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PO Box 83, Deakin West ACT 2600
Ph: (02) 6290 1505
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New Editor

The Forum has a new Editor, Kirsten McNeill, a Director of Apricot Zebra Pty Ltd, Canberra, with twenty years' experience editing legal material, for Thomson Reuters, the Australian Parliament (editing *Hansard*), The Federation Press, and the Australian Government Solicitor (continuing). Welcome Kirsten.
Her appointment follows a five year partnership between Elizabeth Drynan, editor from 2010 to 2015 and the AIAL. Elizabeth is a librarian currently working in the NSW Parliamentary Counsel's Office, Sydney. That partnership saw the development of timelines and Guidelines for the publication process, and an improved quality for publications in *AIAL Forum*. The AIAL thanks Elizabeth for managing the processes with the Editorial Board, authors, the secretariat, and the production team, so efficiently and well during her time as editor.

Publishing with AIAL Forum

The Institute is always pleased to receive papers from writers on administrative law who are interested in publication in the *AIAL Forum*.
It is recommended that the style guide published by the Australian Guide to Legal Citation be used in preparing manuscripts.

Manuscripts should be sent to the Editor, *AIAL Forum*, at the above address.

Articles marked # have been refereed by an independent academic assessor. The refereeing process complies with the requirements of the Department of Education. Refereeing articles is a service AIAL offers contributors to its publications including the *AIAL Forum* and the proceedings of the annual National Administrative Law Conference.

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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Appointment of new Commonwealth Sex Discrimination Commissioner

11 February 2016

The Commonwealth Government has announced the appointment of Ms Kate Jenkins as Australia's Sex Discrimination Commissioner for a term of five years.

Ms Jenkins has an outstanding record in advancing gender equality and as a human rights leader more broadly. This has been demonstrated through her current role as Victorian Equal Opportunity and Human Rights Commissioner.

Ms Jenkins has worked closely with a wide range of organisations, including the Victoria Police, to address issues of entrenched discrimination and harassment. Significantly, she established the Victorian Male Champions of Change strategy, building on the national program established by the former Sex Discrimination Commissioner, Elizabeth Broderick. She has also advanced gender equality in all areas of life with a particular focus on diversity in sport, through the Fair Go Sport and Play By the Rule campaigns.

Ms Jenkins is also a former partner at one of the top law firms in the Asia Pacific, Herbert Smith Freehills, where she led an equal opportunity and diversity practice.

The Attorney-General and Minister for Women are deeply impressed by Ms Jenkins' leadership on issues of sex discrimination and sexual harassment and thank her for agreeing to bring her dedication and energy to the national stage.

They look forward to Ms Jenkins' contribution to the work of the Australian Human Rights Commission where she will extend her productive relationships across the Australian Government and the broader Australian community and building on the outstanding work of her predecessor, Ms Elizabeth Broderick AO.

Supporting women to participate in the workforce is an economic and social priority for the Government. Harnessing the power of our most important capital—our human capital—will ensure we secure our economic future.

https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FirstQuarter/11-February-2016-Appointment-of-new-Sex-Discrimination-Commissioner.aspx

Reappointment of the Hon Susan Ryan AO as Commonwealth Disability Discrimination Commissioner

13 November 2015

The Attorney-General has announce that the Government has reappointed the Hon Susan Ryan AO as the Disability Discrimination Commissioner.

Ms Ryan was first appointed as acting Disability Discrimination Commissioner in July 2014, before being confirmed to the role in September 2014. The term of Ms Ryan's reappointment

aligns with the term of her appointment as Age Discrimination Commissioner, which expires on 28 July 2016.

Ms Ryan continues to be a strong advocate for the rights of people with a disability. She is currently leading Willing to Work, the Commission's national inquiry into employment discrimination against older persons and persons with a disability. Consultations are currently being conducted across Australia, which will inform the Commission's recommendations when they report to Government by July 2016.

On behalf of the Government, the Attorney-General congratulates Ms Ryan on her reappointment and thanks her for her services to date.

https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/13-November-2015-Reappointment-of-the-Hon-Susan-Ryan-AO-Disability-Discrimination-Commissioner.aspx

Victorian Ombudsman investigates transparency of local government decision making

04 March 2016

The Victorian Ombudsman has commenced an 'own motion' investigation into the transparency of local government decision making, reflecting a pattern of complaints to the Ombudsman on this issue.

The investigation will consider whether councils' decision making is transparent, subject to their obligation to maintain confidentiality and to ensure efficiency in council administration.

The investigation will include:

- closed council meetings and special meetings
- determinations around the handling of confidential matters
- delegations relating to decision making
- the nature and quality of records kept and the public availability of those records.

The *Local Government Act 1989* sets out a framework where councils must be responsible and accountable to the local community in the performance of their functions, the exercise of their powers and use of resources. It requires that councils 'ensure transparency and accountability in council decision making' while section 91 requires councils to make local laws governing the conduct of council meetings and special committees.

The Act is currently under review and the investigation will seek to inform that process.

In her response to the review of the Local Government Act, Ombudsman Deborah Glass noted:

> *Secrecy in government can create conditions in which improper conduct and poor administration can flourish. It also fuels suspicions of wrongdoing and erodes community trust.*
>
> *Members of the public who complain to my office about council decisions occasionally mention the fact that decisions were made 'behind closed doors' or 'in secret' as evidence to support their concerns.*

Local government generates the second highest number of complaints to the Victorian Ombudsman of any portfolio area. In 2014-15 this office dealt with 3410 issues about local government.

All 79 Victorian councils were subject to at least one complaint in 2014-15, however the number varied widely across municipalities.

https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Ombudsman-investigates-transparency-of-local-gover

NSW Privacy Commissioner applauds the findings of the Standing Committee on Law and Justice Inquiry into Serious Invasions of Privacy in NSW

The Privacy and Personal Information Protection Act was written over 17 years ago, well before the invention of Facebook, the iPhone and drone technology. In a world of such rapidly changing technology the privacy protections afforded by the Act, to date, have not kept pace.

The Standing Committee on Law and Justice Inquiry into Serious Invasions of Privacy in NSW, chaired by The Hon Natasha Maclaren-Jones MLC, recommended that NSW introduce a statutory cause of action for serious invasions of privacy. The Committee went further to recommend a significant expansion of the powers of the NSW Privacy Commissioner to address claims of serious invasions of privacy.

The Information and Privacy Commission's Privacy Commissioner, Dr Elizabeth Coombs, has been a staunch supporter of the need to implement a statutory cause of action to address serious invasions of privacy. Dr Coombs' written submission, available on the Parliament of NSW website, supported the recommendations for the development of a statutory cause of action.

Dr Coombs said '*…NSW was the second jurisdiction in the world to introduce laws dealing directly with privacy, so it is appropriate that today NSW again takes a leadership role and hopefully act as the catalyst for other Australian jurisdictions to take similar action*.'

The development of a statutory cause of action, as opposed to reliance on common law remedies, is also supported by leading civil rights, privacy, legal and academic groups across NSW and Australia.

Dr Coombs said: '*This is a win for those people who have had their privacy breached in unimaginable ways and then suffered further indignity in discovering that they had no right to recourse…'*

http://www.ipc.nsw.gov.au/sites/default/files/file_manager/20160303%20MEDIA%20RELEASE%20Serious%20invasions%20of%20privacy.pdf

Appointment of Queensland Privacy Commissioner

Information Commissioner Rachael Rangihaeata is pleased to announce that Mr Phillip Green has been appointed to the role of Queensland Privacy Commissioner by the Governor in Council.

Throughout his career, Mr Green has worked in many different Queensland Government roles and in private practice. Most recently, Mr Green was Executive Director, Small

Business – Department of Tourism, Major Events, Small Business and the Commonwealth Games and held that position from 2008.

Mr Green has a Masters in law, majoring in technology law including privacy, regulation of the Internet and media.

Ms Rangihaeata said, 'Mr Green brings extensive leadership experience and expertise to the role of Privacy Commissioner and will make a valuable contribution to the protection of citizens' privacy rights in Queensland.'

https://www.oic.qld.gov.au/information-for/media/appointment-of-queenslands-privacy-commissioner-11-december-2015

Former NT Chief Justice to inquire into establishment of anti-corruption body

Former Northern Territory Chief Justice of the Supreme Court Brian Martin AO QC has been appointed by the NT Administrator to inquire into and report on the establishment of an independent anti-corruption and integrity body in the Northern Territory.

Acting Chief Minister Willem Westra van Holthe said Mr Martin's appointment followed a motion passed in Parliament that set out the independent process of inquiring into the establishment of a new body.

'Brian Martin has a wealth of legal experience having served as Chief Justice of the Supreme Court of the Northern Territory from 2004 to 2010, as a Judge of the Supreme Court of South Australia between 1999 and 2004 and as Commonwealth Director of Public Prosecutions between 1997 and 1999,' Mr Westra van Holthe said.

'Mr Martin presided over the trial of Bradley Murdoch for the murder of Peter Falconio, as well as the trial of the Snowtown murders in South Australia, and he has extensive experience in criminal matters and anti-corruption proceedings.

'His appointment was recommended by an advisory panel that consisted of the Solicitor-General, the Chief Executive of the Department of Attorney-General and Justice and former Administrator Sally Thomas AC, and has been approved by the Administrator.'

As per the motion passed in Parliament, some of the considerations Mr Martin will take into account include:

- The power to investigate allegations of corruption including against Ministers, Members of the Legislative Assembly and other public officials;
- The power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit;
- The appropriate trigger for an NT ICAC jurisdiction and the relationship between this body and other Northern Territory bodies such as the Ombudsman;
- Models from any other jurisdictions and indicative costs of establishing various models in the Northern Territory; and
- The use of existing Northern Territory legislation or Northern Territory statutory authorities.

Mr Martin will consult with relevant stakeholders including but not limited to the NT Police, NT Law Society and the Criminal Lawyers Association.

Mr Westra van Holthe said the Government was committed to working in the best interests of the people of the Northern Territory and looked forward to Mr Martin's report.

http://newsroom.nt.gov.au/mediaRelease/17103

Recent Cases

Jurisdictional errors need not be on the part of the decision-maker

Wei v Minister for Immigration and Border Protection [2015] HCA 51 (17 December 2016)

The plaintiff, a citizen of the People's Republic of China, is 22 years old. He first travelled to Australia on a student visa when he was 15 years old. Having completed his secondary schooling in Australia, he went on to enroll in a course of study known as the 'Foundation Program' provided by Macquarie University, a registered provider under the *Education Services for Overseas Students Act* 2000 (Cth) (the ESOS Act). The plaintiff was subsequently granted a Student (Temporary) (Class TU) Higher Education Sector (Subclass 573) visa, a student visa for the purposes of the ESOS Act.

It was a condition of his visa that he be enrolled in a 'registered course' provided by a 'registered provider' under the ESOS Act. Section 19 of the ESOS Act requires registered providers to give information about student visa holders to the Secretary of the Department of Education and Training, including information confirming their enrolment. The information is stored on an electronic database known as 'PRISMS' and can be accessed by officers of the Department of Immigration and Border Protection ('the Department').

Between June 2013 and June 2014, the plaintiff was enrolled in a registered course provided by a registered provider. Unfortunately, confirmation of that enrolment was not recorded in PRISMS. It can be inferred, on the balance of probabilities, that the confirmation of that enrolment was not recorded in PRISMS because Macquarie University failed to perform the obligation imposed on it by s.19 of the *ESOS Act* to upload the relevant information.

On the basis of outdated information in PRISMS, officers of the Department formed the view in early 2014 that the plaintiff was not enrolled in a registered course. After a number of attempts to contact the plaintiff, the officers formally complied with statutory requirements to notify the plaintiff that consideration was being given to cancelling his visa, but the plaintiff did not receive notice of that consideration.

The time for responding to the notification having expired, a delegate of the Minister made a decision on 20 March 2014 to cancel the plaintiff's visa under s.116(1)(b) of the Migration Act for non-compliance with the condition of the visa that he be enrolled in a registered course.

Written notice of the decision, and of the reasons for it, was set out in a letter, which the delegate sent by registered post to the plaintiff on the same day. However, that letter was returned unclaimed.

On 2 October 2014, the plaintiff discovered his visa had been cancelled. The following day, he lodged an application for review of the decision with the then Migration Review Tribunal. The Tribunal decided on 5 December 2014 that it did not have jurisdiction to review the decision, because the application was lodged too late.

The plaintiff filed an application for an order to show cause in the original jurisdiction of the High Court, seeking writs of certiorari and prohibition to quash the decision of the delegate and to prevent the Minister from giving effect to the delegate's decision.

The High Court unanimously held that the delegate's decision to cancel the plaintiff's visa was affected by jurisdictional error. Jurisdictional error, in the sense relevant to the availability of relief under s.75(v) of the Constitution, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act. There is no reason in principle why jurisdictional error should be confined to error or fault on the part of the decision-maker. The requirement of s.19 of the ESOS Act that a registered provider (in this case Macquarie University) upload onto PRISMS confirmation of enrolment of a person holding a student visa is therefore properly characterised as an imperative duty, in the sense that material non-compliance with the requirement will result in an invalid exercise of the power to cancel a visa conferred by s.116(1)(b) of the Migration Act.

The delegate reached that satisfaction because the delegate found as a fact that the plaintiff was not enrolled in a registered course. The delegate found that fact on the basis of information contained in PRISMS. That finding was wrong because the information contained in PRISMS was wrong. The information contained in PRISMS was wrong because of Macquarie University's failure to perform its imperative statutory duty. The High Court granted the relief sought by the plaintiff.

Incorrect forms and substantial compliance

MZAIC v Minister for Immigration and Border Protection [2016] FCAFC 25 (9 March 2016) (Kenny, Tracey, Buchanan, Robertson and Mortimer JJ)

This appeal was from the judgment and orders of a judge of the Federal Circuit Court of Australia, Judge Hartnett. Her Honour dismissed the application to that court, with costs.

The application to that court was for judicial review of a decision of the then Refugee Review Tribunal that it did not have jurisdiction to review the decision of the delegate of the Minister for Immigration because the application to the Tribunal was not made in accordance with s.412(1)(a) of the *Migration Act 1958* (Cth) (the Migration Act), which requires an application for review to be made in the approved form.

Before the Full Federal Court, the appellant contended that a failure to comply with s.412 did not necessarily lead to the consequence that the Tribunal lacked jurisdiction because the Migration Act does not specify the consequences for non-compliance. In relation to s.25C of the *Acts Interpretation Act 1901* (the AIA), the appellant submitted that the purpose of s.25C is to ameliorate the potentially harsh effects of a failure strictly to comply with the common administrative features of prescribed forms; and when the form submitted by the appellant was compared with the approved from, it was immediately evident that the appellant ‘substantially complied’ with the prescribed form.

The Minister contended, among other things, that s.412 of the Migration Act could not be substantially complied with in circumstances where an applicant used an incorrect form. However, if the Court found it could be; in this case, the appellant did not substantially comply with the requirements of s.412.

The majority of the Full Federal Court (Kenny, Tracey, Robertson and Mortimer JJ)) held that it would be counter to the legislative scheme to hold that the mere use of a superseded form rendered ineffective an application to the Tribunal. The present form is not an application for

a visa, which may well provide precise and detailed information; instead it is an application for review by a Tribunal of an identified decision.

The majority further held that there is no authority for the proposition that to merely use a superseded form prevents there being an analysis of substantial compliance with the current form. It is not the case that no form was used, or a form that appellant was prohibited from using. Moreover, so similar are the two forms that those not versed in the identification system in very small print at the foot of each page would be hard pressed to tell whether or not the form currently approved was being used. The only material difference between the two forms is the new form included provision for the appellant's passport number.

The majority found that there was substantial compliance with an approved form despite the absence of the appellant's passport number. First, the purpose of the form is to indicate that the visa applicant invokes the jurisdiction of the Tribunal and identifies the decision that is being challenged. Secondly, the appellant's application to the Tribunal attached a copy of the notification letter from the Department of Immigration and Border Protection, which contained the appellant's name, date of birth, client ID, application ID and file number. Thirdly, many applicants to the Tribunal would not have passport numbers. Fourthly, the request for a passport number appears to be directed, at best, to the administrative convenience of the Tribunal rather than to whether, as a matter of substance, its jurisdiction has been duly invoked. Fifthly, in context, the request for a passport number provides merely a further or additional means, as a matter of detail, of the purpose stated on the form: ' … to collect information about the person, or persons, applying for review.' It is also significant that, unlike an application for a visa, which occurs at an early stage of the process, an application to the Tribunal of necessity follows a substantial administrative process. If there is a dispute before the Tribunal as to whether the visa applicant truly is a national of a particular country then that is a matter for the review itself rather than the validity of the application. Lastly, assuming the Departmental Secretary fulfils his or her obligation under s.418(3) of the Migration Act, as soon as practicable after being notified of the application to the Tribunal the Secretary will give to the Registrar each other document in the Secretary's possession or control considered by the Secretary to be relevant to the review of the decision; in the present case, this would include the appellant's passport number referred to at item 29 of the appellant's application for a Protection (Class XA) visa. A photocopy of part of that passport was annexed to that application.

The unrepresented applicant and procedural unfairness

SZVCP v Minister for Immigration and Border Protection [2016] FCAFC 24 (9 March 2016) (Kenny, Robertson and Griffith JJ)

This was an application for an extension of time and for leave to appeal from orders of the Federal Circuit Court of Australia made on 15 September 2015.

The applicant is an 'unlawful non-citizen' within s.14 of the *Migration Act 1958* (Cth) (the Migration Act) and is in immigration detention. He was detained at Maribyrnong in Victoria, but had been detained at other immigration centres, including on Christmas Island for about five months.

As at 15 September 2015, the applicant had three substantive applications in the Federal Circuit Court; (1) an application seeking relief arising from the release of his personal information on the Department's website; (2) an application seeking relief from the then Refugee Review Tribunal's decision not to grant him a protection visa; and (3) an application seeking relief from the International Treaties Obligations Assessment (ITOA) concluding he did not engage Australia's non-refoulement obligations. On 15 September 2015, he made an

additional claim for relief in relation to his place of immigration detention: he wished to prevent his return to the Christmas Island Immigration Detention Centre; and for the issue of subpoenas for the production of documents and the attendance of witnesses, who the applicant claimed could provide evidence about the alleged trauma, stress and torture he suffered on Christmas Island.

After a short hearing on 15 September 2015, the primary judge dismissed the applications.

Before dismissing the applications, the primary judge, in response to the application for the issue of subpoenas, informed the applicant that it was inappropriate for the Court to gather evidence. The primary judge also informed the applicant that 'there were matters that are not relevant currently in your application ... because the nature of this Court's jurisdiction is one which it is engaged in determining particular questions which are jurisdictional questions relating to the ITOA and/or the Tribunal decision'. The Court did not in substance address his applications for an interlocutory injunction to prevent his return to Christmas.

Before the Full Federal Court, the applicant sought orders setting aside the primary judge's orders and remitting the matter to the Federal Circuit Court.

The Minister contended that the applicant had not shown that there was any want of procedural fairness. The Minister submitted that the applications in a case were fundamentally defective and properly dismissed and that, in any event, there was no error on the part of the primary judge in refusing to grant the interlocutory injunction.

The Full Court found that there was a clear denial of procedural fairness. The transcript of the hearing makes it clear that the applicant was not given a reasonable opportunity to present submissions in support of any of the dismissed applications. These applications were either not dealt with at all or, in the case of the request for a subpoena, the primary judge acted on the basis of a fundamental misconception that the applicant was asking the Court to gather evidence. The result was that the applicant was deprived of a reasonable opportunity not only to make these applications but also to make his application for injunctive relief.

The Full Court held that the fact that the applicant was unrepresented exacerbates the procedural unfairness that he encountered. Dealing with an unrepresented applicant may require a court to take steps to explain its processes and procedures to the litigant to ensure procedural fairness. This is well-recognised, as *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146, makes clear. However, in the hearing on 15 September 2015, the primary judge made no effort to explain to the unrepresented applicant how he might properly make an application for an injunction under the Federal Circuit Court's rules. Nor did the primary judge explain the other procedures that the applicant might have chosen to utilise.

The Full Court considered that the judge's failure to explain the Court's processes and procedures was unfair to the applicant and involved an unreasonable exercise of power. Had the primary judge taken the time to consider the applications being made by the applicant and to explain the Court's processes and procedures, the outcome might well have been different.

A person aggrieved by a decision under the Judicial Review Act 2000 (Tas)

Tarkine National Coalition Inc v Minister Administering the Mineral Resources Development Act 1995 [2016] TASSC 11 (10 March 2016)

This was an application for an order pursuant to s 35(2) of the *Judicial Review Act* 2000 (Tas) ('JR Act'), requiring the decision-maker to provide a statement of reasons for the decisions to grant two open cut mining leases, to Venture Mining, in an area known as the Tarkine located in the northwest region of Tasmania. Tarkine National Coalition Inc, an incorporated association concerned with the conservation and management of the Tarkine area, requested reasons for those decisions. In each case, the Minister responsible for administering the *Mineral Resources Development Act* 1995 (the MRDA) made the decisions.

The applicant made a number of requests for reasons with respect to the decisions to grant the leases. In refusing to provide reasons for the two decisions, the Minister's stance was the same, asserting that the applicant was not entitled to make a request for reasons because the interests of the applicant were not adversely affected by the decision for the purpose of the JR Act. A letter of 10 February 2015 from the Minister provided: 'the decisions in these matters (to grant the leases under the MDRA) will not produce any relevant physical effect or damage upon the environment in the Tarkine'.

A lease constitutes nothing more than permission to Venture to conduct 'mining operations' on the subject land. The leasee must not conduct any activities which are in breach of the applicable planning scheme, the West Coast Interim Planning Scheme 2013: *Land Use and Planning Appeals Act* 1993 ('LUPA Act'), ss.20(2)(b), 63(2), and, under that Scheme, Venture cannot conduct any mining operations or related activities, such as clearing vegetation, without a permit. Therefore in the Minister's view the legal effect or practical operation of the decision to grant the leases is nil until the West Coast Council exercises its discretion to grant the permit. Therefore the effect of the decision falls short of affecting any interests of the applicant.

In response, before the Court, the applicant contended, among other things, that in light of *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* [2014] HCA 50 ('*Argos*'); the Court should not have regard to the broader statutory context in determining whether the applicant is aggrieved. Only the statute, under which the decision was made, in this case the MRDA, is relevant for the purpose of illuminating the nature of the decision and determining the legal and practical effect of the decision. In the alternative, it was contended, that the mining leases allow exploration and preliminary works to be undertaken merely with the approval of the Director of Mines and without any other approval steps or requirement for a permit. These exploration and preliminary works would have an impact on the environment and an adverse impact on the applicant's interests.

Before considering the issue raised by the applicant, the Court considered it is useful to have regard to the meaning of 'decision' under the JR Act. Court opined that generally, a decision needs to be 'final', but is not limited to a final decision disposing of the controversy between the parties. Ordinarily, and subject to the statutory context, 'a conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision' would not amount to a reviewable decision (*Australian Broadcasting Tribunal v Bond* [1990] HCA 33). In this case, the Minister's decision to grant the mining leases qualifies as a decision reviewable under the JR Act. A substantive issue of whether to grant the mining leases was resolved and the decision was, an ultimate, not an intermediate decision as to the granting of leases. The fact that the decision is an intermediate step in the process required before mining operations can commence was irrelevant.

The Court found that whether the order should be made turns on the applicant's entitlement to reasons and whether it is 'adversely affected' by the decisions to grant the mining leases, within the meaning of the JR Act.

The Court opined that 'to draw a conclusion that a person meets the statutory description of 'a person whose interests are adversely affected' by a decision requires: first, identification of a decision of the designated kind; second, examination of the legal or practical operation of that decision; and, third, the making of a judgment that the legal or practical operation of the decision has been to result in an adverse effect on identified interests of the person. The nature of the requisite interests, and the nature and degree of the requisite adverse effect, depend on the statutory context in which the description appears': *Argos*, Gageler J at [76].

In this case, the Court found that there is ample evidence that the applicant qualifies as a person aggrieved. It possesses an interest greater than an ordinary member of the public. Its interest in the Tarkine is long-standing (for over 20 years) and has not been generated by the present proceedings. The applicant's reason for existing is to protect the natural values of the Tarkine. Its objectives include achieving World Heritage status and National Park status for the Tarkine. It has engaged in activities that demonstrate its commitment to conservation and protection of the natural values of the Tarkine. The mining operations will affect its objectives. The operations are large in scale and the environmental footprint of these operations and impact on the natural environment within the lease areas will be substantive. Both mining leases fall within the boundaries of the proposed National Park. Clearly, the decisions authorising mining in the Tarkine adversely affect the applicant's interests. Therefore the applicant is a person aggrieved for the purpose of s.7 of the JR Act.

REFLECTIONS OF A FORMER INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

Dr Vivienne Thom*

In this paper I will explain why intelligence and security agencies require a specialised oversight agency and how the office provides assurance that intelligence agencies act properly, and will close by setting out some challenges for the future for oversight.

Why does the intelligence community require particular oversight?

If any of you have an interaction with a government agency such as Centrelink, the Australian Tax Office (ATO) or a law enforcement agency, you will usually know what is happening. You will know how to make a complaint, you will know your rights to review, you will know when you can complain to the Ombudsman or seek review by a tribunal. You will know what information is collected about you and how you can seek access to it.

But as a general rule you will not know if you have become of interest to an intelligence agency. You will not know what is done with any data or intelligence information which might have been gathered about you. Generally, intelligence agencies are not subject to the Freedom of Information (FOI) regime and the agency might not return your phone calls or e-mails.

Individual liberties and human rights are best achieved in a secure society and there are good reasons why intelligence agencies should have some exemptions. But these agencies cannot be completely without external scrutiny.

