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THE EVOLUTION OF STATE ADJUDICATIVE POWER AS AN ALTERNATIVE TO STATE JUDICIAL OR ADMINISTRATIVE POWER

Peter Johnston and Peter McNab[†]*

In Memoriam

Peter Walter Johnston (1942 - 2015)

Peter Johnston died in Perth on Australia Day 2015, after a short illness, aged 72.

The public law community both here and overseas mourn the passing of a great friend, teacher, academic and barrister. We record our condolences to his family, friends and colleagues knowing that his influence will live on in his many writings (including those published in this Journal) and also through the influence of his many students.

T S Eliot in his poem 'The Hollow Men' uttered the memorable statement: 'Between the Idea / And the reality / Between the motion / And the act / Falls the shadow.'

In this essay Peter McNab and I set out to explore the landscape of state administrative tribunal adjudication with a view to foreshadowing prospects for potential advances in related areas; namely, the kinds of functions that such bodies might undertake in the future and, also, novel structural forms and procedures of adjudication that could be developed as part of an evolutionary program of building on existing models.¹

But, as T S Eliot reminds us, it is one thing to conceive bold new ideas for exciting projects to advance the frontiers of tribunal adjudication; it is another thing entirely to achieve the realities and conditions necessary for their creation.

What, one may ask rhetorically, stands in the road to inhibit such progressive developments? In this paper, we embark on the task of evaluating one particular 'lion in the path' that casts its shadow over the enterprise. It is the potential impact of what one might broadly define as the *Kable-Kirk* implied limitations² flowing from Chapter III of the Commonwealth Constitution (referred to hereafter as '*Kable-Kirk*').

***Kable-Kirk* restated**

Although an extensive jurisprudence has developed in the wake of *Kable* over the last two decades,³ with the latecomer *Kirk* trailing in that respect,⁴ the combined effect of the two cases for the purposes of this analysis can be shortly summarised as follows:

* A paper presented at the 2014 National Administrative Law Conference 'Innovations in Administrative Law', University of Western Australia, Friday 25 July 2014. Dr Peter Johnston, (1942-2015) Professorial Fellow at the University of Western Australia; Senior Fellow at Monash University; barrister, Perth; a former Deputy President of the Commonwealth Administrative Appeals Tribunal and Inquiry Commissioner for the Commonwealth Human Rights Commission; member of the WA Attorney General's Taskforce that proposed and designed the State Administrative Tribunal of Western Australia.

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Each State must maintain, to the purpose of exercising the judicial power of the Commonwealth under Chapter III of the Constitution a system of state courts that are independent and impartial, in the sense of not being subjected to direction, control or influence by the executive and legislative arms of the state government, and further and in particular, a Supreme Court of the State that retains the core jurisdiction to judicially review and supervise the conduct and decisions of inferior state courts and other state adjudicative bodies; also state government officers, departments and authorities.⁵

At stake is whether the constitutional constraints imposed upon states' legislative power by these doctrines are likely, upon further elaboration and extension, to produce a symmetrical and rigid convergence that results in the virtual assimilation of state adjudicative bodies to the Commonwealth dualist system of split judicial and merits review, founded on the *Boilermakers* principles.⁶ Does *Kable-Kirk* represent a constitutional straitjacket thwarting prospects of sensible but ostensibly divergent forms of dispute resolution in the field of public law?⁷

Translated into practical day-to-day political terms, the central issue for our determination is: to what extent can the states create non-judicial bodies that do not need to comply with Chapter III standards of impartiality and independence that would otherwise deny them the capacity to exercise the judicial power of the Commonwealth?

Whether such an extension of the role of the principal state administrative tribunals is politically desirable or even feasible is another question. The same is true regarding the related issue of whether, in expanding state tribunals' roles beyond their present frontiers those tribunals, in accordance with the *Kable* principle, would cease to be 'courts' for the purpose of Chapter III of the Constitution. The latter is only relevant, however, if such tribunals attempt to exercise federal jurisdiction actually (or potentially) vested in them by virtue of the *Judiciary Act 1903* (Cth).

It is of course true that the problems generated by the *Kable-Kirk* doctrines, and the fragile basis in both logic and precedent attending each case,⁸ have already formed the basis of much academic commentary, as have the related topics of the *constitutionalisation* of Australian administrative law, particularly through the agency of judicial review under s 75(v) of the Constitution.⁹

Two topics especially have occupied recent discourse; first, a postulated convergence or assimilation between the principles and foundations of judicial review in the Commonwealth and state spheres; secondly, the unifying effect of High Court authority concerning judicial review, resulting in an Australian administrative law exceptionalism, in effect isolating or 'Balkanising'¹⁰ it from jurisprudential developments in other common law countries including the United Kingdom, Canada, the United States and New Zealand. The *Kable-Kirk* phenomena can be seen as part of that process. Given the number of recent academic contributions addressing these issues, what justification is there for yet another exploration of even a small part of that terrain?

It is not too much to claim that the implications of *Kable-Kirk* have not yet been worked through to produce a coherent and logically satisfying rationale of the system of Australian administrative justice as it operates in both the Commonwealth and state context.¹¹ It is this latter aspect, namely, the relatively unstable and unresolved state of the constitutional-administrative law nexus that is the justification for this article.

In addressing these conundrums, we argue that the High Court should exercise caution before it extends the principles emanating from the *Kable-Kirk* doctrine to State courts in ways that are likely to impose on them the rigidities previously constraining only federal courts and federal judges. We also contend that the category of 'courts' of the states that fall within the penumbra of *Kable-Kirk* should not be extended without strong justification.

The potential effect of *Kable-Kirk* on state general administrative tribunals

To start with, we confine our analysis to a very particular aspect of the overall phenomena. We are concerned with examining the foundations for the operations of general state administrative tribunals,¹² and the scope for innovative expansion in their jurisdictions and adjudicative methodologies. In that regard, we use the SAT (WA) as the primary exemplar.

Importantly, to the extent that the *Kable-Kirk* doctrines cast a shadow over such innovations we first question whether the concerns about their inhibitive effect are *not well founded* and even possibly overstated. More positively, we seek to make out a case that *Kable-Kirk* should be given a *very limited scope* as solely or quintessentially concerned with crime or community-safety related matters (affecting the liberties and property of subjects) that are properly the subject of curial adjudication in bodies that can properly be called 'courts of a State', with the states' supreme courts as the paradigm example. That entails, necessarily, some attention to both the kind of 'judicial power' exercised in that quasi-criminal jurisdiction, and the characterisation of the bodies exercising it. This, we maintain, requires a fresh look at problems associated with the definitions of 'judicial power' (both state and Commonwealth), proceeding on an assumption that there is a difference between the two. It also requires, as we see it, a re-evaluation of the purpose of defining and categorising state adjudicative bodies as state 'courts'.

This requires us to question whether a distinction can still be drawn between what has been described as a judicial power of the State as against the judicial power of the Commonwealth. The distinction is becoming blurred in the wake of *Kable* and *Kirk* due to the overlay between the notion of a single common law and an integrated judicial system in Australia, giving rise to the proposition that the principles of public law are undergoing a *process of convergence* or assimilation.

Again, more positively, we contend that the starting point for the analysis both for characterising the respective nature or natures of judicial power and that of state courts has been misplaced and has distorted, or at least left unresolved, the logical outcome expressed in some of the High Court authorities on the topic. As part of exploring these problems we suggest that some further linguistic clarification is necessary and that it will be more useful, in some respects, to substitute our preferred concept of adjudication in place of the universal resort to the term 'judicial power'.

We submit that formulating the operation of state tribunals in terms of adjudication rather than judicial or administrative power transforms the nature of the jurisdiction and transcends the constraining effect of the otherwise pervasive, fixed and artificial notion of Commonwealth judicial power. This still requires the act of distinguishing between the different senses in which the original concepts of judicial power have been formulated. Identifying a more encompassing integration of the kind of tasks performed by state administrative tribunals does not obliterate the senses in which judicial power can be used. Instead, a reformulation in terms of adjudication arguably renders redundant and unnecessary conflicts between the two notions of judicial power that arise from non-correspondence or inherent inconsistencies giving rise to contradictions as between the original notions. That in turn arguably radically reduces the potential for *Kable-Kirk* to colonise an adjudicative territory wider than its proper bounds. If our analytic project in mapping the topography of *Kable-Kirk* yields the conclusion that it has a relatively confined ambit, the way is commensurately open to state parliaments to legislate to create the kinds of imaginative tribunal adjudication that state governments see as desirable.

The search is for greater conceptual clarity and to identify the spaces that are still available within which states can exercise their creative licence to fashion dispute resolution in a more

flexible way that can accommodate contemporary modes of adjudication and new or novel (if there is a difference) methods, such as the adoption of the United States' 'administrative judge' model as well as developing substantive principles such as proportionality and the mixing and amalgamation of merits and legal review as part of the process of adjudication.

The conjecture

Because, in our opinion at least, the principles attending the *Kable-Kirk* doctrines have yet to be satisfactorily settled, we can at this stage only offer what might be called a conjecture (something halfway between a speculation and a thesis) about the nature of the functions performed by state administrative tribunals, and the constitutional location of such tribunals within the spectrum of traditional courts and surrogate decision-makers.¹³ The traditional classical understanding of the role of state courts is postulated on the distinction between 'state judicial power' and 'the judicial power of the Commonwealth'. In dealing with each, courts have also sought to apply a further distinction between powers and functions that are 'judicial' as against 'non-judicial'.

The existence of state judicial power as something separate from Commonwealth judicial power has been accepted, largely unquestioned, by the High Court in cases such as *Re Wakim*,¹⁴ although Kirby J in that case seems more appreciative of the problems of differentiation, perceptibly denying any possible 'divorce' between the two kinds of judicial power and noting the different constitutional foundations for the separate judicial systems of the various polities.¹⁵ In his view, the notion of Commonwealth judicial power was to be understood solely in the context of Chapter III.¹⁶

One of the few detailed discussions on the nature of *state judicial power* within the Federal polity is that of Isaacs J, dissenting as to the result, in *Le Mesurier v Connor*.¹⁷ His Honour acknowledges that the expression 'Court of the state' is an organ constituted by the state to exercise some portion of the judicial power, which he treats as a generic term expressing a totality used in its strict sense. At the same time, he maintains that a state court becomes an integral part of the Commonwealth 'Judicature' by virtue of s 71 of the Constitution, adding that the distribution of that power among the courts is, subject to definite constitutional provisions, left to Parliament. By way of contrast, his Honour further recognises that besides this mass of judicial power belonging to the established courts, there is a considerable portion of power, in its nature judicial and quasi-judicial invested from time to time by legislative authority in individuals, separately or collectively, for a particular purpose and limited time. This distinction in respect to judicial power, he saw as running through the administration of all governments. Problematically, in his exposition of the relationship of state judicial power to that of the Commonwealth, Isaacs J tends to fudge the relationship of the two, seeming to treat the judicial power as a single entity.

It is often taken as axiomatic that *state judicial power* is the natural counterpart of the judicial power of the Commonwealth, although the relationship between the two is rarely, if ever made explicit.¹⁸ Treating the former as it were an organic extension of the latter is based on the assumption that although in some ways different (not usually explained) the two 'judicial powers' share a common basic meaning and content. In that regard, both are taken to embrace a wide sense of the judicial power.¹⁹

Clarification of ambiguities in the usage of judicial power

In some schools of philosophy, a name or term can have *more than one meaning* (its sense), by reason of having *more than a single point of reference* (its object).²⁰ Correspondingly, the same object can have different senses. What we seek to show is that the expression 'judicial power' as it has been employed in the *Kable-Kirk* dialogue is capable

of more than one universal, abstract meaning, depending on whether it is used in conjunction with state-provided means of resolving controversies or as manifested in the Commonwealth constitutional context in terms of 'the Judicial Power of the Commonwealth'.²¹

We see the inherent ambiguity in the way that courts have approached this dichotomy as contributing to the confusion and obfuscation underpinning the proper application of *Kable-Kirk* to adjudication by state tribunals. By subjecting the basal assumption to closer analysis we aspire to point the way forward to a more satisfying and convincing resolution of contradictions inherent in those terms. This leads us to proffer the suggestion that, apart from the narrow specific jurisdiction in which state courts engage in determining criminal guilt or the consequences thereof, it is more sensible and fruitful (in terms of opening the way to future developments), instead of referring to state judicial power, to speak in terms of a 'state adjudicative power' in which the distinction between state-conferred judicial and non-judicial, administrative powers is largely eliminated.

If one starts, however, from the premise that the jurisdiction and powers of state courts and other adjudicative bodies are not to be defined by reference to Commonwealth judicial power (whatever that is) a completely different vista is opened. Rather than seeking to establish a further dichotomy between state judicial power and non-judicial power, replicating the Commonwealth model, a much broader *adjudicative capacity* can be attributed to state determinative bodies.

This in turn has logical repercussions as to the kind of taxonomy that applies to state adjudicative bodies. A strict distinction between state 'courts' and 'tribunals' as adopted in *Craig v South Australia*²² tends to dissolve, freeing such tribunals to perform novel functions. These could include developing *policy guidelines* (in the absence of a prescribed government policy) in furtherance of more consistent administration when deciding cases in large volume jurisdictions or providing *advisory statements* that inform state administrators about the proper and sensible interpretation of contentious provisions. This is consistent with a role for tribunals to go beyond being simply adjuncts to civil administration and enhance and enlarge the 'integrity arm' of government.²³

Admittedly, in seeking to dissolve the strict dichotomy between state and Commonwealth judicial power and the division of state adjudicative bodies into 'courts' and 'non-courts' (or 'arbitral/administrative bodies other than-courts'), we are offering a reductionist model that may turn out to bypass rather than eliminate the contentious problems that have attended the application of *Kable-Kirk* to date. We accept that at the end of the day our analysis may fall short of providing conclusive answers about the relationship between state and Commonwealth judicial power but, as Socrates famously observed, the philosophic task is directed not to finding *the answers*, but rather to *asking the right questions*.

The importance of maintaining Federal spaces within the constitutional polity

One of the long-recognised virtues of the Federal system is the potential for political innovation at both levels of government. Federalism leaves space for regional variations in which each state can engage in experimentation. This allows freedom to devise solutions to deal with new problems presented by Australia's rapidly changing society when it is obvious that the old models are inadequate or no longer working.²⁴ This framework for diversity within national unity can be especially justified when there are significant differences between individual states such as Western Australia and Queensland, where, for example, there is a need to develop, relevantly to this discussion, models, often informal, to accommodate the needs of remote, predominantly sparse rural communities with large

indigenous groups. The question is: To what extent does *Kable-Kirk* represent a disincentive for such developments?

The shoals of *Kable-Kirk*

Before that question can be answered it is necessary first to identify both the current and potential reach of *Kable-Kirk*. To do that one must understand the logical and conceptual basis on which it has been constructed. To do that comprehensively is beyond the scope of this paper but the central propositions on which the *Kable-Kirk* doctrine rests are:

- (a) Any 'court' established by a state ('a court of the State') that is capable of being invested with, and exercising, 'the judicial power of the Commonwealth'²⁵ (also described as, though not necessarily always coincidental with, the notion of 'Federal jurisdiction') under s 77(iii) of the Constitution, must exhibit and manifest a basic degree of impartiality and independence from the other arms of the state government;
- (b) That degree of judicial and curial impartiality and independence is an '*essential*' feature and attribute of those state courts capable of exercising vested federal jurisdiction;
- (c) To meet that requirement of impartiality and independence, state legislation must not confer upon a state court 'non-judicial' functions²⁶ that compromise, impair or detract from the minimal standards of independence necessary to maintain the '*institutional integrity*'²⁷ of that court;
- (d) (In the case of state Supreme Courts) each state must maintain a Supreme Court, one feature of which must be its continuing to have jurisdiction to exercise, impartially and independently, judicial review over inferior state courts and tribunals to prevent them committing '*jurisdictional error*'.²⁸

The underlying requirement of an integrated court system

These propositions are founded on several key constitutional premises. First, that to effectuate the Commonwealth Parliament's power to invest state courts with federal jurisdiction such courts impliedly must exist and be available.²⁹ Secondly, federal and state courts *structurally* form part of a *single integrated judicial system* in which the states' Supreme Courts are vehicles through which appeals to the High Court, as the ultimate apex of the Australian judicature, are required to be channelled.³⁰ Thirdly, there cannot be *two grades of judicial power* within that system in which a higher standard is prescribed for federal courts and a lower standard for state courts. This latter contention, however, is compromised by an element of self-contradiction in so far as the High Court has acknowledged that the requirements of impartiality and independence mandated by the Constitution for state courts is not of the same strict quality as prevails under the *Boilermakers* principles with respect to federal courts.³¹ Finally, there is a single common law of Australia, which is administered and developed, as part of the integrated judicial system, by both state and Federal courts.³² One practical conclusion drawn from these structural foundations is that the consequence (namely, that a state law cannot impair the exercise of the judicial power of the Commonwealth) cannot be avoided by notionally segregating the courts of the States into a distinct and self-contained stratum within the Australian judicature.³³

The unifying concept that has come to dominate the *Kable-Kirk* discourse and which undergirds the propositions set forth above is the need to maintain the '*institutional integrity*' of state courts to effectuate that purpose.³⁴ The attributes of impartiality and independence impliedly required for state courts thus translate into an '*essential characteristic*' of courts that may be invested with federal jurisdiction. This is bolstered by giving content to the linguistic terms, 'courts' as in s 77(iii) and 'Supreme Court' in s 73 by reference to the historical nature of colonial courts at the time of Federation.³⁵ Reliance on such extra-constitutional sources in order to extract extended meanings from simple terms such as

'court', however, runs the risk of reaching beyond the text and structure of the Constitution as the source of implication.³⁶

Two further conditions are implicit in the above propositions; first, that if a state court or a state tribunal that can be characterised as a 'court of the State' exercises a non-judicial function that is *incompatible* with maintaining its impartiality and independence it will transgress the *Kable* standard on the prevailing orthodox model.³⁷ This requires an assessment to be made whether any function or power of such a court is to be classified as judicial or non-judicial. That engages the wider question of whether the appellations 'judicial' or 'administrative' are prescriptive and appropriate in relation to the exercise of what we call 'state adjudicative power'.

Secondly, as part of that evaluation, it is necessary to distinguish between bodies that are 'courts of the State' in the true constitutional sense³⁸ and other adjudicative bodies that are not.

It is at this point that closer scrutiny of the High Court's pronouncements on the nature of judicial power and the kind of state courts in which it may be invested is called for. This directs attention to two issues: The characterisation of a state adjudicative body's judicial power, and the characterisation of particular state adjudicative bodies as 'courts of the state'.

First major issue: the nature and characterisation of judicial power as exercised by state adjudicative bodies

The confusions in the current discourse about the nature of judicial power'

Defining the 'judicial power of the Commonwealth' has proven an elusive undertaking. It was early recognised by Griffith CJ in *Huddart Parker and Co Pty Ltd v Moorehead*³⁹ that the concept defies exhaustive 'definition'.⁴⁰ Instead, approximations or resemblances based on some of its constituent elements can be formulated to indicate its essential characteristics. Notably, these include generally, but not always, the notion of settling a dispute as between persons, or persons and government by means of applying law, the facts found as part of the judicial process, leading to whichever court or tribunal is taking a dispute giving an authoritative ruling about the legal rights of those engaged, and making such orders or providing such remedies as are necessary to effectuate the court's or tribunal's determinations.⁴¹ In *Fencott v Muller*⁴² Mason, Murphy, Brennan and Deane JJ referred to judicial power as the power of a sovereign authority to decide controversies between its subjects or between itself and its subjects. Their Honours continued:

The unique and essential function of the judicial power is the quelling of such controversies (that is, controversies between the subjects of a sovereign authority or between the authority and its subjects) by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.

It may fairly be said that the indeterminate nature of judicial power and imprecise 'tests' devised for it rely more on judicial impression than linguistic analysis or logical implication. This was acknowledged to some extent by French CJ and Kiefel J in *Wainohu v New South Wales*⁴³ where, recognising that such questions require evaluative judgments and are unlikely to be answered by the application of precisely stated verbal tests, they said:

That conclusion is consistent with the imprecise scope of the judicial power, which historically was not limited to the determination of existing rights and liabilities in the resolution of controversies between subject and subject, or between subject and the Crown. It is also consistent with the shifting characterisation of the so-called 'chameleon' functions as administrative or judicial according to whether they are conferred upon an authority acting administratively or upon a court. Assessments of

constitutional compatibility between administrative and judicial functions are not to be answered by the application of a Montesquieuan fundamentalism.⁴⁴

Significantly, however, neither the Commonwealth nor the state constitutions speak of or otherwise recognise a correlative entity 'The judicial power of [a State]'

As Gleeson CJ recognised in *Re Wakim* the concept of the judicial power of the Commonwealth is one that can only be expressed in terms specifically of 'matters' of the kind indicated in ss 75 and 76 of the Constitution.⁴⁵ Chapter III is accordingly an exhaustive statement of the kind of Commonwealth judicial power that can be conferred on both Commonwealth courts and, by virtue of s 77(iii), on state courts.⁴⁶

Re Wakim is an instructive authority in another regard. The purpose of embedding and providing for the exercise of the judicial power of the Commonwealth under Chapter III shapes the understanding of that concept. It is the particular expression, as formulated within the terms of Chapter III, that both informs and limits its nature. It is seen to be crucial to the separation of *Commonwealth* governmental powers and functions. It operates to impose a systemic delimitation on the kind of courts that are capable of exercising it as well as the way in which it can be exercised.

In that respect, no relevant distinction can be made between the kind of matters that are embraced in the judicial power of the Commonwealth under ss 75 and 76, on the one hand, and on the other, its content so far as it can be invested in 'other courts' under s 77. Further, Chapter III as the fountain of Commonwealth judicial power does not distinguish between the High Court and other federal courts. That leaves open the logical possibility, however, that while its content may be constant, the nature of state courts in which it can be invested under s 77 need not be the same as the High Court or Federal courts in terms of their 'essential' characteristics.

In the case of *Re Judiciary and Navigation Acts*,⁴⁷ for example, it was held that the determination of questions of law on a reference to the High Court for an advisory opinion was clearly a '*judicial*' function but the court could only respond if the reference engaged the judicial power of the Commonwealth under Chapter III. It was further held that the determination of such hypothetical questions, when they do not arise in a legal proceeding where there is some immediate right, duty or liability to be established by the determination of the Court, does not fall within the judicial power for which Chapter III provides.⁴⁸ From this, it may be deduced that judicial power in a broad sense is not co-extensive with the limits of the judicial power of the Commonwealth.

Adding to this ambivalence, in *Kable* Brennan CJ, without articulating any basis for distinguishing between Commonwealth and state judicial power, did contemplate the latter as having different attributes that depended upon the state's constitution and legislation for their content. In the context of New South Wales, his Honour noted that there was a long history of both courts and other adjudicative bodies exercising both judicial and non-judicial power.⁴⁹

That then leaves open the question: Is the concept of the judicial power of a/the State simply an extension of the notion of the judicial power of the Commonwealth, in terms of sharing the same notion of a single 'judicial power', which is predicated on the basis that its source and foundation is rooted in state statutory, prerogative and common law? Alternatively, should the concept of 'judicial power' be understood differently when it is applied to adjudication on Commonwealth 'matters' and how it functions in relation to non-Commonwealth matters that arise in state jurisdiction?

Underlying the task of differentiating state and Commonwealth judicial power(s) is an unarticulated confusion as between a *monist* formulation that assumes each concept has a degree of substantive correspondence and a formal *dualist* approach that treats, at the extremes, each as a mutually exclusive opposite of the other.

Some, though not necessarily all, of the conceptual relationships between the two generic classes of judicial power, Commonwealth and state, can be depicted by use of the diagrams or circles, as indicated below.⁵⁰ It should be acknowledged, however, that such a depiction is probably overly simplistic in so far as it assumes that there is a common notion of a genus, 'judicial power' which can be subdivided into two other categories of 'Commonwealth judicial power' and 'State judicial power'.

Figure 1

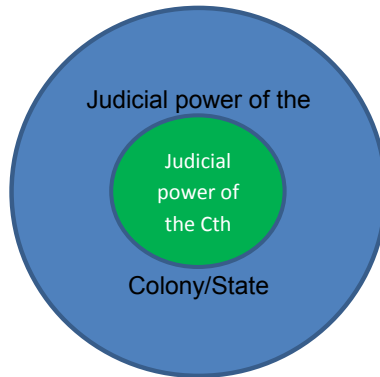


Figure 2

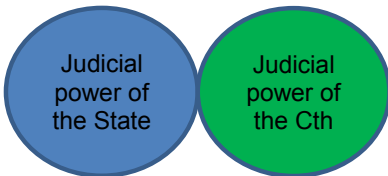


Figure 3

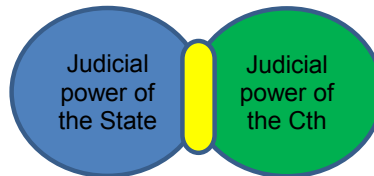


Figure 1 postulates that there is in fact a single entity of judicial power that originally could be identified with the common law and statutory law prevailing in each of the Australian colonies. In due course, following Federation, when some of the matters giving rise to controversies came to be regulated by Commonwealth laws some parts of the pre-existing judicial power came to be constitutionally assigned to what was designated the judicial power of the Commonwealth. Adjudication in relation to such matters then fell to be determined according to the scheme established by Chapter III. Accordingly, while Commonwealth judicial power is a subset of and located within the notion of 'judicial power' it is exclusive of State judicial power, carving out the constitutional space of its own.

In Figure 2 the entities, judicial power of the states and judicial power of the Commonwealth are predicated on the assumption that they are different kinds of jurisdiction,⁵¹ based on a different origins, which may have a 'family' resemblance but are in fact discrete though not dissimilar.

In Figure 3 the assumption is that, irrespective of their origins, the two kinds of judicial power basically share common features and while each may be the subject of separate judicial proceedings, there is nevertheless a potential for overlap and correspondence. In the latter event, as is recognised in cases such as *Fencott v Muller*,⁵² to the extent that there is an

intersection between state laws that regulate the outcome of the dispute on Commonwealth law, the jurisdiction is federalised. In such instances, whether adjudication is by a court of the State or a federal court, the relevant court will be exercising the judicial power of the Commonwealth.

Unresolved issues tending towards incoherence in the High Court's treatment of 'state judicial power'

As foreshadowed above, attempting to delineate the boundaries of each kind of judicial power by seeking to map the juristic fields in which they operate arguably blurs and obscures some of the logical disconnections and contradictions inherent in the several models. At the extreme, one possibility is to deny outright the constitutional, though perhaps not the legal, existence of a judicial power that may be said to reside in the 'State'. Certainly, as stated above, there is no constitutional recognition of an entity known as the judicial power of the State. Legally, although having no constitutional entrenchment, one can metaphorically and perhaps circuitously allude to the judicial power of the State referentially as the kind of non-Commonwealth jurisdiction that is exercised by state courts. Likewise, it is a fallacy, in our submission, to seek to identify the judicial power of the Commonwealth and then to analogise the judicial power of the states to it.

The topic has engaged the attention of the Court on only a few occasions and then, has not been analysed with close attention to its specific relationship with the judicial power of the Commonwealth. In *Kable* itself Dawson J, in dissent, noted that the New South Wales Constitution nowhere provides that 'the judicial power of the State' is vested in the state judiciary.⁵³ He further observed that, although the NSW Constitution had been amended by the insertion of Part 9 ('The judiciary') dealing with matters such as judicial tenure to protect the independence of the state judiciary, the amendments 'clearly do not constitute an exhaustive statement of the manner in which the judicial power of the State is or may be vested. Had [Part 9] attempted such an exercise it would have cut across a long history of the exercise of non-judicial power by the courts and the exercise of judicial power by bodies exercising non-judicial functions'.⁵⁴

In the same case, McHugh J makes only a passing reference to judicial power of the State in the course of one of the seminal judicial statements concerning the interrelationship of state and Commonwealth jurisdiction under Chapter III. Given its centrality and importance, although lengthy, it bears repetition. In *Kable*, His Honour observed:

The [New South Wales Constitution] is not predicated on any separation of legislative, executive and judicial power although no doubt it assumes that the legislative, executive and judicial power of the State will be exercised by institutions that are functionally separated. Despite that assumption, I can see nothing in the New South Wales Constitution nor the constitutional history of the State that would preclude the State legislature from vesting legislative or executive power in the New South Wales judiciary, nor judicial power in the legislature or the executive. Nor is the federal doctrine of the separation of powers - one of the fundamental doctrines of the [Commonwealth] Constitution directly applicable to the State of New South Wales. Federal judicial power may be vested in a State court although that court exercises non-judicial as well as judicial functions. Moreover, when the Parliament of the Commonwealth invests the judicial power of the Commonwealth in State courts pursuant to s 77(iii) of the Constitution, it must take the State court as it finds it. This is because the Constitution recognises that the jurisdiction, structure and organisation of State courts and the appointment, tenure and terms of remuneration of judges of State courts is not a matter within the legislative power of the federal Parliament.⁵⁵

His Honour noted that nevertheless the Constitution required and implied the continued existence of a system of state courts with the Supreme Court at its head. Justice McHugh also went on to hold that implied in the authorities of the Commonwealth Parliament, under Chapter III, to invest state courts with federal jurisdiction, the freedom of the states to confer judicial and non-judicial functions on their courts was not absolute. The states were

constrained by the limitation that they could not confer on a state court a function or procedure that impaired their impartiality and independence. He stated that a State court when it exercises federal jurisdiction 'is not a court different from the court that *exercises the judicial power of the State ...*' adding: 'The judges of a State court who *exercise the judicial power of the State* are the *same judges* who exercise the judicial power of the Commonwealth invested in their courts pursuant to s 77(iii) of the Constitution.⁵⁶ In making these observations, it is significant that his Honour made no attempt to explicate the nature of the judicial power of the State.

The logical incoherence of attempting to define judicial power by reference to something that it is not

Several points may be made about the way that the Justices of the High Court in these few scant allusions have referred to state judicial power. First, in virtually every case the reference is made *en passant* without elaboration about the content of the notion. Secondly, to the extent that there is something to give sense or meaning to the notion it is '*defined*' negatively by *something that is not*. That is, it is represented as a kind of judicial power. It derives its meaning from not being the judicial power of the Commonwealth. Thirdly, it is treated, in so far as it is exercised by state courts or tribunals, as distinguishable from state *non-judicial* power as if the dichotomy relevant to Commonwealth dispute-resolution, mandated by the *Boilermakers* principles, is necessarily inherent in state adjudication.

