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Editor: Elizabeth Drynan

NO 80

aialFORUM

Australian Institute of Administrative Law Incorporated.

Editor: Elizabeth Drynan

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The AIAL Forum is published by
Australian Institute of Administrative Law Inc.
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www.aial.org.au

This issue of the *AIAL Forum* should be cited as (2015) 80 *AIAL Forum*.

The Institute is always pleased to receive papers from writers on administrative law who are interested in publication in the *AIAL Forum*.

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ISSN 1322-9869



Printed on Certified Paper

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VALE CHRISTOPHER HOLT AM

The Australian Institute of Administrative Law notes with great sadness the sudden and unexpected death on 4 September 2014 of Chris Holt, publisher and co-founder of The Federation Press. Law publishing was a narrow field in 1987 when Chris and his two colleagues, Kathryn Fitzhenry and Diane Young, took the bold step of leaving one of the two dominant legal publishers in Australia at the time, the Law Book Company, to establish The Federation Press as a small, independent legal publisher. Their venture has blossomed into a major legal publishing house with more than 400 leading works in its list. He leaves a publishing house distinguished by its strong sense of social justice, something demonstrated in its publishing philosophy, which states:

The Federation Press believes ideas are important and that books remain unrivalled as a forum for communication, analysis and debate on ideas. We encourage authors to write books that not only convey information but which also engage current debates and stimulate the intellect. We encourage the use of language which is clear and unambiguous.

Chris remained strongly committed to that philosophy with the consequence that it is a discernible theme in the wide range of legal and related fields found under The Federation Press imprint. A further consequence is that the output of The Federation Press has made a notable contribution, not only to the law, but also to Australian law and society.

A feature of being an author in The Federation Press stable is that, despite the growth in the business, it was Chris to whom authors talked about their work. He was a great friend and supporter of authors and always remained positive and unflappable, no matter what snags, delays and crises punctuated his daily working life. He will be sadly missed, but the strength of the principles underpinning his publishing house is such that his legacy will live on at The Federation Press.

Peter Sutherland

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Data Retention Bill passed by Parliament - joint media release by the Attorney General and Minister for Communications

On 26 March 2015, the Commonwealth Parliament passed Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the Bill).

'By passing this Bill, the Parliament has ensured that our security and law enforcement agencies will continue to have access to the information they need to do their jobs. No responsible government can sit by while those who protect us lose access to vital information, particularly in the current high threat environment.

At the same time, the Bill contains safeguards to protect our cherished rights and liberties, including through the establishment of additional oversight mechanisms covering the security and law enforcement agencies.

Metadata is the basic building block in nearly every counter-terrorism, counter-espionage and organised crime investigation. It is also essential for child abuse and child pornography offences that are frequently carried out online.

A victim's right to justice, and agencies' ability to solve crimes, shouldn't depend on which service provider is used by the victims and perpetrators.

The Bill ensures that telecommunications providers will be required to retain a defined set of data for a period of two years. This will substantially improve the availability of data should it be necessary for a particular investigation.

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) examined the Bill at length and concluded that the Bill is "a necessary, effective and proportionate response to the serious threat to national security and public safety caused by the inconsistent and degrading availability of telecommunications data."

We also recognise that the right to privacy and the principle of freedom of the press are fundamental to our democracy. For these reasons, the Bill contains new and strengthened safeguards. These include the provision of new oversight powers to the Commonwealth Ombudsman; a reduction in the number of agencies accessing metadata from over 80 to 21; and specific protections for journalists and their sources.

No comparable nations will have greater pre-authorisation approval and post-authorisation oversight requirements for journalists.

The Government acknowledges the important work of two PJCIS inquiries and in particular the efforts of the Chairman and Deputy Chairman of the Committee, Mr Dan Tehan MP and the Hon Anthony Byrne MP. The Government would also like to acknowledge the telecommunications industry, media and other stakeholders who have been part of the ongoing consultation undertaken to achieve this crucial outcome for national security and law enforcement.

This represents the fourth tranche of national security legislation the Abbott Government has successfully implemented since October 2014. Through these laws, the Government has addressed pressing gaps and needs in Australia's national security and law enforcement framework.

We will continue to do everything we can to ensure that our agencies have the resources and powers they need to keep our community safe.'

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/26-March-2015-Data-Retention-Bill-passed-by-Parliament.aspx>

Continuation of the Office of the Independent Reviewer of Adverse Security Assessments

On 11 December 2014, the Attorney General announced that the Hon Margaret Stone will continue in the role of the Independent Reviewer of Adverse Security Assessments for a further two-year term.

Ms Stone has served in this role since December 2012. She has performed a valuable function in conducting independent reviews of Australian Security Intelligence Organisation (ASIO) adverse security assessments of people who have been found to be owed protection under international law but are being held in immigration detention in Australia because of an adverse security assessment.

The Government thanks Ms Stone for her willingness to continue in this role, which provides a valuable advisory review mechanism. This is an important safeguard in addition to internal reviews of these cases conducted by ASIO.

To date, the majority of reviews of the Independent Reviewer have confirmed ASIO's initial assessment, highlighting the integrity of the assessment and internal review process. This is a testament to the confidence that successive Governments have rightly placed in the professional judgment of ASIO. In the small number of cases where the Independent Reviewer has recommended a different outcome to the initial assessment, mainly where additional information had come to hand, ASIO agreed with the recommendation and, in several cases, had already reached the same conclusion on the basis of its internal review.

The (then) Minister for Immigration and Border Protection, the Hon Scott Morrison MP, said 'the reviewer has played a helpful and important role in addressing these cases and I look forward to that continuing as the Government processes the legacy caseload of 30,000 people Labor left behind as a result of their border failure and failure to act on processing.'

The Government looks forward to continuing to work with the Independent Reviewer.

Further information about the Independent Reviewer of Adverse Security Assessments, including terms of reference is available at:

<http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx>

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/11December2014-ContinuationoftheOfficeoftheIndependentReviewerofAdverseSecurityAssessments.aspx>

Super tribunal marks successful first year

(Former) NSW Attorney General Brad Hazzard welcomed strong figures from the state's super tribunal showing that more than 70 per cent of matters in 2014 were resolved at, or prior to, the first hearing.

'It is good news for tens of thousands of consumers and small businesses that disputes in NSW are being resolved speedily and at low cost,' Mr Hazzard said.

'The NSW Civil and Administrative Tribunal (NCAT), which was established on 1 January last year to consolidate the work of 22 former tribunals, has conducted more than 92,000 hearings.

'From neighbours at war over a dividing fence to not getting exactly what you ordered for your mates buck's night, NCAT deals with a diverse range of cases across the state,' Mr Hazzard said.

Along with consumer complaints and tenancy disputes NCAT also assists with guardianship applications for people who are unable to make decisions because of a disability.

Mr Hazzard said NCAT was making digital access easy with two thirds of all applications relating to commercial and consumer disputes being lodged online.

'The NCAT website has been very popular with more than 2.2 million page views last year. I'm pleased to say the website has now been given a fresh new look and feel and been incorporated into the Department of Justice suite of sites making it easier for customers to access services and information in one central place.

'NCAT is a one stop shop for specialist tribunal services in NSW with hearings being offered at 78 locations around the state.

'The NSW Liberal & Nationals Government has a strong track record in delivering quality services to the community and the super tribunal is helping resolve disputes quickly and in a cost effective way,' Mr Hazzard said.

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2015/Super-Tribunal-.aspx>

Review to strengthen Victoria's Charter of Human Rights

The Andrews Labor Government will review Victoria's Charter of Human Rights and Responsibilities to ensure it is robust and effective.

Attorney-General Martin Pakula has appointed Michael Brett Young – CEO of the Law Institute of Victoria (LIV) until 2014 and previously managing partner at Maurice Blackburn – to lead the review.

Introduced by the former Labor Government in 2006, the Charter contains 20 fundamental human rights based on those set out in the International Covenant on Civil and Political Rights.

These include freedom of expression, privacy, liberty, equality before the law, the right to vote and rights in criminal proceedings.

The Charter requires the Victorian Government, public servants, local councils, Victoria Police and other public authorities to act compatibly with these human rights and to consider them when developing policies, drafting legislation and delivering services.

During the last term of government, the Coalition significantly reduced the emphasis placed on the Charter and made cuts to Charter education and training for government departments.

This review is the first step in delivering the Labor Government's election commitment to refresh the Charter and resume public education to embed the values of freedom, respect, equality and dignity in society.

The report – which will include consultation with key stakeholders and submissions from the public – will be delivered to the Government by 1 September 2015, before being tabled in Parliament by 1 October 2015.

Further information on consultations and submissions will be made available shortly. For more information about the Charter, visit:

<http://www.humanrightscommission.vic.gov.au/index.php/the-charter>

<http://www.premier.vic.gov.au/review-to-strengthen-victorias-charter-of-human-rights>

SACAT now open

South Australia's central body for dispute resolution opened its doors on 30 March 2015.

Attorney General John Rau said the South Australia Civil and Administrative Tribunal (SACAT) is a huge step forward for the justice system and the South Australian community and is the result of years of work.

'I want our justice system to be fair and accessible to everyone, SACAT will be a one stop shop for most administrative disputes and tribunals.

'The first phase of legislation passed last year moved the Residential Tenancies Tribunal, Guardianship Board and Housing Appeal Panel into the SACAT.

'SACAT will also hear land valuation matters that were previously dealt with by the Supreme Court. This will streamline the process and will offer real benefits for the public and the justice system.'

Mr Rau said the Tribunal's work is divided into three streams that reflect the broad categories of work: community matters, housing and civil matters, and administrative and disciplinary matters.

An experienced Executive Senior Member has been appointed to lead each of these streams while expert members remain on hand to assist the Tribunal with matters that require a specific area of expertise.

'These are the first of many jurisdictions that will move to SACAT over the coming years,' Mr Rau said.

'SACAT will take on the functions administered by a range of bodies and authorities.

‘For example, disputes of the return of a bond to a tenant or a family dispute about the best way to make decisions for a parent with mental incapacity will be heard by SACAT.

‘It is expected that around 120 Acts will move over to SACAT over time and the Tribunal will continue to adapt as its role expands.’

SACAT President, Justice Greg Parker, said the Tribunal will place great emphasis on accessibility and efficiency for the public.

‘SACAT has been provided with the tools to be as flexible as possible so as to handle matters in the most appropriate way, which will be determined on a case-by-case basis,’ Justice Parker said.

‘Alternative dispute resolution can be used to assist parties to reach an agreement without the need for a hearing. Or, where necessary, SACAT has the power to obtain evidence and manage proceedings.

‘A single online form replaces multiple paper applications and there will be a one off application fee of \$69. These will replace the diversity of application forms and fees that were previously in place.

‘Cases can also be heard in regional areas and via video conferencing or telephone and Tribunal members will continue to attend hospitals for hearings where necessary.

‘There is also a public kiosk based at SACAT headquarters at 100 Pirie Street where online applications can be made with the advice and assistance of trained community access officers.’

For more information about SACAT or to lodge an application visit www.sacat.sa.gov.au.

[www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives Announcements and News/March 2015 - media releases/20150330-MR-AG-sacatopen.pdf](http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/March%202015%20-%20media%20releases/20150330-MR-AG-sacatopen.pdf)

Privacy law reform report card

12 March 2015 marks the first anniversary of the most significant changes to Australian privacy laws in over 25 years. On 12 March 2014, changes to the *Privacy Act 1988* commenced.

The Office of the Australian Information Commissioner’s (OAIC) focus over the past year has been on developing guidance and working with organisations and agencies to ensure compliance.

‘Over the last year we have focused on working with business, government agencies and the wider community to ensure that everyone has the tools and information they need to understand and implement the changes,’ said the Australian Privacy Commissioner, Mr Timothy Pilgrim.

‘I’ve been particularly pleased with how organisations and agencies have responded positively to the challenge of implementation. This is recognition that good privacy practices are good for business, particularly in building customer trust.’

The changes included the introduction of a new set of unified privacy principles, the Australian Privacy Principles (APPs), changes to the credit reporting provisions and new enforcement powers for the Commissioner.

Over the past 12 months, the OAIC has:

- received 4,016 privacy complaints (a 43% increase on the previous 12 months);
- received 14,064 privacy enquiries;
- received 104 voluntary data breach notifications; and
- commenced 13 privacy assessments.

Since 12 March 2014, the OAIC has encouraged organisations and agencies to focus on being open and transparent with customers about how their personal information is managed, a new requirement in the APPs. The Commissioner has commenced a targeted assessment program of a selection of online privacy policies, with more assessments focusing on APP compliance to come in 2015.

‘For the next twelve months our focus will be on governance, assisting organisations and agencies to build a culture of privacy, and ensuring that organisations and agencies are proactive in meeting their compliance requirements. My message for all organisations and agencies is: it is more effective, and ultimately cheaper, to embed privacy in day-to-day processes than it is to respond to issues such as data breaches as they arise,’ said Mr Pilgrim.

The OAIC has been undertaking privacy law reform work during a period of significant change within its own structure, as foreshadowed by the Government in the 2014 Budget.

The implementation of such significant privacy reforms could not have been achieved without the commitment of a dedicated and skilled group of staff who worked tirelessly to ensure that businesses, agencies and the OAIC were prepared,’ said Mr Pilgrim.

<http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/privacy-law-reform-report-card>

Equal Opportunity Act review released

The Western Australian State Government has endorsed recommendations of the review into the structure of the Equal Opportunity Commission.

Attorney General Michael Mischin has also announced the appointment of Allanah Lucas as the Commissioner for Equal Opportunity for a three-year term.

Mr Mischin said the report, compiled by the Public Sector Commissioner, made four recommendations on how the objectives of the *Equal Opportunity Act 1984* could best be achieved.

‘The commissioner has a range of important functions under the Act. The continuing promotion of equality and elimination of discrimination is vital to achieving equal opportunities in Western Australia,’ he said.

‘Such a review seemed timely, given the approach of the 30th anniversary of the passage of the Act.

‘Almost 50 submissions were received in response to the review, demonstrating broad and strong support for the Office of the Commissioner as an independent statutory body.

‘The review did identify opportunities to improve the Commission’s effectiveness, recommending the commissioner revise the internal structure of the organisation and make greater use of technology in operational areas such as complaints handling.

‘It also found there was an opportunity for the Commission to be more proactive and strategic in its role to advise and assist individuals, businesses, organisations and agencies, and recommended greater collaboration with relevant agencies, such as the Australian Human Rights Commission, the Western Australian Ombudsman and Legal Aid Western Australia.’

The Attorney General said, in relation to the Director of Equal Opportunity in Public Employment (DEOPE), the review found there was an opportunity for agencies’ reporting and compliance obligations to be streamlined and rationalised in light of their current obligations under the *Public Sector Management Act 1994*.

‘The review recommended the statutory role of the DEOPE be abolished and its statutory functions transferred to the Public Sector Commissioner,’ he said.

‘This would preserve the important statutory functions of the DEOPE, but accommodate the office within the framework for administration of the public sector under the *Public Sector Management Act 1994*.’

<http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=9253>

Recent Cases in Administrative Law

The ‘national interest’ and unauthorized maritime arrivals

Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor [2015] HCA 3 (11 February 2015)

The plaintiff, a Pakistani national, entered Australia by boat at Christmas Island in May 2012. He did not have a visa and was, therefore, an ‘unlawful non-citizen’ within the meaning of the *Migration Act 1958* (Cth) (the *Act*). By June 2013 amendments to the *Act*, he subsequently became an ‘unauthorised maritime arrival’.

Because the plaintiff was an unlawful non-citizen and an offshore entry person (and later an unauthorized maritime arrival) he was barred from making a valid visa application. In September 2012, the Minister lifted the bar and permitted the plaintiff to make an application for a permanent protection visa (PPV). The plaintiff made an application, which was refused by a delegate of the Minister. The plaintiff sought review of that decision by the Refugee Review Tribunal. The Tribunal remitted the plaintiff’s application to the Minister for reconsideration because the plaintiff was found to be a refugee. The Minister did not decide the plaintiff’s application because of an instrument signed on 4 March 2014, which purported to create a cap on the maximum number of protection visas that could be granted in the financial year ending 30 June 2014. That maximum number having been reached, the grant of a protection visa to the plaintiff in that financial year would exceed that limit.

The plaintiff initiated proceedings in the High Court claiming that various regulatory and other steps, including the cap, which were thought to permit the Minister not to decide the plaintiff's application were invalid or ineffective. In June 2014, the High Court held in favour of the plaintiff and ordered that the Minister consider and determine the plaintiff's application for a PPV according to law (see *Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor* [2014] HCA 24).

In July 2014, the Minister decided to refuse to grant the plaintiff a protection visa. The only reason for the refusal was that the Minister was not satisfied that the grant of a protection visa to the plaintiff 'is in the national interest' (cl.866.226 criterion) because he was an unauthorised maritime arrival. The Minister's decision record shows that he saw 'the national interest' as requiring refusal of a protection visa to any and every unauthorized maritime arrival.

The plaintiff challenged the validity of the 'national interest' criterion on which the Minister relied and asked for orders directing the Minister to grant the plaintiff a PPV. The plaintiff also contended that amendments made to the *Act* and *Migration Regulations 1994* in late 2014 to convert PPV applications into temporary protection visa (TPV) applications, did not affect his right to a grant of the permanent protection visa he had applied for.

The High Court unanimously found that the decision made by the Minister to refuse to grant the plaintiff a protection visa was not made according to law. The Court found that the *Act* exhaustively states what visa consequences attach to being an unauthorised maritime arrival (that they are barred from making an application for a visa unless the bar is lifted), and the Minister could not refuse an application for a visa only because the plaintiff was an unauthorised maritime arrival, in circumstances where the bar was lifted. It was not necessary for the Court to address the validity of the 'national interest' criterion upon which the Minister relied in refusing the plaintiff's application.

The Court also held that the amendments to the *Act* and Regulations in late 2014 did not convert the plaintiff's application for a PPV to a TPV. The new reg 2.08F(3) (which purportedly converts undecided PPV applications into TPV applications) only applied to applications where 'the Minister had not made a decision'. The Court rejected the defendants' submission that reg 2.08F applied because the Minister's decision involved jurisdictional error and 'is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.'

The Court held that this phrase must be read in the context of the whole of reg 2.08F(3), including the reference to legally infirm decisions in reg 2.08F(3)(b)(iii). In this context it becomes evident that 'if...the Minister had not made a decision', does not include legally ineffective decisions made by the Minister. Therefore, for the purposes of reg 2.08F, the Minister had made a decision before its commencement. As such the plaintiff's application for a PPV was not affected by these amendments.

Administrative law and the AFL

Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority [2015] FCAFC 7 (30 January 2015) (Kenny, Besanko and White JJ)

This was an appeal from a judgment of a judge of the Federal Court, dismissing applications for judicial review by Mr James Hird, the Senior Coach of the Essendon Football Club (Essendon) in respect of a decision by the Chief Executive Officer (CEO) of the Australian Sports Anti-Doping Authority (ASADA) to issue notices under cl 4.07A of the National Anti-

Doping Scheme (NAD Scheme) to 34 current and former players for Essendon. Essendon did not appeal.

The notices were issued by the CEO as part of an investigation by ASADA, in cooperation with the Australian Football League (AFL), into a supplements program employed by Essendon in 2011 and 2012. Under cl 4.07A, the notices were required to inform each of the 34 players of a 'possible non-presence anti-doping rule violation.'

Mr Hird challenged the Federal Court's decision on a number of grounds. First, he contended that the 'joint' or cooperative investigation conducted by ASADA with the AFL was not authorised by the *Australian Sports Anti-Doping Authority Act 2006* (Cth) (*ASADA Act*). He also contended, among other things, that the CEO acted unlawfully in: (1) disclosing certain personal (NAD Scheme personal information) to the AFL during the interviews of Essendon players and personnel, and (2) facilitating the abrogation of the interviewees' common law rights against self-incrimination and exposure to civil penalties. Mr Hird also argued that the notices issued to the 34 players were invalid as the evidence or information from the investigation on which the notices were based was unlawfully obtained.

Mr Hird did not contest the findings of fact made by the primary judge, although he disputed the primary judge's characterisation of those findings. The primary judge found that the AFL and ASADA each conducted separate investigations in which they cooperated closely with one another and subsequently made separate decisions within their own areas of responsibility. ASADA was clearly conducting an investigation into possible anti-doping violations while the AFL was undertaking its own enquiries, obtaining information for itself (for instance, through the interview process) for the purposes of enforcing its own Player Rules.

The Full Court rejected Mr Hird's contention that primary judge's decision involved any element of mischaracterisation. It further rejected Mr Hird's challenge essentially because it held that the investigation conducted by ASADA, in cooperation with the AFL, was authorised by the *ASADA Act*, the *Australian Sports Anti-Doping Authority Regulations 2006* (Cth) and the NAD Scheme. This legislative scheme envisaged that there would be close cooperation between ASADA and sporting administration bodies, like the AFL, in anti-doping investigations. The legislative scheme enabled ASADA to benefit lawfully from the AFL's use of its compulsory contractual powers, including by requiring Essendon players and personnel to attend interviews at which both AFL and ASADA representatives were present and to answer questions.

The Full Court also affirmed that there was no unlawful disclosure of NAD Scheme personal information by ASADA to the AFL in the interviews of Mr Hird and the 34 Players because each provided information at his interview directly and simultaneously to the AFL and ASADA, the representatives of both being present when the information was given.

The Full Court also held that the CEO did not facilitate the abrogation of the interviewees' common law rights to the privileges against self-incrimination or exposure to penalty. There was no practical unfairness to the appellant or the 34 Players in the way the interviews were conducted and they were not misled in the interview process. The Full Court rejected Mr Hird's submissions about lack of 'free consent' and that there was no waiver of privilege. The Full Court agreed with the primary judge, who found that, upon becoming a player or official, Mr Hird and the 34 Players voluntarily accepted the obligations under the AFL's Player Rules and Anti-Doping Code to attend interviews and answer questions fully and truthfully, or face possible sanction by the AFL. Mr Hird and the 34 Players were all legally represented at their interviews. They and their lawyers were on notice before and at the interviews that the AFL and ASADA proposed to conduct the interviews together and they could have been in no

doubt about the purposes of the interviews. They also knew that the AFL was invoking the compulsory powers conferred by its Player Rules and its Anti-Doping Code when it required answers to the interview questions. The primary judge found, and Mr Hird did not dispute, that neither he nor any of the 34 Players objected to the presence of either the AFL or ASADA at their interviews. No one objected to answering any question, whether on the ground that its answer might incriminate him or expose him to a civil penalty, or otherwise.

Since Mr Hird failed to establish that the information on which the CEO based the decision to issue notices under cl 4.07A of the NAD Scheme was unlawfully obtained, Mr Hird's challenge to the notices failed and the appeal was dismissed.

The AFL's Anti-doping Tribunal decision – the end?

On 31 March 2015, the AFL's Anti-doping Tribunal handed down its decision with respect to the alleged violation by the Essendon 34 players of the AFL Anti-Doping Code.

The Tribunal was comfortably satisfied that the substance Thymosin Beta-4 was at the relevant time a prohibited substance under the Anti-Doping Code.

However, the Tribunal was not comfortably satisfied that any player was administered Thymosin Beta-4. Therefore, it was not comfortably satisfied that the 34 players violated cl.11.2 of the AFL Anti-Doping Code.

The Tribunal's decision and reasons were provided to the parties in accordance with the function performed by the Tribunal. Any publication of the Tribunal's decision and reasons is a matter for the parties.

The AFL Players Association has said it will take time for a decision to be made on whether the Tribunal findings are to be made public. Each of the 34 players must separately decide whether he wants the decision released.

Quarantine laws and a 'blunt attempt to trump'?

Mowburn Nominees & Ors v Palfreyman, Chief Veterinary Officer, Department of Agriculture, Fisheries and Forestry & Ors [2014] QSC 320 (12 December 2014)

The applicants run about 80,000 head of beef cattle on two properties in far north Queensland. On 4 December 2012, a quarantine notice was issued to the applicants, which confined their cattle to the two properties until the date of release.

Eighteen months later, on 6 May 2014, the respondents served a release on the applicants. On the same day, the applicants were served with a quarantine notice under the *Stock Act 1915* (Qld) for suspected infection of a strand of Bovine Johne's Disease (BJD). This notice related to a positive test for bison, not cattle, BJD in a screening on 13 February 2014. That notice was amended on 5 November 2014.

Both of those notices were quashed on 28 November 2014 in *Mowburn Nominees & Ors v Palfreyman & Ors* [2014] QSC 289. The issuing of the notices was held to be an irregular exercise of statutory power and beyond jurisdiction because neither was supported by satisfactory evidence of the jurisdictional fact of suspected infection.

Within six and a half hours of the Court's declaration, the second respondent issued the new notice in identical terms (the third notice). The applicants concede that the new notice cannot

be challenged on the same basis as the earlier notices. However, based on the haste with which it was issued, they contend that the new notice is 'a blunt attempt to trump' the previous declaration of invalidity. The applicants also contend that the quarantine power was not regularly engaged for failure to meet minimum procedural fairness requirements of prior notice and fair hearing by an open-minded decision-maker for stated reasons.

The Court held that there is no general rule of natural justice requiring that reasons for, or an explanation of, an administrative decision be given to those with rights or interests that could be adversely affected by it (*Public Service Board v Osmond* (1986) 159 CLR 656). Nor is there any circumstance in the context of this case that would make provision of preliminary or contemporaneous reasons a requirement of fairness.

The Court further held the test applied in Australia to determine disqualification by pre-judgment or prejudice is an objective one, that is, 'whether a fair-minded lay observer might reasonably apprehend that [the decision-maker] might not bring an impartial and unprejudiced mind to the resolution of the question [he or she] is required to decide' (*Johnson v Johnson* [2000] HCA 48). Pre-judgment or prejudice must be firmly established before disqualification of a decision-maker is justified.

An expectation by a party that the decision-maker is likely to decide issues or facts adversely is an insufficient basis for inferring a reasonable apprehension of bias. The decision-maker's mind must be shown to be so prejudiced in favour of a conclusion already formed that he or she might not alter that conclusion irrespective of the evidence or arguments presented to him or her (*Laws v The Australian Broadcasting Tribunal* [1990] HCA 31).

The Court held that there is a difference between impartiality and neutrality in the context of this case. Clearly the history between the parties created some predisposition in the second respondent to the applicants' stock prior to the date of issue. However, there is nothing to indicate that she was not able to suppress any preconceptions or preliminary opinions and thus decided to issue the third notice solely on the merits of the case in accordance with the statutory power and duty. The relevant concept of impartiality does not demand that decision-makers close their eyes or have a completely blank mind. What they must have is the capacity to give fresh consideration in the light of all relevant facts.

The Court also found there is no basis for believing that the fair-minded observer might reasonably apprehend that the second respondent might not have formed the state of mind for *Stock Act* purposes perversely, prejudicially or partially. The apprehended bias ground was also rejected. The application was dismissed.

Reviewable decisions under the *NDIS Act*

Burston and National Disability Insurance Agency [2014] AATA 456 (4 July 2014)

Luke Burston is a participant in the National Disability Insurance Scheme (NDIS). On 21 February 2014, he attended a meeting with a Planner at the National Disability Insurance Agency (NDIA) to finalise a plan for the support he would receive through the NDIS. Ms Wilcox, a disability advocate, and his mother, Ms Raynor, also attended the meeting. The NDIA Planner agreed to fund most of the support that was asked for on Luke's behalf but did not agree to fund four hours 'one on one support' for him on weekends.

