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Editor: Elizabeth Drynan

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Katherine Cook*

New Australian law reform inquiry to focus on freedoms

The Attorney-General, Senator the Hon George Brandis QC, has asked the Australian Law Reform Commission (ALRC) to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges.

Senator Brandis said that the review will be one of the most comprehensive and important ever undertaken by the ALRC.

'This is a major instalment towards the commitment I made to restore the balance around the issue of human rights in Australia,' said Senator Brandis.

'I have asked the Commission to identify where traditional rights, freedoms and privileges are unnecessarily compromised within the legal structure of the Commonwealth. Where encroachments exist, the Commission will determine whether they are justified.

'For too long we have seen freedoms of the individual diminish and become devalued. The Coalition Government will strive to protect and restore them.'

'Freedoms are some of the most fundamental of all human rights. They underpin the principles of democracy and we cannot take them for granted.

'The Commission will focus in particular upon commercial and corporate regulation; environmental regulation; and workplace relations.'

The Attorney-General has asked the Commission to provide its report by 1 December 2014.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx

Super Tribunal to start on 1 January 2014

Acting NSW Minister for Justice Michael Gallacher announced that the NSW Civil and Administrative Tribunal (NCAT) will start on 1 January 2014.

'The NCAT is a one-stop shop for almost all state tribunals making it easier for people in NSW to access the services they need,' Mr Gallacher said.

'NCAT enables these services to exist as a network, rather than in isolation, which will improve their quality, consistency and transparency. People will also have access to an internal appeals panel, which will provide quick and accessible reviews of most tribunal decisions.'

The government has integrated 22 of the State's tribunals and bodies into a new overarching tribunal that will provide a simple, quick and effective process for resolving disputes, supervising occupations and reviewing executive action.

Harnessing the expertise of the State's existing tribunals, NCAT operates four specialist divisions:

Consumer and Commercial
Guardianship
Administrative and Equal Opportunity and
Occupational

Across all types of matters, NCAT is committed to: timely, fair, high-quality decision-making; maintaining current levels of service including retaining specialist expertise and services; and continuous improvement in service delivery.

In October last year the government announced the appointment of the Hon Justice Robertson Wright as a Supreme Court judge and as the inaugural President of NCAT. Justice Wright was sworn in as a Supreme Court judge on 25 October 2013. On the same date, he began a five-year term as NCAT President.

'If you have lodged an application with an existing tribunal before 1 January 2014 and it has not yet been heard, the application does not have to be re-lodged at NCAT,' Mr Gallacher said.

'If you are making an application after 1 January 2014 you will be making an application to NCAT.

'Tribunal services will continue to be delivered in multiple locations with registries located across metropolitan and regional NSW,' Mr Gallacher said.

Further information can be found at: http://www.ncat.nsw.gov.au.

http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_news2013#ncat

New Information Commissioner for NSW

NSW Attorney-General Greg Smith SC today announced the appointment of Elizabeth Tydd as the NSW Information Commissioner.

'Ms Tydd will be an independent advocate for transparency and accountability within the state's government agencies, universities and local councils,' Mr Smith said.

'She is well qualified for the role, having worked at a senior executive level in government agencies and independent authorities and been involved in developing transparent policies, resolving disputes and making decisions that upheld the rights of the community.'

The Information Commissioner champions the community's right to information under the *Government Information (Public Access) Act 2009* (NSW). This includes advising agencies about the proactive release of government information, monitoring their compliance and investigating complaints.

'Community members whose applications for information are refused by government agencies, councils or universities can contact the Information Commissioner and seek a review of the decision,' Mr Smith said.

Prior to her appointment as Information Commissioner, Ms Tydd was Executive Director of the NSW Office of Liquor, Gaming and Racing.

In a career spanning more than two decades, Ms Tydd has served as Assistant Commissioner (Compliance and Legal Group), Office of Fair Trading and as Deputy Chairperson of the Consumer Trader & Tenancy Tribunal - the largest tribunal in NSW.

She has also performed the role of Deputy President and Arbitrator at the Workers Compensation Commission.

Ms Tydd is an accredited mediator; she holds a Bachelor of Laws and a Master of Laws from the University of Technology, Sydney and is currently undertaking a Certificate in Governance at the Governance Institute of Australia.

Ms Tydd will begin her five-year appointment as Information Commissioner on 23 December 2013.

For more information about the role of the Information Commissioner and the Office of the Information and Privacy Commission, visit www.ipc.nsw.gov.au.

http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_news2013#new_ic

Inquiry into Children in Immigration Detention announced

The President of the Australian Human Rights Commission, Professor Gillian Triggs, has announced that she will lead an inquiry into the mandatory and closed immigration detention of children seeking asylum in Australia.

'This inquiry will investigate the impact of immigration detention on the health, well-being and development of these children,' said Professor Triggs. 'These are children that, among other things, have been denied freedom of movement, many of whom are spending important developmental years of their lives living behind wire in highly stressful environments.'

In 2004, the Commission's landmark report, 'A Last Resort? National Inquiry into Children in Immigration Detention', found that the mandatory immigration detention of children was fundamentally inconsistent with Australia's international human rights obligations and that detention for long periods created a high risk of serious mental harm.

'It has been ten years since the 'A Last Resort?' report and, when that inquiry was announced, there were over 700 children in immigration detention,' said Professor Triggs. 'Today the numbers are far higher than at any time during the first national inquiry, with over 1000 children currently in immigration detention facilities in Australia and over 100 children detained in the regional processing centre of Nauru.'

Professor Triggs said the new inquiry will also measure progress in the ten years since the last investigation, and find out whether Australia is meeting its obligations as a party to the United Nations Convention on the Rights of the Child 1989.

'It will be vital that we receive submissions from as many people as possible who currently have or previously have had contact with children who are or were asylum seekers and their families, including detainees themselves,' Professor Triggs said. 'The benefit of a national inquiry is that, through public hearings and submissions, it gives a voice to children and families who are directly affected by detention – as well as to people who have had direct experience with them in any number of community capacities, including professionals, experts, friends and others.'

Professor Triggs said she expected that the Commission will complete the inquiry before the end of the year.

For more information about the inquiry, as well as submission forms, go to www.humanrights.gov.au/national-inquiry-children-immigration-detention-2014

https://www.humanrights.gov.au/news/media-releases/inquiry-children-immigration-detention-announced

Immigration detainees with adverse security assessments v Commonwealth of Australia (Department of Immigration & Citizenship)

Eight adults with adverse security assessments from ASIO were arbitrarily detained in closed immigration detention facilities, the President of the Australian Human Rights Commission, Professor Gillian Triggs, has found in a report tabled in Parliament.

The conduct also affected a young boy who was granted a protection visa and was residing in immigration detention with his mother who had an adverse security assessment.

After the former Minister for Immigration and Citizenship provided his response to this report on 26 April 2013, ASIO issued a fresh, non-prejudicial security assessment in relation to the boy's mother. This superseded her previous adverse security assessment and she was released from immigration detention with her son.

Seven of the adult complainants in this report had been found to be refugees. The other adult was assessed as engaging Australia's complementary protection obligations, meaning that he risked significant harm if he was returned to his country of origin. All of the adult complainants had received an adverse security assessment from ASIO recommending that a protection visa not be granted. ASIO was not asked for advice about whether the complainants could be placed in a less restrictive form of detention.

'I recommend that a comprehensive and individualised assessment be undertaken for each complainant to assess whether they pose a risk to the Australian community and whether any such risk could be addressed (for example by imposing conditions) without their being required to remain in an immigration detention facility' Professor Triggs said.

The kinds of conditions that could be imposed include a requirement to live at a specified place, curfews, travel restrictions, regular reporting and possibly even electronic monitoring.

Professor Triggs did not express any view as to what the outcome of an assessment in each particular case would be.

Professor Triggs found that the Department of Immigration and Citizenship failed to ask ASIO to assess whether six of the complainants were suitable for community based detention while they were waiting for their security clearance. Information provided by ASIO suggested that community detention assessments could be conducted within 24 hours. Instead, these six people were held in closed detention for between 15 and 19 months while a security assessment in relation to the grant of a visa was carried out.

Professor Triggs also found that, as a result of Government policy, people who were refused a visa on advice from ASIO were automatically not considered for community detention. However, this was a policy decision and not because of advice from ASIO that community detention was not appropriate.

The detention of the complainants in these circumstances was arbitrary and in breach of article 9(1) of the International Covenant on Civil and Political Rights.

In the case of Ms EG and her son Master EH, Professor Triggs found that the failure to consider fully alternatives to closed detention amounted to a breach of articles 3 and 37(b) of the Convention on the Rights of the Child.

Professor Triggs recommended that the Minister tell his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the department has received advice from ASIO that the person not be granted a visa on security grounds.

Professor Triggs also made a series of recommendations to the department. First, that the department refer each of the complainants to ASIO for advice about whether less restrictive detention could be imposed, if necessary subject to special conditions to ameliorate any identified risk to security.

Secondly, that similar advice be sought in relation to other people in immigration detention with adverse security assessments.

Thirdly, that the department refer cases back to the Minister for consideration of alternatives such as community detention, with details of how any potential risk identified by ASIO could be mitigated.

Fourthly, that Australia continue actively to pursue alternatives to detention, as well as the prospect of third country resettlement, for all people in immigration detention who are facing the prospect of indefinite detention.

The last recommendation was noted by the department. The other recommendations were not accepted by the Minister or the department.

The Commission made similar recommendations in a report tabled in Parliament on 26 November 2012 in relation to 10 adult Sri Lankan refugees with adverse security assessments from ASIO and three children (report [2012] AusHRC 56).

Although the department has not accepted the Commission's recommendations for referral of any of these cases to ASIO, fresh security assessments have been conducted by ASIO in a number of cases, either of its own motion or following a recommendation from the Hon Margaret Stone. This has resulted in non-prejudicial assessments being made for a family of two parents and three children and another single man (all part of the Commission's report tabled last November) and also in relation to Ms EG and her son Master EH (part of the current report).

As this decision can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), this is the only statement the Commission will be making on this matter.

A copy of this report: Immigration detainees with adverse security assessments v Commonwealth of Australia (Department of Immigration & Citizenship) is online at www.humanrights.gov.au/publications/immigration-detainees-adverse-securi...

The previous report: Sri Lankan refugees v Commonwealth of Australia (Department of Immigration & Citizenship) is online at www.humanrights.gov.au/legal/humanrightsreports/AusHRC56.html.

https://www.humanrights.gov.au/news/media-releases/immigration-detainees-adverse-security-assessments-v-commonwealth-australia

South Australian Law Society welcomes privacy paper

The Law Society of South Australia has welcomed the South Australian Law Reform Institute's (SALRI) invasion of privacy paper.

'It's the right time for an examination of privacy laws in SA,' Law Society President Morry Bailes said.

'SA is one of only two states in Australia to not have express legislative right to privacy.'

'With technology advancing at a rapid rate and surveillance techniques getting ever more sophisticated, we need a conversation about whether we have a legitimate right to privacy.'

'How important is the right to privacy? If we have nothing to hide, do we need to be concerned about privacy protection? It depends on how you feel about an individual or Group covertly monitoring your personal activities or collecting personal information about you.' The SALRI paper asks whether the law sufficiently protects personal privacy, and how we may be able to reconcile the right to privacy with the right to free expression.
SALRI is inviting submissions on the paper.

'The Law Society will certainly make a submission on this paper, and I encourage other community members who are interested in the protection of privacy to do so as well,' Mr Bailes said.

The Law Society commends SALRI for its insightful paper and the Attorney-General for re-establishing the law reform institute.

The SALRI was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide.

http://www.lawsocietysa.asn.au/pdf/media_centre_releases/131219_Law_Society_welcomes_privacy_paper.pdf

Recent Decisions

The Official Secretary to the Governor-General and the FOI Act

Kline v Official Secretary to the Governor-General [2013] HCA 52 (6 December 2013)

On 26 January 2011, Ms Kline (the appellant) applied under the *Freedom of Information Act 1982* (Cth) (*FOI Act*) for access to a number of documents held by the Official Secretary to the Governor-General (the Official Secretary). The documents related to the Australian system of honours, the Order of Australia, which is managed by the Official Secretary. The appellant had nominated a person for appointment to the Order of Australia in 2007 and

2009. On both occasions the nominations were unsuccessful and her nominees were not appointed to the Order.

The Official Secretary decided, and the Information Commissioner on review agreed, that the *FOI Act* does not apply to the requested documents by reason of s 6A(1) of the *FOI Act*. Section 6A(1) provides that the *FOI Act* does not operate with respect to documents held by the Official Secretary unless they 'relate to matters of an administrative nature'. The appellant then sought review by the Administrative Appeals Tribunal, which affirmed the Official Secretary's decision. The Full Federal Court upheld the Tribunal's decision.

By special leave, the appellant appealed to the High Court. The appellant contended, among other things, that the exemption in s 6A(1) should be construed widely, such that the only documents of the Official Secretary excluded from the operation of the *FOI Act* are documents which disclose any aspect of the decision-making process in respect of a particular nomination for the Order.

The Official Secretary contended that exception in s 6A(1) should be construed narrowly and operates to oblige it to only give access to documents under the *FOI Act* which involve the management or administration of the office.

The High Court held that the task of construing s 6A(1) of the *FOI Act* is governed by what the Court has recently said about the importance of the text of a statute, the meaning and effect of which are not to be displaced by statements in secondary material (*Saeed v Minister for Immigration and Citizenship* [2010] HCA 23).

The High Court found that the exception of a class of documents which related to 'matters of an administrative nature' referred to documents concerning the office 'apparatus' which supported the exercise of the Governor-General's substantive powers and functions. Accordingly only documents, which relate to the management and administration of the Official Secretary, such as the office's resources, could be sought under FOI.

As the appellant's FOI request related to the substantive powers or functions of the Official Secretary's office, they did not fall within the exception in s 6(1A) of the *FOI Act.*

Is the failure to follow a process an error of law?

Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship [2013] HCA 53 (12 December 2013)

The plaintiff, a Sri Lankan national of Tamil ethnic origin and former member of the Liberation Tigers of Tamil Eelam, arrived at Christmas Island by boat in 2010. Because she had arrived at Christmas Island without a visa, she was an 'offshore entry person' and the *Migration Act 1958* (Cth) prevented her from making a visa application unless the Minister exercised his power under s 46A of the Act to allow her to do so.

In order to consider whether to exercise that power, the Minister created the Refugee Status Assessment process (RSA). Under this process the Department of Immigration and Citizenship (the Department) assessed whether the plaintiff was a person in respect of whom Australia owed protection obligations under the Refugees Convention. Under the RSA if a person was found to be a person to whom Australia owed protection obligations, that person was referred to the Minister for consideration under s 46A (*Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41). The plaintiff was assessed to be such a person.

However, the plaintiff was also the subject of an adverse security assessment by the Australian Security Intelligence Organisation. The Department, acting on ministerial guidelines, took that adverse security assessment to mean that the plaintiff could not satisfy a criterion for the grant of a visa (public interest criterion (PIC) 4002), and therefore it did not refer the plaintiff's case to the Minister for his consideration. Subsequently, in *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46, the High Court held that PIC 4002 was invalid.

In the original jurisdiction of the High Court, the plaintiff argued that the Department's failure to refer her case to the Minister was an error of law because the Minister had not followed the RSA process. The plaintiff sought habeas corpus and declaratory relief, claiming on both statutory and constitutional grounds that her detention was unauthorised. She also asked High Court to re-open and overrule its decision in *Al-Kateb v Godwin* [2004] HCA 37 (*Al-Kateb*).

The High Court unanimously held that the exercise of the Minister's power was affected by an error of law. The High Court found that despite the broad provisions of s 46A, which required the Minister to make a determination to allow an offshore entry person to apply for a visa if the Minister thinks it is in the public interest, the Minister had committed himself to the RSA process. Given PIC 4002 was invalid; an adverse security assessment was no longer a barrier to satisfying the criterion for a grant of a protection visa, and therefore following the RSA process, the plaintiff's case should have been referred to the Minister. As such, the Minister's failure to follow the RSA process constituted an error of law.

The Court held that, because the Minister, as a result of the error of law, had yet to complete his consideration of whether to permit the plaintiff to make a valid application for a visa, the plaintiff's continued detention, being for the purpose of allowing that consideration to be completed according to law, is authorised by the Act.

The Court declined to reopen its decision in *Al-Kateb.*

Can the offer of a further opportunity to be heard remedy a breach of procedural fairness?

X v University of Western Sydney [2014] NSWSC 82 (17 February 2014)

The plaintiff was a first year medical student at the University of Western Sydney (the defendant). On 29 August 2013, he was suspended after a female student (the complainant) complained about his conduct following a social event as a residential college and a 'Facebook' exchange the next day. The plaintiff subsequently challenged his suspension in the NSW Supreme Court and, on 11 September 2013, Beech-Jones J held that the University failed to afford procedural fairness to the plaintiff before he was suspended, and made a declaration that the suspension decision was not validly made and had no effect.

On 1 October 2013, the delegate (Dr Rowland) determined the plaintiff should again be suspended. On 30 September 2013, before making this decision, Dr Rowland interviewed the complainant for the first time. At that interview the complainant spoke of, among other things, her anxiety about running into the plaintiff at University and how this was affecting her study. Dr Rowland did not inform the plaintiff or his lawyers that he had decided to meet with the complainant before making his decision. Nor did he provide any information to the plaintiff on the health and safety matters that complaint had raised, or provide him with an opportunity to respond.

On 18 October 2013, in response to a letter from the plaintiff's lawyers asserting that he had been denied procedural fairness, Dr Rowland provided the plaintiff with his notes from the meeting with the complainant and notified the plaintiff that he was prepared to give him the opportunity to make further written submissions. No further submissions were provided.

On 4 November 2013, the plaintiff challenged the validity of Dr Rowland's decision in the NSW Supreme Court. The plaintiff contended, among other things, he had not been afforded procedural fairness because Dr Rowland had failed to disclose to him matters conveyed by the complainant at the interview on 30 September 2013.

The defendant contended that the plaintiff was afforded numerous and comprehensive opportunities to be heard before Dr Rowland made his decision on 1 October 2013 (including at meetings on 13 September and 19 September 2013 with the plaintiff and his lawyers); and that the issues critical to the suspension decision were apparent to the plaintiff.

The defendant alternatively submitted that even if the plaintiff was entitled, as a matter of procedural fairness, to be notified of what was said to Dr Rowland by the complainant, or of his proposed reasoning, it did not follow that the failure to do so before the making of the decision vitiated it. The defendant contended that any denial of procedural fairness had been remedied by the provision of those reasons and all relevant records to the plaintiff (including Dr Rowland's notes from his meeting with the complainant), and Dr Rowland's continued preparedness to revisit his decision if further material was presented (*Aye v Minister for Immigration and Citizenship* [2010] FCAFC 69).

The Court held that it was clear from Dr Rowland's 'Reasons for Decision' that the complainant's information (which may have been adverse to the plaintiff) was central to his decision to suspend the plaintiff. The matters conveyed by the complainant were relevant and significant to the suspension decision under the University's Misconduct policy, which required a decision-maker to consider the interests of both parties. As such the plaintiff was denied procedural fairness before he was suspended.

The Court also did not consider that the decision in *Aye* was applicable to decisions made under the University's Misconduct Policy. The Court held that no principle was cited to support the proposition that an affected person who has been denied procedural fairness is required to engage in a further inquiry by the same decision-maker.

Delegations and authorisations and rental rebate fraud

New South Wales Land and Housing Corporation v Navazi [2013] NSWCA 431(12 December 2013)

For some years Mr Ali Navazi (the respondent) was a tenant of the Land and Housing Corporation (the Corporation) and in receipt of a rental rebate. In March 2010, following a tip off, and subsequent investigations, an officer in the Department of Housing, determined that the respondent's rental rebate should be cancelled, retrospectively from June 2003. The respondent challenged the validity of that decision in the Common Law Division of the NSW Supreme Court.

The primary judge (Rothman J) held that the decision should be quashed, primarily on the ground that the Corporation had no power to cancel the rental rebate without conducting an investigation under s 58 of the *Housing Act 2001* (NSW) (the Act) for the purpose of determining the weekly income of the respondent; a task which he held had not been undertaken: *Navazi v New South Wales Land & Housing Corporation* [2013] NSWSC 138. The primary judge referred to, but did not need to decide, two questions relating to

delegation. Mr Navazi had submitted that there was no valid delegation of authority upon the officers of the Corporation, including Ms Morgan who purported to undertake the s 58 investigation, or upon Ms Roil who purported to cancel Mr Navazi's rental rebate pursuant to s 57(1). Mr Navazi also submitted that the *Carltona* principle, which recognises that Government officials or bodies can have agents within their agencies who are authorised to perform certain tasks without formal delegation, did not operate.

The Corporation appealed that decision. By notice of contention Mr Navazi sought to uphold the primary judge's decision on the two questions relating to delegation.

The NSW Court of Appeal disagreed with primary judge's decision to invalidate the decision to cancel Mr Navazi's rental subsidy. The Court then considered the two delegation questions.

The Court found that s 6 and 15 of the Act maintain the distinction between delegation and agency. Section 6(3) of the Act expressly invokes agency:

> Any act, matter or thing done in the name of, or on behalf of, the Corporation by the Director-General, or with the authority of the Director-General, is taken to have been done by the Corporation.

In contrast, s 15 confers a power of delegation upon the Corporation and Director-General.

The Court held that the presence of those separate provisions within the Act confirms that there can be no implication in the legislative regime from the existence of a power to delegate that the *Carltona* principle has been displaced. A power to delegate does not necessarily exclude the existence of an implied power to act through the agency of others: *Re Patterson; Ex parte Taylor* [2001] HCA 51, although it is a factor which makes the operation of the *Carltona* principle less likely: *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 352. However in this case s 6(3) of the Act removes the need to consider whether agency has been impliedly displaced.

The Court found that in April 2008, the Director-General approved the appointment of Ms Morgan to a temporary position as 'Project Director' to get 'the new fraud policies and procedures implemented'. As such, there can be no doubt that Ms Morgan's investigation pursuant to s 58 was expressly authorised by the Director-General.

The Court further opined that even in the absence of this authorisation, given the nature and scale of the issue (in March 2007 over 150 active tenant fraud investigations were underway), a court would readily find, aided if necessary by the presumption of regularity, that Ms Morgan was authorised to undertake investigations. Accordingly, Ms Morgan's investigation and report about Mr Navazi answers the description of something done on behalf of the Corporation with the authority of the Director-General.

With regard to Ms Roil's decision, the Court held that taking Mr Navazi's argument at its highest; the absence of an express delegation says nothing as to whether Ms Roil was acting on behalf of the Corporation with the authority of the Director-General, which is sufficient to engage s 6(3). There is no sound reason to find that the Act required all cancellation decisions, of which there would most likely be many, involving a backdating for a period in excess of six months to be undertaken by the Director-General.

DATA CUSTODIANS AND DECISION-MAKING: A RIGHT OF ACCESS TO GOVERNMENT-HELD DATABASES FOR RESEARCH?

Carolyn Adams & Judith Allen*

Every day the wealth of data collected and held by governments grows. It is collected in the course of routine management of service delivery such as the delivery of health care. It is collected through particular programs aimed at gathering data to inform us about our nation and its people, for example the NAPLAN data.[1] It includes personal information and often sensitive information about individuals. Data custodians in government have the responsibility to manage government-held data in the public interest and to protect the privacy and confidentiality of that information.

The primary purposes of this extensive data collection by government include planning and delivery of services, managing funding programs, monitoring program outcomes, and monitoring disease or education outcomes. The potential beneficial use of the data, however, extends well beyond the original purpose of the collection of the data and beyond the remit of the entities that hold it. Data held by government departments is a rich source of information that can be used by researchers and analysts outside government for the public good.

One of these uses is in public health research. Researchers in universities and other institutions seek access to data held by government to conduct research examining the aetiology of disease, physical and social determinants of health, the effectiveness of treatment and the efficiency of health care delivery.