Logicians and philosophers, such as Hegel,⁵⁷ have long identified the problems of attempting to define something in terms of its *non-identity*.⁵⁸ The project starts to collapse into contradiction and inconsistency when one attempts to give content to a notion such as state judicial power by reference to the way in which it is constituted by elements or characteristics that are not commonly shared with its counterpart notion, in this case Commonwealth judicial power. At best, it only presents an illusion of commonality.⁵⁹

From both a practical and pragmatic point of view, a more complete if not wholly satisfying understanding of the relationship between state and Commonwealth judicial power can be developed by considering them as context-dependent where the context is enlarged to embrace the total constitutional universe represented by the composite states-Commonwealth arrangement, including the function performed by s 106 of the Constitution⁶⁰ and the roles played by courts and tribunals within it.⁶¹

One consequence (and arguably an advantage) of so doing is to restore a more balanced, federally oriented construction of the constitutional disposition of adjudicative power as it affects the states. It tends to mitigate the disequilibrium brought about by giving dominant effect to Chapter III of the Constitution exerting its 'gravitational pull'⁶² towards effecting an alignment or convergence between state and Commonwealth systems of dispute resolution.⁶³

In fact the judicial power of the states and the judicial power of the Commonwealth do not relate to each other in some kind of abstract symmetry where *different notions become assimilated* (or, more generally, produce a *contradiction of some kind*). Nor are they in fact two separate and unrelated expressions, each with its own discrete universal application. The differences between the two cannot be reconciled by reference to a common nature (ostensibly a shared notion of a single 'judicial power') alone. As stated above, to reconcile their differences it is necessary to reposition the debate by reference to something *outside of them*. That point of reference is to be found in the different *origins* of each judicial power in the state constitutions and the Commonwealth Constitution, respectively.⁶⁴ That being the case, the kinds of restrictions on state legislative power imposed under the *Kable-Kirk* doctrines should be seen as extending no further than achieving the protective purposes

implicit in Chapter III of the Constitution.⁶⁵ The application of the principle of 'Occam's razor'⁶⁶ as well as the principle of legality espoused by the High Court demand that any further expansion of *Kable-Kirk* must be supported by clear and convincing justifications.

Relocating the point of reference to the broader constitutional perspective also gives effect to the valuable Jainist insight that no single point of view can reveal the complete truth.⁶⁷ Given the plurality of various modes of existence and qualities, none of which can be completely perceived in all of its manifestations and aspects, a more nuanced understanding can be developed which, while acknowledging the complex and multifaceted nature of the task of constitutional construction, recognises the contingent, although not absolute, validity of interpreting constitutional terms or concepts from a relative point of view in history and time (and having regard to other variables), including new forms of the way in which the Australian constitutional system functions. In other words, the relationship between state and Commonwealth judicial power is so complex that no single proposition can fully express its nature.

Such an approach admits that many interpretative disputes arise out of confusion resulting from adopting a singular standpoint such as, in this instance, attributing a fixed meaning and content⁶⁸ to the concept 'the judicial power of the Commonwealth', with all its concomitant implied restrictions, when attempting to map the boundary lines (assuming that such a demarcation is possible⁶⁹) between it and the ostensible 'judicial power of the States'.

The notion of adjudication as a possible means of synthetically reconciling contradictions and conflicts inherent in the different concepts of judicial power

On the analysis outlined above, the better view is that there is, as depicted in Figure 3 (above), a common area of overlap between the notions of state and Commonwealth judicial power but that, properly appreciated, the correspondence only exists, where the function of a state court or tribunal directly duplicates the functions of federal courts when exercising the judicial power of the Commonwealth (in its confined and narrow sense). Beyond that, in what has loosely been described by the High Court under the rubric of 'the judicial power of the State' there is an assortment of functions and procedures that are aimed at settling disputes between citizens, and citizens and government, but which are of an indeterminate and amorphous nature when compared with the 'matters' enumerated in Chapter III. To attempt to distinguish these by reference to whether they are judicial or non-judicial or judicial and administrative serves no constitutional purpose. Accordingly, we propose to refer to these truly innominate functions in terms of the broad concept of 'adjudication'.

To do so is broadly consistent with the oft-repeated contention that the separation of powers doctrine,⁷⁰ so far as it is predicated on a distinction between judicial and administrative powers, has no application to state constitutions.⁷¹ Whether it dissolves entirely the distinction between state judicial and non-judicial powers is another question. However, for the purposes of the *Kable* doctrine there may be an exceptional and narrow core meaning of state judicial power which is attracted whenever a state adjudicative body, court or tribunal, engages in an exercise of determinative power which involves finding and declaring *the guilt* of a person, resulting in *punishment by deprivation of liberty or property*, or in a wider context, in the exercise of *coercive power* by a state body that otherwise affects *the liberty of the subject or renders their property* liable to confiscation.⁷²

The notion of an adjudicative function exercised by determinative bodies is well known in Australian law. It is, in one special sense, recognised in the Constitution. As extensively discussed in the *Wheat Case (New South Wales v the Commonwealth)* in 1915,⁷³ Part IV of the Constitution, dealing with Finance and Trade envisages the establishment of a body designated as the Inter-State Commission. It is specifically provided, by virtue of s 101, with

such powers of *adjudication* and *administration* as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of the Constitution relating to trade and commerce. On its establishment in 1912, the Commission was empowered to investigate disputes relating to violations of s 92 of the Constitution (guaranteeing freedom of interstate trade) and to grant remedies akin to judicial orders of injunction. The High Court held by majority that the Commission was not one of the three kinds of courts enumerated in s 71 of the Constitution and could not therefore exercise the judicial power of the Commonwealth in so far as it involved issuing what are effectively judicial orders of injunction. Griffith CJ provides some guidance as to the meaning of adjudication by noting that is not true that the function of adjudication is either by common law or by statute confined to courts. For many years in the UK and the Australian colonies and States quasi-judicial powers which could be equated with adjudication had been conferred upon administrative bodies as well as courts. In such cases, it was appropriate to use the word 'adjudicate' to denote the determination of the matter.⁷⁴

Barton J, although dissenting in the result, was on common ground in agreeing that the function of adjudication is not confined to courts nor confined to bodies that are not courts. In short, he held that 'adjudication is a function common to Courts and many other bodies, whether existing under the common law or under legislation.'⁷⁵ To this Isaacs J added that in 1900, when the Constitution was framed, the word 'adjudication' was extensively used to denote decisions of a *quasi-judicial character*, a meaning that had continued, though not enlarged, since that date and the position of persons so adjudicating could be either 'judicial' or 'quasi-judicial' although in each case the body was bound to act *judicially*. Notably, focusing on the use of the word 'adjudication' in s 101 he stated that it was necessary to look beyond the word itself and to determine the *character* of the body (in that case the Inter-State Commission) exercising the power.⁷⁶ Rich J observed that the word 'adjudication' might be wide enough in some contexts to include judicial power in the strict sense. However, in the context of Chapter IV the term was not to be assimilated with the judicial power of the Commonwealth and hence did not permit the Commonwealth Parliament to invest the Inter-State Commission, a body not mentioned in Chapter III, with that power.⁷⁷ Although discussed in the specific constitutional context of Chapters III and IV these dicta recognise the wider concept of adjudication as embracing both judicial and administrative powers. To similar effect, McTiernan J in the *Tasmanian Breweries Case*⁷⁸ remarked that the function of the Trade Practices Tribunal in determining whether a monopolistic trade practice was contrary to the public interest was engaged in a quasi-judicial enquiry that involved adjudication. The concept of adjudication, which includes the ascertainment of facts and a pronouncement of their consequences by the application of some rule or standard, was not distinctive of judicial power exclusively and its exercise was not necessarily inconsistent with executive or administrative action. His Honour recognised that adjudication was a very wide concept embracing a function that could be common to each kind of body, court and tribunal.

It is not necessary when dealing with adjudication by a state body to determine whether a power is judicial or non-judicial. That distinction has been imported into state constitutional law as part of the canon of Chapter III principles founded on the *Boilermakers* doctrine. The constitutional rationale and policy derived from s 77(iii) is sufficiently realised by restricting the *Kable* doctrine to state laws that detract from or impair the independence of state adjudicators who are part of a state 'court' capable of exercising Federal jurisdiction.

Second major issue: the characterisation of particular state adjudicative authorities as 'courts of the state'

To this point, we have addressed the issue of how far the *Kable-Kirk* doctrine potentially inhibits extensions in tribunal adjudication by squeezing an expansive notion of State

adjudication into a narrow mould of State judicial power. If it be accepted that, apart from the restricted category of jurisdiction where a state adjudicative entity, court or tribunal, is concerned with determining issues of criminal guilt and punishment or imposing other restrictions on the liberty of the subject or the liability of their property to confiscation in the criminal context, there appears to be no logical reason why a strict dichotomy between state judicial power and non-judicial power should relevantly restrict the *kind* of function that can be conferred upon such a body.

The second part of the equation to be addressed is delineation of the boundaries of *Kable-Kirk* and the barriers it presents for innovative extensions of tribunal adjudication, and to determine whether a particular state adjudicative body is to be classified as a 'court of the State' capable of exercising the judicial power of the Commonwealth.⁷⁹ If it is not, arguably, it then stands freely outside the shadow of *Kable-Kirk* and can be reshaped and developed as the state government and Parliament see fit.

The High Court has approached the notion of a court of a State by reference to what have been described as its 'defining characteristics'. Formulated in non-exhaustive terms, Chief Justice French in *Totani* identified the 'defining characteristics' of a court within the meaning of Chapter III with the attributes of impartiality, fairness and adherence to the open court principle, to which might be added the capacity to administer the common law system of adversarial trial, observing that it is not possible to expound a single all-embracing definition statement of those characteristics.⁸⁰

Conversely, state legislation which embroiled the court in the implementation of government policy, confining its adjudicative process so that it is directed or required to implement legislative or executive determinations without following ordinary judicial processes is liable to deprive the court of those defining characteristics of impartiality and independence, rendering the court an unsuitable repository of federal jurisdiction.⁸¹

Logical problems with the notion of 'defining characteristics'

The assumption that the nature of something can be defined in terms of its essence can be traced back as far as Aristotle, who drew a distinction between what a word or phrase *means* (its nominal meaning) and its real nature, as manifested in the world.⁸²

Increasingly, under analytic assault from various schools of modern and contemporary philosophy, the classical model based on definition in terms of a thing's essential nature has been shown to be vulnerable to logical objection. This is partly due to the complex nature of notions that have composite and often pluralistic components which often makes it impossible to develop a universal airtight axiomatic system founded on fixed and unchangeable predicates.⁸³

In such instances, discerning the core or internal features of a concept is best approached by employing a notion of conceptual 'clustering'. This still entails classification of the features (or 'bundles' of shared properties) that are associated with a given term by grouping them together into a class by reference to their similarities, but is more amenable to accommodating variations by way of things that may not be present in some manifestations of the concept or additional features that do not detract from the basic model.⁸⁴ Rather, 'definition' is equated with approximations of the basic phenomenon most famously on 'family resemblances' in which there can be varying degrees⁸⁵ of 'fitness'. Such a process of conceptual clustering shares features with fuzzy set theory which accepts that a concept can be blurred at its boundaries but may be open to a classification depending on judgment and grading similarities by the degree to which they correspond between examples within the same group.

Arguably, these considerations are relevant when deciding whether the High Court has arrived at a satisfactory 'definition' by reference to the *essential characteristics* of a court of the State. Rather than apply a template or computer program consisting of a list of specific properties and attributes, all of which must be present to satisfy a fixed definition of a 'court', the task of identification and classification should be directed to a cluster of features which, when present, predominantly permit the conclusion that the body is, within approximate boundaries, such an institution.

The boundary line between courts and tribunals, so-called, is both uncertain and elusive.⁸⁶ Drawing that distinction is not necessarily an easy exercise, as recognised by the plurality in *Kirk* who stated:

Behind these conclusions lies an assumption that a distinction can readily be made between a court and an administrative tribunal. At a State level that distinction may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution.⁸⁷

Accordingly, we advocate that the High Court, in determining whether a particular state adjudicative body is a court for Chapter III purposes should approach the issue in a 'relaxed' way that has broad regard to the composition of the body, the kind of functions that it performs, the process and procedures by which it does so, while allowing a wide margin of difference between courts strictly so called and other administrative bodies.

The most extensive discussion of the content and extent of the notion of a court of the state is the High Court's exploration in *K-Generation*⁸⁸ of the issue whether the South Australian Licensing Court⁸⁹ (which was empowered to grant or deny liquor licences to persons depending on whether, on broad criteria that embraced public interest considerations, they were fit and proper persons to sell liquor) was a court of the State that, in particular respects violated the *Kable* principle. As part of its determination, the Licensing Court could close hearings to the applicants and deny them (contrary to the rules of procedural fairness requiring that a person whose livelihood was at stake be made adequately aware of the case against them in order to have a proper opportunity to reply to adverse information) access to 'criminal intelligence' materials furnished by the South Australian Commissioner of Police to the Court. As a step in deciding whether the procedures of the Court⁹⁰ infringed the *Kable* doctrine it was necessary to decide whether the court was a court of the State capable of exercising Federal jurisdiction.

The High Court concluded that it was such a court although it then went on to decide further that *Kable* had no application insofar as the procedures of the Court, although modifying the rules of procedural fairness, did not unduly interfere with the character of the Court so as to undermine its integrity as an impartial tribunal independent of and standing at arm's length from the executive arm of the state Government.

In coming to their conclusion, the High Court had to deal with the following contentions:

- If the restriction on access to the criminal intelligence were found to be inconsistent with the Licensing Court having the character of a court for constitutional purposes, then the consequence would be that the Licensing Court would not be a court of a State capable of being invested with federal jurisdiction pursuant to s 77(iii) of the Constitution, in which case it would follow that it would not be one of the 'several Courts of the States' invested with federal jurisdiction by s 39(2) of the *Judiciary Act 1903* (Cth);
- The broad public policy function of the Licensing Court in granting or withholding licences was *administrative* in nature, and hence indicative that the Court did not answer the description of a court of a State exercising judicial power for the purposes

of s 77(iii) of the Constitution. It followed that no question of the effect of the procedural restrictions on its fitness as a repository of federal jurisdiction could arise.

The High Court rejected the first proposition that if a State altered the nature of a state court in a way that rendered it unfit to exercise federal jurisdiction then the only consequence was that the body became a tribunal in which the judicial power of the Commonwealth could not be vested. In addressing that proposition, the plurality judgment stated:

[C]onsistently with Ch III, the States may not establish a 'court of a State' within the constitutional description and deprive it, whether when established or subsequently, of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court.⁹¹

As their Honours saw it, the consequences of a measure, which has the constitutional vice, attributed to the offending evidentiary provision in that Act were quite different. The correct position is that such a provision would be invalid and questions of severance from the remainder of the Act might arise, but the Licensing Court would retain its character as a 'court of a State'.⁹²

The conclusion that the Licensing Court was relevantly a court of the State was founded on the following propositions. First, the High Court rejected the submission that if the procedural restriction on access to evidence had the effect which the Licensing Court contended, it would cause the Licensing Court to cease to be a 'court of a State' which might exercise federal jurisdiction. Secondly, it held that whether a particular body fell within the latter description depended on whether it exhibited the *defining characteristics* of a state court, and institutional integrity was not distorted, in this instance procedurally, by the power to limit and the applicant's access to evidence. The latter process did not subject the Licensing Court to direction by the executive or any administrative authority.

In the event, it was not necessary for the High Court to rule on the submission that the broad discretionary nature of the functions of the Licensing Court rendered it an administrative tribunal rather than, in its essential nature, a court. This was because the conclusion was clearly that, both in terms of its function of authoritatively deciding whether a person should be granted a statutory right in the form of a liquor licence and in terms of the procedural powers and orders that it could make, the Licensing Court qualified as a court of the state for the purposes of Chapter III.

Implicit in that conclusion, members of the High Court pointed to the fact that there were a number of ways in which Federal jurisdiction under Chapter III and s 39 of the *Judiciary Act* could be engaged. One instance is where the Commonwealth itself could be a party to proceedings (such as if a Commonwealth authority occupying adjacent premises sought to object to the grant of a liquor licence), or if a person resident in another State sought to intervene in the proceedings; these instances would give rise to a matter under s 75(iii) or (iv) of the Constitution.⁹³

One can question the basis on which federal jurisdiction is said to arise in the latter circumstances. Certainly, one can concede that if there is a property occupied by a Commonwealth authority such as a defence recruiting office adjacent to premises that are the subject of an application to the Licensing Court, the Commonwealth may have an interest in the outcome of the application on whether the licensee-applicant is a fit and proper person. The Commonwealth could, on that basis, seek to become a party to the proceedings. Similarly, if the adjacent owner is a person residing in another State who leases the adjacent premises commercially to someone else, the adjacent owner could seek to intervene and what is known as the diversity jurisdiction exercisable by a court is invoked. But in each instance it can be objected that the federal government is only incidentally (and

perhaps in Dixonian terms, ‘accidentally’⁹⁴) involved and does not, by virtue of the ostensible federal connection, *directly* change the nature of the state jurisdiction in terms of the state law applying to the issue before the state court. For example, the fact that an issue may arise under s 109 of the Constitution, such as where a state planning tribunal may make a decision that could be inconsistent with the law of the Commonwealth, should not prevent the tribunal from determining the matter on policy grounds so long as the state law empowering the tribunal does not seek to make its decision final and authoritative. In the circumstances, it seems strained and even strange⁹⁵ to say that the whole adjudication becomes federalised as an exercise of the judicial power of the Commonwealth. It rather seems a case of the *Kable*-tail wagging the constitutional dog. It also seems discordant with the High Court’s current more sympathetic inclination to maintain the underlying objectives of federation.⁹⁶

In cases where a Commonwealth or Federal interest arises it is certainly incontrovertible that the tribunal may not finally rule on any question of constitutional validity or whether state laws are inconsistent with a Commonwealth law. But, consistent with the decision of Brennan J in *Re Adams and the Tax Agents’ Board*,⁹⁷ the tribunal could proceed to determine the matter, including forming an opinion on the relevant law, and including issues of constitutional validity, in order to ‘mould’ its decision to conform to those limits.⁹⁸ Given that in such cases the Supreme Courts of the states, as well as the High Court itself, retain the authority to exercise judicial review with respect to the decision, any wrong conclusions or opinions expressed by the tribunal will be subject to correction.⁹⁹

Some less significant observations can be made about the High Court’s treatment of other issues in *K-Generation*. In the first place, and uncontroversially, members of the court observed that some indication of the State Parliament’s intentions relating to the nature of the body, naming it as a ‘Court,’ provided some aid to interpretation.¹⁰⁰ That conclusion could be bolstered by having regard to the nature of the judges who comprise the body. If they are officers of an existing judicial institution, that lends weight to the conclusion that the body is a state court. However, no Justice was prepared to express an opinion about whether the constitution of a court or tribunal by such people as retired judges, acting members and short-term appointees, or even totally by non-judicially qualified members would deprive the body of the constitutional attribute of a court of the state.

Kirby J took a more stringent view of the application of the *Kable* doctrine, virtually eliminating the distinction between state courts and tribunals.¹⁰¹ He rejected the contention of one of the states that the *Kable* principle only applies to the purported imposition, by state law, on the Supreme Court of the state of functions incompatible with the exercise by that particular court of federal jurisdiction. Similarly, he did not accept the contention that a departure from standard judicial procedures should not be evaluated by a criterion of incompatibility equivalent to that applicable to federal courts regarding the concurrent exercise of the jurisdiction of federal courts. Accordingly, in relation to the less rigid standard applicable to State courts there was no offence to the *Kable* principle when a State court performed an administrative, not a judicial, function. In that regard, without assimilating and treating as symmetrical the standards applicable to federal and state courts respectively, his Honour, rightly in our submission, looked more to the disabling effect of a procedural departure from normal process rather than whether the court’s function should be classified as administrative or judicial. That is consistent with our view that the nature of state adjudication does not call for such rigid dichotomies but rather the issue is whether the execution of the function affects the liberties of the subject in a way that removes, at least with respect to adjudications entailing criminal elements and the like, the necessary safeguards of impartiality and independence from executive, arbitrary dictation or influence.

Observations on the status of stated adjudicative bodies as ‘courts’ in light of *K-Generation*

The question in the end for state legislators is how much leeway is permissible in creating new tribunals or refashioning existing courts and tribunals. It is important to appreciate that so far *Kable-Kirk* has only operated restrictively to affect state ‘courts’, like the Licensing Court in *K-Generation*, bodies that can be readily classified as such. So long as the High Court in future cases adopts a relaxed view of the kinds of state laws that can be taken to violate the *Kable- Kirk* doctrines state parliaments will enjoy a wide margin of appreciation, not shared by federal courts, in terms of the kind of functions that can be conferred on state inferior courts and tribunals, the way that they are constituted, and the evidentiary methodology and procedures that they employ.¹⁰²

The fact that state courts and judges are not subject to all the separation of powers requirements that apply to federal courts serves to maintain the differentiation between the two kinds of adjudicative bodies.¹⁰³

Central to the High Court’s decision in *K-Generation* is the fact that the Licensing Court was authorised and required to exercise what was clearly judicial power upon justiciable issues (the fitness of applicants for licences) involving interests in property that were susceptible to judicial determination. That the Court was engaged in applying a broad-based, public policy discretion, not dissimilar to deciding whether something is unreasonable or inequitable, did not detract from the conclusions that it truly was a ‘court’. Accordingly, the Licensing Court was bound to observe the *Kable* standards. The Court was not performing purely administrative and non-judicial functions. The High Court found it unnecessary to address whether it still could have been classified as a ‘court’ if it had, although Kirby J tentatively indicated that there would be no reason not to extend the *Kable* principle to bodies performing non-judicial, administrative functions in the course of their duties.

There is, so far, no instance where the High Court has actually had to consider a state adjudicative body that is located in the fringe, borderline region where the nature of its functions, whether judicial or administrative, would prevent it from being vested with the judicial power of the Commonwealth pursuant to s 77(iii).¹⁰⁴

Hence, with little else to go on by way of guidance, we take the Licensing Court in *K-Generation* as the paradigm for our conjecture. Applying the analysis that emerges from that and other cases, a primary division between relevant decision-making bodies (courts and non-courts, usually tribunals) can be proposed having regard to factors such as:

- (Pre-eminently) the degree of the body’s impartiality and independence from governmental influence or direction;
- How the body is constituted (by judges or non-judicial members);
- Its functions (to decide legal issues as against making policy determinations, administrative decisions in lieu of officers of the executive government, or non-binding recommendations, as in the case of a commission of inquiry);
- Its methods of fact-finding, including its procedures and the extent to which the traditional rules of evidence apply (for example, classically neutral, adversarial adjudication as against agency-initiated investigation of issues).

To which may be added:

- The degree of formality and capacity to waive procedural technicalities;
- The body’s reliance on alternative modes of dispute resolution.

As an alternative formulation, in a recent contribution to the debate French CJ extra-judicially noted¹⁰⁵ (but did not resolve) a number of competing views about whether state administrative tribunals were to be regarded as State courts. His Honour postulated¹⁰⁶ the following indicative, non-exhaustive list of factors:

- The conferring upon the court of judicial power – that is to say the authority and duty to decide controversies and to discharge functions traditionally regarded as a subject of judicial power or analogous to such functions.
- The reality and appearance of decisional independence from the Executive and from the legislature.
- Adherence to procedural fairness effected by:
 - (i) impartiality, in reality and appearance;
 - (ii) observance of the hearing rule.
- Adherence to the open court principle.
- Accountability for decisions effected by publication of reasons.
- Whether the tribunal can enforce its own orders ...;¹⁰⁷
- Whether the tribunal is a body composed of judges whose terms and conditions of appointment are not inconsistent with decisional independence;
- Whether the body is one whose members enjoy decisional independence from each other ...¹⁰⁸

In light of the above analysis, does the WA SAT and other similar state general tribunals and Courts fall within the description ‘courts of [the] State[s]’ and come within the meaning of s 77(iii)?

The status of the Western Australian State Administrative Tribunal regarding whether it is a Chapter III ‘court of a State’: Reflections on other adjudicative bodies¹⁰⁹

The High Court has not specifically considered the judicial status of general state tribunals.¹¹⁰ One should therefore have regard to a number of State Supreme Court decisions that have addressed the issue. Importantly, in 2013, QCAT (SAT’s Queensland equivalent) was held to be a court of the State for constitutional purposes.¹¹¹ The Court of Appeal had regard to specific factors, including whether it was a court of record; whether the rules of evidence apply; its limited powers to deal with contempt; the limitations on removal from office; the proportion of judges (number of judges compared to members); the lack of continuing tenure; and the administrative functions of the Judge-President. On those factors, SAT arguably compares ‘equally or better’ with QCAT, except for the ‘court of record’ status¹¹² conferred under QCAT’s parent statute. Thus, under that analysis SAT is also likely be regarded as a court.

While not determining its constitutional status, SAT has been held to be a court at common law. In *Re Carey; Ex parte Exclude Holdings Pty Ltd*¹¹³ Martin CJ regarded SAT as ‘anomalous’ and performing a function analogous to that performed by an inferior court, noting that:

The process of characterisation which is to be undertaken to determine the extent of a body’s jurisdiction is distinct from, but nevertheless has some similarity to the question of whether a body is a ‘court of a State’ within the meaning of [the] Constitution of the Commonwealth. In both exercises, the critical questions are those of function and purpose, not nomenclature ...¹¹⁴

Applying what de Jersey CJ in *Owen v Menzies* called an ‘appropriately broad, overall assessment’ it would seem that, on the type of factors considered in that case and in *Re Carey*, SAT is a court for Chapter III purposes.¹¹⁵

Moving away from general administrative tribunals the position becomes more opaque. One considers emerging new styles of courts designed to meet particular social needs, such as 'drug courts'. Sarah Murray in her recent work, *The Remaking of the Courts*,¹¹⁶ has concluded that, in respect of State Drug Courts, despite extraordinary provisions (such as losing the right to appeal and the right to challenge punitive sanctions), such bodies nevertheless remain courts of a State for constitutional purposes. In her view, despite the significant transformation that they bring to the judicial officer's role they do not offend the institutional integrity of State courts mandated by *Kable*.

On a more cautionary note, French CJ in his paper referred to above appears to be ambivalent about trends such as 'therapeutic jurisprudence' (of which perhaps Drug Courts are a paradigm example), emphasising the 'need for careful consideration of the long-term consequences of devaluing' the 'special character of public adjudication'.¹¹⁷ But, if Murray's overall analysis is broadly correct then such developments are less of a concern for specialist courts and tribunals and are unlikely to jeopardise their status as courts of integrity.

The Hegelian synthesis: Freeing state adjudicative power from the shackles of *Kable-Kirk*

The grand conjecture

Given that the influence of Chapter III on state adjudicative bodies, as mediated by *Kable* and *Kirk*, is essentially restrictive, we contend, first, that the *Kable-Kirk* doctrines should be strictly limited to bodies that have a very close family resemblance, in terms of composition, function and procedures, to federal courts.

Secondly, on our analysis, the *Kable-Kirk* doctrines need and should only apply with respect to bodies that are capable of, and may be called upon to exercise 'judicial power' in its most classical and narrow sense, namely where issues of criminal guilt, detention, punishment, imposition of 'super liabilities', including suspension from professional practice, restriction or confiscation of property rights, and matters falling within the penumbra of those matters are directly engaged.

Thirdly, the *Kable-Kirk* strictures should only apply to a state court or tribunal where the nature of its jurisdiction necessarily, or is likely to, *directly engage* federal jurisdiction rather than indirectly or incidentally. If the circumstances arise that a federal interest is only an incidental aspect of the determination, such as where the Commonwealth is a party or objector, that should not prevent the tribunal exercising its jurisdiction in its normal manner, including performing functions which would on the classical *Boilermakers'* model be regarded as non-judicial.¹¹⁸

Restricting the ambit of *Kable-Kirk* also offers some prospect for resisting the ostensible trend towards convergence within the gravitational field generated by the integrated judicial system under Chapter III and the 'unifying' effect of a single common law.

The scope for adjudicative innovation

If *Kable-Kirk* were so limited then the vast range of adjudicative functions that a State might see fit to regulate through its courts or tribunals would remain vacant for innovation, experimentation and evolutionary expansion in terms of their subject matters and methodologies. The prospect for the States undertaking adjudicative initiatives is therefore not totally dismal.

If the boundaries of *Kable-Kirk* are restricted to their present narrow compass, as we contend, there will be ample terrain for further extensions and expansion of the existing state tribunal systems. There would be no need to distinguish between state judicial and non-judicial functions. Treating determinations of state courts/tribunals as exercises in adjudication would suffice. This could have an important bearing in relation to such jurisdictions as integrity supervision over state government executive bodies and officers, formulation of policy plans and frameworks (both environmental and for resource and urban development strategies and programs), and commercial and professional disciplinary regimes entailing both judicial and non-judicial regulation.

This would be consistent with both the non-application of a broad doctrine of the separation of powers to state governments and the maintenance of federal values preserving state autonomy. It would also prevent the colonisation of state judicial systems by subjugating them to the Chapter III model of strict separation between the judicial and other arms of government, except to the extent that, for the purposes of dealing with matters affecting the liberties and property of subjects, distance is preserved between the judicature and the executive and legislative organs of government. This would mean that the degree of independence and impartiality presently required for state courts and tribunals exercising coercive power would be maintained in close, though not exact, approximation with that required of Commonwealth courts. To operate by reference to such a template needs no further resolution of the logical contradictions inherent in, although camouflaged by, the current *Kable-Kirk* jurisprudence.

So far as the state's freedom to change its present adjudicative systems, courts and tribunals is concerned the proposition that a state cannot abolish or reconstruct any adjudicative body that it has established, with the exception of the Supreme Court, is problematic. The same is true of the proposition that in creating any new courts the states must ensure they are capable of exercising the judicial power of the Commonwealth. The logical flaw in each is exposed if one has regard to the fact that any constitutional mandate that a court of the state must be capable of being vested with the judicial power of the Commonwealth requires Commonwealth legislation to give effect to it. The extent to which the Commonwealth Parliament avails itself of the facility of s 77(iii) of the Constitution is in the end dependent on policy considerations and political discretion. As such, a cautionary approach should be taken to extending *Kable-Kirk* and its present parameters.