On 8 May 2014, Ms Wilcox wrote to the NDIA, asking for an internal review of the decision 'not to fund the hours of one on one support.'

On 27 May 2014, the Planner wrote to Mr Burston, informing him that the request could not be supported. However based on changes in Mr Burston's circumstances, it was appropriate to amend his plan, under s 48(2) of the *National Disability Insurance Scheme Act 2013* (Cth) (the *Act*), to include six hours of behaviour support so his current needs could be assessed. Her letter was co-signed by an Acting Senior Planner who was a reviewer for the purposes of s 100(6).

Mr Burston applied to the Administrative Appeals Tribunal (the Tribunal) for a review of the Planner's amended decision.

The Tribunal held that it was clear from Ms Wilcox's letter that Ms Raynor was dissatisfied with the decision not to fund weekend support and wanted the NDIA to review its decision. Although she did not say so in so many words, the Tribunal found that she was asking for a review by a reviewer under s 100(6) of the *Act*. However, it was clear, from her letter dated 27 May 2014, that the Planner took the letter to be a request for a review under s 48(2) of the *Act*. The Planner purported to make a decision under s 48(2) by affirming the decision not to fund one on one support and by amending the plan concerning other support. The only decision under s 48(2) that the Tribunal can review is a decision not to review a plan.

The Tribunal further held that the Planner was not a reviewer for the purposes of s 100(6) of the *Act*. Although the letter was co-signed by a Senior Planner, that is not itself enough to convert a decision which the Tribunal cannot review into a decision under s 100(6) which the Tribunal can review.

As such the Tribunal found it did not have jurisdiction to review the decision in the NDIA's letter.

ISSUES PRESENTED BY LEGISLATIVE AND EXECUTIVE IMPLEMENTATION OF THE NATIONAL DISABILITY INSURANCE SCHEME

*Michael Sassella**

The National Disability Insurance Scheme (NDIS) is an unusual Commonwealth scheme. It is administered by the National Disability Insurance Agency (NDIA) that, unlike almost all other Commonwealth agencies, is a joint venture involving the Commonwealth and all of the states and territories. Forty percent of funding for the scheme is provided by the Commonwealth and 60% by the states and territories. This arrangement creates an unusual governance structure; there is a structure inside the NDIA and, in addition, an intergovernmental governance arrangement involving the joint venturers. The joint venture structure is reflected in the legislation, legislative instruments, financial arrangements and general administration of the scheme. The implementation of the scheme is also influenced by the fundamental compact informing the creation of the NDIS.

Implementation

It is well known that the NDIS had its genesis in the work of the Productivity Commission. Between February 2010 and July 2011 it researched a strategy to enhance the quality of life and increase the economic and social participation of people with disability and their carers. This project resulted in the two-volume report, *Disability Care and Support: Productivity Commission Inquiry Report No 54, 31 July 2011* (the PC Report).¹

There followed discussions between the Commonwealth, states and territories at the Council of Australian Governments (COAG). There was a general acceptance that the then disability support system was underfunded, unfair, fragmented and inefficient, and gave people with disability little choice and no certainty of access to appropriate supports. The stresses on the system were growing, with rising costs for all governments.²

The COAG discussions led to an Intergovernmental Agreement (IGA)³ signed by all heads of Australian governments on 7 December 2012. By that date considerable work had already been done to implement the NDIS. The National Disability Insurance Scheme Launch Transition Agency (NDISLTA) had been operating as part of the Commonwealth Department of Families, Housing Community Services and Indigenous Affairs since early in 2012. The NDIA's legal title is still the NDISLTA.⁴

At officer level, a Design Working Group met frequently to discuss policy, process and miscellaneous arrangements, sometimes in person but usually by telepresence. At Ministerial level a Standing Council on Disability Reform, known generally as the Ministerial Council⁵, had been created and was functioning. The Bill for the *National Disability Insurance Act 2013* (the *NDIS Act*) was introduced into the House of Representatives on 12 December 2012.

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The IGA is a high level agreement which has had to be supplemented for each host jurisdiction⁶ by a bilateral agreement between that state or territory and the Commonwealth. Each bilateral agreement is unique but each covers matters such as transfer of funds, phasing of particular groups in the state or territory into the NDIS, location of offices, what state or territory contracts with providers will be continued and utilised by the NDIA, continuity of supports for those who do not qualify for access to the NDIS (such as those aged over 65) and any other matters unique to the relationship.

All states and territories are now host jurisdictions with the exception of Queensland which has, however, agreed to join the NDIS when the full scheme commences in July 2016.

At Commonwealth level the NDIA is a corporate Commonwealth entity⁷ situated within the Social Services Portfolio. The Department of Social Services is responsible for formulating, negotiating and legislating NDIS policy. The NDIA is responsible for the proper administration of the NDIS.

For the Commonwealth, the joint venture basis of the NDIS has presented particular challenges: how the Commonwealth implements a new scheme or agency and how it then goes about the business of governance and administration.

The remainder of this paper emphasises the operation of this joint venture arrangement as it affects:

- external governance of the NDIS;
- internal governance of the NDIA;
- financial arrangements;
- decision-making; and
- interaction between Commonwealth and host jurisdiction laws.

The merits review arrangements for the NDIS are not affected by the structure and are standard Commonwealth arrangements.

External governance of the NDIS

While the NDIS is administered by the NDIA and is governed by a Board, the Standing Council on Disability Reform, a COAG Ministerial Council made up of Treasurers and Ministers responsible for disability, from the Commonwealth and each state and territory, is the decision-maker on the NDIS policy issues.

The NDIA holds all funds contributed by the Commonwealth, states and territories in a single pool, manages scheme funds, administers access to the scheme and approves the payment of individualised support packages.

The NDIA Board is responsible for the performance of these functions and the strategic direction of the NDIA. The Board manages its costs and liabilities from year to year, including through the development of a reserve and investment of funds.

The NDIA Board is advised by the NDIS Independent Advisory Council (IAC), established by s 143 of the *NDIS Act*.

The Commonwealth Minister is responsible for administering the *NDIS Act*, and exercises statutory powers with the agreement of states and territories, including a power to make the NDIS Rules and direct the NDIA.

The need to obtain consent from, or at least consult with, host jurisdictions, before taking many actions within the NDIA is a necessary precondition to the Minister taking certain administrative, policy or legal actions. The intention, with regard to development of policy and, with reservations, legislation, is for the states and territories to have an effective influence on developments.

Internal governance of the NDIA

In the internal operations of the NDIA the states and territories wield influence in the following ways:

- Before the Minister may give general directions about the performance of its functions under s 121 of the *NDIS Act*, or strategic guidance under s 125, to the NDIA, the Commonwealth and the host jurisdictions have to agree to the giving of the statement.
- After giving a direction to the NDIA the Minister must give a copy to the Ministerial Council (s 176(1)).
- In making appointments to the NDIA Board and the IAC the Minister must consult with all states and territories about the Chair and Principal Member appointments and, for all Board and IAC members, the Minister must seek and receive the support of all states and territories (ss 127(3)-(4), ss 147(2)-(3)).
- If appointing an acting Board or IAC member, the Minister must consult the states and territories, although their support is not required (s 129(2A), s 149(2A)).
- If considering giving leave of absence to the Board Chair or IAC Principal Member, the Minister must consult with host jurisdictions but their agreement is not required (s 131(2), s 151(2)).
- Where the Minister is considering termination of a Board or IAC member for misbehaviour or incapacity, or, in the case only of the Board, want of confidence, the Minister must consult the host jurisdictions and seek and obtain their support (ss 134(3)-(4), ss 155(2)-(3)).
- If the Minister is considering terminating the Chair of the Board or the IAC Principal Member, consultation with the host jurisdiction, without necessarily obtaining agreement, is required (s 134(3), s 155(3)).
- The Minister must tell the Ministerial Council of any of the above actions to do with appointments of Chair or members of the Board and IAC, of the CEO, an acting Chair, Board member or IAC member, granting leave of absence, resignation or termination (s 176).
- The Minister must be satisfied that the Commonwealth and a majority of host jurisdictions agree to the terms and conditions of office of Board and IAC members (s 135(2), s 156(2)).
- The Minister must consult the host jurisdictions before appointing a CEO of the NDIA, although agreement to the proposal is not required (s 160(7)).
- The Board must give the Ministerial Council a copy of various documents including the corporate plan (and any subsequent variations), the quarterly report on NDIA operations, annual reports, any interim reports, notification of significant events and sensitive information to the Minister or Finance Minister, the appointment of a new CEO, resignation of a CEO or termination of a CEO (ss 173, 174, 177).
- Under s 201 the Minister can delegate to the CEO the Minister's powers under s 209 (the power to make rules in the form of legislative instruments) but each host jurisdiction must agree to this delegation.
- Under s 209 the Minister can make rules which have legislative force to flesh out provisions in the *NDIS Act*. Around 20 sets of rules have been made and are on the Federal Register of Legislative Instruments. In s 209 there is a complex set of categories for the various subject areas of the rules. Depending on the category into which a rule falls, the *NDIS Act* will require that the Minister secures agreement from

each host jurisdiction, or agreement from the one host jurisdiction affected by a proposed rule, or agreement from a majority of host jurisdictions, or merely consult with host jurisdictions.

- The regulation making power in s 210 of the *NDIS Act* also requires consultation with, or agreement by, host jurisdictions before the regulations are made. There are no NDIS regulations as yet.

The NDIA is, as a consequence, substantially constrained in its freedom to operate in the ordinary way that other Commonwealth agencies without the substantial state and territory interest can do.

Financial arrangements

The joint funding of the NDIS by the Commonwealth and the states and territories has necessitated particular legislative provisions. Section 178 provides for the Commonwealth to pay money appropriated for the NDIS to the Agency. Section 179 provides for the NDIA to receive money from a host jurisdiction to be used to provide supports funded by the NDIS to participants in the host jurisdiction's geographical area. This has obvious implications for NDIA's accountabilities for expenditure.

In this connection s 175 requires the NDIA to advise the Minister on request about expenditure of money received from a host jurisdiction and NDIA activities relating to a particular jurisdiction. Similarly, the Minister of a host jurisdiction who is a member of the Ministerial Council must be given information requested about how money from that jurisdiction has been spent, how money from the Commonwealth has been spent in that jurisdiction and NDIA activities relating to that jurisdiction. To date the NDIA has not received any requests under s 175.

The NDIA can also charge fees if the Minister, by legislative instrument, prescribes the functions for which fees can be charged and how the fees are to be quantified (ss 120(1)-(2)). The legislative instrument requires the agreement of all host jurisdictions (and the Commonwealth) before the Minister can make the instrument (s 120(4)). No such instrument has been promulgated as yet.

Decision-making

The states and territories have a priority status in some limited NDIA decision-making. These situations are:

- Where a child, ie a person under 18 years of age, is a participant in the NDIS, it is necessary to identify the person or persons with parental responsibility for that child. Whereas the CEO (or a delegate) can routinely decide who should have parental responsibility, where a state or territory Minister or head of a Department of State has guardianship or parental responsibility for a child, the CEO must accept that arrangement unless the Minister or head of Department has agreed in writing that the CEO can make a different determination (ss 74(1A), 75(3A)).
- Where the CEO needs to appoint a nominee for a participant requiring assistance or representation in their dealings with the NDIA, if there is a person who, under a law of the Commonwealth, state or a territory has guardianship of the participant, or has been appointed by a court or other tribunal to make decisions for the participant, the CEO is to have regard to that arrangement in appointing the nominee (s 88(4)).

Interaction between Commonwealth and host jurisdiction laws

The *NDIS Act* contains strong provisions in ss 55-57 permitting the NDIA to seek information relevant to its functions under the Act. Section 58 starts with the presumption that, when these provisions are used to obtain information from a person, even if a state or territory law purports to prevent that person from cooperating, the person must still provide the requested information. However, s 58 permits an exception where the NDIS rules state that certain listed state or territory laws preventing disclosure of information apply to a particular request. In that situation the person required by the NDIA to provide information can resist doing so.

The states and territories provided lists of provisions for inclusion in the *National Disability Insurance (Protection and Disclosure of Information) Rules 2013* (the Information Rules); these are far reaching and could serve to greatly impede the NDIA in its legitimate work. In practice the experience has been that the states and territories have not invoked these provisions to refuse to cooperate with the NDIA.

Section 67 of the *NDIS Act* provides for NDIS rules to regulate the CEO's power to certify that disclosure of protected information can occur in the public interest (in accordance with s 66(1)(a)). Protected information has much in common with personal information as understood under the *Privacy Act 1988*. Relevantly, it is information about a person held in the records of the NDIA⁸. The Information Rules deal with disclosure in the public interest. Examination of the rules shows that, while the states and territories have been able to provide a lengthy list of provisions designed to limit the provision of information to the NDIA, paragraph 4.6 in particular facilitates the provision of NDIS protected information for the enforcement of possibly minor criminal law enforcement by states and territories. This reflects the relatively powerful position of the states and territories in negotiations leading up to the launch of the NDIS in 2013.

The states and territories receive some additional recognition in ss 118 and 207 of the *NDIS Act*. In s 118, the section dealing with the functions of the NDIA, s 118(2)(a) requires that, in performing its functions, the NDIA must use its best endeavours to act in accordance with any relevant intergovernmental agreements, although those agreements are expressed not to be legally enforceable and include some provisions not included in the *NDIS Act*.

Section 207, headed 'Concurrent operation of State laws', states that it is the intention of Parliament that the *NDIS Act* is not to apply to the exclusion of a law of a state or territory to the extent that that law is capable of operating concurrently with the *NDIS Act*. This again reflects a desire to reinforce the place of the joint venture partners in the NDIS project, although s 207 does no more than reinforce what the general law would provide in any case.

Conclusion

The NDIS represents the increasing use of joint venture initiatives involving the Commonwealth and some or all of the states and territories, but the ambition and complexity of the NDIS arrangements represent a high water mark. This is because of the high cost of the full scheme and the interest and pressure from stakeholders who approach all joint venturers with their policy prescriptions.

The extensive requirements for agreement or consultation with all host jurisdictions and, occasionally, with all states and territories before the Minister can perform most of his or her actions, and the role of the Ministerial Council in approving policy and receiving regular performance reports serve to emphasise the ongoing importance of all parties in the operations of the NDIS and the NDIA.

Reference was made earlier to the lack of symmetry between the Commonwealth and states and territories in the matter of disclosure and protection of personal information. It was thought that these arrangements might cause some friction between the Commonwealth and the other parties. However, the Commonwealth and the states and territories have operated in this area much as occurs in other portfolios with similar statutory provisions. The relationship has been professional and cooperative.

More generally, the NDIA experience in working with the states and territories in the first year of the scheme has been uneventful with only a few areas of disagreement. The issues that have arisen have tended to involve aspects of the bilateral agreements between each host jurisdiction and the Commonwealth. The issues have involved processes such as the numbers of participants admitted to the NDIS and the numbers of plans implemented by due dates.

The joint venture is ambitious but it is clearly extremely worthwhile and all parties are working to make it a success.

Endnotes

- 1 The Report can be accessed at <http://www.pc.gov.au/projects/inquiry/disability-support/report>.
- 2 PC Report 2.
- 3 *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch* – see <https://www.coag.gov.au/node/485>.
- 4 *National Disability Insurance Scheme Act 2013* (NDIS Act) s 117.
- 5 *NDIS Act* s 9 (definition of 'Ministerial Council').
- 6 Defined in *NDIS Act* ss 9 and 10.
- 7 As defined in ss 11 and 12 of the *Public Governance, Performance and Accountability Act 2013* and s 117(2) of the *NDIS Act*.
- 8 *NDIS Act* s 9 (definition of 'protected information').

NEW CHALLENGES IN MERITS REVIEW DECISION-MAKING

*Jill Toohey**

Expanding jurisdictions, increasing numbers of parties representing themselves and the amalgamation of diverse tribunals all present challenges for decision-makers in merits review tribunals.

In July 2013, the *National Disability Insurance Scheme Act 2013* (the *Act*) came into effect. It gave the Administrative Appeals Tribunal jurisdiction to review 26 kinds of decisions of the National Disability Insurance Agency (NDIA) and, by amendment to the *Administrative Appeals Tribunal Act 1975*, a new Division of the Tribunal was established.¹

As well as giving effect to Australia's obligations under the UN *Convention on the Rights of Persons with Disabilities* (CRPD) and providing for the National Disability Insurance Scheme (NDIS), the objects of the *Act* include supporting the independence and social and economic participation of people with disability, providing reasonable and necessary supports for participants in the NDIS and enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their support.²

The *Act* recognises the rights of persons with disabilities to determine their own best interests, to exercise choice and control, and to engage as equal partners in decisions that will affect their lives to the extent of their ability. Persons performing functions and exercising powers under the *Act* must do so in accordance with the rights enshrined in the CRPD and other international agreements to which Australia is party,³ and must have regard to the progressive implementation of the NDIS and the importance of ensuring its financial sustainability.⁴

The new jurisdiction presents some particular challenges for the Tribunal. The legislation is based largely on broad principles and is untested. It encompasses almost limitless individual circumstances. Issues of accessibility are raised beyond those encountered in the Tribunal's other jurisdictions where unrepresented applicants and people with disabilities, especially in social security matters, frequently appear.

As well as dealing with the physical accessibility of premises, applicants have a range of complex cognitive and other disabilities, some of them very complex, including difficulties of comprehension and communication, and there are often a number of people involved in an applicant's life, as family members, carers and others, with varying degrees of legal authority to act on their behalf.

The National Disability Insurance Scheme

The NDIS commenced on 1 July 2013. It had bipartisan support in Parliament and was remarkable for the short time between conception and realisation. It is being rolled out

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progressively around the country, until July 2019. As at 1 July 2014, it covered the Hunter region in New South Wales, the Barwon region in Victoria, the Perth Hills area in Western Australia, the Barkly region in the Northern Territory, 15 to 24-year-olds in Tasmania, children under 14 in South Australia, and adults and children of certain ages in the ACT.

The NDIS implements, in broad terms, the recommendations of the Productivity Commission's 2011 report, *Disability Care and Support*.⁵ The Commission described the existing disability support system as one 'marked by invisible deprivation and lost opportunities' which was 'underfunded, unfair, fragmented, and inefficient, and gives people with disability little choice and no certainty of access to appropriate supports'.⁶

The Commission observed that most people know little about Australia's disability system and have no idea how poorly they would be served were they to come to need it, yet:

... major disability can happen to anyone at any time – a simple fall can lead to quadriplegia, and an illness to severe brain damage. Most families and individuals cannot adequately prepare for the large costs of lifetime care and support. The costs of lifetime care and support can be so high that the risks and costs need to be pooled.⁷

The Commission proposed a system, to be known as the National Disability Insurance Scheme, to provide insurance cover for all Australians in the event of a significant disability, and that funding of the scheme should be a core function of Government, like Medicare. Its main function, and source of cost, would be long term, high quality care and support for people with significant disabilities. Everyone would be insured and an estimated 410,000 people would receive scheme funding support.

The NDIS would also aim to better link the community and people with disabilities, and would provide information to the community about disability, help break down stereotypes, and ensure quality assistance and best practice among service providers.

Consistent with being an insurance-based scheme, funding under the NDIS is not a form of income support and is not means-tested.⁸ Like all insurers, the Commission said, the scheme would aim to minimise long-term costs meaning that there would be a strong incentive to undertake early intervention where it was cost-effective to do so; the scheme would 'spend dollars to save more dollars', and people would not have to wait for basic supports such as wheelchairs and personal care, and it would encourage and support people with disabilities to participate in employment and the community generally.

In the Commission's view, the benefits of the scheme would significantly outweigh its costs; people would know there would be a properly financed, comprehensive system to support them in the event that they, or a member of their family, acquired a significant disability. It estimated that the NDIS would only have to produce an annual gain of \$3,600 per participant to meet a cost benefit and, given the scope of the benefits it would provide, that test would be passed easily.

The NDIS provides support for people with disability by way of:

- general supports such as coordination, strategic or referral services or activities;
- funding to persons or entities to enable them to assist people with disability to participate in economic and social life; and
- individual plans under which funding for reasonable and necessary supports is provided to persons with disability who qualify to be *participants* in the scheme.

It is principally in this third area that the Tribunal will be involved, in reviewing decisions concerning access to the scheme and funding for supports. The Tribunal can also review decisions concerning registration of providers of supports, parental responsibility for children, the appointment of nominees who act on behalf of participants in the scheme, and related matters.⁹

The *National Disability Insurance Scheme Act 2013*

The objects of the *Act* are set out in s 3. As well as giving effect to Australia's obligations under the CRPD, they include:

- supporting the independence and social and economic participation of people with disability;
- providing reasonable and necessary supports for participants;
- enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
- promoting the provision of high quality and innovative supports that enables people with disability to maximise independent lifestyles and inclusion in the community; and
- raising community awareness of the issues that affect the social and economic participation of people with disability, and facilitating their greater community inclusion.

By s 209 of the *Act*, the Minister may make Rules prescribing a range of matters. The Minister has made Rules concerning matters including becoming a participant in the NDIS, plan management, supports for participants, timeframes for decision-making, children, and protection and disclosure of information.¹⁰

Becoming a participant in the NDIS

A person who meets the access criteria in s 21(1) of the *Act* becomes a *participant* in the NDIS. The access criteria comprise age, residence, and *disability* or *early intervention* requirements.¹¹

A person meets the *disability* requirements if she or he has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or to an impairment attributable to a psychiatric condition, which:

- is permanent, or likely to be permanent;
- results in substantially reduced functioning in communication, social interaction, learning, mobility, self-care or self-management; and
- affects the person's capacity for social and economic participation,

and the person is likely to require support under the NDIS for her or his lifetime.¹²

Early intervention means that a disability that is, or is likely to be, permanent will improve, or not worsen, if support is provided at an early stage, thereby reducing the person's future needs for supports.¹³

Reasonable and necessary supports

The NDIA must help each participant prepare a plan which is in two parts: a statement prepared by the participant of his or her goals, objectives, aspirations and personal circumstances; and a *statement of participant supports* prepared with the participant and

approved by the CEO of the NDIA which sets out the supports that will be funded or provided through the NDIS.¹⁴

According to the principles in s 4 of the *Act*, reasonable and necessary supports should:

- support people with disability to pursue their goals and maximise their independence;
- support people with disability to live independently and be included in the community as fully participating citizens; and
- develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.

Not every support required by a participant will be funded or provided through the NDIS. The CEO of the NDIA (and so the Tribunal) must be satisfied in relation to each support provided or funded that it meets all of the following criteria in s 34(1):

- (a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;
- (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;
- (c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
- (d) the support will be, or is likely to be, effective and beneficial to the participant, having regard to current good practice;
- (e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;
- (f) the support is most appropriately funded or provided through the NDIS, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:
 - (i) as part of a universal service obligation; or
 - (ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

Practice Direction for review of National Disability Insurance Scheme decisions

The decision to give the Tribunal jurisdiction to review decisions of the NDIA was not universally welcomed. Some thought the Tribunal too inaccessible, its procedures too formal and legalistic, and some questioned the ability of its members to determine complex disability matters and thought a specialist tribunal or an interim level of review, similar to the Social Security Appeals Tribunal, more appropriate.

The Tribunal recognised that it needed to deal with concerns about formality and legalistic procedures, to make its procedures as accessible as possible, and to incorporate into them, as far as possible, the principles of control and choice, and participation in decision-making, embodied in the *Act*. At the same time, it was important not to treat applicants with disabilities as a special case and sideline them from the wider Tribunal.

The Tribunal was also mindful, given the strong links between disability and poverty, that the majority of applicants would be unlikely to engage lawyers although, to some extent, that

concern has been met by the provision of a support person for every applicant to the Tribunal, and funding to Legal Aid Commissions for legal representation in 'complex or novel' cases (see below).

On 1 July 2013, the President of the Tribunal issued a Practice Direction for review of decisions in the NDIS Division.¹⁵ It aims to give applicants as much choice and control in the process, and for the process to be as quick, simple and non-adversarial, as possible. It describes what the Tribunal, the applicant and the NDIA must do to prepare for each stage of the process and encourages parties to reach agreement wherever possible. The Practice Direction and accompanying Facts Sheets are on the Tribunal's website.¹⁶

The process has been streamlined into a case conference between the parties six weeks after the application is lodged, followed by conciliation and a hearing if conciliation is unsuccessful, or a hearing only if the applicant wishes. The aim is to conclude each matter within 13 weeks.

Some features of the process are:

- a Case Officer is assigned to each applicant throughout the process;
- the Case Officer contacts the applicant or his or her representative within three days of the application being received to discuss the process, answer questions and ascertain any particular needs;
- on receipt of documents from the NDIA, the file is assessed by a Member, Conference Registrar and the Case Officer to consider what issues are raised by the application;
- a case conference between the parties is listed for six weeks after the application is lodged;
- parties leave the case conference with a written case plan setting out whether issues are agreed or remain in dispute, any further information required, what will happen next, the date of the conciliation or hearing and who will attend, and anything else that will make the process as quick and as fair as possible;
- the hearing is conducted in a non-adversarial manner, and legal formalities and language are discouraged; and
- oral reasons are given at the conclusion of the hearing wherever possible.

Legal representation and support

A unique feature of the NDIS is that all persons seeking review by the Tribunal are entitled to assistance under the National Disability Advocacy Program administered by the Department of Social Services (DSS). The *External Merits Review Support Component* comprises:

- access to a support person (the *External Merits Review – Support Component*); and
- access to legal representation in cases that raise 'complex or novel' legal issues.

Funding has been provided in each trial site to an agency to engage support persons who assist applicants at all stages of the process and advocate on their behalf if required.

The legal services component provides funding to legal aid agencies under arrangements with the agency in each state and territory. Funding is capped at \$6,720 per matter with a further amount of up to \$2,000 available to obtain expert reports. Applications are made to the Central Assessment Provider at the Department of Social Services. Guidelines for funding are on the DSS website.¹⁷

Applications to date

At July 2014, 21 applications had been lodged with the Tribunal. Several had been resolved by way of a case conference or conciliation, and three had been heard and finalised by way of a decision and published reasons.¹⁸ One decision has been made concerning the Tribunal's jurisdiction to determine an application.¹⁹ Other matters were at various stages of the process.

The matters that have been dealt with so far highlight some of the complexities of the legislation and the scheme generally, and the difficult questions of interpretation and application of the *Act* and Rules facing decision-makers. They include:

- where is the line between supports that should be funded under the NDIS and that which should be funded under other systems such as the health system;²⁰
- should the NDIS provide funding for a form of therapy for which there is emerging evidence of benefit but which is largely untested;²¹
- what is meant by substantially reduced mobility or social interaction or communication;²² and
- to what extent should families and communities be required to provide supports.²³

Other questions that have arisen include: how to assess 'value for money'²⁴ when considering the cost of support against potential benefits for an individual's quality of life; what weight should be given to the opinions of independent experts against the experience of families and therapists involved with an individual; and the tension between the need to ensure the financial sustainability of the NDIS generally and the needs of individuals.

In *Mulligan and National Disability Insurance Agency* [2014] AATA 373, the Tribunal had to decide whether Mr Mulligan met the disability requirements in the *Act*. He suffered from a number of conditions including a heart condition which limited his ability to walk and meant he could not mow his lawn. The only assistance he sought from the NDIS was someone to help him mow his lawn each month.