The focus of the current legal regime governing these data bases is on preventing abuse of government powers and protecting individual privacy and confidentiality by limiting access to and use of the data. While the privacy legislation in Australia expressly allows access to personal information for research, the common law and the legislation empowering governments to collect data together with the complexity of the regulatory regime inhibits access for researchers. There is a danger of neglecting the important goal of ensuring the potential public benefit is fully realized. A balance must be drawn between these goals.

There have been significant advances in the technical and structural ability to protect the privacy and confidentiality of the people concerned. This paper contends that, in light of these developments, the balance drawn by the regulatory regime should be readjusted and suggests that a right of access to government-held data for research should be recognised.

What is public health research?

Public health research investigates the factors that influence the health of people, including the physical and social risk factors affecting health, the distribution and progression of disease and the effectiveness of treatment and other interventions. The outcomes of public

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health research inform developments in treatment and prevention programs, the planning and funding of health care and the evaluation of health policy. One of the key methodologies of epidemiological research of this kind is the analysis of longitudinal information from large groups or whole populations. Government-held data is especially valuable because it is collected over long periods and is comprehensive and accurate. It is generally collected under statutory mandate and in circumstances such as the provision of health care services where it is in the interest of the person to provide accurate information.

Public health research provides evidence that gives a sound base for public health policies and interventions. A study by Kelman et al[2] used linked data from international passenger arrivals in Western Australia and hospital admissions data to investigate the relationship between long haul air travel and deep vein thrombosis. The study found that deep vein thrombosis is four times more likely to develop within two weeks of long air trips and that the annual risk increased by 12% in those taking one long haul trip a year. This evidence has supported the very effective public health campaign to reduce air travellers' risks of deep vein thrombosis.

Epidemiological research provides evidence that guides clinical decision making. A recently published study by Mathews et al[3], of the risk of cancer in children following computer tomography (CT) scans used Medicare records and national cancer records to investigate the link between exposure to low dose ionising irradiation and cancers. The study found that CT scans done in childhood and adolescence are followed by an increase in cancer incidence. Clinicians will have to carefully weigh the diagnostic benefits of CT scans against this potential risk.

Public health research can reveal unintended outcomes from changes in government policies and funding models. In 1997 the Australian government introduced tax incentives to encourage the uptake of private health insurance. Following these reforms the percentage of the population with private health insurance increased from 30% to approximately 45%. Einarsdóttir et al[4] used routinely collected birth and hospital admission data to investigate the impact on the rates of obstetric intervention and found that the increase in private health cover led to an increase in caesarean deliveries, especially those without labour, and an increase in the rate of infants staying longer in hospital.

The translation of research outcomes into public health programs can prevent disease and disability and the economic value of those programs can be quantified. An early data linkage study by researchers at the Telethon Institute of Child Health Research demonstrating the link between folate intake for pregnant women and the prevention of neural tube defects[5] led to the introduction of a public health campaign in Western Australian to publicise the benefits of folate supplements. The economic benefits of this program have been calculated over the period 1995-2003, and it is estimated that the WA Government has saved $125.5 million in that time, including reductions in medical and educational costs and quality-adjusted life years gained.[6]

What government information is relevant to public health research?

Public health addresses the health status of groups or whole populations but the raw material of public health research is the personal health history of individuals. Governments routinely collect information about people during the course of their lives. Information is collected on discharge from hospital, diagnosis of cancer or infectious diseases, payment of Medicare benefits, prescription of medication, births and deaths. The data is summary information which is coded and stored with the individual identifiers. It is this information relating to each episode for each individual that is required for epidemiological research. Aggregated or simplified data will not suffice. Data routinely collected by governments tells the stories of individuals but, as the examples described above illustrate, it also has the

potential to help us understand and improve the health of the community and the delivery of health care services.

Government-held data is compartmentalised across multiple collections in different government agencies. It is divided amongst Commonwealth and state agencies. The story of one person's health is scattered across jurisdictions, departments and separate collections. The individuals' histories have to be drawn together from these scattered locations.

The information in government data sets is personal and often highly sensitive information and access to the data raises important concerns about data security and individual privacy interests. These interests are the concern of the relevant bodies of law that regulate the collection, use and disclosure of the information; privacy legislation; the common law and equitable duties of confidentiality; and the particular empowering legislation. This triumvirate regulates access to the data by researchers.

Privacy and security concerns are also addressed in practical ways such as the development of secure data laboratories and privacy protecting data linkage processes. The development of specialist data linkage units in Australia has enabled researchers to merge data without needing any information that identifies individuals. The particular variables needed for the analysis relating to each person in the cohort can be extracted by the data custodians of multiple data collections and provided to researchers with only an individual project identifier. This enables researchers to merge data sets containing information about hundreds of thousands of people without any information that could identify individuals.

Access to information in the hands of government for public health research

The data collections are established under statute. Information is collected without consent under mandatory reporting requirements and is stored with individual identifiers. It can only be used or disclosed for purposes authorised by statute and must be treated as confidential.[7] Most of the authorising statutes impose express statutory duties of confidentiality on the data custodian and its employees, however, they authorise disclosure for some purposes, such as research. The discretion to release the data for research is usually entrusted to the chief executive or sometimes the Minister of the relevant agency and sometimes specifies preconditions such as approval by a Human Research Ethics Committee (HREC).[8]

The data sought by researchers is not usually identifiable; however, where linkage is required this does involve identifiable data. Data custodians extract identifiers such as name, address and birth date from their data sets and send these only to the data linkage unit which uses them to create the linkage map and linkage identifiers. Data custodians can then provide the de-identified data to the researcher. The linkage stage uses identifiable information and therefore attracts applicable privacy legislation. All the privacy statutes in Australia contain a research exception which limits individuals' rights to control the use of their personal information. The terms of the exception vary slightly from one statute to another but they all provide for the use and disclosure of personal information without consent and they all require that the research be approved by an authorised HREC applying the statutory guidelines. The HREC must be satisfied that the public interest in the research significantly outweighs the public interest in privacy.

The legal framework demonstrates a clear intention to support the use of personal information for research in the public interest and to provide a balance with privacy interests. Where research is approved by an HREC and disclosure is authorised by the empowering statute there are no legal obstacles to the use and disclosure of government data for research. Access to data, however, is dependent on the favourable exercise of an administrative discretion. Where projects involve data from a number of data sets, held by

different government agencies in different jurisdictions, then researchers must persuade each data custodian to exercise this discretion in their favour.

Suppression of data

Many data custodians are working successfully with researchers to facilitate important research, however, concern has been expressed by a number of researchers that some data custodians are refusing to provide access to data or, more commonly, that access requests face intractable delays.[9] This is so even when the information is anonymous and high standards of security are in place and despite the fact that the release of data is lawful and has been approved by an HREC.

The Western Australian Data Linkage Unit reported, for example, that:

> between 2005 and 2009, only 9 of 23 requests for release of Commonwealth data, including from aged care datasets, had been granted, with delays of up to 2 years jeopardising projects with funding in excess of $11 million, most from nationally competitive NHMRC grants.[10]

It took Mathews et al almost five years to obtain the necessary approvals for access to the data for their study of the link between CT scans and cancer.[11]

There is concern among researchers and others that the reasons for delay may not always relate to the legal limitations or the wider public interest. Data custodians, unlike HRECs, are not required to provide reasons for their decisions and so there is a lack of transparency with the decision-making process.

A 2006 survey of 206 public health academics in 17 institutions on their experience over a five year period concluded that the suppression of public health information was widespread, and that the majority of suppressed information concerned the performance of health services, the health status of vulnerable population groups, or harmful exposure in the environment.[12]

Researchers suspected the reasons for suppression were largely related to the avoidance of unfavourable research results and included 'data not to be released until after elections'; 'perception by bureaucrat that recommendations would be controversial'; and 'to avoid ministerial embarrassment'.[13] This suggests that there is at least a perception by researchers that access to data is being denied in order to protect governments from embarrassment or criticism.

Government agencies, on the other hand, have identified a number of obstacles to full implementation of the *Principles on Open Public Sector Information* developed by the Office of the Australian Information Commissioner (OAIC).[14] These obstacles, which may also impact on researcher requests for access to datasets of personal information, include inadequate resources to implement the principles; the difficulty of establishing a culture of open access; compromise of potential revenue streams from agency use of the data; a feared loss of control over the data; and the possibility of misuse, liability and reputational damage.[15]

Thus, from both sides of the data divide there appear to be problems with the free flow of government information to those who wish to re-use it for research and other purposes.

Proposed approach to the problem

One way to approach the problem would be to bring various elements of the Australian information policy framework into closer alignment. The elements of the information policy

framework of most interest in this regard are the public sector information (PSI), privacy, and freedom of information (FOI) regimes.

As noted above, the use of public health related datasets by researchers is expressly provided for in privacy legislation. Such use achieves goals identified in both the FOI and PSI regimes such as scrutiny and evaluation of government policies and programs, and maximising the economic and social benefits of information in the hands of government. By aligning the permission and protection provided by the privacy regime with regulatory requirements from the FOI and PSI regimes, it would be possible to achieve better governance of these valuable datasets in the public interest.

Public sector information as a national resource

Public sector information (PSI) is a national resource that should, wherever possible and appropriate, be made available for community access and use. This is one of the principles enunciated by the OAIC in its *Principles on Open Public Sector Information*. The principles recognise the economic and social value of public sector information and that this value can be enhanced where the information is shared and re-used.[16]

This principle is also reflected in the objects of the Australian federal *Freedom of Information Act 1982* (Cth), which were amended in 2010 to include:

> to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.[17]

There have been significant developments in the area of access to and reuse of non-personal PSI—such as weather, transport and geo-spatial data—that can be put into the public domain or licenced for commercial exploitation by the private sector. Such developments are consistent with recommendations at the international and regional level, seeking to encourage increased access to and use of PSI on the grounds of economic efficiency and the promotion of innovation, although they do not establish a right of access to PSI.[18] It is of interest to note that, under the PSI regime, access can be provided subject to licences and conditions.

Privacy

Clearly, however, the information of interest to public health researchers is not information that can be put into the public domain in the same way as non-personal PSI. It is personal, and often sensitive, information and it is important that any sharing and re-use gives due consideration to issues of personal privacy, confidentiality and security. This is achieved, in the public health research context, by a range of procedures and protections, including those required by privacy legislation.

While mandating a privacy protective framework for handling personal information, the privacy regime also expressly recognises that there is a significant public interest in supporting the use of personal health information for research. Australia's privacy legislation provides for the disclosure and use of such information for medical research without consent under certain conditions. The privacy regime does not, however, create a right of access to the information, and the FOI regime, which does establish a right of access to information, does not currently support the public interest goals reflected in these privacy provisions.

Freedom of information

In contrast to the PSI and privacy regimes, FOI legislation does create a right of access to government information. However, the *Freedom of Information Act 1982* (Cth) (*FOI Act*) provides that a document is exempt from disclosure if it would involve the unreasonable

disclosure of personal information[19] and disclosure would be contrary to the public interest.[20] While access and re-use of personal information for research purposes is not expressly addressed, it is safe to assume that an FOI request for access to a government database containing large amounts of personal health information would be denied on both these grounds.

Unlike the PSI regime, the *FOI Act* does not provide for any limits to be placed on the manner in which the applicant uses or discloses the information released under the Act.

For these reasons, the FOI regime in Australia does not currently provide a workable environment for government to release information in a controlled and limited way to researchers. The *FOI Act* does make clear, however, that the legislation is not intended to prevent or discourage the Australian Government from providing access to information apart from under the legislative scheme.[21] This leaves open the possibility of an administrative arrangement between the Government and researchers to provide access to information in other ways and subject to conditions. This is what happens in practice in those cases where data custodians agree to release information, but is of limited use where a data custodian withholds information.

Bringing the three regimes into alignment

There is a clear public interest in facilitating access to government datasets for research. Where a research project has been reviewed by one or more HRECs and found to meet the relevant statutory privacy guidelines, we would argue that the spotlight should be turned on the data custodian's decision-making process. It is important to ensure that the decision to release or withhold the information is taken on sound public policy grounds, and not on the basis that the research results may reflect badly on government policies or programs.

Adopting a model for data custodian decision-making based on some of the underlying principles of the FOI and PSI regimes would drive greater transparency, consistency and timeliness in decision-making and would help to ensure that the datasets were being administered in the public interest. On this basis, we suggest that the following elements of the FOI and PSI regimes should be adapted and applied to requests for access to and reuse of government datasets by public health researchers.

Default position is that information should be released

The most important element of a pro-disclosure regime is the presumption of openness. Under FOI principles access to information is defined as a right and the default position is that information must be released unless there is a strong public interest in protecting the information. In contrast, the default position for access to government health related datasets for research is that the datasets should not be released in order to protect privacy. We argue that privacy can be properly protected by imposing conditions for release and that the default position should, therefore, be reversed.

Cost

The collection of data comes at a cost to government and, while facilitating use of datasets by researchers also gives rise to costs, the reuse of the datasets adds value to the initial expenditure. Both the FOI and PSI regimes emphasise that the cost of accessing data should be kept to a minimum. FOI regimes permit refusal where processing the request would substantially and unreasonably divert the the resources of the agency.[22] This approach means that cost concerns become transparent and can be challenged.[23] Explicit consideration of cost in decision making would bring these choices into clear focus.

Time frame

FOI and PSI regimes recognise the importance of timeliness by imposing time limits on the decision making process.[24] There have been reports of delays of up to two years before a decision is made by government data custodians in response to requests for access by researchers. This means that projects do not proceed because research grants are time limited.[25] Statutory timelines would ensure that decision-making processes were efficient and would reinforce the need for adequate funding for data delivery.

Conditions

Unlike FOI regimes, the PSI regime allows for the imposition of conditions on reuse. Under current arrangements conditions are regularly imposed on researchers seeking to reuse government health related datasets to ensure security and confidentiality. These routinely include prohibitions on sharing of data and unauthorized merger of data sets; conditions to ensure that published results do not contain identifiable information; and security protocols for the storage, analysis and archiving of data. These conditions are essential to maximise the protection provided for the privacy of the personal information concerned. The capacity to impose such conditions would need to be included in the proposed governance arrangements.

Criteria for decision making

FOI legislation often includes articulated criteria for decision-making. These may include factors that must or must not be taken into account by the decision maker. The *Freedom of Information Act 1982* (Cth), for example, provides that the fact that the release of information could cause embarrassment to or a loss of confidence in the government must not be taken into account.[26] Developing criteria for decision making by government data custodians would help to ensure transparency and consistency.

Reasons for decisions

The giving of reasons for a decision is a fundamental principle of good administration and one of the pillars of Australian administrative law.[27] The *Freedom of Information Act 1982* (Cth), for example, requires that reasons be given where access to a document has been denied or deferred. Where access to a document subject to a public interest test is refused, the Act requires that the statement of reasons includes the public interest factors taken into account in making the decision.[28] A requirement that data custodians give written reasons for any denial or deferral of access to databases, linked to the criteria for decision making, should be one element of the proposed regime.

Application for review

FOI regimes generally provide an avenue for applicants to seek independent, external review of agency decisions, designed to drive greater transparency and consistency—the hallmarks of open government decision-making.

In Australia, the role of first tier independent external review of the decisions of data custodians could be given to the Australian Information Commissioner. The Information Commissioner is already engaged with Australian Government agencies on an ongoing basis, working to promote the objects of the FOI, PSI and privacy regimes and dealing with complaints. The Commissioner is also responsible for approving the guidelines under s 95 of the *Privacy Act 1988*, which deal with the release of information for medical research, and so is well versed in the researcher/HREC/data custodian debate.

Conclusion

The proposed model would provide researchers with an avenue to push through unjustified resistance on the part of government data custodians and to enforce a right of access to such information on behalf of themselves and the community. Currently, the FOI regime is not supporting the goals of the privacy regime in this regard. The lack of robust governance arrangements allows decisions to be taken in a context that lacks transparency and public accountability and leaves open the possibility that access is being denied because the outcomes of any potential research may reflect badly on government. Clearly, this is not consistent with the values underlying the FOI, PSI and privacy regimes or, indeed, those underlying open government.

Endnotes

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THE INCORPORATION OF HUMAN RIGHTS FAIR TRIAL STANDARDS INTO AUSTRALIAN EXTRADITION LAW

*Dr Peter Johnston**

The tension between the obligation to extradite and the protection of an individual's civil liberties

It is accepted that challenges to deportation in the field of refugee law in the quarter of a century since *Kioa*[1] have greatly fuelled the development of administrative law principles. Although not so prolific, extradition challenges have also played a substantial role in that regard. The two fields overlap but also have distinct features and the High Court has been vigilant in ensuring that deportations do not mask a process of disguised extradition.[2]

In the labyrinthine territory of extradition law, because of its legal complexity aggravated by encrustations of amendments, the arcane systems of foreign law often encountered and the highly charged political profile of the cases entails the risk faced by 'the sojourner venturing into that country from whose dread boundaries no visitor ever returns'.[3] Even then, immigration law and extradition law tend to represent polarities in that challenges brought by refugees are for the most part regarded benignly while those mounted by persons facing extradition tend to be looked upon with suspicion and scepticism. In the public psyche they are apt to be seen as pursued by seriously dangerous or deviously corrupt criminals drawing upon secret funds to advance spurious technical objections. Although a species of criminal proceedings[4] applicants in extradition cases tend not to be accorded the benefit of the presumption of innocence.

It is a commonplace of international extradition law that it exists to facilitate cooperation between states so that perpetrators of serious crimes fleeing from one territorial jurisdiction cannot gain immunity from prosecution by claiming sanctuary in another. Rather, predominantly under bilateral treaty agreements, provision is made for the surrender of criminal fugitives to states seeking their return. Equally, it is also accepted that extradition is a *coercive administrative process* that entails removing a person from his or her place of residence and subjecting the person to criminal process in another country.[5] Even if a person is not surrendered, extradition proceedings result in substantial incursions on liberty, interference with normal life, and usually considerable expense. It is not surprising that extradition arrangements among countries address that problem by importing restrictions on the process to afford protection against arbitrary abuse and violation of the civil and political rights of a person whose extradition is sought. These two objectives, returning offenders to answer criminal charges while nevertheless protecting accused persons against undue incursion into their personal freedoms represent the polarities that create an inherent tension in the extradition process.

This article explores the extent to which the *Extradition Act 1988* (Cth) (the *Act*) incorporates international human rights standards, such as the fair trial standards under the *International Covenant on Civil and Political Rights 1966 (ICCPR),* for the purpose of restraining

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extradition in cases where a requested person is likely to face an unfair trial in the requesting country. It asserts that the *Act*, by giving legal effect to certain 'extradition exceptions' included in bilateral extradition treaties between Australia and other countries may be read as importing fair trial standards in Article 14 of the *ICCPR* into the evaluation process to determine if extradition should be refused.

Further, reference to international fair trial standards arguably amounts to a relevant consideration in determining that issue. Accordingly, they provide a basis for advancing more human rights-enhancing submissions in arguments before the courts.[6] The potential for invoking standards delineated in Article 14 is certainly enhanced if it is accepted that in determining whether a decision to extradite engages unfairness and injustice, regard is not to be had solely to Australian standards, as was held in the recent High Court decision, *Commonwealth Minister for Justice v Adamas* (*Adamas HC*).[7]

This prompts a further question, irrespective of whether Article 14 has been given a statutory status in Australian law: to the extent that Australia is under an *international* obligation to observe the provisions of the *ICCPR,* should the fact that Australia may be in breach of that obligation if the Minister authorises surrender of a person be a relevant consideration when making an extradition decision? While on present authority the stronger view appears to be that it is not,[8] this article concludes that it is an open question and awaits authoritative determination by the High Court.

As a subsidiary consequence, the recognition of the relevance of these international standards opens the way for Australian courts to more readily access, in appropriate cases[9] the *comparative jurisprudence* of other human rights tribunals such as the European Court of Human Rights. Further, if there is a substantive incorporation of international standards there may be greater scope for invoking arguments based on considerations of *proportionality*.

The relevance of fair trial standards in the International Covenant on Civil and Political Rights and the European Convention on Human Rights

The principle of a fair trial

It is incontestable that a fair trial is one of the fundamental elements of the Australian criminal justice system.[10] This article explores the extent to which a person subject to extradition can resist extradition based on the objection that he or she is unlikely to receive a fair trial in the other country.

Means of including provisions in Australian extradition law protecting human rights

For Australian purposes it has been claimed that the *Act* purports to resolve the tension between cooperating to extradite fugitives from justice and protecting the liberty of individuals by 'striking a *balance*[11] between the interests of the extradition country in retrieving those whose return it seeks for violation of its laws, and those of Australia in upholding its dominion over those presently on its territory, and those of the alleged extraditable persons' (emphasis added).[12] Those underlying purposes are not, however, immediately evident from a perusal of the principal objects of the *Act*. Relevantly, regarding extradition from Australia, s 3 expresses the *Act's* objects as 'to codify the law relating to the extradition of persons from Australia to extradition countries … and, in particular, to provide for proceedings by which courts may determine whether a person … is eligible to be extradited … and … to enable Australia to carry out its obligations under extradition treaties.'[13]

To appreciate the extent to which the *Act* affords protection of the human rights of a person whose extradition is sought, it is necessary to have regard to:

- first, statutory objections and prohibitions against extradition expressly set forth in the *Act*; and
- secondly, guarantees and limitations provided for in extradition treaties which are given legal effect so as to modify the operation of Part II of the *Act*.[14]

In the first category, s 7 of the *Act* explicitly provides that a person is not eligible for extradition if:

- the offence for which extradition is sought is a '*political* offence';
- the surrender of the person is sought in order to *punish the person on account of*, among other reasons, the person's *race, religion, nationality, or political opinion*; or
- the extradited person may be *prejudiced* at trial *by reason of such factors*.

Significantly, these restrictions reflect fundamental human rights standards which are the subject of existing human rights instruments.[15]

Protections within the second category[16] are necessarily dependent on *specific provisions* made in *individual extradition treaties* and therefore vary according to the arrangements entered into by the parties to a particular treaty. In many cases these exceptions replicate statutory exceptions within the first category, such as the prohibition on extradition in relation to a 'political offence'.[17] However, most bilateral treaties normally go further and incorporate specific articles which provide, for example, that 'extradition shall not be granted' where a person may be subjected to torture or to 'cruel, inhuman or degrading' treatment or punishment.

One such specific exception common to many recent treaties (referred to hereafter as the 'unjust' exception) is expressed as follows:

> *Extradition may be refused* in any of the following circumstances:
> - if the Requested State, while also taking into account -
> - *the nature of the offence;* and
> - *the interests of the Requesting State*
> - considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is sought, the extradition of that person would be -
> - *unjust;*
> - *oppressive;*
> - *incompatible with humanitarian considerations;* or
> - *too severe a punishment*. (Emphasis added)

Applying protective limitations in treaties under the *Extradition Act*

Including a provision like the 'unjust exception' in an extradition treaty prompts the question: 'What is its resulting *legal effect*?' This requires traversing the legislative mosaic set forth in sub-ss 11(1) and (1A) of the *Act*. They relevantly provide that regulations may be made in relation to specific countries that have the effect of applying the *Act* 'subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country.' So where regulations are made under s 11 to give effect to a bilateral treaty, the *Act* applies in relation to extradition arrangements

between Australia and the other treaty country in a *modified form* that adapts the operation of the *Act* to conform to the exceptions provided in the relevant treaty.[18] Hence if a treaty includes a provision like the 'unjust exception' it takes effect as if it were a provision of the *Act*. Consequently, it forms part of domestic Australian law governing extradition between Australia and the other party. In other words, it has *direct* legal effect as if written into the *Act* itself.

The immediate effect of incorporating the 'unjust exception' is to compel the Minister to consider when determining under s 22 of the *Act* whether to surrender a requested person, the personal and other circumstances of the person against the relevant criterion/criteria[19] with a view to deciding whether to *refuse extradition*. Does engrafting the 'unjust exception' into the *Act's* operation directly incorporate *more general international human rights standards,* particularly those relating to *rights to a fair trial established by the ICCPR*, into Australian extradition law?