Testing the conjecture by hypothesis: a case study, using the State Administrative Tribunal, on adjudication with significant judicial involvement in actual law-making

In Western Australia, a town planning scheme (TPS) may authorise its textual amendment by the adoption of Structure Plan or an Outline Development Plan (ODP), instruments approved by the relevant Local Government itself. A TPS has the force of law. These sub-instruments are of a legislative character, albeit brought into effect by an executive act (ie a decision to approve or to make an ODP).¹¹⁹

The SAT has, under the TPS, jurisdiction to fully review decisions concerning such executive 'acts' and, consequentially, the resulting legislative instruments. Thus, the jurisdiction in effect extends to the 'rewriting' of a TPS by the Tribunal on review. This review jurisdiction could be exercised by a part-time, non-legally qualified Member. (None of this would be possible for a federal court, but a federal judge, *persona designata*, could presumably do the same thing, sitting as, say, a Commonwealth Tribunal with respect to an analogous Commonwealth instrument.)

Further, such exercises may be internally reviewed by a Judicial Member of SAT. That review jurisdiction appears to rule out remittal (by not providing for it¹²⁰). A successful review

seems to require the Judicial Member to go on and determine the matter. Hence, a Judge may be required to or may rewrite a legislative instrument, perhaps even, as mentioned, sitting with respect to a federal territory, and thereby ultimately exercise jurisdiction derived from a federal law.

Arguably, no state or federal law authorising the Tribunal to execute such a function is rendered invalid by operation of Chapter III since the integrity of the State Administrative Tribunal, assuming that it is a relevant court, remains unaffected, despite the legislative task given to it. Further, the Tribunal's jurisdiction does not touch upon matters of punishment, detention or deprivation of property or interests such that it would place the matter in the heartland of *Kable-Kirk*.

Different considerations regarding the Tribunal's perception of independence may operate if the State Parliament required SAT to be involved in the approval (including the formulation) of all such ODPs, even assigning such a task to its original jurisdiction. However, this task may still not impair its institutional integrity.

If the Executive government actually rewrote such instruments itself and SAT was *required* to more or less mechanically endorse them, then presumably, even if it remained a relevant court, its institutional integrity might then be endangered and *Kable-Kirk* might then apply. The question would then be: Would Chapter III render the whole legislative scheme invalid or would the effect be simply to immunise SAT from exercising that jurisdiction? While that latter outcome is preferable, the precise effect of *Kable-Kirk* in such circumstances is ambivalent in the light of *K-Generation*, and must remain speculative.

Thankfully, such a proposal is one that can only be distantly viewed on the far horizon and need not to be answered at this stage.

Conclusions

We have sought to survey and map some clear boundaries within which the *Kable-Kirk* doctrine can be confined so as not to inhibit the freedom of state parliaments to take innovative initiatives with their administrative tribunals. The jurisprudence emerging from *Kable-Kirk* constitutes a 'work in progress' from which, in due course, a coherent theory of judicial functions, both Commonwealth and state, will emerge con-jointly under the Commonwealth and state constitutions.

It remains to be seen to what extent the limitations on state legislative power mandated by Chapter III operate to constrain state legislative initiatives beyond the classic 'court-like' institutions and specific *Kable-Kirk* territory. The conceptual mix of variables, including what kind of adjudicative bodies fall within the description of a court capable of exercising federal jurisdiction, the range of deliberative and determinative functions, judicial or administrative, non-judicial and, more comprehensively, 'adjudicative', that can be conferred upon them, and the types of procedures, both adversarial and inquisitorial, with which they can be endowed, entail an infinitely complex set of possible institutional arrangements that defy either a simple or absolute constitutional categorisation.

We propose that one theoretical (and sensible) rationale of *Kable-Kirk* as it presently stands would be to confine it strictly to situations arising in the immediate region entailing the interrelationship of Commonwealth and State courts (properly so called) where there is a *real potential* for the exercise of jurisdiction conferred upon a State court to adversely affect the *human and democratic rights of the subject*.¹²¹ This would be consistent with the fundamental constitutional objective of protecting persons against arbitrary governmental action that is shared by State courts exercising a judicial review function under state

constitutions as well as maintaining their capacity to exercise conferred federal jurisdiction. It would, for the most part, produce a closely assimilated order in which the judicial power of the Commonwealth, and to the extent that it is federalised, the judicial power of the states, can be exercised with the necessary degree of integrity without unduly trenching on the independence of those institutions to undertake other adjudicative and administrative functions.

We can only hope that the High Court will produce in due course a more coherent adjudicative theory along these lines, based on Chapter III, which will redraw the present limits of the *Kable-Kirk* doctrine.

Endnotes

- 1 For an overview of the growth, diversity and functions of tribunals see, for example, Robin Creyke, 'Tribunals: Divergence and Loss' (2001) 29 *Federal Law Review* 403; and Robin Creyke, 'Tribunals and Access to Justice' (2002) 2 *Queensland University of Technology Law and Justice Journal* 64.
- 2 Although in terms of their individual holdings *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*) and *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 (*Kirk*) can be treated as dealing with different aspects of the attributes essential to maintaining state court systems for the purposes of Chapter III of the Constitution, and hence as separate 'doctrines', the two cases can be viewed, for the purposes of this paper, as twin-authorities founded on the constitutional requirement that state courts be independent of influence or direction by the executive and legislative arms of the states.
- 3 This includes such cases as *Fardon v A-G (Qld)* (2004) 223 CLR 575; *Baker v The Queen* (2004) 223 CLR 513; *North Australian Legal Aid v Bradley* (2004) 218 CLR 146; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *A-G (NT) v Emmerson* (2014) 88 ALJR 522 and *Pollentine v Bleijie* (2014) 88 ALJR 796.
- 4 So far *Kirk* has spawned little off-spring, *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* (2012) 249 CLR 398 being one exception.
- 5 This is the authors' summary.
- 6 This concern was the basis of submissions by Victoria and Queensland in *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 564 where they urged caution before the High Court extended the *Kable* principle to State courts in a way that might impose upon them the rigidities previously accepted only in relation to federal courts and federal judges.
- 7 While most of the general state tribunals that currently exist also provide for the resolution of disputes between individuals (such as in a small claims jurisdiction) it is the potential for conflict between subjects and the arms of state government that forms the basis of the *Kable-Kirk* principles.
- 8 The theoretical basis on which these cases rest has been subjected to considerable academic scrutiny, not always approving. For a sample, see Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175; Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397; Wendy Lacey, '*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641; Oscar Roos, 'Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*' (2013) 35 *Sydney Law Review* 781; Alexander Vial, 'The Minimum Entrenched Supervisory Review of State Supreme Courts: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531' (2011) 32 *Adelaide Law Review* 145; Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1; Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed' (2011) 35 *University of Western Australia Law Review* 227; Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216; Peter Johnston, 'State Courts and Chapter III of the Commonwealth Constitution: Is *Kable's Case* Still Relevant?' (2005) 32 *University of Western Australia Law Review* 211; Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152, 160-65; Tarsha Gavin, 'Extending the Reach of *Kable: Wainohu v New South Wales*' (2012) 34 *Sydney Law Review* 395, and Nicholas Gouliadis, 'Privative Clauses: Epic Fail Critique and Comment' (2010) 34 *Melbourne University Law Review* 870.
- 9 Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5; Matthew Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399; Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305; Ronald Sackville, 'The Constitutionalisation of State Administrative Law' (2012)

- 19 *Australian Journal of Administrative Law* 127, 128–9; Suri Ratnapala and Jonathon Crowe, 'Broadening the Reach of Chapter III: the Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175; Graeme Hill and Adrienne Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adelaide Law Review* 67; and Zach Meyers, 'Revisiting the Purposes of Judicial Review: Can There Be a Minimum Content to Jurisdictional Error?' (2012) 19 *Australian Journal of Administrative Law* 138.
- 10 The expression 'Balkanising' was coined by Robert French in 'Judicial exchange - Debalkanising the Courts' [2005] *FedJSchol* 13 (Federal Court of Australia) in the context of a progressive partial integration of state and Commonwealth courts that commenced when the six Australian colonies became States at Federation in 1901, a pattern which has continued since resulting in what has been called in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 'one system of jurisprudence'. Australia's pluralistic judicial system has not yet, however, reached a state of complete unification, integration and rationalisation. *Kable-Kirk* while contributing to that trend has not reached the end point of that process.
- 11 Regarding the concept of 'administrative justice', see Robert French, 'The Equitable Geist In the Machinery of Administrative Justice' (2003) 39 *Australian Institute of Administrative Law Forum* 1; Robin Creyke, 'Administrative Justice - Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705; Sir Anthony Mason, 'Delivering Administrative Justice: Looking Back With Pride, Moving Forward With Concern' (2010) 64 *Australian Institute of Administrative Law Forum* 4; and John McMillan, 'Ten Challenges For Administrative Justice' (2010) 61 *Australian Institute of Administrative Law Forum* 23.
- 12 The State Administrative Tribunal (WA) (SAT), the Victorian Civil and Administrative Tribunal (VCAT), the Queensland Civil and Administrative Tribunal (QCAT), the ACT Civil and Administrative Tribunal (ACAT), the NSW Civil and Administrative Tribunal (NCAT), the South Australian Civil and Administrative Tribunal (SACAT) and the Northern Territory Civil and Administrative Tribunal (NTCAT).
- 13 We are conscious of the danger of overreaching by attempting to solve too many conundrums in order to propound a 'theory of everything'.
- 14 (1999) 198 CLR 511, [6]-[16] (Gleeson CJ); [31]-[34], [50]-[56] (McHugh J); [110], [121]-[122] (Gummow and Hayne JJ).
- 15 *Ibid* [189]; [201]-[203].
- 16 *Ibid* [227].
- 17 (1929) 42 CLR 48.
- 18 See above n 14.
- 19 To the extent that members of the High Court have spoken about the nature of judicial power, they have done so in terms of its core constituent elements. Thus, McHugh J in *Solomons v District Court (New South Wales)* (2002) 211 CLR 119, [49] speaks of the paradigm case of an exercise of judicial power as involving the making of binding declarations of rights in the course of adjudicating disputes about rights and obligations as a result of the operation of the law upon events or conduct that have or has occurred.
- 20 See, eg the entry on the philosopher, and Gottlob Frege (1848-1925) scholar, Michael Dummett in *The Internet Encyclopedia of Philosophy*, c ii: 'Frege and the Origins of Semantics', <<http://www.iep.utm.edu/>>.
- 21 We capitalise the latter term to emphasise it as a separate entity in its own right.
- 22 (1995) 184 CLR 163. There is extensive academic commentary on *Craig*.
- 23 See, Bruce Topperwien, 'Separation of powers and the status of administrative review' (1999) 20 *Australian Institute of Administrative Law Forum* 32. But of the Chief Justice of Western Australia's critical views on this 'branch' of government found in his Whitmore Lecture 2013, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government'. (Hon Wayne Martin AC, Chief Justice of Western Australia, 1 August 2013, Sydney).
- 24 See Kirby J in *NSW v Commonwealth* (2006) 229 CLR 1, [534] referring to the important advantages of choice and diversity in institutions and approach, inventiveness in standards and entitlements, and scope for appropriate innovation associated with the federal form of government enshrined in the Constitution.
- 25 While s 77(iii) of the Constitution provides the authority for the Commonwealth Parliament to vest the judicial power of the Commonwealth in such courts of the state as it chooses, the vesting has actually been effected by s 39 of the *Judiciary Act 1903* (Cth). Federal jurisdiction is thereby conferred generally upon all state courts capable of exercising that jurisdiction, not classes or individually designated courts.
- 26 While the *Kable* line of cases focuses on the *nature* of various *non-judicial* functions conferred on state courts, logically the flaws and defects that attract the application of *Kable* equally apply to the exercise of *judicial* functions, including the kinds of procedures and evidentiary rules under which they operate.
- 27 As stated by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [63]: 'It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.'
- 28 See also Luke Beck, 'What is a "Supreme Court of a State"' (2012) 34 *Sydney Law Review* 295.
- 29 *Fardon v A-G (Qld)* (2004) 223 CLR 575, [66] (Gummow J); *K-Generation* (2009) 237 CLR 501, [235]-[236] (Kirby J).
- 30 *Kable* (1996) 189 CLR 51, 114-115 (McHugh J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, [32] (McHugh J); *K-Generation* (2009) 237 CLR 501, [208]-[210] (Kirby J).
- 31 The reference to 'two grades of judicial power' first appears in *Kable* (1996) 189 CLR 51, 82, where Dawson J rejects the contention that the impossibility of there being two standards of justice requires an integration

- of state and Commonwealth judicial power to the extent that a state court could not exercise non-judicial powers. McHugh J,115, however, maintains that there are not two grades of federal judicial power such that the Constitution draws no distinction between the exercise of federal judicial power by the State courts and its exercise by federal courts.
- 32 Thus McHugh J in *Kable* (1996) 189 CLR 51, 114, stated that the system of state courts under a Supreme Court with an appeal to the High Court under s 73 of the Constitution was an essential part of the machinery for implementing that supervision of the Australian legal system and maintaining the unity of the common law. Regarding the significance of the High Court's recognition of the unifying effect of the common law see Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337. For the reciprocal relationship, see Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31 *Federal Law Review* 131.
- 33 Gummow J in *Kable* (1996) 189 CLR 51, 143.
- 34 See *Fardon v A-G (Qld)* (2004) 223 CLR 575.
- 35 See *Kirk* (2010) 239 CLR 531.
- 36 To do so would violate the injunction of the High Court in *McGinty v Western Australia* (1996) 186 CLR 140, 168, 182-183, 231, 284-285 that implications drawn from outside the textual structure of the Constitution are impermissible. See further, Brendan Lim, 'Attributes and Attribution of State Courts – Federalism and the *Kable* Principle' (2012) 40 *Federal Law Review* 31.
- 37 Regarding the constitutional notion of incompatibility as applied in *Kable*, see, for example, *South Australia v Totani* (2010) 242 CLR 1.
- 38 That is, as the term functions for the purpose of Chapter III of the Constitution.
- 39 (1908) 8 CLR 330.
- 40 In fact, the notion of a non-exhaustive definition is a contradiction in terms.
- 41 This is a collocation of various pronouncements of the High Court seeking to distil the essential features of the concept drawn from such cases as *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Federated Saw Mill Timberyard & General Woodworkers Employees' Association v Alexander* (1912) 15 CLR 308; *A-G (Cth) v The Queen* (1957) 95 CLR 529 (PC) and *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 (HC); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, and other more recent decisions such as *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; and *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542. It does not seek to accommodate exceptional or otherwise anomalous cases such as *R v Davison* (1954) 90 CLR 353; *Luton v Lessels* (2002) 210 CLR 333, and *Thomas v Mowbray* (2007) 233 CLR 307.
- 42 (1983) 152 CLR 570.
- 43 (2011) 243 CLR 181.
- 44 (2011) 243 CLR 181, [30], citing the observation of Gummow J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [104], that critical notions like repugnancy and incompatibility are unsusceptible of further definition in terms which necessarily dictate future outcomes. They added that the exigencies of government make it necessary to address issues of interpretation such as the separation of powers *flexibly and practically* as a matter of *sensible approximation*.
- 45 (1999) 198 CLR 511, [6]; [10]. Although delivered in dissent this general proposition is arguably true and incontestable.
- 46 Interestingly, to the extent that prior to the abolition of appeals to it from state courts, the Privy Council, which could hear appeals from both state supreme courts and the High Court of Australia, and hence was part of the judicature of each of them, could be said to entertain 'matters' that fell outside the concept of Commonwealth judicial power under Chapter III. Arguably, the same is true of matters that are within the jurisdiction of state courts that lack any federal element.
- 47 (1921) 29 CLR 257.
- 48 (1921) 29 CLR 257, 264, see also *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273, 277 (Barwick CJ).
- 49 *Kable* (1996) 189 CLR 51, 67. Brennan CJ was in dissent in the result, but his observation has a more general import.
- 50 With acknowledgment to the Swiss mathematician Leonhard Euler (1707-83).
- 51 The term 'jurisdiction' is notoriously imprecise and can be used in a variety of senses which depend on the particular statutory context: see *Kirk* (2010) 239 CLR 531, [62]-[64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- 52 (1983) 152 CLR 570.
- 53 *Kable* (1996) 189 CLR 51, 78 (Dawson J).
- 54 *Ibid.*
- 55 *Kable* (1996) 189 CLR 51, 109 (McHugh J) (emphasis added) (citations omitted). His Honour was of course only dealing with the situation under the Constitution of NSW. It is arguable that where *some* State constitutions entrench a judicial review function in their Supreme Courts (as in s 73(6) of the *Constitution Act 1889* (WA)) there is a 'mini-version' of a State-based separation of judicial power mandating the same independence and impartiality as is the case under the *Kable* principle. That proposition was rejected by the WA Full Court in *S (a Child) v The Queen* (1995) 12 WAR 392, 401, but that decision was prior to both *Kable* and *Kirk* and may require reconsideration.
- 56 *Kable* (1996) 189 CLR 51, 114 (McHugh J) (emphasis added).

- 57 Georg Wilhelm Friedrich Hegel (1770-1831).
- 58 That is, defining A, expressed logically as *e*, in terms of something that is not-A (logically $\neg e$) – which is not the same as stating that A is not B (something else).
- 59 In the Hegelian analysis, this was known as the problem of *negative-presence*. The logical consequence is that given the impossibility of identifying the boundaries of one concept by reference to negative features that do not correspond with its counterpart, irreconcilable contradictions and inconsistencies prevent any unified resolution so long as the comparison is sought to be made *internally* and exclusively within the universe of the two comparative notions. A reconciling synthesis can only emerge if one gets the frame of reference to a viewpoint outside or above the singular location of the twin-notions in comparative juxtaposition. Viewed from the perspective of the Hegelian principle of non-identity, and as a generalisation from Gödel's theorem (Kurt Gödel, 1906-1978) that consistency and completeness cannot be immediately present at the same time, the contradictions between the two notions can only be reconciled by shifting the analysis to a broader context.
- 60 The role of s 106 of the Constitution as it affects the relationship between the Commonwealth and state constitutions, receives some consideration, *en passant*, in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 547 (Mason CJ, Wilson and Dawson JJ); *Kable* (1996) 189 CLR 51, 65 (Brennan CJ); 102 (Gaudron J); 140 (Gummow J); *McGinty v Western Australia* (1996) 186 CLR 140, 171-173 (Brennan CJ); and 207-210 (Toohey J); *Yougarla v Western Australia* (2001) 207 CLR 344, 375-380 (Kirby J); *A-G (WA) v Marquet* (2003) 217 CLR 545, [67]-[70], [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ); [190], [205]-[206], [216] (Kirby J) and *Totani* (2010) 242 CLR 1, [64] (French CJ); [206] (Hayne J). For commentary, see Christopher Gilbert, 'Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme Courts' (1978) 9 *Federal Law Review* 348; Peter Johnston, 'Tidying up the Loose Ends: Consequential Changes to fit a Republican Constitution' (2002) 4 *The University of Notre Dame Australia Law Review* 189, 193; Anne Twomey, 'State Constitutions in an Australian Republic' (1997) 23 *Monash University Law Review* 312, 316; Geoffrey Lindell, 'Why is Australia's Constitution Binding? - The Reason in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 40 and Neil Douglas, 'The Western Australian Constitution: Its Source of Authority and Relationship with Section 106 of the Australian Constitution' (1990) 20 *University of Western Australia Law Review* 340. It would also raise the question of the (arguably variable) constitutional meaning(s) of a 'State' and in particular, given the oft repeated mantra that there is no doctrine of separation of powers as such applicable to state constitutions, whether it is meaningful to divide the notion of a state polity into its atomic elements such as its legislative, executive and judicial components, except as necessary to give content to a specific in concrete constitutional expression such as the Parliament of a State (Constitution, s 15) or a 'court of the State' (Constitution, s 77(iii)).
- 61 There are a number of deeper issues that could be explored at this point, if time permitted, particularly concerning the vexed interrelationship of state and Commonwealth constitutions and the role of both covering clause V of the *Commonwealth of Australia Constitution Act 1900* (UK) and s 106 of the Constitution. The notion of 'a Constitution of the State' as constituent elements for the purpose of s 106 would also require exploring the different notions of a 'State' (and its component entities, parliament, executive government and courts).
- 62 James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.
- 63 The tendency towards 'convergence' exerted by the gravitational pull of Chapter III has been explored by Stephen McLeish, 'The Nationalisation of a State Court System' (2013) 24 *Public Law Review* 252 and Simon Young and Sarah Murray, 'An Elegant Convergence? The Constitutional Entrenchment of Jurisdictional Error Review in Australia' (2000) 11 *Oxford University Commonwealth Law Journal* 117.
- 64 Seeking to differentiate the two kinds of judicial power by reference to their *constitutional origins* is open to debate. As Windeyer J said in *Felton v Mulligan* (1971) 124 CLR 367, 393, (approved by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller* (1983) 152 CLR 570, 606): 'The existence of federal jurisdiction depends upon the *grant of an authority* to adjudicate rather than upon the *law to be applied* or the subject of adjudication.' (emphasis added). However, if by 'grant of an authority' their Honours meant *constitutional sources*, this statement is not inconsistent with the proposition that we have put forward.
- 65 The *protective* objective of the *Kable* principle is enunciated by Kirby J in *K-Generation* (2009) 237 CLR 501, [232]. His Honour held that once a body is characterised as a 'court of the State' within s 77(iii), it is part of the integrated Judicature of the Commonwealth and attracts the *Kable* standards to protect the litigants who invoke its jurisdiction.
- 66 William of Ockham (c 1285- c 1349); ie, paring all assumptions to the minimum.
- 67 See, eg, *The Internet Encyclopedia of Philosophy* entry: 'Jain Philosophy – 2 Epistemology And Logic', <<http://www.iep.utm.edu/>>: 'Underlying Jain epistemology is the idea that reality is multifaceted ... such that no one view can capture it in its entirety; that is, no single statement or set of statements captures the complete truth about the objects they describe.'
- 68 Such words (meaning and content) are often used interchangeably (see, for example, *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ)), however we mean 'denotation' (meaning) and 'composition or nature' with reference to content.
- 69 Perhaps the concept of judicial power is so amorphous that no 'boundary line' or marker-pegs can delineate the respective fields; perhaps any boundary lines that can be suggested are so porous that they admit exceptions that largely render this attempt to distinguish the two concepts as effectively meaningless or inutile.

- 70 Although the absence of a separation of powers under state constitutions has long been acknowledged (see the cases and authorities cited by French CJ, n 37, in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, including Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 344–349) it should be noted that the denial of such a doctrine in state constitutional law has been directed to the specific kind of *separation of judicial power* as mandated by Chapter III. This is to be distinguished from the different requirements of an implied impartiality and independence of courts under the *Kable* doctrine which, although derived from specific provisions in Chapter III, are confined to the limited universe of ensuring that state courts borrowed for the purpose of exercising the judicial power of the Commonwealth retained, as the core attribute, the requisite degree of impartiality and independence. To the extent that Justices such as Dawson J, in *Kable*, (see at 77-78) have stated that there is no equivalent doctrine of separation of powers operating in the constitutional sense in New South Wales, his Honour's observations should be confined to New South Wales specifically and not extrapolated to those other Australian states whose constitutions entrench the judicial review function of their Supreme Courts.
- 71 See Kenny J in *Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172, [24]-[27] (FC) in which her Honour distinguishes the notion of state executive power from that exercised by the Commonwealth under s 61 of the Constitution, as is discussed in *Williams v The Commonwealth* (2012) 248 CLR 156.
- 72 On analysis, the High Court cases where *Kable* has been invoked (above n 3) can be distributed among four broad categories, the first three of which concern criminal proceedings where preventative detention of a person, over and above any prison sentence, is authorised for the protection of the community (*Kable*, *Fardon* and *Baker*, for example); a person, by reason of his or her connection with the group declared to be unlawful association, is subject to restrictive constraints on their liberty and freedom of association (*Gypsy Jokers*, *K-Generation*, *Totani* and *Wainohu*) or the property of the person is legislatively confiscated upon conviction of repeated offences (*Emmerson*). These are all concerned with the nature of the function performed by the court or the procedures required to be observed. The fourth category, which for analytic purposes need not be considered further, is exemplified by *Forge* where the *Kable* challenge was directed *not* to what the court is *required to do* but rather *how it is constituted* in terms of its judicial membership. Since formulating these categories in our initial draft we note that Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175, also argue that these decisions including *Kirk* can be placed into four interrelated categories; the first dealing with the constitution of state courts in the strict sense of the term; the second concerning impermissible grants of jurisdiction to state courts or judges as *personae designatae*; the third, dealing with impermissible withdrawal of jurisdiction from state courts and the fourth concerning itself with procedural guarantees associated with the doctrine of institutional integrity. Even if these categorisations are variations within the same theme, our basic contention is that the *Kable-Kirk* doctrines can be conceptually confined within a relatively restricted class involving the classic exercise of judicial power in circumstances where the liberty or property of the subject is entailed.
- 73 *Wheat Case* (1915) 20 CLR 54.
- 74 See, *Wheat Case* (1915) 20 CLR 54, 64 (Griffiths CJ) citing *Leeson v General Council of Medical Education* (1889) 43 Ch D 366, 379 (Cotton LJ) that the word 'adjudication' is well known to lawyers, and regarded as apt to describe the functions of an *administrative body entrusted with quasi-judicial powers*.
- 75 *Wheat Case* (1915) 20 CLR 54, 70.
- 76 *Wheat Case* (1915) 20 CLR 54, 83; 87.
- 77 *Wheat Case* (1915) 20 CLR 54, 109-110.
- 78 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 371.
- 79 As Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139, 141 indicates the distinction between courts and administrative tribunals, at the state level, is not straightforward since, although in *Kable* and *Kirk* there is much discussion of the 'essential features' of courts of the state there is in fact no unmistakable hallmark to identify a court. In *Kirk*, [68], the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) identified the distinction between courts and administrative tribunals as the lack of authority of an administrative tribunal to finally determine questions of law. What is essential and what goes to the existence of judicial power are highly contestable questions that are dependent upon the relevant state law. Certainly, some state general administrative tribunals closely resemble courts in terms of their procedures and the capacity to interpret the law and determine rights but that those features alone might be illusory. The distinction is 'blurred' by the fact that a tribunal may be a court for one purpose but not necessarily for the purpose of s 77(iii) of the Constitution.
- 80 *Totani* (2010) 242 CLR 1, [62]-[68] (French CJ).
- 81 *K-Generation* (2009) 237 CLR 501, [82].
- 82 *Posterior Analytics*, Bk 1 ch 4.I. Determining the essential nature of something involves a comparative exercise distinguishing between those features that the expressive model shares in common with other phenomena of the *same* kind as well as differentiating the features that are not inherent as between those phenomena. This necessarily entails a deductive process of categorisation requiring some classification of their salient attributes. As part of that process, Aristotle distinguished between the terms that we give to a subject, defining the kind of thing it is *in itself*, as against those attributes, described as its properties, which are inherent in it. According to the classical view, categories should be clearly defined, mutually exclusive

- and collectively exhaustive. This way, any entity of the given classification universe belongs unequivocally to one, and only one, of the proposed categories.
- 83 See, Seibt, Johanna, 'Process Philosophy', in *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), <<http://plato.stanford.edu/archives/fall2013/entries/process-philosophy/>>.
- 84 Again, Aristotelian analysis distinguishes between essential properties which had to be present in order to characterise a particular theme 'is' and accidental properties which could be present or absent without detracting from that essential nature. It also accommodates an overlap between corresponding features of different models where *p* is a feature common to both but where the two models might share overlapping characteristics [*p and q*] and still be classified as 'the same'.
- 85 Fuzzy logic, like the cognate concept of probability, addresses the problem of *definitional uncertainty*. Fuzzy logic, given the indeterminacy of a class definition, asks *how much* a variable property or quality is in a set of characteristics (either entirely, partially or not in the set). The degree to which the 'defining characteristics' are present in the set can be conveyed, linguistically, by 'hedge' adverbs such as 'very' or 'largely'. Fuzzy set theory stands in contradistinction to the precise, exact true/false distinctions of classical Aristotelian logic.
- 86 Regarding the different natures of tribunals and courts, see Allan Hall, 'Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal' (1994) 22 *Federal Law Review* 13; Enid Campbell, 'The Choice Between Judicial and Administrative Tribunals and the Separation of Powers' (1981) 12 *Federal Law Review* 24 and Duncan Kerr, 'State Tribunals and Chapter III of the Australian Constitution' (2007) 31 *Melbourne University Law Review* 622.
- 87 *Kirk* (2010) 239 CLR 531, [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Regarding this observation, Matthew Groves, 'Reforming Judicial Review at the State Level' [2010] *UMonashLRS* 5 comments: 'In [*Kirk* at [69]] the High Court noted that the distinction between courts and tribunals "may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution." This cryptic passage might be interpreted as an acceptance of the blend of judicial and administrative functions that has arisen in some State tribunals.'
- 88 *K-Generation* (2009) 237 CLR 501.
- 89 The *name* given to the institution, whether a court, commission or tribunal, is not determinative: see *Forge* (2006) 228 CLR 45, [61] (Gummow, Hayne and Crennan JJ).
- 90 Set forth in s 28A of the *Liquor Licensing Act 1997* (SA).
- 91 *K-Generation* (2009) 237 CLR 501, [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). In maintaining this submission that if the procedural restriction so altered the character of the Licensing Court as to render it no longer a 'court of a State' which might exercise federal jurisdiction, two of the intervening States further contended that this was not inconsistent with the implied requirement under s 77(iii) that the states maintain a system of courts capable of being invested with federal jurisdiction. That was because the creation or abolition of any single court, other than the Supreme Court, was entirely a matter for the state concerned. There is some sense in this proposition if one regards s 77(iii) as operating distributively and in an ambulatory way upon the state courts that do exist at any one time without taking the first step that a state cannot abolish or alter any such a court. Given that vesting jurisdiction requires statutory intervention by the Commonwealth, as is the case with the enactment of s 39 of the *Judiciary Act 1903* (Cth), s 77(iii) has only a contingent and temporary operation. To assert that once the *Judiciary Act 1903* (Cth) came into operation it rigidly fixed the nature of particular state courts so that they could not be altered would seem to contravene the *Melbourne Corporation* doctrine as reformulated in *Austin v New South Wales* (2003) 215 CLR 185.
- 92 *Ibid* [154].
- 93 These possible issues capable of attracting Federal jurisdiction are noted in *K-Generation* (2009) 237 CLR 501, [222]. For example, where a State planning court was involved with a Commonwealth authority, see *Defence Housing Australia v Randwick City Council* [2013] NSWLEC 59 (DHA, a party, was there held to be the 'Crown in right of the Commonwealth').
- 94 Reflecting their counterparts in Aristotelian logic, Dixon CJ employed the distinction between essential, accidental and incidental, notably in the *Boilermakers' case* itself: *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254, 275-276 as well as other cases such as *Greutner v Everard* (1960) 103 CLR 177, 185-186 and *Hall v Braybrook* (1956) 95 CLR 620, 626; 635.
- 95 That is, indifferent or alien to the *purpose* of s 39(2) of the *Judiciary Act 1903* (Cth) in vesting Federal jurisdiction in a state court.
- 96 This respect for the original objectives of the Federation is evident in such recent cases as *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156, and *Williams v Commonwealth* (2014) 88 ALJR 701, where the High Court held that there were limits on the capacity of the Commonwealth government to fund directly projects in the States outside the heads of Commonwealth legislative power by relying on the executive power of the Commonwealth under s 61 of the Constitution to expend Commonwealth moneys. The Court held instead that in such cases payments to the intended recipient should be channelled via the states as grants of financial assistance under s 96 of the Constitution. In that regard there is a parallel between ss 77(iii) and 96. In restricting the scope of the Commonwealth spending power under s 61 by reference to the constitutionally-provided means in s 96 the Court seems to have treated the latter as a *constitutionally embedded* provision, without taking into account that s 96 is vulnerable to *legislative repeal* under s 51(xxxvi) of the Constitution. Is there then some analogy with