The first question the Tribunal had to consider was the meaning of disability in s 24(1). The question arose because 'disability' appears to be used with slightly different meanings in different parts of the *Act*. It was also not clear what it would mean to say that Mr Mulligan was 'likely to require support under the NDIS for his lifetime'. The Tribunal offered some tentative views but decided it was not necessarily finally to decide those questions because Mr Mulligan did not have 'substantially reduced functional capacity' in at least one of the areas set out in s 24(1)(c). Because each of the disability requirements in s 24(1) must be met, Mr Mulligan's application failed.

Mr Mulligan's appeal from the Tribunal's decision is listed for hearing by the Federal Court in March.

In *Young and National Disability Insurance Agency* [2014] AATA 401, Mr Young had emphysema and relied on portable oxygen. He also relied on insulin for his type 1 diabetes. There was no dispute that he met the disability requirements in the *Act* and he was receiving some funded supports. The Tribunal had to decide whether a portable oxygen concentrator, and an insulin pump which Mr Young preferred to injecting himself with insulin, were reasonable and necessary supports. It had to consider the meaning of 'clinical treatment' in the *Act* and whether the concentrator and pump were 'most appropriately funded or provided through the NDIS'.²⁵ The Tribunal decided that both were more appropriately funded or provided under the general health system and affirmed the decision under review.

In *TKCW and National Disability Insurance Agency* [2014] AATA 501, the applicant was a child with autism. There was no dispute that he met the early intervention requirements in the *Act* and he was receiving a range of supports under the NDIS. The Tribunal had to decide whether funding for a form of music therapy, for funding for a carer to stay with his twin brother while TKCW attended speech therapy with his mother were reasonable and necessary supports.

The application turned on whether the particular form of music therapy was, or would likely be, 'effective and beneficial' for TKCW, 'having regard to current good practice'.²⁶ The Tribunal heard evidence from a speech therapist whose experience with children with autism was that the therapy was beneficial, and from an academic who said there was a lack of reliable research into its benefits. The Tribunal was not satisfied, on the information it had, that the therapy met the requirement in the *Act*. It also decided that funding for a carer for TKCW's brother was not reasonable and necessary support taking into account 'what it is reasonable to expect families, carers, informal networks and the community to provide'.²⁷ It affirmed the decision under review.

In December 2014, after this paper was presented, the Tribunal published its fourth decision: *ZNDV and National Disability Insurance Agency* [2014] AATA 921. The applicant child, who had Asperger's syndrome, was a participant in the NDIS and was receiving a number of funded supports. At issue was whether occupational therapy equipment to be used in his home was a reasonable and necessary support. The child was using similar equipment with an occupational therapist and his parents

The Tribunal heard evidence about the use of 'sensory motor interventions' for children with autism from the child's treating occupational therapist and from an independent expert. It was not satisfied that the proposed support met the 'value for money' criterion in s 34(1)(c) and affirmed the decision under review.

Conclusion

It is early days in the operation of the NDIS and the Tribunal's new jurisdiction. An independent review of the operation of the *Act* is to commence on its second anniversary.²⁸ Also on the horizon is the amalgamation of the Commonwealth merits review tribunals which will take effect on 1 July 2015. In the meantime, NDIS matters are proving to be among the most interesting in the Tribunal and without doubt among its most challenging.

Endnotes

- 1 By amendment to s 19 of the *Administrative Appeals Tribunal Act* 1975.
- 2 *NDIS Act* s 3.
- 3 *NDIS Act* ss 4, 5.
- 4 *NDIS Act* s 3(3)(b), s 4(17).
- 5 *Disability Care and Support*, Productivity Commission Inquiry Report No 54, 31 July 2011.
- 6 Productivity Commission Report, Executive Summary.
- 7 Productivity Commission Report, Executive Summary.
- 8 So, for example, funding under the NDIS has no bearing on, and is not affected by, entitlement to Disability Support Pension.
- 9 The AAT has jurisdiction to review 26 *reviewable decisions* by the NDIA: see *NDIS Act* 2013, Part 6.
- 10 All of the Rules can be found at www.comlaw.gov.au.
- 11 *NDIS Act* s 21.
- 12 *NDIS Act* s 24.
- 13 *NDIS Act* s 25.
- 14 *NDIS Act* s 33.
- 15 *Review of National Disability Insurance Scheme Decisions Practice Direction*, 1 July 2013.
- 16 www.aat.gov.au.
- 17 <http://www.dss.gov.au>.

- 18 *Mulligan and National Disability Insurance Agency* [2014] AATA 373; *Young and National Disability Insurance Agency* [2014] AATA 401; *TKCW and National Disability Insurance Agency* [2014] AATA 501.
- 19 *Burston and National Disability Insurance Agency* [2014] AATA 456.
- 20 *Young (above)*.
- 21 *TKCW (above)*.
- 22 *Mulligan (above)*.
- 23 *TKCW (above)*.
- 24 Section 34(1)(c).
- 25 NDIS Act s34(1)(f).
- 26 NDIS Act s34(1)d).
- 27 NDIS Act s34(1)(e).
- 28 *NDIS Act* s 208.

BALANCING THE TREATMENT OF 'PERSONAL INFORMATION' UNDER FOI AND PRIVACY LAWS: A COMPARATIVE AUSTRALIAN ANALYSIS

Mick Batskos*

There has been longstanding recognition that there should be some degree of protection provided to privacy of personal information about individuals. Some examples of this include recognition of privacy as a human right worthy of protection as in:

- (a) Article 12 of the Universal Declaration of Human Rights;¹
- (b) Article 17 of the International Covenant on Civil and Political Rights;²
- (c) Section 12(a), *Human Rights Act 2004* (ACT); and³
- (d) Section 13(a), *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁴

Although those examples relate to a broader notion of privacy, the justification behind a broader right of privacy applies equally to the need for *information* privacy. When referring to information privacy I mean, at the very least, the interest of a person in controlling information held by others about him or her.

Some would say that information privacy is broader than that and can be read as being about the rights of individuals to exercise some control over the way information about them is collected, the way in which it may be used, to whom it may be disclosed, and about ensuring that the information is securely stored and not misused. It can also extend to the right of an individual to have access to information concerning himself or herself and to ensure that, when information is used or disclosed, it is not incorrect, out-of-date or misleading.

In Australia, however, there has been some tension and inconsistency about how privacy of personal information should be dealt with when it is held by government agencies. What mechanism should be used to provide protection of personal information privacy rights? Should it be considered as part of freedom of information (or related) legislation, or should it be dealt with in separate privacy legislation? Should it be dealt with in legislation at all, or in some other way?

The variety of approaches in Australian jurisdictions may stem from the difference in views as to what the right to information privacy encompasses and where or how it should be addressed. The correctness or desirability of one view over another is a philosophical debate that is beyond the scope of this paper and one which I will leave to more learned commentators.

In Part 1 of this paper, I look briefly at:

- what privacy regime, if any, exists in each Australian jurisdiction, and how it is manifested; and

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- what each privacy regime protects and what falls within the protection offered. For example, does a regime govern a broader concept of 'personal information', or does it exclude certain matters such as 'health information'?

In Part 2, which will be published subsequently, I look at:

- how each Australian jurisdiction deals with protection of personal privacy in relation to applications for access under freedom of information/right to information legislation. I review the nature and scope of each relevant personal privacy related exemption provision or equivalent; and
- how the different jurisdictions manage the balance between privacy and freedom of information regimes in how they treat personal information.

I also refer to some developments in legislation and case law.

Privacy regimes

All Australian jurisdictions apart from Western Australia and South Australia have specific legislation in place that sets out the general personal information privacy regime for that jurisdiction, at least as it applies to public sector agencies (and in some cases private sector organisations either generally or in specific areas such as the health sector). In most of these jurisdictions, regulations have been made under the relevant legislation and, in New South Wales, there is also a code of practice that appears to be given legislative effect. These arrangements are set out in Table 1 below.

Table 1

Jurisdiction	Legislation	Abbreviation
Commonwealth	<i>Privacy Act 1988</i> (Cth)	<i>Cth Privacy Act</i>
	<i>Privacy Regulation 2013</i> (Cth)	<i>Cth Privacy Reg</i>
ACT	<i>Privacy Act 1988</i> (Cth) as amended by the <i>Australian Capital Territory Government Service (Consequential Provisions) Act 1994</i> (Cth)	<i>ACT Privacy Act</i>
	<i>Health Records (Privacy and Access) Act 1997</i> (ACT)	<i>ACT HRAct</i>

Jurisdiction	Legislation	Abbreviation
NSW	<i>Privacy and Personal Information Protection Act 1998 (NSW)</i> <i>Privacy and Personal Information Protection Regulation 2005 (NSW)</i> <i>Privacy Code of Practice (General) 2003 (NSW)</i> <i>Health Records and Information Privacy Act 2002 (NSW)</i> <i>Health Records and Information Privacy Regulation 2012 (NSW)</i> <i>Health Records and Information Privacy Code of Practice 2005 (NSW)</i>	<i>NSW PPIPA</i> <i>NSW PPIP Reg</i> <i>NSW Privacy Code</i> <i>NSW HRIPA</i> <i>NSW HRIP Reg</i> <i>NSW HRIP Code</i>
NT	<i>Information Act 2002 (NT)</i> <i>Information Regulations (NT)</i>	<i>NT Information Act</i> <i>NT Information Regs</i>
Qld	<i>Information Privacy Act 2009 (Qld)</i> <i>Information Privacy Regulation 2009 (Qld)</i>	<i>Qld Privacy Act</i> <i>Qld Privacy Reg</i>
SA	N/A	N/A
Tas	<i>Personal Information Protection Act 2004 (Tas)</i>	<i>Tas PIPAct</i>
Vic	<i>Information Privacy Act 2000 (Vic)</i> ⁵ <i>Health Records Act 2001 (Vic)</i> <i>Health Records Regulations 2012 (Vic)</i>	<i>Vic IPAct</i> <i>Vic HRAct</i> <i>Vic HR Reg</i>
WA	N/A	N/A

In South Australia, a Cabinet Instruction known as the Information Privacy Principles Instruction (IPPS Instruction)⁶ applies to all public sector agencies as defined in the *Public Sector Act 2009* (SA) unless:

- (a) Cabinet otherwise determines; or
- (b) It falls within a schedule to the IPPS Instruction. That schedule lists a handful of agencies including the Independent Commissioner Against Corruption and the Office for Public Integrity.

In July 2004, the South Australian Department of Health published the *Code of Fair Information Handling Practices*,⁷ which was intended to apply to all employees who, in the course of their work (whether paid or voluntary), have access to personal information collected, used or stored by or on behalf of the Department of Health and/or funded service providers. Compliance with the Code is mandatory in accordance with a directive issued by the Department in December 2001.⁸ This Code is not dealt with in detail in this paper.

In Western Australia, no legislation or any other instrument (such as the SA Cabinet Instruction) deals specifically with privacy. An *Information Privacy Bill 2007* was introduced into Parliament in WA by the then Labor Government. It proposed to amend the WA freedom of information legislation to introduce concepts of personal information privacy and health information privacy. It was introduced in the Legislative Assembly in March 2007, passed through the Legislative Assembly in November 2007, progressed to the Legislative Council where it was read a second time on 4 December 2007, but did not progress further.

At an administrative level, the Commissioner for Public Sector Standards has issued a number of codes of ethics under the *Public Sector Management Act 1994* (WA). For example, on 8 May 2007 the Commissioner issued the *Western Australian Public Sector Code of Ethics (2007)* which provided that, to meet a minimum standard of conduct and integrity, public sector bodies and employees were required to 'protect privacy and confidentiality' and respect the privacy of individuals.

The most recent instrument of which I am aware is *Commissioner's Instruction No 7: Code of Ethics*, which commenced on 3 July 2012. It applies more broadly and requires all public sector bodies and employees to 'treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare' (emphasis added). In addition there is an obligation on all public sector bodies to develop their own codes of conduct, consistent with the Code of Ethics,⁹ and the Commissioner's *Conduct Guide*. The Conduct Guide makes it clear that codes of conduct should address a policy of '[c]ustomer privacy and security of personal information'.¹⁰

For example, a sample code of ethics for a board or committee prepared by the Western Australian Public Sector Commission requires members to 'respect the confidentiality and privacy of all information as it pertains to individuals'.¹¹

Other legislation

In all jurisdictions, there are also legislative secrecy or confidentiality provisions that apply to specific officers and/or agencies, and which may expressly protect personal privacy using phrases such as 'information relating to the affairs of any person' or 'any natural person' or provide more general secrecy protection. Such provisions tend to have the effect of precluding persons who hold or have held certain positions, or certain specified agencies or offices, from disclosing information they have obtained in the performance of their duties, functions or powers. Although they represent ways in which jurisdictions protect privacy in specific contexts, I do not propose to canvass these as they are too numerous to mention.

The regimes

Commonwealth

At the Commonwealth level, the regulation of information privacy is dealt with in the *Privacy Act 1988* (Cth) (*Cth Privacy Act*). It deals with information privacy as it applies to personal information. It defines 'personal information' as follows:

personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.¹²

Key features

The *Cth Privacy Act* establishes 13 Australian Privacy Principles (APPs) dealing with the collection, management, use, disclosure, security, access, correction or transfer of personal information.¹³

The *Cth Privacy Act* imposes obligations on APP entities, which are defined to mean an 'agency' or an 'organisation'. An 'agency' includes a minister, department, body established for a public purpose under a Commonwealth enactment, and various other office holders or bodies.¹⁴ An 'organisation' is defined as an individual, body corporate, partnership or trust that is not one of a number of exclusions (eg not a small business operator with a turnover of less than \$3 million).¹⁵ Therefore, to that extent, it extends to the private sector as well as the public sector.

An APP entity must not do an act, or engage in a practice, that breaches an APP – ie is contrary to or inconsistent with an APP.¹⁶

Some interesting features of the *Cth Privacy Act* include:

- (a) Under APP 12, if a person wishes to obtain access to personal information about themselves, on request to an APP entity that holds that information, access must be given. However, the APP entity is not required to give access if the APP entity may refuse access under the *Freedom of Information Act 1982* (Cth) (*Cth FOI Act*), or under some other Act. The *Cth FOI Act* in this instance takes precedence.¹⁷ APP 12 seems to have a greater role in dealing with access applications to other organisations.
- (b) In contrast, under APP 13, if a person makes a request to an APP entity holding personal information about him/her to correct the information on the basis that it is inaccurate, out of date, incomplete, irrelevant or misleading, the APP entity must take reasonable steps to correct this. The processes and procedures in APP 13 are not a substitute for the procedures contained in Part V of the *Cth FOI Act*, but rather co-exist. Significant differences between them are highlighted in the Guidelines issued by the Information Commissioner.¹⁸
- (c) The *Cth Privacy Act* deals expressly with the position of contracted service providers under government contracts in various provisions.¹⁹
- (d) One part of the *Cth Privacy Act* gives the Information Commissioner power to make a public interest determination; this in effect permits an APP entity to engage in an act or practice that breaches or may breach an APP where the public interest in doing so substantially outweighs the public interest in adhering to the APP.²⁰
- (e) The Information Commissioner is given various powers and functions, these are referred to in more detail below.

How is privacy protected?

An act or practice of an APP entity is an interference with privacy if it breaches an APP in relation to personal information about an individual.²¹ An individual may make a written complaint to the Information Commissioner about an act or practice that may have been an interference with privacy.²²

Complaints made directly to the APP entity are encouraged, so that it can have an opportunity to address and appropriately deal with the complaint. If that has not occurred, or it has occurred and the complaint is being considered and dealt with by the APP entity, the Information Commissioner may decide not to investigate the complaint, or to not investigate further.²³ The Information Commissioner may decline to investigate a complaint on other grounds as well.²⁴

If a complaint has been made about an act or practice that may have been an interference with privacy, and the complainant did complain to the entity before making the complaint to the Information Commissioner, the Information Commissioner shall investigate the act or practice.²⁵

Where the Information Commissioner considers it reasonably possible that such a complaint may be successfully conciliated, and no decision has been made not to investigate or not to investigate further, a reasonable attempt to conciliate must be made by the Information Commissioner.²⁶

Remedies

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Remedies which APP entities might provide to complainants can vary and might include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures intended to mitigate any harm and minimise the risk of future interference with privacy.

Conciliation of complaints to the Information Commissioner may result in similar outcomes eg compensation for injury to feelings and humiliation.

If an entity engages in a serious interference with privacy, or repeatedly performs an act or engages in a practice that is an interference with privacy, it may be liable to a civil penalty of 2,000 penalty units.²⁷ The Information Commissioner can apply to the Federal Court or Federal Circuit Court for an order that an entity, that is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.²⁸

Further, if a matter is not conciliated, after investigating a complaint the Information Commissioner can, if the complaint is not dismissed, find the complaint substantiated and make a determination (which must include any findings of fact on which it is based) with one or more declarations including:

- (a) that the agency has engaged in conduct constituting an interference with privacy and must not repeat or continue such conduct;
- (b) that the agency must take specified steps (which must be reasonable and appropriate) to ensure that such conduct is not repeated or continued;
- (c) that the agency must perform any reasonable act or course of conduct to redress any loss or damage for injury to feelings or humiliation suffered by the complainant;
- (d) that the complainant is entitled to a specified amount by way of compensation for loss or damage for injury to feelings or humiliation suffered;
- (e) that the complainant is entitled to a specified amount to reimburse expenses reasonably incurred in connection with the complaint and investigation.²⁹

If such a determination is made, the agency must not repeat or continue any conduct covered by a relevant declaration, must take steps specified in the declaration and must

perform any acts or course of conduct covered by a declaration and determination.³⁰ Any amounts which the complainant is entitled to be paid are recoverable as a debt due from the agency (or the Commonwealth in certain cases).³¹ If the agency fails to comply, the complainant or the Information Commissioner may commence proceedings in the Federal Court or Federal Circuit Court for an order directing compliance.³²

Victoria

In Victoria, the regulation of information privacy is split between two Acts, the *Information Privacy Act 2000* (Vic) (*Vic IPAct*)³³ and the *Health Records Act 2001* (Vic) (*Vic HRAAct*). The IPAct deals with information privacy as it applies to personal information, but expressly excludes health information, which is dealt with separately in the *Vic HRAAct*.³⁴

What is dealt with?

The *Vic IPAct* uses the following definition of 'personal information':

personal information means information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, but does not include information of a kind to which the **Health Records Act 2001** applies.

Interestingly, this definition is slightly different from the definition of 'personal information' in the *Vic HRAAct*:

personal information means 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, but does not include information about an individual who has been dead for more than 30 years.

This differs from the *Vic IPAct* definition in that it only applies to information or opinion that is recorded in a material form (as opposed to in any form), and it does not apply to persons who have been dead for more than 30 years.

Key features

The *Vic IPAct* establishes 10 Information Privacy Principles (IPPs)³⁵ dealing with the collection, management, use, disclosure, security or transfer of personal information; one IPP deals specifically with sensitive information.³⁶

The *Vic IPAct* imposes obligations on organisations, which are defined to include, among other things, public sector bodies, local councils, various offices or bodies established for public purpose, and certain contracted service providers known as State contractors.³⁷ By contrast, the *Vic HRAAct* applies to both the public and the private sector in relation to health information collected, held or used.³⁸

An organisation must not perform an act, or engage in a practice, that contravenes an IPP in respect of personal information collected, held, managed, used, disclosed or transferred by it. An act carried out or practice engaged in by an organisation that is contrary to, or inconsistent with, an IPP is an interference with the privacy of an individual.³⁹

Interesting features of the *Vic IPAct* include:

- (a) If a provision in another Act is inconsistent with a provision in the *Vic IPAct*, the former Act prevails to the extent of any inconsistency and the latter provision has no force or effect.⁴⁰
- (b) If a person wishes to obtain access to or amend personal information about themselves in a document held by an 'agency' under the *Freedom of Information Act 1982* (Vic) (*Vic FOI Act*), any application for access or amendment must be made under the *Vic FOI Act* processes and procedures, and not under the *Vic IPAct*.⁴¹ This means that, in effect, IPP6 relating to access to and amendment of documents held by organisations probably only has a role in relation to State contractors, which can be private sector bodies not otherwise caught by the *Vic FOI Act*.⁴²
- (c) The *Vic IPAct* does not apply to personal information in a generally available publication – a publication (whether paper or electronic) that is generally available to members of the public and includes information held on a public register.⁴³ Despite this, public sector agencies or councils which administer public registers must so far as is reasonably practicable not contravene the IPPs in connection with the administration of the public register if that information is personal information.⁴⁴
- (d) There is a strong incentive for agencies contracting out to State contractors to ensure that the contract makes adequate provision to bind State contractors by the IPPs to the same extent as if they were the agency contracting them. Otherwise, the agency is attributed with the blame for any interference with privacy which may arise from an act or practice of the contractor.⁴⁵
- (e) The Privacy Commissioner is established by the *Vic IPAct*. The role and powers and functions of the Privacy Commissioner are referred to in more detail below.⁴⁶

How is privacy protected?

We saw that any act done or practice engaged in which is contrary to or inconsistent with the IPPs is an interference with privacy. An individual may make a written complaint to the Privacy Commissioner about an act or practice of an organisation that may have been an interference with privacy.⁴⁷

Of course, complaints made directly to the organisation first are to be encouraged, so that it can have an opportunity to address and appropriately deal with the complaint. If that has not occurred, or it has occurred and the organisation is still dealing with the complaint, the Privacy Commissioner may decline to entertain the complaint.⁴⁸ The Privacy Commissioner may decline to entertain or may dismiss a complaint on other grounds as well.⁴⁹

If conciliation by the Privacy Commissioner is attempted and fails, or is not considered appropriate by the Privacy Commissioner, or the complaint is not entertained or is dismissed, the complainant may request that the matter be referred to the Victorian Civil and Administrative Tribunal (VCAT).⁵⁰ The Privacy Commissioner does not have determinative powers. By contrast, the Health Services Commissioner has powers to investigate a complaint and make a determinative ruling as to whether there has been an interference with privacy and to specify action, if any, to be taken to remedy the complaint. Failure to comply is an offence which is punishable by a monetary penalty.⁵¹

The VCAT can then hear and determine a matter (although VCAT also has alternative dispute resolution processes, such as compulsory conferences, in which it generally requires the parties to participate).⁵²

Remedies

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Remedies which organisations may provide to complainants can vary significantly and can include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future interferences with privacy.

With the Privacy Commissioner, there may be conciliation of complaints with similar outcomes eg compensation for injury to feelings and humiliation.⁵³ For serious, flagrant or repeated breaches, the Privacy Commissioner has power to issue a compliance notice which, if not complied with, gives rise to an indictable offence with potential imprisonment and hefty financial penalties.⁵⁴

At the VCAT, there may be agreed results with the use of the VCAT's alternative dispute resolution processes which are confidential. We are aware from anecdotal evidence and experience in acting for numerous clients that it can result in similar financial and non-financial outcomes for a complainant. If a matter goes to a full hearing, the VCAT has power to make determinations and orders in favour of a complainant including:⁵⁵

- (a) an order that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred in connection with the making of the complaint and the proceedings held;
- (b) an order restraining the organisation from repeating or continuing any act or practice the subject of the complaint, which the VCAT found to be an interference with privacy;
- (c) an order requiring the organisation to perform or carry out any reasonable act or course of conduct to redress any loss or damage suffered by the complainant; and
- (d) an order for compensation for up to \$100,000 for any loss or damage suffered by the complainant, including injury to the complainant's feelings or humiliation suffered by the complainant, by reason of the act or practice, the subject of the complaint.⁵⁶

Australian Capital Territory

In the ACT, the position is somewhat complicated. As I understand it, the privacy regime applies the Commonwealth *Privacy Act 1998* as it existed on 1 July 1994, with some amendments made by the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (ACT) (*Consequential Provisions Act*). I refer to these together as the *ACT Privacy Act*.

To make things a bit more complicated, health records held by ACT Government agencies, including public hospitals, are covered by the *Health Records (Privacy and Access) Act 1997* (ACT) (*ACT HRAct*).

What is dealt with?

The *ACT Privacy Act* deals with 'personal information' which is defined as:

'personal information' means 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 *ACT HRAct* deals with health records which are defined as:

health record means any record, or any part of a record—

- (a) held by a health service provider and containing personal information; or
- (b) containing personal health information.

Relevant to that definition of health record are the concepts of 'personal information' and 'personal health information' of a 'consumer'. These terms are defined as follows:

personal information, in relation to a consumer, means any information, recorded or otherwise, about the consumer where the identity of the consumer is apparent, whether the information is—

- (a) fact or opinion; or
- (b) true or false.

personal health information, of a consumer, means any personal information, whether or not recorded in a health record—

- (a) relating to the health, an illness or a disability of the consumer; or
- (b) collected by a health service provider in relation to the health, an illness or a disability of the consumer.

consumer means an individual who uses, or has used, a health service, or in relation to whom a health record has been created, and includes—

- (a) if the consumer is a young person or legally incompetent person—a guardian of the consumer; and
- (b) if the consumer has died and there is a legal representative of the deceased consumer—a legal representative of the deceased consumer; and
- (c) if the consumer has died and there is no legal representative of the deceased consumer—an immediate family member of the deceased consumer.

Key features

The *ACT Privacy Act* establishes 11 Information Privacy Principles (IPPs) dealing with the collection, management, use, disclosure, security or transfer of personal information.⁵⁷

The *ACT Privacy Act* imposes obligations on ACT agencies, which are defined to have the same meaning as agency in the *Freedom of Information Act 1982* (ACT) (*ACT FOI Act*), with some exceptions.⁵⁸ By contrast, the *ACT HRA Act* applies to both the public and the private sector in relation to health records with the emphasis being on health service providers (providing health services in the ACT) and collectors or keepers of personal health information.

An agency must not perform an act, or engage in a practice, that breaches an IPP – ie do something which is contrary to or inconsistent with an IPP⁵⁹ If an act done or practice engaged in by an agency breaches an IPP it is an interference with the privacy of an individual.⁶⁰

Interesting features of the *ACT Privacy Act* and *ACT HRA Act* include the following:

- (a) apart from a special exception about health information (dealt with further below), it appears that generally a person seeking access to, or wanting to amend personal information about himself/herself in a document held by an ACT agency should do so under the *ACT FOI Act*. This is so even though IPPs 5, 6 and 7 recognise the general desirability of individuals being able to obtain access to documents containing their personal information and to have it amended if it is deficient in a relevant way;
- (b) by contrast, where health records held by an 'agency' as defined in the *ACT FOI Act* are concerned, it is clear that the preferred approach in the ACT is that access to such records and requests for amendment to them should be dealt with under the *ACT HRA Act* rather than under the *ACT FOI Act*. This is evidenced by the fact that agencies are expressly exempt from the operation of the *ACT FOI Act* in respect of

- health records under the *ACT HRAAct*.⁶¹ The whole of Part 3 of the *ACT HRAAct* is about access to health records and IPP7 is about alteration of health records; and
- (c) the role of the Privacy Commissioner is established by the *ACT Privacy Act*. The role and powers and functions of the Privacy Commissioner are referred to in more detail below.⁶²

How is privacy protected?

Any act done or practice engaged in which is contrary to or inconsistent with the IPPs is an interference with privacy. An individual may make a written complaint to the Privacy Commissioner about an act or practice of an organisation that may have been an interference with privacy.⁶³

Of course, complaints made directly to the organisation first are to be encouraged so that it can have an opportunity to address and appropriately deal with the complaint. If that has not occurred, or it has occurred and the complaint is being considered and dealt with by the organisation, the Privacy Commissioner may decline to investigate the complaint.⁶⁴ The Privacy Commissioner may decline to entertain or to dismiss a complaint on other grounds as well.⁶⁵

If a complaint is made to the Privacy Commissioner in accordance with the *ACT Privacy Act*, there is an obligation to investigate the act or practice, which may be an interference with privacy.⁶⁶ The Privacy Commissioner may decide not to investigate on specific bases already mentioned. In order to assist in determining whether or not to investigate, the Privacy Commissioner may make preliminary inquiries.⁶⁷ The *ACT Privacy Act* also sets out the powers which the Privacy Commissioner has during the investigation process.