In the last two years or so the Parliamentary Joint Committee on Intelligence and Security (PJCIS) has conducted a number of inquiries into reforms of national security legislation. The Committee's reports have consistently stressed that any extra powers given to the intelligence agencies must always be balanced by appropriate safeguards for the privacy of individuals. In other words, the current view is that agencies will only be given additional powers – or be allowed to retain the ones they already have – if there is a rigorous oversight regime in place. The answer requires going back 30 years or so to understand the history of why the office of the Inspector-General of Intelligence and Security (IGIS) was established.

Ten of those years can be summarised in one sentence. The Murphy Raid, the 'Combe-Ivanov affair' and the 'Sheraton Hotel incident', as they became known in the 1970s and 80s, fuelled a perception that the intelligence agencies were running out of control. (The descriptors 'raid', 'affair' and 'incident' are fair indicators that these were notorious events.)

Next followed the significant reforms to the Australian Intelligence Community (AIC) that arose from the ensuing Hope Royal Commissions.

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* Dr Vivienne Thom's term as the Inspector-General of Intelligence and Security came to an end on 30 June 2015. She was formerly Deputy Commonwealth Ombudsman and the Chief Executive Officer of the Australian Mint.

As Hope noted:

> .. any secret service poses problems for democracy. If not properly controlled such organisations easily become a law unto themselves or political tools of the government. With this capacity for misuse they represent at least a potential menace to the values they are intended to protect.

The position of the IGIS was an important part of Hope's legacy and was intended to address these concerns that these agencies were not sufficiently under ministerial control, not subject to enough scrutiny, and were being improperly caught up in domestic politics.

The role is independent; the Inspector-General is a statutory officer, the office is part of the Prime Minister's portfolio but not part of the Department of the Prime Minister and Cabinet. It has separate appropriation and appoints its own staff. The IGIS is not subject to direction from the Prime Minister or other ministers on how duties are to be carried out.

The IGIS is required to look beyond matters of strict legality and comment on propriety. The IGIS Act does not provide a definition of the term 'propriety'. I found this to be a good thing. While administrative law experts might angst over the difference between judicial and merits review the IGIS has scope to look at almost anything under 'propriety'

In a recent report the NZ IGIS had a good definition. She said:

> The standard of propriety encompasses whether the agency acted in a way that a fully informed and objective observer would consider appropriate and justifiable in the circumstances.

The key part here is that the IGIS must be fully informed and objective: this is not the same as the pub test. The IGIS must have a good understanding of the national security environment and of relevant intelligence and risks.

Earlier in 2015, Duncan Lewis, the head of ASIO explained:

> ASIO's role is to investigate and provide advice on threats to Australia's national security. In doing this work, we are very mindful of the importance of using the least intrusive method of collection, proportionate to the level of threat.

This test of proportionality applies to all of the intelligence agencies and the IGIS looks to ensure it is applied. For example, in inspections the office reviews ASIO's authorisations and access to telecommunication data to ensure that the level of intrusion is proportionate to the level of threat.

While the test of propriety is broad there are limits to the role of the IGIS: it is generally not the function of the IGIS to comment on government policy. There have been calls to examine alleged payments to people smugglers or allegations about spying for treaty negotiations. Setting aside any questions of legality and propriety about these allegations, there are also fundamental issues here of government policy, and on that the IGIS is silent. The type of oversight activity I am talking about is compliance with laws and government policy. It is generally not whether the policy itself is a good idea.

The office also looks at human rights issues

There has been some recent media coverage on the question of the passage of information to foreign authorities about Australian foreign fighters.

Intelligence agencies cannot only work with friendly democracies. Dangerous threats often come from dangerous people in dangerous places. If an agency receives credible

intelligence that might save lives, they need to act. They would normally want to share the intelligence with a foreign authority if that authority is in a position to act on it.

But they also have a duty to do what they can to ensure that a partner service will respect human rights. If they hold back and do not pass on that intelligence, lives may be lost that could have been saved. This is a real, constant, operational dilemma.

It is not only the possibility of torture that is relevant to human rights questions. Australia and its intelligence agencies are involved in military conflicts where the laws of armed conflict can also apply.

What is the role of the IGIS in these human rights issues? The office reviews the relevant policy guidance provided to agency staff and, in practice, how agencies manage the risks when making decisions relating to exchanging intelligence information with foreign authorities.

Inquiries

The IGIS can conduct inquiries using coercive powers – often referred to as 'Royal Commission' powers. Oral evidence can be compelled and taken on oath or affirmation. The IGIS can require the production of records and access agency premises.

The IGIS can initiate inquiries— sometimes as a result of a complaint - or matters can be referred by a Minister or the Prime Minister.

The subject matters can be broad: in my term the Prime Minister referred the matter of the actions of Australian government agencies in relation to the arrest and detention in Pakistan, Egypt, Afghanistan and Guantanamo Bay of Mr Mamdouh Habib.

In other inquiries I looked at:

- allegations of inappropriate vetting practices by the Defence Security Authority;
- the management of the case of a particular Egyptian irregular maritime arrival who was the subject of an Interpol red notice; and
- the provision of weapons and the training in and use of weapons and self-defence techniques by the Australian Secret Intelligence Service.

Complaints

The office also receives and investigates complaints from members of the public. The largest number by far is the time taken by the Australian Security Intelligence Organisation (ASIO) to conduct security assessments for visas but there is also a fair spread of other complaints. For example, complaints about the behaviour of officers during the execution of ASIO search warrants. In investigating such complaints IGIS staff might interview officers or view video recordings

Integrity of assessments

The IGIS also looks at the assessment agencies — are they objective and independent?

In 2004 Philip Flood conducted an inquiry that arose partly as a result of a concern that intelligence assessments about weapons of mass destruction in the period prior to commencement of hostilities in Iraq may not have been sufficiently independent or robust.

Flood recommended that IGIS should conduct periodic reviews of the statutory independence of the Office of National Assessment to provide assurance that it is free from political interference.

This has now been extended to the Defence Intelligence Organisation (DIO) and ASIO. The office asks the following questions:

- Do assessments show any actual evidence of bias?
- Are they fairly based on the sources and reference material?
- Do they ignore inconvenient material?
- Are the topics selected properly or is there influence to ignore problematic areas?

The IGIS also looks at the foreign intelligence agencies. These agencies generally require ministerial authorisation to collect intelligence on an Australian person. It is natural that any such request will seek to be persuasive when it sets out how a person is involved in activities that are, or are likely to be, a threat to security. It will summarise intelligence about activities and affiliations and, on the face of the documents, the case will usually be convincing. But it is necessary, although difficult and time-consuming, for IGIS staff to look at the raw information behind the document to determine whether such an assessment is actually fair, accurate and balanced. Has it left out exculpatory or contradictory material? Does it overestimate the confidence in a particular conclusion? Does it note that some intelligence cited might be dated or overtaken by other events? Does it set out any risks to the safety of the individual where relevant? Clearly the office cannot do this for all assessments but it is a worthwhile exercise for key or contentious assessments.

We have learned a lot recently about how to conduct this type of analysis from our examination of the full and rigorous reports of the Independent Reviewer of Adverse Security Assessments.

Increasing role of the office – a challenge and opportunity

As the functions and powers of the agencies have expanded so too has the role of the IGIS.

I have already mentioned the amendments to the IGIS Act following the Flood inquiry, but when ASIO's questioning and detention warrants were introduced in 2003 a legislated safeguard was that the IGIS can attend questioning sessions and any concern raised must be considered.

And there have been many more recent changes to agency powers including

- The introduction of identified person warrants which devolves some decision making from the Attorney-General to officials – whose decisions are subject to IGIS scrutiny.
- Changes in computer access warrants to cover systems and networks and allow disruption. This will require technical expertise to oversight.
- Amendments to allow ASIO officers to use force against a person during the execution of a warrant. Concerns about this were raised in committee stage and as a safeguard the legislation now requires ASIO to notify the IGIS if such force is used against a person. This new provision will require oversight of training arrangements as well as investigation of any instances where force is used.
- Amendments to the telecommunications interception and access act include a new role for the IGIS in relation to journalist source warrants – commencing in October. The IGIS must receive a copy of the warrant, and the PJCIS must receive a copy of any IGIS inquiry or inspection of such a warrant, and can request a briefing from the

IGIS. This provision is quite a departure from existing arrangements and might suggest a greater role in the future for the PJCIS.

Special intelligence operations

A good example of a new ASIO power that requires particular oversight is the power to conduct 'special intelligence operations' .This new scheme allows the Attorney-General to give ASIO staff and other people limited immunity from Australian law in relation to particular operations.

The purpose is to allow ASIO to gain close access to sensitive information via covert means. Such operations can involve engaging and associating with those who may be involved in criminal activity, and so has the potential to expose ASIO employees to criminal or civil liability including, for example, membership, training or funding a terrorist organisation.

At committee stage I commented that the scheme has limited reporting requirements and oversight would be required during the life of such operations. The bill was subsequently amended to ensure that the IGIS is notified of such operations from their commencement and can monitor accordingly.

Section 35P of the ASIO Act 1979 is the provision in the scheme that has attracted a lot of media attention and is currently the subject of an Independent National Security Legislation Monitor review.

Generally it provides that a person commits an offence if they disclose information relating to a special intelligence operation. The purpose is to protect sensitive information and the identity and safety of ASIO employees and sources.

One criticism of the provision is that it would have a chilling effect on media reporting and prevent public scrutiny of ASIO operations. There was also concern that an intelligence operation would be declared a 'special intelligence operation' (SIO), in the terms of s 35P, just so that these secrecy provisions would apply.

The actual provision is not actually concerned with the legality or propriety of the conduct of ASIO per se so its operation is not directly within the IGIS's remit. But the IGIS will be required to provide assurance that requests for SIOs are made for proper purposes and not just to invoke these additional secrecy offences.

Credibility and reputation

An ongoing dilemma for intelligence oversight is the matter of credibility and reputation. Unlike ombudsmen and most anti-corruption bodies, intelligence oversight bodies cannot generally publish comprehensive inquiry reports or data about inspection regimes. It is a necessary feature of intelligence work that to make investigations public could compromise operations or capabilities, prejudice security, damage Australia's relations with other countries and endanger lives.

But in my view as much of this work as can be made public should be made public so as to build and maintain confidence in intelligence oversight. Every year I had robust discussions with agencies about what could go in the IGIS annual report. Agencies argued forcefully for adverse material to be omitted and I needed to remind them that public embarrassment about maladministration was not in itself prejudicial to security.

The IGIS Act 1986 also has perhaps the tightest secrecy provisions of any oversight body. The extent of secrecy goes beyond national security considerations. The IGIS cannot confirm or deny whether a particular person has made a complaint or what the subject matter of the complaint is – even to a court.

In response to a complaint about an overt activity, for example a complaint about the execution of an ASIO search warrant, the office can usually provide details of both the investigation and any outcome to the complainant. But, in responding to a complaint about a covert activity, the office does not confirm whether or not the activity took place. This means that such complainants are rarely satisfied. And in some cases it may only serve to confirm in their minds otherwise unfounded suspicions.

This can be frustrating and does not build public confidence in the oversight regime — particularly when the complainant is a parliamentarian or a journalist and the allegation is the subject of ongoing media attention.

A number of recent media articles have questioned the effectiveness of the IGIS. In the absence of evidence to the contrary it is perhaps unsurprising that most media commentators seem to assume that any government office is generally inept!

So, for example, Geoffrey Robertson QC commented in light of an allegation about the Australian Signals Directorate (ASD):

> We are sliding into an Orwellian world where the state can hoover up any electronic communication. Australia has a statutory guardian of the security services, an Inspector-General, but we have not heard a squeak from her. What is the point of her office if she remains silent over such a failure of intelligence?

I have also seen the inevitable but hardly original: 'the watchdog needs a guide dog'— the IGIS is blind to agency faults, or 'the watchdog is a lapdog'—that is, too close to the agencies.

It is difficult to rebut these criticisms without being able to provide comprehensive public reports.

The future

So where does this take us? The IGIS is but one part of the oversight regime. The agencies are also subject to ministerial authorisations and directions. The PJCIS generally examines the administration and expenditure of all AIC agencies and has a role in examining counter-terrorism legislation and the listing of terrorist organisations. The Independent National Security Legislation Monitor (INSLM) is of course part of the framework, as is the Australian National Audit Office (ANAO) and the independent reviewer of adverse security assessments.

There have been a number of calls for changes to strengthen oversight arrangements. For example, last year the then Senator John Faulkner published a thoughtful paper titled *Surveillance, Intelligence and Accountability: an Australian Story* suggesting that a serious examination of the effectiveness of oversight of the AIC is long overview.

In particular, he suggested a PJCIS with more flexible membership, greater powers and resources, including the capacity to generate its own inquiries – in line with US and UK committees. He also suggested better coordination with the IGIS including providing inquiry reports to the committee, and oversight responsibility for the counter-terrorism elements of

the Australian Federal Police (AFP). This would be a significant shift for a committee that has traditionally had a limited role.

It is my view that the current system of oversight does not have serious structural deficiencies: the office of the IGIS currently has the powers, resources (particularly with the recent increases in funding) and expertise to carry out its role effectively. In my experience intelligence agencies do not systemically misuse their powers. But nevertheless controversy and suspicion persists. A recent commentator has noted that notwithstanding any harm to foreign relations or national security caused by the Snowden leaks; the real damage was the loss of public confidence in intelligence agencies.

The IGIS was established as a result of public concerns about the powers of intelligence agencies and the necessary secrecy that attaches to their activities. I acknowledge that 30 years later those critics are even more vocal but, in my view, that does not mean that the office has failed to achieve its purpose; rather, that the need for the IGIS is stronger than ever.

A WORKING JOURNALIST'S PERSPECTIVE ON SECURITY

John Hilvert

As a journalist, frankly these are dark times. These are very dark times because we have a situation where it seems that national security has led to a conflation of a whole series of issues, in terms of control, in particular control of our telecommunications. Those of you who are in the game will probably be aware, the Attorney-General is currently circulating a discussion paper which proposes more direct day to day control of the operations of our telecommunication companies (Telcos) and our internet service providers (ISPs). In the past, that was available theoretically if triggered by a national emergency.

We do not know how that discussion paper will be received. But effectively it means day to day supervision of our Telcos and our ISPs is being sought in the name of national security. To what extent this will limit what our Telcos and our ISPs who are supposed to be at the vanguard of innovation can do, is of concern.

A typical example might be AARNet, a major internet provider. It is probably one of the fastest ways you can get telecommunications and operates a multi-gigabyte network and the way it does its communications is through software. It uses very advanced software and the problem with the requirement that the Attorney-General's department (AGs) or a delegate of that agency can access AARNet is that supervision effectively stops any change to that software for fear that it may, in some way, undermine national security.

In relation to the current legislation one of the first things you need to know is that as at August 13, which is a little over three weeks away, ISPs are expected to submit to the Attorney-General, their plans for complying with the mandatory data regime. This is made difficult because most of the details of what are actually required, are yet to be made available. So we have a situation where there is a mandatory order on all our Telcos and ISPs of which many are ignorant and most are uncertain. Now there are provisions for extensions of time to be granted. I expect these will be sought for the August 13 deadline, but it indicates some of the outrageous requirements that are going on at the moment.

Turning to my life as a journalist with this mandatory data regime, let me start by putting on my other hat, which was as the former communications manager at the Internet Industry Association (IIA). I left that role about five years ago and the Internet Industry Association is now represented by the Communications Alliance, which is doing an excellent job.

While I was with the IIA, I learned that in 2010 and earlier the Attorney-General's department was really keen to have access to metadata. That was under Labor, of course. And being good industry associations, we said 'yeah sure you can have our

metadata, but how do you want it, in your database? in a central database? or do you want us to keep it?'

The response was: 'I don't know'. About a year later, we heard from the department 'I don't think we can keep it centrally. Can you keep it yourself?'

We said 'Fine, but how much are you willing to pay us for the storage and security?' The officials went away again. In the end, I think they figured it sounded a bit too smelly to have a big database of everyone's internet data under government control. In the United States (US) such a proposal was tossed out. More or less the same response occurred in the United Kingdom (UK).

In the end, the current government finally said, 'Well okay, we'll pay for it but the ISPs have to look after it'.

That's more or less the current position. The current estimate for this massive database is something like half a billion dollars in public money to fund all those ISPs. I estimate there are about 50 ISPs in Australia, and maybe 80 per cent of users are accounted for by the top five. But ISP operations are all over the place. That is the big issue. As a tech journalist, I know that many ISPs have got, at most, maybe two security people looking after their operations. They need them to secure the privacy and integrity of their communications.

So our ISPs will now have to store and secure personal data in a way they have never done before. And the inevitable will happen, there will be a breach, there will be a massive breach. It may not be Telco, it may not be Telstra, it may not be iiNet, but it may be some local ISP that will get hacked. It will happen.

It is so easy to get hacked these days. You just have to see what is happening in America. There they have far more people looking after security. The Office of Personnel Management (OPM) in the US Department of Defense got hacked. So the odds are the Australian ISP database is going to be hacked and many journalists, are anticipating it. It is on our 'risk management matrix'.

Indeed I suspect the government is also anticipating it, because that will be the basis on which the government will say, 'Well look, we cannot really trust personal metadata, vital for national security, be left in the hands of these ISPs. They are mainly concerned with communication and profit. We'll take it on and we'll do it more efficiently'. I think that is the end game, and I predict it will occur in the next 6-12 months.

To finish off, I will discuss the journalist information warrant for enthusiasts interested in this area. The journalist information warrant was the basis upon which the Labor Opposition finally said yes, we need to follow this up. We will back mandatory data retention because journalists will be protected. If you search the legislation, the journalist information warrant is an entirely secret process. Journalists would also be forbidden from disclosing information about the new journalist information warrant — including the 'existence or non-existence' of such a warrant and any failed attempt by government to pursue a journalist's communication records. Doing so would be punishable by two years' imprisonment.The Prime Minister appoints a public interest

advocate to argue a position when an application for a journalist information warrant is sought, but the advocate will have no contact with the journalist or the media organisation. There is no trigger to determine when an advocate will be called. The grant of a warrant relies on 'snoops' officially noting that a journalist's data is about to be accessed without a warrant. The advocate will only be required where the authorising body knows or reasonably believes there is a journalist whose metadata is involved, and the purpose of the authorisation would be to identify another person known or reasonably believed to be a *'source*'.

There is no monitoring or reporting mechanism for the number of times a journalist information warrant will be sought, granted or denied. We know from the Australian Federal Police (AFP) that they had at least 13 attempts to access journalist information last year. That figure is for the Australian Federal Police alone. There is no monitoring or reporting mechanism for the number and type of metadata utilised under the authorisation, nor the number of journalist relationships that may be examined and possibly compromised.

The definition of 'professional journalist', the term used in the Act, is much narrower than under Commonwealth shield laws. These laws were enacted because there was a realisation that journalists had an ethical requirement to protect their sources. If a journalist said 'I am duty bound to protect a source', the shield law process would be activated and the issue of whether the shield should apply would be considered by a judge. There is a discretion whether the journalist information would be made available to the court.

But the definition of a 'professional journalist' for the purposes of grant of a warrant appears to be narrower than that covered by the present shield laws. It may mean a freelance journalist, of which I am now one, may miss out on that protection. It could mean bloggers miss out and it could mean journalists writing a book rather than an item for publication in the news media could also miss out.

Finally, and most disturbingly, there is no testing of whether a journalist warrant has been actually granted to require information or metadata from an ISP. According to guidelines supplied to ISPs by the Attorney-General's department, if an ISP receives a request for information or for metadata, the ISP will have to take the agency at its word that it has obtained a warrant to access the metadata of a journalist. The ISP will not be able to see the warrant to verify the grant before handing over the data.

The actual answer to the frequently asked question in the guideline (FAQ) is interesting. It says, *'The data retention obligations do not alter the powers relevant to making requests. Service providers should expect that the kind of request they receive will change only to the extent that once the data retention regime is fully implemented requested data within the prescribed data may be 2 or more years old*'. That is it.

In other words, there will be no testing. The checks that the Attorney-General' department s and the government are relying on are *post hoc* checks. As far as I am aware, there are no actual checks. What I would have been very comforted to have seen is for a scheme in which a proportion, maybe, 1 in 1000, accesses to metadata without a warrant were subject to an Ombudsman overview. I do not know if that is

possible, but that would be something that might have given me some comfort. In fact, the checks that I can see would be provided a long time after the event.

I am very unhappy as a journalist to see what is happening with these laws. Basically the system relies on trust. Do we trust our government to follow through in an appropriate way? I leave that as an open question.

Q What's the point of enacting some sort of privacy right of the type that's just been described when in every other area of information law such as defamation, suppression orders, etc, the internet is proving that the existing laws are very difficult to make work. How would you make Facebook, Google or some other multinational corporation respect our privacy laws in practice?

JH Many of the software companies that we know of are deliberately fixing it that the user has the control of access to their information and their own encryption keys. Those companies stressed they don't hold encryption keys, 'If a user loses them they lose them, they can't come back to us,' has been a common response. That's quite vital, because they need to have the confidence for people to use their services and the only way they can do that is by taking it up to the Government.

Q A question European Union regulators have been looking at is the right to be forgotten. The holding of data by any particular agency or corporation is time limited, so there is effectively a time code against any data retained and as soon as that time code reaches zero then the data must be deleted. I wonder if any of the panel had any knowledge about that kind of thing aimed at organisations such as Google, Facebook and so on.

JH I understand Google actually will signify whether or not the Act has been used in some way and I think that was one of the consequences of that action. Google's doing it as part of their transparency requirements, so you'll often find Google will indicate how often it's been asked to respond to Government access to the records and the like. I think it's an interesting earlier attempt to recognise some personal rights. You'll find that the transparency and accountability requirements of these mega software companies require them to account for any changes at all and some of that is designed to show that they are as open and transparent as possible, notwithstanding some harms that may have been caused to some of the people.

Q I'm all in favour of a statutory right to privacy and all of that sort of thing, but aren't we really confronted with the problems that most people are prepared to surrender privacy. They take out Coles and Woolworths cards which record all of their purchases so that the retailers can get back at them and know exactly what they've been doing, they go into quizzes which find out their personal details and there's no 'oh, we will protect your privacy when you enter this little competition'. You've got an odd chance that you might win something but we really would love to have all of this information. You have millions of people throwing away their privacy and this is in addition to Facebook, etc. So what are you going to do, do you want to force people not

to do that? Do you want to force the people who are collecting this information to not use it? We are in a commercial situation in which for one reason or another a great majority of people surrender their privacy.

JH It's about informed consent really. If I volunteer information in response to a survey, a typical thing might be with the website Trip Adviser which asks me, how was my last trip to Budapest. That's informed consent but if I see that being used outside the terms of my review, I will be very unhappy. My colleague Roger Clarke former chair with the Australian Privacy Foundation has actually been tracking surveys of privacy awareness. Contrary to our beliefs from social media, there is a *heightened* concern rather than a lower end concern about our privacy awareness. It's more nuanced and as long as there is some informed consent, I think it's understood.

IS A RISK-BASED APPROACH APPROPRIATE WHEN REGULATING MATTERS AFFECTING OUR NATIONAL SECURITY?

Dariel De Sousa*

Tuesday, 11 September 2001 is a day that all of us will remember. Indeed, it is a day that is hard to forget. In eastern USA, it was a clear, cloudless morning. Millions of men and women made their way to work, including to the World Trade Centre's Twin Towers in New York City and to the Pentagon in Virginia. Unfortunately, for many of the workers at the World Trade Centre and at the Pentagon, it would be their last day on earth.

At the beginning of 2001, US counterterrorism officials were receiving frequent but fragmentary reports about threats to national security,[1] including troubling information about a number of those responsible for the 9/11 attacks. By spring, the level of reporting terrorist threats and planned attacks increased dramatically[2] and continued to escalate through the summer months to unprecedented levels.[3] These reports led to repeated advisory notices from US intelligence officials warning of impending al Qaeda attacks. The system was 'blinking red'.[4] However, the individual threats posed by those who were responsible for the attacks were not prioritised, allowing the assailants to navigate airport passport control and security checkpoints without obstruction on that fateful day.[5]

More recently and closer to home, on 15 December 2014, in a café in Martin Place, Sydney, Man Horan Monis – a convicted felon – took café patrons hostage. The siege finally ended after Monis took the lives of two hostages. Monis also lost his life in the cross-fire.[6] At the time of the siege, the general terrorism threat had been ranked as high in Australia – that is, it was assessed that a terrorism threat was likely.[7] Nevertheless, investigations conducted by the Australian Security Intelligence Organisation (**ASIO**), the Australian Federal Police (**AFP**) and the NSW Police Force over a number of years prior to the Martin Place siege did not lead to the conclusion that Monis was a threat to national security.[8]

The factual circumstances and associated analyses surrounding both the 9/11 attacks and the Martin Place siege are complex. It would be clearly inappropriate for someone like me who is not a national security expert to draw conclusions about the possible causes of these tragic events or to speculate about whether and, if so, how these events could have been avoided. Nevertheless, it would be fair to say that both cases raise questions about the identification, assessment, evaluation and response to risk posed to national security. In particular, did the regulatory frameworks applicable to managing the national security threats in each of these cases provide for a risk-based approach? If so, was such an approach adopted and effectively implemented in practice? Was a risk-based approach appropriate?

A fundamental assumption of a risk-based approach to regulation is that a regulator will never have sufficient resources to respond to all alleged breaches or monitor all conduct within its regulated sector. The risk-based approach, therefore, requires the regulator to

* Consultant, Maddocks Lawyers. The author would like to thank Kate Lyle (Graduate Lawyer, Maddocks), Xinyu Zhang (Graduate Lawyer, Maddocks), and Billy Gialamas (Lawyer, Maddocks) for their research assistance. The author would also like to thank Bronwyn Weir (Partner, Maddocks) for her contribution and insights.

determine the tolerability of risks – which risks are palatable, which risks need to be mitigated and which risks need to be eradicated altogether. The consequence of this tolerability assessment is that the regulator will not act on every alleged or actual breach. Rather, resources and effort will be directed towards the areas of greatest risks where the risks are deemed to be intolerable.