- Chapter III in so far as the vesting of state courts with federal jurisdiction is not *constitutionally entrenched* but is still contingent on the exercise of legislative power by the Commonwealth Parliament? Repeal of s 39 of the *Judiciary Act 1903* (Cth) or its amendment to operate in only very specific circumstances, such as vesting particular nominated state court with relevant jurisdiction, reveals the truly transitory and very fragile basis on which the edifice of *Kable* has been erected. The same is not true, however, as to the entrenched nature of the supervisory jurisdiction of state Supreme Courts as declared to be the case in *Kirk*. The constitutional basis for that entrenchment is the constitutionally preserved jurisdiction exercised historically by colonial supreme courts in the 19th century as an essential characteristic of those supreme courts.
- 97 (1976) 1 ALD 251 (AAT). The extent to which a body like the SAT can make rulings based on prohibitions derived from the Commonwealth Constitution has not been determined by the High Court. As a matter of practice there are examples where state tribunals have proceeded to do so: see, eg *Treby and the Local Government Standards Panel* (2010) 73 SR (WA) 66 (Pritchard DCJ) ruling on whether the implied freedom of political communication applied in relation to an alleged breach of local government conduct rules. Likewise, what jurisdiction is being exercised when a Tribunal invokes s 109 of the Constitution to resolve conflicts of laws? See, eg, *Adi Limited and Commissioner for Equal Opportunity* [2005] WASAT 259 (Equal Opportunity exemption application); and *Lenzo and Executive Director, Department of Fisheries (WA)* [2005] WASAT 218 (applicable fisheries laws). *Shaboodien and Dental Board of Western Australia* [2008] WASAT 102 required Barker J to examine the Mutual Recognition arrangements between the States and the Commonwealth flowing from both statute and the Constitution.
- 98 *Ibid* 253-255 (Brennan J); Robin Creyke & John McMillan, *Control of Government Action*, (LexisNexis Butterworths, 3rd edition, 2012) 280.
- 99 This would include determining issues of validity of the kind considered in *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410.
- 100 Cf *K-Generation* (2009) 237 CLR 501, [83]-[85] on establishment as a 'court of record' (French CJ); see also *Forge* (2006) 228 CLR 45, [61] (Gummow, Hayne and Crennan JJ).
- 101 *Ibid* [157]; [202].
- 102 See also, Enid Campbell, 'What are Courts of Law?' (1998) 17 *University of Tasmania Law Review* 19.
- 103 In *Kirk*, at [69], the plurality stated: 'Behind these conclusions lies an assumption that a distinction can readily be made between a court and an administrative tribunal. At a State level that distinction may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution.' Similarly, Kirby J in *K-Generation* (2009) 237 CLR 501 stated, [229]: 'There is substance in the submission advanced by Victoria regarding the well-established principle that State courts and judges are not subject to all of the separation of powers requirements as have been held to apply to federal courts and judges. Any statement of the *Kable* principle therefore needs to reflect appropriately that differentiation.'
- 104 The proposition that a body cannot be vested with the judicial power of the Commonwealth if it performs non-judicial functions inimical or antithetical to its capacity to exercise such federal jurisdiction is logically circular if it rests upon the foundation of the state law empowering it disqualifying it from being a 'court'.
- 105 Robert French, 'Essential and Defining Characteristics of Courts in an Age of Institutional Change' (2013) 23 *Journal of Judicial Administration* 3.
- 106 *Ibid* 11, citing *Totani* (2010) 242 CLR 1 that 'perhaps the most important of the characteristics of a court is its *decisional independence* from the Executive and from other external influences'.
- 107 This was held not to be essential in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
- 108 The significance of decisional interdependence in multi-member courts at intermediate or final appellate level would no doubt arise for consideration if a state law were passed requiring such courts to produce only one majority judgment and prohibiting the publication of dissenting judgments, testing the boundaries of what is and is not essential to the characterisation of a decision-making body as a court.
- 109 See also, David Rowe, 'State Tribunals Within and Without the Integrated Federal Judicial System' (2014) 25 *Public Law Review* 48.
- 110 Although it has considered special function bodies like the NSW Industrial Relations Commission in *Kirk* and the SA Licensing Court in *K-Generation*.
- 111 *Owen v Menzies* [2013] 2 Qd R 327(CA); [2013] HCATrans 18. Special leave to appeal was refused: n 371. The views of the Federal and NSW courts on this same issue are discussed in this case. Now see *Qantas Airways Ltd v Lustig* [2015] FCA 253 (Perry J) holding the opposite to the Queensland position with respect to VCAT. Curiously, *Owen v Menzies* was, apparently, not cited to her Honour.
- 112 Cf *Lane v Morrison* (2009) 239 CLR 230 (military justice and courts of record). Cf above n 100.
- 113 (2006) 32 WAR 501, [115].
- 114 See also *Mustac v Medical Board of WA* [2007] WASCA 128 (the extent to which the State Administrative Tribunal was bound by court precedents); *BGC Construction and Vagg* [2006] WASAT 367 (SAT awarding interest under statute as a 'court').
- 115 Cf *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142 (VCAT as a judicial organ of the State for commercial arbitration purposes), but cf the cases cited [73] n 49 (Beach JA). See also, Maya Narayan, 'Creature of Statute, Beast of Burden: The Victorian Civil and Administrative Tribunal and the Heavy Lifting of Human Rights' (2011) 66 *Australian Institute of Administrative Law Forum* 1. Now see also, *Qantas Airways Ltd v Lustig* [2015] FCA 253 (Perry J) holding that VCAT is not 'a court of a State' for Chapter III purposes.

- 116 (Federation Press, 2014), see ch 6.
- 117 (2013) 23 *Journal of Judicial Administration* 3, 5.
- 118 We do not address here issues such as whether the Commonwealth would be constitutionally bound by the relevant state law or whether it should be taken to submit itself to that law. Similarly, we do not address the question of whether the Commonwealth Parliament could legislatively reduce the impact of *Kable-Kirk* by amending s 39(2) of the *Judiciary Act 1903* (Cth) so that, say, it only vests the judicial power of the Commonwealth in specified state courts (such as if prescribed by regulation from time to time).
- 119 Under applied Western Australian law, such state jurisdiction could potentially exist with respect to a federal territory, by reason of a Commonwealth law. See *Gaseng Petroleum (Christmas Island) and Shire of Christmas Island* [2005] WASAT 208 (a town planning case on review, from Christmas Island).
- 120 *Planning and Development Act 2005* (WA), s 244 (internal review by a Judicial Member only on a question of law as to non-legally qualified members' planning decisions). This is very much a truncated and summary procedure, done on the papers. Although remittal orders have been made by SAT's Judges, it would appear that an express grant of statutory authority to do the same is required. Cf *State Administrative Tribunal Act 2004* (WA) s 105(9)(c), powers of the Supreme Court on appeal from SAT, and cf *Linou v Mason and Workers Compensation Appeal Tribunal* (1992) 59 SASR 117, 122-123 (FC); *Wormald International (Aust) Pty Ltd v Aherne* [1995] NTSC 69, [5] (Mildren J); *Hewett v Medical Board of Western Australia* [2004] WASCA 170, [230] (Miller J); *R v Dodds; Ex parte Smith* [1990] 2 Qd R 80 (FC), all of which cases have held that an express power to remit is needed. Further, the summary nature of the review may be frustrated by finding an implied power of remittal.
- 121 In such cases, which bear a strong element of criminal jurisprudence, it is imperative to keep the courts, both federal and state, at arms' length from the executive (a kind of constitutionalisation of the procedural fairness/bias rule) or to strike down state laws that impermissibly mandate draconian procedures egregiously departing from traditional common law, adversarial standards, such as where the legislature dictates a given outcome (representing a constitutionalisation of the 'fair hearing' rule). To apply such an implied limitation to state laws as the essence of *Kable-Kirk* is arguably consistent with the High Court's direction that implied prohibitions should only be recognised *to the extent that they are 'necessary'*.

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Parliament passes the Tribunals Amalgamation Bill

On 14 May 2015 the Commonwealth Parliament passed the Tribunals Amalgamation Bill, a significant reform, which will merge the key Commonwealth merits review tribunals into one body.

From 1 July 2015, the Social Security Appeals Tribunal (SSAT) and the Migration Review Tribunal–Refugee Review Tribunal (MRT–RRT) will join the Administrative Appeals Tribunal (AAT).

This is the biggest reform to the Australian administrative law system since the AAT was established in 1975 as a generalist merits review tribunal with broad jurisdiction.

Bringing the tribunals together will enhance access to justice through the provision of a single, simple point of contact for users of the tribunal. It will adjudicate over 40,000 applications every year, providing fair, just, economical, informal and quick reviews of administrative decisions.

Expertise that is essential to managing matters in specialist jurisdictions will be maintained, while procedures will be harmonised and simplified wherever possible.

The merger will achieve savings of \$7.2 million over four years through shared back office functions and property holdings.

Applicants will come to the merged tribunal to challenge Government decisions in areas such as: tax matters; visa applications; social security benefits; workers compensation; disability support; freedom of information requests and veterans' entitlements.

The new AAT will commence under the leadership of Justice Duncan Kerr *Chev LH* as President.

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/SecondQuarter/14-May-2015-Parliament-passes-the-Tribunals-Amalgamation-Bill.aspx>

Tax complaints to move from Commonwealth Ombudsman

The way in which people complain about the Australian Taxation Office and Tax Practitioners Board will change from 1 May 2015.

Legislation transferring the tax complaints role from the Commonwealth (Taxation) Ombudsman to the Inspector-General of Taxation (IGT) will come into effect on that date and from then most tax complaints will need to be directed to the IGT.

The Ombudsman will continue to receive complaints concerning Public Interest Disclosures or Freedom of Information issues about the ATO or Tax Practitioners Board.

Commonwealth Ombudsman Colin Neave said he would work with the IGT to minimise confusion or inconvenience to taxpayers, and that arrangements for the transfer of the function were in place.

<http://www.ombudsman.gov.au/media-releases/show/243>

Office of the Australian Information Commissioner cooperates with international counterparts to finalise Adobe investigation

The Australian Privacy Commissioner, Timothy Pilgrim, has found that Adobe Systems Software Ireland Pty Ltd (Adobe) breached the *Privacy Act 1988*, following a cyber-attack that affected at least 38 million Adobe customers globally, including over 1.7 million Australians.

Recognising the global nature of this incident, the Commissioner's investigation was conducted in cooperation with the Data Protection Commissioner of Ireland and the Office of the Privacy Commissioner of Canada.

The Commissioner's investigation found that Adobe failed to take reasonable steps to protect all of the personal information it held. 'The Privacy Act does not require an organisation to design impenetrable systems, however, this case demonstrates the importance of organisations applying sufficiently robust security measures consistently across systems,' Mr Pilgrim said.

The personal information compromised in the attack was held on a backup system that was designated to be decommissioned. The information included email addresses, encrypted passwords, plain text password hints and encrypted payment card numbers and payment card expiration dates.

'Adobe generally takes a sophisticated and layered approach to information security and the protection of its IT systems,' Mr Pilgrim acknowledged. 'However I was particularly concerned about the way in which Adobe protected its customers' email addresses and associated passwords in the compromised system.'

The type of encryption that Adobe used for the customer passwords stored in its backup system, together with password hints stored in plain text, allowed security experts to identify the most common passwords and the customer accounts associated with those passwords.

'I am satisfied that the measures that Adobe took in response to the data breach will assist it to significantly strengthen its privacy framework and meet its obligations under the Privacy Act. I have asked Adobe to engage an independent auditor to certify that it has implemented the planned remediation, and to provide me with a copy of the certification and auditor report by 30 June 2015', Mr Pilgrim said.

As this breach occurred prior to 12 March 2014, Adobe was subject to the National Privacy Principles (NPP). The Commissioner's investigation focused on NPP 2 (use and disclosure) and NPP 4 (data security):

- NPP 2 stated that an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection, unless a listed exception applies.
- NPP 4.1 provided that an organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

NPP 2 was replaced on 12 March 2014 by Australian Privacy Principle (APP) 6, and NPP 4 was replaced by APP 11. The requirements of these APPs are substantially similar to the two NPPs.

Further, as the breach occurred before 12 March 2014, the Privacy Commissioner's powers, under the *Privacy Act 1988*, to resolve the investigation were limited to making recommendations.

The OAIC and Data Protection Commissioner of Ireland exchanged information about the data breach in accordance with the Memorandum of Understanding on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in the Private Sector, which they entered into on 25 April 2014. See OAIC website: www.oaic.gov.au/about-us/corporate-information/memorandums-of-understanding/mou-oaic-dpci.

The OAIC and Office of the Privacy Commissioner of Canada exchanged information under the APEC Cross-Border Privacy Enforcement Arrangement: APEC Cross-Border Privacy Enforcement Arrangement (PDF).

The full report can be accessed on the OAIC website: www.oaic.gov.au/privacy/applying-privacy-law/commissioner-initiated-investigation-reports/adobe-omi

<http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/office-of-the-australian-information-commissioner-cooperates-with-international-counterparts-to-finalise-adobe-investigation>

Oversight of the *Public Interest Disclosures Act 1994* (NSW) Annual Report 2013-2014

On 7 May 2015, the NSW Ombudsman tabled his office's third annual report under the *Public Interest Disclosures Act 1994* (NSW) (*PID*). The report provides a snapshot of the disclosures made and handled by public authorities that year. It also outlines the work of the office in monitoring the way in which public interest disclosures are dealt with through interactions with public authorities, the complaints handled and the audits conducted.

The report discusses the growing awareness of the *PID* and the protections it affords for reporters. Despite this, there are challenges and barriers which impede effective internal reporting, such as the management of people involved in the process, and their workplaces; the intention is to minimise the disruption and conflict that can result from reporting.

<https://www.ombo.nsw.gov.au/news-and-publications/news/oversight-of-the-public-interest-disclosures-act-1994-annual-report-2013-2014>

Southern Phone Company's silent number privacy breaches

The Australian Communications and Media Authority (ACMA) has found that Southern Phone Company Limited (SPC), by inadvertently removing the silent number classification from its customer records when uploading customer data to the Integrated Public Number Database (IPND), contravened:

- clause 4.6.3 of the Telecommunications Consumer Protections Code (the TCP Code);
- clause 5.12 of the IPND Industry Code; and
- subsection 101(1) of the Telecommunications Act 1997.

The ACMA has now directed SPC to comply with the privacy clauses of the TCP Code and accepted an enforceable undertaking offered by SPC.

The ACMA investigation found that SPC failed to protect the privacy of 3,854 silent line customers resulting in their telephone numbers and associated name and address details being published in three Australia-wide online public number directories between 18 March 2014 and 24 July 2014. In addition, some of the affected customers also had their service details published in various regional hard copy directories. SPC notified all affected customers of the incident and offered customers the option of a new telephone number free of charge.

'Failure by a telco provider to honour a customer's request for a silent number is an issue that the ACMA takes very seriously, particularly given that such requests often arise from concerns over personal safety,' said ACMA Chairman, Chris Chapman.

The Enforceable Undertaking (EU) commits SPC to upgrade its data collection, engage an independent auditor to review its processes, instigate a comprehensive education and training program, and comprehensively report to the ACMA. Failure to meet the EU exposes SPC to Federal Court action.

SPC has fully cooperated with the ACMA during the investigation and acknowledged that the ACMA had reasonable grounds to make its findings.

The ACMA consulted with the Office of the Australian Information Commissioner during the investigation.

The ACMA will closely monitor SPC's compliance with the EU and direction.

<http://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Obligations/southern-phone-companys-silent-number-privacy-breaches>

Appointment of NSW Ombudsman

On 9 June 2015, NSW Premier Mike Baird announced the appointment of Professor John McMillan AO as NSW Ombudsman, succeeding Bruce Barbour, whose term concluded on 30 June.

At his own request, and because he is aged 65, Professor McMillan has been appointed in an acting capacity for a two-year term.

Professor McMillan is the inaugural Australian Information Commissioner and was Commonwealth Ombudsman between 2003 and 2010. He is an Emeritus Professor of the Australian National University.

'I welcome the appointment of Professor McMillan, whose skills and experience put him in an ideal position to help ensure our public agencies maintain a world's-best level of performance,' Mr Baird said.

'Professor McMillan will take over responsibility for Operation Prospect, which Mr Barbour has progressed to its concluding stages, and I look forward to a comprehensive report as soon as possible.

'Finally, I would like to commend Mr Barbour for his service to NSW,' Mr Baird said.

<https://www.nsw.gov.au/media-releases-premier/appointment-nsw-ombudsman>

The Australian Human Rights Commission welcomes progress on constitutional recognition

Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has welcomed the release of a Joint Parliamentary report on constitutional recognition of Aboriginal and Torres Strait Islander peoples.

The Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was tabled in Federal Parliament on 25 June 2015.

‘The options set out in this report will help guide our discussions at the upcoming bipartisan summit on constitutional recognition,’ Commissioner Gooda said.

‘We need urgent bipartisan agreement on the path forward and a consensus on the question to be put to the Australian public in a referendum.

‘I hope that an agreement on the way forward is reached quickly, and with the involvement of Aboriginal and Torres Strait Islander peoples.

‘As I have said before, we cannot afford to let constitutional recognition of Aboriginal and Torres Strait Islander peoples fall from public consciousness.’

The report also recommended the insertion of the United Nations Declaration on the Rights of Indigenous Peoples in the Human Rights Act.

‘Together with constitutional recognition, the Declaration is a blueprint for realising the rights of Aboriginal and Torres Strait Islander peoples,’ Commissioner Gooda said.

<https://www.humanrights.gov.au/news/media-releases/commission-welcomes-progress-constitutional-recognition>

Annual report on the operation of the Charter released

After eight years of operation, Victoria’s Charter of Human Rights and Responsibilities has moved beyond simple compliance with the law to proactively shaping and improving public sector decision-making.

The annual Charter report, tabled in the Victorian Parliament on 25 June 2015, provides further evidence that since its inception in 2006, the Charter has become a catalyst for change that has promoted and strengthened a culture of human rights across Victoria.

Victorian Equal Opportunity and Human Rights Commissioner Kate Jenkins says, ‘This year’s report gives a clear picture of how far the Charter has come.

‘In many ways, it is now part of everyday business for public authorities to consider human rights when they make decisions that affect people, but is also more than just ticking a box. The critical shift has been towards addressing systemic issues in human rights as the Charter is used in more sophisticated ways when authorities are developing and reviewing policies.

This means the Charter is working as intended, however, some of the disturbing issues raised in this year's report show that there are still a number of areas where human rights practices can be improved.'

In addition to the usual consultations with state government departments, statutory agencies, local councils and community organisations, the Commission this year invited more than 50 community organisations to complete a human rights survey. Government departments and agencies were also given the opportunity to provide comments on specific human rights issues.

The key issues raised this year include the impact on Victoria's tough on crime reforms as well as the experience of children and young people in the criminal justice system. Concerns over increased rates of incarceration of Aboriginal women were also highlighted, in addition to the rights of LGBTI people and the barriers faced by Victorians with disabilities when reporting crimes.

A number of high profile family violence related deaths in Victoria in the first half of 2014 also raised the issue of human rights obligations for Government.

'We need to keep building on the progress we've made to ensure that the Charter continues to be a key driver in organisational behaviour through to law reform efforts aimed at protecting and promoting human rights for all Victorians,' Ms Jenkins said.

This year also sees the Eight Year Review of the Charter. The Commission has made a submission, incorporating 27 recommendations to further strengthen the Charter and to enhance the development of a human rights culture in Victoria.

As a new and developing law, the Charter required a review after four years of operation and again after eight years. The reviews provide an important opportunity to strengthen and build understanding on the role the Charter can play to improve human rights outcomes for all Victorians. The eight year review of the Charter is being conducted by independent reviewer Michael Brett Young. He is due to report to the Attorney General on his review by 1 September 2015.

<http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/media-releases/item/1261-annual-report-on-the-operation-of-the-charter-released>

Recent Cases in Administrative Law

The fair-minded observer and the Staffordshire terrier

Isbester v Knox City Council [2015] HCA 20 (10 June 2015)

Following a hearing before the Knox Domestic Animals Act Committee of the Knox City Council (the panel), a delegate of the respondent who was the Chairperson of the panel made a decision under s 84P(e) of the *Domestic Animals Act 1994* (Vic) (the *Act*) to destroy the appellant's Staffordshire terrier (Izzy). Section 84P(e) of the *Act* provides the Council with the power to destroy a dog where its owner has been found guilty of an offence under s 29 of the *Act*. The appellant had been convicted in the Ringwood Magistrates' Court of an offence under s 29(4) of the *Act*, on a charge that her dog had attacked a person and 'caused serious injury'.

Another member of the panel (Ms Hughes), who had participated fully in the panel's decision-making process and drafted the reasons for the decision, was an employee of the respondent whose duties included the regulation of domestic animals under the *Act*. Ms Hughes had also been substantially involved in the prosecution of the appellant in the Magistrates' Court and the investigation that resulted in those proceedings. Prior to the hearing the appellant was informed that 'the officer involved in the investigation may be present but they will not be involved in the decision-making'.

The appellant unsuccessfully sought judicial review of the respondent's decision in the Victorian Supreme Court. The appellant then appealed to the Court of Appeal of the Victorian Supreme Court, which dismissed the appeal. By grant of special leave, the appellant appealed to the High Court.

The issue before the High Court was whether the decision to destroy the dog should be quashed because of the substantial involvement of Ms Hughes both in the prosecution of the charges concerning the dog and in the panel's decision to destroy the dog.

The High Court unanimously allowed the appeal. The High Court found that a fair-minded observer might reasonably apprehend that the respondent's employee (Ms Hughes) might not have brought an impartial mind to the decision to destroy the appellant's dog, because her role in the Magistrates' Court proceedings gave her an interest that was incompatible with her involvement in the decision making process of the panel.

The High Court held that, although another member of the panel was responsible for making the decision to order the destruction of the dog, there was still an apprehension that the involvement of the respondent's employee in the Magistrates' Court prosecution might affect not only her own decision-making, but also that of the other members of the panel. The High Court found that natural justice required that she not participate in making the decision, and that the decision of the respondent's delegate must therefore be quashed.

Procedural fairness and flexibility in Tribunal hearings

Uelese v Minister for Immigration and Border Protection & Anor [2015] HCA 15 (6 May 2015)

The appellant is a Samoan born New Zealand citizen who moved to Australia in 1998. When he arrived in Australia he was granted a Class TY Subclass 444 Special Category (Temporary) visa, which allows him to remain in Australia indefinitely, while he is a New Zealand citizen. The appellant has a 'substantial criminal record' for the purposes of s 501(7)(c) of the *Migration Act 1958* (Cth) (the *Act*). In 2012, on the basis of that criminal record, a delegate of the Minister for Immigration made a decision under s 501(2) of the *Act* to cancel the appellant's visa.

The appellant applied to the Administrative Appeals Tribunal (the Tribunal) for review of the delegate's decision. Under a ministerial direction made pursuant to s 499 of the *Act*, the Tribunal was required to consider the best interests of any minor children in Australia affected by the cancellation of the appellant's visa. The appellant made submissions about the best interests of three of his children. However, during cross examination of his partner, in the Tribunal hearing, it also emerged that the appellant has two other younger children from a different relationship. It was unclear as to why the appellant did not acknowledge these children.

Section 500(6H) of the *Act* provides that the Tribunal must not have regard to any information presented orally in support of a person's case unless it has been provided in a written statement to the Minister at least two days before the Tribunal holds a hearing. The Tribunal held that s 500(6H) prevented it from considering the position of the appellant's two

youngest children from a different relationship and affirmed the delegate's decision to cancel the appellant's visa.

The appellant applied to the Federal Court for judicial review of the Tribunal's decision. That application was dismissed. The appellant then appealed to the Full Court of the Federal Court. That appeal was also dismissed. By special leave, the appellant appealed to the High Court.

The High Court unanimously allowed the appeal. The High Court held that s 500(6H) does not preclude the Tribunal from considering information, which is not presented by or on behalf of an applicant for review as part of his or her case. The Tribunal, acting upon its erroneous understanding of the effect of s 500(6H) of the *Act*, truncated the review which it was required to undertake.

The High Court held that s 500(6H) should not be construed to restrict the flexibility of the Tribunal to ensure procedural fairness to the parties to a review beyond what is required by its terms (see s 33(1) of the *Administrative Appeals Act 1975*). In particular the Tribunal failed to have regard to whether the interests of the appellant's two youngest children would be best served by cancelling his visa. As a result, the Tribunal did not conduct the review required by the *Act*, and consequently acted beyond its jurisdiction (see *Minister for Immigration and Citizenship v Li* [2013] HCA 18).

Valid applications and incorrectly completed forms

Hassan v Minister for Immigration [2015] FCCA 894 (27 January 2015)

The applicants sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) that an application lodged was not a valid application for review. Under s 347 of the *Migration Act 1958* (Cth) an application for review had to be made in the approved form, by the person who was the subject of the decision, in this case, the visa applicant, not the sponsor.

The applicant's solicitor lodged the approved application form; however, Questions 3 and 5 of the form, which required the name and contact details of the person applying for review, were incorrectly filled out with the sponsor's details, rather than the primary visa applicants' details. Nevertheless, the completed form correctly contained full details of the decision sought to be reviewed, and all the visa applicants' details, and the declaration to be signed by each person applying for review was signed by the visa applicant and his wife.

The Tribunal focused on Question 3 of the form, which incorrectly set out the sponsor's name and took the view that the person applying for review was not the visa applicant and therefore there was no valid application.

The applicants then sought judicial review of this decision by the Federal Circuit Court of Australia.

The issue before the Court was whether the visa applicant was the person who made the application for review and, if so, whether the information on the face of the form fulfilled the purpose of the form and substantially complied with it (s 25C of the *Acts Interpretation Act 1901* (Cth)).

The Court held that the applicants, despite providing the incorrect details in Question 3, had made a valid application. The completed form was in substantial compliance with the relevant legislative requirement. The form itself as it had been completed contains all of the details necessary to determine whether it is a valid application. It contains full details of the

decision that is sought to be reviewed. It contains all the visa applicants' details, as would be required whether described as the visa applicant or the review applicant. It also describes all of the other visa applicants, which form part of the one family. Significantly, at the end of the form, the formal declaration section clearly identifies that the person that is seeking this review and lodging the form is the visa applicant himself.

THE IMPORTANCE OF LEGISLATIVE DRAFTERS – CHALLENGES PRESENTED BY RECENT DEVELOPMENTS IN THE COMMONWEALTH JURISDICTION

*Stephen Argument**

This paper discusses the important role of drafters of delegated (or subordinate) legislation¹ in the Commonwealth jurisdiction. The discussion is set against some recent developments in the Commonwealth jurisdiction and the challenges that those developments present to the role that legislative drafters play in the making (and parliamentary scrutiny) of delegated legislation.

The use of 'legislative rules' in preference to regulations

Early in 2014, the Minister for Industry made the *Australian Jobs (Australian Industry Participation) Rule 2014*. The Rule was made under section 128 of the *Australian Jobs Act 2013* (Cth). It was first considered by the Senate Standing Committee on Regulations and Ordinances (Senate Committee) in the context of its *Delegated legislation monitor No 2 of 2014*. The Committee stated:

Prescribing of matters by 'legislative rules'

The committee notes that this instrument relies on section 128 of the Australian Jobs Act 2013, which allows for various matters in relation to that Act to be prescribed, by the minister, by 'legislative rules'. While the explanatory statement (ES) for the instrument does not address the issue, as far as the committee can ascertain this is a novel approach to the prescribing of matters in Commonwealth legislation, insofar as Acts usually provide for matters to be prescribed, by the Governor-General, by 'regulation'. The committee notes that the latter approach to prescribing matters is consistent with the definition in section 2B of the Acts Interpretation Act 1901, which provides that, in any Act, 'prescribed' means 'prescribed by the Act or by regulations under the Act'. This being so, the committee is uncertain as to whether the prescription of matters by 'legislative rules' is also consistent with the Acts Interpretation Act 1901.

More generally, the committee notes that the making of regulations is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and Executive Council, respectively. To the extent that these requirements may be taken as an additional layer of scrutiny in the prescribing of matters by regulation, it is not clear whether these requirements will also apply to legislative rules and, if not, what the ramifications may be for both the quality of, and level of scrutiny applied to, such instruments. **The committee therefore requests further information from the Minister for Industry.**² [emphasis added]

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This paper was originally prepared for presentation at the Canadian Institute for the Administration of Justice National Conference on 'Nudging Regulations: Designing and drafting regulatory instruments for the 21st century', held in Ottawa on 8 and 9 September 2014. The paper has been updated to reflect various further developments. It is now published with the kind permission of the CIAJ.

Since 1904, when a definition of ‘prescribed’ was introduced into the *Acts Interpretation Act 1901* (Cth), Australian legislation has operated on the basis that Acts allowed for certain things to be ‘prescribed’ by regulations made under the Act. Indeed, the use of ‘prescribed’ was commonly read as meaning ‘prescribed *by the regulations*’. Regulations have always been drafted by the relevant Commonwealth drafting office³ *at no charge to the instructing agency*

The First Parliamentary Counsel’s (FPC’s) first response to the Senate Committee’s concerns

Not novel

The Minister for Industry responded to the Senate Committee’s initial comment in a letter dated 18 March 2014. The letter included a detailed response from the First Parliamentary Counsel (FPC), Mr Peter Quiggin PSM.⁴ Among other things, the FPC letter took issue with the characterisation of the new approach as ‘novel’ and referred to various previous Acts that, in his view, demonstrated that the approach was ‘not novel’.⁵

Relevance of the definition of ‘prescribed’ in the Acts Interpretation Act

On the issue of the definition of ‘prescribed’, the FPC response stated:⁶

There is no legislative principle or practice that requires the word ‘prescribe’ to be used only in relation to regulations. The definition of ‘prescribed’ in section 2B of the *Acts Interpretation Act 1901* (the *AIA*) is a facilitative definition that was intended to assist in the shortening of Acts. However, current legislative drafting practice is to rely on the definition sparingly (even for regulations) because the definition appears not to be widely known by users of legislation, it has no application to the making of instruments apart from regulations and can be uncertain in its application. Under the definition matters can be prescribed by the Act itself or by regulations under the Act.