The *ACT Privacy Act* also imposes an obligation on the Privacy Commissioner to conciliate where appropriate to effect a settlement of the matters giving rise to the investigation (ie the complaint).⁶⁸

Remedies

Remedies which agencies may provide to complainants vary and can include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future interferences with privacy.

The Privacy Commissioner may carry out conciliation of complaints with similar outcomes eg compensation for injury to feelings and humiliation.

If conciliation is not undertaken, or fails after investigation, the Privacy Commissioner has power to make findings and determinations that the complaint was substantiated, and to declare that:

- (a) the agency or individual involved should not repeat or continue the conduct;
- (b) the agency should redress any loss or damage suffered by a complainant (including for injury to feelings or humiliation suffered);
- (c) the complainant is entitled to compensation for loss or damage suffered;
- (d) no further action be taken⁶⁹; and
- (e) the complainant is entitled to an amount to reimburse expenses reasonably incurred in connection with the making and investigation of the complaint.⁷⁰

Such determinations are not binding or conclusive between the parties, but they give rise to other legal rights. An agency is obliged not to repeat or continue the conduct in question and must perform any conduct to redress the loss or damage suffered,⁷¹ failing which an application may be made to court by the Privacy Commissioner or the complainant for an order directing the agency to comply.⁷² Further, the complainant is entitled to be paid amounts specified for compensation or reimbursement of expenses and those amounts are recoverable as a debt due by the ACT to the complainant.⁷³

New South Wales

In New South Wales, the regulation of information privacy is split between the *Privacy and Personal Information Protection Act 1998* (NSW) (*NSW PPIPA*) and the *Health Records and Information Privacy Act 2002* (NSW) (*NSW HRIPA*). The *NSW PPIPA* deals with information privacy as it applies to personal information, but expressly excludes health information which is dealt with separately in the *NSW HRIPA*.⁷⁴

What is dealt with?

The NSW PPIPA uses the following definition of 'personal information':⁷⁵

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

The definition provides some inclusions by way of example, and also provides for specific exclusions. Personal information includes things such as an individual's fingerprints, retina prints, body samples or genetic characteristics. However, it excludes information about a person who has been dead for 30 years, information contained in a publicly available publication, information or opinion about an individual's suitability for appointment or employment as a public sector official, and identifies other specific exclusions.⁷⁶

The definition of 'personal information' provides the basis for defining health information is for the purposes of the *NSW HRIPA*. The *NSW HRIPA* applies to every organisation that is a health service provider that collects, holds or uses health information, whether in the public or private sectors.⁷⁷

Key features

The *NSW PPIPA* sets out numerous Information Protection Principles (IPPs) as separate sections of the Act dealing with the collection, management, access, amendment, use, disclosure, security or transfer of personal information.⁷⁸

The IPPs apply to public sector agencies,⁷⁹ these are defined to include government departments, statutory bodies representing the Crown, NSW Police Force, local councils, etc. The definition of 'public sector agency' expressly excludes a State owned corporation.⁸⁰

The general rule is that a public sector agency must not do anything, or engage in any practice that contravenes an IPP applying to it.⁸¹ There are a number of specific exemptions from the IPPs.⁸²

Interesting features of the *NSW PPIPA* include the following:

- (a) nothing in the *NSW PPIPA* affects the operation of the *Government Information (Public Access) Act 2009 (NSW GIPA)*, or any obligations under that Act upon a public sector agency;⁸³
- (b) one of the IPPs emphasises the obligation on public sector agencies to allow individuals to access their personal information on request. However, there is no specific process in the *NSW PPIPA* for this, presumably because an access application can be made under the *NSW GIPA*;⁸⁴
- (c) in relation to amendment of personal information, the *NSW PPIPA* provides that a person may request a public sector agency to make appropriate amendments to ensure the information is accurate, relevant, up to date, complete and not misleading. The procedural aspects of how this is done are left to guidelines issued by the Privacy Commissioner.⁸⁵ It is important to note that, unlike some other jurisdictions, in NSW the freedom of information legislation does not deal with amendment, but rather it is dealt with in the privacy legislation;
- (d) as already mentioned, the *NSW PPIPA* excludes information about an individual contained in a publicly available publication from the definition of 'personal information';
- (e) unlike some other privacy related legislation, the privacy principles do not apply to private sector bodies. An exception to this is that a 'public sector agency' can include a person or body that provides data services (collection, processing, disclosure or use of personal information), and which have been prescribed by regulations to be a public sector agency. Of course, that could conceivably include a private sector body. As far as I am aware, no such bodies have been prescribed in the *NSW PPIP Regulation*; and
- (f) the Privacy Commissioner is established by the *NSW PPIPA*. The role and powers and functions of the Privacy Commissioner are referred to in more detail below. The Privacy Commissioner also has a role under the *NSW HRIPA*. The Privacy Commissioner has the function of receiving, investigating and conciliating complaints about privacy related matters, and has power to conduct inquiries and make investigations into privacy related matters.⁸⁶

How is privacy protected?

A complaint may be made to or by the Privacy Commissioner about the alleged violations of or interference with the privacy of an individual. A complaint can be verbal or in writing, but the Privacy Commissioner may require it be put in writing.⁸⁷

Of course, complaints made directly to the organisation first are to be encouraged so that it can have an opportunity to address and appropriately deal with the complaint. The *NSW PPIPA* refers to this as an internal review by the public sector agency. After making a preliminary assessment of the complaint, the Privacy Commissioner can decide not to deal with it if satisfied that it would be more appropriate for the complainant to apply for an internal review by the public sector agency. The Privacy Commissioner may decide not to deal with a complaint on other grounds as well.⁸⁸

If the Privacy Commissioner decides to deal with a complaint, the Privacy Commissioner must endeavour to resolve the complaint by conciliation, and can make such inquiries and investigations as thought appropriate in dealing with the complaint.⁸⁹

The NSW Civil and Administrative Tribunal (NCAT) can review the conduct of a public sector agency, but only if the matter has first been made the subject of an application directly to the public sector agency for internal review, and the person concerned is not satisfied with the findings on review or on action taken by the public sector agency.

Remedies

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Where a person applies in writing for internal review by the public sector agency, in reviewing the conduct or alleged conduct and upon completion of the review, the public sector agency may, in addition to taking no further action:

- (a) make a formal apology to the applicant;
- (b) take such remedial action as it thinks appropriate (eg payment of monetary compensation) – but it cannot pay monetary compensation for issues arising from when a person was a convicted inmate;⁹⁰
- (c) undertake that the conduct will not occur again; and
- (d) implement administrative measures to ensure the conduct will not occur again.⁹¹

The public sector agency must notify the applicant in writing of the findings and reasons for findings, action proposed to be taken and reasons for the action, and the right to seek review by the NCAT of the findings and proposed action. The Privacy Commissioner must also be informed of the findings and proposed action.⁹²

If a matter goes to the Privacy Commissioner and is the subject of conciliation, the Privacy Commissioner may make a written report on any findings or recommendations made in relation to the complaint dealt with.⁹³

On reviewing the conduct of a public sector agency, the NCAT may make one or more of the following orders:⁹⁴

- (a) an order that the public sector agency pays the applicant damages not exceeding \$40,000 for loss or damage suffered (where satisfied the applicant suffered financial loss or psychological or physical harm because of the conduct). Orders for compensation cannot be made in relation to conduct while the person was a convicted inmate;
- (b) an order that the public sector agency refrain from the contravening conduct;
- (c) an order requiring the performance of an IPP; and
- (d) an order requiring steps be taken to remedy any loss or damage suffered.

Queensland

In Queensland, the regulation of information privacy is by the *Information Privacy Act 2009* (Qld) (*Qld IPAct*). It deals with information privacy as it applies to personal information more generally, and also deals separately with health agencies.

What is dealt with?

The *Qld IPAct* uses a definition of ‘personal information’ which is:

Personal information is 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.

In relation to health agencies, ‘health information’ about an individual is defined as being personal information about an individual including information:

- (a) about health, disability, expressed wishes about future provision of health services (which are also defined) or a health service provided or to be provided;
- (b) that is collected for or in providing a health service; or
- (c) that is collected in connection with donation or intended donation of body parts, organs or substances.

Key features

The *Qld IPAct* establishes 11 Information Privacy Principles (IPPs) dealing with the collection, management, use, disclosure, security or transfer of personal information.⁹⁵ It also establishes 9 National Privacy Principles (NPPs) with which health agencies must comply. Health agencies are the health department, hospitals and health services.⁹⁶ Collectively, the IPPs and NPPs are referred to as the 'privacy principles'.⁹⁷

The *Qld IPAct* imposes obligations on agencies, which are defined to mean Ministers, Departments, local councils and public authorities.⁹⁸ Interestingly, the privacy principles do not apply to a government owned corporation (or subsidiary of one).⁹⁹ Separate obligations are placed on health agencies.

An agency other than a health agency is required to comply with the IPPs. It must not carry out an act or engage in a practice that contravenes or is otherwise inconsistent with a requirement of an IPP. In addition, an agency must not fail to do an act or engage in a practice where to do otherwise would contravene or be inconsistent with the requirement of an IPP.¹⁰⁰ There are a number of exceptions or variations which are provided for in the *Qld IPAct*.¹⁰¹

Health agencies must comply with the NPPs, and must not carry out an act or engage in a practice that contravenes or is otherwise inconsistent with a requirement of an NPP. In addition, an agency must not fail to do an act or engage in a practice where to do otherwise would contravene or be inconsistent with the requirement of an NPP.¹⁰²

Interesting features of the *Qld IPAct* are that:

- (a) it is not intended to affect the operation of another Act, including the *Right to Information Act 2009* (Qld) (*Qld RTI Act*).¹⁰³ If an access application under the *Qld RTI Act* could have been made under the *Qld IPAct* (ie because it sought access to documents containing information about the applicant), the applicant is to be given the opportunity to choose under which Act the application is to be dealt with. If they choose to have it dealt with under the *Qld IPAct*, the application fee is to be refunded. But if they wish to, they can continue have it dealt with under the *Qld RTI Act*.¹⁰⁴
- (b) a person can apply under the *Qld IPAct* to obtain access to information about them and to have that information amended if it appears inaccurate, incomplete, out of date or misleading;¹⁰⁵
- (c) the privacy principles do not apply to a generally available publication – a publication that is or is to be made generally available to the public, however it is published;¹⁰⁶
- (d) there is a strong incentive on agencies that engage in services agreements with contractors (which can, of course, include private sector bodies), to ensure that the contract makes adequate provision to ensure the contractors are bound by the applicable privacy principles. Otherwise, the obligations that would attach to the contracted service provider attach to the contracting agency;¹⁰⁷
- (e) the Information Commissioner and Privacy Commissioner are established by the *Qld IPAct*. The role and powers and functions of the Information Commissioner in this privacy context are referred to in more detail below; and

- (f) an agency can apply to the Information Commissioner for an approval that waives or modifies the agency's obligations to comply with the privacy principles either temporarily for a fixed period or until it is revoked or amended. An approval can be given where the Information Commissioner is satisfied that the public interest in the agency's compliance with the privacy principles is outweighed by the public interest in waiving or modifying the compliance to the extent stated in the approval.¹⁰⁸

How is privacy protected?

The *Qld IPAct* provides for an individual to make a privacy complaint, which is defined to be about an act or practice of a relevant entity in relation to the individual's personal information that is a breach of the relevant entity's obligations to comply with the privacy principles (or an approval given which waived or modified compliance).¹⁰⁹

An individual whose personal information is or has been held by a relevant entity may make a written privacy complaint to the Information Commissioner.¹¹⁰

Of course, complaints made directly to the relevant entity are encouraged so that it can have an opportunity to address and appropriately deal with the complaint. If that has not occurred, or it has occurred and the complaint is being considered and dealt with by the organisation (and less than 45 days have elapsed), the Information Commissioner may decline to entertain the complaint.¹¹¹ The Information Commissioner may decline to entertain or to dismiss a complaint on other grounds as well.¹¹²

The Information Commissioner is required to consider whether resolution of a privacy complaint could be achieved through mediation. If resolution appears reasonably likely, the Information Commissioner must take all reasonable steps to cause the complaint to be mediated.¹¹³

If a privacy complaint is made to the Information Commissioner and it is not reasonably likely to be resolved by mediation, or mediation is attempted and no resolution is achieved, at the request of the complainant the matter may be referred to the Queensland Civil and Administrative Tribunal (QCAT) which can hear and decide the matter under its original jurisdiction.¹¹⁴

Remedies

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Remedies which organisations may provide to complainants can vary and could include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future contraventions of the privacy principles.

With the Information Commissioner, there may be a mediated agreement reached with similar outcomes eg compensation for injury to feelings and humiliation. For serious, flagrant or repeated breaches, the Information Commissioner has power to issue a compliance notice which, if not complied with, gives rise to an offence with financial penalties.¹¹⁵

If agreement is reached through mediation, either party may request the Information Commissioner to certify a written record of the agreement. That certified agreement can then be filed with QCAT, which can make orders necessary to give effect to the agreement if

it believes implementation is practicable, and consistent with what QCAT could have ordered after a hearing. Such an order is then enforceable as an order of QCAT.¹¹⁶

After hearing a privacy complaint referred to it, the QCAT can, if it finds a privacy complaint partly or wholly substantiated, order one or more of the following:¹¹⁷

- (a) the act or practice complained of is an interference with privacy and the entity must not repeat or continue it;
- (b) the entity must engage in a stated reasonable act or practice to compensate for loss or damage suffered by the complainant;
- (c) the entity must apologise to the complainant for the interference with privacy;
- (d) the entity pay not more than \$100,000 in compensation for loss or damage suffered by the complainant (including for injury to feelings or humiliation suffered); and
- (e) the complainant be reimbursed expenses reasonably incurred in connection with the making of the complaint.

Tasmania

In Tasmania, the regulation of information privacy is dealt with by the *Personal Information Protection Act 2004* (Tas) (*Tas PIPAct*). The *Tas PIPAct* is not expressed in terms of privacy as such, but is focussed on personal information protection.

What is dealt with?

The *Tas PIPAct* defines 'personal information' as follows:

personal information means any information or opinion in any recorded format about an individual-

- (a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and
- (b) who is alive or has not been dead for more than 25 years.

Key features

The *TAS PIPAct* establishes 10 Personal Information Protection Principles (PIPPs) dealing with the collection, management, use, disclosure, security or transfer of personal information and a specific PIPP for sensitive information.¹¹⁸

The *Tas PIPAct* imposes obligations on a 'personal information custodian', which is defined to be a public authority¹¹⁹ or 'any body, organisation or person who has entered into a personal information contract relating to personal information'.¹²⁰ A personal information contract is one relating to the collection, use or storage of personal information,¹²¹ this can clearly extend to private sector contractors.

A personal information custodian (PIC) must comply with the PIPPs.¹²²

Interesting features of the *Tas PIPAct* include:

- (a) if a provision made by or under any other Act is inconsistent with a provision in the *Tas PIPAct*, the former act prevails and to the extent of any inconsistency the latter provision is of no effect;¹²³
- (b) if a person wishes to amend personal information about themselves held by a PIC, a request to do so can be made under Part 3A of the *Tas PIPAct*. There is no right to apply for amendment under the *Right to Information Act 2009* (Tas) (*Tas RTI Act*);

- (c) the *Tas PIPAct* does not apply to public information.¹²⁴ This is personal information contained in a publicly available record (in any format) or publication, or that is taken to be public information under any Act; and¹²⁵
- (d) the only connection which the *TAS PIPAct* has to the private sector is to the extent that a PIC is a private sector contractor which has, for example, entered into a contract for the storage of personal information.

How is privacy protected?

We saw that PICs must comply with the PIPPs. A person can make a written or verbal complaint to the Ombudsman alleging a contravention by a PIC of a PIPP that applies to that person.

However, such a complaint can only be made if the matter is first raised with the relevant PIC and the person is not satisfied with the response from the PIC. Further, if the complaint is verbal, the Ombudsman can require the complaint to be made in writing.¹²⁶ Therefore, there is statutory encouragement for complaints to be made directly to the PIC first so that it can have an opportunity to address and appropriately deal with the complaint.

There are grounds on which the Ombudsman may after conducting a preliminary assessment decide not to deal with the complaint - if it is frivolous, vexatious, lacking in substance or not made in good faith, or the subject matter is trivial.¹²⁷

If the Ombudsman decides to deal with a complaint, the Ombudsman is to conduct investigations in relation to the complaint in accordance with provisions of the *Ombudsman Act 1978* (Tas).¹²⁸

Remedies

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process. Remedies which PICs may provide to complainants can include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future contraventions of the PIPPs.

The emphasis in the *Tas PIPAct* is not so much on conciliation, rather it focuses on what can happen on the completion of an investigation by the Ombudsman and if the Ombudsman is of the opinion that a PIPP has been contravened by a PIC. In such a situation, the Ombudsman is to advise the complainant and the PIC in writing of the opinion reached and reasons for it. The Ombudsman may also make recommendations considered appropriate about the subject matter of the complaint. A copy the opinion and any recommendations are to be given to the relevant Minister, who is required to table the advice and recommendations in both Houses of Parliament within 5 sitting days. Therefore, there is a strong incentive for PICs to avoid such a public outcome.¹²⁹

Northern Territory

In the Northern Territory, the regulation of information privacy is contained within the *Information Act 2002* (NT) (*NT Information Act*).

What is dealt with?

The *NT Information Act* deals with information privacy as it applies to 'personal information', defined as:

personal information means government information from which a person's identity is apparent or is reasonably able to be ascertained.

government information means a record held by or on behalf of a public sector organisation and includes personal information.

record means recorded information in any form (including data in a computer system) that is required to be kept by a public sector organisation as evidence of the activities or operations of the organisation, and includes part of a record and a copy of a record.

person means an individual and includes a deceased individual within the first 5 years after death.

Key features

The *NT Information Act* establishes 10 Information Privacy Principles (IPPs) dealing with the collection, management, use, disclosure, security or transfer of personal information and a specific IPP for sensitive information.¹³⁰

The *NT Information Act* imposes obligations on public sector organisations (PSOs), which include agencies, local councils, various offices or bodies, statutory corporations, government owned corporations, and defined contract service providers,¹³¹ as well as others who provide services to the organisation under contract between the organisation and NT to the extent of the services provided.¹³²

A PSO interferes with a person's privacy if it contravenes an IPP.¹³³

Features of the *NT Information Act* include the following:

- (a) if another provision in the *NT Information Act* is inconsistent with an IPP, the other provision applies and the IPP does not, to the extent of the inconsistency;¹³⁴
- (b) if a person wishes to obtain access to government information (including personal information about himself/herself), or amend the personal information held by a PSO, that is also done under the *NT Information Act*. It is a bit of a one stop shop for records and archives creation and management, access, amendment and privacy;
- (c) only two of the IPPs apply to personal information in publications that are generally available to members of the public, public registers (except for one limitation), and public archives.¹³⁵ The limitation in relation to public registers is that public registers are to be kept in compliance with the IPPs to the extent it is reasonably practicable to do so;¹³⁶
- (d) there is a strong incentive on a PSO to ensure that service contracts provide that contract service providers must comply with IPPs in the same way as the PSO contracting them. Otherwise, the PSO is attributed with the blame for any interference with privacy that may arise from an act or practice of the contractor;¹³⁷
- (e) the role of the Information Commissioner is established by the *NT Information Act*; and
- (f) on the application of a PSO, the Information Commissioner can authorise a PSO in writing to collect, use or disclose personal information in a way that would otherwise contravene or be inconsistent with the IPPs dealing with collection and use/disclosure of personal information including sensitive information. An authorisation can be granted where the public interest in collecting, using or disclosing the information

outweighs to a substantial degree the interference with privacy that would otherwise arise.¹³⁸

How is privacy protected?

A PSO interferes with a person's privacy if it contravenes an IPP.¹³⁹

An individual may make a *written* complaint to the Information Commissioner about a PSO on the basis that it obtained or handled his or her personal information in a manner that contravened an IPP (or authorisation) or was otherwise an interference with the person's privacy.¹⁴⁰

Of course, complaints made directly to the PSO first are encouraged so that it can have an opportunity to address and appropriately deal with the complaint. The *NT Information Act* makes it a statutory pre-condition that before a person can make a complaint to the Information Commissioner, he or she must have first requested the PSO to resolve or rectify the matter complained of and has not received a response or is not satisfied with the response received.¹⁴¹ The complaint to the Information Commissioner must set out details of the attempts made by the complainant to have the PSO resolve or rectify the matter, and the responses to those attempts.¹⁴² There are other grounds on which the Information Commissioner may accept or reject a complaint; these include that the complainant has not requested that the respondent PSO resolve or rectify the matter (or has made such a request, but it is being dealt with or has been dealt with adequately).¹⁴³

If a complaint is accepted, the Information Commissioner must investigate and decide whether there is sufficient *prima facie* evidence to substantiate the matter complained of. If not the complaint is dismissed. If there is sufficient evidence, the matter must be referred to mediation.¹⁴⁴

If the matter is not resolved by mediation or other agreement, the Information Commissioner must *hold a hearing in relation to the complaint in accordance with the procedures set out in the NT Information Act*.¹⁴⁵ After conducting a hearing, the Information Commissioner must make findings as to whether the matter complained of has been proved (either wholly or partly).¹⁴⁶

Remedies

The remedy available to a complainant will depend on the avenue undertaken and the outcome of the process.

Remedies which PSOs may provide to complainants can vary and can include compensation, education of individuals or staff more generally, improvements in processes and procedures, and other similar measures to mitigate any harm and minimise the risk of future interferences with privacy.

Of course, with the Information Commissioner, the mediation process referred to may give rise to similar outcomes eg compensation for injury to feelings and humiliation. If the matter is so resolved, the parties can jointly apply to the Information Commissioner for orders to give effect to the resolution.

For serious, flagrant or repeated contraventions of an IPP, the Information Commissioner has power to issue a compliance notice which, if not complied with, gives rise to an offence with a penalty of up to 300 penalty units.¹⁴⁷

Determinations after a hearing that the matter complained of is proved can result in orders including that:¹⁴⁸

- (a) the PSO refrains from repeating or continuing the act complained of; and
- (b) the PSO redress any loss or damage suffered by the complainant (including injury to feelings or humiliation suffered) including compensation not exceeding \$60,000.

Further, any orders made by the Information Commissioner that the matter complained of has been proved must be given to the minister responsible for the PSO and may be accompanied by recommendations about the collection and handling of personal information by the PSO.¹⁴⁹

Finally, a person aggrieved by a decision of the Information Commissioner can appeal it to the Supreme Court on a question of law only.¹⁵⁰

South Australia

What is dealt with?

In South Australia, the Cabinet IPPS Instruction applies to 'personal information' which is defined as:

'personal information' means information or an opinion, whether true or not, relating to a natural person or the affairs of a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Key features

The IPPS Instruction places an obligation on the principal officer of agencies to ensure that various Information Privacy Principles (Principles) are implemented, maintained and observed for and in respect of all personal information for which the agency is responsible. The Principles deal with collection, storage, access, correction, use and disclosure of personal information.¹⁵¹

An agency¹⁵² must not carry out an act or engage in a practice in breach or contravention of the Principles.¹⁵³

An interesting feature of the IPPS Instruction is that where a contract for service necessitates the disclosure of personal information to a contracted service provider, the contract must include conditions to ensure that the Principles are complied with as if the contracted service provider was part of the agency.¹⁵⁴

The Privacy Committee of South Australia (Committee) was established by Proclamation to advise the Minister and the Government generally about privacy related matters.¹⁵⁵ The Committee can on its own initiative investigate the nature and extent of compliance by an agency with the Principles.¹⁵⁶ It can also exempt a person or body from one or more of the Principles on such conditions as it thinks fit.

How is privacy protected?

Apart from requiring agencies to comply with the Principles, the IPPS Instruction does not provide for how privacy is protected more generally. The Committee has developed a facilitative role to help with the resolution of complaints about privacy.¹⁵⁷

The Committee suggests that any complaints should, in the first instance, be raised directly with the agency that is believed may have breached the complainant's privacy. If the agency is unable to help, or the complainant is dissatisfied with the response, it is suggested that a complaint is lodged with the Committee.

Remedies

The IPPS Instruction gives the Committee the function of referring written complaints concerning violations of individual privacy received by it to 'the appropriate authority'. Consistent with that approach, the Committee web site explains how the complaint will be handled.

In the first instance, the Privacy Committee will forward your complaint to the agency concerned and seek a response as to whether they consider a breach of the Information Privacy Principles has occurred and, if so, what action has been or might be taken to resolve the matter. The Privacy Committee will assess the response and, if necessary, make a recommendation to the agency to amend their practices or to adopt other measures to resolve the complaint. The Committee will acknowledge receipt of your complaint in writing and provide you with updates throughout the complaint resolution process as necessary.

If the complaint relates to privacy breaches in the delivery of Government health services, the Committee may refer the complaint to the Health and Community Services Complaints Commissioner. If the complaint relates to privacy breaches in relation to the South Australian Police, the Committee may refer the complaint to the Office of the Police Ombudsman.

The Committee will also accept complaints in relation to South Australian universities and Local Government. While there is no legislated or administrative privacy regime that applies to these organisations, the Committee has worked with them in the past to resolve complaints and improve their practices when handling personal information.¹⁵⁸

Western Australia

As mentioned earlier, there is no general legislative handling of personal information privacy, but rather there is the administrative protection offered by public sector codes of ethics.

Conclusion

This concludes my brief survey of the privacy regime in each Australian jurisdiction. In Part 2, to be published subsequently, I will consider how each Australian jurisdiction deals with applications for access under their freedom of information/right to information legislation, the nature and scope of each relevant personal privacy related exemption provision, and how the different jurisdictions manage the balance between privacy and freedom of information regimes.

Endnotes

- 1 United Nations General Assembly, 10 December 1948.
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
- 2 The Covenant entered into force for Australia 13 November 1980.
No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 3 'Everyone has the right— (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily...'
- 4 'A person has the right— (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'.