Necessarily, a risk-based approach implies that some risks are not worthy of regulatory attention in light of the volume and spectrum of risks faced by the regulator. It is possible (albeit unlikely) that matters that the regulator considers to be low risk could lead to catastrophic events, like the 9/11 attacks and the Martin Place siege. This paper considers whether a risk-based approach is appropriate in matters concerning Australia's national security. It also considers whether it is ever appropriate to relegate matters to low risk status when national security could be at stake.

What is a risk-based approach to regulation?

In essence, a risk-based approach to regulation focuses on risks associated with non-compliance with legal rules, rather than the legal rules themselves. More specifically, the regulator identifies and assesses the risk associated with non-compliance by a particular regulated entity and/or with a particular obligation or group of obligations. Based on this risk assessment, the regulator makes decisions regarding a range of regulatory matters, including:

- whether or not a licence or authorisation to undertake a regulated activity should be granted to a particular regulated entity;
- what monitoring and information-gathering mechanisms are needed and when should they be employed for particular regulated entities and/or regulated activities;
- the targets, focus and regularity of audit and inspection programs;
- the nature and intensity of compliance and enforcement activity warranted for non-compliance with particular obligations within the regulatory framework; and
- the targets and contents of public reporting on compliance and enforcement activity to encourage voluntary compliance.

A risk-based approach to regulation enables a regulator to tailor its regulatory responses so that they are commensurate with the relevant risks. It is particularly useful where the regulator has a large number of regulatory obligations and/or regulated entities to oversee, resourcing is limited and, consequently, prioritisation may be difficult.

A risk-based approach to regulation can yield a number of important benefits, including:

- maximise efficiency by allocating resources to areas of highest risk;
- increase compliance by focusing on areas where the compliance risk is greatest;
- enhance consistency in decision-making because the regulator's response will be dictated by the relative level of risk; and
- reduce compliance burden by minimising regulatory intervention where the risks are relatively low.

Risk in the regulatory context is conventionally defined as the product of the likelihood and the impact of non-compliance. In other words, how likely is it that a particular obligation will be breached and, if that obligation is breached, what will be the consequences?

Assessing the likelihood of non-compliance might include consideration of a regulated entity's compliance history, the strength of any incentives to comply or not to comply, and

the practical difficulty to comply. The impact of non-compliance could include consideration of the risk of physical damage, injury or death, the number of people who could be affected by non-compliance and the political repercussions associated with non-compliance.

Considering likelihood or impact on their own will give a distorted assessment of risk. High probability events may be limited in impact. Similarly high impact, catastrophic events, may be highly unlikely. By combining consideration of probability and impact of non-compliance together allows an overall assessment of risk to be undertaken.

There is a range of factors that affect the risk assessment including:

- *Criteria used to assess likelihood and impact*: Ideally, criteria used to assess likelihood and impact of non-compliance should be linked to the regulatory framework which governs compliance.
- *Comprehensiveness and credibility of information to assess probability and impact*: Inadequate information could potentially lead either to an overly high or low assessment of risk, depending upon how the available information is interpreted.
- *Skills, experience and resources available to those undertaking risk assessment*: The accuracy of a risk assessment may be affected by those responsible for undertaking the risk assessment. Inappropriate skills, irrelevant experience and/or inadequate resources could skew the risk assessment results.
- *Risk appetite of the regulator*: The regulator's tolerance for risk will also affect the risk assessment. Different regulators may have different levels of tolerance for risk. Moreover, a particular regulator's risk appetite could change over time – what was once considered to be a low risk could eventually be regarded as a high risk and vice versa.
- *Harm that is not governed by regulatory framework*: There might be some harm that the regulator does not have power to address, which may lead the regulator to ignore the harm and/or downgrade the associated risk assessment.

Are regulators concerned with issues of national security required to apply a risk-based approach?

The Australian Government's red tape reduction agenda calls for a risk-based approach to regulation[9] so as to encourage regulators to respond to regulatory breaches in a consistent, efficient, transparent and proportionate way. The underlying objective of the red tape reduction agenda is for regulators to reduce the burden on individuals and businesses so as to enhance economic efficiency and productivity.

The *Regulator Performance Framework* (**Framework**) is part of the Government's red tape reduction agenda. The main premise underlying the Framework is that poorly administered regulation can impose unnecessary costs on stakeholders that reduce productivity. It seeks to ensure that regulators undertake their functions with minimum impact to achieve regulatory objectives by requiring Commonwealth regulators to meet certain key performance indicators, including that actions undertaken by regulators are proportionate to the risk being managed. In other words, the Framework requires regulators to apply a risk-based approach to regulation.

Not all regulators and regulatory activities are subject to the Framework. In particular, government entities that have no interaction with the public and/or are 'law enforcement agencies' as defined under the *Crimes Act 1914*[10]are not required to comply with the Framework.[11] Moreover, while licensing, monitoring, compliance and enforcement activities are covered by the Framework (assuming they are undertaken by entities that are subject to

the Framework), providing advice and guidance is only covered if the activity is undertaken in conjunction with one of the other covered regulatory activities.[12]

The carve-outs under the Framework mean that many of the agencies involved in protecting Australia's national security are not covered by the Framework and, therefore, are not required to apply a risk-based approach to regulation. Nevertheless, as explained in the next section of this paper, there are a number of such agencies that have opted to do so.

Application of a risk-based approach to matters affecting Australia's national security

There is a broad range of regulated areas that are designed in whole or in part to protect Australia's national security. These areas can be generally categorised as follows:

- regulation of people;
- regulation of goods;
- regulation of information;
- regulation of infrastructure; and
- regulation of transactions.

Examples for each of these areas are discussed below, including an explanation of how the applicable regulatory framework(s) seeks to protect national security and the way in which a risk-based approach to regulation applies under each framework.

Regulation of people

The Department of Immigration and Border Protection (**DIBP**) regulates the movement of people across Australia's borders under a range of regulatory instruments, including the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth).

An important objective underlying the regulatory framework is to facilitate entry of genuine travellers to Australia, while preventing entry of those who could threaten national security. Ensuring that this objective is achieved is challenging – passenger movements are expected to grow from just over 33 million in 2012-13 to approximately 50 million by 2020.[13]

The visa system is used to screen people that wish to enter Australia. In summary, all non-citizens are required to hold a valid visa to enter and stay in Australia. With some limited exceptions, non-citizens must apply for and be granted a visa before travelling to Australia.

Under section 29 of the *Migration Act 1958*, the Minister may grant a non-citizen a visa to travel to and enter Australia and, in some cases, to remain in Australia. There is a broad range of visas that may be granted by the Minister. In general terms, the class of visa depends upon the purpose of the visit to Australia.[14]

The criteria for assessment of each class of visa are found in in the *Migration Regulations 1994*. For many visa classes, the criteria include 'public interest criteria'. Among the various public interest criteria are:

> The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*.[15]

A risk-based approach is used by the DIBP to identify and prevent entry into Australia of people who might pose a threat to Australia's national security.[16] In practice, this approach means that risk is used as the basis for determining whether:

- a visa application should be granted;
- more information should be obtained before a determination about whether or not to grant a visa is made; and
- a visa application should be rejected.

The Movement Alert List (**MAL**), which is administered by DIBP, is a tool used to assess visa applicants, including to determine whether or not those applicants pose or may pose a national security risk. MAL is a computer database that contains profiling information for non-citizens who are or may be of concern and information about travel documents that have been reported lost, stolen or fraudulently altered. There are currently over 700,000 identities of interest listed on MAL.[17]

Some salient points about the application of a risk-based approach to protect national security in the context of Australia's visa system are:

- National security risk associated with visa applications is managed at the federal level.
- For many classes of visa, the regulatory framework specifically requires that national security risk be considered and assessed.
- The assessment of national security risk is used to help determine whether or not a visa application should be granted.
- The risk assessment is primarily focused on the national security risk posed by the applicant for a visa.
- DIBP has an established database (MAL), which is used to record on an ongoing basis risk information about visa applicants and relevant travel documents.

Regulation of goods

Depending upon their use, certain chemicals have the capacity to pose significant threats to Australia's national security. Indeed, of the approximately 40,000 chemicals approved for use in Australia, 96 were identified by the Council of Australian Governments (**COAG**) as requiring attention because of their potential for misuse by terrorists. These are known as chemicals of security concern.[18]

The *Agreement on Australia's National Arrangements for the Management of Security Risks Associated with Chemicals* (**Agreement on Chemical Security Risk**) is an inter-governmental agreement, which seeks to enhance the security of these chemicals. The Agreement establishes a framework to ensure a structured process for the development and implementation of measures to enhance the security of chemicals on an ongoing basis that are proportionate to the assessed risk. The measures are intended to assist security and law enforcement agencies in preventing terrorist acts involving chemicals, while not impeding the legitimate use of chemicals. Under the Agreement on Chemical Security Risk, the Australian Government agrees to work with State and Territory Governments to develop a risk assessment methodology, conduct assessments of risks posed by chemicals, and ensure the adequacy of or implement control measures to address these risks.

The only chemical of security concern that is currently regulated is Security Sensitive Ammonium Nitrate (**SSAN**).[19] It is regulated by States and Territories, in accordance with a 2004 COAG agreement to a national set of principles for regulating SSAN.[20] Ammonium nitrate was considered a priority chemical of concern when this agreement was established because of the ease with which it could previously be obtained and used as an explosive.[21]

A licensing regime applies in the States and Territories for the use, manufacture, storage, transport, supply, import and export of SSAN in the various jurisdictions.[22] The primary aim of these licensing regimes is to ensure that SSAN is only accessible to persons who have demonstrated a legitimate need for the product, are not of security concern and will store and handle the product safely and securely. Applicants for a licence need to undergo background checks by ASIO and the local police before an application can be granted.

The regulatory framework applicable to SSAN is complemented by a non-binding *National Code of Practice for Chemicals of Security Concern* (**Code on Chemicals of Security Concern**). The Code on Chemicals of Security Concern, which was launched in July 2013, encourages businesses to prevent potentially dangerous chemicals finding their way into the hands of terrorists. It applies to 11 chemicals that have been assessed as being particularly high risk.[23]

In summary, the objectives of the Code on Chemicals of Security Concern are to promote effective chemical security management practices throughout the chemical supply chain, and in particular to:

- Protect against the diversion of chemicals for terrorist or criminal purposes.
- Encourage cooperation between businesses and organisations that handle chemicals and law enforcement agencies on chemical security matters.
- Educate and train staff to be alert to warning signs and report suspicious behaviours. To achieve these objectives, the Code on Chemicals of Security Concern provides guidance and information on a range of practical security measures that businesses and individuals can take.[24]

Key points about the application of a risk-based approach to protect national security in the context of the use of dangerous chemicals in Australia are:

- National security risk associated with certain chemical use (ie SSAN) is managed at the State/Territory level. However, businesses are encouraged to manage the national security risk associated with other chemicals under a national code, which is non-binding.
- The regulatory arrangements for the management of chemicals of security concern do not require a risk assessment to be undertaken of chemicals of concern because a risk assessment has already been done of a broad range of chemicals by the Commonwealth in collaboration with the States and Territories.
- Nevertheless, the regulatory framework applicable to SSAN seeks to ensure that risks associated with users and use are appropriately managed through the licensing regime.
- ASIO and local law enforcement bodies assist with the assessment of risk associated with applicants for a SSAN licence through background checks.

Regulation of information

The Internet has become an integral, indispensable part of modern society. Nevertheless, given the ease and speed with which information can be accessed and transmitted around the globe, the Internet also poses important national security challenges.

In November 2009, the Australian Government launched its *Cyber Security Strategy*.[25] As explained in the Strategy, the advent of cyber espionage[26] and, potentially, cyber warfare[27] means that this is an important national security issue.[28] Indeed, in the 2008 National

Security Statement to Parliament, the then Prime Minister Kevin Rudd acknowledged that online threats are among Australia's national security priorities.[29]

The Australian Government defines cyber security as:

> Measures relating to the confidentially, availability and integrity of information that is processed, stored and communicated by electronic or similar means.[30]

Australia's cyber security regulatory framework includes the *Criminal Code Act 1995* (Cth) (as amended by the *Cybercrime Act 2001*), *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Spam Act 2003* (Cth). In summary, under the regulatory framework, unsolicited commercial messages are prohibited. Australia's law enforcement and intelligence agencies are empowered to compel carriers to preserve communication records of persons suspected of cyber-based crimes. In addition, cybercrime offences are identified and include:

- computer intrusions (for example, malicious hacking);
- unauthorised modification of data, including destruction of data;
- denial-of-service (DoS) attacks;
- distributed denial of service (DDoS) attacks using botnets;[31] and
- the creation and distribution of malicious software (for example, viruses,[32] worms,[33] trojans[34]).

The *Cyber Security Strategy* emphasises that, in administering the regulatory framework, Australia must 'apply a risk-based approach to assessing, prioritising and resourcing cyber security activities'.[35] The Australian Government Information Security Manual, which helps to implement this imperative, is used for the risk-based application of information security to information and systems.[36] The Manual explains that 'agencies should use the results of the security risk assessment to determine the appropriate balance of resources allocated to prevention as opposed to detection of cyber security incidents'.[37] The Manual also requires that cyber security incidents be registered 'to highlight the nature and frequency of the cyber security incidents so that corrective action can be taken. This information can subsequently be used as input into future security risk assessments '.[38]

The Australian Cyber Security Centre (**ACSC**), which brings together cyber security capabilities across the Department of Defence, the Attorney-General's Department, ASIO, AFP and the Australian Crime Commission, plays an important role in assessing cyber security incidents. The main functions of the ACSC are to:

- raise awareness of cyber security;
- report on the nature and extent of cyber threats;
- encourage reporting of cyber security incidents;
- analyse and investigate cyber threats;
- coordinate national cyber security operations and capability; and
- lead the Government's operational response to cyber incidents.[39]

Important points to note about the application of a risk-based approach to protect national security in the context of cyber security are:

- National security risk associated with the use of the Internet is managed at the federal level under a range of regulatory instruments.
- The requirement to adopt a risk-based approach in relation to cyber security is not embedded in the regulatory framework. However, it is referred to in relevant policy

and procedural documents.

- While there is limited public information available regarding how the risk-based approach is applied in practice, it appears that the risk assessment is focused on the nature and consequences of a cyber security incident, more than the profile of the actual or possible perpetrators of cyber crime.
- ACSC plays an important role in assessing the risk associated with cyber security incidents.

Regulation of infrastructure

Critical infrastructure has been defined by the Australian, State and Territory Governments as the back-bone of the country's economy and includes:

> those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact on the social or economic wellbeing of the nation or affect Australia's ability to conduct national defence and ensure national security.[40]

The spectrum of critical infrastructure includes energy, water, health, communication and banking infrastructure, including the physical facilities, supply chains and the IT networks.[41] Australia's Critical Infrastructure Resilience Strategy notes that '[t]errorism remains an enduring threat to Australia's national security, and violent extremists continue to seek to target critical infrastructure sectors in Australia and abroad'.[42]

Under the current *Critical Infrastructure Resilience Strategy*, the Australian Government takes a non-regulatory approach to critical infrastructure resilience. The approach assumes that owners and operators of critical infrastructure are usually best placed to assess risks and determine how to respond.[43]

In contrast, in Victoria, a new regulatory framework to ensure the protection of critical infrastructure from national security risks came into effect on 1 July 2015. The framework, which was incorporated into the *Emergency Management Act 2013* (Vic),[44] requires certain 'responsible entities' for the State's most critical infrastructure to demonstrate their assets are resilient to risks, including national security risks.[45]

The framework requires the relevant Minister to assess infrastructure for which that Minister is responsible using the criticality assessment methodology[46] to determine whether that infrastructure is:

- *Significant critical infrastructure*: This category applies to the lowest criticality level of infrastructure. If disrupted, this category of infrastructure would affect the supply of an essential service to, or the economic or social well-being of, a region of Victoria.
- *Major critical infrastructure*: This category applies to the middle criticality level of infrastructure. If disrupted, this category of infrastructure would affect the supply of an essential service to, or the economic or social well-being of, more than one region of Victoria.
- *Vital critical infrastructure*: This category applies to the highest criticality level of infrastructure. If disrupted, this category of infrastructure would affect the supply of an essential service to, or the economic or social well-being of, the whole of Victoria.

The 'Victorian Critical Infrastructure Register' is established under the framework and lists all significant, major and vital critical infrastructure.

Only 'responsible entities' have obligations under the new regime. A 'responsible entity' is defined as the person designated by the Governor as the responsible entity in respect of vital critical infrastructure specified in a Council by Order. Each responsible entity must complete an annual 'Resilience Improvement Cycle' comprising:

- *Statement of Assurance*: This must be completed in accordance with the regulations and guidelines and include:
    - an identification of the emergency risks to the relevant critical infrastructure;
    - specify the emergency risk management actions or activities that the responsible entity proposes to take to address the identified emergency risks; and
    - an attestation that the responsible entity has complied with the new obligations imposed by the Act.
- *Emergency Risk Management Plan:* This must be completed in accordance with the regulations and guidelines and must prepare the vital critical infrastructure for an emergency.
- *Exercises:* The responsible entity must develop, conduct and evaluate an exercise each year to test their capability to plan, prepare for, prevent, respond to or recover from an emergency. The exercise must be developed in consultation with the relevant Minister(s).
- *Audit:* The responsible entity must conduct an independent audit of their emergency risk management processes each year to evaluate the efficiency, effectiveness and appropriateness of the management of risks by the responsible authority. A certificate must be provided to the Minister confirming that the audit has been completed, specifying the outcome of the audit and whether any required actions have been identified.

Some of the main features of the application of a risk-based approach to protect national security in the context of the use of Australia's critical infrastructure are:

- National security risk associated with the use of Australia's critical infrastructure is not regulated at the federal level. However, a regulatory framework has been established in one of Australia's States (ie Victoria).
- A risk-based approach is embedded in Victoria's regulatory framework. The framework requires a 'criticality assessment' to be undertaken for key infrastructure involved in the supply of essential services. An Emergency Risk Management Plan must be implemented by infrastructure owners and operators to ensure resilience to risks, including national security risks.
- While relevant ministers have primary responsibility for assessing the criticality of the infrastructure within their portfolio, the final recommendation considers input from owners and operators of critical infrastructure, and an assessment from the relevant department.[47]

Regulation of transactions

As its title suggests, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) is aimed at combatting money laundering and the financing of terrorism, which could threaten Australia's national security. A person is considered to finance terrorism when they intentionally collect or provide money and are reckless about whether the funds will be used to facilitate or engage in a terrorist act.[48]

In summary, the regulatory framework established under the AML/CTF Act regulates a range of sectors that could be susceptible to money laundering and illicit financing – namely, the financial, gambling, remittance[49] and bullion[50] sectors. The framework applies to the supply

by these sectors of designated services listed in the Act, which include services involving account and deposit-taking, payroll, life insurance, loans, securities and derivatives, betting and gaming.[51] The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) is Australia's AML/CTF regulator and is also the government's specialist financial intelligence unit.

Under the AML/CTF Act regulated entities must meet minimum obligations contained in the Act, including enrolment on AUSTRAC's Reporting Entities Roll.[52] Among other things, reporting entities must submit an annual report which provides AUSTRAC with information about compliance with the AML/CTF Act and associated regulations.[53]

The compliance obligations borne by reporting entities include the obligation to conduct a 'ML/TF' risk assessment.[54] This obligation requires reporting entities to put in place a framework to identify, prioritise, treat, control and monitor ML/TF risk – that is, the risk that the reporting entity or its products or services may be used to facilitate money laundering or terrorism financing. A reporting entity must consider the risk posed by the following factors:

- customer types;
- types of designated services provided;
- how the entity provides its designated services (for examples over-the-counter or online); and
- the foreign jurisdictions within which it operates or conducts business.

Reporting entities must ensure that they know their customers and understand their financial activities.[55] Among other things, reporting entities must have risk-based customer due diligence (**CDD**) procedures in place, which must consider risk associated with each of the following factors:

- customer types;
- customers' sources of funds and wealth;
- nature and purpose of the business relationship;
- control structure of non-individual customers;
- types of designated services the reporting entity provides;
- how the entity provides its designated services (for examples over-the-counter or online); and
- the foreign jurisdictions within which it operates or conducts business.

Most CDD obligations must be completed before the provision of a designated service to a customer, regardless of whether it involves a one-off transaction or involves an ongoing business relationship (eg establishing an account or a loan).

The main aspects regarding the application of a risk-based approach to protect national security in the context of money laundering and the financing of terrorism are:

- National security risk associated with money laundering and the financing of terrorism is managed at the federal level.
- Reporting entities that provide designated services must undertake a risk assessment of their customers as well as the supply of services where money laundering or terrorism financing may be involved.
- The regulatory framework sets out the risk factors that must be considered by reporting entities when undertaking risk assessments.
- AUSTRAC can use the risk assessments provided by reporting entities as an input to its financial intelligence.

Comparison of the application of a risk-based approach to regulation in the national security context

In this paper, I analysed an example from each of the main regulated areas that are designed in whole or in part to protect Australia's national security. A risk-based approach has been adopted in the case of each example, although there are some important differences between the examples considered, namely:

- *Level at which risk regulated*: In some cases, national security risk is regulated at the federal level, whereas in others, it is regulated at the State/Territory level.
- *Body responsible for risk assessment*: In a number of cases, the private sector is required to undertake the risk assessment. However, there were also other cases where the relevant government agency undertakes the risk assessment.
- *Information used for risk assessment*: In many cases, specialist intelligence agencies provide or assess information used for the risk assessment, such as ASIO, AUSTRAC and ACSC.
- *Focus of risk assessment*: In a number of cases, the risk assessment focused on the person involved in a regulated activity. Nevertheless, there were other cases where the risk assessment was focused on a thing (eg infrastructure) or activity (eg financial transactions).
- *Guidance for risk assessment*: In some cases the regulatory framework provided guidance regarding the factors to be considered in undertaking the risk assessment. However, in other cases, the guidance was limited.

Assessment of the appropriateness of applying a risk-based approach to regulation in the national security context

The question of whether a risk-based approach to regulation is appropriate in the national security context needs to be answered by considering the alternative. In particular, what would be a regulator's approach if a risk-based approach is not adopted?

The answer is likely to be that the regulator – confronted with an overwhelming spectrum and volume of national security risks at any given time – must address all risks that come to light, applying the same degree of effort and resources for each one. Under such an approach, some risks will be allocated more resources and effort than warranted, whereas others will be allocated fewer resources and effort than required. The response to the former risks is likely to involve undue regulatory intervention and associated burden for regulated entities while the response to the latter risks could lead to major national security events because the response is not commensurate with the true, underlying risk.

This does not necessarily imply that a risk-based approach will yield perfect results, where responses to national security concerns are always commensurate with the underlying risks. Nevertheless, a risk-based approach has the potential to ensure that resources and effort are dedicated to the areas of highest risk, thereby minimising the likelihood of these types of tragic events. A risk-based approach can also help to entrench consistency, efficiency and fairness in decision-making processes by the regulator. Indeed, a risk-based approach is appropriate - if not critical – in the national security context.

Nevertheless, the ability of a risk-based approach to deliver the touted benefits comes down to design and implementation. A well-designed risk framework, which is supported by expert staff, comprehensive information and effective, sophisticated infrastructure (most particularly, IT systems), will help to ensure that a risk-based approach is capable of delivering.

Effective mechanisms to treat low risk issues will be particularly important in the national security context. As previously mentioned in this paper, a risk-based approach will mean that some low risk issues are tolerated by the regulator. It will be important for national security regulators to be clear and conscious about where the threshold between low and higher risks lie. It is possible that the tolerance for risk among national security regulators is much lower than for other regulators because of the possibility that catastrophic events could eventuate in the national security context.

Assuming that national security regulators have a relatively low tolerance for risk, this may mean that resource requirements are higher than if the tolerance for risk were higher. The need for sophisticated tools to identify and assess low risk issues becomes more pressing so that patterns in low risk issues can be detected and risk escalation can occur, when necessary. The absence of such tools may mean that low risk issues are treated as 'noise' and the ability to detect more systemic risks that might be at play is seriously compromised. The 9/11 attacks and the Martin Place siege are cases in point.