This is essentially a question of construction.[20] It entails a consideration of whether the notion of an extradition of a person being *unjust, oppressive, incompatible with humanitarian considerations* could include, as part of its textual content, the sense of 'unjust' etc according to the fair trial standards recognised in Article 14 of the *ICCPR*.

The ICCPR international fair trial standards

Relevantly, **Article 14 provides:**

1. All persons *shall be equal before the courts and tribunals*. In the determination of any criminal charge against him … everyone shall be entitled to a *fair and public hearing* by a competent, *independent and impartial tribunal* established by law.
2. Everyone charged with a criminal offence shall have the *right to be presumed innocent* until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone *shall be entitled to the following minimum guarantees*, in full equality:
   (a) *To be informed* promptly and *in detail* in a language which he understands *of the nature* and cause *of the charge against him*;
   (b) To have *adequate time and facilities* for the preparation of his defence …;
   (c) To be tried *without undue delay*;
   (d) To *be tried in his presence*, and to defend himself in person or through legal assistance of his own choosing; ……
   (e) *To examine, or have examined, the witnesses against him* and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) ….
   (g) Not to be *compelled to testify against himself* or to confess guilt; …..
5. Everyone convicted of a crime shall have *the right to his conviction* and sentence *being reviewed* by a higher tribunal according to law. …..
7. *No one shall be liable to be tried* or punished again *for an offence* for which he has *already been finally convicted or acquitted* in accordance with the law and penal procedure of each country.[21] (Emphasis added)

Because of their relative specificity the enumeration in paragraph 3 of Article 14 of fairness requirements such as the right to examine prosecution witnesses, identifies archetypal *categoric situations* that detract from a fair trial and thus provides more utilitarian guidance than broader statements about 'equality before the law'.

To similar effect, in relation to extradition treaties with countries that are parties to the *European Convention on Human Rights 1950* (*ECHR*), Article 6 of that Convention

prescribes standards governing fairness of trials that a requesting European country will be obliged to observe when making an extradition request.[22]

Necessarily, the analysis of whether the 'unjust exception' imports Articles 14 of the *ICCPR* and Article 6 of the *ECHR* into the *Act* must extend beyond the mere words used in the unjust exception and have regard to the whole scope and purpose of the *Act*[23] and the other terms of the exception.

Principles regarding incorporation of international obligations into Australian law

It is now well established that lacking statutory ratification and endorsement, provisions in an international instrument do not have any immediate and direct legal effect in Australian municipal law.[24] They may, however, perform other functions such as providing guidance in the event of interpretive difficulties with the construction of ambiguous provisions in Australian statutes. They may also constitute a consideration that ought properly to be taken into account in the process of executive administrative decision-making. Finally, in some instances, they may indirectly contribute to the development of common law principles where extension of those principles might otherwise be inconsistent with an international standard or prohibition.[25]

Turning to the *ICCPR* it is virtually a truism, often repeated as a judicial mantra, that it is *not part of* Australian domestic law.[26] That proposition may be accepted in so far as there is no Commonwealth legislation explicitly enacted for that purpose. That is not to say that since the provisions of the *ICCPR* have not been given a statutory status they therefore can be ignored in the course of the Commonwealth decision-making as not constituting a relevant consideration.[27]

However, there can be no debate that, by reason of s 11, the *Act* directly incorporates and gives legal effect to limitations and qualifications in a bilateral treaty, including the 'unjust exception'.[28]

The standard(s) for evaluating fairness: international or domestic

This engages a broader issue: In addressing the fairness of criminal procedures in another country, both systemically and in the particular circumstances of the requested person, are the requirements of a fair trial to be *measured by Australian* or *international standards*? To pose the choice as a dichotomy predicates that there may be a divergence between the two although one would normally start from the assumption that the Australian standards are no lower than those recognised in the *ICCPR*. The authoritative position in the light of *Adamas HC* is now cast in negative terms: that the matter is *not* one to be determined *solely* according to Australian standards; the latter may be relevant though not determinative. However that conclusion does not address just how the several standards, domestic and international, can co-exist and interact, particularly if contradictory.

The starting point: the interpretation of 'unjust', 'oppressive' or 'incompatible with humanitarian considerations'

Whether the incorporation of the 'unjust exception' in a bilateral treaty when given Australian domestic effect carries as a matter of its content the additional freight of embodying fair trial standards under the *ICCPR*[29] is admittedly contentious. The first difficulty in making a case that the international fair trial standards in Article 14 of the *ICCPR* are now comprehended within the 'unjust exception' is the fact that the criteria of injustice and oppression have long been a feature in the history of extradition legislation of the United Kingdom and other Commonwealth countries.[30] As a bar to surrender the notions go back as far as the *Fugitive Offenders Act 1881* (UK). The criteria of 'unjust' and 'oppressive' have been taken up in later

Australian legislation including that relating to interstate extradition.[31] While not expressly appearing in the *Extradition Act 1988* they are now commonly found in treaties incorporated into the *Act*. Over time, they have taken on a broad meaning that predates Australia's accession to the *ICCPR*. The objection can be raised therefore that each represents a *sui generis* concept that draws no content from the *ICCPR*.[32]

Against this, it may be contended that the concepts of injustice, oppression, and incompatibility with humanitarian considerations are facultative and therefore capable of gravitationally pulling into their notional compass later emerging definitions of rights (such as those in the *ICCPR*) that guide and inform those tests in particular factual circumstances. This article is predicated on the premise that the criteria in the 'unjust exception' are flexible and have no fixed meaning that would create a disconformity or inconsistency with the fair trial standards in the *ICCPR*. Supporting this ambulatory contemporaneous understanding is the addition of 'incompatible with humanitarian considerations', humanitarian principles being the result of more recent evolutionary developments of international norms than the notions of 'unjust' and oppression' in earlier British and Australian statutes.

In approaching the meaning of these expressions it is as well to heed the injunction of Heydon J in *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* that words like 'unfair', 'unjust', 'oppressive' or 'prejudicial' are not words of exact meaning.[33] In the first instance, of course, one must start with the way that the notions of unjust, oppressive or not compatible with humanitarian considerations have been interpreted and applied in decisions of Australian courts. This survey will essentially focus on their statutory meanings.

One test or three?

The issue is complicated by a prior logical objection. Should the phrase 'unjust, oppressive or incompatible with humanitarian considerations' be read as setting forth a *composite test* to be assessed cumulatively as part of a general evaluation, or may it be regarded as a test comprising three separate and disjunctive criteria to be individually assessed?

In *Foster v Minister for Customs and Justice* (*Foster*)[34] Gaudron and Hayne JJ suggested that the expression 'unjust or oppressive or too severe a punishment' would be better understood as providing a *single description* of the relevant criterion which is to be applied rather than as three distinctly different criteria. They continued:

> The use of the disjunctive 'or' might suggest the need to consider each element of the expression separately but for several reasons we think it preferable not to approach the provision in that way. First, there is the fact that the terms used are, as we have already said, qualitative descriptions requiring assessment and judgment. Secondly, the use of the words 'too severe' suggests a need for comparison with some standard of punishment that is regarded as correct or just or, at least, not too severe. Thirdly, the considerations which may contribute to the conclusion that something is 'unjust' will *overlap* with those that are taken into account in considering the other two descriptions. It would, then, be artificial to treat the three ideas as rigidly distinct. Each takes its content, in part, from the use of the others.[35] (Emphasis added)

An ostensibly different if not contrary view was stated in *New Zealand v Moloney*[36]*.* There the Full Federal Court, Black CJ, Branson, Weinberg, Bennett and Lander JJ said that 'as a matter of construction it seems clear that each component in the composite expression 'unjust, oppressive or too severe a punishment', must be given some separate meaning. This is so even if there is a degree of overlap between them.'[37]

In *New Zealand v Johnston*[38] the Full Federal Court treated the concepts of 'injustice' and 'oppression' in the context of extraditions to New Zealand as forming a composite expression in which the concepts are not entirely distinct. Accordingly, each component in the composite expression should be given some separate meaning even if there is a degree

of overlap between them. Building on this their Honours observed that in the composite expression 'injustice' is directed primarily to the *risk of prejudice* to the accused *in the conduct of the trial* itself and oppression is directed to the *hardship* visited upon the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration.[39]

In *O'Connor v Adamas* (*Adamas FFC*),[40] Barker J, with whom McKerracher J agreed, commented that that, having regard to *Foster*, one should not take an unduly limited view of the meaning of the words 'unjust' and 'oppressive' and that they should have a broad connotation that would comprehend any other sufficient cause, including the passage of time since the offences are alleged to have occurred, the health of the person sought, hardship likely to arise through extradition, the likelihood of conviction, prison conditions in the requesting state, *the prospects of a fair trial*, the issue of natural justice and the gravity of the offence.[41] He went further and added that the concept of 'humanitarian considerations' should be considered an extremely broad concept that may, depending on the circumstances of the case, go beyond the notion of a particular circumstance being 'unjust' or 'oppressive'.[42] His Honour thereby engaged in a dual operation, attributing a broad sense to each of the words in the 'unjust exception' while accepting that those meanings could overlap, and the test overall be satisfied by factors including the prospect of a unfair trial in the requesting country that fall within one or more senses of the individual components of the composite phrase.

In *Adamas HC* the High Court noted that in making its written submissions to the Minister the Attorney General's Department advised that the 'unjust etc' criterion in Article 9(2)(b) of the *Australian-Indonesian Extradition Treaty 1992* involved broad overlapping, qualitative concepts 'which call for the making of assessments and value judgments about which reasonable minds may differ'.[43] The departmental submission did not limit the criterion by reference to standards defined by Australian domestic law and practice, although reference was made to Australian case law on the right to a fair trial. Without specifically endorsing the Departments interpretation on this point their Honours did observe:[44]

> Interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Treaty, the expression 'unjust, oppressive or incompatible with humanitarian considerations' in Art 9(2)(b) of the Treaty admits of no relevant ambiguity. The expression encapsulates *a single broad evaluative standard* to be applied alike by each Contracting State whenever that Contracting State finds itself in the position of the Requested State. The standards applied within each Contracting State are relevant to its application, as are international standards to which each Contracting State has assented, but none is determinative. (Emphasis added)

This statement was primarily directed to whether the issue of the fairness of criminal proceedings in the requesting country is a matter to be determined according to a compound test embracing both domestic and international standards of fairness. It also can be read as accepting that in having regard to particular matters, such as a conviction *in absentia*, the individual components of unjustness, oppression and incompatibility with humanitarian considerations are not matters to be assessed separately and in isolation.

In the end there is no real contradiction between the various views expressed in the cases considered above. Cumulatively they represent a compromise between taking a global approach to the circumstances under consideration and evaluating them according to each of the various criteria without treating the various conditions as mutually exclusive.[45]

Decisions to surrender involving the 'unjust exception' should therefore be approached in a broad manner that favours a cumulative assessment of *all the circumstances*. However, in making that evaluation the Minister should be guided in a case where fair trial is an issue by a correct understanding of particular matters such as whether the proceedings in the

requesting country would be considered unfair according to both Australian and international standards and, as such, fall specifically within the 'unjust' criterion. Alternatively, the same standards can be applied in concluding that the requested person who may have to wait for some time before being subjected to an unfair trial in another country would be pre-eminently subject to 'oppression'. Finally, depending on the particular circumstances of the individual, including the person's health, the third criterion, 'incompatibility with humanitarian considerations' could also come into play.[46]

Fairness to be determined solely by Australian standards?

As noted above, if it is accepted that the 'unjust exception' requires the Minister to consider whether a trial in another country would be fair, the question follows: 'fair' by reference to the laws of the requesting country, international standards or, if they are different, Australian standards?[47] The short answer arguably is that the matter primarily falls to be resolved according to the *particular* statutory and treaty arrangements that regulate extradition between the countries involved. On the basis of current authority, it is clear that the matter is to be assessed having regard to a composite evaluation involving both international and Australian standards.

In summarising his understanding of the Australian doctrine Barker J in *Adamas FFC*, after reviewing various decisions of the High Court (*Foster*) and the Full Federal Court, including *Bannister v New Zealand* (*Bannister*)[48] and *New Zealand v Moloney*[49] concluded that:

> What is common, however, to the decision of the Full Court in *Bannister* and the judgments of Gaudron and Hayne JJ and Kirby J in *Foster*, in my view, is that the question of what might be considered 'unjust, oppressive or too severe a punishment' if extradition of the requested person were to be permitted, is necessarily to be assessed by way of a value judgment, but a value judgment to be informed *by reference to Australian standards*.[50] (Emphasis added)

This dictum while it may remain true in relation to New Zealand and extradition arrangements with other Commonwealth countries must now be reconsidered in the light of *Adamas HC*. Specifically, the High Court ruled that restriction to the Australian standard of fairness was not appropriate in relation to extraditions between Australia and Indonesia, where the standard by which unjustness, oppression and incompatibility with humanitarian considerations is to be evaluated by reference to the international understanding reflected in the relevant Article in the controlling bilateral treaty.

If *international standards* are implicated does that also include considerations set forth in Article 14 of the *ICCPR*?[51] It is submitted that in an appropriate case it does. This is primarily by virtue of the indirect *incorporation* of that Article under the rubric of the 'unjust exception' although it may be assumed that it informs the *common law concept of a fair trial* which should not be assumed to be inconsistent with it.

The received jurisprudence concerning interpretation and application of the 'unjust exception'

a) *Instances of Australian interpretation of the 'unjust exception' involving extradition to countries with similar common law criminal jurisdictions*

An appreciation of the potential impact of Article 14 on Australian extradition decision-making may be gleaned from examining several recent decisions of the High Court and the Full Federal Court where the 'unjust exception' was raised. In reviewing these cases, however, it is necessary to be aware that while some commonalities may exist each case, as mentioned above must be considered in the light of the specific statutory provisions and treaty arrangements that subsist.

In *Foster*, the United Kingdom requested Foster's extradition for a number of fraud charges. Extradition in such cases is regulated by the *Extradition (Commonwealth Countries) Regulations* (Cth). He argued that having spent a substantial period of time in custody in Australia where he had fled after absconding while on bail in England it was unlikely that he would be sentenced to any additional term if extradited. Hence it would be unjust and oppressive to do so. The Minister decided he should be surrendered nevertheless. Foster then claimed that the Minister had fallen into jurisdictional error in failing to ascertain the maximum length of sentence he could receive if extradited as it was relevant to determining what would otherwise be an oppressive surrender. The majority held that the Minister was not bound to make detailed inquiries about the likely sentence which might be imposed in concluding that she was not satisfied that it would be unjust or oppressive or too severe a punishment to surrender him. There being no obligation to make such enquiries, the Court did not have to determine whether the possibility of having to serve further time rendered the surrender unjust or oppressive according to Australian standards.[52]

In *Bannister*,[53] New Zealand sought the extradition of a person on rape charges. Bannister had been charged in New Zealand in 1998 in relation to events alleged to have occurred many years earlier, in 1975. The charges included four which were described as 'representative'. In each case the matters alleged were not the subject of separate detailed charges. A magistrate refused extradition under s 34(2) on the basis that Bannister would suffer considerable hardship if he were surrendered to New Zealand, having regard to the lapse of time and his personal circumstances. That decision was reversed on review by the primary judge. On appeal, the Full Court took an adverse view about the fairness of representative charges, regarding them as discredited in Australian practice and no longer allowed in this country. This reflected a ruling of the High Court that trial on representative charges presented a risk of a miscarriage of justice.[54] As a result, the Full Court concluded that in the circumstances it would be 'unjust or oppressive' to return Bannister to New Zealand to answer the charges. In so doing, the Full Court held that it was permissible to have regard to *the quality of the trial* which the accused person would receive in New Zealand.

In *Moloney*,[55] New Zealand sought the extradition of two members of a religious order who were alleged to have committed various sexual offences against young boys between 1971 and 1980. The respondents claimed that it would be 'unjust' to surrender them to New Zealand. It was accepted that the time that had elapsed since these offences were said to have occurred gave rise to difficulties with respect to the fairness of any trial that might take place. In proceedings before a magistrate to determine whether they were eligible for extradition, they challenged their extradition on that ground that the lengthy period that had lapsed since the offences were allegedly committed meant that their surrender would be unjust. The magistrate did not uphold that objection.

On review, a single Federal Court judge reversed that finding and set aside the magistrate's orders. The judge had particular regard to the fact that, unlike New Zealand law, in an Australian trial where a person was accused of sexual offences long after they were allegedly committed the jury had to be given a special warning (known as a *Longman* warning) about the problem of a conviction after such a lapse of time. A *Longman* caution was seen to be necessary to ensure a fair trial in Australia. The Full Court extensively considered the meaning of 'unjust'[56] and in turn overturned the primary judge's decision, unanimously deciding that while there were differences between Australian and New Zealand law concerning the need for a special warning that did not warrant the conclusion that it would be unjust to return the respondent to New Zealand. In particular, the Full Court concluded that despite the long period that has elapsed since the offences were allegedly committed, it would not necessarily be unjust to surrender the respondent. Whether the long delay was unfair was a matter that *could be left to the New Zealand trial court* to determine.

In *Newman v New Zealand*,[57] the appellant was an 87-year-old man whose extradition was sought in relation to charges of indecent assault of his daughters in a period spanning 1957 to 1961 and 1966 to 1975. In the Full Federal Court he challenged a magistrate's order that he be surrendered to New Zealand, and the subsequent first instance review confirming that order, on the basis that some of the New Zealand charges made against him were 'representative charges'. Accordingly, it would be unjust or oppressive if he were surrendered to New Zealand. The Full Federal Court allowed the appeal on the basis that it would be possible, if he were surrendered, for him to face some charges specified in the warrant that were representative. In that case it would be unjust and oppressive to order his surrender at all. The Full Court followed *Bannister*, observing that there was no conflict between *Foster, Bannister* and *Moloney*.[58]

In *New Zealand v Johnston*[59] New Zealand sought the extradition of a 69 year old male Australian citizen to answer serious charges of sexual interference with a minor alleged to have occurred in the 1970s. Given the lapse of time, there were concerns that materials adduced in the original investigations and relevant testimony might no longer be accessible and capable of cross-examination.

The Full Federal Court held that the loss of such evidence did not render the respondent's surrender to New Zealand unjust. The Court first noted that allegations of sexual assault against a child are very serious matters and the nature of those allegations should weigh very heavily in favour of extradition. It also noted that in cases involving sexual misconduct towards children, delays, and hence the loss or unavailability of evidence, were very common. It could be expected, however, that any prejudice arising would be a matter that would be *assessed by the New Zealand trial court*. The loss of capacity to carry out necessary investigations did not constitute prejudice of such seriousness as to render the respondent's trial in New Zealand unfair. It was not for Australian courts, when determining whether surrender would be unjust, to assess the strength of the prosecution case and whether the person was likely to be acquitted. The Court, however, distinguished that situation from a case where there was *evidently some fatal flaw* or where there was some reason the prosecution was clearly bound to fail.[60]

It may be noted that each of the above cases entailed extradition with other Commonwealth countries, the UK and New Zealand, in which case the *Extradition Act 1988* and earlier legislation have made special provision for extradition to those countries. Necessarily, because they are common law jurisdictions, Australian courts accord a great deal of respect to the fairness of criminal procedures in those countries. Not surprisingly, given the similarity and traditions of criminal process in those instances, Australian courts are well able to evaluate the issues about whether subjecting someone to trial in those countries would be unjust, oppressive, or contrary to humanitarian considerations. Invocation of the international standards of fair trial in the *ICCPR* and the *ECHR* in such cases is unlikely to be particularly informative.[61] The latter standards may, however, have a more relevant application in regard to extradition requests from non-common law countries. Two recent decisions of the Full Federal Court illustrate that potential.

b) *Two recent cases involving non-common-law criminal systems*

i) *Zentai v Hungary*

In *Zentai (No 3)*[62] Hungary sought the extradition of Mr Zentai for *interrogation*[63] regarding the offence of a 'war crime' contrary to s 165 of the Hungarian *Criminal Code 1878*.[64] The offence entailed the killing of a Jewish student in Budapest by members of the Hungarian armed forces, including allegedly, junior officer Zentai. This was alleged to have occurred in November 1944. In making its extradition request Hungary relied on depositions taken before the notorious People's Court in 1947-1948 in trials of the two principal officers

involved in the killing. Those court documents implicated Zentai by recording that he had been present at the time the student was beaten and later when his body was thrown into the Danube. Questions of the reliability and voluntariness of statements in this documentary evidence were raised. This included, among other objections, the fact that one of the officers charged tried unsuccessfully to retract a 'confession' allegedly procured under torture by the political police. Hungary also relied on indirect hearsay statements of other persons who were present in the military barracks but had not seen Zentai doing the alleged acts, relying on the statements of others that he had. There were grounds for believing (not contradicted by Hungary) that all relevant witnesses had died and would not be available, as required by Article 6 of the *ECHR* and Article 14(3)(e) of the *ICCPR*, to be produced for cross-examination by the defendant.

In *Zentai,* the applicant relied on a number of overlapping grounds. These included a combination of factors claimed to support a finding of manifest *Wednesbury* unreasonableness in surrendering a national who was old and ill and could, as an Australian national resident in Australia be prosecuted under Australian war crimes legislation,[65] or, to satisfy the Hungarian request to interrogate him, easily be interviewed in Australia.[66] He also contended that the Minister's determination was flawed by illogical and irrational conclusions to such a degree and was so manifestly unreasonable that it could stand as a proper and genuine discharge of his responsibilities under the *Act*. This challenge was directed both to the *process* by which the Minister made his determination (based principally on misleading observations) and which in *its result* was *so unreasonable*, that his exercise of discretion should be found to have miscarried.[67]

A further ground was predicated on the Minister's refusal to make inquiries about the availability of witnesses in Hungary which might have revealed that the person could not be prosecuted if the Budapest Military Tribunal, applying Article 6 of the *ECHR*, was not prepared to admit documentary hearsay evidence.[68] In particular, Mr Zentai claimed that the Minister had not properly considered whether his extradition would be *unjust, oppressive, and incompatible with humanitarian considerations*.[69] Alternatively, he claimed, in the face of assurances that Hungary, being a party to both the *ECHR* and the *ICCPR* was bound to provide a fair trial, the Minister was under a duty to make direct enquiries of Hungary as to whether it could produce the key prosecution witnesses for examination.[70] Finally, he claimed that it would be unfair for him to be prosecuted given the great lapse of time since 1944 during which essential military documents that could substantiate his alibi that he was not in Budapest at the time had been destroyed.