- 5 Note that at the time of writing, there was a bill before the Victorian Parliament which would repeal and substitute the *Vic IPAct*, the Privacy and Data Protection Bill 2014 (Vic PDP Bill). That bill was enacted as the *Privacy and Data Protection Act 2014* (Vic PDPAct).
- 6 *Cabinet Administrative Instruction No 1 of 1989* (as amended). Available at http://dpc.sa.gov.au/sites/default/files/pubimages/Circulars/PC012_Privacy_0.pdf
- 7 Available at <http://www.health.sa.gov.au/Portals/0/Health-Code-July04.pdf> (as at 7 July 2014).
- 8 Directive D0067. This is no doubt supported by the *Code of Ethics for the South Australian Public Sector* which was introduced as a public sector code of conduct under the *Public Sector Act 2009* (SA). It places an obligation on public sector employees to maintain the integrity and security of official information for which they are responsible. Employees are required to ensure that the privacy of individuals is maintained and may only release information in accordance with relevant legislation, industrial instruments, policy or lawful and reasonable direction. Section 6 of the *Public Sector Act 2009* (SA) requires public sector employees to comply with such codes of conduct.
- 9 See Commissioner's Instruction No. 8: *Codes of conduct and integrity training*, available at http://www.publicsector.wa.gov.au/sites/default/files/documents/commissioners_instruction_08_codes_of_conduct_and_integrity_training.pdf as at 7 July 2014.
- 10 Public Sector Commission, *Conduct guide*, p9. Available at http://www.publicsector.wa.gov.au/sites/default/files/documents/conduct_guide_5.pdf at July 2014.
- 11 Available on a link at <http://www.publicsector.wa.gov.au/document/sample-code-conduct-boards-and-committees> as at 7 July 2014.
- 12 Definition in s 6, *Cth Privacy Act*. The *Cth Privacy Act* also deals with health information for research and similar purposes and will not be considered further in this paper.
- 13 Section 14(1) and Schedule 1, *Cth Privacy Act*.
- 14 See definition of 'agency' in s 6, *Cth Privacy Act*.
- 15 See s 6C, *Cth Privacy Act*.
- 16 Sections 6A and 15, *Cth Privacy Act*.
- 17 APP 12, *Cth Privacy Act*.
- 18 *Chapter 13: Australian Privacy Principle 13 – Correction of personal information*, February 2014 available at: <http://www.oaic.gov.au/images/documents/privacy/applying-privacy-law/app-guidelines/chapter-13-app-guidelines-v1.pdf> at 21 July 2014.
- 19 See for example s 13(3), *Cth Privacy Act*.
- 20 Part VI, *Cth Privacy Act*. See also Part VIA in relation to dealing with personal information in emergencies.
- 21 Section 13, *Cth Privacy Act*.
- 22 Section 36, *Cth Privacy Act*.
- 23 Section 40(1A) and 41(2), *Cth Privacy Act*. The Information Commissioner retains a discretion to decide to investigate if he or she considers that it was not appropriate for the complainant to complain directly to the respondent entity.
- 24 See s 41, *Cth Privacy Act* generally.
- 25 Section 40, *Cth Privacy Act*.
- 26 Section 40A, *Cth Privacy Act*.
- 27 Section 13G, *Cth Privacy Act*.
- 28 Section 80W, *Cth Privacy Act*.
- 29 Section 52, *Cth Privacy Act*.
- 30 Section 58, *Cth Privacy Act*.
- 31 Section 60, *Cth Privacy Act*.
- 32 Section 62, *Cth Privacy Act*. Note however that an application may be made to the Administrative Appeals Tribunal (AAT) for review of the decision of the Information Commissioner to make a determination under s 52: s 96, *Cth Privacy Act*.
- 33 Since this paper was presented, the *Vic IPAct* has been repealed and replaced by the *Vic PDPAct*.
- 34 I will not refer to the provisions of the *Vic HRAAct* other than to point out some similarities or differences between the *Vic IPAct* and the *Vic HRAAct*.
- 35 Under the *Vic HRAAct* there are 12 Health Privacy Principles (HPPs).
- 36 Section 14(1) and Schedule 1, *Vic IPAct*. Now see s 18(1) and Schedule 1, *Vic PDPAct*.
- 37 Section 9(1), *Vic IPAct*. Now see s 13(1), *Vic PDPAct*. A State contract is defined as meaning: a contract between an organisation and another person or body (whether an organisation for the purposes of this Act or not) under which services are to be provided to one (the outsourcing organisation) by the other (the contracted service provider) in connection with the performance of functions of the outsourcing organisation, including services that the outsourcing organisation is to provide to other persons or bodies.
- 38 Section 11, *Vic HRAAct*.
- 39 Sections 14(3) and 16(1), *Vic IPAct*. (See also now ss 16 and 20, *Vic PDPAct*.) Sections 18 and 21, *Vic HRAAct*.
- 40 Section 6(1), *Vic IPAct*. (See also now s 6(1), *Vic PDPAct*) Section 7(1), *Vic HRAAct*.
- 41 Section 12, *Vic IPAct*. (See now s 14, *Vic PDPAct*) See also s 16, HPP6 and Part 5, *Vic HRAAct* for access to and amendment of health information.
- 42 There are specific provisions in Part 5 of the *Vic HPAAct* for access to health information because that Act extends to the private sector as well as the public sector.

- 43 Section 11(1), *Vic IPAct*. (See now s 12(1), *Vic PDPAct*) See s 15, *Vic HRAAct* for publicly available health information.
- 44 Section 16(4), *Vic IPAct*. See now s 20(2), *Vic PDPAct*.
- 45 Section 17, *Vic IPAct*. (See now s 17, *Vic PDPAct*) See also s 12, *Vic HRAAct* for health information.
- 46 Under the *Vic HRAAct*, matters are dealt with by the Health Services Commissioner. Under the *Vic PDPAct*, matters are now dealt with by the Commissioner for Privacy and Data Protection.
- 47 Section 25, *Vic IPAct*. See now s 57, *Vic PDPAct*. A complaint about health information is to the Health Services Commissioner under s 45, *Vic HRAAct*.
- 48 Section 29(1)(c) and (h), *Vic IPAct*. (See now s 62(1)(c) and (h), *Vic PDPAct*) See s 51, *Vic HRAAct* for health information complaints.
- 49 See s 29, *IPAct* generally. See now s 62, *Vic PDPAct*.
- 50 Sections 29, 32, 37, *Vic IPAct*. (See now ss 62, 66 and 71, *Vic PDPAct*.) See s 54, *Vic HRAAct*.
- 51 Section 64, *Vic HRAAct*.
- 52 See s 83, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*VCAT Act*).
- 53 See for example, *AY v Public Sector Employer* [2013] VPrivCmr 2 viewed on 19 July 2013 at: [https://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/files/complainant-ay-v-public-sector-employer-2013/\\$file/case_note_02_13.pdf](https://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/files/complainant-ay-v-public-sector-employer-2013/$file/case_note_02_13.pdf).
- 54 Sections 44, 48, *Vic IPAct*. (See now ss 78 and 81, *Vic PDPAct*) See ss 66 and 71, *Vic HRAAct*.
- 55 Section 43, *Vic IP Act*. (See now s 77, *Vic PDPAct*) See s 78, *Vic HRAAct* in relation to health information.
- 56 As far as we are able to ascertain, the VCAT has never imposed a compensation order when a finding of interference with privacy has been made.
- 57 Section 14, *ACT Privacy Act*. The *ACT HRAAct* establishes 12 privacy principles (there are also some sub-principles (PPs)).
- 58 See Schedule 3, *Consequential Provisions Act*.
- 59 Sections 6(2) and 16, *ACT Privacy Act*.
- 60 Section 13, *ACT Privacy Act*. A person can make a complaint to the ACT Human Rights Commission about an act or omission which contravenes the privacy principles: s 18(1), *ACT HRAAct*.
- 61 Section 6(2), *ACT FOI Act*.
- 62 Under the *ACT HRAAct* complaints are dealt with by the ACT Human Rights Commission.
- 63 Section 36, *ACT Privacy Act*. A complaint about health records is made to the ACT Human Rights Commission under s 18, *ACT HRAAct*.
- 64 Section 41, *ACT Privacy Act*.
- 65 See s 41, *ACT Privacy Act* generally.
- 66 Section 40, *ACT Privacy Act*.
- 67 Section 42, *ACT Privacy Act*.
- 68 Section 27(1)(a), *ACT Privacy Act*.
- 69 Section 52, *ACT Privacy Act*.
- 70 Section 52(3), *ACT Privacy Act*.
- 71 Section 58, *ACT Privacy Act*.
- 72 Section 62, *ACT Privacy Act*.
- 73 Section 60(2) and (2A), *ACT Privacy Act*.
- 74 See s 4A, *NSW PPIPA*. I will not refer to the provisions of the *NSW HRIPA* other than by way of contradistinction or illustration to point out some similarities or differences between it and the *NSW PPIPA*.
- 75 Section 4(1), *NSW PPIPA*. The definition in the *NSW HRIPA* is identical, with the exception of the exclusions: s 5, *NSW HRIPA*.
- 76 See s 4(2) and (3), *NSW PPIPA*.
- 77 Section 11, *NSW HRIPA*. There are some public sector specific provisions in Part 3 of *NSW HRIPA* and some private sector specific provisions in Part 4 of the *NSW HRIPA* – particularly in relation to access and amendment, as well as in Part 6 in relation to making complaints against private sector persons for contraventions of Health Privacy Principles: Part 6, *NSW HRIPA*.
- 78 Sections 8-19, *NSW PPIPA*. The *NSW PPIPA* sets out numerous Health Privacy Principles (HPPs).
- 79 Section 20, *NSW PPIPA*.
- 80 Section 3, *NSW PPIPA*.
- 81 Sections 21, *NSW PPIPA*.
- 82 See ss 22-28, *NSW PPIPA*.
- 83 Section 5, *NSW PPIPA*.
- 84 Section 14, *NSW PPIPA*.
- 85 Section 15, *NSW PPIPA*.
- 86 Section 36, *NSW PPIPA*.
- 87 Section 45, *NSW PPIPA*.
- 88 See s 46, *NSW PPIPA*.
- 89 Sections 48 and 49, *NSW PPIPA*.
- 90 Section 43(7A), *NSW PPIPA*.
- 91 Section 53, *NSW PPIPA*.
- 92 Sections 53 and 54, *NSW PPIPA*.
- 93 Section 50, *NSW PPIPA*.
- 94 As well as any ancillary orders thought appropriate: s 55, *NSW PPIPA*.

- 95 Section 26 and Sch 3, *Qld IPAct*.
- 96 Sections 30, 31 and Sch 4, *Qld IPAct*. See definitions in Sch 5, *Qld IPAct*. These are understood to be limited to public hospitals and health services and do not extend to the private sector.
- 97 The 'privacy principles' are the requirements applying to an entity under Chapter 2 (which includes all agencies and health agencies): see definitions in Schedule 5, *Qld IPAct*.
- 98 Section 18, *Qld IPAct*. 'Public authority' is defined in s 21, *Qld IPAct*.
- 99 Schedule 2, Part 1, cl 6, *Qld IPAct*.
- 100 Section 27, *Qld IPAct*.
- 101 See eg ss 28 and 29, *Qld IPAct*.
- 102 Section 31, *Qld IPAct*.
- 103 Sections 4-9, *Qld IPAct*.
- 104 Section 9, *Qld IPAct* and s 34, *Qld RTI*.
- 105 See generally Chapter 3, *Qld IPAct*.
- 106 Section 16, cl 7(a) of Schedule 1, and definition of 'generally available publication' in Sch 5, *Qld IPAct*.
- 107 See ss 34-37, *Qld IPAct*.
- 108 Section 157, *Qld IPAct*.
- 109 That is, an agency or a bound contracted service provider: s 164, *Qld IPAct*.
- 110 Section 165, *Qld IPAct*.
- 111 Sections 166(3), 168(1)9b), (d).
- 112 See s 168, *Qld IPAct* generally.
- 113 Section 171, *Qld IPAct*.
- 114 Sections 174 – 177, *Qld IPAct*.
- 115 Sections 158 – 160, *Qld IPAct*.
- 116 Sections 172 and 173, *Qld IPAct*.
- 117 Section 178 *Qld IPAct*.
- 118 Section 16) and Schedule 1, *Tas PIPAct*.
- 119 As defined in the *TAS RTI Act* to include an agency under the *State Services Act 2000* (Tas), the University of Tasmania, the police, councils, statutory authorities, bodies established for public purposes, GBE's etc.
- 120 See definition of 'personal information custodian' in s 3, *Tas PIPAct*.
- 121 See definition of 'personal information contract' in s 3, *Tas PIPAct*.
- 122 Section 17(1), *Tas PIPAct*.
- 123 Section 4, *Tas PIPAct*.
- 124 Section 8, *Tas PIPAct*.
- 125 Definition of 'public information' in s 3, *Tas PIPAct*.
- 126 Section 18, *Tas PIPAct*.
- 127 Section 19, *Tas PIP Act*.
- 128 Section 21, *Tas PIP Act*.
- 129 Section 22, *Tas PIPAct*.
- 130 Section 65 and Schedule 2, *NT Information Act*.
- 131 Persons or bodies collecting or handling personal information for or on behalf of a PSO under a service contract: definitions in s 4, *NT Information Act*.
- 132 Section 5, *NT Information Act*.
- 133 Section 67, *NT Information Act*. This also applies to a contravention of any code of practice or an authorisation given by the NT Information Commissioner.
- 134 Section 65(2), *NT Information Act*.
- 135 Section 68, *NT Information Act*. See also s 12.
- 136 Section 68(2), *NT Information Act*.
- 137 Section 149, *NT Information Act*.
- 138 Section 81, *NT Information Act*.
- 139 Or code of practice or authorisation.
- 140 Section 104(1), *NT Information Act*.
- 141 Section 104(2), *NT Information Act*.
- 142 Section 105(e), *NT Information Act*.
- 143 Section 106(3)(c), *NT Information Act*.
- 144 Section 110, *NT Information Act*.
- 145 Sections 113, 121-128.
- 146 Section 115, *NT Information Act*.
- 147 Section 84, *NT Information Act*.
- 148 Section 115, *NT Information Act*.
- 149 Section 116(2), *NT Information Act*.
- 150 Section 129, *NT Information Act*.
- 151 Clause 4, IPPS Instruction.
- 152 That is, public sector agencies as defined in s 3(1) of the *Public Sector Act 2009* (SA).
- 153 Clause 6, IPPS Instruction.
- 154 Clause 5A, IPPS Instruction.
- 155 See generally, Government of South Australia, *Privacy Committee Members Handbook*, March 2014.
- 156 Clause 8, IPPS Instruction.

- 157 See generally the web site of the Committee at: <http://www.archives.sa.gov.au/privacy/committee.html>.
158 See at <http://www.archives.sa.gov.au/privacy/complaint.html> . Further information is available from the annual reports of the Committee (eg 2012/13 Annual Report at: http://www.archives.sa.gov.au/files/privacy_annualreport_12-13.pdf).

APPLYING *PROJECT BLUE SKY* – WHEN DOES BREACH OF A STATUTORY REQUIREMENT AFFECT THE VALIDITY OF AN ADMINISTRATIVE DECISION?

Graeme Hill*

The High Court's decision in *Project Blue Sky v Australian Broadcasting Authority*¹ sets out the approach to determine whether a failure to comply with a statutory requirement affects the validity of an administrative decision.² A joint judgment of four members of the Court (McHugh, Gummow, Kirby and Hayne JJ) stated:³

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

The joint judgment rejected the previous distinction between 'mandatory' and 'directory' statutory requirements, stating that this distinction merely recorded a result that has been reached on other grounds. Instead, their Honours stated that a better test for determining the issue of validity is to ask whether it was 'the purpose of the legislation that an act done in breach of the provision should be invalid'.⁴

This paper attempts to give some content to this rather general test. I will use two cases as illustrations:

- the first is the decision of the Full Court of the Federal Court in *Kutlu v Director of Professional Services Review*.⁵ This case held that a failure by the Minister to consult the Australian Medical Association (AMA) before appointing members of various Professional Services Committees meant that the decisions of those committees were invalid; and
- the second is the decision of the Victorian Court of Appeal in *Director of Public Prosecutions v Marjancevic*.⁶ That case considered whether a failure to swear an affidavit filed in support of an application for a search warrant meant that any evidence obtained under that warrant was inadmissible.

I should acknowledge that the joint judgment in *Project Blue Sky* itself doubted whether it would be possible to lay down a more specific test. Their Honours stated:⁷

Unfortunately, a finding of purpose or no purpose [to invalidate a decision] in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

Moreover, the usual difficulties in ascertaining legislative 'intention'⁸ are magnified in this context – very often the courts are imputing a legislative intention to a Parliament that has

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not addressed this issue.⁹ For that reason, it could well be said that the *Project Blue Sky* test is no less conclusory than the 'mandatory/directory' test that it rejected.¹⁰ However, while it is not possible to lay down any 'decisive rule', it is possible to draw some themes that emerge from the cases that have applied *Project Blue Sky*.

This discussion assumes that the relevant statute does not make any express provision for the consequences of breaching a statutory requirement and it only considers the position of administrative decision-makers, not courts. The High Court has made it clear that the *Project Blue Sky* approach is not relevant when considering the effect of non-compliance with statutory requirements on the jurisdiction of courts.¹¹

***Project Blue Sky* and case illustrations**

The starting point is the factors used in *Project Blue Sky* itself to determine whether the breach of a statutory requirement in that case should lead to the invalidity of the decision under consideration.

Project Blue Sky

The question in *Project Blue Sky* was the legal effectiveness of an Australian content standard made by the Australian Broadcasting Authority,¹² purportedly under s 122(2)(b) of the *Broadcasting Services Act 1992* (Cth) (the *Broadcasting Services Act*). Under cl 9 of that standard, Australian programs had to comprise 55% of all broadcasts between 6am and midnight. Section 160(d) of the *Broadcasting Services Act* required the Australian Broadcasting Authority to perform its functions in a manner consistent with Australia's international obligations. One of those international obligations was a trade agreement between Australia and New Zealand, which provided that Australia and New Zealand would offer equal access and treatment to persons and services of the other country. The Australian content standard (or at least cl 9) clearly did not provide equal treatment for Australian and New Zealand programs. The High Court held that cl 9 of the Australian content standard was contrary to s 160(d) of the *Broadcasting Services Act*.¹³

The question then was, what was the effect of non-compliance with s 160(d) of the *Broadcasting Services Act* on the Australian content standard.

Section 160 provided that the Australian Broadcasting Authority 'is to perform' its functions in a manner consistent with the four listed matters (including Australia's international obligations). The joint judgment does not appear to have given much weight to this apparently mandatory (or obligatory) language. However, in a related context, the High Court has stated that the fact that a statutory requirement is expressed by the use of 'must' is not conclusive.¹⁴

In *Project Blue Sky*, the joint judgment relied on three other factors to conclude that a breach of s 160(d) of the *Broadcasting Services Act* did not render a decision invalid as such.

Regulation of existing function

The first factor was whether the statutory requirement regulated the exercise of functions already conferred, or was an 'essential preliminary' to the exercise of a function. The joint judgment held that s 160 of the *Broadcasting Services Act* merely regulated an existing function, which 'strongly indicate[d]' that a breach of s 160 should not invalidate a decision.¹⁵

No ‘rule-like quality’

The second factor was the nature of the statutory requirement. In *Project Blue Sky*, the joint judgment considered that the obligations imposed by s 160 of the *Broadcasting Services Act* did not have ‘a rule-like quality’ that could easily be identified and applied:¹⁶

- apart from s 160(d), the other considerations listed in s 160 concerned matters of policy.¹⁷ The joint judgment stated that when a function is to be carried out in accordance with matters of policy, ordinarily non-compliance will not affect the validity of any decision;¹⁸ and
- in relation to s 160(d), the joint judgment observed that Australia’s international obligations may often be expressed in indeterminate language, that describes goals to be achieved rather than rules to be obeyed.¹⁹

Public inconvenience

The third factor was the public inconvenience that would result if non-compliance meant that a decision was legally ineffective. The joint judgment:

- considered that, in the light of the indeterminate nature of the obligations in s 160 of the *Broadcasting Services Act*, a finding that non-compliance with s 160(d) invalidated a decision would cause public inconvenience. For example, the Australian Broadcasting Authority’s functions include allocating and renewing licences. As part of these functions, the Authority designs and administers price-based systems for allocating licences; and
- stated that non-compliance with s 160 was ‘far from fanciful’, and it was unlikely that the validity of a licence was to depend on whether the Australian Broadcasting Authority had complied with s 160.²⁰

For these reasons, the joint judgment held that the Australian content standard was not invalid, despite the breach of s 160(d) of the *Broadcasting Services Act*.

However, that was not the end of the matter. The joint judgment held that the standard, although not invalid, was unlawful. Accordingly, a person with a sufficient interest could apply for a declaration that the relevant clause of the content standard was unlawful, and in an appropriate case could apply for an injunction to prevent the Australian Broadcasting Authority from taking any further action in reliance on that clause.²¹ This approach seems to invalidate the Australian content standard with prospective effect only.²²

Kutlu – failure to consult before appointing

My first case to illustrate the *Project Blue Sky* test is *Kutlu*.

The issues in *Kutlu* arose because in 2005 and 2009, the Minister did not consult with the Australian Medical Association (AMA) before making various appointments under ss 84 and 85 of the *Health Insurance Act*. The agreed facts established that the Minister had not consulted with the AMA before appointing three persons as Deputy Directors in January 2005, nor before appointing six persons as Panel members and three persons as Deputy Directors in November 2009.²³

Obligation to consult AMA before appointment (ss 84(3) and 85(3))

Part VAA of the *Health Insurance Act* establishes the Professional Services Review Scheme. In general terms, this scheme reviews and investigates the provision of services by a person to determine whether the person has engaged in 'inappropriate practice'. This investigation is undertaken first by the Director of Professional Services Review (Div 3A), who may refer a matter to a Professional Services Review Committee (Div 4).

Committee members are drawn from a Professional Services Review Panel appointed under s 84. Some panel members are also appointed as Deputy Directors under s 85. Both ss 84 and 85 require the Minister to consult with the AMA before appointing a medical practitioner as a panel member, or as a Deputy Director.

Section 84(3) provided:

- (3) Before appointing a medical practitioner to be a Panel member, the Minister must consult the AMA. The Minister must make an arrangement with the AMA under which the AMA consults other specified organisations and associations before advising the Minister on the appointment.

Section 85(3) imposed the same requirement on appointing a medical practitioner to be a Deputy Director.

Committees and their decisions invalid

The Full Court of the Federal Court held that the failure to consult, as required by ss 84(3) and 85(3) of the *Health Insurance Act*, meant both that the appointment of those Committees was invalid, and that the decisions taken by those Committees were invalid.²⁴

Rares and Katzmann JJ reasoned as follows.

- although the Minister was not bound to accept the AMA's advice, the consultation and advice required by ss 84(3) and 85(3) 'can expose significant matters for the Minister to consider about a prospective appointee as part of the deliberative process'.²⁵ The advice of the AMA is a relevant, though not decisive, consideration for the Minister in deciding who to appoint;²⁶
- Part VAA provides for a system of peer review. The appointment process under ss 84 and 85 is intended not only to ensure public confidence in the decisions of Committees, but also to ensure the confidence of the relevant professions and of the person who is being reviewed. This indicated that prior consultation by the Minister was an 'essential pre-requisite' to the validity of the appointment of persons under those sections;²⁷
- the fact that s 96A made only limited provision for a Panel to continue without consent when a member is unavailable was an indication that Parliament regarded the valid and proper constitution of a Committee as an essential and indispensable condition of any Committee's exercise of functions under the *Health Insurance Act*;²⁸ and
- the fact that the invalidity of the appointments would cause public inconvenience was, on its own, suggestive of a legislative intention that failure to consult would not lead to invalidity.²⁹ However, these considerations did not displace the express words of ss 84(3) and 85(3).³⁰ The requirements of ss 84(3) and 85(3) had a rule-like quality that could be easily identified and applied.³¹ The scale of the Ministers' failures to obey 'simple legislative commands' to consult the AMA was not likely to have been something that the Parliament had anticipated. If the appointments were treated as valid, the unlawfulness of the Minister's conduct would attract no remedy.³²

Flick J reasoned to similar effect that:

- although the fact that ss 84(3) and 85(3) stated that the Minister ‘must’ consult was only the beginning of the inquiry,³³ the use of mandatory language was still a ‘valuable guide’;³⁴
- an adverse finding from a Professional Services Review Committee would prejudicially affect the reputation and standing of the practitioner concerned.³⁵ An ‘essential aspect’ of the scheme provided for in Pt VAA was that a practitioner’s conduct would be reviewed by practitioners who have been appointed after consultation by the Minister.³⁶ That is, non-compliance with the requirement to consult the AMA is not a mere technicality or mere formality, because the AMA played a ‘pivotal role’ in the scheme of Pt VAA;³⁷
- the medical practitioner whose conduct is being reviewed would be unable to determine whether the necessary consultation had occurred. This was not a case where a practitioner could be expected to conduct his or her own independent investigation as to whether these requirements had been complied with;³⁸ and
- arguments about ‘public inconvenience’ had the potential to be ‘self-justifying and circular’. Where there was uncertainty as to the presumed legislative intention in circumstances where there has been non-compliance with a statutory provision, it is permissible to take account of the consequences of one interpretation as opposed to another, including a consequence of ‘public inconvenience’.³⁹ In this case, however, the requirements of ss 84(3) and 85(3) were clear, and there was no room to rely on ‘public inconvenience’ as an aid to statutory construction.⁴⁰ Any ‘public inconvenience’ is something for which the Minister alone must remain accountable.⁴¹

Committees and decisions validated by legislation

The High Court granted special leave to appeal from the Full Court’s decision in February 2012,⁴² but those proceedings were discontinued in May 2012.⁴³

In June 2012, the Commonwealth Parliament enacted legislation to address the problem identified in *Kutlu*. Schedule 1 of the *Health Insurance Amendment (Professional Services Review) Act 2012* (Cth) applies to a thing purportedly done under Pt VAA, VB or VII of the *Health Insurance Act* to the extent that the thing would be invalid because a person was not appointed or validly appointed as a Panel Member or Deputy Director under Pt VAA of that Act (item 1(1)):

- the thing purportedly done ‘is as valid and effective, and is taken always to have been as valid and effective, as it would have been had the person been validly appointed as a Panel member or Deputy Director under that Part’ (item 1(2)); and
- ‘[a]ll persons are, by force of this subitem, declared to be, and always to have been, entitled to act on the basis that the thing purportedly done is valid and effective’ (item 1(3)).

Marijancevic – failure to swear affidavits

The other illustrative case is *Marijancevic*. Unlike *Kutlu*, this was not a case where a person was seeking to invalidate a particular administrative act. Rather, the issue in *Marijancevic* was the admissibility of evidence obtained pursuant to a search warrant, where the statutory requirements for obtaining the warrant had not been complied with. The specific issue was whether that evidence should be admitted under s 138 of the *Evidence Act 2008* (Vic) (the *Evidence Act*).

In *Marijancevic*, the accused were charged in the County Court with various offences relating to drug manufacture and trafficking. Much of the evidence against the accused was obtained from search warrants issued under the *Drugs Poisons and Controlled Substances Act 1981* (Vic) (the *Drugs Act*). During the course of the trial, it was found that the affidavits relied on to obtain the search warrants had not been sworn (as required by s 81 of the *Drugs Act*),⁴⁴ but rather had been simply signed in the presence of a police inspector authorised to take affidavits.

The trial judge held that the breach of s 81 of the *Drugs Act* meant that the evidence had been obtained unlawfully and refused, in the exercise of discretion, to permit this evidence to be admitted under s 138 of the *Evidence Act*. An appeal to the Court of Appeal was dismissed.

Evidence Act s 138

Section 138(1) of the *Evidence Act* provides that evidence obtained ‘in contravention of an Australian law’ is not to be admitted ‘unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.’ Without limiting the s 138(1) discretion, the court must take into account the matters listed in s 138(3):

- (a) the probative value of the evidence;
- (b) the importance of the evidence in the proceeding;
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
- (d) the gravity of the impropriety or contravention;
- (e) whether the impropriety or contravention was deliberate or reckless;
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights;
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

On appeal in *Marijancevic*, the areas of dispute were the factors in s 138(3)(d) and (e). It was common ground that the evidence had significant probative value (s 138(3)(a));⁴⁵ that the exclusion of the evidence significantly weakened the case against the accused (s 138(3)(b));⁴⁶ and that one of the accused was charged with serious offences (s 138(3)(c)).⁴⁷ For present purposes, the Court’s discussion of s 138(3)(d) – the gravity of the impropriety – is relevant.

