practice Statements*, with PS LA 2011/17 indicating that the concept of serious hardship suggests unduly burdensome consequences following payment of a tax debt, such that the person would be deprived of necessities according to normal community standards. This would be evidenced by the taxpayer being left without means to achieve reasonable acquisition of food, clothing, medical supplies, accommodation, education and other basic requirements,[18] rather than merely suffering a limitation of social activities or entertainment, or loss of access to goods and services of a more luxurious nature or standard.

In a similar vein, *Finance Circular 2009/09* suggests that financial hardship would be established when there are strong reasons for the view that a person's financial

circumstances would not improve to the point where the debt could be paid '… without suffering a reduction in living standards that is unacceptable by community standards.'[19] It is suggested, further defining financial hardship, that financial hardship exists if payment of the debt would result in '… the applicant being left without the means to achieve reasonable acquisition of food, clothing, medical supplies, accommodation, education and other basic needs.'[20]

In addition the determination of serious hardship, as judged against normal community standards, should be an objective determination which does not involve the exercise of a discretion by the decision maker. While there may be a range of factors to consider in determining whether severe hardship has been established, the broad test that has emerged is whether payment of the liability would reduce the taxpayer to a standard below normal community expectations, where necessities of life would not be able to be met. It is suggested that, while there may be some variability in this test, in the sense that the test may not be susceptible to reduction to a dollar value, it is sufficiently certain to allow the decision as to whether hardship exists to be made on the basis of a quantifiable objective evaluation.

The evidence from the cases suggests that the courts view the determination of serious hardship as an objective determination. In the decision in *COT v Milne*,[21] Conti J referred to the then current ATO Tax Ruling IT2440[22] dealing with relief for serious hardship, noting that the ruling referred to the notion of '… without serious detriment to living standards' which notion his Honour found to be '… objective in nature.'[23]

However, while it is suggested that determination of financial hardship should be an objective determination, where a degree of discretion lies with the decision-maker is in the decision whether to provide relief to the affected taxpayer, when hardship has been established.

The discretion to not collect tax

The issue of establishing serious hardship is a threshold condition to the exercise of an executive decision as to whether to waive or not collect a tax debt.

The first question is whether the provisions granting the power to not collect tax do, in fact, grant a discretion. This issue of construction was addressed by Hill J in *Powell*, in particular whether the word 'may' in the statute should be seen as providing a discretion, or whether, once severe hardship had been established, the statutory meaning should be 'shall', thus requiring remission of the tax debt in whole or in part. From a review of the authorities, his Honour formed the view that 'may' provided a choice at the discretion of the decision maker. His Honour noted, in particular, the finding of Dixon J in *R v Trebilco: Ex parte Falkiner & Sons*,[24] that:

> … if a taxpayer does satisfy one of the conditions precedent so laid down, he does not obtain a right to relief … he obtains only a title to the consideration by the board of the general circumstances of his case and to a determination whether it is just and proper that he should receive … relief … The degree of relief is left to the board in express terms. A power given by the word 'may' in such a provision must … be understood as discretionary.[25]

On this basis, Hill J was prepared to conclude that, in these circumstances, '… the word "may" encompasses the discretion of the commissioner.'[25]

Having established the power as discretionary, Hill J found that the correct interpretation of the forerunner provision to *TAA* s 340-5 Sch 1 was that the power involved two steps, first to identify whether payment of the tax liability would cause severe hardship and, if so, to then determine whether or not to grant full or partial release from the taxation debt.[26] Significantly,

Hill J noted that '… the factors that may be relevant to the second of these steps could be a great deal wider than the factors which are relevant to the first of the steps.'[27]

That such an approach is still applicable under the terms of *TAA* s 340-5 Sch 1 was made clear by Stone J in *FCT v A Taxpayer*:

> The Tribunal's conclusion as to serious hardship does not conclude the matter. The decision to release the respondent from his tax obligations is clearly discretionary. … The Tribunal was aware that it had discretion to grant or withhold relief even if it was satisfied on the serious hardship point. If a taxpayer has been able to establish that payment of the tax liability would create a circumstance of serious hardship, the second step identified is for the Commissioner to exercise the legislative discretion in determining whether or not to release the taxpayer from the tax liability.[28]