Endnotes

1 National Commission on Terrorist Attacks, *The 9/11 Commission Report*, 2005, 254.
2 Ibid 255.
3 Ibid 256 - 262.
4 Ibid Chapter 8.
5 Ibid 1 - 14.
6 Australian Government, Department of the Prime Minister and Cabinet, *Martin Place Siege, Joint Commonwealth – New South Wales review*, January 2015, Executive Summary, iv.
7 Ibid iv.
8 Ibid v.
9 The *Coalition's Policy to Boost Proactivity and Reduce Regulation*, July 2013; Productivity Commission, *Regulator Audit Framework*, March 2014; *Regulator Performance Framework*, October 2014.
10 Under the *Crimes Act 1914*, 'law enforcement agency' is defined under sections 15GC and 15K to include the Australian Federal Police, the police force of a State or Territory, Customs, the Australian Crime Commission and the Australian Commission for Law Enforcement Integrity, the Australian Tax Office and any other Commonwealth agency set out in the Regulations (presently, there are no such regulations).
11 Australian Government, *Regulator Performance Framework Guidance – Coverage*, 2015.
12 Id.
13 http://www.border.gov.au/about/corporate/information/fact-sheets/70border.
14 For example, visa classes include permanent entry visa, work visa, temporary entry visa, visitor visa and business visa.
15 This criterion is public interest criterion '4002' and is defined in Schedule 4 ('Public interest criteria and related provisions') of the *Migration Regulations 1994*. 'Security' is defined in section 4 of the *Australian Security Intelligence Organisation Act 1974* as: '(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference; whether directed from, or committed within, Australia or not; and (aa) the protection of Australia's territorial and border integrity from serious threats; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa)'.
16 http://www.border.gov.au/about/corporate/information/fact-sheets/70border.
17 http://www.border.gov.au/about/corporate/information/fact-sheets/77mal.
18 https://www.ag.gov.au/NationalSecurity/ChemicalsOfConcern/Pages/default.aspx.
19 Ammonium nitrate can be used to make explosives. Some fertilisers contain high concentrations of ammonium nitrate.
20 http://www.nicnas.gov.au/about-nicnas/regulatory-partners/chemicals-of-security-concern.
21 http://www.nationalsecurity.gov.au/ChemicalSecurity/Pages/default.aspx.
22 See, for example, the Victorian *Dangerous Goods (HCDG) Regulations 2005*.
23 http://www.nationalsecurity.gov.au/ChemicalSecurity/Pages/default.aspx. The 11 high-risk chemicals are: ammonium perchlorate; hydrogen peroxide; nitric acid; nitromethane; potassium chlorate; potassium nitrate; potassium perchlorate; sodium azide; sodium chlorate; sodium nitrate; and sodium perchlorate.
24 Australian Government, *National Code Of Practice For Chemicals Of Security Concern*, 2013, 5.
25 On 27 November 2014, the Prime Minister announced that the Australian Government will undertake a review of Australia's cyber security policies and strategies. The results of the review are due to be delivered in mid-2015.

26 'Cyber espionage' is generally defined as the use of computer networks to gain illicit access to confidential information, typically that held by a government or other organisation.
27 'Cyber warfare' is defined as Internet-based conflict involving politically motivated attacks on information and information systems. Cyberwarfare attacks can disable official websites and networks, disrupt or disable essential services, steal or alter classified data, and cripple financial systems.
28 Australian Government, *Cyber Security Strategy: An Overview*, 2009, 5.
29 *The First National Security Statement to the Australian Parliament*, Address by the Prime Minister of Australia, the Hon Kevin Rudd MP, 4 December 2008.
30 http://www.ag.gov.au/RightsAndProtections/CyberSecurity/Pages/default.aspx.
31 A 'botnet' is a network of computers infected with malicious software and controlled as a group without the owners' knowledge.
32 A computer 'virus' enters a computer usually without the knowledge of the operator. While some viruses are mild and only cause messages to appear on the screen, others are destructive and can wipe out the computer's memory.
33 An internet 'worm' is a program that spreads across the internet by replicating itself on computers via their network connections.
34 'Trojans' are malicious programs that perform actions that have not been authorised by the user, including deleting, blocking, modifying or copying data.
35 Australian Government, *Cyber Security Strategy*, 2009, vi.
36 Australian Government, Department of Defence, *Australian Government Information Security Manual – Controls*, 2014, 2.
37 Australian Government, Department of Defence, *Australian Government Information Security Manual – Controls*, 2014, 60.
38 Ibid 63.
39 http://www.asio.gov.au/ASIO-and-National-Security/Partners/The-Australian-Cyber-Security-Centre.html.
40 Australian Government, *Critical Infrastructure Resilience Strategy: Policy Statement*, 2015, 3.
41 http://www.nationalsecurity.gov.au/Informationforbusiness/Pages/TrustedInformationSharingNetwork.aspx.
42 Australian Government, *Critical Infrastructure Resilience Strategy: Policy Statement*, 2015, 2.
43 Ibid. 5.
44 Part 7A of the *Emergency Management Act 2013* deals with 'Critical Infrastructure Resilience'.
45 Victorian Government, Emergency Management Victoria, *Critical Infrastructure Resilience Strategy*, 2015, 4.
46 The *Ministerial Guidelines for Critical Infrastructure Resilience*, 28 May 2015, set out the key principles of the Criticality Assessment Methodology.
47 *Ministerial Guidelines for Critical Infrastructure Resilience*, Critical Assessment Methodology, 28 May 2015, 6.
48 Section 103.1 of the *Criminal Code Act 1995*.
49 Remittance services facilitate the transfer of money or property from a customer in one location and pay an equivalent amount in cash or value to a beneficiary customer in another location, often outside the formal financial and banking system.
50 'Bullion' means gold, silver, platinum or palladium authenticated to a specified fineness in the form of bars, ingots, plates, wafers or other similar mass form; or coins.
51 The designated services are listed in section 6 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006.*
52 Part 3A – Reporting Entities Roll, *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.
53 Part 3 – Reporting obligations, Division 5 – AML/CTF compliance reports, *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.
54 Chapter 8, Part A of a standard anti-money laundering and counter-terrorism financing (AML/CTF) program, *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1)*.
55 http://www.austrac.gov.au/part-b-amlctf-program-customer-due-diligence-procedures.

DUTIES AND DISCRETIONS: HOW HAVE 'PLAIN ENGLIGH' LEGISLATIVE DRAFTING TECHNIQUES FARED IN ADMINISTRATIVE LAW?

Jeffrey Barnes*[+]

> Drafters are constantly seeking to keep the language they use up to date and to take appropriate account of the latest developments in plain language techniques. It is important that developments and innovations that improve the quality of legislative language are allowed to take place …[1]

Background

In simple terms, 'administrative law' is concerned with the regulation of executive power. It is trite to observe that a multitude of statutes confer executive power. It follows that, potentially, changes to the way legislation is drafted will not only impact on the readability of that law, they will also impact on the limits of executive powers.

For the last 30 years, the plain English movement has been the pre-eminent influence[2] affecting the manner in which legislation has been drafted in common law countries.[3] Signs of that change include the widespread adoption of plain English policies by legislative drafting offices in Australia,[4] New Zealand[5] and the United Kingdom,[6] the development of plain English manuals,[7] rewrites of legislation in plain English,[8] and a secondary literature that is supportive.[9]

A seminal work distilling the principles of plain English as they apply to legislation is by Turnbull, at the time head of the Office of Parliamentary Counsel of the Commonwealth of Australia.[10] He described three main elements of a simplified style of legislative drafting.[11] The first is to follow the 'rules of simple writing', such as 'using shorter, better constructed sentences'. The second is to 'avoid traditional forms of expression that are unnecessarily long and obscure', such as connecting associated provisions unnecessarily. The third is 'to use aids to understanding that are not merely concerned with language', such as an objects provision. These three elements of a 'new style' underpin the current plain English manual of the Commonwealth Office of Parliamentary Counsel[12] and are reflected to a great extent in other drafting manuals in the common law world.[13]

As many innovations are associated with the plain English movement[14] it is necessary to make a selection for present purposes. Illustrative of Turnbull's second principle, 'avoid traditional forms of expression that are unnecessarily long and obscure', the particular changes examined are those designed to avoid troublesome words when the drafter is

* Senior Lecturer, School of Law, La Trobe University; J.Barnes@latrobe.edu.au. The author thanks Nick Horn and Thomas Barnes for comments on a draft of this article.

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seeking to impose a duty or confer a discretion. The traditional form for expressing a duty is 'shall'; for a discretion, it is 'may'. Plain English reforms have led to 'must' being used instead of 'shall' when an imperative sense is desired. And they have led to the use of alternative drafting structures being used to confer a discretion instead of the simple use of 'may'.

The general approach in the present article is to make these inquiries: what perceived problems arose with respect to the expression of duties and discretions? What 'plain English' innovations were proposed to deal with the problems? And how have the innovations fared?

The article proceeds as follows. In section 1 I give some further background to the plain English movement. In section 2 I discuss its response to the imposition of duties: the alleged problems with 'shall'; the extent to which 'must' and other plain English alternatives have been adopted; how 'must' has fared in the courts; and the reasons why the innovations have generally worked. In section 3 I discuss the plain English response to the conferral of discretions: the amendment of certain Acts Interpretation Acts, and the use of more explicit wording in the substantive Act concerned. Section 4, the Conclusion, synthesises sections 2 and 3 and considers what this case study suggests about the utility of plain English legislative drafting techniques.

1. The plain English movement

Turnbull's principles of plain English drafting did not come out of the blue. The purpose of this section is to supply some context to the principles.[15]

By rights, the term 'plain English' ought to be clear. However, the plain English movement's dimensions, goals and scope are difficult to pin down. Ironically, even its proponents acknowledge 'plain English' is a 'woolly term'.[16]

In relation to legislation, drafting changes are but one of dimensions of the plain English movement. They also include:[17]

- directly involving the public in the process of developing a legislative proposal;
- making changes to the drafting process;
- making the current law physically accessible;
- simplifying and restating the law of interpretation of legislation; and
- improving the dissemination of the nature and effect of the law.

As is typical of other social movements,[18] the goals of participants in the plain English or plain language movements[19] are highly diverse. At one end of the spectrum, some have suggested plain English techniques are a guarantee, or almost a guarantee, of communication:

> Plain English involves the deliberate use of simplicity to achieve clear, effective communication. It is commonly considered to be the best technique for effective communication in legislation. … Plain English is not achieved only by using simple language. Other devices are used to guarantee clear communication.[20]

> Plain language is an approach to communication that begins with the needs of the audience. It results in *effective* communication because the reader can understand the message. … Using plain language in the law provides several additional benefits: … People get the benefit of the law because they understand it.[21]

> The goal — and the achievement — has been documents that are legally valid and readily comprehensible.[22]

> [Mellinkoff] showed what by now, thirty years after, should be undisputed: the law can usually be made clear even to the public.[23]

At the other end of the spectrum, some have suggested the movement has had, or will have, little effect, for example, the late Professor Colin Howard:

> [H]ow can legal language respond to the sentiment that it ought to be not only more exact but also a lot more comprehensible to the non-lawyer? The contemporary political response to this issue is the plain English movement. … I frankly doubt that the effort [of the plain English movement] will turn out before long to be anything more than window dressing … [but] there is always room for improving on [the law's] less necessary absurdities.[24]

In the middle of the spectrum are advocates who, taking a more cautious view of the aims, have expressed them in terms of improvement, such as

> The Council would endorse any developments that would create a legal training environment which was more aware of legitimate criticisms of 'legal language' and more open to legitimate possibilities for improving access to the law through the application of plain English policies.[25]

> … the plain English project can still be valuable for two reasons: (i) it can improve the engagement of *represented* people in their legal affairs; (ii) it can make the law more precise and intelligible to *lawyers.*[26]

> The objective is to *improve* the way the legal system operates, not to revolutionize it.[27]

What unites social movements are shared dominant social values and an opposition to existing political-administrative practices.[28] Participants in the plain language movement vindicate and reaffirm a number of dominant social values, including the rule of law,[29] the duties of a democratic legislature,[30] access to justice,[31] human rights,[32] and even common sense.[33] Participants in the movement oppose what they perceive to be a 'faulty [drafting] tradition',[34] namely the perpetuation of 'erroneous language practices',[35] 'false notions about language',[36] and a lack of practical consideration of the audience. [37]

Two approaches are possible in discussing plain English. One usage treats 'plain English' as an *outcome*. For example:

> For a document to be in plain English, the people who use it must be able to find the information they need easily and understand it the first time they read it.[38]

More commonly however, a plain English document is recognised by its *elements*.[39] In the case of legislation, it is the particular plain English drafting techniques that a legislative drafter employs. Turnbull's account is a clear example, and this approach to discussing plain English is adopted here.

2 The imposition of duties

Alleged Problems with 'Shall' and Counterarguments

Critics of 'Shall'

'Shall' has been called 'the most misused word in the legal vocabulary'.[40] Several criticisms have been made – of the word and its usage. First, it is argued that using 'shall' to express an obligation is out of step with community usage,[41] clients being 'more likely to interpret 'shall' as expressing mere futurity'.[42]

Second, even for expert readers, it is argued that 'shall' is easily misunderstood and has led to confusion and imprecision. Here too the 'potential confusion [arises] between *shall* indicating futurity, and *shall* indicating obligation.[43] As a result its use has led to 'uncertainty',[44] 'confusion and imprecision',[45] and 'countless court cases'.[46]

Third, it is argued that 'shall' is prone to be used inappropriately;[47] in particular, it is frequently used when the author does not intend to impose an obligation.[48] For example, it has been used to perform a range of other functions, as Driedger pointed out:[49]

> Whenever an accident *shall* happen [future auxiliary];
>
> No action *shall* lie [divine ordination];
>
> There *shall be* a corporation [creative shall?];
>
> The Governor in Council *shall* appoint the members [unintended command];
>
> The Minister *shall* prescribe the forms [permission or power];
>
> The agreement *shall* contain [command to the inanimate];
>
> The appellant *shall* file notice of appeal within 30 days [indication of procedure; unintended obligation];
>
> An application *shall be* signed by the owner [directory; it is not the intention that is the owner is being compelled to sign]; and
>
> The General Manager *shall be* a member of the Board [ambiguity].

Critics say that many of these are examples of a 'false imperative'.[50]

Fourth, using 'shall' imposes an unnecessary imposition on the judiciary in working out that word's meaning in a particular context.[51]

Defence of 'Shall'

These alleged problems with 'shall' have been disputed or queried. Unlike 'must', it is argued that 'shall' at least imposes a legal obligation at the point it is employed by the speaker.[52]

It is also argued that 'the average reader' could have worked out the meaning of 'shall'.[53] Alternatively, it is argued that 'shall' has a sound *legal* meaning regardless of its use in ordinary speech. It is pointed out that 'legal usage and general usage are not coextensive'.[54] 'Shall' is a part of legal history.[55] Indeed, acknowledging that the use of 'shall' as a future tense has become rare or obsolete, one commentator has argued that the demise of 'shall' in ordinary speech *supports* the continued use of 'shall' in legal English. He argued that the drafter is now 'free' to use it 'in the distinct sense of the imposition of a legal obligation'.[56] Paradoxically, it would seem, it is argued that using a word in a technical way will be clear to the ordinary citizen:

> Saying that the clerk 'shall' leaves no room for doubt in the mind of the citizen that the use of the word that would be archaic in normal speech indicates both the formality and the unique nature of what the rule — a form of legislation — is doing; it is using a word not found in everyday speech because it is doing something — imposing a legal obligation — not done in everyday life.[57]

It is further argued that the legal drafter can rely on the courts to work out its meaning in cases of doubt.[58] Using 'shall' can also mitigate the severity of 'must'.[59]

Plain English Innovations

Where an obligation is sought to be imposed plain English advocates and practitioners have often sought to replace 'shall' with 'must'.[60] Similarly, with respect to the imposition of a duty not to act (ie a prohibition), legal authors have been urged to say 'must not'.[61] In addition, the plain English movement has proposed some alternative expressions to express a duty. They include 'is to', 'is required to', and 'it is the duty of'.[62] To create a duty not to act, an alternative is 'is required not to'.[63]

Plain English proponents had a number of objects in mind in advocating the use of 'must' and alternatives to express an obligation. They included: to 'make the writing and interpretation of documents easier';[64] 'to achieve greater precision in our drafting';[65] and to bring legal and general usage into agreement wherever possible.[66]

Plain English Justifications

Advocates have two main justifications for using 'must' and other alternatives to 'shall'. The first is that a ready alternative to 'shall' — namely 'must' — is available.[67] 'Must' is a commonly used word.[68] It is more in line with ordinary speech.[69] Even defenders of 'shall' acknowledge that 'must' is used in 'everyday colloquial speech'.[70] It is 'an appropriate equivalent for the imperative shall'.[71]

Advocates claim support from various dictionaries for the use of 'must' to impose an obligation,[72] however precise reference is lacking. The present author has examined several reputable dictionaries and grammatical works. Some support the plain language case. The 1981 edition of the *Macquarie Dictionary* has this definition of 'must':

> Aux. v. **1**. to be bound by some imperative requirement to: *I must keep my word.* **2.** to be obliged or compelled to, as by some constraining force or necessity: *man must eat to live.*

However, it is true that neither example illustrates 'must' in the sense of the speaker creating an obligation.

The entry for 'must' in the *Australian Oxford Dictionary*[73] also lends support to the plain language case:

> Auxiliary verb …
>
> - **1a** to be obliged to (*you must go to school; must we leave now?; said he must go; I must away).*

The first example above shows the speaker exerting authority, although the example could be said to be an instance of an obligation elsewhere created.

An authoritative 2004 work on English usage[74] distinguishes between 'must' in the sense of obligation and 'must' in the sense of necessity. Further, the examples the author gives most likely indicate the speaker using 'must' to impose an obligation:

> Candidates must demonstrate their command of a language other than English.
>
> You must come with me.

A number of scholars have analysed 'must' from a grammatical point of view. Some note the use of 'must' as referring to an 'obligation', as distinct from 'logical necessity', without going

into detail.[75] However, others are more illuminating. One 1983 work (Coates) makes clear that it can be used by speakers to impose a duty:

> You must be back by 10 o'clock ('You are obliged [by me] to …') … The usual implication of *must* (= 'obligation') is that the speaker is the person who exerts authority over the person(s) mentioned in the clause.[76]

In her work, Coates undertook a comprehensive analysis. Unlike other grammarians she worked from a corpus of material, that is, the study was an empirical one, rather than one that primarily relied on the linguist's intuition.[77] The material was large (over a million and a half words), and covered 'the entire spectrum from formal written prose to informal conversation'.[78] The author found that the use of 'must' fell into two broad categories. One, which she called 'epistemic', conveyed the speaker's confidence in the truth of what he or she was saying.[79] The other, which she called 'root' or non-epistemic, lay on a cline or gradient extending from a sense of strong obligation to cases where the sense of obligation was extremely weak.[80] At the extreme end of the cline, 'must' could be paraphrased as 'it is imperative/obligatory'[81] or 'and I order you to do so'.[82] An example she gave was: ''You must play this ten times over', Miss Jarrova would say, pointing with relentless fingers to a jumble of crotchets and quavers.'[83] This obligatory sense was marked out by a number of features, including that it was a command, it was clear who was exerting authority, and the speaker had authority over the subject.[84] For Coates the core or stereotype made clear the speaker's involvement. This slanted her research to examples of 'must' in the second person, which were 'rare' in the corpus.[85] However, the corpus also included 'must' commands in the third person, such as: 'All students must obtain the consent of the Dean of the faculty concerned before entering for examinations.'[86]

To conclude, at the time the plain English movement was making a case for 'must' to replace 'shall' where the author intended to create an imperative, the above dictionaries and grammatical authorities show that there was support for the claim that 'must' was a ready alternative to 'shall'. They show the use of 'must' as a command, *and* the use of 'must' as a direct command by the speaker concerned. A limitation of the sources however is that they tend to show 'must' was used in this sense in the more familiar second person rather than the third person.

A second justification of plain English advocates for using 'must' is that it avoids the confusion that the use of 'shall' may introduce.[87] It does not have the confusing range of meanings that attends 'shall'.

Finally, although advocates have not used the law to justify the use of 'must', the use of 'must' in legislation predates the contemporary plain English movement. For example, early Commonwealth Acts employed 'must', sometimes on frequent occasions. Examples are the *Distillation Act 1901* (Cth) (81 instances), s 50 of the *Commonwealth Public Service Act 1902* (Cth) (one instance), and the *Commonwealth Electoral Act 1902* (Cth) (18 instances).

Criticisms of 'Must'

Some commentators question the use of 'must' on the basis that it does not have the ordinary meaning that plain English advocates claim it has. One claim is that 'must' merely refers to a duty imposed *elsewhere*. For example, Driedger asserted, 'Strictly speaking, … [must] does not directly create a duty; it merely asserts the existence of a duty, however it may have been created.'[88] Another claim is that 'must' is not a word of duty or obligation. Rather, ''[m]ust' is a word of compulsion or necessity: it is not a word of duty or obligation.'[89] Unfortunately, the prosecution of their case is weakened in that these lawyer-critics do not

cite any sources in support.[90] And, as revealed above, the plain English case is supported by reputable dictionaries and grammatical authorities.

The critics also argue that replacing 'shall' with 'must' will be no panacea. The fundamental problem in the argument condemning 'shall', it is said, 'lies in the assumption that a word, for legal purposes, is inelastic and has some absolute meaning'.[91] In other words, '[i]t would still be for the courts, where meanings are disputed, to construe whatever words may be used in the context in which they have been used'.[92] This valuable point is now taken up. I now examine the operation of 'must' and other plain English alternatives in practice.

To What Extent Have 'Must' and Other Plain English Alternatives Been Adopted, Instead of 'Shall', To Express Duties?

There is ample evidence showing that 'shall' has been largely abandoned in recent Australian and New Zealand legislation, and that 'must' and other plain English alternatives are used instead to express an obligation. As I will elaborate, the evidence comes from a survey of drafting offices, from a survey of legislation, and from an examination of drafting manuals.

Horn, a legislative drafter then based in the Australian Capital Territory Parliamentary Counsel's Office, conducted a survey of legislative drafting practice, beginning in late 2001.[93] The survey was updated in 2003 and 2004 and published in 2005. It covers the Commonwealth legislative drafting offices, the drafting offices of all Australian states and mainland territories, and the drafting offices of New Zealand and Ontario. The survey compiled the expert views of one respondent from each of the drafting offices about a number of aspects of legislative drafting, including the extent to which plain English devices were used by that office. The respondent was someone with considerable experience in each office. In some instances the respondent was the head of the office, and in most other cases the responses were cleared by the head.[94] In his survey respondents from all Australian federal, State and territory legislative drafting offices and from the NZ office either reported that 'shall'' was never used for obligations ('must' or alternatives were used instead), or that 'shall' was avoided for stating obligations and 'must' was generally used instead.[95] The exception in the survey was the Ontario office, which disagreed on the rationale for the change.

My own research of 2013 legislation in all Australian jurisdictions supports this 2005 survey result. With one slight exception, it shows that 'shall' is not used or virtually never used. A possible exception is Victoria in which 9 out of 81 Acts passed in 2013 contain 'shall'.

'Must' for stating obligations has been adopted in the drafting manuals of legislative drafting offices in many common law countries, including Australia,[96] Canada,[97] Hong Kong,[98] New Zealand,[99] South Africa,[100] United Kingdom,[101] and the United States.[102] Not all common law drafting offices are so committed.[103] Some are still wedded to 'shall'.[104]

How has 'Must' Fared in the Courts?

In one sense 'must' has suffered the fate of every ordinary English word that is used in legislation:[105] like its predecessor 'shall', it has become a 'legal' word; its meaning being subject to interpretation. Its predecessor had been read presumptively as expressing an obligation.[106] So too is 'must'; it has been held not to have a fixed or universal meaning; rather it has a prima facie meaning.[107] Courts concede that the meaning of 'must' is not fixed but is contextual.[108]

DPP v George

Is there evidence that a 'must' provision has been held to confer a discretion? In one, perhaps solitary, case this has occurred: *DPP v George*.[109] The leading opinion is that of White J.[110] His Honour's opinion on the meaning of 'must' is probably dicta,[111] but the issue was seriously considered.

Section 95(1) of the *Criminal Assets Confiscation Act 2005* (SA) provided:

> **95—Making pecuniary penalty orders**
>
> (1) A court must, on application by the DPP, make an order (a *pecuniary penalty order*) requiring a specified person to pay an amount determined under Subdivision 2 to the Crown if satisfied that the person has been convicted of, or has committed, a serious offence and—
>
> (a) the person has derived benefits from the commission of the offence; or
> (b) an instrument of the offence is owned by the person or is under his or her effective control.

The issue was whether the provision imposed a duty or conferred a discretion.[112] White J held that the construction of s 95 'as vesting a discretionary power in courts is open and, further, that it is the appropriate construction'.[113]

How was this conclusion arrived at? His Honour's starting point was that the word 'must' was likened to 'shall' in terms of 'generally used in an imperative sense'.[114] White J then had regard to 'the application of more general principles of statutory interpretation',[115] principally the context of the provision and the consequences of a 'literal interpretation'.[116]

White J considered that the following interpretative factors favoured the literal construction of the provision (that is, 'must' was obligatory).[117] From the unit of inquiry (the provision in question), the literal construction was clearly open.[118] From the Act as a whole, the permissive wording in provisions relating to *other* orders suggested that s 95 was drafted to lay down an obligation,[119] and there would be some inconsistent policy if a literal construction were departed from.[120]

However, a number of considerations were in favour of a discretionary construction of the provision. From the Act as a whole, s 95(2) referred merely to the court's 'power' to make a pecuniary penalty order ('PPO').[121] Alternative words could have been used if an obligation had been intended (for instance, 'obligation').[122] And a detailed legislative analysis showed that PPOs are subordinate to forfeiture of 'instruments' in the statutory scheme.[123] From the wider context, White J identified various adverse consequences of the literal construction. First, he found it 'curious' that a determination by a court that a forfeiture order is inappropriate must be negated by the imposition of the alternative but subordinate sanction of a PPO in relation to the very same instrument.[124] His Honour described the consequences of the literal construction as 'something unfair, if not cruel'.[125] Second, there would be 'pointless' court hearings.[126] Third, it was 'likely to engender a lack of respect for [the court] proceedings and the authority of the courts conducting them was likely to be undermined'.[127] Fourth, there would be inconsistent treatment in comparison with forfeiture orders.[128]

The interpretation in *DPP v George* has been criticised. Herzfeld and Prince opine that, 'That conclusion is doubtful, given the ordinary meaning of the word: unlike 'shall' it does not appear reasonably capable of bearing any meaning other than one imposing an obligation.'[129] At first sight, this criticism looks reasonable. But on closer inspection, the criticism itself is dubious. First, focusing on the meaning of a word is misplaced. It is the sentence or legislative provision which has legal meaning.[130]

Second, there is no rule that legal meanings of disputed words are restricted to a choice amongst the ordinary meanings.[131] As famously pointed out:

> But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[132]

Third, appellate courts have held that words can be given a strained or non-literal meaning.[133] This is sometimes equated with a 'Humpty Dumpty' approach:

> … like Humpty Dumpty in 'Alice through the Looking Glass', Parliament can give a word any meaning it wishes: 'When *I* use a word, Humpty Dumpty said, in a rather scornful tone, it means just what I choose it to mean - neither more nor less ... The question is, said Humpty Dumpty, which is to be the master - that's all.' Parliament is not bound by ordinary usage. Provided it makes its intention clear, Parliament can use any word it wishes, however much this may offend linguistic purists.[134]

Fourth, rather than the ordinary meaning, the legal meaning of a contested provision depends on 'the overall weight of argument',[135] that is, the overall weight of the relevant interpretative factors.[136]

DPP v Dickfoss

An unusual empirical analysis of the use of 'must' in legislation is presented in *DPP v Dickfoss*.[137] In this case the court (Mildren J) analysed 51 uses of 'must' in the *Criminal Property Forfeiture Act 2002* (NT). It found that 'the word 'must' … is found in numerous provisions in the Act, and in most (if not all) cases it is used in an imperative sense'.[138] This indicates that, in the Act in question, the word 'must' has a consistent and clear meaning.