At first instance, McKerracher J accepted the Commonwealth's submission that in considering whether he was satisfied that surrender would *not* be contrary to the conditions set forth in the 'unjust exception' in the treaty, the Minister was required to make value judgments about which reasonable minds might differ. Given the comprehensive nature of the departmental submissions presented to him it was therefore open to him to be satisfied that extradition would not be unjust, oppressive or contrary to humanitarian considerations. He also held that, particularly for reasons of international comity, the Minister was not obliged to seek further information or documentation about the way that Hungary would seek to comply with its obligations under the various international instruments if Mr Zentai was prosecuted.[71]

The Full Federal Court upheld his Honour on this ground.[72] It held that, particularly given the detailed departmental submissions the Minister could not be said to have failed to take into account a relevant consideration regarding whether Hungary, in the absence of relevant living witnesses, would be able to provide a fair trial in accordance with Article 6 of the *ECHR*. In any event, the *Act* did not require him to do so in the sense of it being an essential precondition to the valid exercise of the power arising under s 22.[73]

Ironically, shortly after the Full Federal Court gave its decision in *Zentai* and before the High Court considered the Commonwealth's appeal on another ground, the Military Division of the Budapest Municipal Court[74] on 19 July 2011 acquitted a Hungarian citizen, Sandor Kepiro, of war crime charges alleged to have been committed in World War II while a member of the Hungarian Gendarmerie. Kepiro was tried for offences involving the deaths in 1942 in Southern Hungary of 30 Jews. This was two years before the alleged murder of the student who was the subject of the proceedings against Mr Zentai. The basis for dismissing the charges against Kepiro was that another Hungarian officer, a Lieutenant Janos Nagy, said to be implicated in the killings as a principal, and whose written testimony was crucial to the case mounted by the Hungarian prosecution,[75] had died in 1985. He could not, in compliance with Article 6 of the *ECHR*, be produced for examination about his recorded statements. Ironically, Kepiro's acquittal vindicated the Hungarian assurances given in the Zentai proceedings about the independence of its judiciary and the fact that it would have regard to the fair trial requirements under the Convention.[76] Assuming the Military Division applied the same reasoning in the case of Mr Zentai it is likely that had he been summoned before the military tribunal in Budapest for interrogation, he would have been immediately released to return to Australia. Whether surrendering in light of such a likely outcome could be justified as reasonable is another question.[77]

ii) *Adamas v Indonesia*

The litigation leading up to *Adamas HC*[78] concerned a request by Indonesia for the extradition of the respondent who had been convicted *in absentia* on serious fraud and corruption involving misusing and disappearance of substantial funds of Bank Surya for his own purposes. He had been sentenced to imprisonment for life. Indonesian law did not provide an automatic right of appeal or re-trial if he were returned to Indonesia. Further, Indonesia had provided no evidence that he had been served with any process of a kind that would have made him aware of the charges. His leaving Indonesia would not amount to absconding if he had not been aware that he had been charged. Faced with the need to determine whether in those circumstances it was open to the Minister to decide not to surrender the respondent having regard to the equivalent 'unjust exception' provision in Article 9(2)(b) of the *Extradition Treaty between Australia and the Republic of Indonesia 1992* the Attorney General's Department submission advised him that he could conclude that surrender would not be unjust etc. Crucially, the Department did not advise however, in determining what would be unjust the Minister was bound to apply Australian standards of unfairness.

At first instance Gilmour J held that the Department's analysis, which he took to have been adopted by the Minister, incorporated a wrong legal test in that it failed to recognise that whether surrender fell within the 'unjust exception' was to be determined *solely* according to Australian standards. Further, that if he had applied the correct legal test he could not reasonably have concluded that it would *not be unjust*, oppressive or incompatible with humanitarian considerations for Mr Adamas to be surrendered. As his decision was unreasonable he thereby committed judicial error.[79]

In the Full Federal Court Barker J, with McKerracher J agreeing, found that while there was no bar on extraditing a person convicted in another country *in absentia* it was possible that the Minister had been misled by the departmental submission which merely advised that it was open to him to be satisfied that surrender would *not* be unjust or oppressive, while failing to explain that the matter had to be evaluated according to Australian notions of fairness.[80] Nor had his attention been drawn to salient facts about the respondent's lack of awareness which could be viewed as unjust by reference to that standard. The majority held that the Minister had *constructively failed* to take into account relevant considerations by assuming that the departmental submission had correctly informed him as to his decision-making task when determining whether surrender would be unjust, etc. This was because

the advice he received did not properly identify the question that he should ask himself, namely, whether the *in absentia* conviction of the respondent in Indonesia *in all the circumstances* would be considered unjust by Australian standards.

Relevantly, Barker J addressed at length the respondent's submission that the Minister had failed to take into account Article 14 of the *ICCPR*'s general condemnation of *in absentia* trials[81] as considered in decisions of international courts such as the European Court of Human Rights.

His Honour was, as it happened, able to find independently of Article 14 that in the particular circumstances of the case the extradition of Mr Adamas *would be unfair* by Australian standards. Accordingly, reference to the specific requirements in Article 14 was otiose and unnecessary.

Finally, in answer to the respondent's submission that the Minister might have been misled by *other advice* in the departmental submission about Australia's obligation not to surrender a person contrary to standards consistent with Article 14, his Honour held that the respondent had not demonstrated that the Minister had failed to have regard to Australia's international obligations under the *ICCPR* since the Department's advice had been redacted. Without knowing its contents the Court was unable to draw any conclusions about its accuracy.[82]

Significantly, while his Honour found that the *ICCPR* was strictly not part of Australian municipal law he was prepared, as indicated above, to have regard to the comparative jurisprudence of the European Court of Human Rights in determining whether Mr Adamas had been fairly convicted in Indonesia. He was not prepared, however, to conclude that Departmental advice regarding Australia's international obligations under the Convention contained errors that might have misled the Minister.[83]

On further appeal the High Court noted that the crucial issue that divided the Full Court was whether in determining if surrender would be unjust, oppressive or incompatible with humanitarian considerations, that issue 'must be assessed from an Australian perspective against Australian standards, not by any other perspective or standards that do not form part of Australian law'.[84]

The High Court further observed that in determining the meaning of Article 9(2)(b) of the Treaty a court must have regard to its specific formulation, not a general principle governing all cases in which the 'unjust exception' was in part adopted. Hence, in forming the necessary satisfaction that the conditions set forth in the 'unjust exception' did not exist the Minister was also required broadly[85] to consider at the same time two further qualifying and possibly countervailing conditions, namely, whether 'in the circumstances of the case, including the age, health or other personal circumstances of the person' and 'also taking into account the nature of the offence and the interests of [the Republic of Indonesia as] the Requesting State'.[86] Citing Article 31(1) of the *Vienna Convention on the Law of Treaties 1969,* the Court stated that as a provision in a treaty Article 9(2)(b) should be interpreted in good faith in accordance with the *ordinary meaning* to be given to its terms in its context and in the light of the object and purpose of the treaty. The Court thus firmly planted one limb of the interpretive task in the international arena of related concepts expressed in the 'unjust exception'.

Problematically, however, the Court went on to comment:[87]

> The words 'where the Requested State ... considers' emphasise the qualitative nature of the evaluation to be made by the Requested State in the application of that single standard. They provide no warrant for the application of a different standard by each Contracting State, much less for the

> application by each Contracting State of a standard based wholly on domestic laws and practices prevailing within that Contracting State.

What that formulation arguably fails to settle is the conundrum faced by the Minister where the standard of fairness of trials varies as between each of the contracting states and possibly, where one or other is less than the international norms set forth in Article 14 of the *ICCPR*. That is relevant in circumstances such as those contended for by Mr Adamas where he alleged he had not been made aware of the conviction *in absentia* proceedings in Indonesia.

The ambiguity is compounded when the Court went on to elaborate: [88]

> The circumstance that, under s 22(3)(e)(ii) and (iv) of the Act, the consideration required by Art 9(2)(b) is to be given by a Minister of the executive government is an indication that the standards to be applied are not to be equated with Australian domestic law, the exposition and application of which are the province of the judiciary.

This statement, which appears indirectly to engage the constitutional doctrine of separation of powers, is curiously opaque. It appears to leave the evaluative task of forming the necessary satisfaction required by s 22 entirely in the hands of the Minister. It would be surprising however, if the Court was indicating thereby that decisions of the Minister because of the nature of the subject matter were necessarily entirely immune from judicial review under s 75(v) of the Constitution, assuming the latter is practically feasible.[89]

The 'unjust exception' post-Adamas

The decision in *Adamas HC* raises the further question of whether it has overruled previous decisions of the Federal and High Courts regarding the meaning to be attached to the 'unjust exception'. Quite clearly, the Court recognised that the interpretation of Article 9(2)(b) of the bilateral Treaty with Indonesia was not of universal application. It distinguished earlier cases such as *Bannister* and *Foster* on which the respondent had relied as concerned with the particular arrangements for extradition to New Zealand and extraditions governed by the *Extradition (Commonwealth Countries) Regulations* (Cth). It therefore left them untouched. Accordingly, in cases of extradition to countries with common law criminal systems, cases like those considered above, they will continue to provide interpretive guidance.

This poses a further problem, namely, that there is not a consistent framework of analysis applying universally across the spectrum of all arrangements incorporating various forms of the 'unjust exception'. Given that the scope for invoking the 'unjust exception' is capable of variation across different bilateral treaties it arguably leaves up in the air the matter of the appropriate standards that the Minister is required to apply in each case.

This may not be a matter of any consequence in the end because even if in a particular case, the Minister, after concluding that on all relevant standards, domestic and international, it *would be unfair* to surrender a person, the Minister may, nevertheless, under the residual discretion in s 22 of the *Act* acquiesce in the request of a foreign request by deciding not to refuse. This is because in their own terms, treaties such as the Indonesian Treaty allow the Minister considerable leeway to put a higher premium on international considerations even where there are strong grounds for concluding that surrender would be unjust. In fact diplomatic considerations may assume a special priority in the case of major and sensitive bilateral relations with countries such as Indonesia. In such cases, the Minister is largely free to determine the matter untrammelled by the prospect of judicial review based on the 'unjust exception', particularly in the absence of any requirement to give reasons.

While the prospect might seem abhorrent to many Australians the broad interpretation in *Adamas HC* appears to skew the balance towards diplomatic considerations trumping the

countervailing purposes of the *Act* in providing protection of individual human rights. It offers little basis for optimism even in cases where there could be a clearly demonstrated injustice in surrendering someone for a foreign trial. This may reflect a broader principle that, in cases involving diplomatic sensitivities, courts should be loath to pronounce on the legality of decisions made by the executive branch of government.[90]

Has Adamas HC rendered resort to Article 14 of the ICCPR unnecessary or irrelevant?

Each of the *Zentai* and *Adamas* cases considered above challenged extradition to jurisdictions with continental criminal trial systems. In each case the person affected invoked specific matters alleging contravention of fair trial standards in the *ICCPR* as a basis for questioning whether the Minister had properly understood and applied the 'unjust exception'. In both cases, the Full Federal Court contemplated without deciding that the persons whose extradition was sought *could establish jurisdictional error* or an error of law based on the likely contravention of *those international standards*. In *Adamas FFC* the Federal Court, erroneously as it turned out, determined the issue of whether it would be unjust to surrender the person in regard to his *in absentia* convictions in Indonesia solely by reference to *how Australian courts* would regard the conviction in circumstances where the accused had no knowledge of the criminal proceedings against him. It is notable on the other hand that Barker J was prepared to take into account comparative international jurisprudence as *not inconsistent with* Australian standards. In *Zentai* also, neither McKerracher J nor the Full Federal Court went so far as to say that consideration of Article 14 of the *ICCPR* or Article 6 of the *ECHR* was irrelevant in determining injustice or oppression, rather, that Mr Zentai had not been able to demonstrate *on the basis of inference* that the Minister had erred.

If now indirectly part of Australian extradition law, does the incorporation of Article 14 provide a basis for arguments invoking proportionality?

Whether proportionality is a ground of judicial review in Australian law or an adjunct of reasonableness standards, including both *Wednesbury* unreasonableness and jurisdictional error founded on irrationality, is a vexed question.[91] Even the relationship between the latter two (*Wednesbury* unreasonableness measured by absurdity of *outcome*, irrationality based on deficiencies or *errors in the reasoning process*, including not addressing a crucial and relevant consideration) is still unsettled in administrative law theory.[92] Arguably the two are porous concepts that do not allow of 'bright-line' distinctions.

The case law on the topic is to this point inconclusive. In *Minister for Immigration and Citizenship v Li*, some members of the High Court appeared to contemplate that proportionality may enter the lexicon of judicial review but again backed away from a definite endorsement.[93] In this relatively fluid and plastic state it is hard to predict how these theoretical conundrums will be resolved. One possibility is development along the lines of Canadian authority, including judicial recognition of institutional integrity as an aspect of executive decision-making.[94]

It is submitted that if proportionality analysis finds a place in or among the grounds of review it will be located in the field of human rights adjudication. In that event if as postulated Article 14 is now entrenched in evaluations about whether a surrender would be legally and factually unjust, it may permit recourse to arguments based on proportionality in the European and international law sense.[95]

Breach of Article 14 of the ICCPR as a relevant consideration even if not directly incorporated into Australian extradition law

A further question was posed at the outset about the extent to which standards stipulated in Article 14 of the *ICCPR* are otherwise implicitly *required to be addressed* by the Minister in

responding to extradition requests from other countries. Irrespective of whether Article 14 has been given *statutory status* in Australian extradition law, is the fact that Australia is under an obligation *in international law* to observe the *ICCPR* and may breach that Convention's fair trial standard a relevant consideration to be taken into account when making an extradition decision?[96]

This issue was raised in the first two levels of the *Zentai* challenges and in varied form also advanced in *Adamas*. In *Zentai*, it was claimed that Australia had a duty under the *ICCPR* to consider whether surrender in circumstances where it was likely, in the absence of information about the existence of witnesses, that the Applicant could not be afforded a fair trial, contrary to international human rights law. This was predicated on the premise that there was a *real risk*[97] that the person's human rights would be violated by the requesting state.[98] The European Human Rights Court's decision in *Soering v United Kingdom*[99] was cited in support.

These contentions were not accepted in either case.[100] Further, Davies J in *Snedden v Minister for Justice of the Commonwealth* explicitly denied that the Minister is obligated to consider a breach of Australia's international undertakings when making a surrender determination.[101] However, the logical conundrum remains. If inclusion of the 'unjust exception' is a matter that the Minister is bound to consider in making a surrender determination and he or she must evaluate the fairness of proceedings in the requesting country by, among other factors, international standards incorporated into the *Act*, how can an impending breach be ignored as irrelevant? It is submitted that a High Court decision is necessary to settle the matter.

The continuing relevance of Article 14 of the *ICCPR* in the Australian extradition process

Even though it has not yet been authoritatively established that the international ramifications of a breach of the *ICCPR* is a relevant matter for the Minister to consider, it is evident from cases such as *Zentai (No 3)*[102] and *Adamas FFC*[103] that Australian courts have seen international fair trial standards in the *ICCPR* and attendant European jurisprudence as *potentially informing* the notions implicit in the 'unjust exception'. As such, arguably, to that extent the thesis propounded above has been sustained.

There are therefore sound reasons to claim that possible departures from the fair trial standards in the *ICCPR* and the *ECHR* can be invoked in determining whether surrender would be unjust, oppressive or contrary to humanitarian considerations. Nevertheless, it is pertinent to ask: Does it matter in the end? What significant difference can it make?

The better view appears to be that if there are general reasons for concluding on a normal Australian common law approach that surrender would be unjust and unfair, the fact that the evaluation has to be made in the context of the particular circumstances provided for in bilateral treaty arrangements focuses the enquiry on the more ambiguous *intentions of the contracting parties* in the particular case. On the authority of *Adamas HC*[104]*,* that process necessarily entails consideration of the international standards of fair trial as understood by the contracting parties. It is submitted that in more difficult and finely balanced cases recourse to the specific international examples of what is required for a fair trial under Article 14 of the *ICCPR*, such as the right to confront and question adverse witnesses, should at least be taken into account where they can illuminate the analysis and assist in guiding the Minister's conclusion. Whether the Minister can ignore the *ICCPR* standards in a clear case of impending breach, such as where there are no living witnesses, without committing jurisdictional error is arguably another matter still to be determined by High Court.[105]

Endnotes

1 *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550.
2 *Moti v The Queen* (2011) 245 CLR 456 at [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
3 With apologies to William Shakespeare, *Hamlet*, Act 3 Sc 1 lines 78-79 referring to death as 'the undiscovered country from whose bourn no traveller returns'.
4 *O'Donoghue v Ireland* (2008) 234 CLR 599 at [23] per Gleeson CJ.
5 *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at [6] per Gleeson CJ; *R v Governor of Brixton Prison, Ex parte Levin* [1997] AC 741 at [746] per Lord Hoffman.
6 Matthew Groves, 'International Law and Australian Prisoners' (2001) 24 *University of New South Wales Law Journal* 17 at [58] endorses the view that reference to equivalent concepts in European human rights instruments may be instructive to courts, engaging decisions of the European Commission on Human Rights and the European Court of Human Rights. In *Momcilovic v The Queen* (2011) 245 CLR 1 members of the High Court referred extensively to such decisions. Unlike the Victorian legislation considered in *Momcilovic*, however, to have regard to international human rights standards in making surrender decisions does not require a court to make declarations that the *Act* is in some aspect incompatible with those standards.
7 *Commonwealth Minister for Justice v Adamas* (*Adamas HC*) [2013] HCA 59. Throughout this article the term 'Minister' will be used in preference to 'Attorney General'; while the Attorney is designated in the *Act* as the responsible Minister the function is normally delegated to another Commonwealth Minister.
8 *Snedden v Minister for Justice of the Commonwealth* [2013] FCA 1202 at [53]-[53] per Davies J; *Le v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 875 at [59]; *AB v Minister for Immigration and Citizenship* [2007] FCA 910; 96 ALD 53.
9 As a matter of caution it should be observed that it will only be in specific instances that reference to such comparative human rights jurisprudence will prove illuminating and informative.
10 *Dietrich v R* (1992) 177 CLR 292, 300 at [6] per Mason CJ and McHugh J. It is another thing, however, to attempt to list exhaustively the attributes of a fair trial; ibid, [8]. In *Rivera v United States of America* [2004] FCAFC 154 the appellant sought to invoke the *Dietrich* principle and also rely on Article 14 of the *ICCPR* in relation to the fairness of proceedings before an Australian magistrate under s 19 of the *Act*. The Full Federal Court at [24]-[30] per Heerey, Sundberg and Crennan JJ held that reliance in each case was predicated on a misconception; that the criminal charge against him was being determined in the proceedings conducted under the *Act*. Those proceedings were, however, an *administrative determination* of his eligibility for surrender not a *determination of his guilt*. *Dietrich* was therefore inapplicable. See similarly *O'Donoghue v O'Connor* [2012] FCAFC 47 at [52]-[53] per Keane CJ, Rares and Lander JJ noting that extradition proceedings are civil not criminal; but query that view: see Gleeson CJ note 4 above. In *Momcilovic v The Queen* note 6 above at [96] French CJ observed that in declaring whether statutory provisions were inconsistent with human rights a distinction could be drawn between civil and criminal proceedings.
11 Whether it is possible to objectively perform a 'balancing' calculation as between satisfying another country in meeting its extradition request and preserving the rights of the individual is questioned later in this article. Commenting on the article by Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, McHugh J in *Coleman v Power* (2004) 220 CLR 1 at [83]-[91] drew attention to problems of applying a balancing test in the Australian constitutional context. Regarding the notion of 'balance' in the extradition context see E P Aughterson, 'Australian Extradition Law', paper delivered at the Commonwealth Criminal Law Conference, Sydney, September 2008, p 1.
12 *Director of Public Prosecutions (Cth) and the Republic of Austria v Kainhofer* (*Kainhofer*) (1995) 185 CLR 528 at [48] per Gummow J. To similar effect regarding English law prior to 2002, see Lord Griffiths in *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42, 61-62: 'Extradition procedures are designed not only to *ensure that criminals are returned* from one country to another but also to *protect the rights* of those who are *accused of crimes* by the requesting country.' (Emphasis added.) In general concerning the protective object, see Aughterson, above note 11, p 1.
13 Section 3 of the *Act* also includes a further object of providing for 'proceedings by which courts may determine whether a person is to be … extradited, without determining the guilt or innocence of the person.'
14 The distinction is sometimes drawn between express statutory provisions as *objections* and protections under treaties as *exceptions* or *conditions*, the latter reflecting the terms of s 11 of the *Act*. An *objection* to extradition for political offences can be raised to bar extradition; see ss 5 (definition) and 7 of the *Act*.
15 These include the *ICCPR* and the *International Convention on the Elimination of Racial Discrimination 1965.*
16 A measure of protection is also given by the principle requiring 'dual criminality' in many extradition treaties; namely that there must be a measure of substantial correspondence between the extradition offence and offences under Australian criminal law that would be applicable if the relevant acts or omissions of the person occurred in Australia; see E P Aughterson, *Extradition: Australian Law and Procedure*, Law Book Company, Sydney, 1995, 60. For a judicial discussion of the significance of dual criminality as a protection see *Minister for Home Affairs of the Commonwealth v Zentai* (2012) 246 CLR 213 at [20]-[29] per French CJ and [68]–[69] per Gummow, Crennan, Kiefel and Bell JJ. The author was counsel for Mr Zentai in the many

and various Australian proceedings concerning his case including the Commonwealth's appeals to the Full Federal Court and the High Court.

17 Such as in Article 3(1) of the *Extradition Treaty between Australia and the Republic of Hungary 1995.*

18 For an analysis of the statutory framework of the *Act* see French CJ in *Minister for Home Affairs of the Commonwealth v Zentai*, note 16 above, at [12]-[16]; also the High Court in *Commonwealth Minister for Justice v Adamas* (*Adamas HC*) [2013] HCA 59 note 7 at [31]-[32]. Judicial comments differ about whether s 11 of the Act actually 'incorporates' the relevant treaty into domestic law. For example Lindgren J in *Oates v Attorney-General for the Commonwealth of Australia* [2001] FCA 84; (2001) 181 ALR 559 at [16] reads s 11 as *not incorporating* the relevant treaty into Australian law, preferring the meaning only that the *Act* 'applies' 'subject to' any limitations, conditions, exceptions or qualifications found in the Treaty that are inconsistent with the *Act*. The Full Federal Court in *Federal Republic of Germany v Gregory Parker* (1998) 84 FCR 323 speaks more emphatically of a bilateral treaty *forming part of domestic law* by force of s 11. These apparently contradictory accounts may disguise a difference in understanding of the incorporation theory of international law as it applies in the Australian constitutional context.

19 Whether the various descriptors in the unjust exception should be treated as separate and individual tests or should be approached as a composite test is discussed below. The preferable view is that they represent an amalgam of conditions with separate meanings but which overlap and tend to work cumulatively.

20 Regarding the primacy of Australian law where an international instrument has been adopted in an enactment, the correct approach is to first ascertain with precision what the Australian law is then to say how much of the international instrument Australian law requires to be implemented: *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 71 [61] per Callinan, Heydon and Crennan JJ, applied in *Secretary, Department of Families, Housing, Community and Indigenous Affairs v Mahrous* (*Mahrous*) [2013] FCAFC 75; (2013) 213 FCR 532. In *Mahrous,* Kenny, Flick and Kerr JJ at [38]; [52]-[55] noted that the principles set forth in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties 1969* (*Vienna Convention*) guide the process of construing provisions of an international agreement where they have by enactment become part of the law of Australia, citing *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2000) 231 CLR 1 at 14-16 [34]; also *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 at 186 [70] per McHugh J and *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [24]-[25] per Gleeson CJ and Gummow, Hayne and Heydon JJ. In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255-6 McHugh J adverted to the general principle that international instruments should be interpreted *in a more liberal manner* than would be adopted if the court is required to construe *exclusively domestic* legislation. See generally R K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 71. Regarding resort to Article 31 of the *Vienna Treaty* see *Minister for Home Affairs (Cth) v Zentai* note 16 above, 246 CLR 213 at 229-230 [36] per French CJ; 238-239 and [65] per Gummow, Crennan, Kiefel and Bell JJ; also *Maloney v The Queen* [2013] HCA 28; (2013) 87 ALJR 755 at [15] per French CJ.

21 This replicates the common law principles of *autrefois convict* or *autrefois acquit* barring double jeopardy for the same offence; this objection is encapsulated in s 7(e) of the *Act*.

22 Where, for example, reliance is placed to '*a decisive extent'* on statements by anonymous witnesses the European Court has held that in accordance with Article 6 defendants to criminal charges must have reasonable means of testing the witnesses' reliability or credibility, particularly where a witness's identification is the only evidence indicating a defendant's presence at the scene of the crime; see *Windisch v Austria* (1990) 13 EHRR 281, *Kostovski v Netherlands* (1989) 12 EHRR 434; *Doorson v Netherlands* (1996) 22 EHRR 330 and *Van Mechelen v Netherlands* (1997) 25 EHRR 647, applied by the House of Lords in *R v Davis* [2008] UKHL 36; at [24]-[25] and [44] per Lord Bingham; [75]-[90] per Lord Mance. Regarding the importance of the opportunity to test evidence of a decisive character under Article 6 ECHR see *Secretary of State for the Home Department v AF* [2009] UKHL 28. The Grand Chamber of the European Court of Human Rights has rather confusedly recognised that in some instances *hearsay evidence of a deceased witness* may be given provided there are reasonable safeguards as to its authenticity; see *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127. In *Al-Khawaja* there were other independent witnesses to the offence. Where there are *no living* witnesses the inability of the defendant to confront them to test the veracity of their written evidence would seem determinative: the defendant could not be given a fair trial in those circumstances.