Scope of executive discretion

In relation to the wording of the hardship provision in the *TAA*, the statute provides that the 'Commissioner may release' the tax liability.[29] The *Financial Management and Accountability Act 1997* (Cth) provides that the Finance Minister 'may waive' the right to payment,[30]or that a Chief Executive Officer need not pursue a debt if it is 'considered' to be non-economical.[31]

The wording used in these provisions initially appears to provide the executive with a wide and unfettered power, without legislative limitation on the exercise of that power. There is no guidance in the statutes as to the exercise of the discretion, other than the general overriding rule that the power must be exercised for the purposes of the Act, and no guidance, by way of prescription or preclusion, as to the range of matters which may be considered by the decision maker in the exercise of the discretion.

However, while the discretions may initially appear to be large, the courts have shown a willingness to impose some broadly stated limits on what may otherwise appear an unfettered power, suggesting that discretions cannot be exercised for purposes for which they were not conferred, examples being for private purposes or gain, or irrationally. The approach followed in Australia has its roots in the words of Lord Halsbury LC, who said a discretionary power meant:

> [T]hat something is to be done according to the rules of reason and justice, not according to private opinion … according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office, ought to confine himself.[32]

In the Australian context, Windeyer J in *Giris Pty Ltd v FCT*[33] had spoken of the need, when exercising a discretion, ' … to be guided and controlled by the policy and purpose of the enactment, so far as that is manifest in it [and to] exclude from … consideration any matter which it would be unlawful … to take as a criterion.'[34] In *Kruger v Commonwealth*,[35] Brennan CJ suggested that when '… a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.'[36]

The legislative grant of an executive discretion may imply limitations on the factors to be considered. Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[37] found the discretion in that case to be '… similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard.'[38] Further, and more recently, in *Hot Holdings v Creasy*,[39] Brennan CJ, Gaudron and Gummow JJ explained that 'The courts do not readily classify as absolute or unfettered a statutory discretion the exercise of which will affect the rights of the citizen …'.[40]

Even in situations where the discretionary power is based on the 'opinion' of the decision maker, or the decision maker 'considers' a state of affairs is satisfied, there is an implication that the decision maker should act rationally and fairly, and not for personal or other

improper motives. French J (as he then was) has clarified use of the term 'absolute discretion' in legislation as follows: 'There is, of course, no such thing as an absolute discretion in the literal sense.'[41] In a similar vein, Kirby J in *Gerlach v Clifton Bricks Pty Ltd*[42] had opined that:

> All repositories of public power in Australia, certainly those exercising such power under laws made by an Australian legislature, are confined in the performance of their functions to achieving the objects for which they have been afforded such power.[43]

Further, it has been suggested, on the basis of the reasoning in *Plaintiff S157/2002 v Commonwealth*,[44] that the High Court may view extremely broad executive powers as unlawful, on the basis that the grant of power was too broad.[45]

Given that courts will now not accept that a statutory discretion that does not carry statutory limitation is an absolute unfettered discretion, the issue remains as to the nature of matters which may be considered in exercising the discretion to waive or not to collect a tax debt.

Considerations in the tax dispensing discretion

In examining which matters may be considered in relation to the operation of discretionary taxation dispensing powers, courts and tribunals traditionally have adopted a broad approach.

At issue in *Giris v FCT* was the power of the Commissioner to not apply a penalty rate of tax if the Commissioner considered it unreasonable to do so. Menzies J suggested a wide scope for the discretion, as the legislature had left '… as a problem for the Commissioner to decide, retrospectively and in the light of what has happened, whether the particular provision should not apply to a particular trust estate in respect of a year that has passed.'[46] Forming an opinion 'in the light of what has happened,' provides a wide scope for matters that may be considered.