The Word 'Must' Can Give Rise to Other Ambiguities and Uncertainties

Although not directly associated with the issue of replacing 'shall' with 'must' when a duty is sought to be imposed, use of the word 'must' has not stopped other issues arising — issues that also arose in the case of 'shall'. One is an issue as to the *scope* of the duty that has been imposed.[139]

Another issue that has arisen, if a duty has been found to be imposed, concerns relief. The issue is whether a court ought to exercise its discretion to refuse relief.[140] If it does, a failure to perform the duty is not enforced through a judicial remedy.

Why Has the Innovation Generally Worked?

The above evidence indicates that the replacement of 'shall' in its imperative sense with 'must' has not only taken place in statute law; with rare exceptions it has given rise to few ambiguities. Why has the innovation been so successful? Part of the reason is because 'must' is free of the inherent ambiguity of 'shall'. But this is not the only reason. As *DPP v George* showed, 'must' is not always free of ambiguity.

It has been suggested that 'must' has also succeeded in reducing uncertainty because drafters have been forced to think more specifically about the meaning of each rule.[141] A good example of the careful attention by drafters to the replacement of 'shall' and the use of 'must' is apparent in the *Magistrates (Miscellaneous) Amendment Act 2013* (SA), Sch 2. This Schedule made various statute law revision amendments to the *Magistrates Act 1983* (SA). In this Act the word 'shall' was replaced by no less than four different words or combination of words. Some amendments replaced 'shall' with 'must'.[142] And some replaced it with a plain English equivalent, a present tense verb.[143] But other amendments removed the

ambiguity 'shall' otherwise might have had — replacing it with the future tense 'will',[144] or the permissive word 'may'.[145]

3. The conferral of discretions

Traditionally, the word 'may' has been used by drafters to confer a discretion. However, courts sometimes read a provision containing 'may' as conferring a power and containing an implied duty to exercise the power in the circumstances.[146]

The ambiguity that can exist with 'may' has given rise to two innovations that seek to reduce the difficulty.

Amendment of Acts Interpretation Acts

In Victoria and Queensland, Acts Interpretation Acts have been used in an attempt to impose a universal meaning for the word 'may'. The provisions are similar in their wording.

The *Interpretation of Legislation Act 1984* (Vic) provides:

> **45 Construction of 'may' and 'shall'**
>
> (1) Where in this Act or any Act passed or subordinate instrument made on or after the commencement of this Act the word 'may' is used in conferring a power, that word shall be construed as meaning that the power so conferred may be exercised, or not, at discretion.
>
> (2) Where in this Act or any Act passed or subordinate instrument made on or after the commencement of this Act the word 'shall' is used in conferring a power, that word shall be construed as meaning that the power so conferred must be exercised.
>
> (3) The provisions of this section shall have effect notwithstanding any rule of construction to the contrary and any such rule is hereby abrogated with respect to this Act and any Act passed or subordinate instrument made on or after the commencement of this Act.

In Queensland the *Acts Interpretation Act 1954* contains the following:

> **32CA Meaning of may and must etc.**
>
> (1) In an Act, the word may, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.
>
> (2) In an Act, the word must, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.
>
> (3) To remove any doubt, it is declared that this section applies to an Act passed after 1 January 1992 despite any presumption or rule of interpretation.

The words in ss 45(3) and 32CA(3) each suggest that the intent was to provide a universal meaning for the word 'may'. This is confirmed by the speech that the Victorian Premier, John Cain, gave upon a motion that the Interpretation of Legislation Bill be read a second time:[147]

> The Government is committed to ensuring that, as far as possible, the language of legislation is intelligible to all citizens of Victoria and all who might be affected by the laws of this State.
> …
> While 'may' was often interpreted to mean that exercise of the power was discretionary, sometimes it was interpreted as meaning that there was no such discretion. The resultant confusion of meanings was often the cause of protracted litigation. The present provision seeks to provide a clear rule to govern the use of these terms.
> …
> This means the courts will no longer have the power to define … 'may' as requiring the mandatory exercise of a power.

Has the innovation worked in the way it was intended? On the one hand, there is dicta in a few cases that suggest the Acts Interpretation Act provisions might be effective in laying down a universal meaning.[148] But there is no case (of which I am aware) holding that the court would have decided the question of meaning differently but for s 45(3) or s 32CA(3).

Furthermore, there is full Court authority which holds that the Victorian Acts Interpretation Act provision does *not* mandate a meaning if the words of the later statute impliedly indicate otherwise. In *Telstra Corporation Ltd v Hurstville City Council*[149] the Federal Court was called upon to interpret s 158 of the *Gas Industry Act 1994* (Vic). By way of background, s 158(1) required a Council once per year to declare the amount it intended to raise by rates and charges, and the way in which general rates would be raised (uniform or differential rate).[150] The critical provision, s 158(3), provided:

> (3) A Council may levy general rates, municipal charges, service rates and service charges by sending a notice to the person who is liable to pay them.

The interpretative issue was whether the word 'may' in s 158(3) meant there was always a discretion to levy rates, even once the rates had been declared? This question arose because the appellant argued that the primary judge was wrong in holding that the Councils had no discretion whether or not to rate telecommunications cables.[151]

The Court[152] held there was no discretion in s 158(3), where rates had been declared.[153] In other words, the provision was interpreted as a power coupled with an implied obligation to levy rates in the circumstances of rates having been declared.

In reasoning to that conclusion, the Court acknowledged that s 45(3) of the Interpretation of Legislation Act was not the normal interpretation Act provision with respect to the meaning of 'may'.[154] Nevertheless, an implied obligation arose because other provisions of the 1994 Act so indicated.[155] These included the power to declare rates and charges on rateable land (s 155) and the fact that the liability of the owner of land arose once rates had been declared: s 156. In that context 'levy' in s 158(3) had the more narrow meaning of 'demand payment or take the necessary steps to enforce payment of that which has been imposed'.[156] Thus, in working out the intention of the Parliament, the Court gave more weight to the terms of the later and specific 1994 Act than to the terms of the earlier and general 1984 Act.

The Full Court's reasoning is supported by dicta of the High Court in *Bropho v State of Western Australia.*[157] In that case the High Court was considering the presumption that statutes do not bind the Crown. In dicta, it considered how statutory rules in certain Acts Interpretation Acts would be read in the light of its ruling that the common law presumption was weakened. The Court opined that a statutory rule relating to statutes binding the Crown would have to give way to an interpretation of the later Act read in the light of the revised common law:

> Indeed, even if such a rule of statutory construction had been laid down in completely unqualified and mandatory terms by legislative provision, it would necessarily give way to the provisions of a subsequent enactment which, notwithstanding the earlier provision, disclosed a contrary legislative intent since the subsequent enactment would represent a pro tanto repeal or amendment of the earlier provision.[158]

For 'May', Substitute 'Has a Discretion', Or Add Such Words[159]

An alternative step urged by members of the plain English movement is to substitute 'has a discretion' for 'may', or to add similar words.[160] The justification is that if these alternative words are provided '[i]t would be difficult to interpret wording of that kind as imposing an obligation' and might 'put the matter beyond argument'.[161]

The suggestion has been taken up in federal and state legislation. First, here is an example of the substitution of 'has a discretion' for 'may'. The *Family Law Reform Act 1995* (Cth) inserted s 68T(3)(b) into the *Family Law Act 1975* (Cth). The subsection read relevantly:

> (3) This Part, and the Rules of Court, apply to the making, revival, variation, discharge or suspension of a Division 11 contact order in the family violence proceedings subject to the following qualifications:
>
> …
>
> (b) if the court makes an interim family violence order, or an interim order varying a family violence order, then, in addition to the effect of paragraph (a):
>
> (i) the court **has a discretion** whether to apply paragraph 68F(2)(a) … .

Two examples of simply adding 'at his or her discretion' may be given. An old example, which will be familiar to many administrative lawyers, is s 6 of the *Ombudsman Act 1976* (Cth):

> (1) Where a complaint has been made to the Ombudsman with respect to action taken by a Department or by a prescribed authority, the Ombudsman may, in **his** or **her discretion**, decide not to investigate the action or, if he or she has commenced to investigate the action, decide not to investigate the action further:

More recently, there is s 98 of the *National Health Act 1953* (Cth), as amended by Sch 1, item 34 of the *Health and Ageing Legislation Amendment Act 2004* (Cth):[162]

> (3) If the Secretary is satisfied that:
>
> (a) an approved pharmacist is not carrying on business as a pharmacist at premises in respect of which the pharmacist is approved; or
>
> (b) the premises are not accessible by members of the public for the purpose of receiving pharmaceutical benefits at times that, in the opinion of the Secretary, are reasonable;
>
> then the Secretary may (**at his or her discretion**), by notice in writing to the pharmacist, cancel the approval of the pharmacist under section 90.

Sometimes it is asserted that the addition of words such as 'at his or her discretion' will automatically put in place a discretion for all circumstances. For example, in relation to s 98(3) of the *National Health Act 1953* (Cth) (set out above), the explanatory memorandum for the Bill in question, the Health and Ageing Legislation Amendment Bill 2003 (Cth), stated: 'The proposed amendments will put beyond doubt that the decision-maker has the discretion whether or not to cancel the relevant approvals.' [163]

However, whether additional words such as 'at his or her discretion' actually make available a discretion *in particular circumstances* is still a matter of interpretation. The leading case is *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd.*[164] In this case the High Court, drawing on support from *Padfield v Minister of Agriculture, Fisheries and Food*,[165] held that:

> When the power exists and the circumstances call for the fulfilment of a purpose for which the power is conferred, but the repository of the power declines to exercise the power, mandamus is the appropriate remedy *even though the repository has an unfettered discretion in other circumstances to exercise or to refrain from exercising the power*.[166]

A recent case illustrating how the availability of a discretion may depend on the circumstances is *Saeed v Minister for Immigration and Citizenship*.[167] The case concerned s 56 of *Migration Act 1958* (Cth):

> 56 Further information may be sought
>
> (1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.
>
> (2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.

The interpretative question raised in the case was this: did the Minister always have a discretion in s 56(2), or could the Minister come under a duty to exercise the power in particular circumstances? In dicta, and consistent with *Commissioner of State Revenue*, the High Court observed it was the latter:

> It remains to mention the procedures provided by s 56. It may be observed that an invitation under s 56(2) might allow for a response to adverse information by the exercise of the power to obtain additional information. The power given by s 56 is not expressed in terms which would oblige its exercise by the Minister in order that an opportunity for comment could be provided to a visa applicant. Nevertheless, as Gaudron J observed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*, where the Minister has regard to information other than that provided by an applicant, a question may arise whether procedural fairness requires that the powers in s 56(2) must be exercised to permit an applicant to put submissions or provide further information. …
>
> The powers given by s 56(2) put the issue in context. As was observed earlier in these reasons, questions about the exercise of that power in accordance with natural justice principles may well arise where relevant, adverse, information is received by the Minister. Although s 56(2) is cast in terms that the Minister 'may' invite the giving of additional information, where information is received which is adverse to an applicant, perhaps critically so, the circumstances may be such as to call for the exercise of the power.[168]

4. Conclusion

The plain English movement as it relates to legislation is a wide-ranging attempt to address perceived problems in the legislative process and legislative drafting in particular. Some participants wish to bring certainty to the law and have suggested plain English techniques are a guarantee of communication; others simply wish to make legislation easier to understand and thereby improve the legal system as a whole. Some are sceptical of the movement's aims, for example, the claim that plain English is nothing more than 'window dressing'.

In a seminal description of plain English legislative drafting, Turnbull drew attention to three general principles: 'the rules of simple writing', 'avoiding traditional forms of expression where they can be expressed more simply', and using 'aids to understanding that are not merely concerned with language'. In this article I have examined the second of those principles. The principle has been examined through the decision to replace the traditional form of expression for imposing a duty ('shall') with 'must', and the attempts to use alternative drafting structures to confer a discretion, rather than simply the word 'may'.

Using 'must' instead of 'shall' to impose an obligation has been remarkably successful in Australia. Not only has the plain language technique been widely implemented, it has produced very little confusion and litigation; certainly far less than its predecessor. However, its success is not just down to a better 'product' being employed. Legislative drafters have been much more careful and precise with modal auxiliaries. With regard to existing legislation, they have not simply replaced 'shall', wherever occurring, with 'must'. The use of 'must' and other alternatives to 'shall' would not have succeeded without their dedication to the task of removing unnecessary obstacles to understanding.

The attempt to confer discretions through alternative drafting structures has been less successful. The amendments of certain Acts Interpretation Acts have not succeeded in creating an absolute meaning for the word 'may' because, as an ordinary Act, an Acts Interpretation Act is not available to impose such meanings on later enactments. Courts have continued to interpret 'may', where it is ambiguous, as they do with other ambiguous words: in their entire context and not just with reference to a single interpretative factor such as the Acts Interpretation Act. The other alternative drafting structure that has been employed has been the use of more explicit wording, such as 'at his or her discretion' or simply 'has a discretion'. This wording may add weight to a case for a discretion made by a party. But additional wording cannot guarantee the existence of a discretion in particular circumstances if, in those circumstances, the interpretative factors, on balance, point to a duty being imposed.

The different impacts described above are revealing. In the case of the replacement of 'shall', interpretation has been accepted as part of the drafting process. But in the case of using alternative drafting structures instead of a simple 'may', interpretation has been either suppressed or overlooked. As Nick Horn has eloquently written, the plain English movement tends to be uneasy about interpretation.[169] Yet, as he says, a law with however many plain English elements remains 'legal English', not ordinary English.[170] Statutory interpretation and other performative aspects of law have a tendency to haunt the uninformed reader.[171]

One final general point can be made. The present case study indicates that while plain English elements are not in themselves the guarantee of communication that some advocates have claimed, neither are the innovations the mere window-dressing that some sceptics had opined.

Appendix:
Turnbull's three main elements of a 'simpler style'

[Source: I M L Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161; some editing has occurred for reasons of brevity.]

Rules of Simple Writing

- Using shorter, better constructed sentences.
- Avoiding jargon and unfamiliar words.
- Using shorter words.
- Avoiding double and triple negatives.
- Using the positive rather than the negative.
- Using the active voice instead of the passive voice.
- Keeping related words as close together as possible, for example, not separating subject from verb, or auxiliary verb from main verb.
- Using parallel structures to express similar ideas in a similar form, for example, not mixing conditions and exceptions, and not mixing 'if' and 'unless' clauses.

Avoid Traditional Forms of Expression If They Could Be Expressed More Simply

- Avoid connecting associated provisions in the one section.
- Express proportions by mathematical formulae.
- Avoid the traditional style that distinguishes between a class and its members.
- Avoid duplicating words unnecessarily.
- For cases ('in a case to which section X applies') use 'if'.
- Avoid 'the provisions of' in 'the provisions of this Act'.
- If a sentence has alternative subjects differing in number make the verb agree with the nearer of its subjects.
- Use 'contravene' to cover omissions, saving additional reference to 'failure to comply with'.
- Use the shorter 'under' instead of 'pursuant to', 'in pursuance of'' and 'by virtue of'.
- Use participles (being, having, issued) instead of the longer relative clauses (that is, that has, that was issued).
- Use pronouns more often instead of repeating the noun.
- Use the short form of the possessive, for example, 'the Minister's', instead of the long form 'of the Minister'. Use 'whose' with inanimate objects.
- Use definitions to help make sentences shorter.

Aids to Understanding that are not Concerned Merely with Language

- Purpose clause.
- Heading.
- Road map.
- Arranging Bills so that the relationship between provisions is as clear as possible.
- Express calculations in steps.
- Better use of definitions, eg grouping definitions together, avoiding colourless term.
- Acronym and abbreviation.
- User-friendly algebraic formula.
- Graphic.
- Example.
- Note.

Endnotes

1 Stephen Laws CB, 'Drawing the Line' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 19, 28.
2 It is not the only influence. Another influence on traditional drafting has been general principles drafting. See I Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle' (1997) 18(1) *Statute Law Review* 21; Lisbeth Campbell, 'Legal Drafting Styles: Fuzzy or Fussy?' (1996) 3(2) *Murdoch University Electronic Journal of Law* <https://elaw.murdoch.edu.au>.
3 The 'plain language' movement has also extended to many other countries: Anne Wagner and Sophie Cacciaguidi-Fahy (eds), *Legal Language and the Search for Clarity: Practice and Tools* (Peter Lang, 2006); Emma Wagner and Martin Cutts (eds) (2002) 47 *Clarity.*
4 Nick Horn, 'Legislative Drafting in Australia, New Zealand and Ontario: Notes on an Informal Survey' [2005] 1 *The Loophole* 55.
5 Ibid.
6 Office of the Parliamentary Counsel (UK), *Drafting Guidance* (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454628/guidancebook_August_2015.pdf>.
7 For example, Office of Parliamentary Counsel (Cth), *Plain English Manual* <https://www.opc.gov.au/plain/docs.htm>.
8 For example, these Commonwealth Acts (previous version): *Offshore Petroleum Act 2006* / *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (*Petroleum (Submerged Lands) Act 1967*); *Australian Passports Act 2005* (*Passports Act 1938*); *Designs Act 2003* (*Designs Act 1906*); *Corporations Act 2001* (Companies Codes); *Public Service Act 1999* (*Public Service Act 1922*); *Income Tax Assessment Act 1997* (*Income Tax Assessment Act 1936*); *Aged Care Act 1997* (provisions in the *National Health Act 1953*; *Aged or Disabled Persons Care Act 1954*); *Export Market Development Grants Act 1997* (*Export Market Development Grants Act 1974*); *Auditor-General Act 1997* (*Audit Act 1901*); *Offshore Minerals Act 1994* (*Minerals (Submerged Lands) Act 1981*); *Sales Tax Assessment Act 1992* (various Acts); *Social Security Act 1991* (*Social Security Act 1947*). For a drafter's view of Commonwealth rewrites, see Vince Robinson, 'Rewriting Legislation: Australian Federal Experience' (Paper presented at conference, Ottawa, Canada, March 2001) <https://www.opc.gov.au/plain/docs.htm>. Many rewrites have also occurred at the State level, for example, in Victoria: *Unclaimed Money Act 2008* (*Unclaimed Moneys Act 1962*); *Land Tax Act 2005* (*Land Tax Act 1958*); *Duties Act 2000* (*Stamps Act 1958*); *Residential Tenancies Act 1997* (*Residential Tenancies Act 1980*); *Wills Act 1997* (*Wills Act 1958*). Some of these Acts were more than rewrites but each had a plain English rewrite as a major objective.
9 Xanthaki describes the movement as having 'revolutionised legislative drafting': Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing, 2014) 130. The author makes plain language a constant theme in her work, see, eg 131ff. For a general review of the literature, see Jeffrey Barnes, 'The Continuing Debate about 'Plain Language' Legislation: A Law Reform Conundrum' (2006) 27(2) *Statute Law Review* 83.
10 I M L Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161.
11 Ibid 166-72.
12 Office of Parliamentary Counsel (Cth), above n 7, chs 3-5.
13 United Kingdom: Office of the Parliamentary Counsel (UK) 2015, above n 6; Scotland: Office of the Scottish Parliamentary Counsel, *Plain Language and Legislation* (2006) <http://www.scotland.gov.uk/Resource/Doc/93488/0022476.pdf>; British Columbia: BC Securities Commission, *Plain Language Style Guide* (British Columbia Securities Commission, 2nd ed, 2008) <http://professionalcommunications.ca/BCSC_Plain_Language_Style_Guide_2008.pdf>; Nova Scotia: Registry of Regulations, Nova Scotia Department of Justice, *Style and Procedures Manual: A Guide to Drafting Regulations in Plain Language* (Province of Nova Scotia, 2005) <http://www.gov.ns.ca/just/Regulations/styleman/Style%20Manual%202005.pdf>; Canada: Department of Justice (Canada), *Legistics* <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/toc-tdm.asp>; New Zealand: Parliamentary Counsel Office (NZ), *Drafting Manual* <http://www.pco.parliament.govt.nz/clear-drafting/>. See also other drafting guides which have influence: Law Reform Commission of Victoria, *Plain English and the Law* (Law Reform Commission of Victoria, 1987) App 1; Law Commission (NZ), *Legislation Manual: Structure and Style* (Law Commission, 1996).
14 See Appendix.
15 The introduction is necessarily brief. For a comprehensive discussion of the plain English movement see Michele M Asprey, *Plain Language for Lawyers* (Federation Press, 4th ed, 2010): ch 4 and Barnes, above n 9.
16 Martin Cutts, *Oxford Guide to Plain English* (OUP, 4th ed, 2013) xii.
17 For an elaboration see Barnes, above n 9, 87.
18 Jan Pakulski, *Social Movements: The Politics of Moral Protest* (Longman Cheshire, 1991) 38.
19 'Plain language' is an alternative term. It is often used when speaking of non-English speaking countries.

20 Department of Premier and Cabinet (Qld), *The Queensland Legislation Handbook: Governing Queensland* (Queensland Government, 5th ed, 2014) <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/assets/legislation-handbook.pdf> 18 [3.5.1].
21 Philip Knight, *Clearly Better Drafting: A Report to Plain English Campaign on Testing Two Versions of the South Africa Human Rights Commission Act 1995* (Plain English Campaign, 1996) App 4, 4-2, 4-3; emphasis in original.
22 Robert D Eagleson, 'Efficiency in Legal Drafting' in David St L Kelly (ed), *Essays on Legislative Drafting* (Adelaide Law Review Association, 1988) 13, 15.
23 Joseph Kimble, 'Plain English: A Charter for Clear Writing' (1992) 9(1) *Thomas M Cooley Law Review* 1, 9.
24 Colin Howard, 'The Language of the Law' (1993) 86 *Victorian Bar News* 21, 23, 24-5, 29.
25 National Board of Employment, Education and Training, and Australian Language and Literacy Council, *Putting it Plainly: Current Developments and Needs in Plain English and Accessible Reading Materials* (AGPS, 1996) 49.
26 Rabeea Assy, 'Can the Law Speak Directly to its Subjects? The Limitation of Plain Language' (2011) *Journal of Law and Society* 376, 383; emphases in original.
27 John Mark Keyes, 'Plain Language and the Tower of Babel: Myth or Reality?' (2001) 4 *Legal Ethics* 15, 16; emphasis in original.
28 Pakulski, above n 18, 61.
29 *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570, 612 per Lord Diplock; F A R Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th ed, 2008) 35.
30 Tom Campbell, 'Legislative Intent and Democratic Decision Making' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate/Dartmouth, 2001) 291, 291; Dennis Murphy, 'Plain English — Principles and Practice' (Paper presented at Conference on Legislative Drafting, Canberra, 15 July 1992) 6.
31 George Tanner, 'Law Reform and Accessibility' (Paper presented at Australasian Law Reform Agencies Conference, Access to Justice: Rhetoric or Reality, Wellington, New Zealand, 13–16 April 2004).
32 Tom Campbell, 'Ethical Interpretation and Democratic Positivism' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 83, 84.
33 Justice Lionel Murphy, cited in Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34 *Federal Law Review* 103, 110.
34 Robert D Eagleson, 'Plain English: Some Sociolinguistic Revelations' in Suzanne Romaine (ed), *Language in Australia* (Cambridge UP, 1991) 362, 364.
35 Ibid 364.
36 Ibid 364, 372. See also Peter Butt and Richard Castle, *Modern Legal Drafting* (Cambridge UP, 2nd ed, 2006) ch 1. However, the latter is a work focusing on private legal drafting: see 126 and its definition of a 'legal document' as one which 'creates a private law for the parties'.
37 Eagleson, above n 34, 368–9.
38 Redish in Janice C Redish, 'Defining Plain English' (1996) 4(3) *Australian Language Matters* 3, 3.
39 Neil James, 'Defining the Profession: Placing Plain Language in the Field of Communication' (2009) 61 *Clarity* 33, 35.
40 Asprey, above n 15, 213, citing Professor Joseph Kimble.
41 Robert Eagleson and Michele Asprey, 'Must We Continue with 'Shall'?' (1989) 63 *Australian Law Journal* 75, 76.
42 Ibid 76.
43 Michael Meehan and Graham Tulloch, *Grammar for Lawyers* (LexisNexis, 3rd ed, 2013) 33 [2.41].
44 Anthony Watson-Brown, 'Shall Revisited' (1995) June *Queensland Law Society Journal* 263, 269.
45 Eagleson and Asprey, above n 41, 76.
46 Robert D Eagleson and Michele M Asprey, 'We Must Abandon 'Shall'' (1989) 63 *Australian Law Journal* 726, 727. An example of a case is *Re Davis* (1947) 75 CLR 409, in which the High Court of Australia split on whether 'shall' in s 10 of the *Legal Practitioners Act 1898* (NSW) imposed a duty: per Latham CJ at 415 and McTiernan J at 427 (dicta): it did; per Starke J at 418-9: it did not. The headnote is in error regarding McTiernan J.
47 Eagleson and Asprey, above n 41, 78; Nick Horn, 'And Yet More on the Thorny Business of Auxiliary Verbs …' (2002) 48 *Clarity* 35, 35; Watson-Brown, above n 44, 267.
48 Eagleson and Asprey, above n 46, 726.
49 The examples come from Elmer A Driedger, *The Composition of Legislation: Legislative Forms and Precedents* (Department of Justice, Canada, 2nd ed, 1976) 12-15. For similar lists, see Horn, above n 47, 35.
50 Watson-Brown, above n 44, 268, quoting Reed Dickerson.
51 Eagleson and Asprey, above n 46, 727.
52 Daniel Greenberg, 'In Honour of the Moribund 'Shall'' (2014) 35(2) *Statute Law Review* v, vi.
53 *Halwood Corporation Ltd v Roads Corporation* [1998] 2 VR 439, 445 per Tadgell JA with whom Brooking JA agreed.
54 J M Bennett, 'In Defence of 'Shall'' (1989) 63 *Australian Law Journal* 522.
55 Ibid 523-4 (admittedly 'less compelling').
56 Greenberg, above n 52, vi.