Thus, prescription of matters by legislative rules is not inconsistent with the *AIA*. The definition simply does not apply to rules or other types of instruments other than regulations.

Resources issue

Importantly, the FPC response also stated:⁷

Since the transfer of a subordinate legislation drafting function from the Attorney-General’s Department to OPC in 2012, OPC has reviewed the cases in which it is appropriate to use legislative instruments (as distinct from regulations). OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate to do so.

The FPC response went on to say:⁸

OPC’s view is that some types of provisions should be included in regulations and be drafted by OPC as the Commonwealth’s principal drafting office, unless there is a strong justification for prescribing those provisions in another type of legislative instrument. These include the following types of provisions:

- (a) offence provisions;
- (b) powers of arrest or detention;
- (c) entry provisions;
- (d) search provisions; and
- (e) seizure provisions.

Then, the FPC response stated:⁹

OPC's view is that it should use its limited resources to best effect and focus its resources in drafting subordinate legislation that would most benefit from its drafting expertise. Further details about OPC's approach are set out in Drafting Direction 3.8, which is available on OPC's website at https://www.opc.gov.au/about/draft_directions.htm.

The FPC response indicates that he is seeking to do less drafting within his office because he has a resources issue. But the unavoidable effect of what he is doing is to push additional work on to agencies that similarly have resources issue, because of budget cuts across the Commonwealth public service. This must result in a negative effect on the drafting of delegated legislation in the Commonwealth.

The FPC's responsibilities under the Legislative Instruments Act

After referring to a series of recent Acts in which the legislative rules approach had been used, the FPC stated:¹⁰

OPC's approach is consistent with the *Legislative Instruments Act 2003* (the *LIA*) and the First Parliamentary Counsel's functions and responsibilities under the *LIA*. Under the *LIA* all disallowable legislative instruments are subject to the same high-level Parliamentary scrutiny. Also, under the *LIA* the First Parliamentary Counsel's responsibility to encourage high standards in drafting of legislative instruments applies to all legislative instruments and not just regulations.

Without mentioning the provision specifically, the FPC is presumably referring to his obligations under section 16 of the *Legislative Instruments Act 2003* (Cth) which provides:

16 Measures to achieve high drafting standards for legislative instruments

- (1) To encourage high standards in the drafting of legislative instruments, the First Parliamentary Counsel must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments.
- (2) The steps referred to in subsection (1) may include, but are not limited to:
 - (a) undertaking or supervising the drafting of legislative instruments; and
 - (b) scrutinising preliminary drafts of legislative instruments; and
 - (c) providing advice concerning the drafting of legislative instruments; and
 - (d) providing training in drafting and matters related to drafting to officers and employees of Departments or other agencies; and
 - (e) arranging the temporary secondment to Departments or other agencies of APS employees performing duties in the Office of Parliamentary Counsel; and
 - (f) providing drafting precedents to officers and employees of Departments or other agencies.
- (3) The First Parliamentary Counsel must also cause steps to be taken:

- (a) to prevent the inappropriate use of gender-specific language in legislative instruments; and
- (b) to advise rule-makers of legislative instruments that have already been made if those legislative instruments make inappropriate use of such language; and
- (c) to notify both Houses of the Parliament about any occasion when a rule-maker is advised under paragraph (b).

His response concludes as follows:¹¹

Whether particular legislative rules are drafted by OPC is a matter for agencies to choose. OPC will continue to be available, within the limits of its available resources, to draft (or assist in the drafting of) legislative rules for agencies as required. In this respect legislative rules are in no different position to other legislative instruments that are not required to be drafted by OPC.

The issues mentioned above set the framework for the discussion with the Senate Committee that followed.

The Senate Committee's response

The Senate Committee responded to the FPC's first response in its *Delegated legislation monitor No 5 of 2014*.

Not novel?

In response to the 'not novel' issue, the Senate Committee contrasted the approach taken in section 128 of the *Australian Jobs Act 2013* (Cth) with the 'traditional' approach in Australian legislation, under which regulation-making powers were set broadly, in terms of prescribing what was 'required or permitted' or 'necessary or convenient' for carrying out or giving effect to the Act, while the power to make non-regulations legislative instruments was generally expressed by reference to specific functions. The Senate Committee stated:¹²

In the committee's view, the broadly-construed regulation-making power may be contrasted with the usually more specific or constrained provisions allowing for the making of other types of instruments. However, in the present case, section 128 of the *Australian Jobs Act 2013* provides:

128 The Minister may, by legislative instrument, make rules (legislative rules) prescribing matters:

- (a) required or permitted by this Act to be prescribed by the legislative rules; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Further, **the *Australian Jobs Act 2013* does not contain a regulation-making power. The committee notes that the broadly-expressed power to make legislative rules in the *Australian Jobs Act 2013* therefore effectively replaces the regulation-making power.** [emphasis added]

The fact that the *Australian Jobs Act* did not contain a regulation-making power was a significant issue for the Senate Committee. It went on to state:¹³

With this context, the committee notes that many of the examples referred to by FPC appear to be distinguishable from this broad power to make legislative rules in the absence of a regulation-making power. A number of these may be distinguished on the basis that:

- the relevant instrument-making power is not expressed in as broad a manner in which the legislative-rule making power is expressed in the present case (for example, they are limited to matters 'required or permitted' by the Act, but not to things 'necessary or convenient');

- the rule-making power is complemented by the inclusion of a broadly defined regulation-making power expressed in the usual terms; and
- the rule-making power is constrained by being permitted only in relation to specific parts or subdivisions of the relevant Act (or to specific items).

However, with the exception of the *Income Tax Assessment Act 1997*, the committee notes that seven of the remaining eight examples listed in paragraph 12 provide analogous powers to the legislative rule-making power in the *Australian Jobs Act 2013*. That is, the following Acts provide for a broad rule-making power that appears to take the place of a general power to make regulations:

- *Asbestos Safety and Eradication Agency Act 2013*;
- *Australia Council Act 2013*;
- *Australian Jobs Act 2013*;
- *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*;
- *Public Governance, Performance and Accountability Act 2013*;
- *Public Interest Disclosure Act 2013*; and
- *Sugar Research and Development Services Act 2013*.

The committee notes that these Acts are all dated 2013 and, according to the FPC's advice, were drafted 'since the transfer of the subordinate legislation drafting function to the Office of Parliamentary Counsel in 2012'.

The Senate Committee also picked up on the FPC's reference to Drafting Direction 3.8:

In light of the above, the committee considers that FPC's advice tends to confirm the view that the provision for a broadly-expressed power to make legislative rules in place of the regulation-making power is a novel approach, employed in the drafting of Acts only since 2013. Further, **the committee notes that on 6 March 2014 (subsequent to the committee's initial comments on this matter), OPC circulated revised Drafting Direction No 3.8, which included the addition of extensive instruction on the use of 'general instrument-making powers' of this kind.** The committee notes that Drafting Direction No 3.8 appears to confirm the inclusion of such powers in delegated legislation as a novel approach (emphasis added). It states:

It has long been the practice to include general regulation making powers in Acts.

More recently, an approach has been taken to adapt that practice for other legislative instruments. [emphasis added]

The Senate Committee then turned to the fact that, in its assessment, the inclusion of a general rule-making power in Acts was something of a surprise. The Senate Committee stated:¹⁴

With the exception of the *Public Governance, Performance and Accountability Act 2013 (PGPA Act)*, the committee is not aware of any reference to the inclusion of a general rule-making power in place of the regulation-making power in the explanatory memorandums (EMs) for these Acts. The EM for the *PGPA Act* stated (p 58):

Using rules, rather than regulations, as the form of legislative instrument is consistent with current drafting practice. The Office of Parliamentary Counsel reserves the use of regulations to a limited range of matters that are more appropriately dealt with in regulations made by the Governor-General than in an instrument made by some other person. Matters in this category include offence provisions, powers of arrest or detention, entry provisions and search or seizure provisions. The rules will be legislative instruments subject to disallowance by Parliament and will sunset under the provisions of the *LI Act*.

In the committee's view, the EMs for these Acts did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of the regulation-making power. The committee's current inquiries seek to provide that opportunity.

While the committee acknowledges that agencies must seek to best use often limited resources, the committee considers that what appears to be a potentially significant change or addition to the use of the general regulation-making power should not be effected solely through agency policy.

The new approach had not previously been directly raised with the Senate in any meaningful way. In all the circumstances, this would appear to have been a less-than-optimal means of introducing the new approach.

Resources issue

On the 'resources' issue, the Senate Committee sought to pursue with the FPC the particular issue of the likely effect of the new approach on the quality of drafting. The Senate Committee stated:¹⁵

Ramifications for the quality and scrutiny of legislative rules

The committee notes that the broader thrust of its comments on the prescribing of matters by the general instrument-making power relate to the ramifications of this approach for the quality and level of executive and Parliamentary scrutiny applied to such instruments.

FPC's advice notes that instruments made under the general instrument-making power may now be drafted by agencies (unlike regulations, which are required to be drafted by OPC). OPC may, however, draft or assist agencies 'within the limits of available resources'. In the committee's experience, regulations are characterised by the highest drafting standards, and it seems unlikely that agencies are equipped to achieve the same standards in the drafting of instruments under the general instrument-making power. In particular, the committee notes that regulations may be lengthy and complex, covering a range of matters as permitted by the general power on which they are based. Given this, the Parliament's ability to scrutinise instruments that are of a similar character, but not drafted, and subject to only limited oversight, by OPC, may be adversely affected where the highest standards are not maintained.

The Senate Committee then sought the Minister for Industry's advice in relation to the following questions:¹⁶

- Regarding FPC's advice that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument', in the event that such provisions are required for the Acts listed on page 3 above, how will the required measures be introduced in the absence of a regulation-making power?
- Will the drafting of complex and lengthy instruments by departments and agencies based on the general instrument-making power achieve the same levels of quality and accuracy as achieved by OPC in its drafting of regulations?
- What is the minister's understanding of the fundamental or original reason for requiring regulations to be drafted by OPC and made by the Governor-General? Do such requirements ensure higher standards in such instruments by mandating greater executive responsibility and scrutiny?

The FPC's second response to the Senate Committee's concerns

The Minister for Industry responded to the Senate Committee in a letter dated 5 June 2014.¹⁷ Again, the response included a detailed response from the FPC. In addition, the Minister's covering letter opened up a new issue. The Minister stated:

I am concerned that the Rule, which serves an essential function has become the vehicle by which the Committee is exploring OPC's drafting practice of including a rule-making power in primary legislation as opposed to the more traditional regulation-making power. In particular, I note that the Committee has taken the step of having moved a notice of motion to disallow the Rule, notwithstanding the Committee's queries do not relate to the substance of the Rule itself, but rather to the underlying power authorising the making of the instrument.

The Senate Committee had moved a 'protective' notice of motion in relation to the Rule.¹⁸

The Senate Committee's response to the FPC's second response

In *Delegated legislation monitor No 6 of 2014*, the Senate Committee responded to the Minister's comment (at pages 10 to 11):

In relation to the minister's view that the matters in question 'cannot be resolved in the context of scrutiny of this rule', the committee notes that the question of whether the Parliament regards the new general rule-making power as appropriate to the exercise of the Parliament's delegated legislative powers goes fundamentally to the committee's institutional role and the principles which inform its operation.

The delegation of the Parliament's legislative power to executive government involves a 'considerable violation of the principle of separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'. This principle is effectively preserved through the committee's work scrutinising delegated legislation, and the power of the Parliament to disallow delegated legislation.

'Tied work'

In the second response, the FPC acknowledges that the drafting of legislative instruments that are to be made or approved by the Governor-General are, under the *Legal Services Directions 2005*, 'tied work'. This means (in essence) that the drafting can only be undertaken by the OPC (see paragraph 7 of the second response). Though not explicitly acknowledged in the FPC's second response, the work in question must be carried out without cost to the instructing agency.

The second response goes on to state (at paragraph 11):

The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

Section 16 of the Legislative Instruments Act

In the second response, the FPC specifically refers to his responsibilities under section 16 of the *Legislative Instruments Act*. He then goes on to state (at paragraphs 15 and 16):

I am also required to manage the affairs of OPC in a way that promotes the proper use of the Commonwealth resources that OPC is allocated (see section 44 of the *Financial Management and Accountability Act 1997*), including resources allocated to the drafting of subordinate legislation.

I consider that [Drafting Direction] 3.8 is an appropriate response to these responsibilities in relation to the drafting of Commonwealth subordinate legislation.

Volume of legislative instruments

At paragraph 17 of the second response, the FPC gives some figures in relation to the volume of legislative instruments. However, he concludes by stating:¹⁹

As mentioned in my previous letter, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

Division of material between regulations and legislative instruments

At paragraphs 24 to 25 of the second response, the FPC addresses the issue of the division of material between regulations and legislative instruments, stating:

Before the issue of [Drafting Direction] 3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments.

The response goes on:

...[Drafting Direction] 3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so drafted by OPC and considered by the Federal Executive Council. I would welcome any views that the Committee may have on the appropriate division of material between regulations and other legislative instruments and would be happy to review [Drafting Direction] 3.8 to take into account any views the Committee may have.

Quality and accuracy of drafting of instruments not tied to the OPC

The second response states:²⁰

I remain of the view that OPC's drafting approach to instrument-making powers is measured and appropriate and will, over time, raise standards in the drafting of legislative instruments and support the ability of the executive and Parliament to scrutinise instruments appropriately.

... The quality and accuracy of the drafting of an instrument not tied to OPC under the Legal Services Directions is a matter for the responsible agency (and the rule-maker). As discussed above, in my view, the approach taken in [Drafting Direction] 3.8 will contribute to raise the standard of legislative instruments overall.

No information is provided in the second response as to *how* this raising of standards is to be achieved.

The Senate Committee's response to the FPC's second response

The Senate Committee responded to the second FPC response in its *Delegated legislation monitor No 6 of 2014*.²¹ The Senate Committee stated:²²

The committee notes the advice of FPC that, where provisions that should continue to be included in regulations (according to the recent OPC drafting directions relating to the use of legislative rules) are required, 'it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions'.

However, the committee notes that there is no absolute requirement for such matters to be included in regulations, and it is unclear how, and by whom, decisions will be made regarding whether or not there is a 'strong justification' for not including such matters in regulations. The committee notes that the stated effect of implementing legislative rules is to make agencies and departments responsible for the drafting of such instruments; and that FPC has previously advised that OPC will draft or assist agencies only 'within the limits of available resources'. The committee considers that, on its face, the new arrangement carries a significant risk that drafting standards may suffer, and that matters will be improperly included in rules. This is particularly so given FPC's advice that 'requiring regulations to be drafted by OPC and made by the Governor-General provides for higher drafting standards and an additional level of executive scrutiny'.

The committee notes that, to the extent that the implementation of the general rule-making power leads to a diminution in the quality of drafting standards, there is likely to be a corresponding increase in the level of scrutiny required to be applied by the Parliament. Such an outcome would effectively fracture the longstanding requirement of direct executive control of, and responsibility for, the standards of drafting in relation to the exercise of the broadly expressed power delegated by the Parliament to the executive.

The FPC's third response to the Senate Committee's concerns

In a letter dated 2 July 2014, the FPC responded directly to the Senate Committee's (at that stage) most recent comments.²³

Drafting standards

After re-stating his view that the OPC does not have the resources to draft all Commonwealth subordinate legislation, 'nor is it appropriate for it to do so', the FPC stated (at paragraph 12):

In my view, the approach set out in [Drafting Direction] 3.8 will allow OPC to ensure that it has the capacity to draft the instruments that have the most significant impacts on the community. It will enable OPC to draft the most significant instruments itself and allow it either to draft or assist agencies to draft other instruments. These services include instrument design and template development, editing, commenting on draft instruments and providing advice. In my view this approach will enhance, and not diminish, the overall quality of legislative instruments and ensure that the most significant matters receive the highest level of drafting expertise and executive scrutiny.

In my experience at the OLDP/OPC, between 2007 and 2013 (with section 16 of the *Legislative Instruments Act* operating for the whole of that period), I saw no evidence of instrument design or template development for agencies. Editing of or commenting on draft instruments was also actively discouraged. If these activities are carried out in the future then it will be a most welcome innovation.

Scope of general rule-making powers

The FPC's third response also included some significant suggestions in relation to the scope of general rule-making powers. At paragraph 18 of the response, the FPC stated that, in his view, the kinds of provisions that he had originally indicated would not (without 'strong justification') be included in legislative instruments other than regulations (ie offence provisions, powers of arrest or detention, etc), would, in fact, not be authorised by a general rule-making power. The FPC stated that, in his view, such provisions would require an express authorising provision for them to be able to be included in rules (as would be the case for their inclusion in regulations).

The third response goes on to state:²⁴

However, it may be possible to make the matter even more certain. For example, standard form of rule-making power ... could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

... Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement of compliance with the standards. This would achieve a high level of transparency and should facilitate the Committee's scrutiny function.

These are welcome and timely suggestions.

The Senate Committee's response to the third FPC response

The Senate Committee responded to the third of the FPC's responses in its *Delegated legislation monitor No 9 of 2014*.²⁵ In relation to the quality of drafting issue, the Senate Committee stated:²⁶

... the committee notes that FPC's view and assurances that the new general-rule making power will 'enhance, and not diminish, the overall quality of legislative instruments'. However, it remains unclear to the committee how this outcome will be achieved in practice, given that departments and agencies will have responsibility for the drafting of rules.

... In addition to these questions, it is unclear to the committee what mechanisms are available to OPC to monitor the quality of drafting of instruments based on the new general rule-making power; and what resources and mechanisms may be available to OPC to respond in the event that drafting standards do in fact suffer.

In relation to the issue of the division of material between regulations and other legislative instruments, the Committee stated:²⁷

The committee notes FPC's statement that certain types of provisions such as offence, entry, search, seizure, and civil penalty provisions would not be authorised by either a general regulation-making power or a general rule-making power:

Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

However, FPC's statement leaves open the question of whether the inclusion of these types of provisions in a rule is both generally appropriate, and appropriate in a given case, thus supporting the inclusion of an express power in a rule to allow for the prescribing of such matters. The determination of this question appears to turn on the policy considerations which will inform judgements as to what is a 'strong justification' as provided for in Drafting Direction 3.8. The committee's inquiries to date have shed little light on would constitute a 'strong justification' for the inclusion of such matters in rules or, indeed, who will be responsible for the making of such judgements.

The Senate Committee then went on to do 3 things.²⁸ It noted that a meeting with the FPC that had previously been arranged had, due to issues with the Parliamentary program, not taken place and would be rescheduled. It also noted that, in the light of the 'continued engagement' of the FPC in relation to the Senate Committee's concerns, it had agreed to withdraw the 'protective' notice of motion in relation to this particular legislative instrument.

The Senate Committee also referred to its comments in relation to another instrument, discussed in *Delegated legislation monitor No 9 of 2014*. The point of interest was that that instrument – the *Jervis Bay Territory Rural Fires Ordinance 2014* – provided for the creation of offences by legislative rules made under the ordinance. This was clearly contrary to the proposition stated in the FPC's first response to the Senate Committee that, without 'strong justification', offence provisions would be included in regulations, rather than another form of legislative instrument.²⁹

The Assistant Minister for Infrastructure and Regional Development, being the Minister responsible for that ordinance, responded to the Senate Committee's concerns in a letter dated 2 July 2014. The Minister stated:

I am advised that the drafting of the ... Ordinance ... ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.

The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.

Given that this instrument appeared to have slipped through the OPC's existing mechanisms and processes, the more formal mechanisms foreshadowed in the FPC's third response to the Senate Committee are welcome.

The FPC's fourth response to the Senate Committee's concerns

In a letter dated 6 August 2014, the FPC responded directly to the Senate Committee's (at that stage) most recent comments.³⁰

In the response, at paragraphs 14, 15 and 16, he refers to the 'broad range of measures [that he has taken] to promote high drafting standards for all legislative instruments', the 'other strategies to promote high drafting standards that the OPC is already pursuing' and 'the other measures that OPC is already pursuing'. However, no detail was provided at that point as to the measures and strategies.

Further detail was subsequently provided to the Senate Committee at a private meeting with representatives of the OPC held on 3 September 2014 and in a written response from the FPC in relation to questions that the Senate Committee put on notice, after the meeting. However, the Senate Committee has not yet reported on the meeting, nor has it published the answers to the questions on notice. It is therefore not appropriate that I discuss those details here.

In relation to the effect of the new approach on the quality of legislative instruments, the FPC's fourth response stated:

... my view remains that the use of general rule-making powers, taken with the other measures OPC is already pursuing, will enhance, and not diminish, the overall quality of legislative instruments and support the scrutiny of legislative instruments by the Parliament.

In relation to the effect of the new approach on the volume of instruments drafted by the OPC, the fourth response stated:

In developing the current version of DD3.8 OPC took into account the need to ensure that OPC's limited budget-funded drafting resources are appropriately managed and applied and, in particular, remain sufficient to draft the Government's legislative program as well as drafting the subordinate legislation that will have the most significant impacts on the community. However, this does not mean that DD3.8 will lead to OPC drafting fewer instruments. In my view, the opposite will be the case.

OPC will continue actively seeking drafting and publishing work that is not tied to it. OPC competes and charges for this work in accordance with the Competitive Neutrality Principles. Because the work is billable, OPC will be in a better position to increase its drafting resources, increase the number of instruments that it drafts and further develop its services to assist agencies to draft the instruments drafted by them. This will contribute to raising the standard of all legislative instruments, not just those drafted under a general rule-making power.³¹

The Senate Committee had also asked the FPC what mechanisms were available to the OPC to monitor the quality of drafting of instruments based on the new general rule-making power. In his fourth response, the FPC stated:³²

... I do not agree that the use of general rule-making powers raises risks that require special monitoring. Nevertheless, monitoring mechanisms are available and could be extended if necessary.

The fourth response goes on to state:

OPC is responsible for maintaining the Federal Register of Legislative Instruments. (FRLI). All legislative instruments, explanatory statements and legislative instrument compilations are required to be registered on FRLI. Legislative instruments, explanatory statements and legislative instrument compilations are already checked for compliance with registration requirements. As part of these checks, issues of a drafting or formal nature are frequently detected and pointed out to the rule-making agency.

For example, the Committee would be aware that issues with the drafting of the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014* discussed in Delegated Legislation Monitor No. 9 had already been detected by OPC and drafting advice provided to the administering Department by the relevant OPC client adviser. OPC client advisers are Parliamentary Counsel from whom agencies can obtain quick, informal advice about matters in which OPC has expertise that may not be readily available in an agency. These matters include matters necessary, desirable or acceptable for inclusion in instruments and options for improving the standard of instruments.³³

The issue identified in relation to the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014* was first identified by the Senate Committee on 27 June 2013, in *Delegated legislation monitor No 7 of 2013*, in relation to the *Autonomous Sanctions (Designated Persons and Declared Persons – Syria) Amendment List 2013*.³⁴ The (then) Minister for Foreign Affairs responded on 5 August 2013 (*Delegated legislation monitor No.8 of 2013*), indicating that future amending instruments would address this issue. Despite this there were at least 2 or 3 further appearances of the issue between the original comment and the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014*.

The Senate Committee's response to the fourth FPC response

The Senate Committee responded to the FPC's fourth response in its *Delegated legislation monitor No 10 of 2014*.³⁵ However, the Senate Committee merely noted the response and indicated that the response would inform the briefings and deliberations in relation to the meeting with the OPC that subsequently took place on 3 September 2014.

Meeting between Senate Committee and the OPC on 3 September 2014

The Senate Committee met with representatives of the OPC on 3 September 2014. After the meeting, the Senate Committee conveyed a series of questions on notice to the OPC to which the FPC responded in a letter dated 23 September 2014.³⁶

The Senate Committee's wrap-up and the OPC response

The Senate Committee concluded its discussion of the issues that had arisen as a result of its discussion of the implementation of the 'general instrument-making power' in referencing the various responses from the FPC, on 3 December 2014, in *Delegated legislation monitor No 17 of 2014*.³⁷ The Senate Committee made a series of recommendations. The majority of those recommendations related to the management and monitoring of issues that had been identified in the Senate Committee's discussions with the OPC. Many called for relevant amendments to the OPC Drafting Directions and procedures. In addition, the Senate Committee made a significant recommendation in relation to the FPC's obligations under section 16 of the Legislative Instruments Act. The Senate Committee recommended that ...

... OPC annual reports include reporting on the steps that FPC has taken to fulfil his statutory obligations under section 16 of the *Legislative Instruments Act 2003*.

The FPC's response to the Senate Committee's recommendations

In a letter dated 15 December 2014, the FPC indicated to the Senate Committee that he accepted the various recommendations. This was largely reflected in amendments that were made to Drafting Direction 3.8. He also advised the Senate Committee that he would include in the OPC's annual reports material indicating the steps that he had taken in relation to his obligations under section 16 of the Legislative Instruments Act.³⁸

What is the point? Volume of legislation drafted other than by the OPC

In my 2 years as Legal Adviser to the Senate Committee, I have been fascinated to observe both the proportion of delegated legislation drafted other-than-by-OPC and also the (at best) variable quality of the non-OPC-drafted legislation.

In 2011, 1,471 legislative instruments were registered on the Federal Register of Legislative Instruments (FRLI). Of those legislative instruments, 286 were 'Select Legislative Instruments' or SLIs. Regulations are SLIs. In simple terms, it can safely be assumed that most SLIs were drafted by the OPC. This being so, for 2011, just over 19% of legislative instruments registered on FRLI were drafted by the OPC.

For 2012, 2,591 legislative instruments were registered on FRLI, of which 331 were SLIs. That means that, for 2012, just under 13% of legislative instruments registered on FRLI were drafted by the OPC.

As of November 2013, 1,832 legislative instruments were registered on FRLI, of which 235 were SLIs. That means that, to that point, for 2013, just under 13% of legislative instruments registered on FRLI were drafted by the OPC.

As of 25 December 2014, I had scrutinised 1,722 instruments in 2014. Of that number, 295 had been drafted by the OPC. That is just over 17% of the total.

As already mentioned above, in his second response to the Senate Committee, the FPC provided some figures in relation to the volume of legislative instruments.³⁹ He stated:⁴⁰

In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer to OPC in 2012) made up approximately 14% of all instruments registered on the Federal Register of Legislative Instruments (FRLI) and 25% to 30% of the number of pages of instruments registered. In addition, in 2013 OPC drafted approximately 4% of all non-ExCo legislative instruments registered and 13% of the number of pages of non-ExCo legislative instruments registered. This meant that in 2013 OPC drafted approximately 35% of all the pages of legislative instruments registered on FRLI.

The 35% page figure is probably inflated by some massive (many hundreds of pages⁴¹), annual instruments that the OPC is currently *required* to draft because they are regulations. I have always been surprised that the percentage of non-OPC drafting is so high. For me, this high percentage is a matter of concern, not the least because the vast majority of the relevant instruments appear to be drafted largely by people without training in legislative drafting.

Quality of non-OPC drafting

My experience with the Senate Committee leads me to observe that the quality of non-OPC drafting is, at best, *variable*. At one end of the spectrum is the drafting emanating from agencies such as the Australian Maritime Safety Agency (AMSA), which is responsible for making Marine Orders under section 342 of the *Navigation Act 2012*. Marine Orders

constitute a significant body of delegated legislation. They are generally drafted to a very high standard.

An example of less-than-optimal non-OPC drafting is recent drafting of instruments by the Department of Foreign Affairs to ‘designate’ a person or entity (for the purpose of the application of autonomous sanctions), under regulation 6 of the *Autonomous Sanctions Regulations 2011*. What often happens in this area is that an instrument is made that amends an earlier instrument. For example, the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2014, made by the Minister for Foreign Affairs on 8 April 2014, amends the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012. Section 3 of the amending instrument provides:

3 Amendment of the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) List 2012*

Schedule 1 amends the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) List 2012*.

Schedule 1 of the amending instrument then provides (in part):

Schedule 1	Designated persons and entities and declared persons	
	(section 3)	
Part 1	Designated and declared persons	
Item	Description	
1	Name of Individual: Additional Information: Date of Birth: Listing Information:	Augustine CHIHURI Police Commissioner-General 10/03/1953 Formerly listed on the RBA Consolidated List as 2002ZIM0015
2	Name of Individual: Additional Information: Date of Birth: Listing Information:	Constantine CHIWENGA Lt Gen, Commander Zimbabwe Defence Forces 25/08/1956 Formerly listed on the RBA Consolidated List as 2002ZIM0025
.....		

As a former legislative drafter, my problem with this instrument is that *it simply does not work*. Section 3 of the instrument states that Schedule 1 amends the principal instrument but (in my view) Schedule 1 *does not*, in fact, amend the principal instrument, because there is no amendment instruction in Schedule 1 that indicates *how* Schedule 1 amends the principal instrument. Clearly, what is intended is that Schedule 1 of the amending instrument replaces Schedule 1 in the principal instrument. But nowhere does the amending instrument actually say that.

This is an example of persons attempting to draft by using an earlier instrument, drafted by a professional drafting office, as a 'template' but without understanding what is behind the template.

The Senate Committee raised this issue with the Minister for Foreign Affairs, in *Delegated monitor No 5 of 2014*.⁴² The Minister's responded to the Senate Committee in a letter dated 9 July 2014. The Minister stated (in part):

... the Instrument, which amends the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012* ('the Principal Instrument'), was drafted in accordance with standard drafting practice for these types of instruments under the *Autonomous Sanctions Regulations 2011*. On the basis of recent advice from the Office of Parliamentary Counsel and the comments of the Committee in the Monitor, DFAT has updated its drafting practices to ensure that future instruments include an express amendment instruction to indicate how the Principal Instrument will be amended.⁴³

Clearly, the fact that this issue is to be addressed for the future is a good thing. However, the proposition that the instrument 'was drafted in accordance with standard drafting practice for these types of instruments' is a little alarming.

Most Australian lawyers seem to think that they can draft

In my experience, a surprising proportion of Australian lawyers seem to think that they can draft. An alarming number of the instructors that I have encountered (and not all of them lawyers) seem to think that they can draft better than the trained legislative drafters.