23 It is well established that the correct approach in determining the scope of a statutory discretion that is unconfined by express statutory criteria is to ascertain the factors that may be taken into account by reference to the *subject matter, scope and purpose* of the statutory provision; see, for example, *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J and *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 40 per Mason J; also *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235 at [41] per Allsop CJ, Buchanan and Griffiths JJ.

24 *Polites v Commonwealth* (1945) 70 CLR 60; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582 and *Simsek v MacPhee* (1982) 148 CLR 636. The extensive literature on this topic includes Wendy Lacey, 'The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing' in H Charlesworth, M Chiam, D Hovell and G Williams (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) 82; Stephen Donaghue, 'Balancing Sovereignty and International Law: The Impact of International Law in Australia' (1995) 17 *Adelaide Law Review* 213; Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent

Trends' (1995) 17 *Sydney Law Review* 177 and Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363.

25 See *Minister of State for Immigration & Ethnic Affairs v Teoh* (*Teoh*) (1995) 183 CLR 273, at [25]-[28] per Mason CJ and Deane J. Regarding the capacity of international standards to affect the development of the common law, it may be argued that provisions such as Article 14 of the *ICCPR* also declare or shape *customary* international law obligations such as the notion of a fair trial; hence they can be taken into account in Australian extradition decisions if they are *not inconsistent* with domestic statute law; see Groves note 6 above at [60]. The issue of incorporation of customary international norms and prohibitions in the field of human rights is vexed; see *Nulyarimma v Thompson* [1999] FCA 11; (1999) 165 ALR 421.

26 *Teoh*, ibid, at [17] per Mason CJ and Deane J: 'Ratification of the *ICCPR* as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the *ICCPR* are not incorporated into Australian law *unless and until specific legislation is passed* implementing the provisions.' To similar effect see *Dietrich* note 10 and *Coleman v Power* (2004) 220 CLR 1 at [17]-[21] per Gleeson J: see also [223]-[267] per Kirby J.

27 In *Dietrich* note 10 several members of the Court considered how the *ICCPR* conformed to the common law concept of a fair trial.

28 The argument advanced in this article, however, is that s 11 of the *Act* has achieved a *limited incorporation* by effectively drawing in treaty obligations such as those in the *ICCPR* through the medium of the 'unjust exception'.

29 A wider issue is whether the interpretation of terms in the *Act* such as 'accused' (see definition of 'extraditable person' in s 6) should be considered primarily as a *matter of domestic Australian law* or *according to their international meaning.* That is something that requires separate consideration. French CJ in *Maloney v The Queen* note 20 at [15], for example, discusses the interpretive difficulties that arise where domestic law incorporates criteria drawn from international instruments, the text of which may lack precision and clarity. He referred to Gummow J in *Applicant A v Minister for Immigration and Ethnic* Affairs (1997) 190 CLR 225 at 275. While the issue cannot be sufficiently addressed in this article, the preferable view in light of the High Court's decision *in Minister for Home Affairs of the Commonwealth v Zentai* note 16 above at [65]-[72] per Gummow, Crennan, Kiefel and Bell JJ appears to be that construction of terms such as 'accused' is *essentially a domestic matter*, although capable of being *informed by* the relevant jurisprudence of international tribunals. See also *Minister for Immigration v Haji Ibrahim* (2000); 204 CLR 1 at [136] per Gummow J holding that a treaty should be construed by first giving its terms their ordinary meaning but bearing in mind the Convention as a whole, including its context, object and purpose, citing McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (*Applicant A*) (1997) 190 CLR 225 at 272-275. McHugh J there referred to the interpretive guidelines in Article 31 of the UN *Vienna Convention on the Law of Treaties 1969.* For an ostensibly contrary English approach see the majority in *Assange v The Swedish Prosecution Authority* [2012] UKSC 22 where primacy was given to the *European* rather than British understanding and practice in interpreting the notion of a 'judicial authority' charged with issuing extradition warrants as *not requiring the officer to be independent* of government.

30 *New Zealand v Moloney* [2006] FCAFC 143; (2006) 154 FCR 250 at [38]-[39].

31 The unjust and oppressive test was incorporated in s 18(6) of the *Service and Execution of Process Act 1901* (Cth) based on the *Fugitive Offenders Act 1881* (UK).

32 A similar argument was dismissed by McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [64]-[65]. He rejected a submission that the Constitution should be read contemporaneously in accordance with international instruments even though they had been entered into long after the Constitution had been enacted.

33 (2009) 239 CLR 75 at [58].

34 (2000) 200 CLR 442 at [43].

35 Ibid at [41].

36 Note 30 above.

37 Note 30 at [65]. It may be objected that, as noted by Barker J in *O'Connor v Adamas* (2013) 210 FCR 364 (*Adamas FFC*) at [325] the qualification found in s 34(2) of the *Act* differs in form from the terms in which the 'unjust exception' is expressed in treaties and regulations made under the *Act*. Section 34(2) does not require the Minister to take into account the nature of the offence or the interests of the requesting state. The relevant Article in the Treaty with Indonesia does contain that enlargement. This was seen to be significant in *Adamas HC* note 7 above. Further, s 34(2) of the *Act* contains a mandatory prohibition while the Treaty provision is only discretionary. Against this, it may be said that the core of the 'unjust exception' test in each case is substantively the same.

38 [2011] FCAFC 2; (2011) 274 ALR 509.

39 At [72]. The Court referred to Aughterson, above note 16, 163–164.

40 Note 37 above. The decision of the Full Federal Court was overturned on appeal to the High Court in *Adamas HC* note 7 above but not with respect to this issue of whether the three criteria are separate integers or represent a composite notion with a common core.

41 *Adamas FFC* note 37 at [323]-[331], [335].

42 At [355]; regarding 'incompatible with humanitarian considerations' his Honour referred to Aughterson, above note 16, 171-172; see also *de Bruyn v Minister for Justice* (2004) 143 FCR 162 at [63] per Kiefel J.

43 Note 7 at [18].

44 At [34].

45 To do so does not, it is submitted, entail the kind of error noted by Gordon J in *Sea Shepherd Australia Limited v Commissioner of Taxation* [2013] FCAFC 68; (2013) 212 FCR 252 at [34]. Regarding the interrelationship between the meaning to be attributed to individual words in a phrase in construing and applying that phrase Gordon J identified the task as one of *construing the language of the phrase as a whole in context* rather than selecting the *disaggregated meaning of individual words* divorced from context and then attempting to reassemble a composite provision by combining the dictionary meanings of its component parts (citing *XYZ v Commonwealth* (2006) 227 CLR 532 at [102] and *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389 at 397). The interpretive process proposed by Barker J in *Adamas FFC* does not attempt such an impermissible disaggregation in isolation of context.

46 For example, to subject a person of limited intellectual capacity to complex foreign proceedings in a country recognised as not having a competent judiciary and legal profession and where legal aid is not assured could be regarded as infringing this criterion.

47 There is some ground for concluding that the Department sometimes considers that extradition for trial in a foreign country is sometimes preferable to domestic criminal proceedings due to more flexible fair trial standards in the requesting country. In the case of Mr Zentai considered in *Zentai v Honourable Brendan O'Connor (No 3*) *(Zentai (No 3)* [2010] FCA 691; (2010) 187 FCR 495 the Department in its submission to the Minister, after referring to the advice of the Commonwealth Director of Public Prosecutions that an Australian prosecution for war crime would face difficulty in the absence of living witnesses, advised, at [119] that:

In these circumstances, any potential difficulties that may be identified with prosecuting Zentai in Australia for an offence allegedly committed in Hungary may not be difficulties which arise in Hungary under its different criminal justice system and which would support refusal. (Emphasis added),

Commonwealth, *Extradition - a Review of Australia's Law and Policy*, *Joint Standing Committee on Treaties*, Report No 40, (2001) para 2.13 recognised that one of the potential difficulties in extraditing people between countries is the existence of two distinct systems of law: the common law or 'adversarial' system that originated in England and applies in Commonwealth countries throughout the world, and the civil law or 'inquisitorial' system that developed from Roman law and applies in many European countries and their former colonies.

48 [1999] FCA 362; (1999) FCR 417.

49 Note 37 above.

50 At [336]-[345]. He added at [403] that this required the Court to identify *Australian law and practice* in relation to *in absentia* convictions.

51 In the case of a European matter Article 6 of the *ECHR* relevantly applies.

52 The duty to make enquiries of the requesting country is a vexed issue. In *Zentai (No 3)* note 47 at first instance and in the Full Federal Court on appeal, Mr Zentai, relying on *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992 and *Minister for Immigration & Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 submitted that enquiries should have been directed to Hungarian prosecution authorities regarding whether there were any living witnesses to give evidence at his trial, otherwise extradition would be unreasonable. The Court in each instance held there was no obligation. See further *O'Connor v Zentai* [2011] FCAFC 102; (2011) 195 FCR 515 at note 72 below.

53 Note 48.

54 *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266.

55 Note 30 above.

56 At [74]-[128].

57 [2012] FCAFC 133. In *Newman* at [22] the Full Federal Court queried whether the approach in *Moloney*, note 30 was consistent with the views expressed by Gummow and Hayne J in *Foster*. It is submitted that even if it was inconsistent, the view of Barker J in *Adamas FFC* note 37 above sums up the current situation.

58 Note 30, [26]-[28]; [40]-[44].

59 Note 38.

60 Ibid at [127]-[136].

61 It may be argued to the contrary that paragraph 3(a) of Article 14 of the *ICCPR*, requiring persons to be informed in detail of the nature of the charges against them could provide guidance in relation to the cases dealing with representative charges above; and that paragraph 3(c) requiring the person be tried without undue delay might inform cases in which there were large time gaps between the alleged conduct and the institution of charges (although the provision seems to be primarily concerned with ensuring *promptness of trial* after arrest rather *than lapse of time* issues).

62 Note 47.

63 A separate issue was raised in the course of the litigation concerning Mr Zentai: whether a person merely *wanted for interrogation*, as against *for trial* and possible conviction, could be said, as a jurisdictional fact, to be 'accused' and hence an 'extraditable person' within the meaning of s 5 of the *Act*. The distinction was drawn by Gummow J in *Kainhofer* note 12, 185 CLR 528, at [88] between proceedings which are 'merely *investigativ*e or *preliminary*' in contrast to those where 'one can suspect a person in a manner which is the product of a more advanced state of affairs, in particular, *accusation by the laying of charges*' (emphasis added). McKerracher J on this ground held that Zentai was not liable to extradition. The Full Federal Court reversed his decision on this aspect, holding that the issue of whether he was an 'extraditable person'

ceased to be relevant once the magistrate had made a decision under s 19 of the *Act* that he was 'eligible' for extradition. This aspect was not pursued on appeal to the High Court. Similar issues regarding whether a person mistakenly identified can be an 'extraditable person' for the purposes of the *Act* were raised in *Marku v Minister for Home Affairs (No 2)* [2013] FCA 1015 (Gordon J) and *Marku v Republic of Albania* [2013] FCAFC 51 but were rejected on jurisdictional grounds on the basis of *Kainhofer.* The issue in that case could still reach the High Court via s 39B *Judiciary Act* proceedings challenging the Minister's ultimate decision. Whether a person can be said to be '*accused*' if only wanted for interrogation remains a live issue. It was raised by Julian Assange in English proceedings resisting his extradition to Sweden for *questioning* about sexual offences. It is apparently a contention that may be raised in relation to the request for extradition to Peru of six Australians alleged to have been implicated in the killing of a hotel employee in Lima. In cases of this sort, given modern electronic media such as video conferencing, or interrogation *in situ*, questions of the unreasonableness of extraditing merely to be questioned can be posed.

64 The offence of 'war crime' in Hungarian statutory criminal law was created retrospectively in 1945 after the relevant events were alleged to have occurred. In *Minister for Home Affairs v Zentai* note 16 above the High Court upheld the decisions of the judge at first instance and the Full Federal Court majority that the respondent was not liable to be extradited for the offence of 'war crime' as it did not exist as a Hungarian offence in November 1944. This was due to a bar upon retrospective offences in Article 3(2) of the *Extradition Treaty between Australia and Hungary 1995*. Significantly the prohibition in Article 3(2) did not contain the usual exception in the case of war crimes or crimes against humanity as established in international law, usually provided in instruments like the *ICCPR*, Article 15. The evolution of the international concept of war crimes is discussed in *SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 42; 147 FCR 1 (Merkel, Finkelstein and Weinberg JJ); see Peter Johnston and Claire Harris, 'SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs: War Crimes and the Refugee Convention - Case Note' (2007) 8 *Melbourne Journal of International Law* 104. Regarding the effect of retrospectivity in Australian law see *Polyukhovich v Commonwealth* (*War Crimes* Case) [1991] HCA 32; (1991) 172 CLR 501. The High Court did not find it necessary to determine issues of retrospectivity in *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20; see also Suri Ratnapala, 'Reason and Reach of the Objection to Ex Post Facto Law' (2007) 1 *The Indian Journal of Constitutional Law* 140. Retrospectivity was not a bar to prosecution for war crimes in Canada given the way the offence was framed in Canadian criminal law: see *R v Finta* (1994) 1 SCR 701.

65 The unredacted version of the Departmental submission to the Minister revealed that on advice from the Commonwealth DPP the Australian Federal Police decided in the absence of living witnesses not to proceed to a war crimes prosecution in Australia; see *Zentai (No 3)* note 47 above at [234]-[238] per McKerracher J.

66 This could be conducted either by investigating Hungarian police or prosecution officers in Australia or by video interview under international mutual assistance arrangements.

67 Mr Zentai relied on *Minister for Immigration v Eshetu* (1999) 197 CLR 611, at 626 [40]-[44] per Gleeson CJ and McHugh J and at [124]–[126] per Gummow J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 at [82] per McHugh, Gummow and Hayne JJ, and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

68 This contention was founded on *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, (2009) 83 ALJR 1123 at [19]–[25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273 at 321per McHugh J; *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32, (2004) 78 ALJR 992 and *Minister for Immigration & Citizenship v SZGUR* (2011) 241 CLR 594, that in a significant matter, Commonwealth decision-makers were obliged to make enquiries about matters that could be readily ascertained and which were central to the subject matter of the decision.

69 Within the meaning of Article 3(2)(f) of the *Extradition Treaty between Australia and the Republic of Hungary 1995*.

70 See note 49 above.

71 *Zentai (No 3)* note 47 above at [260]-[291]. There the applicant argued that comity should not preclude making further enquiries about issues central to whether a person will receive a fair trial in the requesting country. The contrary view expressed by McKerracher J seems to be inconsistent with that taken by the Full Court in *Habib v Commonwealth* [2010] FCAFC 12; (2009) 175 FCR 411 per Black CJ at [6]-[12]; Perram J at [23]-[37] and [46] and Jagot J at [51]-[56] and [72]-[135]). There the Court rejected an argument that comity and the 'act of state' doctrine precluded making embarrassing enquiries of the conduct of officials of the foreign state.

72 *O'Connor v Zentai* [2011] FCAFC 102; (2011) 195 FCR 515.

73 Ibid, at [192]-[197] per Jessup J with whom North and Besanko agreed.

74 The same tribunal before which Mr Zentai would have been interrogated if extradited. Its presiding judicial officer, Brigadier General Dr Bela Varga, exhibiting his independence from Hungarian prosecuting authorities, had earlier provided representatives of Mr Zentai in Hungary with a statement (accepted as correct by the Hungarian Government) that his extradition was sought *only for the purpose of preliminary investigation* regarding his involvement in the alleged war crime and he was *not charged* with any offence; see *Zentai (No 3)* note 47 above at [129] per McKerracher J.

75 The testimony of a Lt Nagy was claimed to be unreliable and needing to be tested in cross-examination because it had arguably been obtained under the notorious customary torture administered during interrogation by the pro-Russian political police. This was similar to allegations made about one of the convicted officers (remarkably also called Nagy) in the *Zentai* proceedings.
76 On the other hand there were concerns that a six year delay in prosecuting Kepiro violated his right to a fair trial under Article 6 *ECHR*. This was not upheld.
77 Barker J in *Adamas FFC* note 37 at [344] accepted that the consequences of sending an eligible person to the requesting country, including what is likely to happen once *in situ*, could be taken into account in assessing injustice.
78 Note 7.
79 [2012] FCA 227; (2012) 291 ALR 77 at 91-95, [81]-99].
80 Taking a broad view of the composite criteria in the 'unjust exception' and referring to *Binge v Bennett* (1988) 13 NSWLR 578.
81 As well, the respondent contended that the Indonesian conviction in his absence prevented him exercising his right to examine prosecution witnesses, contrary to Article 14(3)(e). This did not figure in the result.
82 See *Adamas FFC* note 37 above at [448]-[478] per Barker J.
83 Extensive redaction is one of the factors that can render judicial review of such decisions practically ineffective.
84 At [25].
85 See High Court passage quoted at note 44 above.
86 At [29].
87 At [35].
88 At [36].
89 The almost insurmountable difficulties of mounting a challenge to Ministers' extradition determinations where no reasons are given and inferences are left to be made almost wholly on the basis of departmental submissions will be addressed in the second part of this article to be published in a subsequent number of the AIAL Forum.
90 This did not seem to deter the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 (the 'Malaysian Solution' case).
91 The notion of unreasonableness may also elide into jurisdictional error where a decision lacks a reasoned basis.
92 See Peter Johnston, 'Proportionality in Administrative Law: *Wunderkind* or Problem Child? (1996) 26 *University of Western Australia Law Review* 138; Geoff Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 *Melbourne University Law Review* 543 and John Basten, 'Judicial Review under Section 75(v)' [2011] *University of New South Wales Faculty of Law Research Series* 56. For an English view see Sir Phillip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223 discussing the possibility of replacing *Wednesbury* unreasonableness with proportionality in UK public law (admittedly in the context of cases concerning the *Human Rights Act 1998* (UK)).
93 [2013] HCA 18; (2013) 87 ALJR 618, at [23] per French CJ and [63[-[78] per Hayne, Kiefel and Bell JJ. The role of proportionality was also extensively considered in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 87 ALJR 289. That was in the context of the constitutional validity of municipal by-laws and not discretionary executive powers; it was discussed without reference to international conceptions of proportionality.
94 Arguably *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 laid the foundation in Canada for a duty of reasonableness owed by public officials in their discretionary determinations; see Lorne Sossin, 'Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law' (2003) 66 *Saskatchewan Law Review* 129 and Lorne Sossin, 'Administrative Justice in an Interconnected World' (2013) 74 *AIAL Forum* 24. Since *Baker,* Canadian administrative law has developed principles of reasonableness review, parallel with a notion of correctness review, which diverge from the classical Australian model: see *Dunsmuir v New Brunswick (Board of Management)* [2008] SCC 9; [2008] 1 SCR 190. In a flurry of recent cases, *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)* 2012 SCC 10, [2010] 1 SCR 364; *Nor-Man Regional Health Authority v Manitoba Association of Health Care Professionals* 2011 SCC 59, [2011] 3 SCR 616; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, [2011] 3 SCR 654 and *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 the Canadian Supreme Court seem to have arrested this development and allowed greater scope for judicial deference to administrative expertise. There may be room for convergence between the Canadian approach and that adopted recently by the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18, embracing a standard of *legal reasonableness* applicable to failures in the exercise of discretion; see [22]-[30] per French CJ discussing the relationship between reasonableness and irrationality; [63]-[76] per Hayne, Kiefel and Bell JJ; c.f. Gageler J at [107]-[113] adhering to the *Wednesbury* standard.
95 In the case of *Zentai* the fact that Hungary was a party to the *ECHR* arguably introduced an element of *proportionality* according to European notions. Could a failure to comply with Article 6 because of inability to produce key prosecution witnesses be offset by a need to pursue World War II war crimes before the perpetrators are all dead, giving greater leeway to admitting documentary hearsay testimony? Could the request by Hungary to interrogate Mr Zentai be proportionately satisfied by the alternative of an interview in

Australia, given his age, health and infirmity? In *Leask v Commonwealth* (1996) 187 CLR 579 various members discussed the European concept of proportionality holding that it had no application to questions of *constitutional* validity of Commonwealth laws but not foreclosing its application in administrative law.

96 In *AB v Minister for Immigration and Citizenship* [2007] FCA 910 at [27] Tracey J observed that Australia's *unenacted* international treaty obligations relating to refoulement of persons within the jurisdiction are matters to which decision-makers are entitled, but *not bound*, to have regard when exercising powers under s 501 of the *Migration Act 1958* (Cth). In the absence of legislative requirement they are not bound to do so. If they do not bring them into account as part of the decision-making process no jurisdictional error will therefore occur. If they choose to have regard to treaty obligations but, in some way misunderstand the full extent or purport of the obligations, this will not constitute jurisdictional error. If, however, as this article contends Article 14 of the *ICCPR*, by reason of s 11 of the *Extradition Act*, is enacted with statutory the opposite result arguably follows.

97 The analogy here is drawn with 'real chance' under the *Refugee Convention 1950*: see *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379.

98 Roda Mushkat, '"Fair Trial" as a Precondition to Rendition: An International Legal Perspective' Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, Occasional Paper No 5 (July 2002).

99 In *Soering v United Kingdom*, ECtHR, 1989 the European Court held that the fact or even the risk that an actual human rights violation would take place outside the territory of the requested state does not absolve that state from responsibility for any foreseeable consequence of extradition suffered beyond its jurisdiction. See also the ruling of the UN Human Rights Committee in *Ng v Canada* [(1993) 98 ILR 479. In *Regina v Secretary of State for the Home Department; ex parte Bagdanavicius* [2005] UKHL 38 the House of Lords in considering *Soering* recognised that the expulsion of a person by a state party to the *ECHR* (read also the *ICCPR*) may engage the responsibility of that state under the Convention where substantial grounds exist for believing that the person in question, if expelled, would face a real risk of being subjected in the receiving country to treatment contrary to a provision of the Convention.

100 See *Zentai (No 3)*, note 52 above, McKerracher J at [261]-[291] finding that it was not open on the materials before the Minister to infer that he failed to seriously consider the fair trial question; affirmed on appeal *O'Connor v Zentai*, note 72 above, see [291] per Jessup J finding similarly that it was not open to infer that he failed to seriously consider the fair trial question. Regarding *Adamas FFC* note 37 above, see Barker J at [445]-[479]. *Soering* was specifically mentioned in *Adamas*.

101 Note 8 above at [53]-[53]. Her Honour held that the relevant articles of the Geneva Conventions regarding prisoners of war were not mandatory relevant considerations and could not found jurisdictional error, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [101], as Australia's international obligations did not condition the lawful exercise of the statutory power under s 22(2) of the *Act*. No consideration appears to have been given to whether the Conventions engaged specific treaty requirements of justice and fairness.

102 Note 47.

103 Note 37.

104 Note 7.

105 This assumes that the decision is transparent as to the Minister's reasoning. If 'submerged' by a countervailing exercise of the Minister's general discretion under s 22 of the *Act* not to refuse the matter is probably immune from review.

THE IMPACT OF TECHNOLOGY ON REFUSAL DECISIONS ABOUT 'VOLUMINOUS' FOI REQUESTS IN AUSTRALIA AND OTHER JURISDICTIONS

Mick Batskos*

I will begin by quoting a passage from the blog of a FOI practitioner from the UK, Mr Paul Gibbons, otherwise known as FOI Man. He raises a very interesting question about what may *very loosely* be called 'voluminous requests':[1]

> If you've ever watched Monty Python and the Holy Grail, you'll recall King Arthur's encounter with the Black Knight. The knight challenges him to combat. They battle. Arthur chops his arm off and claiming victory, makes to leave. But the knight, in denial of all sense (yes, I know it's a comedy, but bear with me on this), won't accept defeat and insists that Arthur keep fighting. No matter how many limbs Arthur lops off, the knight is insistent that the conflict continue. Eventually Arthur walks off whilst the knight, now literally without a leg to stand on, continues to shout after him.
>
> But when you're providing a public service and legally obliged to respond to [FOI requests], you can't just walk off. Or can you?