57 Ibid vi.
58 Bennett, above n 54, 522.
59 Ibid 524.
60 Watson-Brown, above n 44, 270.
61 Ibid 270, citing Reed Dickerson. However, 'must not' in the context of 'neglect or fail to comply' effectively imposes a duty: *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* [2014] NSWCA 409, [35] per Barrett JA.
62 Watson-Brown, above n 44, 270; Law Drafting Division, Department of Justice (Hong Kong), *Drafting Legislation in Hong Kong: A Guide to Styles and Practices* <http://www.legislation.gov.hk/blis/eng/drafting.html> [9.2.9]; Asprey, above n 15, 215.
63 Watson-Brown, above n 44, 270, citing Reed Dickerson.
64 Eagleson and Asprey, above n 41, 78.
65 Eagleson and Asprey, above n 46, 727.
66 Ibid 727.
67 Macquarie Library, 1981.
68 Asprey, above n 15, 206.
69 Helen Xanthaki, *Thornton's Legislative Drafting* (Bloomsbury Professional, 5th ed, 2013) 115 [5.33].
70 Greenberg, above n 52, v.
71 Asprey, above n 15, 209, citing Gowers.
72 Eagleson and Asprey, above n 41, 75-6.
73 (OUP, 2nd ed, 2004).
74 Pam Peters, *The Cambridge Guide to English Usage* (Cambridge UP, 2004) 362.
75 Rodney D Huddleston, *The Sentence in Written English: A Syntactic Study Based on an Analysis of Scientific Texts* (Cambridge UP, 1971) 311. See also, to similar effect, Angelika Kratzer, 'What 'Must' and 'Can' Must and Can Mean' (1977) 1 *Linguistics and Philosophy* 337, 338.
76 Geoffrey Leech, *Meaning and the English Verb* (Taylor and Francis, 3rd ed, 2013) 162. And see also Watson-Brown, above n 44, 267.
77 Jennifer Coates, *The Semantics of the Modal Auxiliaries* (Croom Helm, 1983) 3.
78 Ibid 2. However, the author did not claim the corpus was exhaustive. She merely claimed that it was a check on subjective judgement: 2-3.
79 Ibid 41.
80 Ibid 21, 32.
81 Ibid 32.
82 Ibid 33.
83 Ibid 34.
84 Ibid 33, 35.
85 Ibid 35.
86 Ibid.
87 Xanthaki, above n 69, 115 [5.33].
88 Driedger, above n 49, 10. Driedger acknowledged that where 'must' is used in legislation, it can be inferred that a duty was sought to be imposed: ibid, 10. In other words, a duty was impliedly imposed: ibid, 11. Another author to take the same view as Driedger is Horn. He argued that 'must' merely 'described a command that has its origins elsewhere than in the command itself: Nick Horn, 'A Dainty Dish to Set Before the King: Plain Language and Legislation' (Paper presented at Fourth Biennial Conference of the PLAIN Language Association International, Toronto, Canada, 27 September 2002) 4 <http://en.copian.ca/library/research/plain2/dish/dainty.pdf>; Horn, above n 47, 35. He also did not provide any support.
89 Greenberg, above n 52, v. No authority is cited.
90 Interestingly, however, the entry in the *Oxford English Dictionary* (online edition) for 'must' has a meaning of 'expressing necessity' but it does not otherwise define it in terms of imposing an obligation.
91 Bennett, above n 54, 522.
92 Ibid 522.
93 Horn, above n 4.
94 Ibid 62.
95 Ibid 82, Table 5.7.
96 Office of Parliamentary Counsel (Cth), above n 7, [83].
97 Nova Scotia Department of Justice, above n 13, 83; British Columbia: see Asprey, above n 15, 209.
98 Law Drafting Division, Department of Justice (Hong Kong), above n 62, [9.2].
99 Parliamentary Counsel Office (NZ), above n 13, [3.34], [A3.32]-[A3.33].
100 See Asprey, above n 15, 207-8.
101 Office of the Parliamentary Counsel (UK), above n 6, [17]-[18].
102 See Asprey, above n 15, 207. See also drafting texts: Xanthaki, above n 69, [5.33]; Law Reform Commission of Victoria, above n 13, App 1 [137]; Law Commission (NZ), above n 13, [171]-[172].
103 Office of the Scottish Parliamentary Counsel, above n 13, 35.
104 Office of Legislative Legal Services, Colorado General Assembly, *Colorado Legislative Drafting Manual* (Online Edition, 2009) <http://tornado.state.co.us/gov_dir/leg_dir/olls/LDM/OLLS_Drafting_Manual.pdf> F52-F53.

105 Howard, above n 24, 28.
106 *In Re Davis* (1947) 75 CLR 409, 428 per Williams J.
107 *DPP v Dickfoss* (2011) 249 FLR 374, 395 [87].
108 *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146, 162-3 [54]; *DPP v Dickfoss* (2011) 249 FLR 374, 395 [87]; *DPP v George* (2008) 102 SASR 246, 284 [184] ff.
109 (2008) 102 SASR 246.
110 Vanstone J agreed: ibid 282 [170]; and Doyle CJ relevantly agreed: ibid 264 [80].
111 Ibid 283 [180].
112 Ibid 284 [185].
113 Ibid 296 [245].
114 Ibid 284 [186].
115 Ibid 286 [191].
116 Ibid 288 [196].
117 The analysis that follows adopts the 'spiral' approach articulated by Justice Glazebrook: Susan Glazebrook, 'Filling the Gaps' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, 2004) 153, 169-76.
118 (2008) 102 SASR 246, 284 [183].
119 Ibid 295 [241].
120 Ibid 295 [242].
121 Ibid 291 [217].
122 Ibid.
123 Ibid 293 [228].
124 Ibid 293 [231].
125 Ibid 294 [233].
126 Ibid 294 [234]-[235].
127 Ibid 294 [236].
128 Ibid 293 [227].
129 Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Lawbook Co, 2014) [2.200]; Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013) [25.1.1230].
130 *2 Elizabeth Bay Road Pty Ltd v The Owners - Strata Plan No 73943* [2014] NSWCA 409, [82] per Leeming JA with whom Basten JA agreed at [1].
131 *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287, 289 per Wilcox J; F A R Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (OUP, 2009) 39-40.
132 *Cabell v Markham*, 148 F 2d 737 (1945) per Justice Learned Hand, <http://scholar.google.com/scholar_case?case=15276921566891156202&hl=en&as_sdt=2&as_vis=1&oi=scholarr>
133 *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 651-2 [9] per French CJ and Bell J; *Zhang v Zemin* (2010) 79 NSWLR 513, 535 [126] per Spigelman CJ, with whom McClellan CJ at CL agreed and Allsop P generally agreed; Bennion, above n 29, 533-7; section 533.
134 *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287, 289 per Wilcox J; typographical errors in original quotation corrected.
135 Bennion, above n 131, 21.
136 Ibid 109.
137 (2011) 249 FLR 374.
138 Ibid 396 [90].
139 *Howie v Youth Justice Court* (2010) 161 NTR 1; *Halwood Corporation Ltd v Roads Corporation* [1998] 2 VR 439, 446 per Tadgell JA with whom Brooking JA agreed.
140 *DPP v Dickfoss* (2011) 249 FLR 374, 396-7 [91].
141 Asprey, above n 15, 207, citing Style Subcommittee of the Standing Committee on Rules and Procedure (US).
142 Sections 10(2), 15(6), 17(3).
143 Sections 13(1a) ('is'), 15(8) ('is entitled'), 16(2) ('accrues'), 17(5) ('is entitled'), 17(6) ('is'), 18(4) ('counts'), 19(2) ('has').
144 Sections: 5(3); 10(5); 13(4); 15(2), (3), (7); 16(3); 17(2), (4).
145 Sections: 10(3); 12; 13(3); 15(4), (5); 21.
146 For examples, see Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) ch 11; Herzfeld and Prince, above n 129, [2.210]; Herzfeld, Prince and Tully, above n 129, [25.1.1250]. Sometimes, mistakenly, it is said, even by some judges, that courts can read 'may' as 'must'. See Asprey, above n 15, 217 for examples. Similarly, it is mistakenly said that 'justice must bend the rules of grammar occasionally': Asprey, above n 15, 217. But neither is correct as a court *implies* a duty in the provision containing 'may' rather than alters the ordinary meaning of the word 'may'. See also Herzfeld and Prince, above n 129, [2.210]; Herzfeld, Prince and Tully, above n 129, [25.1.1250].
147 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1984, pp 30051, 3056 (Mr Cain).
148 *Encyclopaedia Britannica (Australia) Inc v Director of Consumer Affairs* [1988] VR 904, 912 per Fullagar J with whom Murray J agreed. See also *Victoria v Robertson* (2000) 1 VR 465, 466 [2] n 1 per Callaway JA. Cf 473 [22] n 31 per Batt JA (with whom Buchannan JA agreed), who did not take a position. And see *Accident Compensation Commission v Murphy* [1988] VR 444, 447.

149 (2002) 118 FCR 198.
150 Ibid 232 [76].
151 Ibid.
152 After the hearing of the appeal Katz J was unable to continue as a member of the Full Court. By consent the case was decided by the remaining members: ibid 201 [1].
153 Ibid 233 [78].
154 Ibid.
155 In the paragraph in which it held there to be an obligation the Court stated 'In view of what we have said at [76], we need not pursue the matter.': ibid. At [76] there is a detailed discussion of the statutory context of s 158(3).
156 Ibid 232 [76].
157 (1990) 171 CLR 1.
158 Ibid 22, extracted in Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 9th ed, 2015) 384 [13.9].
159 In this discussion I am drawing on Peter Butt, 'Recent Decisions' (2002) 48 *Clarity* 34, 35.
160 Butt, above n 159.
161 Ibid 35.
162 The provision is discussed in *Flaherty v Secretary, Department of Health and Ageing* (2010) 184 FCR 564.
163 Explanatory Memorandum, Health and Ageing Legislation Amendment Bill 2003 (Cth) 2.
164 (1994) 182 CLR 51.
165 [1968] AC 997, esp at 1033-4; emphasis added.
166 (1994) 182 CLR 51, 88 per Brennan J with whom Toohey J and McHugh J agreed at 103. Emphasis added.
167 (2010) 241 CLR 252.
168 Ibid 262 [23], 269 [50]; footnotes omitted.
169 Nicholas Horn, 'Black Letters: Epistolary Rhetoric and Plain English Laws' (2000) 9(1) *Griffith Law Review* 7, 22.
170 Nicholas Horn, 'The Haunting of Plain English' (Paper presented at 9th Annual Conference of the Law and Literature Association, Beechworth, Victoria, 5-7 February 1999) 11.
171 Ibid.

MERITS REVIEW OF REGULATORY DETERMINATIONS IN THE ECONOMIC REGULATION OF ENERGY UTILITY INFRASTRUCTURE

Sophie Li*

Merits review of the Australian Energy Regulator's regulatory determinations is limited to the grounds specified in energy legislation: material error(s) of fact, incorrect exercise of discretion, and unreasonableness. Recent amendments to this 'limited merits review' regime introduced the requirement for review applicants and the review body to each establish a 'materially preferable decision' with respect to the prescribed objectives of energy utility regulation. Under the revised regime, a decision found to be affected by one or more reviewable grounds of error must be affirmed if an alternative decision does not exist that is materially preferable on its merits. This paper submits that this reconstructed regime better advances the long-term interests of energy consumers and the objectives of energy utility regulation.

Background

The objective of energy utility regulation is to advance the public interest in the efficient investment in monopoly infrastructures by regulating the revenue that utility operators can recover from tariffs charged to consumers. This objective is prescribed in energy legislation as the National Electricity Objective (NEO) and the National Gas Objective (NGO) which, with the endpoint of 'efficiency investment' in mind, further promote the 'efficient operation and use of infrastructure services for the long term interests of consumers with respect to price, safety, reliability and security of supply' of gas and electricity, and, in addition, in the case of the NEO, 'with respect to the reliability, safety and security of the national electricity system'.[1]

The framework governing the regulation of domestic energy markets is the *Australian Energy Markets Agreement* (the Agreement), entered into in 2004 by the ministers for energy of the Commonwealth and of participating jurisdictions convened under the then Council of Australian Governments (COAG) Ministerial Council for Energy (now the Energy Council, and formerly the Standing Council on Energy and Resources). The Agreement established the Australian Energy Markets Commission as the body vested with powers to make determinations varying rules under the National Electricity Law (NEL) and the National Gas Law (NGL), and the Australian Energy Regulator (AER) as the national economic regulator of electricity and gas infrastructure. Also under the Agreement, South Australia (SA) is the lead legislating jurisdiction, enacting the NEL and the NGL as schedules to Acts of the SA Parliament[2] with the remaining participating jurisdictions legislating to adopt the NEL and NGL, and any subsequent amendments, as laws within their own jurisdictions.

The AER is a statutory body established under the *Competition and Consumer Act 2010* (Cth) and is vested with powers and functions under the NEL and the NGL to make regulatory determinations setting energy tariffs and utility operators' total allowable revenue.

* Former counsel to the Australian Energy Regulator. Any views expressed are my own.

The national electricity market, as regulated under the NEL, currently extends to all Australian States and Territories except Western Australia and the Northern Territory. Interconnected gas pipeline networks in all jurisdictions except Western Australia and Tasmania are regulated under the NGL.

The Limited Merits Review Regime

In 2008, amendments to the NEL and the NGL introduced the regime for the limited merits review of electricity and gas regulatory determinations. Under this regime, application to the Australian Competition Tribunal (the Tribunal) for review of a regulatory determination of the AER is limited to the following grounds[3]:

1) the making of an error of fact that was material to the making of the decision;
2) the making of more than one error of fact that, in combination, were material to the making of the decision;
3) an incorrect exercise of discretion having regard to all the circumstances; and
4) the decision was unreasonable having regard to all the circumstances.

A 'reviewable regulatory decision' under the NEL or a 'designated reviewable regulatory decision' under the NGL is a revenue or pricing determination of an utility operator's total allowable revenue for a regulatory period (of usually 5 years).[4] A reviewable decision can include other types of determinations, typically cost pass-through determinations on whether network operators are to pass onto energy consumers certain unanticipated expenditure or savings during a regulatory period.[5]

The SCER Inquiry

In 2012, the then COAG Standing Council on Energy and Resources commissioned a review (the SCER review) into the effectiveness of operation of limited merits review under the NEL and the NGL. The review found that limited merits review, during the first four years of the regime's operation, took an error-based approach to changing the distribution of economic resources between utility operators and energy consumers and, as a result, neglected the quintessential merits of the central pricing and revenue determination.[6] The scope of regulatory reviews was found to have been unduly narrow and the Tribunal, in considering those aspects of the decision relevant to the grounds of review, failed to have regard to the merits of the regulatory decision overall.[7] Reviews also paid insufficient attention to the objectives of energy utility regulation and the long-term interests of energy consumers, thereby failing the legislative intent.[8]

Revisions to the Regime

In November 2013, the NEL and the NGL were amended[9] to address the findings of the SCER review. The most important of these amendments was the introduction of this concept of a 'materially preferable decision' with respect to the NEO and the NGO as a tier to the review in addition to the grounds of review. The amendments require that:

1) an applicant for leave to appeal a reviewable regulatory decision establish a prima facie case that a determination made by the Tribunal to vary an AER decision or to set aside and remit a decision to the AER on the basis of one or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable NEO or NGO decision; and
2) the Tribunal, in determining an appeal before it, be satisfied of the same – that is, that a decision that is materially preferable to the reviewable regulatory decision in

> making a contribution to the achievement of the NEO or the NGO will, or is likely to, result – before determining to vary or set aside and remit a decision.[10]

The Second Reading Speech to the amendment bill explains that the long-term interests of consumers is to be 'of paramount consideration' to the Tribunal's determination and that the position of Energy Ministers on the former Standing Council on Energy and Resources is that the interests of consumers should be 'the sole criterion' for determining the preferable decision.[11] In this legally fine-tuned regime, any reliance on such departures from or substitutes for the legislative language as 'paramount consideration' and 'sole criterion' is apt to mislead.

Post the 2013 amendments, an applicant for review must establish one or more of the grounds for review *and* a prima facie case for a 'materially preferable decision'. A Tribunal considering an appeal must affirm a decision, notwithstanding that the decision might be affected by an error of the reviewable type, if it is not satisfied that an alternate 'materially preferable decision' better promotes the objectives of energy utility regulation. The 2013 amendments promote a stay of the regulator's determination, or improve so-called 'regulatory certainty', by both lifting the threshold for the Tribunal to grant leave to appeal and increasing the applicant's burden of proving why a determination admitted on appeal should be anything but affirmed.

'Materially Preferable Decision'

The NEL and NGL guide proscriptively construction of the term 'materially preferable decision', that is, by reference to what one is not to do: impact on revenue is not to be, in and of itself, determinative of whether a 'materially preferable decision' exists; establishment of one or more ground(s) of error is not to be, in and of itself, so determinative; and the mere fact that the pecuniary interest the subject of appeal meets the legislative threshold ($5 million or 2% of revenue) for leave to be granted is also not to be so determinative.[12]

The Tribunal, in July 2015, granted the three NSW electricity distribution networks leave to appeal the AER's regulatory determinations applying to them for the 2014-19 regulatory period, admitting of their respective submissions a prima facie case that a variation or remit of the AER's decisions would be likely to result in materially preferable decisions.[13] At the time of this paper, the substantive outcomes of those appeals are not known. On the interpretation of the term 'materially preferable decision', the Tribunal concedes, in its reasons for granting all applicants' leave to appeal, that:

> the satisfaction required [of it in order to admit an appeal] may exist on the basis of one or more of the (accepted) grounds of review giving rise to that prima facie appearance to, or level of satisfaction to, the Tribunal. That is because, at this point, it would be very difficult, and certainly not efficient, to assess the inter-relationship between grounds of review in any comprehensive way.[14]

The Tribunal's reasoning suggests that interpretation of 'materially preferable decision', at the stage of determining an application for leave to appeal, admits of a type of higher-order subjective evaluation, one which foresees, and predicates the granting of leave on a 'prima facie appearance', of there being a 'materially preferable decision', by the making out of a ground of error. In making the substantive determination to an appeal so admitted, the Tribunal is to embark on a slightly different exercise, one which is to separate its evaluation of whether a 'materially preferable decision' exists from the fact of there being a reviewable ground of error, so that the latter alone does not determine a question of the former.[15]

ActewAGL's Appeal of a Cost Pass-through Determination

At the time of this paper, the Tribunal had dealt conclusively with one appeal of a reviewable regulatory decision under the revised limited merits review regime. In *Application by ActewAGL Distribution*[16]*,* the ACT electricity distribution network ActewAGL appealed a decision of the AER to reject its application to pass through to electricity consumers incremental cost increases, due to periods of increased rainfall in the ACT, to the clearing of vegetation growth around power lines (a component of the operating expenditure). The Tribunal held that the AER's decision to reject the application was merely a purported decision because it was made outside of the statutory timeframe and that, applying the relevant legislative provisions, the AER was therefore deemed to have accepted ActewAGL's cost pass through application. A deemed decision, the Tribunal continues, characterised by the lack of a published determination, may nevertheless be a 'reviewable regulatory decision', enabling 'an affected or interested person or body'[17] (which could be construed to encompass energy consumers individually and collectively), having standing under the NEL and the NGL, to appeal a decision so deemed.[18]

Implications for Administrative Justice

Merits review of energy utility regulation is, in addition to being limited to specified grounds and to those appeals to which the Tribunal grants leave, is limited also in the body of evidence which the review body could consider in an appeal and the matters which an applicant could raise on review.

The NEL and the NGL, properly construed, do not permit the Tribunal or the AER, as a party to a review, to broaden the scope of a review to encompass additional grounds.[19] The prohibition on the Tribunal of casting a wider view of the regulatory decision, beyond those elements of it alleged to be in error, made the pre-2013 regime vulnerable to inflated revenue. It enabled network operators to 'cherry-pick' particular building blocks of regulatory determinations for appeal with almost predictable success for their revenue bottom-line.[20]

While under the pre-2013 regime, the Tribunal *could* cast a wider view on the regulatory decision, and in fact needed to look at the overall regulatory decision and its complexities in determining whether to vary it or set it aside and remit it [21], the taking of that wider view was almost tokenistic, in that the review focus was still on error-correction. The SCER inquiry referred to this situation as a 'one way street'[22], that is, that the outcome of evaluating the overall regulatory decision was not a ground on which the Tribunal could reject an appeal of a decision affected by a ground of reviewable error. In practice, this meant that the mere fact that an operator's allowable revenue was sufficient or efficient was not, by itself, a basis on which the Tribunal could allow the corresponding regulatory determination to stand. While this was a legally sound paradigm for the operation of conventional merits review, that is, the correction of specified grounds of error, its policy outcome was the 'gold-plating' so-alleged of network infrastructure and ad-hoc network pricing influenced by 'cherry-picking' (one example of this is that approved tariffs charged by NSW electricity network operators were double that charged by Victorian network operators, though there are other contributing factors to this phenomenon).

The 2013 amendments opted for pragmatism in a shift away from conventional merits review. Under that regime, the establishment of a ground of review (or error) is only one half of the equation. If an alternative decision was not materially preferable, then the original decision must be affirmed notwithstanding that it is affected by one of the errors constituting the ground(s) for review.

Whilst this practice sits rather anomalously with established principles of administrative law, it achieves what legislators expect to be a more 'holistic'[23] approach to review of regulatory determinations, respecting the reality that elements of the building block model interrelate. One obvious example is the relationship of trade-off between operating expenditure and capital expenditure: a higher capital allowance for the replacement of ageing network assets usually correlates to a reduction to the operating expenditure needed to maintain those same assets.

Under the post-2013 regime, all constituent elements of the primary decision inform the formulation of the 'materially preferable decision' and, subsequently, the decision to affirm, vary, or set aside and remit a primary decision. While the scope of the review's remit appears to have broadened through the addition of an express legislative requirement to consider the decision as a whole in determining whether a materially preferable NEO or NGO decision exists[24], the revised regime actually does little to give consumers and network operators certainty of pricing or to add to the volume or extent of litigation. On the other hand the imposition of those caveats discussed above requiring an applicant to seek leave to appeal from the Tribunal, mean the original regulatory determination is more prone to being affirmed than it was under any previous regime.

The Tribunal must now state in its reasons for decision how the 'constituent components of the reviewable regulatory decision interrelate with each other and with the matters raised as a ground for review'[25], further entrenching the whole-of-decision approach to evaluating achievement of the NEO and the NGO and addressing shortcomings found to arise from applying the previous regime.

A further limitation of merits review under this regime, as with the pre-2013 regime, is that applicants for review must not raise any matter that was not raised in regulatory proposals and submissions to the regulator. Post-2013, applicants for review must have both 'raised and *maintained*' (emphasis added) a matter in submissions to the regulator in order to raise the matter on review.[26] The Tribunal could consider new extrinsic material if satisfied that that material was publicly available to the regulator, or not reasonably withheld from it, so as to give rise to a reasonable expectation that the regulator would have considered it in making its determination.[27]

Intersection with Judicial Review

Regulatory determinations appealed to the Australian Competition Tribunal have on occasions been appealed concurrently to the Federal Court. Despite the availability of this appeal avenue, the Federal Court had entertained less than a handful of applications.[28] This situation might change post-2013 (the NSW networks' concurrent appeals of 2015 to the Federal Court might be seen as evidence of this).

If an applicant seeking of the Tribunal leave to appeal were to fail to establish the requisite prima facie case for a 'materially preferable decision', then the applicant could find virtually identical grounds in judicial review for setting the decision aside. The four grounds of error for limited merits review are almost replicated in statutory judicial review. They are improper or incorrect exercise of discretion, unreasonableness, and lack of evidence or factual basis for decision;[29] and in common law judicial review for no evidence, and irrationality or illogicality. The demarcations known to exist between judicial and merits review have never been as fine as under the revised regime.

Despite its availability as an avenue of appeal, reliance on judicial review as a substitute for limited merits review can have the corollary of reversing the improvements to the regime which it is the intent of the 2013 revisions to implement. The essence of judicial review is

enforcing the rule of law against *ultra vires* exercises of power and, as it is not concerned primarily with arriving at a preferable decision on the merits, a decision invalidated in judicial review and corrected for any affected errors upon remit stands as a valid regulatory decision irrespective of considerations of merit. This is the sort of unilateral and error-correcting approach which the 2013 amendments sought to abolish for its failure to regard the merits of a decision as a whole and its neglect of the legislative policy intent. To ask of a court in judicial review to function as a merits body in this sphere is to 'entangle [judicial review] with policy making, creat[ing of] severe difficulties for judge-led organisations, since it requires judges not only to become policymakers, but also to explain and be accountable for decisions in ways that the regulator is'.[30]

Conclusion

The science of utility regulation in Australia, and in several other first-world countries, is in many ways unsophisticated. In this twenty-first century, and a decade following the convention federating domestic energy markets, regulation of Australia's domestic energy markets is continuing to unify and mature through the implementation of better regulation initiatives and sound application of the growing reserves of economic benchmarking data from both domestic and international sources.