There is an approach that is underpinned by a belief that all a drafter of legislation needs to do is take an existing OPC document and change a few of the words to suit the particular case.

Another example

I recently looked at the Vehicle Standard (Australian Design Rule 42/04 – General Safety Requirements) 2005 Amendment 4.⁴⁴ Section 2 of the instrument provides:

2. AMENDMENT OF VEHICLE STANDARD

- 2.1. The changes specified in Schedule 1 amend Vehicle Standard (Australian Design Rule 42/04 – General Safety Requirements) 2005.

Schedule 1 then provides:

SCHEDULE 1

- [1] Clause 14.3.3.1 **to be** removed:
- [2] Clause 14.3.3.2 **to be** renumbered 14.3.3.1

[emphasis added]

The use of 'to be' in items [1] and [2] implies future effect. The instrument (and the amendments made by the instrument) commence on the day after registration. There is no suggestion (in any meaningful way) of future effect. Why not:

SCHEDULE 1

[1] Clause 14.3.3.1

omit

[2] Clause 14.3.3.2

renumber as clause 14.3.3.1

The role of settlers and editors

Another advantage of a specialist drafting office that I believe is not properly appreciated is the role of settlers and, in particular, editors. In addition to their years of experience, and having the benefit of having drafts settled by (usually) more senior officers, legislative drafters usually have access to professional editors.

My drafts were invariably improved by comments that I received from the editors. I doubt that the majority of in-house drafters would have the same sort of access to settlers and editors.

Rowena Armstrong's 1993 paper

In 1993, Rowena Armstrong QC, (then) Chief Parliamentary Counsel for Victoria, gave a paper entitled 'Should delegated legislation be drafted by a specialist drafting office?'.⁴⁵ Unsurprisingly, Miss Armstrong concluded that it should. In reaching that conclusion, Miss Armstrong stated:

In order to carry out the task [of drafting], the drafting office must have certain resources. It must have legally trained staff who specialise in constitutional and administrative law, statutory interpretation and who develop a particular and specialised knowledge of the statute book and of the scope of delegated legislation within the jurisdiction. The skills of this group of people will include a specialised knowledge of Parliamentary procedures.

Most importantly, the members of a drafting office learn from each other. Certain aspects of drafting are skills that are acquired through experience and practice. Drafters are like any other professional group in their interchange with each other. They meet together, criticise each other, discuss current issues and problems and, at least to some limited extent, try to establish a national network in Australia and New Zealand. This also makes it easier to deal with uniform legislation, where that is required, and to address issues about drafting practices, including public comment and criticism.⁴⁶

An even more flattering view of the role of legislative drafters has been expressed by VCRAC Crabbe:

The training given to parliamentary counsel, their vast knowledge of existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they have to advise and warn.⁴⁷

In making her comments in 1993, Miss Armstrong did not rule out a role for in-house drafters. Indeed, she stated that the role of in-house drafters was, in certain circumstances, 'particularly important'.⁴⁸ I do not disagree with that proposition. I would, however, make two additional comments.

First, one of the advantages that I see in a specialist drafting office that Miss Armstrong does not refer to is the tendency towards longevity. In my view, legislative drafters do not tend to be the most mobile of lawyers. The nature of drafting and the nature of people who are

attracted to drafting is that legislative drafters are ordinarily in it for at least the medium haul. This means that drafting offices can be great repositories of experience and 'corporate knowledge'. This is one of the reasons that they are so important to legislative scrutiny.

Instructors, on the other hand, come and go. In my experience, increasingly, they move from one project to another. Among other things, this means that, in their dealings with instructors, legislative drafters continually have to reinforce things such as the principles that emanate from legislative scrutiny committees. Legislative drafters cannot rely on their instructors to be aware of a legislative scrutiny committee's requirements because of previous experiences because they may not have had previous experiences. This means that an added advantage of legislative drafters is that they are, in effect, keepers of the faith.

My second point relates to the implications of all that I have said above in relation to legislation drafted outside of a specialist drafting office. I consider that it is less likely that someone outside a specialist drafting office will have the knowledge of the work and requirements of legislative scrutiny committees that a legislative drafter would have. This is less than ideal.

That leaves the question of how to ensure that there is a quality control process if legislation is drafted in-house. I think it is less likely that the same level of expertise and corporate knowledge will develop in departments as has developed in drafting offices. There are exceptions to this rule (in addition to the AMSA example discussed above, I note that the Civil Aviation Safety Authority has both a long history of using internal drafting resources and a high volume of output) but I think that it is generally less-than-optimal to rely on in-house legislative drafters to do the same job as legislative drafters in an office such as the OPC.

In her 1993 paper, Miss Armstrong suggested that specialist drafting offices could assist in-house drafters by being available to advise and assist and by preparing drafts, where resources permitted. She suggested that drafting offices might also assist by preparing guidelines and setting standards.⁴⁹

I agree. Indeed, as already noted, in the Commonwealth arena, this is *required* to be done, under of section 16 of the *Legislative Instruments Act*. In my view, in the light of the 'legislative rules' development, this section 16 obligation is *clearly* more important than ever.

A final point

I note the potential impact of the new approach that has been discussed above on the interpretation of delegated legislation by the courts. I am grateful to Christopher Tran, of the Victorian Bar, for drawing my attention to this issue.

Australian courts have tended to approach their interpretation of legislation with an acknowledgment of whether the relevant legislation was drafted by legislative drafters. In particular, I refer to the comments of the Full Court of the Federal Court of Australia, in *Evans v State of New South Wales* (2008) 168 FCR 576.

The question that Mr Tran posed, in discussions with me in relation to the proposed greater use of 'legislative rules', as opposed to regulations, was 'how will this affect the interpretation of delegated legislation by the courts?'

It is my observation that Australian courts make certain assumptions about legislation, depending on who drafted it. As *Evans* (and other decisions) demonstrates, courts tend to assume that legislation drafted by legislative drafters is drafted with certain fundamental legal principles in mind.

The following Australian decisions (in addition to the *Evans* decision) offer some guidance as to the approach of Australian courts and tribunals to this issue:

- *Paintessa Developments Pty Ltd and Town of East Fremantle* WASAT 81 (1 July 2014), at paragraph 21;
- *Nostrebor Holdings Pty Ltd and Shire of Denmark* [2014] WASAT 64 (10 June 2014), at paragraph 11;
- *Nguyen v Minister for Immigration* [2013] FCCA 1864 (22 November 2013), at paragraphs 38 and 39;
- *Minister for Immigration and Citizenship v Anochie* [2012] FCA 1440 (18 December 2012), at paragraphs [25] to [27];
- *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs (No 2)* [2012] FCA 1275 (31 October 2012), at paragraph [33];
- *Seoud and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 640 (13 September 2011), at paragraph 13;
- *Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq)* (16 May 2014), at paragraphs 44 to 45;
- *Day v Harness Racing NSW* [2014] NSWCA 423 (18 November 2014), at paragraph 79.

I also note the following passage from the Federal Magistrates Court's decision in *Kienle and Ors v Commonwealth of Australia* [2011] FMCA 210 (1 April 2011) as an indicative view of Australian courts and tribunals of the involvement of both legislative drafters and parliamentary scrutiny committees in relation to the various issues discussed above:

The Commonwealth Ombudsman further identifies the differing accountability measures available under legislative and executive schemes in the *Executive Schemes Report No. 21*, August 2009:

Government schemes that are established by legislation are subject to a range of accountability measures that do not apply to executive schemes.

If the eligibility criteria for a grant or program are in an Act, they must pass through several stages of scrutiny before Parliament agrees to them. First, all bills are drafted by the Office of Parliamentary Counsel, whose officers give expert assistance to agencies to ensure allowance is made for transitional arrangements, unforeseen circumstances and protection of rights and liberties in accordance with standard drafting principles. Second, agencies preparing legislation must consult with other government agencies and, where appropriate, with other interested parties. Third, once a bill is introduced to Parliament, it is subject to scrutiny by at least one parliamentary committee. The Senate Scrutiny of Bills Committee considers and reports publicly on each bill against criteria such as whether the bill trespasses unduly on personal rights and liberties, whether it makes rights, liberties or obligations unduly dependent on insufficiently defined administrative powers or non-reviewable decisions, or whether it provides insufficient parliamentary scrutiny of how a power is exercised. In addition, many of the more complex or controversial bills are referred to standing committees for more detailed public inquiry and report before Parliament debates them.

When the criteria for a program or grant are in regulations made under an Act, there are similar although more limited measures to review their content. The Office of Legislative Drafting and Publishing (OLDP) drafts all

regulations. The Senate Regulations and Ordinances Committee considers all regulations and reports on whether they are in accordance with the parent statute, whether their provisions would be more appropriately contained in legislation and whether they trespass unduly on personal rights and liberties or make rights unduly dependent on administrative decisions whose merits cannot be independently reviewed. All bills, Acts and regulations are available to the public online.

Sometimes program criteria are not in legislation or regulations but are set out in a legislative instrument. Those too are subject to a range of safeguards: OLDP drafts some of those instruments on request by agencies; there are measures to promote high drafting standards; consultation is required where business may be affected; all instruments are published online on the Federal Register of Legislative Instruments; and all legislative instruments (with limited exceptions) are subject to disallowance by Parliament. These requirements are underpinned by the Legislative Instruments Act 2003.

By comparison, criteria for executive schemes:

- are less likely to be drafted by a person who has training and experience in legislative drafting*
- require no public consultation in their development or amendment (except if they are regulatory schemes covered by the Best Practice Regulation Handbook)*
- are not routinely examined by Parliament, although high profile or controversial schemes may be the subject of committee inquiries or parliamentary questions, particularly during the Senate estimates process*
- are not agreed by or subject to disallowance by Parliament*
- are not necessarily published as soon as they come into effect or when they are amended.⁵⁰*

Two steps forward, one step back?

In 1990, the late Professor Douglas Whalan, while Legal Adviser to the Senate Committee, said:

There is relatively easy access to statutes, regulations and, indeed, ordinances. Not only are they drafted by specialist professionals, but they are properly published in a series in print that can be read without the aid of a microscope. In contrast, some instruments have turned up on rather scrappy bits of paper, with the drafting in them of poor standard and with an indecipherable signature.⁵¹

Professor Whalan was speaking at a time when the passage of the *Legislative Instruments Act 2003* (Cth) was still in the future.

In 2003, the Commonwealth Parliament passed the Legislative Instruments Act. In brief, the Act established a comprehensive regime for the making, publication, tabling, parliamentary scrutiny (including disallowance) and 'sunsetting' of delegated legislation in the Commonwealth jurisdiction. It also established a registration regime, with delegated legislation published on the Federal Register of Legislative Instruments (FRLI). The Legislative Instruments Act not only requires new delegated legislation to be registered but also sets out procedures for 'backcapturing' delegated legislation that existed at the time that

the Legislative Instruments Act came into effect and that is intended to have continuing effect.

For me, the most exciting innovation introduced by the Legislative Instruments Act is the key concept on which the Act operates: its application is to ‘instruments of a legislative character’.

The Legislative Instruments Act applies to ‘legislative instruments’. This concept is defined (largely) in section 5 of the Act, which provides:

5 Definition—a legislative instrument

- (1) Subject to sections 6, 7 and 9, a **legislative instrument** is an instrument in writing:
 - (a) that is of a legislative character; and
 - (b) that is or was made in the exercise of a power delegated by the Parliament.
- (2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
 - (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; an
 - (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.
- (3) An instrument that is registered is taken, by virtue of that registration and despite anything else in this Act, to be a legislative instrument.
- (4) If some provisions of an instrument are of a legislative character and others are of an administrative character, the instrument is taken to be a legislative instrument for the purposes of this Act.

While this definition is not without its problems, my firm view has always been that the use of this key term is a stunning development. It means that the Legislative Instruments Act (and all the mechanisms for parliamentary scrutiny, etc that it contains) applies to instruments of delegated legislation based on what they *do*, rather than (as in all other Australian jurisdictions) based on what they are *called*. My particular interest in this issue is that, over a period of 20 years or more, prior to the passage of the Legislative Instruments Act, a vast body of delegated legislation was provided for that escaped proper parliamentary scrutiny purely because it was called something other than, say, a ‘regulation’ or a ‘statutory rule’. Whatever its other faults, the Legislative Instruments Act put a stop to that happening.

Further, the enactment of the Legislative Instruments Act also went a long way towards addressing the issues identified by Professor Whalan in 1990. My belief is that section 16 of the Legislative Instruments Act was of particular relevance in this regard.

Recently, however, I have come to question that belief. My observation of the *real* impact of section 16 of the Legislative Instruments Act, in my time in the OLD/OPC, is that there had

been *no* real impact. If there *has* been a real impact then it has eluded me and I stand to be corrected.

More worrying, however, is that the recent developments in relation to pushing material that was previously in regulations into 'legislative rules' may result in the Commonwealth legislative landscape being taken backwards, not forwards. If non-OPC drafters are to be responsible for drafting even more Commonwealth delegated legislation than they do at present then – in the absence of a concerted effort by the OPC to carry out the obligations imposed by section 16 of the Legislative Instruments Act (the FPC has told the Senate Committee this *is* now occurring) – I have significant concerns for the effect on the overall quality of Commonwealth delegated legislation.

This is not to disparage the work of non-OPC drafters in the Commonwealth jurisdiction. I am sure that they all do their best to produce the best legislation that they possibly can. The problem is that most of them do so without formal training as legislative drafters, without any substantive guidance as to how they should approach their drafting and, presumably, without the same sorts of formal settling and editing process implemented in offices such as the OPC. That being so, it is important that the FPC does all that he can to fulfil his obligations under section 16 of the Legislative Instruments Act. In that regard, what the FPC has told the Senate Committee (and what he has done and agreed to do) is a very welcome sign.

Concluding comments

This paper states my belief in the importance of legislative drafters to the legislative process (including the legislative scrutiny process) and why I hold that belief. The discussion of the 'legislative rules' issue demonstrates both a challenge to the important role of legislative drafters *and* the importance of the engagement of a legislative scrutiny committee in the issue.

Endnotes

- 1 In this paper, I use the term 'delegated legislation', rather than 'subordinate legislation' or 'rules', 'statutory rules', etc except where the context suggests the use of a different term.
- 2 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/pdf/n02.pdf, at pp 1-2.
- 3 It is not appropriate to go into a detailed history of the drafting of Commonwealth legislation for this paper. Briefly, until 1973, regulations were drafted by the Office of Parliamentary Counsel (OPC). In 1973, the responsibility for drafting regulations was transferred to the Attorney-General's Department. The relevant area of the department eventually became the Office of Legislative Drafting and then, in 2005, the Office of Legislative Drafting and Publishing (OLDP). In 2012, the functions of OLDP were transferred back to the OPC. For a more detailed history of the OPC, see Meiklejohn, C, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2012).
- 4 The Minister's letter and the first FPC response are reproduced in *Delegated legislation monitor No. 5 of 2014* (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no5.pdf), in Appendix 3). All but one of the FPC responses are also usefully reproduced in *Delegated legislation monitor No. 17 of 2014* (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no17.pdf), in Appendix 1.
- 5 Paragraphs 3 to 6 and 12.
- 6 Paragraphs 7 and 8.
- 7 Paragraph 9.
- 8 Paragraph 10.
- 9 Paragraph 11.
- 10 Paragraph 13.
- 11 Paragraph 14.
- 12 Page 2.
- 13 Page 3.
- 14 Page 4.
- 15 Page 4.
- 16 Page 5.

- 17 The letters are reproduced in *Delegated legislation monitor No. 6 of 2014* (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no6.pdf) at pages 61 to 73.
- 18 For 'protective' notices of motion, *Odgers' Australian Senate Practice*, 13th ed (2012), states: 'Giving notices of motions to disallow indicates concern about the delegated legislation in question, and these are known colloquially as protective notices of motion, in that they protect the right of the committee, and of any senator, to move disallowance if it is subsequently decided that this is appropriate. Such concern is often allayed by further explanatory material from the minister or an undertaking to amend the legislation. Where the committee's concerns are met, the notice of motion to disallow is withdrawn (although it may be taken over by another senator). There are some occasions where the responsible minister does not satisfy the committee and the motion to disallow proceeds. Frequently a protective notice of motion is withdrawn on the basis of undertakings from a minister to take action addressing the matters causing concern, usually by amending the legislation in question.' (see http://www.aph.gov.au/About/Parliament/Senate/Powers_practice_n_procedures/odgers/chap1516).
- 19 Paragraph 18.
- 20 Paragraph 33.
- 21 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no6.pdf.
- 22 Page 19.
- 23 The letter is reproduced in *Delegated legislation monitor No. 9 of 2014* (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no9.pdf), at pages 49 to 53.
- 24 Paragraph 19 and 20.
- 25 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no9.pdf.
- 26 Page 22.
- 27 Page 23.
- 28 Page 24.
- 29 It has been pointed out to me that the proposed policy (in the absence of 'strong justification') of only including offence provisions in regulations is actually at odds with at least 2 recent Acts – the *Navigation Act 2012* (see section 342) and the *Marine Safety (Domestic Commercial Vessel) National Law 2012* (see section 163 of Schedule 1).
- 30 The letter is reproduced in *Delegated legislation monitor No. 10 of 2014* (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no10.pdf), at pages 75 to 79.
- 31 Paragraph 17 and 18
- 32 Paragraph 19.
- 33 Paragraph 20 and 21.
- 34 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2013/pdf/no7.pdf. See page 445.
- 35 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no10.pdf.
- 36 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no17.pdf.
- 37 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no17.pdf.
- 38 The letter (and the amended Drafting Direction 3.8) is reproduced in *Delegated legislation monitor No. 1 of 2015* (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2015/pdf/no01.pdf), in Appendix 1.
- 39 See *Delegated legislation monitor No. 6 of 2014* (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no6.pdf), at page 65.
- 40 Paragraph 17.
- 41 For example the *Health Insurance (General Medical Services Table) Regulation 2014* (available at <http://www.comlaw.gov.au/Details/F2014L00713>).
- 42 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no5.pdf
- 43 The letter is reproduced in *Delegated legislation monitor No. 9 of 2014* (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_cte/mon2014/pdf/no9.pdf), at pages 57 to 58.
- 44 Available at <http://www.comlaw.gov.au/Details/F2014L01285>.
- 45 Armstrong, RM, 'Drafting: Should delegated legislation be drafted by a specialist drafting office?'
- 46 Armstrong, RM (note 46), p 2.
- 47 Crabbe, VCRAC, *Legislative Drafting* (1993).
- 48 Armstrong, RM (note 46), p 3.
- 49 Armstrong, RM (note 46), p 3.
- 50 Paragraph 68.
- 51 Whalan, DJ, 'The final accolade: Approval by the committees scrutinizing delegated legislation', paper given to seminar conducted by the (Commonwealth) Attorney-General's Department titled 'Changing attitudes to delegate legislation', held in Canberra on 23 July 1990, at page 9 of the paper.

TOWARDS AN ADMINISTRATIVE ESTOPPEL

*Lucy Jackson**

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What happens when a person relies upon a representation made by a government which is later departed from? To the extent that the answer is more than 'nothing', the position in Australia is unclear. Through a discussion of the existing Australian and English authorities on estoppel, legitimate expectations and procedural fairness, and the recent development of the law of abuse of process in the United Kingdom, this paper argues that, in an appropriate situation, an 'administrative estoppel' should lie against a public authority. This estoppel differs from an equitable estoppel because its public law context must be taken into account.

The first part of this paper very briefly surveys the current Australian law on estoppel, legitimate expectations and procedural fairness, with reference to key English cases in the development of these actions in that jurisdiction. The question of what remedy is sought in an action of this kind is also briefly canvassed.

The second half of the paper considers the recent development of the law of 'abuse of process' in the United Kingdom, with particular focus on the facts and reasoning in *R v Downey* [2014] EW MiscC (CCrimC). I argue that 'abuse of process' clarifies the interrelationship of the rules with respect to government promises and, ultimately, when taken with the Australian authority, that a stand-alone rule of 'administrative estoppel' can be distilled. Finally, objections such as those arising from the doctrines of separation of powers, ultra vires and fettering discretion are also considered.

Estoppel against a public authority

In Australia, estoppel can operate at common law¹ and in equity.² The effect of an estoppel is to prevent a party from departing from a previous representation, provided that certain requirements are met.

The elements needed to ground an estoppel are that:

- 1) a clear and unambiguous representation is made about an existing or future state of affairs, with the knowledge or intention that the representation would induce reliance;
- 2) the representation has been reasonably relied upon by the representee; and
- 3) the representee has suffered detriment when the representation is not fulfilled by the representor.³

It is possible for an estoppel to lie against a public authority. In *Commonwealth v Verwayen* the Commonwealth was estopped from relying on a statutory defence that it had represented

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that it would not rely upon.⁴ When the Commonwealth sought to change its policy and to rely upon the defence, the majority of the High Court held that it could not do so.⁵

An earlier example comes from 1949, when Denning J at first instance upheld the estoppel raised by Mr Robertson, a war veteran, who had relied upon the representation made to him in a letter from the War Office that his injuries were attributable to military service, and that therefore he would receive the appropriate pension.⁶ In the words of Denning J, '[c]an it be seriously suggested that, having got that assurance, he was not entitled to rely on it?'⁷

In *Brickworks Ltd v Warringah Corporation*,⁸ Windeyer J accepted that an estoppel by representation cannot preclude the operation of a statutory discretion, following the Privy Council's decision in *Maritime Electric*⁹ that, 'where the statute...imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it.'¹⁰ Our relationship with government today is quite unlike that understood by the Privy Council in 1937 and, as such, it may be that the suggestion that a statutory discretion cannot be affected by an estoppel is now incorrect.

In *Kurtovic*,¹¹ Gummow J said that, where there is a duty to exercise a discretion, an estoppel cannot be raised to interfere with that discretion beyond what is required by statute.¹² Justice Gummow's statement should be read to say that the decision-maker cannot expand or reduce his or her power beyond that created by statute by way of estoppel,¹³ not that an individual cannot be protected by the intervention of an estoppel when the party estopped is a public authority.

The doctrine of legitimate expectations

A legitimate expectation differs from an expectation arising from a representation which grounds an estoppel in that the former arises out of the usual operation of a policy or the requirements of a statute: what, in all the circumstances, could the citizen legitimately expect?¹⁴ This distinction is made clear in the facts of *Downey*, below. In *Kurtovic*, Gummow J also drew this distinction between 'the planning or policy level of decision-making wherein discretions are exercised' and 'the operational decisions which implement decisions made in exercise of that policy'.¹⁵ In deciding whether an applicant can raise an estoppel or a legitimate expectation, the question to ask is: what is the source of the expectation?

However, the position of legitimate expectations has been clouded by the High Court. In *Lam*,¹⁶ the applicant was led to believe that the family members caring for his children would be contacted before the decision cancelling his visa was made.¹⁷ When this was not done, and his visa was subsequently cancelled, Mr Lam sought prohibition to prevent the cancellation on the basis of the representation. His application was unsuccessful, and this seems to have turned on two points: first, that Mr Lam had not relied upon the representation to his detriment; and second, that even if the carers had been contacted, this would not have changed the outcome.¹⁸ Although it is questionable whether refraining from providing further information did not amount to detrimental reliance, what *Lam* seems to stand for is that, to make out an action based on a legitimate expectation, there must be proof of detrimental reliance, and probably also that the decision would have been different but for the reneged promise.

Whilst in Australia an action based in the doctrine of legitimate expectations seems to have little chance of success following *Lam*, in England this area has developed as a more useable body of law which has the potential to ameliorate the power imbalance between government and citizen.

The key English case is *Coughlan*.¹⁹ Ms Coughlan had been hospitalised for several years as a result of her severe physical disabilities but in 1993 had agreed to move into a care facility, Mardon House, in reliance on the local health authority's representation that this would be her 'home for life'.²⁰ Within five years, the health authority changed its policy and decided to close Mardon House. Ms Coughlan's expectation would clearly be breached by this decision, but the relevant question for the court was what the terms of that expectation legitimately were, and, subsequently, how that expectation could be protected.²¹

In the Court of Appeal, Lord Woolf MR outlined standards of protection for different types of legitimate expectations.²² The first is where the citizen can legitimately expect that the public authority is required to give weight to its previous policy or representation when making its decision. The second, where an opportunity for consultation with the affected applicant is required; and the third, where if a substantive benefit is expected, the question of whether frustrating that expectation would be so unfair as to amount to an abuse of power must be considered by the court. In *Coughlan*, the third category applied and the writ of certiorari was upheld. The reasons that led the Court to hold that this was within the third category were: (a) the importance of the content of the promise made to Ms Coughlan (in the context of the *Human Rights Act 1998*); (b) that the promise was only made to a limited number of individuals; and (c) that the consequences to the health authority of enforcing the promise would be financial only.²³

The decision in *Coughlan* is a departure from the more confined role of judicial intervention in government decision-making envisaged by the *Wednesbury* principle.²⁴ That principle is that if a decision is sought to be challenged on its content, rather than its procedure, then the court should only intervene if that content is entirely unreasonable. *Coughlan*, however, says that where an administrative decision deprives a citizen of his/her legitimate expectation of a substantive benefit, the court's role when looking at the content of that decision is to balance 'the requirements of fairness against any overriding interest relied upon for the change of policy'.²⁵

In *Begbie*,²⁶ Laws LJ offered a more nuanced analysis of the standards of protection of expectations than the tripartite scheme coined in *Coughlan*.²⁷ In this approach, Laws LJ emphasises the central importance of the facts of the individual case in ascertaining what protection ought to be afforded to the citizen's expectation. For example, if only a small number of people held the legitimate expectation (as in *Coughlan*), the court can more easily foresee the consequences of any order it might make with respect to the breach of that expectation. Likewise, the weight to be given to the overriding public interest (if any) in the change of policy will differ according to the facts of the case at hand.

Procedural Fairness

Finally, if neither an estoppel nor a legitimate expectation can be made out, it may be open to an applicant to establish procedural unfairness. In *NAFF*,²⁸ the applicant was made the representation by a Tribunal member that she would be given 21 days to respond to further questions that would be sent to her following her hearing. In fact, the questions were never sent to her and instead the Tribunal member proceeded to affirm the decision to refuse her protection visa. The High Court was unanimous in agreeing that the applicant was denied procedural fairness,²⁹ despite there being no evidence of detrimental reliance by the applicant. However, although what can be said from *NAFF* is that an action in procedural unfairness does not require detrimental reliance, it is unclear why the High Court did not consider the refusal of a protection visa to be a detriment.

Remedies

Finally, something needs to be said to the question of what remedy one seeks in pursuing an action of this type, though an analysis of the different types of remedies available in public law is beyond the scope of this paper.³⁰ Presumably, in the situation where one has relied upon a representation made by the executive, the solution sought will be that the contents of the representation are upheld by the executive, rather than a money remedy such as damages or equitable compensation. Substantive remedies of this type were dismissed by Mason CJ in *Quin*.³¹ Likewise, in *Lam*,³² although Mr Lam did not claim a substantive remedy,³³ McHugh and Gummow JJ (with Callinan J agreeing) dismissed the idea that a denial of procedural fairness could attract a substantive remedy.³⁴

In fact, this is another reason why estoppel is appropriate in this context. The remedy when an equitable estoppel is made out is the 'minimum equity to do justice'.³⁵ As Finn and Smith explain, this remedy:

would allow, as the persisting 'public law' orthodoxy does not, pecuniary relief against a government which induces detrimental reliance. In other words, the government, if still not to be compelled to honour the expectation it has created, would nonetheless be able to be held liable for loss occasioned by reasonable reliance on that expectation... While the public interest may necessitate a refusal to enforce the representation or undertaking, it should not allow government with impunity to occasion loss to a person who has relied upon that representation.³⁶

The better way to conceive of the remedy sought is as a means of preventing departure from the representation. When understood in this way, it may be that it is the Constitutional writ of prohibition that is sought.³⁷ As a public law remedy, perhaps this would be more appropriate as a remedy against a public authority.

Additionally, in *Quin* and *Kurtovic*, the applicants sought to compel a positive act. In contrast, in *Downey* (below) the representation made was that the government would refrain from acting. This may be an important factual difference in whether the breach can be remedied, and what that remedy would be.

The facts in *Downey*

John Downey was prosecuted in February 2014 for four charges of murder and one charge of doing an act with intent to cause an explosion, arising out of the Irish Republican Army (IRA)'s bombing in Hyde Park, London, on 20 July 1982. However, Sweeney J stayed the prosecution as being an abuse of process, the reasons for which will be discussed below, and should become apparent from the facts.

Mr Downey had been convicted for membership of the IRA in 1974,³⁸ and in 1982 there was some evidence to link Mr Downey to at least the car used for the Hyde Park bombing.³⁹ In May 1983, the fact that Mr Downey was wanted was circulated on the Police National Computer (PNC) and, in October 1984, his photograph was published in the Sunday Times with the statement that he was at the top of Scotland Yard's Most-Wanted list.⁴⁰ Further articles to the same effect were published in national newspapers in June 1985, March 1986 and October 1987.⁴¹ In September 1993 the UK prosecuting authorities decided that 'the subject is not extraditable but is obviously arrestable should he be detained within the UK jurisdiction'.⁴² Mr Downey's record remained in circulation on the PNC until his arrest at Gatwick Airport in May 2013.

On 10 April 1998 the Good Friday Agreement was signed.. This was a major achievement in the peace process. Part of the Agreement created a framework for the early release of serving prisoners whose convictions arose out of IRA activity prior to the Agreement who

would now not serve more than two years in prison after the commencement of the Agreement.⁴³ Equivalent provisions were in place in the Republic of Ireland. However, this did not apply to people who had not yet been charged with relevant offences, or to those who had been charged but had escaped the jurisdiction. This latter group became known as the 'on the runs' or 'OTRs'.⁴⁴

The position of the OTRs was anomalous and troublesome. In the negotiations that were ongoing through 1998-1999, Sinn Fein argued that as many OTRs were strong supporters of the Good Friday Agreement and their presence in the United Kingdom would promote the peace process in Northern Ireland,⁴⁵ this would require a means by which OTRs could return to, or go to, Northern Ireland without the risk of arrest or prosecution for pre-Good Friday Agreement activity.