The scope of factors that are relevant to the discretion to not collect tax was addressed by Hill J in *Powell*, where his Honour took the view that the factors considered in exercising the discretion to release the debt would be at large, and '… could be a great deal wider than the factors which are relevant in determining the first of the steps [serious hardship].'[47] His Honour explained that:

> … in the course of consideration of the release of tax the Board may consider not only such matters as go to the issue of serious hardship but also other matters which in the discretion of the Board may be relevant, those other matters being merely proscribed by the general principle that the discretion must be exercised bona fide and for the purposes for which it was conferred …[48]

In addition to requiring that the discretion be exercised bona fide and for the purposes of the Act, Hill J noted a requirement for fairness, since 'Even where the discretion conferred upon the decision maker is a very wide one the requirements of fair play are not necessarily ousted.'[49] Similarly, in *Milne* Conti J acknowledged that the factor of fairness to other taxpayers was relevant to the Tribunal's approach to decision making.[50]

In a different taxation context,[51] French J had suggested in *FCT v Swift*[52] that the exercise of a discretionary power to dispense with tax collection would involve consideration of the widest range of factors:

> Instead of endeavouring to spell out the circumstances in which burdens imposed by the legislation might be lifted, the Parliament has provided for a dispensation that is capable of exercise by reference to the widest range of factors. In this context, the scope and purpose of the Act can be seen as the collection of company tax subject to a dispensing power. The dispensing power is incidental and ancillary to the primary object of the legislation.[53]

In *A Taxpayer*, the AAT had made comments in relation to public interest considerations, and while Stone J agreed that public interest was an irrelevant consideration in determining serious hardship, there was no suggestion that public interest would not be a relevant matter in the exercise of the discretion by the decision maker.[54]

Limiting the dispensing discretion

However, as with the trend noted earlier for courts to find that a wide discretionary power is not at large, there has been evidence in more recent tax dispensing cases of courts and tribunals seeking to limit the scope of the discretion, by delineating those matters which may be considered. In *Re Wilson v Minister for Territories*,[55] Deputy President Hall noted that relevant considerations will vary between cases, but suggested that:

> ... relevant considerations are likely to include the circumstances out of which the hardship arose; whether those circumstances were within the capacity of the applicant to have foreseen and controlled; whether the applicant has over-committed himself financially; whether the applicant or any of his dependants has suffered serious illness or accident involving irrevocable financial loss to the applicant; whether the applicant has been in regular employment; whether the circumstances of the hardship are likely to be of a temporary or recurring nature; and whether a decision to remit the rates would, as a matter of administrative justice and fairness be appropriate ...[56]

A matter raised in this passage and in a number of other decisions is the significance to be attached to the degree of culpability which attaches to the taxpayer in contributing to the 'severe hardship' in which they find themselves, and which prevents them from meeting their tax liability. Wilcox J, in *Corlette v Mackenzie & Ors*,[57] had noted that 'It would be extremely odd if a taxpayer who was the author of his or her misfortunes, through imprudent or extravagant expenditure, was entitled, as a matter of right, to a release of unpaid income tax.'[58]

In *Milne*, Conti J noted that the Tribunal found that the taxpayer's business catastrophes, fraud by a former partner and ill health all provided evidence of eventualities which the taxpayer had been unable to control, with Conti J seeing these as material issues as they established the lack of moral wrongdoing by the taxpayer in relation to his financial misfortune.[59] Conti J was persuaded that these factors, along with the fact that the taxpayer had taken steps to reduce his expenditure, were relevant considerations which the Tribunal could consider in providing relief from the tax debt.[60]

The significance of taxpayer culpability was again highlighted by Deputy President Block in *Rollason v FCT*[61] when noting that in *A Taxpayer* and *Milne*, in both of which relief had been granted, the taxpayers were able to establish both serious hardship, and the fact that the hardship had arisen from misfortune for which they were not responsible.[62] By contrast, in denying relief in *Rollason* the AAT found that while there was hardship, '... it is equally clear that (the taxpayer) is responsible for the fact that he finds himself in this position.'[63] Matters considered by the AAT included that the taxpayer had disposed of income without making provision for tax liabilities, that while there had been payment to an unidentified creditor, there had been no payment to the Commissioner, and that the taxpayer had what was described as an appalling compliance history.