The 2013 revisions make significant headway in advancing the objectives of regulation by purging the previous review regime of its critical weaknesses. Limited merits review, particularly post-2013, is becoming increasingly a regime designed to accommodate the peculiarities and complexities of any sort of review of utility regulatory determinations. By appearing to challenge the textbook separation of jurisdiction and merit, it becomes better positioned to effect regulatory objectives.

Endnotes

1 National Electricity Law (NEL) s7; National Gas Law (NGL) s23.
2 The NEL and the NGL are Schedules to the *National Electricity (South Australia) Act 1996* (SA) and the *National Gas (South Australia) Act 2008* (SA) respectively.
3 NEL s71C; NGL s246.
4 NEL s71A; NGL s244.
5 *National Electricity (South Australia) Regulations 1996* (SA), Reg 9, prescribing a 'reviewable regulatory decision'.
6 Yarrow, Egan and Tamblyn, 'Review of the Limited Merits Review Regime – Stage One Report', 29 June September 2012 ('Stage One Report'), available on the COAG Energy Council website: https://scer.govspace.gov.au.
7 Ibid.
8 Ibid.
9 *Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA).
10 NEL ss71E, 71P; NGL ss248 and 259.
11 Second reading speech to the Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Bill 2013, South Australian House of Assembly, 26 September 2013 ('Second Reading Speech').
12 NEL s71P(2b)(d), NGL s259(4b)(d).
13 *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] *ACompT* 2 (17 July 2015).
14 Id at [19].
15 NEL s71P(2b)(d)(i); NGL s259(4b)(d)(i).
16 *ACompT* 2.
17 NEL s71B.
18 *Application by ActewAGL Distribution*, above n 18 at [29].
19 Opinion of the Acting Solicitor-General of the Commonwealth, No 22 of 2012, 'In the Matter of the Limited Merits Review Regime in the National Electricity Law and the National Gas Law', 12 September 2012 ('Solicitor-General Opinion'), available on the COAG Energy Council website: https://scer.govspace.gov.au.
20 Yarrow, Egan and Tamblyn, 'Review of the Limited Merits Review Regime – Stage Two Report', 30 September 2012 ('Stage Two Report'), at 31, available on the COAG Energy Council website: https://scer.govspace.gov.au.
21 Solicitor-General Opinion, above at n 22.

22 Stage One Report, above at n 7.
23 Second Reading Speech, above at n 13.
24 NEL s71P(2b)(d)(i); NGL s259(4b)(d)(i).
25 NEL s71P(2b); NGL s259(4b).
26 NEL s71O(2); NGL s258A(3).
27 NEL s71R(3); NGL s261(3a).
28 These have been in instances where applicants have commenced judicial review in strategic preference to merits review (for example, *ActewAGL Distribution v The Australian Energy Regulator* [2011] FCA 639) or initiated judicial review of a decision made by the Tribunal in merits review (for example, *SPI Electricity Pty Ltd v Australian Competition Tribunal* [2012] FCAFC 186).
29 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss5 and 6.
30 Stage Two Report, above at n 23.

THIRD TIER COMPLAINTS HANDLERS FOR HUMAN SERVICES AND JUSTICE

Tom McClean and Chris Wheeler*

Introduction

In June 2015, the International Ombudsman Institute published an interview with Peter Tyndall, who is currently Ombudsman and Information Commissioner for the Republic of Ireland. Before his appointment in 2013, he was Ombudsman for Wales for five years. He also served for two years as chair of the British and Irish Ombudsman Association, and is a member of the World and European Boards of the International Ombudsman Institute. In this interview, he argued that the adoption of privatisation over the last three decades has threatened citizens' rights to scrutinise and seek redress from public services. Privatisation, he claimed, has had this effect because it removes those services from the jurisdiction of the ombudsman, which provides independent, rigorous oversight, complaint handling and investigation.

Tyndall is not alone in voicing concerns about the impact of reform on accountability. Academics and practitioners have been doing so for several decades. The literature on this topic raises concerns over a very wide range of policy domains, from housing and education to welfare and transport. It also identifies a wide range of mechanisms that are supposedly under threat, from ministerial accountability, through freedom of information and ombudsmen, to private access to public law remedies via the courts. Most of the English-language academic literature on the topic focuses on the USA and the UK,[1] but by looking beyond the boundaries of the peer reviewed, one can find similar concerns being raised about almost any country with a government advanced enough to have services worth privatising and accountability mechanisms sufficiently strong to be undermined.

Tyndall is right, as a matter of principle, to be concerned about this. Individual citizens' rights to scrutinise and seek redress from public services, of the kind that are traditionally protected by an ombudsman, are of fundamental importance for a variety of reasons. Most individuals are at a significant disadvantage when things go wrong with public services, because these are generally provided by large organisations full of people who are familiar with the arcane and byzantine rules of the game, backed up by the power of the state. The problem is even more acute in the case of social services and welfare. These are usually provided to the most vulnerable and disadvantaged in our society. We know from experience that the vulnerable and disadvantaged find it particularly difficult to make their voices heard when their rights are not respected, or their needs are not recognised. Independent oversight bodies like an ombudsman, which can handle complaints and conduct formal investigations, are essential when things go wrong and appeals to the original decision-maker or their supervisor do not resolve the issue. Ombudsman are a vital counterweight to the asymmetries of information and organisation which lurk at the heart of public sector bureaucracies' dealings with their citizens.

* Chris Wheeler is Deputy Ombudsman, NSW Ombudsman's Office. Tom McClean is a Principal Investigator, NSW Ombudsman's Office. We acknowledge the assistance we have received in preparing this paper from our colleagues at Ombudsmen Offices around Australia.

Why Australia's experience matters

In this paper, we consider how well Peter Tyndall's claims match Australian experience. Has administrative reform affected access to the scrutiny and redress protected by independent oversight bodies? If so, how have we responded to this challenge, and to what extent have we solved the problem? What, if anything, remains to be done?

We will answer these questions in two stages. First, we describe the history of administrative reform in Australia over the past three decades. This description will be brief, because it is now a familiar story that has been told elsewhere in more detail than we can or want to go into here. We will then trace the impact of this reform on oversight and accountability, and how the various governments in Australia adapted to this impact. The answers to these questions are of intrinsic interest to Australians, especially those who care about protecting access to administrative justice, particularly for the most vulnerable of our fellow citizens.

The Australian experience is also of broader interest for several reasons. First, all Australian jurisdictions set up ombudsman's offices in the 1970s, well before the onset of the kinds of reform we will be discussing. In the 1980s, most also put in place other, related mechanisms to foster administrative accountability towards individual citizens, like freedom of information and privacy legislation (although these lie outside the scope of our discussion). This system of administrative justice is supported by a democratic culture and set of democratic institutions which were firmly entrenched well before the modern era of administrative reform began.

Second, Australia has been one of the world leaders in administrative reform over the last three decades. Between 1990 and 2000, privatisations by the States, Territories and the Commonwealth generated estimated returns of US $69.7bn, more than any other OECD nation except France and Italy. This amounted to the highest per capita proceeds of any OECD nation (US $3,764), and the second-highest proceeds as a proportion of GDP (15.9 per cent, behind Portugal).[2]

In combination, these two factors mean Australia is exactly the kind of place where any negative impacts of administrative reform on ombudsman-style oversight, scrutiny and redress should be most evident. The UK and New Zealand are significant for much the same reasons. By way of contrast, Portugal also implemented a relatively large privatisation programme in the 1990s. But it differed from Australia in that it had experienced a significant period of authoritarian rule which ended in the mid-1970s. Thus, although Portugal established an Ombudsman as part of the democratic transition in 1975,[3] its complicated political history means we must exercise greater caution when explaining changes to accountability mechanisms solely in terms of public sector reform. Canada is a second contrasting example. It has a long democratic tradition similar to ours, and established ombudsman at provincial level at more or less the same time. But Canada did not establish a fully-fledged public ombudsman at federal level. Nor did it undertake privatisation on anything like the scale of Australia in the 1990s, either in relative or in absolute terms. One would therefore expect the impact on its accountability mechanisms to be correspondingly more complex and less severe.[4]

Australia is of broader interest for one further reason. Our federal system provides opportunities for each of the jurisdictions to respond in different ways to the challenges posed by reform. As we will show below, the States and Territories have indeed responded in their own ways, and as a result Australia is also an ideal case for considering the merits of alternative approaches to ensuring citizens' access to administrative justice.

Two eras of reform and accountability

Australia's experience of public sector reform is similar to that of most other democratic, industrialised countries, and especially our Westminster cousins. Without wishing to over-simplify, it is helpful to distinguish between two different phases of reform within the last two to three decades, based on the kinds of changes which were commonly advocated, and the rationales cited for doing so. Each of these had different effects on citizens' access to the ombudsman and other kinds of administrative justice.

New public management

The first phase of reform in Australia began in the 1980s, and peaked in the mid to late 1990s. It principally involved a shift away from governments directly delivering services, to governments regulating and/or funding the delivery of services by third parties, sometimes described as a shift from 'rowing' to 'steering'. Inspired by changes introduced by the Thatcher and Major governments,[5] and to a lesser extent by Regan's reforms in the USA, new public management involved the application of private sector organisational structures, modes of governance, and operations to public services. It also included the two kinds of reform – privatisation and contracting out – of most concern to those who care about access to administrative justice. We will focus on these below.

New public management also involved other reforms that were less controversial among those who care about citizens' access to accountability mechanisms. Examples include purchaser-provider arrangements between central government and line agencies, and private sector norms and management techniques within public sector bodies.

At Federal level, the peak period of this kind of reform was during the Keating and Howard governments, which were much more ideologically sympathetic to this kind of reform than the Hawke government had been. During this period, the Commonwealth Bank, Qantas, AUSSAT, the first two tranches of Telstra, airports in Perth, Brisbane and Melbourne, and various transport and scientific organisations were privatised.[6] The same period also saw the establishment of National Competition Policy, and the contracting out of employment assistance, children's and disability services, veterans' hospital and counselling services, and rural postal services. In 1996, the total value of services contracted by the Commonwealth government was $8bn.[7]

Analogous changes also occurred within the States and Territories. Victoria privatised a particularly wide range of assets including the power network, ports and financial operations like the state bank and insurance office. Other States and Territories privatised similar kinds of assets, but much less extensively: proceeds from privatisation in Victoria accounted for around three quarters of all those realised by States and Territories between 1990 and 1997.[8] Privately-operated prisons first opened in Australia at Borallon in Queensland in 1990 and then at Junee in NSW in 1993. Privately run prisons now operate in New South Wales, Queensland, South Australia, Victoria, and Western Australia. Somewhat less controversially, during this period all States and Territories began outsourcing things like information technology, cleaning, building maintenance, library services, legal services, recreation services and auditing functions. Contracting out was similarly widespread at the local government level. One of the more radical examples was the Kennett government's restructuring of local councils in 1994. As part of this, councils were required to expose 50 per cent of their budgets to competitive tendering. By 1996, the estimated value of services contracted by State and local governments was $5.3bn.[9]

Devolved/network governance

The second phase of reform began in the 2000s, and goes by many names ('distributed public governance' for the OECD, 'devolved governance' for the Australian Public Service Commission).[10] It constitutes an evolutionary descendant of new public management rather than a decisive break, not least in that advocates continue to emphasise the importance of 'steering' over 'rowing'.[11]

One of the more obvious differences between the two phases is that privatisation and contracting out are now less prominent policy tools than they were a decade ago. This is partly because the zeal of the 1990s left few obvious candidates for privatisation,[12] but also partly because experience has shown that some public services cannot be straightforwardly privatised or contracted out. In some cases there are political risks involved, but it is now also generally recognised that some of the goods and services governments provide cannot easily be produced (or provided appropriately) by market-oriented, for-profit businesses.

Reflecting more than a decade of this kind of experience, reform discourse is now more nuanced and complex. New public management drew its primary inspiration from trenchant critics of state bureaucracy, including Hayek and public choice economists. It framed reform as a choice between a wasteful and inefficient public service, and efficient and effective private corporations. Contemporary reformers, by contrast, draw on the work of Nobel laureate Elinor Ostrom[13] and others.[14] Less ideologically opposed to the involvement of the state, and less committed to the market as a universal policy solution, their focus is on finding the most appropriate mode of governance for those policy domains where the state remains involved.

Contemporary discourse identifies three modes of policy governance, each of which is appropriate under different circumstances. The first is the direct provision of services by the government itself. This is usually reserved for the core fiscal and public order functions of state: police, the courts and justice system, the military, taxation and transfer payments. The second is the use of market-like mechanisms in areas where private markets have not developed on their own. These can be used to solve distributional issues, or where policymakers seek to encourage behavioural change in contexts where individual choice and/or competition are seen as desirable. A prominent recent example is emissions trading schemes to reduce greenhouse gas emissions.[15]

The third mode gives the era its name, and is usually known as devolved or network governance.[16] This occurs when governments support third parties to deliver services or provide public goods. It bears certain similarities with contracting out, not least in that government usually provides financial support. But devolved governance embodies a fundamentally different ethos. NGOs do not merely deliver a service whose main features are decided by government. They are partners, involved in the process of policy development and planning as well as delivery. The Commonwealth Public Service Commission identifies devolved governance as particularly appropriate when flexibility or innovation are more important than central control, when service acceptance or close ties between provider and community are important, or when important expertise and resources (such as volunteer time) are not held by government.[17] Devolved governance is, in some ways, a new name for an old approach – Medicare, for example, displays several of its core features. But it has become particularly prominent, especially in social policy since the mid-2000s. At a national level, the National Disability Insurance Scheme combines elements of market-based and devolved governance in ways that are similar to Medicare. Two prominent contemporary examples of network governance in NSW are the transfer of out-of-home care to the non-government sector and the adoption of co-design in early intervention, both of which rely heavily on partnership with non-government providers.

New public management and administrative accountability

Accountability has been a prominent feature of debate about reform in almost all countries since the modern era began. In Australia, this debate proceeded through several distinct stages.

Advocates of new public management argued explicitly that reform would *improve* accountability. This claim rested on radical (and, in retrospect, radically narrow[18]) assumptions about what public services should be accountable for, and how that accountability should be exercised. In broad terms, new public management viewed public sector accountability mechanisms in much the same way as it viewed the public sector more generally: rigid, ineffective and more concerned with process than outcome. The solution was to encourage public sector organisations to be more responsive by introducing mechanisms and incentives modelled on the private sector.

Consistent with this, new public management involved substituting traditional accountability towards individuals, based on scrutiny and redress, with market pressure. Those who received services should, according to this logic, be treated not primarily as citizens but as customers. Anyone dissatisfied with the service they received could express this dissatisfaction most effectively by changing providers, in much the same way as customers of commercial companies do. Service providers, for their part, would be driven to anticipate and address their customers' needs for fear of losing their business. From this perspective, accountability is best achieved by establishing an institutional environment which allows customers to exercise choice or 'exit', rather than by empowering them to engage in a dialogue with providers over what constitutes appropriate service or how to respond to breaches of standards ('voice').[19]

By the mid-1990s, something approaching consensus had emerged among academics and public commentators that – whatever its merits may have been for managers and ministers – new public management did *not* improve accountability towards citizens. In fact, a considerable body of scholarly and professional literature from this period testifies to deep concern that the emphasis on market mechanisms of accountability and control was *weakening* mechanisms for individual scrutiny and redress.[20] Some commentators identified exactly the problem that Peter Tyndall raised: privatising public functions may move them beyond the reach of public law accountability mechanisms like public audit, freedom of information and the ombudsman.[21] Reform thus removes rights which citizens previously enjoyed. There was also profound confusion over whether and when public law accountability mechanisms continued to operate, which is a problem in and of itself.[22] This combination of uncertainty and concern tended to be expressed most clearly and frequently in respect of outsourcing, and to a lesser extent devolution of operational responsibility to public bodies operating at arm's length from a minister.[23]

This confusion flowed from two separate but related sources. First, public law is based on a deeply-entrenched distinction between public and private spheres, and it was by no means clear to all concerned that a private firm should be subjected to public sector norms of disclosure and accountability merely because it happened to have signed a contract with the state. This confusion was easier to maintain, second, because new public management was explicitly based on the view that private sector norms and approaches were superior – the whole point of outsourcing and other techniques was to divest government of operational responsibility, and hence of accountability.[24]

With the benefit of hindsight, however, we can see that the radical assertion of private, market-based forms of accountability under new public management was neither as profound nor as long-lasting as feared. Attempts to actually limit accountability met with

varying degrees success. Ombudsman offices and public auditors explored ways of holding public sector bodies to account for the actions of their subcontractors, and consistent with Westminster traditions, Ministers could and did intervene in the operations of nominally-outsourced prisons, schools and other services if they so chose. Between the late 1990s and the mid-2000s, many Australian jurisdictions explicitly re-established traditional, non-market forms of administrative justice over most of the services which had been affected by reform.

Interestingly for those who, like Peter Tyndall, are most concerned about the impact of privatisation on access to an independent complaints handlers, the earliest counter-reforms in Australia involved sectors where access to this kind of institution had been most radically affected: the newly-privatised and deregulated telecommunications, energy and water industries. The Telecommunications Industry Ombudsman, established in 1993, was a particularly early example. Energy and water ombudsmen were established in most States and Territories later in the decade.

Ensuring access to administrative justice in relation to contracted-out services took somewhat longer. In the early 2000s, all Australian jurisdictions except NSW and Victoria introduced a right to complain to the Ombudsman about public services provided under contract. The Commonwealth and WA achieved this by extending jurisdiction specifically to private bodies operating under contract with a public authority. The other jurisdictions introduced amendments couched in more general language, which brought within the Ombudsman's jurisdiction bodies operating 'on behalf of' or 'with the authority of' public sector agencies.

Victoria and NSW have not (yet) extended the Ombudsman's jurisdiction to all contracted services. They have instead taken a piece-meal approach of extending the Ombudsman's jurisdiction to specified providers, or providers in specified areas, regardless of whether they are public or private. Victoria has taken this further than NSW by expanding the jurisdiction of its Ombudsman under the *Ombudsman Act 1973* to cover 38 kinds of entity, including contractors in courts and health services, private prisons, and registered community service providers. The Victorian Ombudsman's jurisdiction now covers many – but by no means all – of the kinds of services which the State might contract out.

By contrast, residents of NSW have no general right to complain about outsourced public services provided by their State Government. Jurisdiction conferred by the *Ombudsman Act 1974* (NSW) has been extended only to privately-operated prisons[25] and 'accredited certifiers within the meaning of the *Environmental Planning and Assessment Act 1979*'. [26] In addition, the NSW Ombudsman also has extensive jurisdiction over community and disability services, under a separate Act which we will discuss in more detail shortly. But outside these areas, if someone should complain to the NSW Ombudsman about, say, a problem they have with a contractor working on behalf of a local council, the Ombudsman has no power to work directly with the contractor to resolve the issue. Often, the Ombudsman has to take the indirect route of working with the council as the contracting public authority, and trust that it will then resolve the matter with its contractor.

Nevertheless, by the early 2010s, the ability of ordinary citizens to scrutinise and seek redress had largely been restored in one way or another to the parts of government most affected by new public management. Moreover, the Australian experience of establishing ombudsman-style complaints handlers for privatised commercial operations suggests that one long-term impact of new public management may have been to foster the spread of public sector accountability mechanisms to the private sector. This is pleasantly ironic, given the visceral preference for all things private sector which lies at the heart of new public management rhetoric.

In re-asserting public sector accountability in this way, Australia appears to have avoided the serious reservations commentators like Peter Tyndall express about industry ombudsman, particularly that such institutions may not offer an equivalent level of impartiality and rigour as their public sector counterparts. This concern is legitimate, but our experience suggests it is not an inherent weakness of industry ombudsman schemes. In many Australian cases, participation in the relevant ombudsman scheme is a condition of receiving or retaining a licence to operate in the industry. This provides a degree of influence independent of industry goodwill. Critics of industry ombudsman schemes sometimes point to the fact that they are funded by the industry they oversight as a structural weakness. But experience in Australia has shown that, provided this is structured appropriately (e.g. by allowing the ombudsman to bill providers for time spent resolving complaints), it can provide strong incentives for providers to cooperate and resolve matters quickly.

Devolved governance and administrative accountability

Access to administrative justice in those parts of Australian governments affected by devolved governance is less clear, in part because this style of reform is newer and its implications are still being worked out.

We suspect that most Australians do not consider there to be a particularly severe threat to administrative justice this time around. There is certainly less overt concern in the contemporary academic and professional literature. This may be partly because the provision of social services by non-government organisations is generally viewed as more benign than the involvement of for-profit companies. It may also be due to rhetorical differences: unlike under new public management, there is widespread consensus among advocates of devolved governance on the importance of public sector accountability mechanisms like ombudsmen. A degree of complacency may also be at work: one might expect scrutiny and redress to be adequately provided by the jurisdiction most ombudsmen now have over contracted services. After all, governments provide a significant proportion of revenue for non-government organisations. According to a 2010 Productivity Commission report, this accounts for around a third of revenue for the NGO sector overall; in the case of education, social service and non-hospital health charities, the proportion is over half.[27] Thus, in a world where exposure to public sector accountability follows receipt of public funds, non-government partners in the devolved governance and delivery of public services should fall under the jurisdiction of an existing independent statutory complaint-handler.

We should not lull ourselves into a false sense of security, however. While not-for-profits may not have the same incentives as for-profit providers to cut costs, they are by no means immune from all the problems that oversight aims to address. In the NSW Ombudsman's experience, not-for-profits often have weak governance systems, especially smaller organisations with fewer resources. They therefore find it particularly challenging to handle fraud, corruption and systemic risks to clients. This is a significant issue, because devolved governance is likely to be associated with significant growth, both of individual not-for-profit organisations, and for the sector as a whole.[28]

Nor can we afford to assume that, simply because government is a significant funder of NGO-provided welfare services as a group, citizens will enjoy access to administrative justice under existing arrangements. Government funding is not evenly distributed across the sector: depending on the nature of the service they offer and the way they structure their operations, for-profit and community-oriented providers alike may be able to forego such support while providing services that are the equivalent of those attracting government funding. Simply 'following the money' runs the risk of making access to administrative justice unnecessarily arbitrary.

A similar problem arises from the fact that distributed or devolved models of governance assume non-government bodies will contribute their own resources, including finance, the time and effort of volunteers, or exercising independent judgment about how best to provide services in a particular community. They therefore envisage that, even those service providers which *do* receive public funds will deal with clients in ways not explicitly specified or funded under any contract with government. Such arrangements are likely to make practical decisions about access to public-sector mechanisms of administrative justice complex if jurisdiction is defined in terms of the flow of public funds. Finally, there are many models for funding social policy which simply fall outside existing ombudsman laws and their focus on contractual relationships. These include transfer payments to service receivers (which occur under several Commonwealth programs, such as child care rebates), or grant and block funding (such as, at Commonwealth level, legal aid and indigenous health organisations).

Those who care about access to administrative justice are now in a similar position to the mid-1990s. We have experienced around a decade of a kind of reform which is radically transforming the way important public goods and services are delivered. This reform agenda is blurring the distinction between the state and organisations which have traditionally been seen as outside the state. Because these boundaries have been blurred, it is no longer clear that citizens enjoy reliable access to administrative justice in all circumstances where it might be appropriate.

We suggest that the best way to protect individual access to administrative justice under devolved governance arrangements is to apply the lessons of history. We responded to the challenges of new public management by re-asserting access to scrutiny and redress in ways which were fundamentally consonant with the reforms themselves. New public management was grounded in a profound ideological commitment to the distinction between the state and the market; in most jurisdictions, the counter-reforms of the late 1990s re-asserted access to administrative justice by pushing the boundaries of the public-style accountability back out along the very lines by which it had been rolled back: within newly-privatised industries, and by extending the 'public' realm to include contractual arrangements. We must do something similar again, in ways adapted to the new reliance on civil society. Devolved governance is less doctrinaire about the methods used to deliver public policy, and more concerned with establishing partnerships among organised stakeholders within specific policy domains. We should therefore abandon the distinction between 'public' and 'private' bodies, and instead focus on identifying the other circumstances giving rise to a public interest in independent, effective investigations and complaints handling.

Adopting this approach would be a pragmatic consolidation of existing practice rather than an ideological leap in the dark. In most Australian jurisdictions, parliaments have already decided that in certain circumstances there is a public interest in independent review, and have adopted precisely those kinds of accountability arrangements in one form or another. At first these were piecemeal responses to local factors, but more recent examples appear to be direct responses to the fact that existing mechanisms of accountability are inadequate under conditions of devolved governance. Overall, experience suggests that a systematic and comprehensive approach would benefit clients and services alike.

From a historical perspective, there appears to be something of a natural affinity between devolved governance and administrative justice mechanisms with combined jurisdiction over both public and private bodies. Health services are a good example. These have long been provided in Australia by a combination of Federal and State/Territory governments, private organisations (both for-profit corporations and charities), and independent experts with a significant role in service provision (GPs and specialists). The overall governance

arrangements in this sector seek to ensure equitable access and contain costs by relying on a combination of quasi-market mechanisms (in this case, underpinned by public regulation of the price paid for pharmaceuticals and many medical procedures), and negotiation between governments and private providers. This firmly entrenched, complex configuration of multiple public and private interests goes hand in hand with laws dating back at least two decades in all jurisdictions, establishing independent statutory complaint handlers for all medical services, such as the Health Care Complaints Commission in NSW.[29]

The case for natural affinity between devolved governance and administrative justice mechanisms is strengthened by emerging evidence that arrangements in the disability services sector are converging on this kind of accountability as underlying governance arrangements also converge. Several States and Territories already have oversight bodies with general jurisdiction over disability services. The earliest of these is in NSW, where the Ombudsman has jurisdiction over all publicly funded and/or licensed providers of community and disability services, under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. [30] The NSW Act was a particularly early example of this type of arrangement, and the circumstances under which it was introduced are instructive. It was around ten years before any other jurisdiction adopted similar oversight arrangements for disability or community services, and adoption remains uneven.