Initially, it was considered that a legislative scheme would be the most efficient solution. However, the question of whether or not to pursue a prosecution was recognised as a matter for the Department of Public Prosecutions for Northern Ireland (DPP (NI)) and not for the legislature.⁴⁶ Eventually it became clear that the solution for the OTRs would be an individual assessment of each case by the prosecuting authorities and the Attorney General, and there would be a legal not political decision on the merits of each case.⁴⁷

It was decided that a letter would be sent to each OTR when a decision was reached on his/her case. The first was sent out in 2000 and despite ongoing attempts to create a legislative scheme, the letters continued to be the politically preferred means of dealing with the OTRs. This became known as 'the administrative scheme'.⁴⁸

The process initially involved a person's name being put forward by Sinn Fein, then the DPP (NI) and Crown Solicitors considered all files they had on the individual. Next, the police carried out a full evidentiary review, and the DPP (NI) checked whether the individual was wanted by any police force in the UK (by checking the PNC) or by any other country (by checking with Interpol).⁴⁹

In January 2002 Mr Downey's name was put forward by Sinn Fein and investigation of his file commenced. However, work on the administrative scheme was halted in 2004.

In July 2005 the ceasefire was ordered and the UK Government announced that legislative measures would be undertaken to implement further protections for people wanted for relevant offences.⁵⁰ This included the introduction of the Northern Ireland (Offences) Bill 2005, which would have provided protection for all persons liable to prosecution for those offences, including members of the police and armed forces. The protection for persons within these latter categories was the reason that the Bill was withdrawn in January 2006.⁵¹

In February 2007 the administrative scheme recommenced and was known as Operation Rapid.⁵² The idea was to expedite the review of the remaining OTRs, including Mr Downey. The process essentially was intended to be the same as before - establishing whether or not an individual was wanted in the United Kingdom by checking the relevant files and databases.

Meanwhile, in April 2002, Mr Downey's PNC records were printed and it was recorded that he was wanted for murder in the jurisdiction of the Central Criminal Court. In September 2002 the DPP (NI) wrote to the Police Service of Northern Ireland (PSNI) (the new name for the RUC) that Mr Downey was also named as a suspect in a bombing at Enniskillen in 1972, but that a direction for no prosecution had been issued in relation to the incident unless further evidence came to light.⁵³ In March 2003, enquiries into that incident were recorded as ongoing. In July 2004 it was recorded that Mr Downey was wanted for interviewing in respect

of a number of Northern Ireland incidents, including Enniskillen, and that he had been identified in relation to the Hyde Park bombing. Communications between the Attorney General and the Secretary of State for Northern Ireland (SSNI) (Mr Hain) and between the Northern Ireland Office (NIO) and Sinn Fein in February and March 2006 respectively, stated that the defendant was wanted for questioning in relation to serious offences if he returned to Northern Ireland.⁵⁴

In March 2007 a check made within Operation Rapid on the status of Mr Downey confirmed that he was the subject of a current alert on the PNC.⁵⁵ In May 2007, Operation Rapid's Acting Detective Chief Inspector reviewed Mr Downey's file and concluded that he was not wanted by PSNI but that an updated report from the Metropolitan Police should be requested. Eventually, in June 2007, an entry was made by the Operation Rapid team that Mr Downey was 'not currently wanted by PSNI unless a new appropriate alert is created by an Investigating Officer.'⁵⁶ At around the same time a request was received from the NIO requesting confirmation that all checks with outside forces had been carried out in accordance with the Operation Rapid terms.⁵⁷ In July 2007 confirmation was sought again by the NIO, with the Operation Rapid Officer replying 'To confirm, these checks have been carried out on the ten names in the 11 July letter' - clearly implying that the results of the checks were negative.⁵⁸

On this basis, letters were sent out, including one to Mr Downey. The terms of this letter were:

The Secretary of State for Northern Ireland has been informed by the Attorney General that on the basis of the information currently available, there is no outstanding direction for prosecution in Northern Ireland, there are no warrants in existence nor are you wanted in Northern Ireland for arrest, questioning or charge by the police. The Police Service of Northern Ireland are not aware of any interest in you from any other police force in the United Kingdom.⁵⁹

In giving evidence, Mr Hain stated that the letter:

provides an assurance that he was not liable to arrest if he entered the jurisdiction. On its face it informed him that he was not wanted in the north of Ireland. Nor was there any interest from any other police force in the United Kingdom (on the basis of information from the PSNI). I confirm that was the assurance that was intended by the Government to be understood by the recipient.⁶⁰

In July 2008, the PSNI expressed some concern about Mr Downey's case and, in particular, that his letter did not include the usual caveat that if new evidence came to light then this would be dealt with in the usual way.⁶¹ PSNI internal email correspondence set out this concern that, 'despite the understanding that new evidence would over turn (sic) an Operation Rapid assessment there is potential that PSNI could be accused of abuse of process or acting in bad faith, particularly since the letter specific to Downey did not contain the appropriate caveat.'⁶²

Further internal communications reveal that, upon investigation, the Metropolitan Police alert for the Hyde Park bombing was found to still be on the PNC, but the PSNI did not communicate this to the DPP (NI) or any other party.

Mr Downey relied upon the letter and the representations contained within it. In the summer of 2008 he travelled to Canada. In April 2009, he visited Londonderry and in November 2009 he visited Belfast. He visited the mainland United Kingdom in February, March and April 2010, April 2011, November 2011, July 2012 and January 2013 without incident. In November 2012 and March 2013 he visited Northern Ireland. On 19 May 2013 he was arrested at Gatwick Airport whilst in transit to Greece. On arrest he told the police:

I am surprised that this has come up as I have travelled in and out of the UK on a number of occasions to see family and I have travelled to Canada from Dublin. When I went to Canada I contacted the UK Government to check it would be OK as I didn't want any problems. *They said it would be fine.*⁶³

Reasoning: the OTR policy

One ground relied upon by Mr Downey was that the commitment of the Government to the OTRs 'gave rise to an expectation that prosecutions would not be pursued in respect of those who (like the defendant) would otherwise qualify under the early release scheme'.⁶⁴ Essentially, this argument relies upon the political process giving rise to an expectation. However, Sweeney J held that expectation arising from the process alone was insufficient, in spite of the fact that the political context should hold particular weight in understanding the government's conduct.⁶⁵

Reasoning: the letters

The ground upon which the prosecution was ultimately stayed in *Downey* was the argument that the 2007 letter provided an unequivocal promise to Mr Downey that he would not be prosecuted for the Hyde Park bombing,⁶⁶

The key paragraph here is:

This ground involves a balancing exercise between the public interest in ensuring that those who are accused of serious crime should be tried and the competing public interests in ensuring that executive conduct does not undermine public confidence in the criminal justice system and bring it into disrepute, and in holding officials of the state to the promises they have made in full understanding of what is involved in the bargain.⁶⁷

What is of particular note is the exercise in balancing competing *public* interests, one of which is holding government to its word, as opposed to balancing private and public interests. I return to this distinction in the following section.

The bargain that must be understood by the authorities is the representation that gives rise to the abuse of process argument - that they have effectively promised not to arrest or prosecute. In fact, by highlighting the following portions of the witness statements of the various government officials, Sweeney J was satisfied that the bargain was fully understood by all:

Powell: *'to reassure the individuals concerned that they could return to the UK without fear of arrest'*

Kelly: *'an unequivocal statement...that they meant what they said...that the recipients thereafter believed that they were able to organise their lives accordingly'*

McGinty: *'the scheme sought only to identify those individuals who were able to return without fear of arrest'*

Hain: *'the British Government did not intend individuals to be misled into believing they were safe to return to the jurisdiction and then arrested'*⁶⁸

Mr Justice Sweeney accepted that Mr Downey was made an unequivocal representation that he was not wanted in the United Kingdom and was, as a result, free to return to the jurisdiction. Nothing was done to correct the misstatement made in the letter.⁶⁹ He was entitled to believe that this was a genuine representation.⁷⁰ By visiting the mainland, Mr Downey acted upon this representation, and this was to his detriment 'by way of arrest, the

loss of his freedom for a time, the imposition of strict bail conditions, and being put at risk of conviction for very serious offences.⁷¹

In conducting the balancing exercise, Sweeney J noted that the public interest in ensuring that persons accused of very serious crimes should be brought to trial is a very strong one, particularly in light of the political circumstances. However, the public interest in holding government to its word (and the overlapping public interest in ensuring that executive conduct does not undermine public confidence in the justice system) significantly outweighed that former interest in these facts. For these reasons the prosecution was stayed, which in effect gives substantial enforcement to the representation made in the letter.

Administrative estoppel

I suggest that the development of the law in Australia, with the persuasive influence of the English decisions, now points to the emergence of a type of estoppel in public law: an administrative estoppel.

The relevant law in *Downey* was abuse of process. In *Abu Hamza*,⁷² Lord Phillips CJ surveyed the existing English authorities on the elements of an abuse of process. These are:

- (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted; and
- (ii) the defendant has acted on that representation to his detriment. Even then, if facts come to light that were not known when the representation was made, these may justify proceeding with the prosecution despite the representation.

After *Waltons* and *Verwayen*, in the Australian context we recognise that Lord Phillips' elements are the elements of an estoppel. But, as *Downey* demonstrates, the context of a promise made on behalf of a government requires that a balancing exercise be undertaken. Whereas in *Coughlan* the balancing exercise was between the *private* interest of Ms Coughlan in remaining in her 'home for life' and the *public* interest in the efficient running of the NHS,⁷³ *Downey* develops the law to the more satisfactory point where the balancing exercise is between the public interest in the prosecution of serious crimes, and the competing public interest in holding government to its word. This is how 'administrative estoppel' differs from promissory estoppel: the competing public interests in (a) holding government to its word and (b) whatever the wider effect of the abandoned representation is (eg the efficient running of the NHS, or the prosecution of serious crimes), acknowledge the different position of the executive as a body with a public purpose. The addition of the balancing exercise to make out an administrative estoppel may justify the different treatment of private law actions and estoppels against public authorities.

The inclusion of this balancing exercise was alluded to by Mason CJ in *Quin* in his discussion of when an estoppel may lie against the Executive:

What I have said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.⁷⁴

Although Pagone had argued that upholding an estoppel against a public authority 'seem[s] to favour the private interests above that of the public',⁷⁵ the development of the law in this area since, and in particular the reformulation of the competing interests in *Downey*, demonstrates that this is not the case. The private interest of the individual in fact has very little importance in the balancing exercise. What the upholding of the estoppel against a public authority does is to favour the public interest in holding government to its word against the relevant competing public interest on the facts.

It has been argued that the equitable concept of 'unconscionability' may offer the means to weigh the 'public interest' in an estoppel against a public authority.⁷⁶ As explained by Deane J in *Verwayen*,

the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he [sic] would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted.⁷⁷

This also has some resonance in the statement of Lord Denning in *Laker Airways*,⁷⁸ that:

The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute of by common law, when it is doing so in the proper exercise of its duty to act for the public good...It can, however, be estopped when it is not properly exercising its powers, but misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public.⁷⁹

I suggest that a consideration of unconscionability provides the framework for working out the balancing exercise on a case-by-case basis.

Arguments against administrative estoppel

Separation of powers

In Australia, the *Constitution's* separation of powers may provide some limits on the application of these principles by the judicial arm of government. In *Lam*, McHugh and Gummow JJ noted that 'an aspect of the rule of law under the *Constitution* is that the role or function of Ch III courts does not extend to the performance of...the executive function of administration.'⁸⁰ However, the proper role of the separation of powers is for the provision of checks and balances on each branch of government, with the effect of limiting the power of each branch. The result of this should be that the public (and the individuals who constitute this) are protected from the overreach of power by government. An administrative estoppel would contribute to this end. As O'Mara has argued, 'it is questionable whether the legal doctrine of separation of powers is so critical as to trump any argument based on the protection of individual rights and associated values.'⁸¹

Ultra vires

It has often been said that an estoppel cannot cause or allow a public authority to act ultra vires or beyond the power conferred by statute. However, as Thompson has argued, 'estoppel which leads to administrative action ultra vires a statute's express terms may not compel the administrative body to act without statutory authority, because the administrative body will act according to the legislation's terms as impliedly modified by equity'.⁸² As explained by Chief Justice French, writing extrajudicially, this means that a statutory power or duty may 'be capable, on general principles, of a construction accommodating obligations from equitable principles.'⁸³

Fettering discretion

The principle against fettering discretion is that a decision-maker cannot bind himself or herself to a decision before actually making that decision. However, as O'Mara argues,

The approach of Australian law seems to unfairly weight the interests of the decision-maker in maintaining an unfettered discretion against those of an individual who has relied to their detriment on a representation which is within power. Whilst the principle against the fettering of discretion is central to administrative law, in some circumstances it must be balanced with other principles⁸⁴

There may also be a different result as to whether a discretion can be exercised once or from time to time, and what the relevant representation has conveyed in the case at hand.

Conclusion

There should be no reason in principle nor in law why a substantive remedy cannot be granted in the circumstances where an individual has relied to his/her detriment upon a clear representation made by a public authority, provided that the public interest in holding the government to its word outweighs the competing public interest in the effect of departing from the representation. The first half of this paper sought to identify the fact that governments should and can be held to their word, and to identify what the appropriate cause of action for an applicant is depending on their circumstances. At its most basic formulation, an estoppel is grounded in an individual representation occasioning detrimental reliance, a legitimate expectation arises from detrimental reliance on a policy or law which is then departed from, and procedural unfairness requires only that the representation, usual policy or law is departed from but does not incorporate the element of detrimental reliance.

In the second half of this paper I argued that the appropriate estoppel to raise against a public authority is an administrative estoppel, which incorporates elements of the English law of abuse of process into the Australian law of equitable estoppel, allowing for competing public interests to be weighed by the court in deciding whether the representation which grounds the estoppel should be substantively upheld. This may be done through the Australian jurisprudence on 'unconscionability'. In the context of representations made by government, there may also be something to be said for estoppels grounded in negligent misstatements,⁸⁵ but that is beyond the scope of this paper.

So, what happens when a person relies upon a representation made by a government which is later reneged? The position in Australia is still unclear and unsatisfactory, but the development of administrative estoppel would enhance certainty. If *'they said it would be fine'*,⁸⁶ '[c]an it be seriously suggested that, having got that assurance, he was not entitled to rely on it?'⁸⁷

Endnotes

- 1 A common law estoppel involves the representation of an existing fact: *Thompson v Palmer* (1933) 49 CLR 507. See also Parkinson P, *The Principles of Equity* (Law Book Co, 2003).
- 2 A representation as to an intention or future state of facts may ground an estoppel in equity: *Waltons Stores v Maher* (1988) 164 CLR 387 (*Waltons*).
- 3 *Waltons*. See also: Radan P and Stewart C, *Principles of Australian Equity and Trusts* (LexisNexis, 2nd ed, 2013), 273-282.
- 4 (1990) 170 CLR 394 (*Verwayen*).
- 5 Mason A, 'The Place of Estoppel in Public Law' in M Groves (ed.) *Law and Government in Australia*, (Federation Press, 2005), 166.
- 6 *Robertson v Minister of Pensions* [1949] 1 KB 227 (*Robertson*).
- 7 *Robertson*, 232 (Denning J). *Robertson* was subsequently overturned in *Howell v Falmouth Boat Construction Co.* [1951] AC 837.

- 8 *Brickworks Ltd v Warringah Corporation* (1963) 108 CLR 568 (*Brickworks*).
- 9 *Maritime Electric Co. v General Dairies Co Ltd* [1937] AC 610 (*Maritime Electric*).
- 10 *Maritime Electric* 620.
- 11 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 (*Kurtovic*).
- 12 *Kurtovic*, 211 (Gummow J).
- 13 Mason, above n 5, 169.
- 14 *Findlay v Secretary of State for the Home Department* [1984] 3 All ER 801, 830 (Scarman LJ).
- 15 *Kurtovic* (1990), 215 (Gummow J).
- 16 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 (*Lam*).
- 17 In furtherance of the Tribunal's statutory duty to inform themselves of all the circumstances.
- 18 See Dyer B, 'Legitimate Expectations in Procedural Fairness after *Lam*' in M Groves, above n 5, 186.
- 19 *R v South and East Devon Health Authority; Ex parte Coughlan* [2000] 3 All ER 850 (*Coughlan*).
- 20 *Coughlan*, 1.
- 21 *Coughlan*, 55.
- 22 *Coughlan*, 57.
- 23 *Coughlan*, 60.
- 24 Elliott M, 'Legitimate Expectation: The Substantive Dimension' (2000) 59(3) Cambridge Law Journal 421.
- 25 *Coughlan*, 57.
- 26 *R v Secretary of State for Education and Employment; Ex parte Begbie (Begbie)* [2000] 1 WLR 1115
- 27 *Begbie*, 1129-1131.
- 28 *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 211 ALR 660 (*NAFF*).
- 29 *NAFF*, 670-671 (McHugh, Gummow, Callinan and Heydon JJ), 674 (Kirby J).
- 30 See eg Varuhas J, 'A Tort-Based Approach to Damages under the Human Rights Act 1998' (2009) 72(5) *Modern Law Review* 750; Varuhas J and Turner PG, 'Injunctions, Undertakings in Damages, and the Public-Private Divide' (2014) 130 *Law Quarterly Review* 33; Cane P, 'Damages in Public Law' (1997-2000) 9 *Otago Law Review* 489.
- 31 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 (*Quin*), 23.
- 32 *Lam*.
- 33 *Lam* 230 (Hayne J).
- 34 *Lam*, 517-8 (McHugh and Gummow JJ), 539 (Callinan J).
- 35 *Verwayen*, 411 (Mason CJ).
- 36 Finn P and Smith K, 'The Citizen, the Government, and "Reasonable Expectations"', (March 1992) 66 *Australian Law Journal* 139, 147.
- 37 s 75(v) *Constitution of Australia*. The ancillary writ of certiorari would, presumably, also be sought.
- 38 *Downey*, [19].
- 39 *Downey*, [19].
- 40 *Downey*, [21].
- 41 *Downey*, [21].
- 42 *Downey*, [23].
- 43 *R v SSHD* [1999] NIQB 68.
- 44 *Downey*, [27].
- 45 *Downey*, [28].
- 46 *Downey*, [29].
- 47 *Downey*, [32].
- 48 *Downey*, [44].
- 49 *Downey*, [51].
- 50 *Downey*, [68]-[70].
- 51 *Downey*, [71].
- 52 *Downey*, [75].
- 53 *Downey*, [87].
- 54 *Downey*, [97]-[98].
- 55 *Downey*, [102].
- 56 *Downey*, [109].
- 57 *Downey*, [111].
- 58 *Downey*, [121].
- 59 *Downey*, [123].
- 60 *Downey*, [139].
- 61 *Downey*, [126]-[129].
- 62 *Downey*, [128].
- 63 *Downey*, [141] (emphasis added).
- 64 *Downey*, [158].
- 65 *Downey*, [161].
- 66 *Downey*, [164].
- 67 *Downey*, [162].
- 68 *Downey*, [164].
- 69 *Downey*, [173].

- 70 Downey, [173].
71 Downey, [173].
72 *R v Abu Hamza* [2007] 3 All ER 45, 54.
73 Coughlan, 246-7. See Weeks G, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in Groves M (ed) *Modern Administrative Law in Australia*, (Cambridge, 2014), 237.
74 Quin, 18 (Mason CJ).
75 Pagone G, 'Estoppel in Public Law: Theory, Fact and Fiction' (1984) 7 *University of New South Wales Law Journal* 267, 274-5.
76 O'Mara A, 'Estoppel Against Public Authorities: Is Australian Public Law Ready to Stand Upon its Own Two Feet?' (2004) 42 *AIAL Forum* 1, 17.
77 Verwayen, 445 (Deane J). Cited with approval in *Guimelli v Guimelli* (1999) 196 CLR 101, 123 (Gleeson CJ, McHugh, Gummow and Callinan JJ).
78 *Laker Airways Ltd v Department of Trade* [1977] QB 643 (*Laker Airways*).
79 *Laker Airways*, 707 (Lord Denning MR).
80 *Lam*, 520 (McHugh and Gummow JJ).
81 O'Mara, above n 78, 10-11.
82 Thompson J, 'Estoppel by Representation in Administrative Action' (1998) 26 *Federal Law Review* 83, 102.
83 French R, 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *AIAL Forum* 1, 19.
84 O'Mara, above n 78, 12.
85 See eg *Legione v Hateley* (1983) 152 CLR 406.
86 above n 65.
87 above n 7.

BALANCING THE TREATMENT OF 'PERSONAL INFORMATION' UNDER FOI AND PRIVACY LAWS: A COMPARATIVE AUSTRALIAN ANALYSIS. PART 2

*Mick Batskos**

Part 1 of this paper, published in *AIAL Forum* 80, looked briefly at:

- (a) What privacy regime, if any, exists in each Australian jurisdiction, and how is it manifested?
- (b) What does each privacy regime protect? What falls within the protection offered – for example does it govern a broader concept of 'personal information', or does it exclude certain matters, such as 'health information'?

Part 2 of the paper addresses the treatment of personal privacy as a concept under Australia's freedom of information laws. Each Australian jurisdiction deals directly or indirectly with protection of personal privacy to some extent when disclosure of documents under freedom of information laws is being considered. Despite this commonality of approach and the recognition that personal privacy deserves some protection, there appear to be sufficiently divergent approaches taken in how exemptions are applied, and substantial differences in the features which apply to these exemptions, to warrant closer examination and comparison.

In Part 2, I look at:

- (a) How each Australian jurisdiction deals with protection of personal privacy in relation to applications for access under their freedom of information/right to information legislation? What is the nature and scope of each relevant personal privacy related exemption provision or equivalent?
- (b) How the different jurisdictions manage the balance between privacy and freedom of information in how they treat personal information?

Commonwealth

The *Freedom of Information Act 1982* (Cth) (*Cth FOI Act*) addresses personal privacy using a concept of 'personal information'.¹ That term has the same meaning as in the *Privacy Act 1988* (Cth) (*Cth Privacy Act*):²

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.

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Therefore, personal information can include information that identifies or could identify a person, says something about a person, it may be opinion (it does not have to be factual), it might be false, but must relate to a natural person/individual. It includes names, addresses, telephone numbers, dates of birth, medical records, taxation information, banking details, signatures, etc.

Under the *Cth FOI Act*, every person has a legally enforceable right to obtain access in accordance with the Act to documents of an agency or Minister other than exempt documents.³ The right exists and is unaffected by the reasons for seeking access (or the perceived reasons for seeking access).⁴

The exemption under the *Cth FOI Act* dealing with personal privacy is s 47F. It provides that a document is conditionally exempt if its disclosure under the *Cth FOI Act* would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The Australian Information Commissioner suggests that generally, the individual's identity needs to be reasonably ascertainable *by the applicant*. The ability of an applicant to reasonably ascertain an individual's identity will depend on the context and circumstances. It depends on whether it is practically possible for an applicant to link pieces of information to identify an individual. If the agency or minister is aware of relevant information that the applicant has (or could easily obtain) to ascertain the individual's identity, this is to be taken into consideration. An agency or minister must not, however, seek information from the applicant about what other information they have or could obtain. The Information Commissioner suggests that, where an agency or minister is unaware of the other information the applicant may have, the question to be asked is what other information a reasonable member of the public would be able to access.

This exemption does not apply if the personal information is only about the applicant.⁵ However, there are limitations to this in relation to certain health and well-being information.

Section 47F is one of the public interest conditional exemptions in the *Cth FOI Act*. This means that even if the requirements of s 47F are made out, the document is only conditionally exempt and access must be provided to the document unless, in the circumstances, access would, on balance, be contrary to the public interest.⁶

For the purposes of working out whether disclosure would on balance be contrary to the public interest, the *Cth FOI Act* sets out relevant factors and irrelevant factors. It is not an exhaustive list. One of the factors favouring disclosure is whether access to a document would allow a person to access his or her personal information.⁷ Further, in working out whether access would on balance be contrary to the public interest, an agency must have regard to any guidelines issued under s 93A by the Information Commissioner for the purposes of s 11B(5) of the *Cth FOI Act*.

The Information Commissioner has issued a guideline on public interest factors for and against disclosure some of which might be more relevant to matters involving personal information:⁸

Public interest factors favouring disclosure

- (a) The personal information is that of a child, where the applicant is the child's parent and disclosure of the information is reasonably considered to be in the child's best interests.
- (b) The personal information is that of a deceased individual where the applicant is a

- close family member (generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household).
- (c) It will contribute to the administration of justice for a person.
 - (d) It will advance the fair treatment of individuals in accordance with the law in their dealings with agencies.

Public interest factors against disclosure

- (a) The personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests.
- (b) The personal information is that of a deceased individual where the applicant is a close family member (like a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if they were alive.
- (c) It could reasonably be expected to prejudice the fair treatment of individuals and the information concerns unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.
- (d) It could reasonably be expected to impede the administration of justice for an individual.
- (e) It could reasonably be expected to harm the interests of an individual or group of individuals.

One of the more challenging aspects for decision makers is that, when weighing where the public interest balance lies, the decision maker must explain the relevance of the factors and the relative weight given to those factors in any statement of reasons for decision.

There are some safeguards built into the *Cth FOI Act* to enable persons whose personal information is in documents to have some input into the decision about whether or not to disclose such information. Section 27A(1) applies if access is sought to a document containing personal information about a person (including a person who has died) and it appears to the person (or dead person's legal representative) that the person (or representative) might reasonably wish to contend that:⁹

- (a) the document is conditionally exempt under s 47F; and
- (b) access would be contrary to the public interest under s 11A(5) ('exemption contention').

Where s 27A applies, the agency must not make a decision to give access unless the person concerned in relation to the personal information has been given a reasonable opportunity to make submissions in support of the exemption contention, and the agency has had regard to any such submissions, provided it is reasonably practicable in all the circumstances to give the person concerned that opportunity.¹⁰

There are also protections for individuals who make submissions about the exemption depending on the decision outcome. If the agency decides to give access to the document containing the relevant personal information, it must give notice of that decision to the person concerned (as well as the applicant). In the meantime, the agency is not to give access to the applicant until all review or appeal opportunities have run out and the decision remains unchanged.¹¹

If such a decision is made, then as an affected third party, the person whose personal information is involved has review rights to:

- (a) seek internal review of the access grant decision;¹² or
- (b) seek review from the Information Commissioner¹³ (in which case the onus is on the affected third party individual to establish that a decision refusing access should be made);¹⁴ and
- (c) seek review from the Administrative Appeals Tribunal of a decision of the Information Commissioner which is adverse to the affected third party (in which case the third party individual has the onus of establishing that a decision to refuse access is justified).¹⁵

Specific provisions provide for some caution when it comes to disclosing to an applicant a document containing information about the applicant that was provided by a 'qualified person' acting in that capacity, and it appears to the principal officer of the agency¹⁶ that disclosure to the applicant might be detrimental to the applicant's physical or mental health or well-being.¹⁷

A 'qualified person' is a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being.¹⁸ That includes but is not limited to a medical practitioner, psychiatrist, psychologist, counsellor, or social worker.

Where the principle officer considers that detriment might occur, the principal officer can direct that, to the extent the document contains such information, it is not to be given to the applicant directly, but rather to a qualified person nominated by the applicant, who carries on the same occupation as the qualified person who provided the information.

Some concessions are made to applicants seeking their own personal information. There is no charge payable for provision of access to a document that contains personal information about the applicant.¹⁹

Victoria

The *Freedom of Information Act 1982* (Vic) (*Vic FOI Act*) addresses personal privacy using a concept of personal affairs information, or more accurately, 'information relating to the personal affairs of any person'. Even so, a definition of that term only occurs in the context of and for the purposes of a specific exemption, even though the phrase appears in other provisions of the *Vic FOI Act*.

Under the *Vic FOI Act*, every person has a legally enforceable right to obtain access in accordance with that Act to a document of an agency other than an exempt document.²⁰ In relation to protection of personal privacy, s 33 is the relevant exemption provision. Section 33(1) of the *Vic FOI Act* is headed 'Document affecting personal privacy' and provides that:

A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

Section 33(9) of the *Vic FOI Act* provides that in s 33 the phrase 'information relating to the personal affairs of any person' has an inclusive meaning. That is, it includes information:

- (a) that identifies any person or their address or location; or
- (b) from which any person's identity, address or location can reasonably be determined.

That definition was introduced in late 1999, after a series of decisions of the Victorian Civil and Administrative Tribunal (VCAT) and its predecessor were divided as to the application of the phrase 'information relating to the personal affairs of any person' to staff and other

officers of agencies. This culminated in the *Frankston Hospital Case*,²¹ in which a convicted triple murderer was granted access to the nursing rosters for an outer suburban hospital, on the basis that the nursing rosters did not contain information about the nurses' 'personal affairs' information for the purposes of s 33 of the *Vic FOI Act*.

As a consequence of the resulting furore, the *Vic FOI Act* was amended to introduce in s 33(9) a broad definition of 'personal affairs' information, making it clear that s 33 could apply to information about **any** individual, regardless of whether or not they were an officer or staff member of an agency.

Another by-product of the *Frankston Hospital Case* was the introduction of an additional factor that must be considered as part of the balancing exercise in determining whether disclosure of personal affairs information would be unreasonable. Section 33(2A), introduced at the same time as s 33(9), provides:

An agency or Minister, in deciding whether the disclosure of a document under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, must take into account, in addition to any other matters, whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.

Even if an applicant is unlikely to take violent action against a person whose personal information would be revealed by disclosure of the documents, the mere fact that release of the information could create apprehension in the mind of the person concerned may be enough to render disclosure unreasonable.²²

More generally, determining whether granting access to personal affairs information would involve 'unreasonable' disclosure requires competing interests to be balanced. On one hand are the interests of the person seeking access to information and, on the other, the legitimate interests of a person whose privacy may be invaded by disclosure of a document.²³ The range of factors that may be considered is not limited in any way and can include, in addition to the s 33(9) requirement:²⁴

- the nature of the information;
- the circumstances in which the agency holds the information;
- the likelihood that the individual would wish to have his/her information disclosed without consent;
- whether disclosure may cause any person stress, anxiety or embarrassment;
- the motives of the applicant and whether or not they are commendable;
- the identity of the applicant and his/her interest in the information;
- whether there is any public interest in disclosure; and
- the current relevance of the information.