In granting relief in the decision in *Swift*, French J had noted that factors should not be dealt with piecemeal, but must be taken together, as '... reference to personal factors cannot be disentangled from the consideration of their objectives in entering the transaction that they did, and the nature of their participation in it.'[64] His Honour found it appropriate to take into account the fact that the applicants were not privy to any fraud, and had done nothing to bring about the situation whereby the tax liability could not be met.[65]

Taxpayer behaviour which may contribute to the hardship condition is one matter listed in PS LA 2011/17 as a factor to consider in the exercise of the discretion. The ruling recognises

that, in exercising the discretion, the decision-maker '... is obliged to act reasonably and responsibly, and should not act arbitrarily or capriciously.'[66] Examples of factors which may result in the exercise of the discretion to grant relief against a taxpayer suffering hardship are:

- whether the taxpayer had disposed of funds without making provision for tax liabilities;
- whether granting relief would not reduce hardship, such as where there was a prospect of bankruptcy, and relief would only serve to advantage other creditors;
- whether the taxpayer had failed to pursue debts; and
- whether the hardship was associated with a single event or short term outcome.

It is argued here that, in exercising the dispensing discretion, relevant considerations should impliedly be limited to those elements surrounding the circumstances under which the serious hardship has arisen, in accord with the scope and purpose of the relevant legislation. Matters of particular relevance are the degree of taxpayer culpability in generating the circumstances, or taxpayer attempts to ameliorate the circumstances whereby the hardship has arisen, and the extent to which those circumstances were under the control of the taxpayer suffering the hardship.

This view broadly corresponds with the findings in *Re Wilson* noted earlier. It is suggested that, in the normal course of events, factors outside the circumstances surrounding the creation of the hardship, and the degree of control by, and culpability of, the taxpayer in relation to those circumstances, should not generally be relevant to the decision as to whether to provide relief.

It is suggested that this view is in accord with the statutory purpose and scope of the statutory scheme, as shown in the interpretation of dispensing provisions by French J in *Swift*. The legislative scheme in the *TAA* and *FMAA* legislation can be seen as providing a dispensation power, which is incidental and ancillary to the major purpose of tax collection, in those circumstances where a threshold requirement of severe financial hardship has been established.

Having established severe hardship, the purpose of the legislation is that a dispensing power be available, although not mandatory. There may be an undermining of this legislative intent to provide dispensation in hardship cases if the decision-maker has a broad and unfettered discretion as to whether to grant the relief envisaged by the legislation, and the grant of relief was denied in circumstances where there was compelling evidence that the taxpayer had not contributed to the hardship circumstances, and contributing factors were outside the taxpayer's control. As an example, if hardship was established but relief denied on the basis of a perceived community demand for a 'tough stance' by the ATO, this may be seen as contrary to the legislative intent of providing a dispensation in such circumstances.

Limiting relevant considerations in the exercise of the discretion to the factors enunciated would not compromise the requirement for fairness and public interest raised by the courts, as outlined earlier.

If the notion of faimess applies in terms of procedural fairness, this should be afforded to taxpayers in exercising the discretion. However, if fairness is used in relation to the outcome of the decision, rather than the process of decision making, the notion provides little assistance unless seen in the context of the surrounding circumstances, as there can be no objective standard. An outcome of relief being granted from the tax debt may be seen as 'fair' by the taxpayer receiving the relief, but may not be seen as 'fair' by other taxpayers who have difficulty meeting tax obligations but have not been granted relief. The concept of fairness, therefore, cannot be seen as an independent relevant consideration in exercising

the discretion, but should be seen in the context of the surrounding circumstances; it is too amorphous a concept to be considered at large and without context.

It is argued that the context within which fairness may be judged is best provided by those circumstances under which the hardship arose, and the culpability and control of the taxpayer in generating or ameliorating those circumstances. If, the relevant considerations are limited to these circumstances, 'fairness' of the outcome, in a broad sense, would be seen to be best achieved, as the fairness is based on objective matters rather than a nebulous concept.

A similar argument may be made in relation to the public interest criterion. On a wide interpretation, public interest considerations in exercising the discretion could be seen to include such matters as enhancement of the reputation of the ATO, or community goodwill and improved compliance if relief was granted. However, it is suggested that this would only operate in the most general sense and that the public interest needs to be judged on the basis of the context of the hardship circumstances.

Again, it is argued that this context is provided by the circumstances that led to hardship, and the taxpayer's role in those circumstances. As an example, it may be argued that providing relief to a taxpayer may be seen as creating an environment which would encourage future compliance by that taxpayer, and thus be in the public interest. However, if relief was provided to a taxpayer who was seen as undeserving, with the taxpayer being the architect of their own downfall and the resultant hardship, this may compromise future compliance by other taxpayers, and could hardly be seen as being in the greater public interest.