Some would say that, subject to at least some degree of consultation with applicants, the 'voluminous' request provisions in Freedom of Information/Right to Information (FOI/RTI) legislation have that precise effect. They enable an agency to just walk off when processing will all be much too hard…….or do they?

In this paper, I address the following points:

- What is a 'voluminous' request and does it actually have to be 'voluminous' before you can refuse to process a request? I propose a change in terminology. If you fail to adopt my suggestion, then consistent with the earlier Monty Python reference, it will result in you being put in the *comfy chair* and poked with the *soft cushions*.[2]
- I consider the question of whether the development of technology[3] has had an impact on decisions to refuse access to documents on the basis of an unreasonable diversion of resources. The position in various Australian jurisdictions is considered first.
- Comparable provisions, cases and other materials in some overseas jurisdictions are considered and some overall conclusions are drawn.

'Voluminous' requests misnomer

The title of the paper is about the impact of technology in Australia and other jurisdictions on decisions about 'voluminous' FOI requests. The word 'voluminous' is placed in inverted commas intentionally. This is because I wish to highlight and address it specifically as a preliminary matter before considering the main thesis of my paper.

The reference to 'voluminous' requests is often used by FOI practitioners. By FOI practitioners I mean FOI officers, managers of FOI officers, legal advisers, information commissioners, ombudsmen, tribunals and courts. The term 'voluminous' requests has crept into the jargon and firmly established itself in the glossary of language used by FOI

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practitioners. Many see it as a convenient, shorthand expression to describe one of the bases on which a request for access may be declined.

I see it as a dangerous misnomer which misrepresents the true nature of the tests to be applied in each jurisdiction. The provisions in question are *not* based on volume, but rather on the effect that processing a request for access would have on resources of an agency, its ability to carry out its day to day functions, or other similar impediments.

Relevant legislative provisions

The nature of the tests in the relevant legislative provisions in Australia varies slightly from jurisdiction to jurisdiction and has varied within some jurisdictions over time.[4]

An agency can refuse access in the following circumstances:

- 'the work involved in giving access to all the documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations…'
- 'the work involved in processing the request… would substantially and unreasonably divert the resources of the agency from its other operations'.
- 'work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions'.
- 'dealing with the application would require an unreasonable and substantial diversion of the agency's resources.'
- 'the work involved in dealing with the application … would, if carried out … substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions'.
- 'the work involved in providing the information requested … would substantially and unreasonably divert the resources of the public authority from its other work'.
- 'the work involved in dealing with it within the period allowed … or within any reasonable extension of that period … would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions'.
- 'the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations'.
- 'providing access would unreasonably interfere with the operations of the organisation.'

How did the term 'voluminous' request come into being?

There is no certainty as to how the term 'voluminous' request came into being. At best, it is possible to hypothesise based on the historical introduction and development of such provisions in legislation in Australia. That legislative history has contributed to the term 'voluminous' being adopted as a shorthand expression of the types of requests captured by these provisions and the nature of this basis for refusing access.

When the *Freedom of Information Act 1982* (Cth) (*FOI Act*) was being introduced in the House of Representatives, during the second reading speech on the Bill, the Minister introducing the Bill stated generally in relation to the Bill (presumably in relation to what became s 24 of the *FOI Act*):

> Secondly, a number of the provisions have regard to the resource implications of requests, **particularly requests which would involve searching for and collating a large number of documents**, by empowering an agency to refuse a request if the work involved would substantially interfere with its other operations.[5] (emphasis added)

When s 24(1) of the *FOI Act* was enacted, it provided:

> Where –
>
> - a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter; and
> - the agency or Minister dealing with the request is satisfied that, apart from this sub-section, the work involved in giving access to all the documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations or would interfere substantially and unreasonably with the performance by the Minister of his functions, as the case may be, **having regard to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency** or of the office of the Minister, the agency or Minister may refuse to grant access to the documents in accordance with the request without having caused those processes to be undertaken. (emphasis added)

Cases considering this provision in that form began to explain what decision makers were required to turn their minds to by referring to the requirement of 'having regard to the number and volume of the documents' as 'are they voluminous?'[6]

In 1991, s 24 of the *FOI Act* was repealed and replaced with a new s 24(1) which included the following:

> The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request:
>
> (a) in the case of an agency – would substantially and unreasonably divert the resources of the agency from its other operations; or…'

Even after the introduction of this new provision, which removed the limited consideration of only the number and volume of documents and difficulty in locating the documents, the shorthand description of 'voluminous' requests remained in the jargon in the practice of FOI and the decided cases, albeit less often.[7]

Similarly, when the same provision was introduced in Victoria in 1993, the Victorian Attorney-General stated in her Second Reading Speech:

> **Voluminous requests** have caused serious problems in the administration of freedom information since its inception. Evidence given to the Legal and Constitutional Committee in its 38th report to Parliament suggest that although the number of **voluminous requests** was relatively small it nevertheless caused severe disruption to agencies. At present there is no provision in the Act to refuse to process the request on the grounds that it would unreasonably and substantially divert the agency's resources.[8] (emphasis added)

In many Australian jurisdictions, the term 'voluminous' has over the years remained an inherent part of the description of requests to which these types of provisions apply;[9] this includes when referring to the amount of stored electronic data or information.[10] The term 'voluminous request' can also be found in the catchwords of decided cases[11] and has even crept into the language of the Victorian Court of Appeal.[12]

Even under the current Australian Information Commissioner review regime, the term 'voluminous' request appears to be part of the jargon in referring to requests resulting in thousands of pages of material being released as 'voluminous requests'.[13] Although, in

fairness, recent decisions under ss 24, 24AA and 24AB of the *FOI Act* by the Australian Information Commissioner have so far steered clear of such references.[14]

To this day, if you speak to FOI practitioners about requests or applications for access possibly falling within these provisions, they will almost always use the term 'voluminous' request when referring to them.

At my insistence, our firm has, for a number of years, refused to refer to such requests in those terms and refers to them instead as 'unreasonable diversion requests'. Although not a fully accurate summary of the true test to be considered and applied, this label focuses on the effect that processing would have on the resources of an agency, and not on the more arbitrary and narrow notion of sheer volume of documents.

This view has now been recognised to a degree in the practice notes published by the Victorian Department of Justice. Practice Note 6 is entitled *'Voluminous' Requests for Access* and states the following in answer to the question, 'what is a 'voluminous' request?':

> There is no actual mention in the Freedom of Information Act 1982 (FOI Act) of a 'voluminous' request. The term was used in the second reading speech to the Bill which introduced s 25A into the Act in 1993 and has developed over time as a shorthand expression to cover the circumstances where an agency may refuse to process a valid request for access on certain grounds in section 25A. Those circumstances are not confined to sheer volume so the term 'voluminous request' is not strictly accurate and can be misleading.[15]

I encourage all those reading this paper to similarly adopt the language of 'unreasonable diversion requests' when referring to those requests which might fall within the provisions which are the subject of the paper. That way it will help avoiding the unconscious mental trap of focussing improperly on sheer volume of documents rather than the need to focus on the impact processing a request for access would have on the agency's resources.

Impact of technology in Australian cases

Whether requests seek access to hard copy documents or electronically stored information, the principles to be applied are the same.[16]

Particular difficulties created by computerised records were recognised by Deputy President Forgie in the Administrative Appeals Tribunal case of *Langer v Telstra Corporation Ltd*[17] where, after referring to decided cases on the unreasonable diversion provisions, she noted:

> While these considerations remain relevant, electronic storage of e-mails and other computerised records brings with it another set of difficulties. Issues relating to location and retrieval, for instance, require consideration not only in terms of the workload of staff not having experience with the subject matter of the request but in terms of the workload of staff having expertise in the retrieval of computerised records where the officer creating the records is no longer available, or is unable, to retrieve them from his or her computer. The need to consider skilled staff arises from the nature of the medium. Unlike paper files (perhaps with the exception of older archived materials that are more likely to be considered under the Archives Act) that may be located and handled by staff with no special expertise, computer records that are stored and not retrievable simply by searching the files on a particular computer require particular skills.[18]

In my view those comments made by Deputy President Forgie remain valid even though more than 10 years have passed since they were made. The difficulties associated with location and retrieval of electronic documents have been illustrated in subsequent cases.

Backed up emails

In *Re Ford and Child Support Registrar*[19], the Tribunal accepted the evidence that if the search described was required, it would have been a substantial and unreasonable diversion

of resources. In that case the applicant sought, among other things, all emails and other correspondence which referred to the applicant. The evidence was that:

- 77 back up tapes from Melbourne and Perth registries which contained 8,250 GB of information would have to be quarantined and searched.
- the search would require three staff of a particular level of seniority full time for 6 months to examine individual documents.
- it would require further infrastructure and hardware at a cost of over $500,000 (there is no obligation on an agency to expend its funds in obtaining additional equipment in order to satisfy a request for access).[20]

A recent illustration of the problem or difficulty with backups is the case of *The Age Company Pty Ltd v CenITex*.[21] It involved two requests for access made by *The Age* from CenITex.

CenITex is the Victorian Government's Centre for Information Technology Excellence. It was created in 2008 and delivers information and communications technology, infrastructure, application hosting and desktop services to the public sector. As part of its functions, CenITex builds and operates ICT infrastructure for the whole of the Victorian Government. That includes desktop services, internet access services, email and diary services, and backup, storage and disaster recovery services. Its clients are each of the Departments of State and two other statutory authorities.

The requests for access from *The Age* sought many different categories of documents including, most importantly for present purposes:

- for a 21 month period from 1 January 2010, *emails*, letters, memos or summaries of complaints received by CenITex about its contractors and/or contract staff made externally by other departments or within by CenITex VPS staff;
- reports, summaries, briefs, *emails* or memos from the beginning of 2010 for a 22 month period, containing customer feedback results on CenITex services.

There was extensive evidence from CenITex on the difficulties that would be encountered in processing the requests and, in particular, just in retrieving and perusing the emails to determine what was relevant or not.

The Tribunal found in favour of CenITex and accepted that the decision to refuse access on the basis that processing the request would substantially and unreasonably divert the resources of CenITex from its other operations was the correct and preferable decision on the evidence. It accepted that:

- the requests were for an extensive time period (up to 33 months);
- the terms of the request were very broad;
- CenITex would need to go through virtually every email to ascertain whether the email contained a complaint or feedback in order to comply with the obligation to take all reasonable steps to identify all relevant documents. It accepted that this would involve in excess of 1 million emails;
- the location of the documents meant that they would need to be retrieved from an external source;
- the way in which the documents were stored meant that they would need to be recovered from magnetic back up tapes.[22] The emails would then have to be processed on a server and that it would be a time consuming and labour intensive process. The time in restoring and examining the documents would be great;

- the identification, location and collation of the documents requested would be arduous. The checking of the backups would then be substantial and would take many months. The processing of the requests would run into many months rather than weeks;
- the time lines for compliance with a request was another indication of what a reasonable amount of time is to process a request. The Tribunal accepted that the request in this case would fall well out-side the parameters of the legislation. It would not be possible for CenITex to comply with the request within 45 days; and
- *The Age* had not taken advantage of the invitation to consult to narrow the request. The Tribunal commented that the refusal by *The Age* to co-operate and limit the terms of the request had not assisted.

For another example where searching backup tapes supported that conclusion that disclosure would substantially and unreasonably divert resources of an agency from the performance of its functions is the Queensland case of *Re Seal and Queensland Police Service*.[23] In that case, the Office of the Information Commissioner determined that part of a request was appropriately refused on this basis. The evidence which was accepted by the Assistant Information Commissioner was that to load and search the backup tapes for the required period before 30 September 2002 back to 1997 would take at least 10 working weeks, which would involve the use of considerable resources.[24]

A similar approach was taken in the case of *Smeaton v Victorian Workcover Authority*.[25] This is one of many cases involving the same parties over a number of years. In that case the applicant had read a previously released email which suggested to him the possibility that there was a further document attached to an email. Based on previous searches conducted by the respondent agency in satisfying requests for access made by the applicant, he formed the view that the only place left to search was the entire WorkCover email database and that the request was a 'voluminous' one. The Tribunal accepted the evidence that:

- to establish whether any documents as requested existed in the respondent's email system require research across the entire Victorian Workcover Authority mail domain. It would require research of the current/live email boxes of current contractors and employees and restoring the archives of past employees (and contractors) so they also may be searched. The search would have to be done at the individual mailbox level.
- the search involved searching each of the individual mailboxes of all VWA personnel over the period 20 months from 1 May 2005 (the start of the referral to KPMG) to 31 December 2006. About 1,200 employees and contractors of the respondent have email inboxes. There is also an unknown number of staff and contractors who have email boxes that have been closed.
- on a conservative estimate, assuming as a minimum it took one hour to consider each existing email box for a period of 20 months, this alone would take 1200 hours.
- the IT contractors were not willing to provide a quote as they thought the job unrealistic.

The Tribunal affirmed the respondent agency decision stating that the correct and preferable decision in this proceeding was obvious.[26]

Amount of information

Some cases have recognised that the existence of large amounts of electronically stored potentially relevant documents is a significant contributing factor to a decision to refuse access on the basis of a substantial and unreasonable diversion of resources.

In *Re Conservation Council of Western Australia Inc and Department of Conservation and Land Management*[27] the applicant sought extensive electronically stored data relating to

calculation of sustainable yields of jarrah forests. An amended request sought, among other things, a list of all jarrah datasets used in the forest management plan and even the *computer program* which runs a particular model from the datasets. The WA Information Commissioner accepted that with the large amount of data, and accessibility issues, an estimate of 240 hours to process the request was not an unreasonable estimate and justified a decision to refuse access on the unreasonable diversion basis.

Another example is *Re Sideris and City of Joondalup*.[28] In that case, in addition to some 500 hard copy documents, there were about 1,000 electronically stored documents comprising approximately 2,000 pages. It was estimated that it would take 65 working days to properly process the request and make a decision. The WA Information Commissioner accepted that the decision to refuse access on the unreasonable diversion basis was correct and affirmed it.

The fact that technology allows recording and storage of a large amount of information, even in relation to a discrete and separate topic, even in a wholly separate database, can also be detrimental if applicants do not submit reasonable requests. For example, in the New South Wales case of *Oliveri v NSW Police Force*,[29] the applicant sought access to the complete and entire case file from the Eaglei police database for a particular operation known as Operation Burkitt. The evidence submitted was that:

- the database was used to capture every single document created as part of the investigation in Operation Burkitt, investigation logs, emails, reports, and administrative and budgetary documents.
- only one very senior officer had access to all documents.
- the Operation ran for about 12 months with up to 30 different officers deployed, 6 of whom were allocated on a full-time basis.
- there were thousands of documents estimated to exist comprising many thousands of pages.
- it would take nearly a month for the officer with full access to print off all relevant documents and a further two weeks time to review and edit the documents.

The Tribunal accepted the evidence and found that processing would have been a 'massive task'. It even concluded that the estimate of time required to process was likely underestimated. It found that processing would constitute a substantial and unreasonable diversion of the agency's resources.

The use and proliferation of email as a means of communication can add a further layer of difficulty. How emails are used, their frequency, and the propensity of people to 'copy in' multiple individuals can also result in massive duplication of documents. That duplication 'does not reduce the task of identifying or sorting them'.[30] It can result in exponential growth in relevant documents having to be waded through, as some individuals forward email chains on to others creating further branches or tracks which need to be pursued during the search process in order to satisfy the search obligation of agencies.

In another *Smeaton*[31] case, the sheer number of emails generated about the subject matter meant that the decision to refuse access on this basis was accepted, not because of the difficulty in locating the documents (and getting a hard copy), but the time taken to deal with over 1,000 pages of material in all the circumstances.

Similarly, but not directly related to a decision to refuse access on the basis of an unreasonable diversion request, it is possible for there to be such 'voluminous' material within electronic sources such as CDs and DVDs which would make the editing of exempt material not practicable and therefore, not required.[32]

Type of technological development

The extent to which technology can impact on a decision to refuse access on the unreasonable diversion basis can depend on the nature of the technological development and the quality of the information stored. For example, in another *Smeaton* case,[33] the existence of an electronic archive index made it possible for the respondent to easily identify that it would need to search 80 archived boxes of documents which might contain relevant documents. There still had to be an estimate of the number of documents and time and effort required for those boxes to be physically searched.

In another case, the fact that the diary of the Prime Minister was kept electronically meant that some processing activities would take *less time*:

> …identifying, locating and collating the documents requested, bearing in mind that the diaries are maintained in an electronic format. Copying and editing should also take only a small amount of time.[34]

Similarly, in the ACT case of *Coe and Chief Minister's Department*[35] the ability to conduct an electronic search of files proved to be of assistance in being able to identify 143 files that would need to be searched to find relevant documents. Those files were identified by dong a search of files at ACT Record Services, an agency of the Department of Urban Services which had the function of archiving and storing all ACT government files. The search was done using particular search terms and related to a request about native title related documents. The Tribunal relied on, among other things, the fact that *there was no suggestion that there would be any difficulty in identifying what documents fell within the request*. However, it is important to note that the statutory test under the ACT FOI Act permitted consideration only of the number and volume of the documents and to any difficulty that would exist in locating or collating relevant documents in the agency filing system.[36]

The development in *technology used to process requests* has also been a contributing factor to decisions to refuse access on the basis that processing would substantially and unreasonably divert the resources of an agency from performing its functions. This is a reference to scanning hard copy documents for the purposes of facilitating the editing or redacting function. This is well illustrated in the Queensland case of *Re Middleton and Building Services Authority*.[37] Although it was not necessarily the determining factor, it was a significant contributor to the decision that the Right to Information Commissioner accepted the following relevant evidence:[38]

- a number of the relevant documents were created prior to June 2008 and are not available electronically; once they were located they would need to be scanned into the Authority's database *for further editing*.
- it takes administrative staff 2.5 hours to prepare and scan 600 documents (it was conservatively estimated that the application would involve processing between 2,500 and 3,000 documents).

The legitimacy of considering the time spent scanning documents has been explained by the Right to Information Commissioner in Queensland as follows:

> the action of 'scanning' documents can in my view be seen as a facet of the act of 'collation'.[39]

Similarly, the capacity for technological advancements to assist the search process may depend to a large extent on what information is stored *and whether or how it may be searched for*. For example for some older stored documents, systems might assist in

searching to identify relevant or potentially relevant *files*, but might not necessarily help to identify *actual documents*.[40] Further, documents might not be stored in a way that permits full text searching, but rather may only permit key words searches used to describe the documents when they were created or stored. As technology progresses, better search capabilities are being developed which may ease this problem.

Not just technology

The fact that documents may be stored electronically will *not necessarily alone* be the reason for a request for access to be refused on the basis that processing would substantially and unreasonably divert resources,[41] but may be a significant contributing factor overall.

This was illustrated in a recent case before the Australian Information Commissioner. In *Davies and Department of the Prime Minister and Cabinet*,[42] the applicant, a journalist with the Sydney Morning Herald, made requests seeking for various periods a copy of the diaries of Prime Minister Gillard and former Prime Minister Rudd. These were maintained as an electronic diary in standard calendar format, with a list of appointments and reminders entered against time slots. There was a mixture of official, party and personal engagements. They were no different to the electronic diaries that many people maintain.[43]

In total there were some 2,000 entries in the diaries. That fact alone was not the cause of the decision to find that a practical refusal reason existed in respect of each of the two requests. The other evidence about the *extensive amount of time and effort that would be required to process each of the entries* was what led the Commissioner to find that a practical refusal reason existed.

It should be noted that different outcomes can result depending on the particular request and the facts of a particular case. This is conveniently illustrated by another case determined by the Australian Information Commissioner on the same day as *Davies*, namely, *Fletcher and Prime Minister of Australia*.[44] The request was for extracts from the diary for a whole year, but only in relation to scheduled meetings between the Prime Minister and one or more of 6 nominated MPs. The time and effort involved in processing the request was considered to be *significantly less* so as to not give rise to a practical refusal reason to not process the request.

Quite ironically, there have even been cases where decisions to refuse on the basis of a substantial and unreasonable diversion of resources have been applied to documents relating to the development of technology.[45]

Impact of technology in overseas cases

After considering what has happened across the various Australian jurisdictions, it is of interest to examine whether similar experiences have occurred in some overseas jurisdictions that may have equivalent provisions.

United Kingdom

In some instances, similar provisions do not necessarily exist in FOI or RTI legislation but in legislation that is subject specific, such as that relating to environmental information.

In the United Kingdom, the *Environmental Information Regulations 2004* (EIR) import the enforcement provisions of the *Freedom of Information Act 2000* (UK). Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that a request for access is 'manifestly unreasonable'. That term is not defined. However, the

UK Information Commissioner considers that a request may be deemed manifestly unreasonable where, among other things, *complying with the request would be an unreasonable diversion of resources*.[46] There must be an obvious, clear or self-evident quality to the unreasonableness.[47]

In the case of *Re Queens University Belfast*,[48] the applicant sought tree ring dating data from the University. The University was one of the world's leading centres for tree ring dating research. The request was for data stored electronically about some 11,000 individual tree samples. The data was stored on 67 floppy discs which contained 150 folders of relevant data. The UK Information Commissioner established that it took on average about 5 minutes to transfer data folder to data folder using the Notepad program. Therefore, it would only take 12.5 hours to transfer all the data and make a copy. The fact that the data might be meaningless or could not be put to any meaningful purpose was irrelevant. The Commissioner concluded that the request was *not* manifestly unreasonable.[49]

There is an EU Directive from which the EIR originate.[50] An implementation guide to a relevant UN convention which refers to the 'manifestly unreasonable' test provides that there must be more than volume and complexity, as those things alone do not make the request manifestly unreasonable.[51]

Perhaps strangely, the Information Commissioner has found that under the EIR an agency would not be able to take into account the time it took to redact certain information in establishing the reasonableness of a request.[52]

Recent jurisprudential developments referred to later show that these provisions are almost indistinguishable from UK *FOI Act* provisions and that both are quite close to the Australian provisions.

UK FOI Act

The Australian jurisdictions focus on the impact that processing a request for access would have on the resources of an agency. The UK *Freedom of Information Act 2000* (*FOI Act*) appears at first glance to be quite different. It does not have a similarly worded provision, but rather two separate provisions which provide separate but related bases on which a request for access may be refused without processing.

Section 12

The first focuses on the cost of complying with a request for access. Section 12 of the UK Act exempts a public authority from the obligation to provide information if the cost of complying with the request would exceed an appropriate limit. The appropriate limit and how it is to be calculated is set out in relevant regulations.[53] The relevant regulations make it clear that in estimating the cost of complying with the request, the public authority may only take into account costs reasonably expected to be incurred in:

(a) determining whether it holds the information;
(b) locating the information, or a document which may contain the information;
(c) retrieving the information, or a document which may contain the information; and
(d) extracting the information from a document containing it.

To the extent that the cost of doing those things involves estimating time which persons undertaking those activities are expected to spend on those activities, the cost is to be estimated at £25 per person per hour. The appropriate limits are £600 for central government public authorities (such as Departments) and £450 for most other public

authorities. The estimates must be arrived at on a reasonable basis. They must be sensible, realistic and supported by cogent evidence. [54]

In the Information Tribunal case of *Fitzsimmons v Information Commissioner*[55] the request for information sought details of certain approved expenses of two staff of the BBC. The Information Commissioner had upheld the BBC's reliance on s 12 of the UK *FOI Act* to refuse to comply with the request. On appeal to the Information Tribunal the evidence was that there were both electronic and manual expense claims. Part of the search would be to use an electronic database or computer system to review payments to the staff members during the period, note the date and number of the invoice referred to and then go to the hard copy source.