In short, in determining whether disclosure is unreasonable, the decision-maker must identify all facts and matters relevant to the question to be determined, and make an evaluative judgment based upon them. What amounts to unreasonable disclosure will necessarily vary from case to case. It includes having regard to a range of factors beyond the privacy of the persons whose affairs will be disclosed in determining whether disclosure is unreasonable.²⁵ Any matter which, as a matter of relevance, logic and proof informs the decision of whether the statutory condition is satisfied must be taken into account. In the end, the proper application of s 33(1) of the *Vic FOI Act* will require a decision-maker to consider all matters relevant, logical and probative to the existence of conditions upon which the section depends.²⁶

In Victoria, the application of the exemption is determined on the basis of disclosure to the

particular applicant, but potentially to the world because the agency cannot control what happens to a document once it is disclosed to the applicant. There is no such concept as conditional disclosure under the *Vic FOI Act* and an agency cannot rely on any assurances by applicants that they will not disclose the information more widely.²⁷ Therefore, consideration of the likelihood of wider dissemination beyond the applicant is relevant.²⁸

Agencies are not legally required to consult a person before determining whether or not disclosure of his/her personal affairs information would be unreasonable. However, a government practice note encourages consultation on the basis that it may be required by the existence of s 33(2A), as the individual concerned would be in the best position to advise whether the disclosure would, or would be reasonably likely to, endanger their life or physical safety.²⁹

It should also be noted that if an agency decides that disclosure of an individual's personal affairs information would not be unreasonable, it is required if practicable to notify the person who is the subject of that information (or in the case of a deceased person, that person's next-of-kin) of the decision, and of the right to seek review of such a decision.³⁰ Review is available from the VCAT, not the FOI Commissioner.³¹

Apart from a narrow exception in relation to certain health information, the exemption in s 33(1) does not apply where a person seeks a document containing information relating to their own personal affairs.

The specific exception about health information applies where an applicant seeks access to documents containing the applicant's health information. Section 33(4) requires the agency's principal officer to determine whether, on reasonable grounds, granting access to such a document would pose a serious threat to the life or health of the applicant. If so, access must not be given to the document as it is exempt; review procedures incorporated from the *Health Records Act 2001* (Vic) apply to the refusal decision.³²

Where the principal officer of the agency is not a doctor registered to practice as a medical practitioner under the Health Practitioner Regulation National Law, the agency must appoint a registered person to stand in the shoes of the principal officer when considering whether disclosure of the health information would pose a serious threat to the life or health of the applicant.³³ This is a mandatory procedure.³⁴

Some concessions are made to applicants seeking documents containing their own personal affairs information. Although they must pay an application fee to request access,³⁵ they may not be charged certain access charges (which are reduced even further if the applicant is suffering financial hardship).³⁶ But it should be noted that some charges are probably inescapable whether or not the information is about the applicant, and whether or not the applicant is impecunious.³⁷

A unique and, some would say, peculiar provision relating to personal affairs in the *Vic FOI Act* is s 33(6). In effect, it enables agencies to neither confirm nor deny the existence of documents where to include this information in a hypothetical document would cause the hypothetical document to itself be exempt on the basis of an unreasonable disclosure of personal affairs information. It applies mostly where an applicant seeks documents about another named individual, in circumstances where merely acknowledging whether or not such documents exist would unreasonably disclose information about the named person's personal affairs.

Australian Capital Territory

The *Freedom of Information Act 1989* (ACT) (*ACT FOI Act*) deals with personal privacy using the concept of 'personal information', defined as:

personal information means information or an opinion (including information 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.³⁸

This has been held to include dates of birth, occupations, private phone numbers, direct work phone numbers, private addresses and email addresses, and official titles.³⁹

Under the *ACT FOI Act*, every person has a legally enforceable right to obtain access in accordance with that Act to a document of an agency or Minister, other than an exempt document.⁴⁰

In relation to protection of personal privacy, s 41 is the relevant exemption provision. It provides that a document is an exempt document if its disclosure under the Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

As in Victoria, apart from a narrow exception in relation to certain health information, the exemption in s 41(1) does not apply where a person seeks a document containing his/her own personal information.

The health related exception applies where a requested document contains information of a medical or psychiatric nature concerning the applicant. Where the agency's principle officer considers that disclosure of this information might be prejudicial to the applicant's physical or mental health or wellbeing, the principal officer may direct that the information in question not be provided to the applicant directly, but rather to a doctor nominated by the applicant.⁴¹

As in the *Cth FOI Act*, s 27A of the *ACT FOI Act* applies if access to a document containing personal information about person (including a person who has died) is requested, and it appears to the agency that that person (or their legal representative if deceased) might reasonably wish to submit that the document is exempt under s 41.⁴²

In those circumstances, and if practicable, the agency must not grant access to personal information in a document unless the person concerned (or the legal representative of a deceased person) is given a reasonable opportunity to make a submission that the document is exempt (in so far as it contains personal information), and the decision-maker has considered that submission.

If such submissions are made, but the agency nevertheless decides to release the document, it must notify the person making the submission of the decision to disclose. The person concerned (or the legal representative of a deceased person) can apply to the ACT Civil and Administrative Tribunal (ACAT) for review of a decision to release a document containing that person's personal information.⁴³ The agency must not give access to the personal information until the time permitted for seeking review has ended and no application to the ACAT has been made, or unless the ACAT has dismissed the application, made a decision with the agreement of the parties, or affirmed the original decision.⁴⁴

Further, if the agency decides that a document is exempt under s 41 and the FOI applicant applies to the ACAT for review, the person who is the subject of the personal information (or their legal representative if deceased) must be informed by the agency of the application to

the ACAT.⁴⁵

Some concessions are made to applicants seeking their own personal information. In considering whether to remit access charges associated with a request, an agency must take into account whether the document contains personal information that relates to the applicant (or the person on whose behalf the application for access was made).⁴⁶ Similarly, the application fees associated with the making of a request for access or seeking review may be wholly or partly remitted if the agency is satisfied the document contains personal information that relates to the applicant (or the person on whose behalf the application for access was made).⁴⁷

New South Wales

The *Government Information (Public Access) Act 2009* (NSW) (*GIPA Act*) also deals with personal privacy using the concept of 'personal information', defined as '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 (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion'.⁴⁸

'Personal information' includes such things as an individual's fingerprints, retina prints, body samples or genetic characteristics. Excluded from the definition is:

- information about an individual who has been dead for more than 30 years; and
- information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.

Under the *GIPA Act*, a person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4, unless there is an overriding public interest against disclosure of the information.⁴⁹ There is an overriding public interest against disclosure of government information for the purposes of the *GIPA Act* if (and only if):

- (a) there are public interest considerations against disclosure; and
- (b) on balance, those considerations outweigh the public interest considerations in favour of disclosure.⁵⁰

Although there are many factors for and against disclosure, some of those that may play a role in a finding that disclosure of personal information is or is not in the public interest include:

Public interest factors favouring disclosure

- (a) the general public interest in favour of disclosure of government information.
- (b) the information is personal information of the person to whom it is to be disclosed⁵¹ - the public interest in providing people with access to their own information is extremely strong and should only be displaced where the considerations against disclosure are overriding.⁵²

Public interest factors against disclosure

- (a) disclosure of certain classes of information are conclusively presumed to be against the public interest including about aspects of adoption and child protection.⁵³

For all of the following factors, each is but one of many factors that must be weighed in the balancing process to determine whether there is an overriding public interest against disclosure:

- (b) where disclosure could reasonably be expected to reveal a person's personal information.⁵⁴ This cannot apply if the personal information has already been publicly disclosed lawfully.⁵⁵
- (c) where disclosure could reasonably be expected to contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* (NSW) or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002* (NSW).
- (d) where disclosure could reasonably be expected to prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness.
- (e) where disclosure could reasonably be expected to reveal false or unsubstantiated allegations about a person that are defamatory.
- (f) where disclosure could reasonably be expected to expose a person to a risk of harm or of serious harassment or serious intimidation.
- (g) Where, in the case of the disclosure of personal information about a child—it could reasonably be expected that disclosure of information would not be in the best interests of the child.
- (h) where disclosure could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests.⁵⁶
- (i) personal factors of the application can be taken into account including the applicant's identity, their relationship with any person, motives for the application, and any other factors particular to the applicant to the extent they are relevant to considering factors such as those in paragraphs (b) to (h) above.⁵⁷

The public interest factors against disclosure must be very significant to override the general presumption of disclosure in the *GIPA Act*, and the specific consideration in favour of disclosure of giving people access to their own information.⁵⁸

Personal factors of the applicant can be taken into account, including the applicant's identity, their relationship with any person, their motives for the application, and any other factors particular to the applicant.⁵⁹

As a procedural safeguard, an agency must take reasonably practicable steps to consult with a person (or a close relative of a deceased person)⁶⁰ before providing information relating to the person if:

- (a) the information includes personal information about the person, or is about their business, commercial, professional or financial interests; and
- (b) the person may reasonably be expected to have concerns about the disclosure of the information; and
- (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.⁶¹

The consultation seeks to ascertain whether the person objects to some or all of the information being disclosed, and the reasons for any such objection. The agency must take into account any objection to disclosure when determining whether there is an overriding public interest against disclosure of government information.⁶² If the person objects and the agency decides nevertheless to disclose the information, the person has review rights and the agency must not disclose the information pending any review.⁶³

Another personal privacy aspect of the *GIPA Act* is that there is no obligation to include in a disclosure log any personal information about an individual applicant or any other individual.⁶⁴ An individual can object to inclusion of certain information about them in a disclosure log on the basis that the information is personal information about the objector (or a deceased relative for whom they are the personal representative), or the information is about the objector's business, commercial, professional or financial interests.⁶⁵

A processing charge cannot be imposed for the first 20 hours of processing time where an individual applicant seeks his/her own personal information.⁶⁶

Where there is information about an individual applicant which is medical or psychiatric information, an agency can impose a condition that it be provided to a medical practitioner nominated by the applicant rather than directly to the applicant personally.⁶⁷

Queensland

The *Right to Information Act 2009* (Qld) (*Qld RTI Act*) does not itself contain any specific definition of personal information, personal affairs, or personal privacy. Rather, the definition of 'personal information' the dictionary in the *Qld RTI Act* simply says *Information Privacy Act 2009* (Qld).

The *Qld RTI Act* provides that a person has a right to be given access to a document of an agency or a Minister, subject to the rest of the Act.⁶⁸

Unlike most other Australian jurisdictions, the *Qld RTI Act* does not have a specific privacy related exemption. An agency or Minister may refuse access to a document to the extent it comprises exempt information as set out in Schedule 3,⁶⁹ but none of those exemptions specifically relate to personal privacy or personal information.

An agency or Minister may also refuse access to a document to the extent that it comprises information if disclosure would, on balance, be contrary to the public interest under s 49. Section 49 sets out how to determine whether disclosure would, on balance, be contrary to the public interest by reference to public interest factors in Schedule 4 of the *Qld RTI Act*.⁷⁰ Factors particularly relevant to personal privacy include:

Factors favouring disclosure

- (a) The information is the applicant's personal information.
- (b) The information is the personal information of a child within the meaning of s 25, the agent acting for the applicant is the child's parent within the meaning of s 25 and disclosure of the information is reasonably considered to be in the child's best interests.
- (c) The information is the personal information of a deceased individual and the applicant is an eligible family member of the deceased person.
- (d) Disclosure of the information could reasonably be expected to advance the fair treatment of individuals in their dealings with agencies.
- (e) Disclosure of the information could reasonably be expected to contribute to the administration of justice for a person.

Factors favouring non-disclosure

- (a) Disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities.
- (b) Disclosure of the information could reasonably be expected to prejudice the

- protection of an individual's right to privacy.
- (c) The information is the personal information of a child within the meaning of section 25, the applicant is the child's parent within the meaning of section 25 and disclosure of the information is reasonably considered not to be in the child's best interests.
 - (d) The information is the personal information of an individual who is deceased (the deceased person), the applicant is an eligible family member of the deceased person and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.
 - (e) Disclosure of the information could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.
 - (f) Disclosure of the information could reasonably be expected to impede the administration of justice for a person.

Factors favouring non-disclosure because of public interest harm

- (a) Except where the information is about the applicant,⁷¹ disclosure of the information could reasonably be expected to cause public interest harm if it would disclose personal information of a person, whether living or dead.

In addition to this general protection of personal privacy based on a public interest balance, specific protection is also provided for:

- (b) documents sought under an application by or for a child which comprise the child's personal information, the disclosure of which would not be in the child's best interests, under s 50; and
- (c) to the extent the document comprises an applicant's relevant healthcare information the disclosure of which might be prejudicial to the physical or mental health or wellbeing of the applicant, under s 51.

An agency may only give access to a document containing information that may reasonably be expected to be of concern to a relevant third party individual if the agency first takes reasonably practicable steps to:

- (a) obtain the views of the relevant third party (or a deceased's representative) about whether the information is contrary to the public interest;
- (b) to inform them that if access to the document is given, it may also be given under a disclosure log.⁷²

If the agency obtains the views of the relevant third party (who considers it to be contrary to the public interest), but the agency decides that it is not such information, it must give a written notice of decision to the relevant third party. Further, it must not give access to the document until:

- (a) the relevant third party gives written notice that no review will be sought; or
- (b) the review period has expired; or
- (c) any review has concluded⁷³ – whether that is internal review by the agency under Part 8 or external review by the Information Commissioner under Part 9.

Interestingly, if the relevant third party brings an external review application, he or she bears the onus of establishing that a decision not to disclose a document or information is justified.⁷⁴

Tasmania

The *Right to Information Act 2009* (Tas) (*Tas RTI Act*) addresses personal privacy using the concept of 'personal information', which is defined to mean 'any information or opinion in any recorded format about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion' and 'who is alive or has not been dead for more than 25 years.'

Under the *Tas RTI Act* a person has a legally enforceable right to be provided in accordance with the Act with information in the possession of a public authority or Minister unless it is exempt information.⁷⁵ Information may be exempt information by virtue of a provision in Part 3 of the Act,⁷⁶ including s 36.

Section 36 provides that information is exempt if its disclosure 'would involve the disclosure of the personal information of a person other than the' applicant. This appears to be very broad in coverage but there is an additional public interest requirement; information is exempt only if the principal officer of the public authority determines that disclosure would be contrary to the public interest after taking into account all relevant matters.⁷⁷

In determining whether disclosure is contrary to the public interest, consideration must be given at least to those matters set out in Schedule 1 of the *Tas RTI Act*, while those matters in Schedule 2 must be disregarded. Factors that must be considered include:

- whether the disclosure would promote or hinder equity and fair treatment of persons in their dealings with government;
- whether the disclosure would promote or harm the interests of an individual or group of individuals; and
- whether the disclosure would harm the business or financial interests of any person.

A procedural safeguard exists to give affected individuals some input into decisions related to disclosure of information that may be about them in limited situations. First, there must be an application for information where the information was provided to the public authority or Minister by a third person.⁷⁸ Secondly, the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party. In those circumstances, before deciding whether or not to disclose that information, if practicable, the principal officer or Minister must send a notice to the third party to seek his/her views about possible disclosure of the information within 15 working days. If a decision is made to disclose the information after receiving the third party's views, notice of decision must be provided to that person, also notifying them of the right to seek review of the decision.⁷⁹ Where the decision is made by a delegated officer, the right of review is to seek internal review by the principal officer.⁸⁰

Northern Territory

The *Information Act 2002* (NT) (*NT Information Act*) again addresses personal privacy using the concept of 'personal information', defined to mean 'government information from which a person's identity is apparent or is reasonably able to be ascertained.'

Interestingly, the *NT Information Act* provides that every person has separate rights to obtain access to government information other than personal information,⁸¹ and to obtain access to his or her own personal information.⁸² A person may apply to a public sector organisation for access to government information held by the organisation, including the person's personal information.⁸³ The public sector organisation can refuse access to the information if the information is exempt.⁸⁴

The exemption dealing with personal privacy is found in s 56. It provides that information may be exempt if the disclosure of the information would be an unreasonable interference with a person's privacy (with respect to personal information) and it is not in the public interest to disclose the information.⁸⁵ It states that disclosure of information may be an unreasonable interference with a person's privacy even though the information arises from the performance of a public duty.

In 2011, a decision by the Office of the NT Information Commissioner distinguished between information about a person's home life, and information about their behaviour when carrying out publicly funded employment. It held that releasing the latter type of information would not be an unreasonable interference with privacy. The decision maker had earlier concluded:

However I do not consider that disclosure of the name of a member of staff of a public sector organisation, without any more information about their personal circumstances, could possibly constitute an interference with their privacy, whether 'unreasonable' or not. In my view, staff names, position titles, and salary rates attaching to positions in public sector organisations should be, and most often are, publicly available information.⁸⁶

As a procedural safeguard, a public sector agency must not disclose information about a person, where that disclosure might interfere with privacy, unless it first seeks the person's views.⁸⁷

South Australia

The *Freedom of Information Act 1991 (SA)* (*SA FOI Act*) addresses personal privacy using the concept of 'personal affairs', defined as:

personal affairs of a person includes that person's—

- (a) financial affairs;
- (b) criminal records;
- (c) marital or other personal relationships;
- (d) employment records;
- (e) personal qualities or attributes,

but does not include the personal affairs of a body corporate;

Under the *SA FOI Act*, an agency may refuse access to a document if it is an exempt document by virtue of Schedule 1 of the Act.⁸⁸ The relevant exemption in Schedule 1, dealing with personal privacy, is cl 6. It sets out when a document is an exempt document, and then provides for a limited exception as to when a document may not be exempt.

Clause 6(1) provides:

A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

A specific provision dealing with criminal and similar allegations is contained in Clause 6(2) of Schedule 1, which provides:

A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.

Neither of the subclauses applies merely because a document contains information about the applicant, there is a prima facie right of individuals to have access to their own information.

However, there is a further narrow exception to this general right of access to one's own personal information set out in cl 6(3). It provides (in summary) that a document is exempt where it contains:

- (a) information about an applicant who is less than 18 years old (or was when the information was 'furnished'); or
- (b) information about an applicant who is (or was when the information was furnished) suffering from mental illness, impairment or infirmity, or is about such a person's family or circumstances; and
- (c) disclosure would be unreasonable having regard to the need to protect that person's welfare.

As a procedural safeguard, an agency must not give access to a document that contains information concerning the personal affairs of any person (whether living or dead) (except where that person is the applicant) unless the agency has first taken reasonable steps to obtain the person's views.⁸⁹

Western Australia

The *Freedom of Information Act 1992 (WA)* (*WA FOI Act*) addresses personal privacy using the concept of 'personal information', defined as follows:

personal information means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead —

- (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or
- (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.

The definition of personal information has been interpreted widely to include information which, if coupled with information which one other person may have, enables the identity of the person to be ascertained. It does not have to in and of itself identify the individual. The WA Information Commissioner has found:

As the purpose of the clause 3 exemption is to protect the personal privacy of individuals about whom government-held documents contain personal information, in my view the definition of 'personal information' should be construed in a way that achieves that purpose and accords with the objects of the FOI Act. I am inclined to the view, therefore, that if any person, even if only a person having some additional knowledge, could reasonably ascertain the identity of a particular individual from particular information about that individual, that information will be personal information for the purposes of the FOI Act.⁹⁰

Under the *WA FOI Act*, an agency may refuse access to a document to the extent that it contains matter that is exempt under Schedule 1 of the Act.⁹¹ The relevant exemption is contained in cl 3 of the Schedule. It starts with a proposition as to when something is exempt matter and lists various exceptions or limits to that exemption. Clause 3(1) provides that:

Matter is exempt matter if its disclosure would reveal personal information about an individual (whether

living or dead).

The exceptions to that exemption – namely, where matter is not exempt matter and therefore a document is not exempt – are (in summary):

- (a) Where disclosure would reveal personal information about the applicant. Of course, where an applicant seeks information about himself/herself, the agency must take reasonable steps to satisfy itself of the identity of the applicant and ensure that only the applicant (or their agent nominated in writing) receives the document.⁹²
- (b) Where merely because disclosure would reveal, in relation to a person who is or has been an officer of an agency, *prescribed details*⁹³ relating to the person, their position or function as an officer, or things done in performing their functions as an officer.
- (c) Where merely because disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, *prescribed details*⁹⁴ relating to the person, the contract, or things done in performing the contract.
- (d) If the applicant provides evidence of the individual's consent to disclosure.⁹⁵
- (e) If, on balance, its disclosure would be in the public interest.

Interestingly, the *WA FOI Act* specifically provides that, if the applicant has requested access to a document containing his/her personal information, the fact that matter is personal information about the applicant must be considered as a factor in favour of disclosure for the purpose of making a decision as to —

- (a) whether it is in the public interest for the matter to be disclosed; or
- (b) the effect that the disclosure of the matter might have.⁹⁶

There are some other specific personal privacy related provisions in the *WA FOI Act* which may be of interest. For example, access can be refused if the information in a document is about a child who is not yet 16 years old, if the agency is satisfied that access would not be in the best interests of the child, and if the agency is satisfied that the child does not have the capacity to make a mature judgment as to what might be in his or her best interests, whether or not the child is the applicant.⁹⁷

Similarly, access can be refused if the information in a document is about an intellectually handicapped person, and the agency is satisfied that access would not be in the best interests of the person, whether or not the person is the applicant.⁹⁸

As a procedural safeguard, an agency is not to provide access to personal information about a person other than the applicant unless the agency has taken such steps as are reasonably practicable to obtain the views of that third party individual or, if dead, their closest living relative.⁹⁹

The nature of this exemption has been summarised by the Western Australian Freedom of Information Commissioner in the following terms:

I consider that clause 3 is a recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals and that the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny without the consent of the individuals concerned where there is no demonstrable benefit to the public interest in doing so.¹⁰⁰

There is a concession provided to applicants who wish to obtain personal information about themselves, in that no application fee or charges are payable for giving an applicant access to 'personal information about the applicant'.¹⁰¹ If an applicant does not pay the \$30

application fee, the application is only valid as an application for access to the applicant's personal information. Any information in the requested documents about other people is outside the scope of the application and, therefore, need not be disclosed.¹⁰²

Conclusion

This brief comparison of Australian jurisdictions confirms recognition in each jurisdiction that, either directly or indirectly, protection of personal privacy is warranted. It is the precise form which that protection takes which results in many similarities and equally as many differences in areas such as:

- what types of information are specifically included or excluded from protection;
- whether information about public servants is covered;
- whether or not affected individuals must be consulted before a decision is made about disclosure of information;
- in determining whether or not personal information is to be disclosed, a balancing of factors for and against should take place – but there are differences as to those factors;
- whether the identity, motives and intended use of personal information by an applicant can or cannot be taken into account;
- special acknowledgement that certain health based information about an applicant should be treated differently; and
- whether affected individuals have review rights if their information is to be released.

Endnotes

- 1 The *FOI Act* originally dealt with personal affairs but moved to personal information, broadening the scope of what is covered and to be consistent with the Privacy Act 1988 (Cth), with amendments in 1991.
- 2 See definition of personal affairs in s 4, *FOI Act*.
- 3 Section 11(1), *FOI Act*.
- 4 Section 11(2), *FOI Act*.
- 5 Section 47F(3), *FOI Act*.
- 6 Sections 11A(5) and 31B, *FOI Act*.
- 7 Section 11B(3)(d), *FOI Act*.
- 8 Guideline available at: <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/part-6-conditional-exemptions/applying-the-public-interest-test> as at 18 July 2014.
- 9 Section 27A(2) sets out what the decision maker must consider in determining whether a person might reasonably wish to contend the matters set out in s 27A(1)(b)(i) and (ii).
- 10 Section 27A(4), *FOI Act*.
- 11 Sections 27A(5) - (7), *FOI Act*.
- 12 Sections 53B, 53C and 54A, *FOI Act*.
- 13 Section 54M, *FOI Act*.
- 14 Section 55D(2), *FOI Act*.
- 15 Section 61(2), *FOI Act*.
- 16 The powers and functions of a principal officer in s 27F can be exercised by an appropriately authorised person: s 27F(6), *FOI Act*.
- 17 Section 47F(4), *FOI Act*.
- 18 Section 47F(7), *FOI Act*.
- 19 Regulation 5(1), *FOI Charges Regs*.
- 20 Section 13, *Vic FOI Act*.
- 21 *Coulston v Mornington Peninsula and District Hospital* (Unreported, VCAT, 22 November 1998, Senior Member Megay).
- 22 *Akers v Victoria Police (No 1)* [2003] VCAT 397; *Koch v Swinburne University* [2004] VCAT 1513 at [28].
- 23 *Victoria Police v Marke* [2008] VSCA 218, at [76], [93], [96], [103], [106].
- 24 *Page v Metropolitan Transit Authority* (1988) 2 VAR 243, 245-6.
- 25 Id [74], [76], [97].

- 26 Id [104]; *Re Shewcroft and ABC* (1985) 7 ALN 307; *Re Lavidos and Office of Corrections (No 3)* (1990) 4 VAR 150, 154; *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.
- 27 Id at [30]-[31], [69]-[70], [105]-[106].
- 28 Id at [5], [86], [99].
- 29 Victoria, Department of Justice, *Practice Note 12: Personal Information Exemption*, [6] as at 17 July 2014 at <http://www.foi.vic.gov.au/home/for+government+agencies/practice+notes/practice+note+12+personal+information+exemption#ConsultationWithThirdParties>
- 30 Section 33(3), *Vic FOI Act*.
- 31 Section 50(3), *Vic FOI Act*.
- 32 Section 33(4), *Vic FOI Act*.
- 33 Section 33(5), *Vic FOI Act*.
- 34 *Morgan v Inner South Community Health Service Inc* (Unreported, VCAT, 9 September 2008) at [15] available at <http://www.foisolutions.com.au/documents/MorganvInnerSouthCommunityHealthService.pdf>
- 35 Two fee units under the *Monetary Units Act 2004* (Vic) which as at 1 July 2014 was \$26.50.
- 36 Sections 22(1)(h)(iii) and 22(1)(i), *Vic FOI Act*.
- 37 See s 22, *Vic FOI Act* and Schedule to the *Vic FOI Regulations*.
- 38 Dictionary, *ACT FOI Act*.
- 39 *Thornton v Director of Public Prosecutions* [2009] ACAT 40.
- 40 Section 10, *ACT FOI Act*.
- 41 Section 41(3), *ACT FOI Act*.
- 42 Section 27A(3) of the *ACT FOI Act* sets out factors to consider in determining whether the individual concerned might reasonably wish to submit that the document is exempt.
- 43 Section 69A, *ACT FOI Act*.
- 44 Section 27A(4), *ACT FOI Act*.
- 45 *Ibid*.
- 46 Section 29(3)(b), *ACT FOI Act*.
- 47 Section 30(1)(b), *ACT FOI Act*.
- 48 Clause 4, *Schedule 4, GIPA Act*.
- 49 Section 9, *GIPA Act*.
- 50 Section 13, *GIPA Act*. For an examples of how this balance is applied in practice see *Gee v Department of Education and Communities* [2014] NSWCATAD 7; *Cameron v Commissioner of Police New South Wales Police Force* [2014] NSWCATAD 13; *Pedestrian Council of Australia Limited v North Sydney Council* [2014] NSWCATAD 80.
- 51 Section 12(2)(d), *GIPA Act*.
- 52 Id at [2.6].
- 53 Section 14(1) with clauses 9 and 10, *Schedule 1, GIPA Act*.
- 54 The reference to personal information should be taken as personal information about someone other than the person requesting the information: *NSW Guideline 4*, at [3.3].
- 55 See definition of reveal in cl 1 of *Schedule, GIPA Act*.
- 56 Section 14(2) and Table (which provides an exhaustive list – it cannot be added to by Guidelines issued by the Information Commissioner: s 14(3)), *GIPA Act*.
- 57 Section 55(1), (3), *GIPA Act*.
- 58 Office of the Information Commissioner, New South Wales, *Guideline 4: Personal information as a public interest consideration under the GIPA Act*, December 2011, at [2.3], available as at 15 July 2014 at: http://www.ipc.nsw.gov.au/aqdbasev7wri_assets/privacy/m727302l5/guideline_gipa_4_personalinfo_publicinterestest.pdf (NSW Guideline 4).
The Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information, for the assistance of agencies: s 12(3), *GIPA Act*.
- 59 Section 55(1) and (2), *GIPA Act*.
- 60 Section 54(3), *GIPA Act*.
- 61 Section 54(1) and (2), *GIPA Act*.
- 62 Section 54(4) and (5), *GIPA Act*.
- 63 Section 54(6) and (7), *GIPA Act*.
- 64 Section 26(3), *GIPA Act*.
- 65 Section 56(2), *GIPA Act*.
- 66 Section 67, *GIPA Act*.
- 67 Section 73(3), *GIPA Act*.
- 68 Section 23, *Qld RTI Act*.
- 69 Section 47(3)(a), *Qld RTI Act*.
- 70 For examples of how this balance is applied in practice see: *Young and Queensland Police Service* [2013] QICmr 16; *F60XCX and Queensland Ombudsman* [2014] QICmr 28; *Brodsky v Gympie Regional Council* [2014] QICmr 17.
- 71 Or a person on whose behalf an application is made.
- 72 Section 37, *Qld RTI Act*.
- 73 Section 37(3), *Qld RTI Act*.
- 74 Section 87(2) and (3), *Qld RTI Act*.
- 75 Section 7, *Tas RTI Act*.

- 76 Section 5(1), *Tas RTI Act*.
77 Section 33, *Tas RTI Act*.
78 That is, not the applicant.
79 Section 36, *Tas RTI Act*.
80 Section 43(2), *Tas RTI Act*.
81 Section 15, *NT Information Act*.
82 Section 16, *NT Information Act*.
83 Section 18, *NT Information Act*.
84 Section 24(1), *NT Information Act*.
85 Section 50, *NT Information Act*.
86 Decision F1/10-11 available at http://www.infocomm.nt.gov.au/publications/documents/_pf_summaries_web_foi_2.pdf
87 Or if the person is a child, has a disability or is deceased, a permitted representative under s 155 of the *NT Information Act*.
88 See definition of exempt document, s 4(1), *SA FOI Act*.
89 Section 26, *SA FOI Act*.
90 *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23, [53]; *Re Terrestrial Ecosystems and Department of Environment and Conservation* [2013] WAICmr 9, [75]-[80].
91 For definitions of terms see the Glossary in the *WA FOI Act*.
92 Section 29, *WA FOI Act*.
93 These include name, position, job description, anything done in performing their functions or duties, etc: cl 9(1), *WA FOI Regulations*.
94 These include name, qualifications relevant, position described in the contract, the nature or details of the services provided, anything done in performing the contract, etc: cl 9(2), *WA FOI Regulations*.
95 Bearing in mind it is an offence if, in doing so, the applicant knowingly deceives or misleads a person performing functions under the *WA FOI Act* to get personal information about another person: s 109, *WA FOI Act*.
96 Section 21, *WA FOI Act*.
97 Section 23(4), *WA FOI Act*.
98 Section 23(5), *WA FOI Act*.
99 Section 32, *WA FOI Act*. There are specific provisions dealing with situations in which the third party (or closest living relative) is a child under 16 or is intellectually handicapped.
100 *Re Terrestrial Ecosystems and Department of Environment and Conservation* [2013] WAICmr 9, [70].
101 Section 16(1)(d), *WA FOI Act*, and reg 4, *Freedom of Information Regulations 1992* (WA).
102 *Re Georgeson and Government Employees Superannuation Board* [2013] WAICmr 10.