Gravity of impropriety (s 138(3)(d))

The trial judge found that the gravity of the impropriety was of the ‘highest order’ (cf s 138(3)(d)).

The Court of Appeal agreed with the trial judge that failing to swear affidavits (as distinct from merely signing them) was a very serious error. The Court stated that the importance of making an affidavit in support of a search warrant ‘can hardly be gainsaid’.⁴⁸ A search warrant authorises what would otherwise be a trespass.⁴⁹ To proffer to a magistrate material which is not sworn or affirmed in order to obtain a search warrant ‘has a tendency to subvert a fundamental principle of our law’.⁵⁰

In assessing s 138(3)(d), the Court made observations on the degree of seriousness of gravity that are potentially of broader application:⁵¹

- at the least serious end of the spectrum of improper conduct is that ‘which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety’;
- in the middle of the range is conduct ‘which was known to be improper but which was not undertaken for the purpose of gaining any advantage or benefit that would not have been obtained had the conduct been legal’; and
- at the most serious end is conduct ‘which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct.’

The conduct in *Marijancevic* was only in the middle range, because it was not undertaken for the purpose of obtaining an advantage that could not by proper conduct be obtained. The Court held that the trial judge’s reference to impropriety of the ‘highest order’ only meant that the conduct was of such a high order as to justify the exclusion of the evidence.⁵²

This analysis looks at the extent of and reasons for non-compliance. This analysis raises two factors: (1) the decision-maker’s knowledge of the non-compliance; and (2) whether any advantage was obtained from the non-compliance. As discussed below, more recent cases suggest that there may be room to consider the extent and consequences of non-compliance in applying *Project Blue Sky* (at least in some contexts).

In the result, the Court of Appeal refused to interfere with the trial judge’s exercise of discretion. However, the Court stated that ‘[i]t should not be assumed that we would have made like findings or that we would have exercised the discretion in the same way had a finding of inadvertent or careless conduct been made’.⁵³

Affidavits validated by legislation

The evidence given in *Marijancevic* indicated that there was a widespread practice within Victoria Police of merely signing, rather than swearing, affidavits. The Victorian Parliament enacted legislation to address this issue. The *Evidence (Miscellaneous Provisions) Amendment (Affidavits) Act 2012* (Vic) (the *2012 Affidavits Act*) inserted a new s 165 into the *Evidence (Miscellaneous Provisions) Act 1958* (Vic). In general terms, the new s 165 provides that:

- if an affidavit signed before 12 November 2011 by a person and by a person duly authorised to administer oaths contains words indicating that the first person states that the affidavit is made on oath or affirmation, then the words indicating that the first person states that the affidavit was made on oath or affirmation are and are taken always to have been effective by way of oath or affirmation even if specified acts (such as making the oath orally) were not done or did not occur (s 165(1));
- a warrant, order, summons or other process issued or made in reliance on such an affidavit ‘is not invalid only by reason of the fact that, but for [s 165(1)], the affidavit would not have been duly sworn or affirmed’ (s 165(2); and

- for the purposes of the prosecution of an alleged offence, the fact that, but for s 165(1), an affidavit would not have been duly sworn or affirmed 'is to be disregarded in determining whether evidence obtained in reliance, directly or indirectly, on that affidavit ought to be admitted' (s 165(3)).

In *Rich v The Queen*,⁵⁴ the Victorian Court of Appeal rejected an argument that the 2012 *Affidavits Act* was contrary to the principle in *Kable v Director of Public Prosecutions (NSW)*.⁵⁵

Kutlu and *Marijancevic* are striking decisions because, first, significant disruption would follow from invalidating the relevant administrative actions and secondly, the breaches did not seem to be ones that would undermine the quality of the final decisions made (that is, the decisions by the Professional Services Committee, or the contents of the affidavits made in support of the applications for search warrants).

Analysis of relevant factors

As with any question of statutory construction, it is necessary to start with the text.⁵⁶ However, the fact that a provision is expressed in mandatory language is relevant, but not conclusive (as Flick J observed in *Kutlu*).⁵⁷ Several cases have held that non-compliance with a statutory requirement does not lead to invalidity, despite apparently mandatory language, because of other factors such as public inconvenience that would follow from holding decisions to be invalid.⁵⁸

The different judgments in the Full Court in *Lansen*⁵⁹ illustrate how different weight may be given to textual and other factors. The issue in that case was the effect of non-compliance with s 134(4)(a) of the *Environment Protection and Biodiversity Act 1999* (Cth) (the *EPBC Act*), which provides that, before attaching conditions to an approval decision under that Act, the Commonwealth Minister 'must consider' any relevant conditions that have been imposed under State or Territory law.⁶⁰ The majority justices (Moore and Lander JJ) held that non-compliance with s 134(4)(a) rendered the Minister's approval invalid. Their Honours relied particularly on textual matters, such as the mandatory language of s 134(4)(a),⁶¹ and the fact that other provisions of the *EPBC Act* expressly dealt with the consequences of non-compliance but not s 134(4)(a).⁶² The dissenting judgment of Tamberlin J gave more weight to the inconvenience to the proponent of invalidity,⁶³ which caused his Honour to give less weight to those other textual matters.⁶⁴

I would suggest that a more significant factor than apparently mandatory language is the role that the particular provision plays in the statutory scheme, which is considered below.

'Essential preliminary' to regulation of existing function

The first factor from *Project Blue Sky* is whether the statutory requirement regulates the exercise of functions already conferred, or is an essential preliminary to the exercise of a function.

This factor was referred to in *Fernando v Minister for Immigration and Multicultural Affairs*.⁶⁵ The question in that case was whether the Refugee Review Tribunal (the RRT) could determine a review application that was lodged more than 28 days after the person was notified of the decision. Heerey J (with Dowsett J agreeing) stated that making an application within the time limit was an 'essential preliminary' to the exercise of the RRT's function.⁶⁶ Accordingly, the RRT could not consider an application that was lodged after 28 days.

I would suggest that the mere timing of a requirement, as a matter of chronology, does not assist greatly in determining whether non-compliance leads to invalidity. Often this factor will only re-state the question of whether non-compliance was intended to deprive a decision of legal effect.⁶⁷

In this context, 'preliminary' does not refer to a chronological sequence of events but rather to a matter that is legally antecedent to the decision-making process.⁶⁸ To determine whether a requirement is an 'essential preliminary' requires considering the purpose of the Act and the importance of the error in the circumstances of the case.⁶⁹ There is some similarity between this exercise and determining whether a fact is a 'jurisdictional fact' for the purposes of a statutory scheme. In that context, the question is whether, as a matter of statutory construction, the existence of a fact is a precondition to the valid exercise of a power.⁷⁰

At the same time, there are many requirements that seem to regulate an existing power, yet non-compliance with these requirements will mean that a decision is ineffective. An example is a statutory requirement for a decision-maker to notify a person of relevant information.⁷¹ So a requirement may be 'essential' even though it is not 'preliminary'.

In *Kutlu*, the failure to consult occurred before the appointment of the Professional Services Committees. However, the fact that the *Health Insurance Act* required consultation before appointment did not, in itself, make the consultation 'essential' – consultation was essential because of the important role it played in giving effect to the system of peer review. Once the Court found that the Committees were invalidly appointed, it followed that any decisions made by those Committees were invalid as well. The specific provision made in s 96A of the *Health Insurance Act* showed that a Committee could not otherwise validly perform functions under the Act unless all of its members were validly appointed.⁷²

In *Marijancevic*, the failure to swear the affidavit occurred before any decision was made whether to grant a search warrant. However, the temporal sequence of events, in itself, was rightly given little significance. The 'essential' nature of the requirement to swear affidavits followed from the role that this requirement played in our system of justice.

Nature of requirement

The second factor drawn from *Project Blue Sky* is the nature of the requirement. As noted, the joint judgment considered that the obligations imposed by s 160 of the *Broadcasting Services Act* did not have 'a rule-like quality' that could easily be identified and applied.

Certainty of application

In *Project Blue Sky*, the nature of the requirement focused on the certainty of application of the relevant statutory provision. I would suggest that this factor (certainty) is a second order consideration in itself, and takes its weight from its combination with other factors.

In *Project Blue Sky*, the indeterminacy of the statutory requirement was significant because of the public inconvenience that would result if non-compliance deprived a decision of legal effect (see below).

A similar approach was taken in *Bare v Small*.⁷³ In that case, Williams J held that the requirements of s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) lack a 'rule-like quality'.⁷⁴ That in turn meant that there was undesirable uncertainty as to whether the decision of an entity was in breach of s 38(1), with the potential for public inconvenience.⁷⁵

Conversely, in *Kutlu*, the major factor was that the consultation requirements in ss 84(3) and 85(3) of the *Health Insurance Act* were central to the system of peer review established by Pt VAA of that Act. The fact that these requirements were ‘easily identified and applied’⁷⁶ bolstered the conclusion that non-compliance with those provisions should lead to invalidity.⁷⁷

Another relevant factor is the place of the statutory requirement in the legislative scheme. As already noted, a particular statutory requirement might be central to a statutory scheme. For example, *Kutlu* held that the consultation requirement considered in *Kutlu* was central to the system of peer review established by Pt VAA of the *Health Insurance Act*. Non-compliance with a central provision of this sort is likely to lead to invalidity.

Procedural safeguard or effect on private rights

Even if a provision is not central, non-compliance is likely to lead to invalidity if the statutory provision contains a procedural safeguard for persons affected by the scheme, or is a provision that affects private rights.⁷⁸

An example of a procedural safeguard is a statutory provision that mirrors or gives effect to an important administrative law obligation, such as procedural fairness. Non-compliance with a provision of this sort is very likely to lead to the invalidity of the decision.

This point is illustrated by *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*.⁷⁹ A majority of the High Court held that non-compliance with a requirement to provide details of adverse information to an applicant in writing⁸⁰ invalidated a decision, even if that information had been provided orally. The requirement to provide that information in writing was directed towards complying with the administrative law obligation to provide procedural fairness. Accordingly, the majority justices derived a legislative intention that *any* breach of this requirement should invalidate the decision.⁸¹

Another example is *Oke*.⁸² In that case, the police officer executing a search warrant failed to make available a copy of the warrant to the occupier of premises, as required by s 3H of the *Crimes Act 1914* (Cth). The Full Court of the Federal Court held that this failure invalidated the warrant. One relevant factor was that, unless the occupier has a copy of the warrant, it would be extremely difficult for the occupier to monitor the conduct of those executing the warrant to ensure that nothing is seized in purported reliance on the warrant that is not authorised.⁸³ It was also relevant that the courts interpret statutory provisions authorising the issue and execution of search warrants strictly, because they authorise the invasion of property rights.⁸⁴

A third example is *Smith v Wyong Shire Council*.⁸⁵ In that case, a council had failed to publicly exhibit a Ministerial direction, as required by s 66 of the *Environmental Planning and Assessment Act 1979* (NSW). The NSW Court of Appeal referred to the importance of public consultation in the scheme of the Act in holding that this non-compliance meant that the relevant direction was invalid.⁸⁶

Public inconvenience if decision invalid

The third factor referred to in *Project Blue Sky* is the public inconvenience that would result if non-compliance meant that a decision was invalid.

'Inconvenience'

The first issue is the meaning of 'inconvenience' in this context.⁸⁷ The reference to *public* inconvenience seems to exclude any potential inconvenience to the decision-maker that would result from holding the decision to be legally ineffective.⁸⁸ (The converse issue is whether the breach of a statutory requirement has caused any inconvenience or prejudice to the person challenging the validity of the decision.)

The courts are particularly concerned with inconvenience to persons who do not have control over whether the error is made. That point appears clearly from the following statement of principle in *Montreal Street Railway Co v Normandin*:⁸⁹

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious inconvenience, *or injustice to persons who have no control over those entrusted with the duty*, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only.

In *Project Blue Sky*, the joint judgment was concerned that members of the public should be able to order their affairs on the basis of apparently valid decisions.⁹⁰ This is so particularly for people who spend a great deal of money on the purchase of a broadcasting licence, and spend more money in utilising that licence. According to the joint judgment, to hold that a licence could be ineffective as a result of non-compliance by the Australian Broadcasting Authority (when that non-compliance might be difficult to detect) would lead to expense, inconvenience and loss of investor confidence.⁹¹

Conversely, the courts will be less concerned about inconvenience if compliance with the requirement is within the control of the person affected. For example, in *Fernando*, both Heerey J and Finkelstein J noted that compliance with a 28 day time limit for lodging an application for review would usually be within the control of the applicant. Accordingly, their Honours gave little weight to possible inconvenience to the applicant of finding that the RRT had no jurisdiction to review the application, because in that case the failure to comply with the 28 day limit was the applicant's fault.⁹² (Admittedly, Heerey J noted that there might be situations where non-compliance was not the fault of the applicant, and the strict time limit would cause hardship.⁹³)

Sometimes the potential for inconvenience to the public generally will need to be weighed against the potential for prejudice to the individual. In *Project Blue Sky*, the joint judgment was concerned to avoid the public inconvenience that would follow from a finding that non-compliance with s 160 of the *Broadcasting Services Act* invalidated a decision of the Australian Broadcasting Authority. Imagine, however, that a licensee is prosecuted due to a failure to comply with an additional condition on a licence imposed under s 43 of the *Broadcasting Services Act*.⁹⁴ In that situation, the individual licensee may well wish to argue that a failure to comply with s 160 of the Act in imposing that condition would invalidate the decision.⁹⁵

Kutlu provides an example of this point. One of the main purposes of reviews under Pt VAA was to protect the public. Flick J accepted that the invalidity of the appointment of Committee members might mean that practitioners have engaged in 'inappropriate practice' but would escape any sanction because of what some may perceive to be a technicality.⁹⁶ However, this inconvenience was one for which the Minister alone must be accountable.⁹⁷

Effect of a finding of potential inconvenience

The second point is how a finding of potential public inconvenience weighs against other factors in determining whether non-compliance with a statutory requirement should lead to an administrative decision being invalid.

It seems clear that a potential for public inconvenience carries little weight if there has been non-compliance with a central provision in a statutory scheme. For example, in *Kutlu*, the Full Court considered that consultation with the AMA was a central part of the statutory scheme of peer review. The admitted inconvenience that would follow from invalidating the Committees could not overcome the requirements of the statutory scheme.⁹⁸

That type of approach is supported by the decision of French J in *Sandvik Australia Pty Ltd v The Commonwealth*.⁹⁹ That case considered whether a failure to give notice of a commercial tariff concession order in the Gazette invalidated the order. French J considered that the notice requirement¹⁰⁰ was of 'central importance' to the statutory scheme, because this requirement gave people who would be affected by the order an opportunity to provide information and their views to the decision-maker.¹⁰¹ Consequently, although to invalidate the order would cause inconvenience to organisations who had ordered their affairs on the basis that the order was valid, the statutory language was too clear to be overcome by more general considerations of public policy.¹⁰²

The two decisions of the SA Supreme Court in *Epstein v WorkCover Corporation of South Australia*¹⁰³ and *Bond*¹⁰⁴ provide an interesting contrast. Each case concerned the facility in s 3(7) of the *Workers Rehabilitation and Compensation Act 1986* (SA) (the *WRC Act*) for making regulations that exclude specified classes of workers from the application of that Act. Section 3(8) of the *WRC Act* imposed a condition on making regulations under s 3(7), although that condition was amended between *Epstein* and *Bond*:

- at the time of *Epstein*, s 3(8) provided that a regulation under s 3(7) 'cannot be made unless the [Board of Management of the WorkCover Corporation] ... agrees to the making of the regulation'; and
- at the time of *Bond*, s 3(8) provided that a regulation under s 3(7) 'may only be made after consultation with the [Workers Rehabilitation and Compensation] Advisory Committee'.

In *Epstein*, the Full Court of the SA Supreme Court held that a failure to comply with s 3(8) of the *WRC Act*, as it then stood, meant that the regulation was invalid. Besanko J (with Prior and Bleby JJ agreeing) relied on four factors:¹⁰⁵

- the wording of s 3(8) (a regulation 'cannot be made unless') is imperative;
- the subject matter of a s 3(7) regulation is significant – excluding workers from the protection of the *WRC Act* is important;
- the body whose agreement is required by s 3(8) (the Board of WorkCover Corporation) represented the different interest groups, and administered that Act; and
- the question of whether the requirements of s 3(8) have been met is capable of being determined relatively easily.

Besanko J was prepared to assume that declaring a regulation invalid may result in expense and inconvenience to persons who have regulated their conduct on the basis that the regulation is valid.¹⁰⁶ However, the four factors referred to outweighed any inconvenience.¹⁰⁷

In *Bond*, Gray J held that the applicant had not demonstrated that (the amended) s 3(8) of the *WRC Act* had not been complied with,¹⁰⁸ but held further that non-compliance with s 3(8) would not result in invalidity in any event. Gray J referred to the following factors:

- the amended form of s 3(8) ('may only') arguably uses permissive language;¹⁰⁹
- the requirement for consultation under the amended s 3(8) is less onerous than the previous requirement of agreement and greatly reduced the chance of non-compliance;¹¹⁰
- section 3(8) regulates a power to make regulations that is already conferred, rather than imposing essential preliminaries.¹¹¹ (Arguably s 3(8) defines the power to make regulations, rather than merely regulating it.);
- to hold a regulation invalid would cause public inconvenience.¹¹² The relevant regulations had stood unchallenged for many years;¹¹³ and
- if consultation had taken place, there would have been power to make the regulation, even if the Committee had opposed it.¹¹⁴ (This point gets close to saying that consultation is a mere formality, and the same decision would have been made even if consultation had occurred.¹¹⁵)

It might be noted that Gray J does not address the points made in the second to fourth factors from *Epstein*, above.¹¹⁶

Two additional factors

Apart from the three factors mentioned in *Project Blue Sky*, the cases suggest two additional factors that are relevant.

Other means of giving effect to provision

The first of those additional factors is whether there are any other means of giving effect to a requirement, other than by invalidating a decision that does not comply with that requirement.¹¹⁷

A simple example is where a statutory requirement (such as a requirement to provide reasons) can be enforced by mandamus – in that situation, it is not necessary to hold that non-compliance with the requirement invalidates the decision in order to give that requirement some work to do.¹¹⁸

A well-known case that relied on this factor is the High Court's decision in *Australian Broadcasting Corporation v Redmore*.¹¹⁹ The question in that case was the effect of a statutory requirement that the Australian Broadcasting Corporation (the ABC) obtain the approval of the Minister before entering into contracts worth more than \$500,000.¹²⁰ The High Court held (by majority) that non-compliance with s 70(1) did not invalidate the contract. Relevantly for present purposes, the majority justices pointed out that there were other methods of enforcing the requirement in s 70(1). Specifically, non-compliance might constitute misconduct for the purpose of disciplinary proceedings, and would also lead to an unfavourable report by the Auditor-General.¹²¹ Thus s 70(1) was not reduced to a 'pious admonition'.¹²²

Redmore also illustrates the point made earlier about inconvenience – to hold that non-compliance invalidated the contract would prejudice the other party to the contract, who had no way of knowing whether the requirement had been complied with.¹²³

Redmore was relied on by the Commonwealth in *Kutlu*. Rares and Katzmann JJ distinguished it on the following bases:

- first, *Redmore* was said to be a case concerned with the private law consequences of a failure by a statutory corporation to comply with a statute.¹²⁴ *Redmore* was concerned not to invalidate a contract with an innocent third party. That consideration did not apply to a public law requirement to appoint a person as a Commonwealth officer in accordance with statutory preconditions;¹²⁵ and
- secondly, there was no remedy other than invalidity that could apply to the Minister's conduct. In particular, it was not now possible to obtain an injunction to restrain the Committee members from exercising powers.¹²⁶

This reasoning in *Kutlu* is similar to the approach taken by the NSW Court of Appeal in *Correa v Whittingham*.¹²⁷ In that case, a person had purported to act as a voluntary administrator of a registered club without being appointed in accordance with s 41 of the *Registered Clubs Act 1976* (NSW). Gleeson JA (with Barrett JA and Tobias AJA agreeing) stated that '[p]rima facie, a statutory requirement that a party not act in a particular capacity unless given approval to so act by a specified body, must be construed as having some legal effect'.¹²⁸ The fact that contravention of s 41 was not an offence, and otherwise attracted no remedy, indicated that non-compliance meant that the appointment of a person as administrator of a registered club was invalid.¹²⁹

Another example of this additional factor is the decision of Finkelstein J in *Hall v Minister for Immigration and Multicultural Affairs*.¹³⁰ The question in *Hall* was whether a failure to provide documents within the time limit specified in s 500(6C) of the Migration Act prevented the Administrative Appeals Tribunal (the AAT) from determining an application to review a decision. Finkelstein J relied heavily on the fact that there were other means of obtaining the information in question,¹³¹ and that other provisions ensured that the applicant could not prolong the appeals process.¹³² Given that there were other means to give effect to the purposes of s 500(6C), it was not necessary to hold that non-compliance with s 500(6C) prevented the AAT from considering the application for review.¹³³

Finally, this factor was also considered in *Kirkham v Industrial Relations Commission (SA)*,¹³⁴ which held that a failure to notify the SA Industrial Commission of the proposed grounds of termination of employment of a State public servant¹³⁵ did not invalidate that termination. Kourakis CJ held that:

- it was neutral that this statutory requirement could be described as an 'internal quality control mechanism'.¹³⁶
- it was not correct to say that breach of the notification provision 'would attract no consequence' unless the termination was invalidated. Failure to comply would be a breach of the public service legislation (which could be a subject of report to the Minister). Also the breach could make it more likely, as a practical matter, that the termination was harsh, unjust or unreasonable;¹³⁷ and
- although it could be said that the objects of s 54(3) would be better served by a finding of invalidity, that observation could be made about every statutory requirement imposed on the exercise of a power.¹³⁸

Extent and consequences of non-compliance

A second additional factor is the extent and consequences of non-compliance. The relevance of this factor is a matter of some continuing debate.¹³⁹

In *Minister for Immigration v SZIZO*,¹⁴⁰ the High Court considered whether the RRT's decision was invalidated by it giving notice of a hearing to an applicant personally, rather than an applicant's representative. Section 441G of the *Migration Act* provided that the RRT 'must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant'. However, it was common ground that the notice came to the attention of the authorised representative within the prescribed period.

The High Court posed the *Project Blue Sky* question as follows:¹⁴¹

Was it a purpose of the legislation that, despite holding a hearing at which all of the applicants for review, including their authorised recipient, appeared before the tribunal to give evidence and to present arguments relating to the issues arising in relation to the decision under review, the tribunal could not validly decide the review?

It may be noted that this question is very specific to the circumstances of that case.

The Court held that this notification requirement was of a different character to the requirement considered in *SAAP* (to give written particulars of adverse information).¹⁴² Although s 441G (read with s 425A) ensures that an applicant has timely and effective notice of a hearing, the manner of providing timely and effective notice is not an end of itself. The procedural steps dealing with the manner of giving notice are to be distinguished from the other statutory requirements giving effect to the hearing rule.¹⁴³ In the case of procedural steps, there was no legislative intention that any departure from those steps would result in invalidity 'without consideration of the extent and consequences of the departure'.¹⁴⁴

The reasoning in *SZIZO* indicates that the 'extent and consequences of departure' are relevant for mere procedural requirements, but may not be relevant for more substantive requirements (such as notifying a person of the case to be met).

In *Jenkins v Director of Public Prosecutions*,¹⁴⁵ the jury in a criminal trial had separated without an order under s 54(1)(b) of the *Jury Act 1977* (NSW).¹⁴⁶ The applicant contended that the separation of the jury without an order under s 54(1)(b) had the result that the District Court had no jurisdiction thereafter to receive the verdicts from the jury and could not convict him. Gleeson JA stated that non-compliance with a statutory requirement does not necessarily lead to invalidity (quoting *Project Blue Sky*),¹⁴⁷ and stated further that in considering the effect of non-compliance with a statutory requirement or condition, a significant factor will be a 'consideration of the extent and consequences' of such non-compliance (citing *SZIZO*).¹⁴⁸ Gleeson JA found that there was no legislative intention that non-compliance with s 54(1)(b) should lead to the consequences asserted by the applicant.¹⁴⁹ Again, the requirements of s 54(1)(b) can be seen as procedural in nature.¹⁵⁰

This difference between 'procedural' and other requirements may prove difficult to define. It may become significant how (meaning the level of generality at which) the statutory requirement and the error are described. At one level, describing an error more generally (such as a breach of procedural fairness, rather than the particular conduct) may increase the chance that the court will find that the requirement has not been complied with at all. Consider, for example, the following statement by McHugh J in *SAAP*:¹⁵¹

[t]here can be no 'partial compliance' with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not.

If, however, the relevant obligation was re-framed as an obligation to provide certain information to the applicant *in writing* (which more closely reflects the terms of s 424A of the *Migration Act*), then it could be argued that this is a mere procedure. The extent and consequences of non-compliance are not great if the same information is provided orally.

The reference to extent and consequences of non-compliance seems to raise issues very similar to asking whether there has been ‘substantial compliance’ with a statutory requirement. It might be noted that the joint judgment in *Project Blue Sky* appeared to reject the relevance of ‘substantial compliance’ as a useful tool in this context.¹⁵² An interesting issue is whether the factors mentioned in *Marijancevic* in the context of s 138 of the *Evidence Act* (knowledge that there had been non-compliance; whether any advantage obtained from non-compliance)¹⁵³ may be relevant to the ‘extent and consequences’ of non-compliance.¹⁵⁴

Lack of prejudice to the applicant?

This issue can be posed another way. As noted, it is relevant if holding the decision to be invalid would inconvenience the public, including a person directly affected by the decision. Can the decision-maker argue, conversely, that a decision should not be held to be invalid if there is no prejudice to the applicant?

Again, the answer appears to be that much turns on the nature of the statutory requirement that has been breached, and the court’s assessment of the importance of that requirement.

This type of issue often arises in the criminal law, particularly when it comes to the formalities of an instituting document.

In *R v Janceski*,¹⁵⁵ Mr Janceski was convicted of maliciously inflicting grievous bodily harm, after two trials. He argued that his conviction was invalid, because the barrister who signed the indictment for his second trial did not have authority to do so. The barrister had not been authorised by the NSW Director of Public Prosecutions (the DPP), as required by s 126(1)(b)(iii) of the *Criminal Procedure Act 1986* (NSW) (the *NSW Criminal Procedure Act*).¹⁵⁶

Spigelman CJ acknowledged that the defendant had received a fair trial, and that the non-compliance with s 126(1) was of no practical significance in this case. Accordingly, to invalidate the conviction on the basis of this technical error might adversely affect public confidence in the criminal justice system, by creating the impression that the system is ‘just a forensic game’.¹⁵⁷ Even so, his Honour held that the error, technical as it was, invalidated the conviction. Two crucial factors in this conclusion were, first, that the indictment founds the jurisdiction of the court to hear the trial and, secondly, courts have insisted on punctilious compliance with legal formalities in criminal trials, because these trials can result in the state imposing the stigma of a criminal conviction on a person.¹⁵⁸

In *Ayles v The Queen*,¹⁵⁹ the High Court was divided on whether any information could be amended by the judge, without application from the parties, to correct the statutory provision referred to. The majority held that the information could be amended in this fashion, pursuant to a statutory power of amendment. Gummow and Kirby JJ stated in dissent:¹⁶⁰

In *Kotsis v Kotsis* [(1970) 122 CLR 69 at 90] Windeyer J emphasised that, with respect to alleged merely formal defects in the court record:

The observance of forms and the due recording of proceedings are one of the safeguards of justice according to law.