Public interest cannot be a stand-alone consideration in exercising the discretion, which suggests that the relevant considerations in exercising the discretion should be limited to the circumstances surrounding the creation of the taxpayer's hardship, and the taxpayer's role in those circumstances.

Conclusion

While the discretionary power appears to be at large, in exercising the power to grant discretionary relief the relevant factors should not be at large or unfettered but should be limited in all but exceptional cases to the circumstances whereby the hardship arose and the extent to which those circumstances were under the control of the taxpayer suffering the hardship. The limitation of relevant considerations is in accord with the statutory intent that relief be granted in appropriate cases; this test best serves to identify appropriate cases.

By limiting the relevant considerations to the circumstances surrounding the hardship, including the taxpayer's role in generating or ameliorating the hardship, and whether circumstances were outside the control of the taxpayer, the broad factors of fairness and public interest can also be satisfied, as these matters should be seen in the context of the circumstances of a particular case.

Endnotes

1 See, eg, *Income Tax Assessment Act 1936* (Cth) (*ITAA 1936*) s 8; *Income Tax Assessment Act 1997* (Cth) (*ITAA 1997*) s 1-7; *Tax Administration Act 1953* (Cth) (*TAA*) s 3A.
2 *Financial Management and Accountability Act 1997* (Cth) (*FMAA*) s 44.
3 *FMAA* s 47; note that there are specific exceptions.
4 *TAA* s 340-5(1) Sch 1.
5 *TAA* s 340-10(1)&(2) Sch 1.
6 *TAA* s 340-5(7) Sch 1.
7 *FMAA* s 34.
8 *Finance Circular 2009/09*, Attachment C [19].
9 *FMAA* s 47.
10 *FMAA* s47(1).

11 PS LA 2011/17 [69-70].
12 [1989] FCA 114.
13 Ibid [20–21].
14 [2006] FCA 888.
15 Ibid [17].
16 [2004] AATA 779, 35.
17 *A Taxpayer* [55].
18 PS LA 2011/17 [37–38].
19 *Finance Circular 2009/09*, Attachment C [19].
20 Ibid [25].
21 [2006] FCA 1005.
22 Since withdrawn and incorporated in PS LA 2011/17.
23 *Milne* [15].
24 (1936) 56 CLR 20.
25 Ibid 31-2.
25 *Powell* [32].
26 Ibid [40].
27 Ibid.
28 *A Taxpayer* [58-9].
29 *TAA* s 340-5(3). The Commissioner may release you, in whole or in part, from the liability …
30 *FMAA* s34. Finance Minister may waive debts etc.
(1) The Finance Minister may, on behalf of the Commonwealth:
(a) waive the Commonwealth's right to payment of an amount owing to the Commonwealth …
31 *FMAA* s 47. Recovery of debts
(1) A Chief Executive must pursue recovery of each debt for which the Chief Executive is responsible unless:
…
(c) the Chief Executive considers that it is not economical to pursue recovery of the debt.
32 [1891] AC 173 at 179, quoted in M Aronson, B Dyer & M Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) [3.35].
33 (1969) 119 CLR 365.
34 Ibid 384 quoted in *Powell* [36].
35 (1997) 190 CLR 1.
36 Ibid [36].
37 (1986) 162 CLR 24.
38 Ibid [40].
39 (1996) 185 CLR 149.
40 Ibid 171.
41 *Goldie v Commonwealth* [2002] FCA 261 [45].
42 (2002) 209 CLR 478.
43 Ibid 503-4.
44 (2003) 211 CLR 476.
45 See, eg M Aronson, B Dyer & M Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) [17.65].
46 *Giris* 381.
47 *Powell* [48-9].
48 Ibid [36].
49 Ibid [54].
50 *Milne* [22].
51 Concerning the discretionary powers in the *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth).
52 (1989) 89 ATC 5101.
53 Ibid 5116.
54 *A Taxpayer* [50].
55 (1985) 7 ALD 225.
56 Ibid [24].
57 (1996) 62 FCR 597.
58 Ibid 598.
59 *Milne* [19].
60 Ibid [57].
61 [2006] AATA 962.
62 Ibid [44].
63 Ibid [50].
64 *Swift* 5117.
65 Ibid.
66 PS LA 2011/17 [51].