The Tribunal accepted that the estimated costs for the online expense claims, including further significant work which would be required in relation to those online electronic expenses, in conjunction with the work for the manual expenses, would clearly take the hours of work required well over the 18 hours which would have given rise to the £450 appropriate limit. The Tribunal was satisfied that estimate was sufficiently reliable to conclude it was reasonable and the conclusion was that the BBC was entitled to rely on s 12 to not comply with the request.

In another very recent example, the applicant sought from a local council emails and attachments on the subject of 20 mph speed limit schemes from January 2010 to July 2012. Access was refused on the basis of s 12. The evidence was that there were 47 individuals whose emails would have to be checked. The evidence, based on a sample, was that it would take about 8 hours per person to locate, retrieve and extract the information sought which would have cost £9,400.[56] The Information Commissioner seemed to be a bit sceptical of the estimate, but concluded that even allowing that it may take all the individuals 1 hour to carry out a search, that would still take it beyond the appropriate statutory limit.[57]

A decision by the UK Information Commissioner in March 2013 illustrates very well the potential for the volume of emails that officers get on a day to day basis and the difficulties associated with searching can result in refusal decisions on the basis of internal cost. In *Re Department of Work and Pensions*,[58] the applicant sought copies of emails sent and received by a named Higher Executive Officer at the Department on the subject matter Universal Jobmatch and an organisation called Monster Worldwide, for 2 months (49 working days). Remember, the appropriate limit to process a request for a Department is £600.

The (cogent and reasonable) evidence was as follows:

(a) To locate all the emails, the individual would have to search:
- Microsoft Outlook Inbox, sent items and 37 Microsoft Outlook Data Files (.pst folders)
- 6 folders and sub-folders with the 'My Documents' heading on his computer; and
- Shared folders and sub-folders within a particular project server space (of which there were more than 4,000).

(b) A search of the Outlook folders for the relevant date period would have to be by reference to the names of 10 individuals at Monster with whom he was in regular contact.

(c) A sample was done for a randomly selected day within the date range which yielded 21 emails and the search and collation took 40 minutes (0.67 hours). Over a 49 working day period, that would take 32.67 hours.

(d) Further details of searches required and time estimates were provided which culminated in a cost estimate of £1,311.75 (52.47 hours x £25 per hour).

The UK Information Commissioner accepted that s 12 was correctly applied to enable the Department to refuse to comply with the request.

Section 12 of the UK *FOI Act* provision has also been used to refuse access to information which exists electronically on an ongoing basis, but where the information sought was as at a particular past point in time (which would require manual reconstruction or searches because of search limitations inherent in the database) going well beyond the appropriate limit.[59]

In relation to difficulties associated with searching backed-up emails, the position gets quite interesting in the UK. In one case, the estimated time to search for hard copy documents, electronic folders of documents and emails (not backed up) was *less* than the time which would result in the statutory maximum being reached to enable s 12 to be properly claimed to refuse to comply with a request. However, a further 15.5 to 16.5 hours were included in the agency's estimate in relation to restoration and searching of backed up emails which may have been deleted over the relevant period. That would have clearly taken the search time (and resultant cost) over the statutory limit.

Interestingly, however, the UK Information Commissioner is of the view that information contained on a backup is **not** information 'held' by a public authority for the purposes of the UK *FOI Act*. This is because the main purpose of backup is *disaster recovery* and generally, a public authority will have no intention of accessing information on a backup. However, where such information on a backup is used as an *archive facility*, only then is the information to be treated as being 'held' for the purposes of the UK *FOI Act*. If the only reason to retrieve such 'archived' information is to respond to a request, only then could the cost be included in the estimate in considering whether the statutory limit was reached under s 12.[60]

Section 14

The second provision is s 14 of the UK *FOI Act*. It provides that a public authority is not obliged 'to comply with a request for information if the request is vexatious.' There have been some UK decisions in January 2013 which appear to bring the interpretation of s 14 into much closer alignment with the test that is applied in Australia.

The following important points arise in relation to s 14 of the UK *FOI Act*:

(a) It has been held that a request that would be 'manifestly unreasonable' under r 12(4)(b) of the EIR would be 'vexatious' under s 14 of the UK *FOI Act*. The meaning of the two expressions is essentially the same; there is in practice no material difference between the two tests, and the same sorts of considerations should apply.[61]
(b) The whole purpose of s 14 (and of r 12(4)(b) of the EIR) was to protect public authorities' resources (in the broadest sense of that word) from exposure to a disproportionate burden in handling information requests, and from being squandered on disproportionate use of FOI.[62]
(c) There is no reason why excessive compliance costs alone should not be a reason for invoking s 14 (just as it may be done under r 12(4)(b) of the EIR) whether it is a 'one off' request or one made as part of a course of dealings.[63]

In the light of these recent decisions, the UK Information Commissioner has suggested in a 'guidance' note published in May 2013 that public authorities should not regard s 14 as something which is only to be applied in the most extreme circumstances, or as a last resort. Rather, authorities are encouraged to consider its use in any case where they believe the

request is disproportionate or unjustified.[64] More particularly, s 14 has been summarised as being 'designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a **disproportionate** or **unjustified** level of disruption, irritation or distress.'[65]

Since the recent UK decisions in January 2013, there have been no cases which I have been able to locate or identify where technology had any significant role to play in relation to any decision to refuse access on the basis of it being vexatious under s 14.[66]

Scotland

Similar provisions exist in the *Freedom of Information (Scotland) Act 2002* (*FOI Act*)[67] and *Freedom of Information (Fees for Required Disclosures) (Scotland) Regulations 2004*[68] and similar outcomes have been reached to those in the UK. See the following for examples in decisions of the Scottish Information Commissioner:

- *Attridge v Lothian Health Board*[69]where the request was for (in Excel spreadsheet format) a list of all individual invoices over the sum of £500, listed by company or organisation name, invoice date, transaction amount, transaction description and the date paid by NHS Lothian, for the financial years 2009/10, 2010/11 and 2011/12. Section 12 applied.
- *Francis v Scottish Ministers*[70] where the request for all legal advice on a particular broad topic would require extensive searches of electronic files. Section 12 applied.
- *Mr V v Aberdeen City Council*[71] extensive searches of 5 years of electronically stored reports would be required which alone took the cost beyond the appropriate limit. Section 12 applied.[72]
- *Mr Q v Scottish Prison Service*[73] where a prisoner disgruntled with lateness of mail sought information from CCTV footage to see when the mail was collected. It was found relevant in determining the request was vexatious under s 14 of the Scottish FOI Act that the data would have to be transferred from hard drive to a disc, then reviewed to protect privacy and some pixilation introduced, it was a technical task to be outsourced under supervision of a suitably senior manager (given the length and sensitivity of the footage).

Ireland

The provisions in the *Freedom of Information Act 1997* (Ireland) (*FOI Act*) are a little closer to those in the Australian jurisdictions, or at least to the original form of the Commonwealth *FOI Act* and the *Freedom of Information Act 1989* (ACT) provisions. There is a connection to the number of documents or records.

Section 10(1)(c) of the Irish *FOI Act* provides that a request for access can be refused if granting would, 'by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of the other work of the public body concerned'. In the case of *Ms XX and Health Service Executive*[74] the applicant, after consultation to narrow an even broader request, sought access to the number of staff in the administrative grades from grade 4 up who received incremental credit awarded for various service for the years 2001 to 2009 in the Hospitals and Community Care Centres of the respondent. Although, at the request of the Irish Information Commissioner, a list of all 400 or so staff who provided services could be prepared, a record which would meet the Applicant's requirements did not actually exist but it was possible for the public body to compile a record

of information sought from data available in *a combination of the agency's IT and manual systems*.

That list would have to be cross referenced with those who received incremental credit and each individual HR file would have to be retrieved to ascertain the basis on which the incremental credit was awarded to see if it was the basis of interest to the applicant. The Information Commissioner could see no basis on which to dispute the assertion of the respondent that the retrieval and examination of such records and the staff time necessary to search through a large number of records and establish whether or not incremental credit was awarded on the correct basis would cause substantial and unreasonable interference with the respondent agency's work. The basis for refusal was considered justified.

As with some of the Australian cases, this is an instance where the existence of technology only provided part of the solution and resort still had to be made to hard copy records.

This difficulty in the transition or interaction between hard copy records and electronically stored records and how that impacts on unreasonable diversion decisions is further illustrated in the Irish case of *X and Western Health Board*.[75] In that case from 2000, the applicant sought records giving a detailed breakdown of payments made under a particular welfare scheme. The agency's records commenced to be computerised in 1998. It could not produce a computerised listing of cases by name, except in relation to the most recent month. It was able to (and did) provide historical information on numbers, but not the details sought by the applicant without going back to hard copy records. The Information Commissioner described that as requiring 'considerable time and expense' if that was to be done and considered that to require that would be a substantial and unreasonable interference with the respondent's other work.

Similar problems with technology can be experienced when data is stored and resultant graphical representations of it prepared on an ongoing basis and an applicant seeks the data of a graphical representation which existed at a past point in time.[76]

CONCLUSIONS

In my view, there are both positive and negative aspects associated with the development of technology insofar as it may impact on the processing of requests for access.

On the positive side:

(a) developments in technology can facilitate the identification or location of potentially relevant documents or files. These include:
    (i) electronic archive indexes;
    (ii) electronic document management systems with varying (but ever improving) search capabilities;
    (iii) increased full text search capability for stored documents.
(b) the development of electronic scanning and associated software has facilitated the collation and editing (or redacting) of documents for greater practicability of at least partial access.

On the negative side:

(a) the ability or capacity of an agency to locate or retrieve certain computerised records can be limited by only few staff having the particular skills to be able to do it;

(b) the need to search backup tapes, which may have to be physically retrieved, restored and searched by skilled staff or contractors, can take very large amounts of time, effort and resources (including equipment needed for other usual purposes);
(c) computer technology development and proliferation in use has facilitated the creation of vast amounts of information by government agencies which may be held electronically and/or in hard copy, with a growing propensity for computer storage. That fact alone is not negative, but the time taken to identify and then trawl through those documents with a view to redacting exempt or irrelevant information is proportionately increased with the growth in document generation. This is increased by the use and proliferation of email as a means of communication within government agencies.

The cases reviewed from overseas jurisdictions support the conclusion that the experience overseas has been relatively consistent with the Australian experience. This is despite the difference in tests used between jurisdictions. The same types of difficulties and processing limitations or restrictions arising from technological development have been experienced in overseas jurisdictions.

The type of issues experienced overseas also include the fact that multitudes of emails are generated and may potentially be relevant to requests, which means they have to be located, retrieved and examined (including from backup sources).

The combination of the above suggests that:

(a) technology has made a significant impact in that refusal of access decisions on the unreasonable diversion ground are more likely;
(b) this might be lessening as knowledge of technology and search capabilities improve within agencies;
(c) ultimately the outcome might depend on the ability of agencies and applicants to work together to narrow the scope of requests once the difficulties faced become apparent.

APPENDIX 1: Australian legislation extracts

Commonwealth – Freedom of Information Act 1982

Section 24(1) – 1982 to 1991

> (1) Where –
>
> (a) a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter; and
>
> (b) the agency or Minister dealing with the request is satisfied that, apart from this sub-section, the work involved in giving access to all the documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations or would interfere substantially and unreasonably with the performance by the Minister of his functions, as the case may be, having regard to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or of the office of the Minister, the agency or Minister may refuse to grant access to the documents in accordance with the request without having caused those processes to be undertaken.

Section 24(1) – between 1991 and 2010

(1) The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request:
  (a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or
  (b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions.

Section 24 and Section 24AA – post 2010 amendments

24 Power to refuse request—diversion of resources etc.

(1) If an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request (see section 24AA), the agency or Minister:
  (a) must undertake a request consultation process (see section 24AB); and
  (b) if, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists—the agency or Minister may refuse to give access to the document in accordance with the request.

(2) For the purposes of this section, the agency or Minister may treat 2 or more requests as a single request if the agency or Minister is satisfied that:
  (a) the requests relate to the same document or documents; or
  (b) the requests relate to documents, the subject matter of which is substantially the same.

24AA When does a *practical refusal reason* exist?

(1) For the purposes of section 24, a ***practical refusal reason*** exists in relation to a request for a document if either (or both) of the following applies:
  (a) the work involved in processing the request:
    (i) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or
    (ii) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions;
  (b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).

Victoria – Freedom of Information Act 1982

25A Requests may be refused in certain cases

(1) The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request—

  (a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or

(b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions.

***New South Wales – Freedom of Information Act 1989* (repealed)**

25 Refusal of access

(1) An agency may refuse access to a document:

(a1) if the work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions

New South Wales – Government Information (Public Access) Act 2009

60 Decision to refuse to deal with application

(1) An agency may refuse to deal with an access application (in whole or in part) for any of the following reasons (and for no other reason):

(a) dealing with the application would require an unreasonable and substantial diversion of the agency's resources,

Queensland – Freedom of Information Act 1992

29 Refusal to deal with application—agency's or Minister's functions

(1) An agency or Minister may refuse to deal with an application for access to documents or, if the agency or Minister is considering 2 or more applications by the applicant, all the applications, if the agency or Minister considers the work involved in dealing with the application or all the applications would, if carried out—

(a) substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or

(b) interfere substantially and unreasonably with the performance by the Minister of the Minister's functions.

Queensland – Right to Information Act 2009

41 Effect on agency's or Minister's functions

(1) An agency or Minister may refuse to deal with an access application or, if the agency or Minister is considering 2 or more access applications by the applicant, all the applications, if the agency or Minister considers the work involved in dealing with the application or all the applications would, if carried out—

(a) substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or

(b) interfere substantially and unreasonably with the performance by the Minister of the Minister's functions.

Australian Capital Territory – Freedom of Information Act 1989

23 Requests may be refused in certain cases

(1) An agency or Minister may refuse to grant access to documents in accordance with a request without processing the request if—

(a) the request is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and

(b) the agency or Minister is satisfied that the work involved in giving access to all documents to which the request relates would substantially and unreasonably—

(i) divert the resources of the agency from its other operations; or

(ii) interfere with the performance by the Minister of his or her functions.

Tasmania – Freedom of Information Act 1991 **(Repealed)**

20 Requests may be refused in certain cases

(1) If –

(a) a request for information is expressed to relate to –

(i) all information of a specified kind; or

(ii) all information in respect of a specified subject-matter; and

(b) the agency or Minister dealing with the request is satisfied that the work involved in providing the information requested –

(i) would substantially and unreasonably divert the resources of the agency from its other work; or

(ii) would interfere substantially and unreasonably with the performance by the Minister of the Minister's other functions –

having regard to –

(iii) the amount of that information; and

(iv) any difficulties that exist in identifying, locating or collating the information within the records of the agency or of the office of the Minister –

the agency or Minister may refuse to provide the information without undertaking the processes referred to in paragraph (b)(iv).

Tasmania – Right to Information Act 2009

19 Requests may be refused if resources unreasonably diverted

(1) If the public authority or Minister dealing with a request is satisfied that the work involved in providing the information requested –

(a) would substantially and unreasonably divert the resources of the public authority from its other work; or

(b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions –

having regard to –

(c) the matters specified in Schedule 3–

the public authority or Minister may refuse to provide the information without identifying, locating or collating the information.

South Australia – Freedom of Information Act 1991

18 Agencies may refuse to deal with certain applications

(1) An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it within the period allowed under section 14 (or within any reasonable extension of that period under section 14A) would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

Western Australia – Freedom of Information Act 1992

20. Agency may refuse to deal with application in certain cases

(1) If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.

(2) If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.

Northern Territory – Information Act 2000

25 Refusing access because providing access unreasonably interferes with operations

(1) A public sector organisation may decide to refuse access to the information because providing access would unreasonably interfere with the operations of the organisation.

(2) A public sector organisation may only decide to refuse access under subsection (1) if the organisation and the applicant are unable to agree on a variation of the information identified in the application.

APPENDIX 2: International legislation extracts

United Kingdom – Freedom of Information Act 2000

1 General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled–

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

12 Exemption where cost of compliance exceeds appropriate limit

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) 'the appropriate limit' means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority–

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

14 Vexatious or repeated requests

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

United Kingdom - Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

The appropriate limit

3(1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

Estimating the cost of complying with a request – general

4(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or
(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(a) determining whether it holds the information,
(b) locating the information, or a document which may contain the information,
(c) retrieving the information, or a document which may contain the information, and
(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

Scotland - Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

…

(6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

14 Vexatious or repeated requests

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

Scotland - Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

(1) In these Regulations, 'projected costs' in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.

(2) In estimating projected costs-

(a) no account shall be taken of costs incurred in determining-

(i) whether the authority holds the information specified in the request; or

(ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and

(b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount
The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

Ireland – Freedom of Information Act 1997

10.—(1) A head to whom a request under section 7 is made may refuse to grant the request if—

…

(c) in the opinion of the head, granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of the other work of the public body concerned,…

(2) A head shall not refuse, pursuant to paragraph (b)…of subsection (1), to grant a request under section 7 unless he or she has assisted, or offered to assist, the requester concerned in an endeavour so to amend the request that it no longer falls within that paragraph.

Endnotes

1 The quote has been taken from the FOI Man blog and refers to the operation of the vexatious application provisions of the UK *FOI Act* referred to further below. The quote available at http://www.foiman.com/archives/category/freedom-of-information-act/vexatious as at 12 July 2013.
2 See http://www.youtube.com/watch?v=CSe38dzJYkY.
3 Technology per se extends beyond computer technology; however, given the nature of FOI/RTI legislation, the focus of this paper will be on computer technology.
4 An extract of the relevant provisions for each Australian jurisdiction (including some repealed provisions) appears in **Appendix 1** to this paper.
5 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 August 1981.
6 See for example *Re Shewcroft and Australian Broadcasting Corporation* [1985] AATA 42; *Re Timmins and National Media Liaison Service* [1986] AATA 23 at [22] and [24]; *Re Cullen and Australian Federal Police* [1991] AATA 671 at [11]; *Re Coe and Chief Minister's Department* [2006] ACTAAT 8.
7 See for example *Re Maksimovic and Australian Federal Police* [2008] AATA 537 at [8] and [35].
8 Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, Vol 412, 1738. The Legal and Constitutional Committee Report referred to made recommendations in terms of 'voluminous requests' see *Wright v SECV* [1998] VCAT 162.
9 *Luck v Victoria Police* [2013] VCAT 206; *Colefax v Department of Education and Communities (No.1)* [2013] NSWADT 42 at [40]; *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550; *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1551; *AB v Department of Education* [2012] VCAT 1233 at [40]; *Altaranesi v Sydney South West Area Health Service* [2011] NSWADT 43 at [71]; *Geelong Community for Good Life Inc v Environment Protection Authority & Anor* [2009] VCAT 2429 at [5]; *Re Mineralogy Pty Ltd v Department of Industry and Resources* [2008] WAICmr 39; *XYZ v Victoria Police* [2007] VCAT 1686; *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137; *Kelly v Department of Treasury and Finance* [2001] VCAT 419; *Mildenhall v Department of Education* (Unreported, VCAT, 19 April 1999) at [30]; *A v Department of Human Services* [1998] VCAT 299; *Re Hesse and Shire of Mundaring* [1994] WAICmr 7.
10 See for example *Re Maksimovic and Australian Federal Police* [2008] AATA 537 at [8] and [35]; *The Age Company Pty Ltd v CenITex* [2012] VCAT 1523.
11 *The Age Company Pty Ltd v CenITex* [2012] VCAT 629.
12 *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [48] – 'it is plain enough that s.25A was introduced to overcome the mischief that occurs when an agency's resources are substantially and unreasonably diverted from its core operations by voluminous requests for access to documents.'
13 *Heffernan and Australian Nuclear Science and Technology Organisation* [2013] AICmr 25 at [27].
14 See for example *Philip Morris Ltd and Department of Health and Ageing* [2013] AICmr 49; *T and Australian Securities and Investments Commission* [2013] AICmr 33; *Davies and Department of Prime Minister and Cabinet* [2013] AICmr 10.
15 Available at

http://www.foi.vic.gov.au/home/for+government+agencies/practice+notes/practice+note+06+voluminous+requests+for+access#1 as at 11 June 2013. FOI Solutions was retained to draft most of the Department's practice notes including this one.

16 *Langer v Telstra Corporation Ltd* [2002] AATA 341 at [111] 'the principles expressed in [the cases] are applicable whatever the medium.'

17 [2002] AATA 341 at [116].

18 In that case the Tribunal found that processing would have involved individual checking of each message after being processed on a server standing apart from the network system and that it would be a very time consuming and labour intensive process. 'I am satisfied that the workload involved in checking individual computers and the back up tapes would be substantial.' (Id at [117]-[118]).

19 [2007] AATA 1242.

20 *Radicic v Australian Postal Corporation* (2000) 59 ALD 157, 159 per Branson J. See also *Re Macdonald and City of Joondalup* [2006] WAICmr 2 where there were approximately 900 electronic 'documents' sought. The decision to refuse on the unreasonable diversion basis was upheld.

21 [2012] VCAT 1523.

22 For a case on whether retrieving information from back-up tapes is required on the basis that it is not done from computer equipment ordinarily available to an agency, see *Smeaton v Victorian Workcover Authority* [2012] VCAT 521. As to when it is necessary to produce a written document from information stored on computer see s 19, Vic FOI Act and *Halliday v Corporate Affairs* (1991) 4 VAR 327; s 17, Cth *FOI Act* and *Re Collection Point Pty Ltd v Commissioner of Taxation* [2011] AATA 909.

23 (Unreported, 29 June 2007, No. 2005 F0619 available as at 25 June 2013 at http://www.oic.qld.gov.au/__data/assets/pdf_file/0012/7050/2005-F0619-Dec-26-06-07.pdf.

24 See also Re Luc and Department of Health (Unreported, 28 June 2000, No. 1999/S0204) available as at 25 June 2013 at http://www.oic.qld.gov.au/decisions/luc-and-department-of-health.

25 [2012] VCAT 1551.

26 For another case in which the difficulties in searching older backed up emails resulted in a successful refusal to grant access on this basis see *Smeaton v Victorian Workcover Authority* [2013] VCAT 591.

27 [2005] WAICmr 5.

28 [2008] WAICmr 1.

29 [2010] NSWADT 299.

30 *Altaranesi v Sydney South West Area Health Service* [2011] NSWADT 43, [75].

31 *Smeaton v Victorian Workcover Authority* [2012] VCAT 1236. Some of the relevant circumstances included the fact that the applicant had already made over 50 FOI requests to the agency, the number of pages of material was by way of a preliminary search, an estimate of 160 hours to process the request over many weeks, processing would be unlikely to further the public interest, processing would place unreasonable demands on the FOI Unit which receives about 2,000 requests per annum, the applicant was on a fishing expedition and did not assist by narrowing the request.

32 See for example *Re Maksimovic and Australian Federal Police* [2008] AATA 537 at [35].

33 *Smeaton v Victorian Workcover Authority* [2012] VCAT 150.

34 *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 at [40]; See also *Fletcher and Prime Minister and Cabinet* [2013] AICmr 11.

35 [2006] ACTAAT 8

36 Which was how the original version of the Cth FOI Act test was stated before amendment in 1991.

37 [2010] QICmr 39.

38 At [26] and [32].

39 *Re Mathews and University of Queensland* [2011] QICmr 45 at [34], fn 19.

40 See examples in *Chand v RailCorp* [2009] NSWADT 44, [42]-[43]; *Cianfrano v Director General, Premier's Department* [2006] NSWADT 137, [21].

41 Or in the case of a Minister, interfere with the performance of the Minister's functions.

42 [2013] AICmr 10.

43 Id at [32]-[33].

44 [2013] AICmr 11. For further examples where an electronic diary was involved in a decision to refuse access because it would divert a substantial and unreasonable portion of the agency's resources from its other operations, see: *Re Ravlich and Minister for Energy; Training and Workforce Development* [2010] WAICmr 10; *Re Ravlich and Deputy Premier; Minister for Health; Indigenous Affairs* [2010] WAICmr 11; *Re Ravlich and Attorney General; Minister for Corrective Services* [2009] WAICmr 17, [39]-[44].