When considering the statutory formalities which under English law attend the preferring of indictments, Lord Bingham of Cornhill recently remarked, in *R v Clarke* [[2008] UKHL 8 at [17]]:

Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place.

We agree. ... It is an approach that expresses the law of Australia, as long understood. It is the foregoing precept stated by Lord Bingham respecting the manner of exercise of the coercive power of the state which we seek to apply in what follows.

A similar debate occurs in England.¹⁶¹ In *Soneji*,¹⁶² the issue was whether non-compliance with the requirements for postponing a confiscation proceedings invalidated the confiscation order ultimately made by the court.¹⁶³ The House of Lords held that the confiscation order was not invalidated.

Lord Steyn referred with approval to the approach in *Project Blue Sky*,¹⁶⁴ and held that the emphasis should be on, first, the consequences of non-compliance with the relevant requirement and, secondly, whether Parliament can fairly be taken to have intended total invalidity.¹⁶⁵ Relevantly for present purposes, his Lordship held that the prejudice to the accused in this case was not significant, and that any prejudice was 'decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process'.¹⁶⁶

Some English intermediate courts considered that *Soneji* represented a 'significant departure' from the way that these issues were previously decided.¹⁶⁷

However, in *R v Clarke*,¹⁶⁸ the House of Lords stated that decisions including *Soneji* 'are valuable and salutary, but the effect of the sea-change which they wrought has been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect'. In *Clarke*, the House of Lords held that a failure to sign an indictment meant that a conviction must be quashed.

Conclusion

This review suggests that some broad conclusions can be drawn about the manner in which the courts apply the *Project Blue Sky* approach to determining whether non-compliance with a requirement impinges on the effect of a decision.

The most important factor is the court's assessment of the significance of the statutory requirement. Non-compliance is likely to impinge on the effectiveness of a decision if:

- a requirement is an essential element of a statutory scheme; or
- the requirement contains a procedural safeguard for persons affected by the statutory scheme (such as a provision that gives effect to the requirements of procedural fairness), or affects private property rights.

The next important factor is the extent of public inconvenience that would follow from concluding that non-compliance means that a decision is invalid. The potential for public inconvenience will not be determinative, if the requirement that has been breached is central to the statutory scheme. On the other hand, public inconvenience will carry particular weight when the person or people affected by the decision cannot readily identify whether or not the requirement has been complied with.

Another important factor is whether there are other means of giving effect to the purpose of a requirement, other than holding that non-compliance makes the decision invalid. It may be

that, if a requirement is central or otherwise significant, the courts might assess how workable these alternative means of enforcement are.

Project Blue Sky also refers to whether a requirement is an essential preliminary to performing a function, or regulates an existing function. I have suggested, however, that this factor will often only re-state the question of whether non-compliance was intended to deprive a decision of legal effect.

Lastly, there are some indications that it may be relevant to consider the extent and consequences of non-compliance. That may, however, be limited to procedural statutory requirements.

Finally, I want to emphasise that this paper has considered the position when the Parliament has not addressed expressly the consequences of non-compliance with a statutory condition. That is by far the more common situation.

However, from time to time, Parliaments do address the consequences of non-compliance. These provisions may take a number of different forms.

One relatively anodyne provision excuses ‘formal defects or irregularities’, such as s 306 of the *Bankruptcy Act*. This raises a similar, but not identical, question to that posed by *Project Blue Sky*.¹⁶⁹ Another relatively harmless provision states that ‘substantial compliance’ with a provision (commonly a form) does not lead to invalidity. Section 25C of the *Acts Interpretation Act 1901* (Cth) is an example.

Section 138 of the *Evidence Act* takes a different tack – evidence may be admissible, despite the fact that it was obtained in breach of an Australian law.¹⁷⁰ In that situation, an administrative law challenge is only helpful or relevant to prevent the evidence from being obtained. This provision also does not raise any difficulties, because a court controls its processes through the exercise of discretion.

A slightly more adventurous provision states that a failure to comply with a certain section ‘does not affect the validity of the decision’. In *Palme*,¹⁷¹ the majority judges in the High Court appeared to treat a provision of this sort as relevant in deciding that a failure to provide reasons for a decision did not affect the validity of that decision.¹⁷²

A more comprehensive provision states that the validity of a decision ‘shall not be affected by reason that any of the provisions of this Act have not been complied with’. In *Commissioner of Taxation v Futuris Corp Ltd*,¹⁷³ the High Court was largely prepared to treat a provision of this sort¹⁷⁴ as being relevant, in a *Project Blue Sky* sense, to whether a decision could be challenged directly in judicial review proceedings, rather than being challenged in the review proceedings provided for under the relevant legislation.

The issues raised by these ‘no invalidity’ clauses is a matter of some complexity – particularly if they are not combined with generous review rights.¹⁷⁵

Endnotes

- 1 (1998) 194 CLR 355 (*Project Blue Sky*).
- 2 As with ‘nullity’, ‘invalid’ has a number of different legal consequences, so its meaning depends on context: see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at [10.30] (discussing ‘nullity’).
- 3 *Project Blue Sky* (1998) 194 CLR 355 at [91].
- 4 *Project Blue Sky* (1998) 194 CLR 355 at [93].
- 5 (2011) 197 FCR 177 (*Kutlu*).

- 6 (2011) 33 VR 440 (*Marijancevic*).
- 7 *Project Blue Sky* (1998) 194 CLR 355 at [91]. See also Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at [6.280].
- 8 See *Zheng v Cai* (2009) 239 CLR 446 at [28] (the Court).
- 9 *R v Soneji* [2006] 1 AC 340 (*Soneji*) at [15] (Lord Steyn).
- 10 Mark Aronson, 'Nullity' (2003) 40 *AIAL Forum* 19 at 23; *Sumukan Limited v Commonwealth Secretariat* [2007] EWHC 188 (Comm) (*Sumukan*) at [44].
- 11 *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 (*Berowra Holdings*) at [28] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Of particular concern in *Berowra Holdings* was that the relevant statutory provision applied to proceedings in a superior court, as well as proceedings in an inferior court: at [11]-[12].
For a difficult example of the effect of non-compliance with a statutory requirement on the jurisdiction of courts, see *Director of Public Prosecutions v Edwards* [2012] VSCA 293.
- 12 Now the Australian Communications and Media Authority.
- 13 *Project Blue Sky* (1998) 194 CLR 355 at [42] (Brennan CJ), [80], [84]-[85] (McHugh, Gummow, Kirby and Hayne JJ).
- 14 See *Adams v Lambert* (2006) 228 CLR 409 at [14], [29] (the Court), considering s 306 of the *Bankruptcy Act 1966* (Cth) (*Bankruptcy Act*). See also *Lansen v Minister for Environment* (2008) 174 FCR 14 (*Lansen*) at [34] (Moore and Lander JJ): 'the intention of the legislature is not ascertained merely because the legislature has couched the doing of the condition precedent in imperative language.'
- 15 *Project Blue Sky* (1998) 194 CLR 355 at [94].
- 16 *Project Blue Sky* (1998) 194 CLR 355 at [95].
- 17 The other paragraphs of s 160 provided that the Australian Broadcasting Authority was to perform its functions in a manner consistent with 'the objects of [the Broadcasting Services] Act and the regulatory policy described in section 4' (s 160(a)), 'any general policies of the Government notified by the Minister under section 161' (s 160(b)), and 'any directions given by the Minister in accordance with this Act' (s 160(c)).
- 18 *Project Blue Sky* (1998) 194 CLR 355 at [95].
- 19 *Project Blue Sky* (1998) 194 CLR 355 at [96].
- 20 *Project Blue Sky* (1998) 194 CLR 355 at [97]-[98].
- 21 *Project Blue Sky* (1998) 194 CLR 355 at [100].
- 22 Aronson and Groves contend that there was a 'complete convergence' in result between the High Court's decision and the decision of Davies J at first instance, who made orders that the Australian content standard was ineffective, but only from 5 months after his Honour's decision: *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at [10.230].
- 23 See *Kutlu* (2011) 197 FCR 177 at [5]-[6].
- 24 *Kutlu* (2011) 197 FCR 177 at [49] (answers to questions 1-3).
- 25 *Kutlu* (2011) 197 FCR 177 at [18].
- 26 *Kutlu* (2011) 197 FCR 177 at [19]. Accordingly, a separate reason for invalidity was that the Minister had failed to have regard to a mandatory relevant consideration: at [36]. In *Lee v Napier* (2013) 216 FCR 562, Katzmann J held that the requirement to 'consult' meant that the Minister could not make an appointment without waiting for a response from the AMA.
- 27 *Kutlu* (2011) 197 FCR 177 at [20].
- 28 *Kutlu* (2011) 197 FCR 177 at [21]-[23].
- 29 *Kutlu* (2011) 197 FCR 177 at [25].
- 30 *Kutlu* (2011) 197 FCR 177 at [27].
- 31 *Kutlu* (2011) 197 FCR 177 at [28].
- 32 *Kutlu* (2011) 197 FCR 177 at [32].
- 33 *Kutlu* (2011) 197 FCR 177 at [74].
- 34 *Kutlu* (2011) 197 FCR 177 at [77].
- 35 *Kutlu* (2011) 197 FCR 177 at [79]. Moreover, proceedings under Pt VAA have some of the characteristics of a disciplinary hearing: at [85]-[86].
- 36 *Kutlu* (2011) 197 FCR 177 at [80].
- 37 *Kutlu* (2011) 197 FCR 177 at [81].
- 38 *Kutlu* (2011) 197 FCR 177 at [83].
- 39 *Kutlu* (2011) 197 FCR 177 at [94].
- 40 *Kutlu* (2011) 197 FCR 177 at [97].
- 41 *Kutlu* (2011) 197 FCR 177 at [98].
- 42 *Commonwealth v Kutlu* [2012] HCA Trans 35.
- 43 <http://www.hcourt.gov.au/cases/case-s50/2012>.
- 44 Section 81(1) of the *Drugs Act* refers to a magistrate issuing a warrant if satisfied of certain matters 'by evidence on oath or by affidavit'.
- 45 *Marijancevic* (2011) 33 VR 440 at [60].
- 46 *Marijancevic* (2011) 33 VR 440 at [61].
- 47 *Marijancevic* (2011) 33 VR 440 at [62]. The Court of Appeal did not find it necessary to consider the trial judge's reasons concerning s 138(3)(h): at [64].
- 48 *Marijancevic* (2011) 33 VR 440 at [54].

- 49 *Marijancevic* (2011) 33 VR 440 at [57].
- 50 *Marijancevic* (2011) 33 VR 440 at [58].
- 51 *Marijancevic* (2011) 33 VR 440 at [67].
- 52 *Marijancevic* (2011) 33 VR 440 at [68].
- 53 *Marijancevic* (2011) 33 VR 440 at [92]. By way of comparison, in *G A v The Queen* [2012] VSCA 44, the Victorian Court of Appeal held that the omission of the words 'by Almighty God' from the oath did not affect the validity of an affidavit: at [36]-[37] (the Court).
- 54 (2014) 312 ALR 429.
- 55 (1996) 189 CLR 51.
- 56 See eg *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).
- 57 *Kutlu* (2011) 197 FCR 177 at [74]. See also *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 (*Chase Oyster Bar*) at [40] (Spigelman CJ): 'The first textual indicator that is always of significance is the mode of expression of the element directly in issue. Substantial, indeed often, but not always, determinative, weight must be given to language which is in mandatory form.'
- 58 See for example *Waratah Coal Inc v Minister for the Environment* (2008) 173 FCR 557 at [41] (Collier J): 'Such language as 'may only' in legislation is indicative of a need to comply with a set time limit, although not conclusive'; see also *Bond v WorkCover Corporation of South Australia* (2005) 93 SASR 315 (*Bond*), discussed below.
- 59 (2008) 174 FCR 14.
- 60 At first instance, Mansfield J held that non-compliance with s 134(4)(a) of the *EPBC Act* did not render the approval decision invalid: *Lansen v Minister for Environment* (2008) 102 ALD 558 at [179].
- 61 *Lansen* (2008) 174 FCR 14 at [25], [71]-[72].
- 62 *Lansen* (2008) 174 FCR 14 at [65]-[67].
- 63 *Lansen* (2008) 174 FCR 14 at [291].
- 64 *Lansen* (2008) 174 FCR 14 at [298].
- 65 (2000) 97 FCR 407 (*Fernando*).
- 66 *Fernando* (2000) 97 FCR 407 at [31]. In addition, the Court referred to the general policy that administrative review should be conducted expeditiously (at [22] (Heerey J), [48] (Finkelstein J)), and noted that the time of lodging an application was within the applicant's control (at [28], [31] (Heerey J), [46] (Finkelstein J)).
- 67 By way of comparison, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 (*Palme*) at [44], Gleeson CJ, Gummow and Heydon JJ held that the question of whether a requirement to give reasons for a decision was a condition precedent for the exercise of power (noting that reasons are given after the decision) depended on the construction of the relevant Act, to determine whether it was a purpose of the Act that a failure to give reasons should render the decision invalid.
- 68 *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [47]-[48] (Spigelman CJ); *Chase Oyster Bar* (2010) 78 NSWLR 393 at [44] (Spigelman CJ). *Woolworths* was a case about jurisdictional fact: see [30] ff.
- 69 See, by analogy, *Adams v Lambert* (2006) 228 CLR 409 at [29] (the Court), contrasting an essential requirement and a formal defect or irregularity).
- 70 *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [37]-[38] (Spigelman CJ); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7 at [80] (Gageler J). Professor Aronson points out that the characterisation of facts as 'jurisdictional facts' sometimes seems to depend on a court's assessment of how important these facts are in the statutory scheme: see Mark Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12 *Public Law Review* 17 at 37. Moreover, he points out that even genuinely preliminary matters may only be procedural in nature, and therefore not 'jurisdictional' in the sense that a failure to comply invalidates the decision: at 34.
- 71 For example, the requirement that a police officer provide a copy of a search warrant to the occupier of land: see the discussion of *Commissioner, Australian Federal Police v Oke* (2007) 159 FCR 441 (*Oke*) below.
- 72 *Kutlu* (2011) 197 FCR 177 at [35] (Rares and Katzmann JJ). The Court rejected an argument that the Committee members were 'de facto officers': at [47]-[48] (Rares and Katzmann JJ), [121]-[122] (Flick J). Some Acts provide expressly that certain types of non-compliance with the requirements of appointment do not invalidate the decisions of the bodies: see eg *Competition and Consumer Act 2010* (Cth), s 38; *Australian Securities and Investments Commission Act 2001* (Cth), s 245.
- 73 [2013] VSC 129.
- 74 *Bare v Small* [2013] VSC 129 at [117].
- 75 *Bare v Small* [2013] VSC 129 at [118].
- 76 *Kutlu* (2011) 197 FCR 177 at [28].
- 77 See also *Oke* (2007) 159 FCR 441 at [34] (Branson and Lindgren JJ, with Besanko J agreeing on this point): 'the obligation imposed by s 3H(1) [of the *Crimes Act 1914* (Cth)] is relatively easily complied with and ... it serves an important purpose.'
- 78 *Sumukan* [2007] EWHC 188 (Comm) at [44].
- 79 (2005) 228 CLR 294 (SAAP).
- 80 Section 424A(1) of the *Migration Act 1958* (Cth) (*Migration Act*) provided that the RRT must 'give' the applicant clear particulars of any adverse information. The effect of s 424A(2)(b) and reg 5.02 of the

- Migration Regulations 1994* (Cth) was that information was only 'given' to a person in immigration detention if given in a document. Section 424AA (added in 2007) now provides that this information may be given orally at the hearing.
- 81 SAAP (2005) 228 CLR 294 at [77] (McHugh J), [208] (Hayne J, with Kirby J agreeing on this point).
82 (2007) 159 FCR 441.
83 *Oke* (2007) 159 FCR 441 at [34].
84 *Oke* (2007) 159 FCR 441 at [36].
85 [2003] NSWCA 322 (*Wyong Shire Council*).
86 *Wyong Shire Council* [2003] NSWCA 322 at [58]-[59], [63] (Spigelman CJ), [168], [181] (Tobias JA, with Sheller JA agreeing on this point).
87 There may sometimes be disagreement as to whether the asserted inconvenience exists: see eg *Wyong Shire Council* [2003] NSWCA 322 at [144] (Tobias JA).
88 That is, expense following from having to repeat a process may not amount to 'inconvenience'. Note, however, that Professor Aronson has argued that it is legitimate to consider regulatory efficacy and efficiency: see Mark Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12 *Public Law Review* 17 at 27.
89 [1917] AC 170 at 175 (emphasis added), cited in *Project Blue Sky* (1998) 194 CLR 355 at [97]. The issue in *Normandin* was whether a failure to comply with the statutory requirements for constituting a jury invalidated the convictions of persons tried by those juries.
90 *Project Blue Sky* (1998) 194 CLR 355 at [97] also cites *Clayton v Heffron* (1960) 105 CLR 214 at 247 and *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 (*Duffy (No 3)*) at 104-105.
In *Clayton v Heffron*, Dixon CJ, McTiernan, Taylor and Windeyer JJ rejected an argument that a failure to hold a free conference of the managers of the NSW Legislative Council and the NSW Legislative Assembly would invalidate any amendment to the NSW Constitution resulting from the joint sitting of the Houses. Their Honours stated ((1960) 105 CLR 355 at 247): 'Is it possible to imagine a stronger case of inconvenience than the invalidation perhaps at some future time of a constitutional provision possessing all the outward appearances of a valid law on the ground that when it was made managers of the Council had not met managers of the Assembly before the members of the two Houses were required by the Governor to meet?'
In *Duffy (No 3)*, the applicant contended that a notice and inquiry under the *Broadcasting and Television Act 1942* (Cth) was invalid because the Minister had failed to consult it before issuing the notice. Sheppard J stated that the public inconvenience of holding the inquiry invalid was 'manifest', and it 'seems hardly likely' that the legislature would have intended such a consequence: (1985) 8 FCR 93 at 104-105.
91 *Project Blue Sky* (1998) 194 CLR 355 at [98]. Similarly, in *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404, the NSW Court of Appeal observed that the statutory provisions that had been breached were not directed to (that is, did not impose obligations on) the person who took the benefit of the relevant certificate: at [167] (Sackville AJA, with McColl and Barrett JJA agreeing).
92 *Fernando* (2000) 97 FCR 407 at [28], [31] (Heerey J), [46] (Finkelstein J).
93 *Fernando* (2000) 97 FCR 407 at [22]. For an example of such hardship (albeit involving a time limit on seeking judicial review), see *WAFE of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 70 ALD 57.
94 Non-compliance with an additional condition is not itself an offence (cf the offences in s 139, which relate to a breach of conditions set out in Sch 2). However, the Australian Communications and Media Authority, if satisfied that a licensee is breaching a condition of the licence, may direct the licensee to take action to correct the breach (s 141(1) of the *Broadcasting Services Act*). Failure to comply with a s 141 notice is an offence (s 142).
95 In the absence of legislation to the contrary, an administrative decision will be subject to collateral challenge: *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [36] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). In this example, the defendant could challenge the validity of the decision to impose an extra condition as a defence to a prosecution arising out of a failure to comply with that condition.
96 *Kutlu* (2011) 197 FCR 177 at [96].
97 *Kutlu* (2011) 197 FCR 177 at [98].
98 That said, it is somewhat begs the question to state that considerations of public inconvenience 'do not displace the express words of s 84(3) and s 85(3)': cf *Kutlu* (2011) 197 FCR 177 at [27] (Rares and Katzmann JJ), because the issue is the meaning of those words. It also seems unduly restrictive to say that potential inconvenience is only relevant when there is uncertainty about legislative intention: cf [94] (Flick J). The better view is that potential public inconvenience is part of the context that can be considered from the outset: see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
99 (1987) 89 ALR 213 (*Sandvik*).
100 The notice requirement was contained in s 269L of the *Customs Act 1901* (Cth) (the *Customs Act*).
101 *Sandvik* (1987) 89 ALR 213 at 227. French J also noted that other provisions of the *Customs Act* (but not s 269L) expressly provided that a failure to provide notice did not affect the validity of a decision.
102 *Sandvik* (1987) 89 ALR 213 at 228.
103 (2003) 85 SASR 561 (*Epstein*).
104 (2005) 93 SASR 315.
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- 105 *Epstein* (2003) 85 SASR 561 at [49].
- 106 *Epstein* (2003) 85 SASR 561 at [50] (Besanko J, with Prior and Bleby JJ agreeing).
- 107 *Epstein* (2003) 85 SASR 561 at [52]. The requirement was for the SA workers compensation authority to agree to any regulation that excluded a category of worker from the operation of the SA workers' compensation statute. The Court held that this was an essential requirement, because (1) the mandatory language of the regulation, (2) the importance of workers being excluded from the Act, (3) the fact that the SA workers compensation authority occupies an important position under the Act, and (4) it was relatively easy to determine whether the necessary agreement had been obtained: at [49].
- 108 *Bond* (2005) 93 SASR 315 at [57]-[58].
- 109 *Bond* (2005) 93 SASR 315 at [64].
- 110 *Bond* (2005) 93 SASR 315 at [65].
- 111 *Bond* (2005) 93 SASR 315 at [69].
- 112 *Bond* (2005) 93 SASR 315 at [70].
- 113 *Bond* (2005) 93 SASR 315 at [80].
- 114 *Bond* (2005) 93 SASR 315 at [80].
- 115 Cf the approach in *Kutlu*, which held that the fact that the Minister was not bound to accept the advice of the AMA did not make the consultation with the AMA a formality: see footnote 26 above.
- 116 See footnote 105 above.
- 117 See *Wyong Shire Council* [2003] NSWCA 322 at [40], [46] (Spigelman CJ).
- 118 *Palme* (2003) 216 CLR 212 at [41], [48] (Gleeson CJ, Gummow and Heydon JJ), [57] (McHugh J), considering s 501G(4) of the Migration Act. See also *Snedden v Minister for Justice* [2014] FCAFC 156 at [107] (Middleton and Wigley JJ, with Pagone J agreeing on this point): the requirement in s 22 of the *Extradition Act 1988* (Cth) to make a surrender decision 'as soon as is practicable' is enforceable by mandamus, and breach of that requirement does not cause the power to lapse.
- 119 (1989) 166 CLR 454 (*Redmore*).
- 120 See s 70(1) of the *Australian Broadcasting Corporation Act 1983* (Cth).
- 121 *Redmore* (1989) 166 CLR 454 at 459-460 (Mason CJ, Deane and Gaudron JJ).
- 122 *Redmore* (1989) 166 CLR 454 at 459 (Mason CJ, Deane and Gaudron JJ).
- 123 *Redmore* (1989) 166 CLR 454 at 457.
- 124 This difference between public and private law also affects whether an injunction is available to restrain future reliance on an act done in breach of a statutory requirement: cf *Project Blue Sky* (1998) 194 CLR 355 at [100], referred to in footnote 21 above. In *Acquista Investments Pty Ltd v Urban Renewal Authority* [2014] SASC 60, Dart J held that, on the hypothesis that the Authority had entered into a contract in breach of s 11 of the *Public Corporations Act 1993* (SA), but that contract was not void, there was no basis for granting an injunction to restrain future performance of that contract: at [493].
- 125 *Kutlu* (2011) 197 FCR 177 at [31].
- 126 *Kutlu* (2011) 197 FCR 177 at [32].
- 127 [2013] NSWCA 263 (*Correa*).
- 128 *Correa* [2013] NSWCA 263 at [91].
- 129 *Correa* [2013] NSWCA 263 at [92].
- 130 (2000) 97 FCR 387 (*Hall*).
- 131 The AAT has power to require the Minister to provide documents in the Minister's possession or control (s 500(6K) of the *Migration Act*). The documents that the applicant is required to provide are provided to him or her by the Minister (see s 500(6C)(b) and s 501G(2) of the *Migration Act*), and therefore within the Minister's possession or control. See *Hall* (2000) 97 FCR 387 at [12].
- 132 If the AAT does not make a decision within 84 days, the decision under review is taken to be affirmed (s 500(6L) of the *Migration Act*). See *Hall* (2000) 97 FCR 387 at [14].
- 133 *Hall* (2000) 97 FCR 387 at [13], [16].
- 134 [2015] SASCFC 1 (*Kirkham*).
- 135 See *Public Sector Act 2009* (SA), s 54(3). It appears that Kourakis CJ did not consider s 54(3) to be an important substantive right (although s 54(2) is): *Kirkham* [2015] SASCFC 1 at [25]. Nonetheless, s 54(3) could be considered a 'procedural safeguard' for an employer: see footnote 78 above. Kourakis CJ held that the consideration that the public sector agency is not bound to follow the Commissioner's advice does not strongly indicate that non-compliance with s 54(3) does not lead to invalidity. The public sector agency is required to consider that advice, as was the case in *Kutlu*: see footnote 26 above.
- 136 *Kirkham* [2015] SASCFC 1 at [28].
- 137 *Kirkham* [2015] SASCFC 1 at [32]. To similar effect, a failure to include a statement of environmental effects in an application does not invalidate any consent given, but this failure may make it less likely that the relevant consent will be given. In this sense, the statutory requirement is not 'set at naught', even if non-compliance does not render the consent invalid: see *Cranky Rock Road Action Group Inc v Cowra Shire Council* [2006] NSWCA 339 at [86] (Tobias JA, with Young CJ in Eq and Campbell J agreeing), quoting *MCC Energy Pty Ltd v Wyong Shire Council* [2006] NSWLEC 581 at [67]. This aspect of *Cranky Rock* was criticised, but not overruled, in *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 at [198]-[200] (Basten JA, with Spigelman CJ agreeing); contra [235] (Campbell JA).
- 138 *Kirkham* [2015] SASCFC 1 at [34].
- 139 See Justice Nye Perram, 'Project Blue Sky: Invalidity and the Evolution of Consequences for Unlawful Administrative Action' (2014) 21 *Australian Journal of Administrative Law* 62 at 67-69. In *Lansen v Minister*

- for *Environment* (2008) 102 ALD 558 at [170], Mansfield J held (based on *SAAP* (2005) 228 CLR 294 at [77], [209]) that it was irrelevant to the *Project Blue Sky* question whether the breach of the statutory requirement could have caused a material difference to the decision.
- 140 (2009) 238 CLR 627 (*SZIZO*).
- 141 *SZIZO* (2009) 238 CLR 627 at [26].
- 142 *SZIZO* (2009) 238 CLR 627 at [31].
- 143 *SZIZO* (2009) 238 CLR 627 at [34].
- 144 *SZIZO* (2009) 238 CLR 627 at [34].
- 145 [2013] NSWCA 406 (*Jenkins*).
- 146 Section 54(1)(b) provides 'The jury in criminal proceedings:... may, if the court so orders, be permitted to separate at any time after they retire to consider their verdict.'
- 147 *Jenkins* [2013] NSWCA 406 at [54]. Cf *Berowra Holdings*, which questioned whether *Project Blue Sky* was applicable to the jurisdiction of courts: see footnote 11 above.
- 148 *Jenkins* [2013] NSWCA 406 at [55].
- 149 *Jenkins* [2013] NSWCA 406 at [65].
- 150 See *Police v Lloyd* [2004] SASC 54 at [48] (Perry J): minor deviations from the prescribed form of warning did not invalidate the results obtained from a breathalyser test, provided that these deviations 'do not alter the sense of what is being conveyed in any significant way'.
- 151 (2005) 228 CLR 294 at [77].
- 152 *Project Blue Sky* (1998) 194 CLR 355 at [92]; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at 348 [6.240].
- 153 See footnote 52 above.
- 154 Cf *Lansen v Minister for Environment* (2008) 102 ALD 558 at [177] (Mansfield J): the Minister's failure to comply with s 134(4)(a) of the *EPBC Act* was not a conscious decision but was inadvertence. As noted, the decision of Mansfield J was overturned on appeal: *Lansen* (2008) 174 FCR 14.
- 155 (2005) 64 NSWLR 10 (*Janceski*).
- 156 Section 126(1) of the *NSW Criminal Procedure Act* provides (relevantly) that '[a]n indictment shall be signed ... for and on behalf of the Attorney General or the Director of Public Prosecutions by ... a person authorised [by the DPP] to sign indictments'.
- 157 *Janceski* (2005) 64 NSWLR 10 at [98].
- 158 *Janceski* (2005) 64 NSWLR 10 at [90], [98]. Spigelman CJ also engaged in detailed analysis of s 126 of the *NSW Criminal Procedure Act* and related provisions. However, there were textual considerations in support of either view.
- 159 (2008) 232 CLR 410 (*Ayles*).
- 160 *Ayles* (2008) 232 CLR 410 at [10]-[12].
- 161 There is a helpful summary of cases from England, Canada and New Zealand in *Bond* (2005) 93 SASR 315 at [71]-[78] (Gray J).
- 162 [2006] 1 AC 340.
- 163 Section 72A of the *Criminal Justice Act 1988* (UK) provided that a court could not postpone confiscation proceedings for more than 6 months, unless the court was satisfied that there were 'exceptional circumstances'. The court had not made a finding of exceptional circumstances.
- 164 *Soneji* [2006] 1 AC 340 at [21].
- 165 *Soneji* [2006] 1 AC 340 at [23].
- 166 *Soneji* [2006] 1 AC 340 at [24].
- 167 See *R v Ashton* [2006] EWCA Crim 794 at [68]; *R v Clarke* [2006] EWCA Crim 1196 at [30]-[31].
- 168 [2008] 1 WLR 338 at [20]. Cf *R v Stocker* [2013] EWCA Crim 1993 at [43]-[45], holding that, despite the warning in *Clarke*, an reference to an incorrect statute in an electronic form of indictment did not invalidate a conviction, in circumstances where the trial and summing up to the jury used the correct statute.
- 169 See generally *Adams v Lambert* (2006) 228 CLR 409.
- 170 See also *Telecommunications (Interception and Access) Act 1979* (Cth), s 75(1): a person who has obtained telecommunications information purportedly under a warrant but in breach of s 7(1) may give that information to a court or tribunal if the court or tribunal is satisfied that: (a) but for an irregularity, the interception would not have constituted a contravention of s 7(1); and (b) in all the circumstances, the irregularity should be disregarded. An 'irregularity' does not include a substantial defect or irregularity: s 75(2).
- See also *Commonwealth Electoral Act 1918* (Cth), s 360: in the case of some illegal practices, the court of disputed return will only declare an election void if it is satisfied that the result of the election is likely to be affected.
- 171 (2003) 216 CLR 212, considering s 501G(4) of the *Migration Act*.
- 172 *Palme* (2003) 216 CLR 212 at [45] (Gleeson CJ, Gummow and Heydon JJ), [55] (McHugh J).
- 173 (2008) 237 CLR 146 at [23]-[24] (Gummow, Hayne, Heydon and Crennan JJ). However, there are limits beyond which that provision does not reach, such as 'conscious maladministration': at [25].
- 174 See *Income Tax Assessment Act 1936* (Cth), s 175.
- 175 See generally Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 Public Law Review 14; Charles Noonan, 'Section 75(v), No-invalidity Clauses and the Rule of Law' (2013) 36 *University of New South Wales Law Journal* 437.