45 See for example *Re Allanson and Queensland Tourist and Travel Corporation* [1997] QICmr 20 which involved a request for tens of thousands of documents relating to the development, use, retailing, licensing, management and sale of a computer program developed by employees of the respondent as a reservation system for use in the travel industry.

46 *Re Queen's University Belfast* (29 March 2010, FS50163282) available at: http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FS_50163282.PDF as at 11 July 2013.

47 *Re Environment Agency* (30 September 2010, FER0253026) available at http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FER_0253026.PDF as at 11 July 2013.

48 (29 March 2010, FS50163282) available at: http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FS_50163282.PDF as at 11 July 2013.

49 Id at [43]-[46].

50 EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC) available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML as at 11 July 2013 – Article 4(1)(b) enables a request for environmental information to be refused if the request is 'manifestly unreasonable'. That should be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure (Article 4(2).

51 United Nations, *The Aarhus Convention: An Implementation Guide*, 2000 at p 57 (available at http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf as at 11 July 2013. See also *Re Environment Agency* (30 September 2010, FER0253026) at [43] available at http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FER_0253026.PDF as at 11 July 2013.

52 *Re Environment Agency* (30 September 2010, FER0253026) at [50] available at http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FER_0253026.PDF as at 11 July 2013.

53 Relevant extracts of the UK Act and the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (UK) appear at Appendix 2 of this paper.

54 Of course, a public authority does not have to rely on s 12; it is free to comply with a request even if the estimated cost of doing so exceeds the statutory appropriate limits: *Fitzsimmons v Information Commissioner* [2008] UKIT EA 2008 043, [23] and [30] at http://www.bailii.org/uk/cases/UKIT/2008/EA_2008_0043.html as at 11 July 2013.

55 [2008] UKIT EA 2008 043 (at http://www.bailii.org/uk/cases/UKIT/2008/EA_2008_0043.html as at 11 July 2013.

56 47 individuals x 8 hours = 376 hours x £25 = £9,400.

57 *That is, 47 individuals x 1 hour = 47 hours x £25 = £1,175: Re West Sussex County Council (7 May 2013, FS50469852) at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50469852.pdf as at 13 July 2013.*

58 (11 March 2013, FS50471803) at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50471803.pdf as at 13 July 2013. For another example, see *Re Isle of Wight Council* (11 March 2013, FS50461554) at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50461554.pdf as at 13 July 2013.

59 *Re Ministry of Justice* (26 March 2013, FS50467125) at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50467125.pdf at 13 July 2013.

60 *Re Carmarthenshire County Council* (27 March 2013, FS50461626) at [28]-[30] at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50461626.pdf as at 13 July 2013.

61 *Craven v Information Commissioner and Department of Energy and Climate Change* [2012] UKUT 442 (AAC), [22], [30], per Judge Wikeley.

62 Id, [23]; *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC), [10].

63 Id, [31]. The Upper Tribunal did say, however, that if the public authority's principal reason or sole reason for wising to reject the request concerns the projected costs of compliance, as a matter of good practice serious consideration should be given to applying s 12 alone rather than s 14 in the FOI context – this would not be available in the EIR context where no separate cost basis exists. See also *Independent Police Complaints Commissioner v Information Commissioner* [2012] UKFTT 2011_0222 (GRC), [15] available at http://www.bailii.org/uk/cases/UKFTT/GRC/2012/2011_0222.html (at 13 July 2013).

64 Information Commissioner's Office, *Dealing with vexatious requests (section 14)*, [11] available at http://www.ico.org.uk/for_organisations/freedom_of_information/guide/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx as at 13 July 2013.

65 Id, [9], [20].

66 In *The Common Council of the City of London (Ref: FS50469440)* (23 April 2013) available at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50469440.pdf as at 13 July 2013 the fact that hard copy and electronic records of many people would have to be searched and it was estimated would take one officer a week was one of many relevant factors.

67 With a maximum limit of £600.

68 At an hourly rate of £15.

69 (24 June 2013, 115/2013) at http://www.itspublicknowledge.info/uploadedFiles/Decision115-2013.pdf at 13 July 2013.

70 (29 May 2013, 099/2013) at http://www.itspublicknowledge.info/uploadedFiles/Decision099-2013.pdf at 13 July 2013.

71 (22 April 2013, 075/2013) at http://www.itspublicknowledge.info/uploadedFiles/Decision075-2013.pdf at 13 July 2013.

72 See also *Okasha v Scottish Ministers* (26 March 2013, 055/2013) at [65] where the electronic search alone took the matter beyond the appropriate statutory limit.

73 (1 August 2012, 127/2012) at http://www.itspublicknowledge.info/uploadedFiles/Decision127-2012.pdf at 13 July 2013.

74 [2010] IEIC 090231.

75 [2000] IEIC 24.

76 See *Mr X and Department of Communications, Energy and Natural Resources* [2011] IEIC 080184.

PRIVACY BY DESIGN: DELIVERING GOVERNMENT SERVICES USING MOBILE APPLICATIONS

Gabrielle Hurley*

The Department of Human Services (DHS) has been developing its online service delivery capacities since 2007, and primarily focussed on Medicare, Centrelink and Child Support services' customers accessing online services from their home computers and laptops. However, in late 2012, the department commenced the roll out of its mobile applications program, Express Plus, which leverages the Department's online services capabilities. DHS has released Express Plus Apps for Jobseekers, Families Students and Seniors as well as an App for Medicare and a multilingual App. These mobile applications (Apps) have been designed for use on iPhones and android smart phones and are downloadable from the App Store and Google Play. In the future Express Plus App releases will further expand the reach of the Department's online services into the Australian community.

Utilising mobile apps to deliver online services that were originally designed for computers and laptops has raised and continues to raise design, implementation and post release issues for DHS, particularly from a privacy perspective. These issues include designing Apps that incorporate the features of smart devices without minimising privacy protections, designing compliant privacy notices and ensuring information security in the design and use of the Apps. It continues to be an interesting online journey, as it is the essential operating nature of the App downloaded onto a person's smart device that has raised unique privacy issues for the department when delivering government services.

Smartphones are quickly becoming the world's dominant computing device with more than one billion currently in use.[1] More specifically, in Australia between June 2011 and June 2012, there was a 104 per cent increase in the number of adults with a smartphone.[2] Comparatively from a global perspective according to research conducted in July 2012, Singapore at 92% was the country with the highest smart device penetration among adults aged 15 to 64 years old and Australia was the fourth at 79%.[3]

The attraction of a smart phone or smart device is that it is far more than just a phone. In addition to internet access, a smartphone can have the ability to synchronise with a computer, create documents and spread sheets, listen to music, manage social networks through various applications and take pictures.[4] The rapid increase in smart device ownership correlates with a rapid increase in the usage of Apps.

Apps are 'software applications often designed for a specific task and for a particular set of smart devices such as smartphones, tablet computers and internet connected televisions. They organise information in a way suitable for the specific characteristics of the device and they often closely interact with the hardware and operating system features present on the devices.'[5]

Apps are also market driven as they are developed and designed to provide a service, whether commercial or free, to the person wishing to download that App to his/her smart device. In 2012, the App marketplace was dominated by Apps that offered social networking,

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games, photo taking and sharing, navigation and location tracking, and finance and banking.[6]

The rapid growth of Apps in the market place is evident from the statistics below:

- In the US it has been reported that 80% of consumers' time on mobile devices is spent in Apps and that every minute 47,000 Apps are downloaded by users worldwide.[7]
- In Australia, the number of adult smartphone users who download Apps increased from 2.41 million in June 2011 to 4.45 million in June 2012 – an increase of 85 per cent.[8]
- The average number of Apps downloaded between February 2013 and May 2013 by Australians who had ever downloaded an App, was eight free Apps and four paid Apps.[9]
- The App store for iPhones went live on 10 July 2008 with around 500 Apps available. In 2013 there are more than 850,000 Apps in the store with 50 billion downloads and $10bn having been paid to iOS developers to date.[10]

DHS Express Plus Apps

In mid-2011, legislation[11] was enacted that merged the former agencies of Medicare and Centrelink into DHS which already included the Child Support Agency, Australian Hearing and Commonwealth Rehabilitation Services within the Department. As a result the Australian government further developed its service delivery reform agenda as DHS became the primary means by which the government delivered services to the Australian community.

From 2007, Centrelink, Medicare and Child Support services developed and increased their online services presence. Online services focussed on customers using fixed computer terminals, the traditional means of online interaction at the time. The advantage of online services was that customers did not have to attend DHS offices, wait in queues for assistance or contact a call centre and wait on the phone for assistance.

In late 2012, DHS released the Express Plus Apps series that leverages the types of services already being delivered online by Centrelink to conduct business with its customers. The Express Plus App project has been a resounding success story for DHS with DHS being recognised by the Australian Government with the 2013 Overall Excellence in government Award and Service delivery Category award for the Express Plus App.[12]

From late 2012 to early 2013, DHS delivered the first series of Express Plus Apps, ie Express Plus Students, Express Plus Jobseekers, Express Plus Families and Express Plus Seniors. These Apps deliver services for Centrelink and are available for free download to iPhones and Android smart devices and are distributed by Apple in the App Store and by Google in Google Play.

Some of the services available to customers (who must already be registered with Centrelink online services) include reporting employment income and viewing future appointments, Centrelink income or payment statements and child care summaries. A customer can also access his/her current and past payments and ascertain if any money is owed to DHS.

Since the initial release of the Express Plus App series DHS has also released Express Plus Medicare and Express Plus Lite (multilingual) to the App store and to Google Play. Express Plus Medicare offers services to Medicare customers and Express Plus Lite enables customers to meet their Centrelink jobseeker reporting obligations using one of the four available languages, ie English, Vietnamese, Basic Chinese or Arabic.

In developing the Express Plus Apps series, DHS has embraced the Privacy by Design approach, recognised in 2010 as the global privacy standard. [13] Essentially the approach 'requires the application of privacy enhancing practices throughout the life cycle of the personal information that is its collection, storage, use, disclosure and destruction.'[14] Relying on this approach, privacy considerations have guided the design and implementation phases of the Apps, as they are used by DHS customers to interact with DHS services.

Privacy and the App eco system

Australian government agencies are regulated by the *Privacy Act 1988* (the *Privacy Act*) and by the Information Privacy Principles (IPPs)[15] which (amongst other things) articulate an agencies obligations with respect to the collection, storage (security), use and disclosure of personal information.

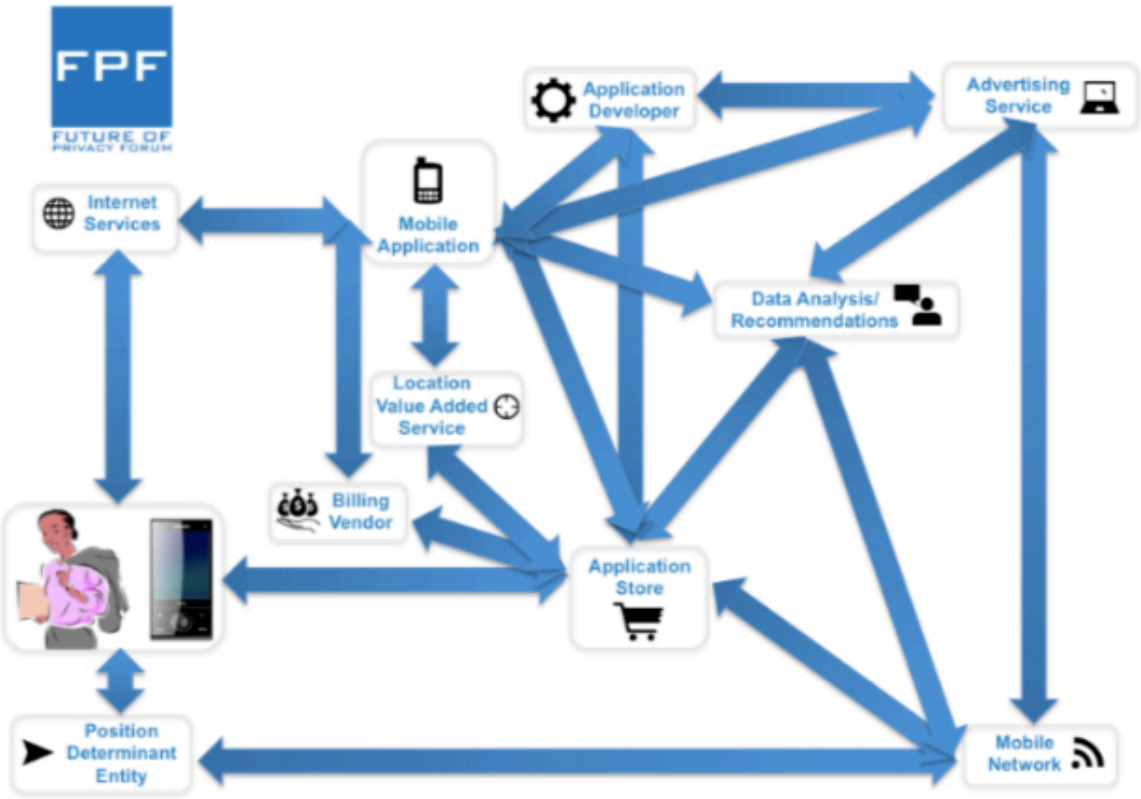
The Australian Privacy Principles (APPs) will commence on 12 March 2014 and will apply to government agencies and private entities covered by the *Privacy Act*. The APPs will specify additional privacy obligations for government agencies which are not covered by the current IPPs. To understand the proposed changes, the Office of the Australian Information Commissioner has issued a useful comparison guide that summarises and analyses these key changes.[16]

Section 6 of the *Privacy Act* defines personal information to mean:

> …information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

The *Privacy Act* and the IPPs require an agency to have measures in place that protect a person's privacy ie personal information. To put measures in place it is necessary to identify when an agency is collecting, using or disclosing personal information and also to ensure that when personal information is being maintained it is kept secure. To undertake this exercise for Apps it is essential to understand the personal information flows and the entities involved, particularly as Apps and smart devices rely on both the internet and telecommunications systems.

Diagram: The App Eco System



The Future of Privacy Forum has produced a diagram (above) that depicts the App Eco System.[17] It provides a helicopter view of the potential entities involved and the flow of personal information or non-personal information to and from entities. It also illustrates the interrelationship of the telecommunication system and the internet.

The entities that may be involved at any one time as a result of a consumer downloading an App potentially include:

- internet providers;
- distributor/App stores –Google Play, App Store;
- billing vendors (paid App) – eg Paypal, credit card vendors;
- location value added service – GPS facility – eg Google maps;
- mobile App;
- App developers;
- advertising services;
- data analysis/recommendations eg Google analytics;
- mobile networks; and
- position determinant entities (PDEs) – which provide the precise location information of devices in an operator's CDMA network.

A diagram depicting the entities and personal information flows for the Express Plus App series would be less complex than the App Eco System diagram above. Express Plus Apps are available for free and have been designed to prevent third parties from accessing the information in the App. This means that the billing vendor, App store distributor, advertising services and data analysis/ recommendations entities would not be part of a personal information flow diagram for Express Plus Apps.

Designing privacy notices

In circumstances where agencies are collecting personal information from individuals, the *Privacy Act* requires agencies to take reasonable steps to make individuals aware (before information is collected or as soon as practicable afterwards) of the purpose for which the information is being collected, if the collection is authorised or required by law, and any person body or agency to which information of that kind is usually disclosed.[18] An agency's obligations are usually satisfied by giving the individual a privacy notice that outlines the required information.

The informational content requirements of a privacy notice and assurance that the notice is accessed, read and understood in the context of the design restraints of an App and a smart device can be quite challenging. Some of these challenges include:

- Apps are accessed using smart devices that have small screens (although tablets have more capacity) which limits the text space that is available before the consumer has to scroll down the page. Successful Apps do not require consumers to scroll though pages of text.
- Consumers can be highly motivated to install an App without having full regard to notices about the personal information that may be collected by the App developer or third parties.
- Consumers can suffer notice fatigue which results in a person ignoring notices or warnings that they see all the time.

For the purposes of the Express Plus App series and to minimise and overcome the App design challenges, DHS has put in place the following privacy design features:

- **Design one** - multi layered privacy notice approach - a short privacy notice is inserted in the terms and conditions which must be accepted by the customer before he/she can successfully download an Express Plus App. The short privacy notice includes a URL link to the long privacy notice which is on the DHS website.[19] After accessing the long privacy notice on the website, the customer can directly return to the terms and conditions in the App.

- **Design two** – a static privacy tab has been designed for the Express Plus App series and placed on the landing page of the App. Behind the privacy tab is the long privacy notice and when clicked the long notice can be read in its entirety. The privacy tab is always visible on the App and is available anytime that the customer wishes to review the long notice.

- **Design three** – the upload and capture function of the Express Plus App series uses the camera function of the smart device which enables the customer to take a photo of a document and to provide the photo to DHS using the App. For example; in Express Plus Families, a Proof of Birth claim can be made by taking a photo of the new born child's

Birth Certificate, uploading it to the claim in the App and submitting it to DHS for processing.

An additional privacy measure has been designed with this function. Before a customer uploads a photo of a document to the App using the smart device camera, a pop up screen appears and the customer is required to indicate that they have read and agree with the privacy notice in the tab. It is only after agreeing that the customer can successfully submit the claim and send the supporting photo to DHS.

Information security

Agencies have security obligations under the *Privacy Act* to take reasonable steps to keep personal information safe and secure from unauthorised access, modification or disclosure and also against misuse and loss.[20] The Office of the Australian Information Commissioner has recently issued a guide to information security that outlines some of the steps that entities covered by the *Privacy Act* can take to ensure that personal information is protected.[21]

DHS has put in place a series of security enhancing design features for the Express Plus Apps, which are summarised below:

- Any consumer can download the Express Plus App series onto his/her smart device. But, to use the App, the person needs to be a customer of DHS and registered for the relevant Online service, for example Centrelink Online Services or Medicare Online Services; this is a process that is undertaken directly with DHS prior to having an online account.
- To activate the App on the smart device and set up a PIN, a registered online user will need to do the following:
    (i) input their Customer Access number and password (created as part of the online services registration process)[22] and
    (ii) answer a secret question – set up as part of the online services registration process).
- Additional security measures in relation to a customer's PIN are:
    (i) three unsuccessful PIN attempts and the user is locked out of the App;
    (ii) the PIN must be changed every three months;
    (iii) because the App requires a smart device specific 4 digit PIN login, one device will support only one App download; if customers are sharing devices they cannot share the App.
- The Express Plus App series uses mobile portal technology to bring information to the smart device after the App is downloaded and successfully authenticated by the DHS customer. The technical state of the App at rest in the smart device is referred to as an 'empty container' – it is the mobile portal technology that reaches out from DHS services that gives the App life and this only occurs after successful authentication by the customer;
- Any technical information that is stored in the smart device for the purposes of the mobile portal technology requirements and activating the App has been encrypted by DHS. Therefore third parties (such as the entities identified in the App Eco System diagram) are unable to access technical information that is stored in the smart device after the App is installed and successfully authenticated by the customer.
- If a customer has lost his/her smart device, the customer can ask DHS to deactivate the device.

- In the future, new authentication processes will be implemented for current and future Express Plus Apps that will rely on the new myGov username and password process. myGov has replaced the Australia.gov portal link with respect to providing authenticated government services.[23]

Permission systems and privacy

Unlike Apple and the App store, Android does not review or restrict Android Apps that are distributed by Google Play. Instead Android 'uses permissions to alert users to privacy or security invasive applications.'[24] The specific permissions relevant to any App being distributed by Google Play are available to consumers in the store and are listed behind the permissions tab. The App developer relies on the consumer giving the developer access to certain features or information on their smart device in order to effectively operate the App, after it is downloaded by the consumer.

The Android permissions are broadly defined and rely on standardised descriptions available in the permissions tab. The developer does not have the capacity in the permission list in Google Play to change the description of the permission or to explain why it is required for the App to operate effectively. The following are extracts of Android permissions that are required for Express Plus App services to operate on the smart device:

- The Express Plus App offers a service that involves taking a photo of documents (upload and capture) using the smart device camera feature. The permission is described as follows:

  CAMERA
  TAKE PICTURES AND VIDEOS
  Allows the app to take pictures and videos with the camera. This permission allows the app to use the camera at any time without your confirmation.

- The Express Plus App offers a location service for finding the closest DHS office using Google maps. The permission is described as follows:

  YOUR LOCATION
  APPROXIMATE LOCATION (NETWORK-BASED)
  Allows the app to get your approximate location. This location is derived by location services using network location sources such as cell towers and Wi-Fi. These location services must be turned on and available to your device for the app to use them. Apps may use this to determine approximately where you are.

  PRECISE LOCATION (GPS AND NETWORK-BASED)
  Allows the app to get your precise location using the Global Positioning System (GPS) or network location sources such as cell towers and Wi-Fi. These location services must be turned on and available to your device for the app to use them. Apps may use this to determine where you are, and may consume additional battery power.

- The Express Plus App offers a service that pushes Centrelink appointments to the smart device calendar. The permissions is described as follows:

  YOUR PERSONAL INFORMATION
  READ CALENDAR EVENTS PLUS CONFIDENTIAL INFORMATION
  Allows the app to read all calendar events stored on your device, including those of friends or co-workers. This may allow the app to share or save your calendar data, regardless of confidentiality or sensitivity.

ADD OR MODIFY CALENDAR EVENTS AND SEND EMAIL TO GUESTS WITHOUT OWNERS' KNOWLEDGE
Allows the app to add, remove, change events that you can modify on your device, including those of friends or co-workers. This may allow the app to send messages that appear to come from calendar owners, or modify events without the owners' knowledge.

Early in 2013, consumer reviews in Google Play (as opposed to the App store) relating to Express Plus Apps started to raise issues about the permissions that DHS was relying on to provide services in the Apps. The majority of issues raised were in the Express Plus Jobseeker App, however there were similar concerns being raised in consumer reviews for the Express Plus Students and Families App. These related to DHS as the App developer accessing the camera, GPS locator and phone facility on a customer's smart device.[25]

In response to these consumer reviews, DHS posted an explanation of the permissions being sought in the overview of each of the Apps in Google play and also in the Apple store and the DHS trouble shooting guide.[26] DHS explained that the permissions were required to allow the App to work effectively with the customer's device and assured customers that the information provided by the App was not used within the Department for any other purpose. In the explanation DHS highlighted that in order to provide the customers with particular functions in the App it would need to access the smart device capabilities.

The following information about the permissions was provided to consumers:

- Camera - the upload and capture facility required the customer to use the camera on the smart device therefore the App needed camera access.
- Access Personal Information - to add an appointment to the smart device calendar, personal information would be pushed from DHS using the App to the customer's calendar, however no information would be retrieved from the calendar as a result.
- Your location - for the office locator function the App needed permission to access the GPS facilities of the smart device, however this information when it is received by DHS would not be stored in its systems. On a practical note if the customer had turned off the GPS facility on their phone this function would not be available to the App anyway.
- Phone calls - if a customer needed to use the smart device call function while using the App, the App needed access to the phone call facilities of the smart device.

As a result of DHS's actions, the negative consumer reviews about privacy and permissions access slowed down considerably, however these issues continue to be raised with DHS as customers work to comprehend the permissions system used by Google Play.

Conclusion

From an App design perspective privacy issues need to be resolved and minimised within the context of the App Eco System as it relates to personal information data flows and potential connections to third party entities that support the system. With respect to Express Plus Apps, DHS has sought to design Apps that incorporate the special features of smart devices without minimising privacy protections, to provide compliant Privacy Notices and to ensure that reasonable steps have been taken to have in place a robust level of information security in the design and use of the Apps.

As an App developer and as the primary agency for delivering Australian government services, DHS continues to improve its App design to deliver more services using the current Express Plus Apps with a view to releasing new Apps in the future.

Endnotes

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