DISCIPLINARY HEARINGS: WHAT IS TO BE DONE?

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In the last fifty years there has been a large expansion in the law relating to decision making by disciplinary and other bodies. With this development has been an evolution in the rules of natural justice. In 1949 it was said with some caution that 'the requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, and the subject which is being dealt with, and so forth'.¹ In 1963 in *Ridge v Baldwin*², in reversing an English Court of Appeal decision that a Chief Constable had no right to a hearing before dismissal, Lord Hodgson said the features of natural justice, which stood out were a right to be heard by an unbiased tribunal; the right to have notice of charges of misconduct; and the right to be heard in answer to the charges. The rights of the individual depend on the character of the decision making body, the kind of decision it has to make, the statutory or other framework in which it operates.³

Non statutory bodies

The parties to disciplinary proceedings cannot by their consent confer jurisdiction upon a tribunal which is entirely a creature of statute. Where a position is not governed by statute, it is prudent for organisations to require a written statement from an applicant for membership, agreeing to be bound by its disciplinary rules.⁴ The terms of the contract of membership of a private organisation may derive from its articles of association, code of conduct, regulations, by-laws, or rules.⁵

A court will be slow to interfere with proceedings of private bodies such as social clubs, sporting associations, the stock exchange, political parties and sometimes even trade unions. The doctrine of natural justice has no application to purely private law contractual claims, where a definition of professional conduct is put in a contract and the public law concept of reasonableness has no place.⁶

For example, it has been said that the contractual obligations on a dog club in exercising disciplinary functions were, at most, to act fairly, to take reasonable steps to apply the rules of the club and to act in accordance with the law. It was not contractually obliged to reach a correct decision, and damages could not generally flow from any wrongful decision on its part, unless there was unfairness or negligence.⁷

There is no time limit for bringing disciplinary proceedings in the absence of a rule to the contrary, though undue delay resulting in prejudice to the defendant can sometimes give rise to an abuse of process where the charges are brought under statutory enactment.⁸ In a private contractual arrangement disciplinary jurisdiction ceases once the contract of membership expires, although there is no reason why members of a professional body should not agree to be bound by the rule that they continue to submit themselves to disciplinary procedures after membership ceases. A professional body may want to ensure such a condition, otherwise those who merit disciplinary action can evade it by an act of resignation.⁹

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Statutory disciplinary bodies

In Australia, whether the disciplinary hearing is of a public nature and therefore subject to judicial review, usually depends upon whether the hearing is under a statute or enactment.¹⁰ A number of factors warrant consideration. If a function is one of public concern, such as a private company running a prison, then judicial review is likely to be available. It is relevant to consider the rights and interests of the individual affected in determining whether the accountability that judicial review demands is relevant to the particular body under examination.¹¹ Professions such as medicine and law are governed by statutory principles to which the rules of natural justice apply. Those rules require a right to be heard by an unbiased tribunal; to have proper particulars and notification of charges; and to be given an opportunity to answer the charges. Natural justice also allows for principles such as whether there has been an abuse of process, for example by reason of undue delay, to be applied.

Public Sector Management Act 1994 (WA)

One example of a statutory process which reflects many of the common law rules is to be found in the *Public Sector Management Act 1994 (WA)* (*PSM Act*). Under s 82A(1) of the *PSM Act*, in dealing with a disciplinary matter, an employing authority must proceed with as little formality and technicality as the matter permits; not be bound by the rules of evidence; and it may determine the procedures to be followed subject to any statutory officer's instructions.

Under the *PSM Act* the standard of proof necessary for an adverse finding is decided on the balance of probabilities. An offence can be established on the evidence if it is found more likely than not to have occurred. Investigations are normally carried out without the ability to summon witnesses, compel responses or subpoena documents.

Commencing an investigation

Under the Public Sector Management (General) Regulations 1994 (WA) the prescribed procedures require that:

- (a) suspected breaches of discipline are investigated and the respondent is notified in writing (clause 2(1) of the Act and Regulation 16);
- (b) the investigation will lead to a finding being made in respect of, and may lead to action being taken against, the respondent under division 3 of part 5 of the Act, and to state the range of possible findings and possible actions;
- (c) certain steps may be taken in the conduct of that investigation prior to the making of a finding, and the taking of any action, against the respondent;
- (d) the respondent is notified of any interview or meeting which he or she is required to attend; and
- (e) he or she has the right to have present, during any interviews or meetings attended by the respondent, a representative capable of providing advice to the respondent.

Some bodies, under statutory powers, must investigate, others have a discretion. It has been said that there are many situations in which natural justice does not require that a person be told the complaints against him or her, and given a chance to answer at that particular stage. The investigation may be purely preliminary. Where there is no penalty or serious damage to reputation inflicted by proceeding to the next stage without such preliminary notice, then that may be done.¹² Generally a person who is the subject of disciplinary proceedings is entitled to disclose confidential information if it is necessary for his or her own protection to do so. There is no confidence as to disclosure of an iniquity.¹³

Since a preliminary enquiry is not a trial, and is therefore not ordinarily attended by the rules of natural justice, there may be no requirement that the person be notified. However, an investigator may not treat a member unfairly, for example, by giving an untruthful account of the evidence against him or her in order to induce an unwarranted admission.¹⁴

The decision to proceed with a disciplinary action

Usually the test for proceeding with disciplinary action is a 'realistic prospect of conviction' or the existence of a *prima facie* case which, if un-contradicted, could be grounds for a finding of guilt.

Notification

A defendant has a right to receive fair notice of the charges against him or her. This is for the purpose of enabling a defendant to defend or answer complaints and the notice must be sufficient to enable him or her to prepare a defence or answer.^{15 16} There is no requirement at common law that the defendant receive advance notice of the evidence as opposed to notice of charges. The charges laid should specify the relevant contravention in law and a short summary of the factual elements upon which this contravention is alleged to have occurred. If there is a fundamental change in the nature of the allegations, the defendant is entitled to notice. To be effective, a notice of a disciplinary hearing must be received in good time before the hearing. It has been held that five days notice is sufficient for a disciplinary hearing and fifteen days sufficient for a professional disciplinary proceeding.¹⁷ This would depend upon the nature and complexity of the case and the time needed to prepare an adequate defence.

Service of notice

Service of a notice means actual receipt by the person concerned. Normally mere dispatch, even under a rule which allows service by post to a party's last known address, is not service upon that person.¹⁸ However, under section 40 of the *PSM Act* if the address of the public service office is unknown, then the notice may be forwarded to the last known address and notice of posting given. Sometimes the rules provide that proof of posting is proof of service, but even then it is probably *prima facie* evidence only. Notice may be deemed to have been given if there is 'obstructive conduct on the part of a person (concerned)' such as the refusal to collect a registered letter which, as he is aware, contains the notice.¹⁹

PSM Investigative Steps

Under the *PSM Act* there are steps in a disciplinary investigation to establish the authority to undertake the investigation; to consider the scope of the investigation; to construct an investigation plan and to draw up a chronology. This is followed by the collecting of documentary evidence, organising and commencing interviews and considering whether a site inspection is required. This, in turn, is followed by collating and analysing the evidence; considering the need for further evidence; and conducting further interviews and collecting further documentation. Finally, there is the writing of the report, and consideration if there is a need for further evidence, before finalising and presenting the report.²⁰

The preliminary phase

Sometimes a tribunal holds a preliminary meeting as required by the rules or as a matter of convenience to decide whether there is anything worth investigating.²¹ The procedure carries some risk of apparent bias, but generally an authority, which is required to hold a preliminary enquiry before summoning a person before it, may do so without disqualifying

itself from the hearing.²² It would be a useful precaution for different people to sit on the enquiry and the tribunal if possible.

At what stage do the rules of natural justice begin?

The case against the right to be heard at the preliminary stage is based on convenience and simplicity. If there is a fair hearing after formal charges are laid, this is enough to satisfy procedural fairness. If not, how far back into the administrative process does natural justice have to go?²³ Public enquiries, which do not formally affect legal rights, must comply with natural justice if their reports or proceedings 'expose persons to criminal prosecutions or civil action' or damage to reputation.²⁴ Some codes of professional discipline provide for preliminary enquires in which there is a right to be heard. It is a practice in some turf associations to have a preliminary hearing in the presence of the potential defenders, before any charges are laid. If a charge follows, there is a further opportunity to be heard.²⁵

It was said in *Pearlberg v Varty*²⁶ by Lord Pearson: 'fairness.... does not necessarily require a plurality of hearings....otherwise nothing could be done simply and quickly and cheaply'. In that case a taxpayer had received a default assessment based on a tax officer's estimate of his true income; the appellant unsuccessfully claimed that the tax office should have given him a chance to persuade them first that there was no need for a default assessment, without being obliged to challenge after the assessment had been received. It has been held in Australia that taxpayers have no right to be heard before the Commissioner of Taxation can obtain compulsory access to their financial records.²⁷

In the absence of a special provision, a statute imposing a duty to 'enquire into complaints, and form a preliminary opinion as to whether disciplinary proceedings should be commenced, does not require a hearing at that stage'.²⁸

Conversely in the Privy Council case of *Rees v Crane*²⁹ it was held that natural justice applied at the first stage. The legislation of Trinidad and Tobago prescribed that before a Judge was removed from office the question went before a judicial legal services commission; if there was a prima facie case of incompetence, it was then reported to the President, who then had to appoint a special tribunal to advise him; and, if the latter commission recommended dismissal the person could then seek further advice from the Privy Council in London. An adverse finding at the initial stage of the judicial legal services did attract rules of natural justice because it was a public non-binding opinion that dismissal would be appropriate.

In *Ainsworth v Criminal Justice Commission* the respondent reported to a parliamentary committee on the introduction of poker machines and recommended to the committee that the Ainsworth group of companies should not be permitted to participate in the gaming machine industry. No notification was given to the companies to be heard. A duty of procedural fairness arises because the power involved is one which may 'destroy, defeat or prejudice a person's rights, interest or legitimate expectation'. The High Court said where a report made and delivered by the Commission had, of itself, no legal effect and carried no legal consequences whether direct or indirect, no action lies, but it is different when a report or recommendation operates as a precondition or is a bar to a course of action, or is a step in the process capable of altering rights, interests or liabilities.³⁰ The publishing of a report, damaging to the reputation of the applicant, without having given the applicant a hearing, was found to lack fairness and a declaration made to that effect.

What is 'misconduct'?

It has been said that in order to ascertain whether conduct amounts to misconduct it is necessary to set out which standard or standards of professional behaviour are alleged to

have been breached.³¹ A properly drafted statement of allegations will set out a summary of the facts relied upon concisely and usually in chronological order. The duty of the draftsman is to analyse the supporting evidence and to distil the relevant facts and discard irrelevancies. If it is alleged that the defendant knew, or ought to have known certain matters, the facts giving rise to that actual constructive knowledge should also be set out.³²

Duplicity and vagueness

Duplicity is not a basis for interfering with a disciplinary finding, although it may be relevant to the fairness of the proceedings. Vagueness is a ground for judicial review if it leads to unfairness in the proceedings since the respondent will not know with precision what is alleged, and not be fully able to address these matters in the course of the hearing.³³

Unreasonableness and statutory decision making

An important distinction, which follows from disciplinary tribunals acting under an enactment, distinguished from those governed by private contractual arrangement, is that legal unreasonableness in decision making may arise under public law. In *Minister for Immigration and Citizenship v Li*³⁴ the failure of the Migration Review Tribunal to grant an adjournment was held to be unreasonable. The adjournment had been requested to allow for the result of an assessment to be reconsidered; the Court found a referral to alter the adjournment showed a certain arbitrariness that rendered it unreasonable. The plurality considered that legal unreasonableness is not confined to an irrational or bizarre decision, or one so unreasonable that no sensible decision maker would have made it, such as was found in the *Wednesbury* case.³⁵ It is a decision which lacks an evidential intelligible justification. French CJ said 'a disproportionate exercise of an administrative decision, taking a sledge hammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what is necessary for the purpose it serves'. Sometimes questions of proportionality may be relevant to reasonableness. A question may be asked whether excessive weight was given to the fact that Ms Li had an opportunity to present her case.

A disproportionate response is one way in which a conclusion of unreasonableness may be reached. A disproportionate exercise in administrative discretion might be characterised as irrational or unreasonable on the basis that it 'exceeds what, on any view, is necessary for the purpose it serves'.³⁶ Conversely, Gageler J said that successful invocation of *Wednesbury* unreasonableness has been rare, and nothing in his reasons should be taken as an encouragement to greater frequency.

Another area where disciplinary proceedings taken under an enactment give rise to a different approach is abuse of process. In *Walton v Gardiner*³⁷ it was said that a stay of proceedings is not confined to improper purpose or absence of a fair hearing. Certain doctors were charged with statutory offences, and granted an indefinite stay of proceedings on the grounds of undue delay in bringing the proceedings. On the other hand, where it was argued that a charge brought against a university professor, under the provisions of a collective agreement, though recognised as an instrument under the provisions of the *WorkPlace Relations Act 1996* (Cth), was not itself to be regarded as an enactment and therefore public principles of judicial review did not apply, and a stay of proceedings would not be granted.³⁸

Conduct of the hearing

Proceedings of a disciplinary tribunal must be conducted in accordance with the tribunal's own rules, except to the extent to which they may be inconsistent with the rules of natural justice.³⁹ Natural justice requires that the hearing be fair. The common law does not

recognise the general right to an oral hearing, though such a right is usually accorded in all except the most informal tribunals.⁴⁰ Where credibility issues arise, or bad faith is impugned, an oral hearing is very likely to be required.⁴¹ Lord Bingham said that it is often difficult to address effective representations without knowing the points which are troubling the decision maker.⁴²

Is legal representation allowed?

At common law a person charged before a disciplinary hearing, even with facts amounting to a crime, is not always entitled to legal representation. Where the rules are silent the applicant should seek leave if wanting representation.⁴³ There is no authority that supports a right to counsel at public expense outside the higher Criminal Courts.⁴⁴ Where it exists it is usually based on a statutory provision. *R v Secretary of State for the Home Department & Others ex parte Tarrant*⁴⁵ sets out where representation may be allowed, such as where it is due to the seriousness of the charge and the potential penalties; whether there are any points of law likely to arise; the capacity of the defendant to present his case; procedural difficulties such as a need to interview and cross-examine witnesses; the need for reasonable speed in making the adjudication; and the need for fairness as between parties. This test was approved by the House of Lords in *Hone v Maze Prison Board of Governors*.⁴⁶ Where parliament creates a tribunal, and says nothing about its procedure, it will have implied powers incidental to the exercise of its jurisdiction; power to regulate its procedures; and power to make such administrative arrangements as are appropriate for it to discharge its function (*Virdi v The Law Society*⁴⁷).

Procedures at trial

There is no general right to privacy. Indeed the principle is that quasi-judicial proceedings should be open. However, where there is no protection against defamation it is not uncommon for threats of defamation action to be made and in such circumstances the hearing may be in private.⁴⁸ The principles are said to include a procedure which is fair to both sides: that both sides must normally allow each party to call relevant evidence; to ask relevant questions; and to make relevant submissions. The tribunal is responsible for fair conduct of the trial and neither the parties nor the representatives are in control of the hearing. Procedural fairness applies to the conduct of all those involved in the hearing. The tribunal is under a duty to behave fairly, and to require the parties and the representatives to act in a fair and reasonable way in the presentation of their evidence, and in challenging the other side's evidence and in making submissions. The tribunal makes an error in its procedural rulings if it either has no power to make the ruling or if in the exercise of discretion it makes a ruling which is plainly wrong.⁴⁹

As with courts, it is customary to exclude from the court room all witnesses until their turn comes to give evidence, except for expert witnesses. Whoever goes first is usually the person on whom the burden of proof lies, but he or she is also given the right of reply. The last word is a valuable right, which offsets, perhaps, the disadvantage, if any, inherent in having to go first.⁵⁰

The burden of persuasion and evidential rules

In the case of disciplinary proceedings the regulator, or whoever prosecutes, carries the burden of proof, which is usually, though not always, defined as the civil standard.

However, sometimes the burden of showing that someone is a fit and proper person to hold a position is upon the applicant for registration.⁵¹

Where allegations involve criminal conduct usually proof to the criminal standard is required in England⁵² but not in Australia where the civil standard applies. The admissibility of evidence, and the technical rules of evidence applicable to civil or criminal litigation, form no part of the rules of natural justice. What is required is that the materials are logical and probative, in the sense that they show existence of facts consistent with the finding. Evidence is not restricted to evidence that should be admissible in a court of law.

The rationale and nature of reasons

Although it is not universally accepted that there is a mandatory requirement for reasons to be given by judges, it has been said that reasons must be given in order to render practicable the exercise of rights of appeal. However, there are a number of other justifications. These include the requirement that justice not only be done but be seen to be done. Reasons are required for decisions to be acceptable to the parties and to members of the public; the requirement to give reasons concentrates the mind of the judge; and it has even been contended that the requirement to give reasons serves a vital function in constraining the judiciary's exercise of power.

The case for binding reasons as an incident of natural justice is strong. With articulated reasons it shows that the Tribunal has discharged its duty. It is one of the fundamentals of good administration.⁵³ A decision maker is not required to deal with every argument, but for the appellant process to work satisfactorily the judgment has to enable the appellant court to understand why the judge reached the decision. Every factor which weighed with the judge should be identified and explained. The issues should be identified and the manner in which he or she resolved them also explained. A tribunal should explain why it has accepted the evidence of one expert and rejected that of another. The essential requirement is that the terms of the judgment should enable the parties, and any appellant tribunal, to readily analyse the reasoning that was essential to the judge's decision. In relation to any award of costs, it is unlikely to be appropriate to appeal for lack of reasons.⁵⁴ Decisions should be made known within a reasonable time. Lord Denning claimed that in his first year as a High Court Judge he did not reserve judgment once, but that may be a counsel of perfection not given to lesser mortals. It remains true that decisions do not improve through undue delay.

Judicial review

Where an Act of Parliament provides for judicial review, such as it does for matters which go to the West Australian State Administrative Tribunal, the scope and nature of appeal will be defined. So too under the *PSM Act*.⁵⁵ However, where there are no defined avenues of appeal, then the principle of jurisdictional error will apply to statutory tribunals. Jurisdictional error is not a concept which can be exhaustively defined, but the definition embraces an absence of procedural fairness; addressing the wrong legal issues; taking into account factors which ought not to have been taken into account, or failing to take into account factors which it is bound to take into account.⁵⁶ It is therefore important for a decision maker to set out carefully the salient facts; and to summarise the arguments for and against the defendant. The tribunal should address all arguments open to the defendant on the evidence unless his or her representative disclaims any reliance upon such arguments. Reasons require careful analysis of why one version of events is preferred to another, and that in turn may require some comment on the demeanour of witnesses, as well as on how inferences from the facts are to be arrived at.

If the disciplinary decision maker follows precepts of a good administrative decision maker and yet jurisdictional error is revealed on appeal, he or she can perhaps take consolation in the words of Lord Asquith who said of the English trial process: 'the duty of the trial Judge is to be quick, courteous and wrong. That is not to say the Court of Appeal should be slow, rude and right, for that would be to usurp the function of the House of Lords'.⁵⁷

Endnotes

- 1 *Russell v Duke of Norfolk* [1949] 1 All ER 109 (per Tucker LJ).
- 2 [1963] 2 All ER 66.
- 3 Brian Harris, Andrew Carnes (ed), *Disciplinary and Regulatory Proceedings* (Bristol Jordans, 7th ed, 2013). (2.02 & 2.03).
- 4 Harris (1.06).
- 5 Harris (1.07).
- 6 Harris (1.09).
- 7 Harris (1.12).
- 8 Harris (1.20).
- 9 Harris (1.21).
- 10 *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 and *Griffith v Tang* (2005) 221 CLR 99. In the latter case the argument was whether a decision to exclude a student for misconduct was 'under an enactment' as set out in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The *Griffith University Act 1998* (Qld) provided for governance and set out general powers but 'it does not follow any administrative acts made in pursuance of this authority has its foundation in statute'. The Act contained a general power of governance, but said nothing about 'academic misconduct' in particular, or how it should be treated, so it did not follow the decision by the university officer was open to review.
- 11 Robert Lindsay, 'Yes Minister? The 2012 Migration Amendments: Whence Have We Come and Whither Are We Going?' 2013 72 *AIAL Forum* 63.
- 12 Harris (6.25).
- 13 Harris (6.62 & 6.67).
- 14 Harris (7.09).
- 15 *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1.
- 16 *McAleer v University of Western Australia* [2007] FCA 52.
- 17 Harris (10.17 and 10.19).
- 18 *Fancourt v Mercantile Credits Limited* (1983) 154 CLR 87 (Forbes, *Justice in Tribunals* 5th ed at 132).
- 19 *Bornecrantz v Queensland Bridge Association Inc.* [1999] QSC 58.
- 20 My grateful thanks to Tuba Omer for her research on the *PSM Act*.
- 21 Forbes paragraph 8.1; *R v Medical Board of South Australia ex parte S* (1976) 14 SASR 360.
- 22 *R v Medical Board of South Australia ex parte S*.
- 23 JRS Forbes, *Justice in Tribunals* (Federation Press, 2002).
- 24 Forbes 8.4; *Re Pergamon Press Ltd* [1971] Ch 388 at 399.
- 25 *R v Williams; Ex parte Lewis* [1992] 1Qd R 643.
- 26 1972 1 WLR 534 at 545.
- 27 Forbes 6th ed para 8.7.
- 28 *Eckersley v Medical Board (Qld)* [1998] 2 Qd R 453 (Forbes 8.15).
- 29 [1994] 1 All ER 833.
- 30 (1992) 175 CLR 564 580.
- 31 Harris (10.13).
- 32 Harris (10.14).
- 33 Harris (10.27).
- 34 (2013) 249 CLR 332.
- 35 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1.
- 36 Michael Barker & Alice Nagel, *Legal Unreasonableness: Life after Li* 2015 79 *AIAL Forum* 1; *Minister for Immigration and Citizenship v Li* French CJ at [30].
- 37 *Walton v Gardiner* (1993) 177 CLR 378.
- 38 *McAleer v UWA (No. 3)* 2008 FCA 1490.
- 39 Harris (13.01).
- 40 Harris (13.03).
- 41 Harris (13.04).
- 42 *Smith v The Parole Board* 2005 UKHL1.
- 43 Forbes 3rd ed paragraphs 11.1 – 11.4 at pages 162-173.
- 44 Forbes 3rd ed 11.28.
- 45 1984 1 All ER 799 at 816.
- 46 1988 AC 379.
- 47 2010 EWCA Civ 100.
- 48 Forbes 3rd ed 12.4 at pages 179-180.
- 49 Harris (13.27).
- 50 Per Lindsay J in *Stoke Rochford Management Ltd v Talton* [1998] UKEAT 611_98_1305; Harris (10.06).
- 51 Harris (12.08).
- 52 Harris (12.18).
- 53 Forbes 3rd ed 13.2 at page 249; recently in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 North and Bromberg JJ at [127] cited cases where a failure to provide any or any sufficient reasons may amount to an error of law.

- 54 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605.
- 55 Section 78 of the *PSM Act* provides certain appeal rights to the Public Service Appeal Board. Appeal under Part 5 for substandard performance can be made to the West Australian Industrial Relations Commission (WAIRC).
- 56 *Kirk v Industrial Relations Commission of NSW* [2010] HCA 1 at [66]–[77]; *Craig v South Australia* (1995) 184 CLR 163 at 177-180.
- 57 Attributed to Lord Asquith, reported in Anthony Sampson, *The Anatomy of Britain* (Hodder & Stoughton, 1962).