In the mid-2000s, which is to say early in the era of devolved public governance, the ACT and South Australia set up independent complaints handlers with jurisdiction over both community and disability services (the Human Rights Commission in the former, the Health and Community Services Complaints Commissioner in the latter). The Northern Territory followed suit in 2014. Victoria took a slightly different approach: it extended the Ombudsman's jurisdiction to include community services registered under the *Children, Youth and Families Act 2005 (Vic)*,[31] but established a separate Disability Services Commissioner in 2006. It appears that Queensland and Tasmania still lack an independent complaints handler with general jurisdiction over community or disability service providers, while Western Australia has no such body for community services. The recent establishment and ongoing rollout of the National Disability Insurance Scheme provides an opportunity to provide consistent access to administrative justice for people with disability. As the NSW Ombudsman's Office has argued elsewhere,[32] its experience suggests that independent oversight along the lines discussed here would improve the delivery of services to people with disability in numerous practical ways.

In addition to this natural affinity, an examination of areas of service delivery to vulnerable clients characterised by devolved governance suggests considerable practical benefits as well. Two areas where the NSW experience may prove particularly informative are community services and housing. As we have already noted, there has been ombudsman-style independent oversight of community services in NSW since 1993, and since the early 2000s this has been exercised by the Ombudsman's Office itself.

The introduction of this regime cannot be directly attributed to the introduction of devolved governance, because historically community services were provided either directly by the state (e.g. statutory child protection) or by individuals working directly with state authorities (e.g. foster carers).[33] This appears to be changing, however: NSW, for example, has begun to devolve a significant portion of community services over the last five to ten years. This was originally in response to recommendations made by the Wood Special Commission of Inquiry in 2008, but more recent efforts are the result of the Department of Family and Community Services' adoption of so-called 'co-design' in service planning and delivery. The proportion of matters received by the NSW Ombudsman's Community Services Division which relate to non-government organisations has risen as these changes have taken effect. The proportion was around 6 per cent between 2004 and 2008, and since then has risen to

around 12 per cent.[34] NSW find itself in the happy position, by accident of history as much as anything else, of already having oversight mechanisms which are well-adapted to this new governance regime. As devolved governance spreads into this sector, the NSW Ombudsman expects the trend in its complaint patterns to continue, and we believe the remaining jurisdictions would do well to consider adopting similar oversight arrangements.

By contrast, no State or Territory has an oversight body for social housing with these kinds of complaint handling and investigatory powers. In most jurisdictions, State-owned social housing falls under the jurisdiction of the Ombudsman, but other kinds of social housing do not. If our experience in NSW is any indication, this is an unsatisfactory situation. Moreover, there are signs the government is considering transferring at least some public housing stock to the community housing sector and private providers.[35] If this occurs, it is likely to exacerbate problems with current oversight and accountability arrangements.

The NSW Ombudsman's experience shows that public housing is a significant source of complaints, both from public housing tenants and members of the public who are their neighbours. In 2013-2014, Housing NSW, Land and Housing Corporation and Aboriginal Housing Office made up 17 per cent of all formal complaints and 26 per cent of all enquiries conducted under the *Ombudsman Act 1974*. These included complaints about failure to reply to complaints, applications and requests; failure to give adequate reasons for decisions; failure to comply with policies regarding giving notice before inspections; and failure to address safety issues such as maintenance or antisocial behaviour from other tenants.

There is no reason to think that these issues are peculiar to the state-funded housing sector; in fact, the available evidence suggests problems are equally present in the community housing sector. Around 7% of all enquiries and complaints to the NSW Ombudsman's Office about social housing concern matters which are not within its jurisdiction (e.g. because they concern community housing providers). This figure is surprisingly high, given that the Office makes no attempt whatsoever to seek out these kinds of complaints. On a slightly different note, 20 per cent of all social housing complaints which *do* fall within the Ombudsman's jurisdiction are from neighbours alleging nuisance from a public housing tenant. In many serious cases, complainants describe experiencing violence and witnessing criminal behaviour from neighbours. Such complaints are made by both private homeowners/tenants and other public housing tenants. There is no equivalent complaint handler for nuisance caused by tenants of community housing, and options for scrutiny and redress are limited. The national law regulating community housing providers limits the investigative powers of the Registrar of Community Housing to 'the compliance of registered community housing providers with community housing legislation'. Instead, aggrieved parties generally have to take their case to the NSW Civil and Administrative Tribunal or the courts to obtain relief.[36]

Conclusions

The Australian experience of administrative reform and counter-reform holds a number of lessons for those concerned about preserving ombudsman-style oversight mechanisms and protecting citizens' rights to scrutinise and seek redress from service providers.

First, our experience suggests that Peter Tyndall is right to be concerned that administrative reform, if left unchecked, can mean citizens lose these rights. Privatisation, contracting out and devolved governance can each, in different ways, mean that services which once fell within the jurisdiction of the Ombudsman can now fall outside it. Accountability institutions need constantly to adapt, and those of us who care about the protections they provide need to be vigilant and active in defending them.

Second, our experience suggests that reform is a complex phenomenon, and it can also provide unexpected opportunities to extend these rights in places where they may previously have been unavailable. The establishment of industry ombudsman over the last 20 years is a prime example: here, private industry has more-or-less willingly adopted a model of independent oversight developed in the public sector. Tyndall himself has expressed some reservations about such bodies, questioning their independence and suggesting their very multiplicity may be a source of confusion. But on balance, these valid technical concerns should not diminish our appreciation of the broader point: public-sector norms of accountability have established a bridgehead in the private sector.

Third, there are straightforward, practical ways to address the problems Tyndall identifies, and to take advantage of the opportunities we have mentioned. We can remove any ambiguity over access to independent oversight, scrutiny and redress in respect of contracted-out services by legislating to give ombudsmen jurisdiction over services provided by private bodies under contract with public agencies. All Australian jurisdictions except NSW (and to a lesser extent Victoria) have done this. Because NSW lags behind, the NSW Ombudsman's ability to address complaints in these circumstances is weaker than elsewhere.

Fourth, access to administrative justice in devolved policy environments can also be protected, but doing so requires us to abandon a founding principle of public law. We need to recognise that thirty years of reform have rendered the distinction between 'public' and 'private' spheres largely irrelevant to the actual experience our fellow citizens have of 'public' services. Instead, we should ensure administrative justice is available wherever the issues, organisations or activities give rise to a public interest in independent scrutiny and redress. Australian parliaments have already recognised this public interest in a number of individual cases, and have experimented with a range of responses: giving jurisdiction to the public ombudsman, establishing standalone oversight bodies, and industry ombudsman schemes. What matters most is that there be some independent entity with power independently to handle complaints and conduct investigations, regardless of the public-law status of the subject of complaint, and with a mandate to drive improvements across the sector through monitoring, reviewing and other engagement work.

This proposal also raises a profoundly important question: if we abandon the distinction between public and private as a basis for deciding where an ombudsman-like jurisdiction should exist, what other rationale should we adopt in its place? By way of concluding this paper and laying the groundwork for future debate, we propose four circumstances in which, we believe, there is a public interest in ensuring ombudsman-style oversight.[37] The first is where the client population for a service is vulnerable in some way which makes it difficult for them to make their voices heard. We have in mind vulnerabilities like mental health issues, drug problems, and also things that might not obviously constitute a vulnerability, like not speaking English fluently or being young. The second is where the nature of the relationship between client and provider means the client cannot easily choose whether to receive a service or who to receive it from, they must be protected by mechanisms of scrutiny and redress. Thirdly, similar protections must be in place where the relationship between the two is characterised by a structural asymmetry of information. This usually arises where large organisations provide services to individuals or families, but it can also arise where services rely heavily on expert knowledge.[38] Finally, such protections must also be in place where service providers are in a position to make decisions that are binding on their clients – where, in other words, the service provider is exercising the authority of the state. None of these are mutually exclusive, and where more are present, the need for independent oversight is all the greater.

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Endnotes

1 Even a brief and unsystematic scan of the peer reviewed literature gives a flavour of this Anglocentric diversity. Eg C Ludowise, 'Accountability in Social Service Contracting: The State Action Doctrine and Beyond,' 27 *Journal Of Health & Human Services Administration* (2004), P Leyland, 'Back to Government? Reregulating British Railways,' (2005) 12 *Indiana Journal Of Global Legal Studies* 12 , P Lipman and N Haines, 'From Accountability to Privatization and African American Exclusion,' (2007) 21 *Educational Policy*, M E Gilman, 'Legal Accountability in an Era of Privatized Welfare,'(2001) 89 *California Law Review*, E Genders, 'Legitimacy, accountability and private prisons,' (2002) 4 *Punishment & Society*, M Strayhorne, 'Oversight and Accountability of Water Privatization Contracts: A Proposed Legislative Policy,' (2014) 14 *Sustainable Development Law & Policy*, M J Trebilcock and E M Iacobucci, 'Privatization and Accountability,' (2003) 116 *Harvard Law Review*, R S Gilmour and L S Jensen, 'Reinventing government accountability: Public functions, privatization, and the meaning of 'state action',' (nd) 58 *Public Administration Review* (2006) 108 *Teachers College Record* 108, D Boyles, 'The Privatized Public: Antagonism for a Radical Democratic Politics in Schools?' (2011) 61 *Educational Theory*, 'When Hope Falls Short: HOPE VI, Accountability and the Privatization of Public Housing,' (2003) 116 *Harvard Law Review*.

2 OECD, *Privatising State-owned Enterprises. An Overview of Policies and Practices in OECD Countries* (Paris: Organisation for Economic Cooperation and Development, 2003), 26, Herbert Obinger and Reimut Zohlnhöfer, 'Selling off the 'Family Silver': The Politics of Privatization in the OECD 1990-2000. Working Paper No 121,' (Cambridge MA: Harvard Center for European Studies, 2005), 3.

3 Portuguese Ombudsman, 'Report to the Parliament 2011. Summary,' (Lisbon: The Ombudsman's Office - Documentation Division, 2012), 11.

4 One should not push the point too far, of course: access to administrative justice is probably affected by administrative reform in both Portugal and Canada (OECD, *Distributed Public Governance* (Paris: Organisation for Economic Cooperation and Development, 2002), 67.) The point is, the relationship between the two should probably be clearer in Australia.
5 Judy Johnston, 'The New Public Management in Australia,' (2000) 22 *Administrative Theory & Praxis* 22.
6 Reserve Bank of Australia, 'Privatisation in Australia,' (1997) *Reserve Bank of Australia Bulletin* December 14.
7 Keith Horton-Stephens and Colin McAlister, *Competitive Tendering and Contracting by Public Sector Agencies, Report No 48* (Melbourne: Australian Government Publishing Service, 1996), 3.
8 Reserve Bank of Australia, 'Privatisation in Australia,' 14-16.
9 Horton-Stephens and McAlister, *Competitive Tendering and Contracting by Public Sector Agencies. Report No 48*, 3.
10 See OECD, *Distributed Public Governance*.
11 Wilma Gallet et al, 'The Promises and Pitfalls of Prime Provider Models in Service Delivery: The Next Phase of Reform in Australia?' (2015) 74 *Australian Journal of Public Administration*.
12 Although there are some notable counter-examples, one of the most prominent at the time this paper was written being the privatisation of the NSW electricity distribution network. This was first proposed in the late 1990s, and again in the early 2000s. It was not implemented at the time due for political reasons, but appears likely now.
13 Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems,' (2010) 100 *American Economic Review*.
14 Robyn Keast et al, 'Mixing State, Market and Network Governance Modes: The Role of Government in 'Crowded' Policy Domains,'(2006) 9 *International Journal of Organization Theory and Behaviour* .
15 It must be acknowledged that the use of such policy tools was also a prominent part of later new public management, and was used in the UK under Major and NSW under Greiner to name but two examples.
16 Eg Australian Public Service Commission, 'Policy Implementation through Devolved Government,' (Canberra: Attorney-General's Department, 2009).
17 ———, 'Policy Implementation through Devolved Government,' 14-15.
18 Graeme Hodge and Ken Coghill, 'Accountability in the Privatized State,' (2007) *Governance* 20.
19 Cf Albert Hirschman, *Exit, Loyalty and Voice: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).
20 Administrative Review Council, *The Contracting Out of Government Services, Report No 42* (Canberra: Attorney-General's Department, 1998); Robin Creyke, 'Report No 42 – The Contracting Out of Government Services - Final Report: a Salutation,' *Administrative Review Council* (1999) 51 *Admin Review*), Jacqueline Ohlin, 'Will Privatisation and Contracting Out Deliver Community Services? Research Paper No 15, 1997-98,' (Canberra: Parliamentary Library, 1998), Geoff Mulgan, 'Contracting Out and Accountability. Graduate Public Policy Program Discussion Paper 51,' (Canberra: Australian National University, 1997).
21 Carla Michler, 'Government By Contract - Who Is Accountable?,' (1999) 15 *QUT Law Journal*.
22 The Commonwealth Ombudsman noted that the current jurisdictional arrangements with respect to contracting can 'lead to some inconsistencies, and to some members of the public being denied immediate access to the independent and impartial service' offered by his Office. *Commonwealth Ombudsman,* Annual Report, *1999-2000* (Canberra: Commonwealth Ombudsman, 2000).
23 See, for example, Commonwealth Auditor-General, 'Some issues in contract management in the public sector', presentation to the Australian Corporate Lawyers Association and Australian Institute of Administrative Law conference on outsourcing, Canberra, 26 July 2000. Quoted in Verspaandonk, *Outsourcing-For and Against. Current Issues Brief 18 2000-01*.
24 For a contemporary overview of the issues involved, see Administrative Review Council, *The Contracting Out of Government Services, Report No 42*.
25 Technically, jurisdiction over prisons is extended by s246 of the *Crimes (Administration of Sentences) Act 1999*, but this merely states that the jurisdiction of the Ombudsman Act and relevant regulations apply to prisons managed under subcontract.
26 Accredited certifiers are brought in under the little-known s 5(1)(1f) of the *Ombudsman Act 1974 (NSW)*.
27 Productivity Commission, *Contribution of the Not for Profit Sector* (Canberra: Productivity Commission, 2010), 72-3.
28 Bruce Barbour, *Risky Business: the potential for improper influence inthe non-government sector* (Western Australia: Speech delivered to the Australian Public Sector Anti-Corruption Conference, 16 November 2011, 2011), Independent Commission against Corruption, *Funding NGO Delivery of Human Services in NSW: A Period of Transition* (Sydney: Independent Commission against Corruption, 2012).
29 Similar arrangements have also been put in place in non-devolved policy domains, such as legal services commissions. One common feature in these is an asymmetry of information and expertise which acts to the disadvantage of the customer. We will return to this point later.
30 Oversight under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* was originally exercised by the Community Services Commission. The Commission was merged into the Ombudsman in the early 2000s.
31 *Ombudsman Act 1973 (Vic)* Item 19, Schedule 1.
32 Kathryn McKenzie, *Submission on Proposal for an NDIS Quality and Safeguarding Framework* (Sydney: NSW Ombudsman, 2015).

33 In June 2013, just under 95% of children across Australia in out-of-home care were in home-based arrangements. See Australian Institute of Health and Welfare, 'Child Protection Australia 2012-2013 (Child Welfare Series No. 58),' (Canberra: AIHW, 2014).

34 It should be noted that some of this increase may also be due to changes in the NSW Ombudsman handles matters involving what is now the Department of Family and Community Services. In absolute terms, the number of complaints concerning NGOs has usually been 30-50% higher since 2008, compared with the first part of the decade.

35 At the time of writing, this transfer is not formal NSW government policy. However, in November 2014 the government began a public consultation process as the first stage of a reform programme. As part of this, it explicitly identified greater involvement of the non-government and private sectors in the social housing system as a priority for consultation. See Department of Family and Community Services, *Social Housing in NSW: A discussion paper for input and comment* (Sydney: Department of Family and Community Services, 2014), 10.

36 We recognise that my argument raises a question which we do not have space to fully address here: if it is a good idea to provide access to administrative justice to tenants of community housing, why should we not extend access to all tenants of private housing? We discuss some principles on which we believe it would be reasonable to distinguish between tenants of community housing and other private tenants in the conclusion.

37 These principles also provide a basis of deciding where access to ombudsman-style administrative justice may not be necessary. For example, the first two principles provide a rationale for not extending access to administrative justice beyond tenants of community housing to all private tenants. Many tenants of private housing face no particular barriers to protecting their rights, and the existence of a private housing *market* means tenants can, in practice, leave unsuitable accommodation if needs be. Under such circumstances, there may not be sufficient benefit to funding a third-tier complaint handler in addition to tribunals and the courts.

38 Examples of experts who are already subject to this kind of oversight are doctors and lawyers (who fall under the jurisdiction of professional standards bodies for precisely this reason).

PRIVACY – A REGULATOR'S PERSPECTIVE

John McMillan*

Privacy issues are both frequent and prominent in the daily media. A common link is privacy, technology and big data. In the news today, for example, there are stories about traffic cameras being used for mass surveillance, health and lifestyle information stored on smart watches being unsecured, the hacking of the Ashley Madison dating website, and retail photo booths linking credit card information to stored names and images.

The concept of privacy and how it is threatened is continually expanding. Privacy was famously defined by Warren and Brandeis in 1890 as the right 'to be let alone'.[1] A particular threat they had in mind was that a person's private affairs could be dragged into the public arena against their will by new developments such as photography and newspapers. In a later age with different threats, Cowen in the Boyer Lectures in 1969 saw privacy as the right of individuals 'to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society'.[2]

Those definitions no longer capture the spread of interests that now fall within the concept of privacy: as the Australian Law Reform Commission observed in 1983, 'privacy is a collection of related interests and expectations, rather than a single coherent concept'.[3] Nevertheless, the core principle on which the 'right to privacy' rests has changed little over time. It is that individuals should have control over when and how their personal information is released into the public domain.

Undoubtedly that is now a more complex challenge. Many privacy breaches involve the unauthorised release of or access to personal information that an individual has already shared with others – such as a bank, an employer, a government agency, the phone company or the operator of an electronic gate. The information sharing was done for a particular purpose and the individual did not expect that their personal information would be used or released for a different purpose. There was no general surrender by the individual of their right to decide when and with whom their personal information could be shared.

This more nuanced concept of privacy is reflected in the thirteen *Australian Privacy Principles* (APPs) that commenced operation in 2014 as part of a remodelled *Privacy Act 1988*. The APPs regulate the collection, use, disclosure, management, access to, amendment and destruction of personal information. They do so in a detailed manner: there are special rules for particular categories of personal information such as credit and health information; there are listed exceptions to every privacy principle; the APPs extend to cross-border sharing of personal information and to personal information stored in 'cloud' facilities housed in other countries; and the APPs address new privacy challenges such as direct marketing and data matching.

* Professor John McMillan was Australian Information Commissioner at the time of this presentation.

The other notable feature of modern privacy law is that administration and enforcement is placed in the hands of an independent privacy regulator, presently the Office of the Australian Information Commissioner (OAIC). The regulatory functions, responsibilities and powers of the OAIC were enhanced in the 2014 reforms. They include complaint investigation, the award of compensation, commissioner-initiated investigations, providing guidance on privacy law, monitoring and assessing compliance by entities to which the law applies, directing a government agency to undertake a privacy impact assessment, requiring an enforceable undertaking by an entity to comply with the law, bringing proceedings to enforce an enforceable undertaking, and applying to a court for a civil penalty order of up to $1.7M for a breach of a civil penalty provision.

The development and expansion of privacy law and regulation reflects the growth and value of personal information. Ninety percent of global data was generated in the last two years, and it is forecast that the amount of data globally will continue to grow by about 50% each year. Not all data is personal information, but a high proportion is. One estimate is that over 80% of information stored by government is linked to a residential or business address. An apt description of personal data by the European Consumer Commissioner is that it is 'the new oil … the new currency of the digital world'.[4] Reflecting that value, the global giants of a former age (Exon, Mobil, Texaco, BP) have largely been overtaken by the new information resource giants (Microsoft, Google, Facebook, Apple, Yahoo, LinkedIn).

The value of personal information has been substantially enhanced by data analytics. This is the process by which large quantities of personal data can be amassed, aggregated, analysed, reassembled, shared and put to different uses. The profound benefits in this process belong not only to the corporate data custodians, but to individuals in transactions as routine as electronic banking, online shopping and search-engine research. We benefit too through the greater capacity of government to understand the economy and society and to forecast the impact of government regulation and the working of the tax and transfer system.

The privacy debate now intersects with an expanding variety of public agenda issues, as diverse as counter terrorism, use of telecommunications data, aerial drones, biometrics, the e-health system, downloadable apps and credit regulation. The role of the regulator is principally to ensure that compliance with the Australian Privacy Principles is a paramount concern in those and other developments. That rests on a key definitional issue: whether the data that is being managed is 'personal information' to which the Privacy Act applies.

That term is defined in the Act as meaning 'information or opinion ... about an individual who is reasonably identifiable'.[5] In an earlier age, the more obvious information to which that definition applied was a person's name, photograph and residential address. In a digital age the definition can extend more broadly to information that can reasonably be used to trace a person – such as an email address, credit card information, or a telephone number. Data analytic capacity adds a new dimension altogether, since it enables items of data that bear no identifying mark to be assembled in a mosaic that does identify an individual.

This is a prominent issue in a recent ruling of the Privacy Commissioner, Timothy Pilgrim, in a case in which a Telstra customer sought access under the APPs to the customer metadata it held relating to his mobile phone usage.[6] The metadata was spread across Telstra's networks and records management systems. A person outside the organisation with access to the metadata would probably not be able to identify the customer. Telstra, on the other hand, had the operational capacity to identify the applicant because of its advanced systems for aggregating and reading the data. Accordingly, the Commissioner ruled that the applicant was to be given access to the metadata – his personal information – as required by the APPs.

The decision brings into sharp relief the choices and tensions that now arise in privacy law. On the one hand, the outcome in this case has been applauded by some who see it as a realistic recognition that data analytics has changed the landscape by enabling inconsequential and anonymous data to be used to identify individuals. It is appropriate, it is argued, that privacy law should apply to that data in order to safeguard individuals who would otherwise have little control over how the data is used and managed. The data has been acquired for corporate use for the sole reason that it is valuable and supports the commercial enterprise of the organisation that holds it. There should be corresponding responsibilities in managing a valuable, sensitive and potentially damaging resource.

The opposing argument is that privacy law is being stretched well beyond its central purpose. The anonymous data is not personal information in any popular sense. Telstra alone may be the only organisation with the capacity to use it to identify an individual. The risk of misuse of the data can be controlled in other and more appropriate ways. To apply privacy law to data of this kind is to impose responsibilities that are unrelated to any genuine risk of mismanagement. Classifying anonymous data as personal information mean that all the APP rules have to be observed on matters such as privacy management plans, collection notices, access arrangements and destruction schedules.

Another arena in which a similar debate is now being played out is in relation to recent legislation that requires telecommunications providers to retain data for two years so that it can be accessed by law enforcement agencies for national security purposes.[7] The public debate focussed strongly on whether this practice posed an unacceptable danger to privacy. The Government pointed to the safeguards in the legislation, including strict statutory controls around the retention and disclosure of this data, and OAIC and Ombudsman oversight of whether those controls were being observed. There was also a Government attempt, largely abandoned once the debate began in earnest, to argue that the privacy impact was minimal because the law only required retention of telecommunications metadata, and not the content of messages.

Critics responded that it may be more worrying from a privacy perspective to know who was called and at what time, than what was said in the call. The other strong criticism of the data retention legislation was that it had blanket application to all telecommunications metadata and could go well beyond the stated purpose of enabling detection of terrorism-related activity.

An OAIC proposal that was adopted in the legislation is that telecommunications data to which the law applies is deemed to be personal information. This will ensure that it is managed in accordance with the APPs and under the regulatory oversight of the OAIC – an important privacy development.

Another important Government concession during the data retention debate is the need for a mandatory data breach notification scheme.[8] At present there is a voluntary scheme administered by the OAIC, that urges organisations to notify consumers and the OAIC if a serious data breach occurs and of the steps being taken to remedy the privacy breach.[9] Some organisations take this voluntary step, but many others will try actively to suppress public knowledge of a breach for reputational reasons. The underlying principle of privacy law – that individuals should have control over when and how their personal information is released into the public domain – presupposes that people should know how their personal information is being managed and if a serious privacy breach occurs.

Privacy law now imposes considerable legal and administrative responsibilities on data custodians. Being aware of what is required and taking proactive steps to comply – captured in the universally popular phrase, ‘privacy by design’ – is the most constructive way of

reducing the compliance and regulatory burden. Three other options that can alleviate any burden – and that are strongly promoted by the OAIC – are to de-identify or anonymise data, to provide individuals with online access to their personal information, and to undertake a privacy impact assessment when designing a new program.

The first option – de-identification – can effectively remove data from the operation of the Privacy Act. The Act applies only to 'personal information'; information that has successfully been stripped of personal identifying qualities will no longer fall within the regulatory requirements of the APPs. At a transactional level, organisations should continually question whether, for example, they need form fields that require the entry of personal information. This should be accompanied by an active record review and destruction process to ensure that personal information is not retained for any longer than it is required for genuine operational purposes.

The benefit of the second option – online access – has been demonstrated by financial institutions that provide customers with online access to their own account. The customer can view, update and remove items of information. The regulatory burden on the organisation is substantially reduced, along with the suspicion that personal information may be misused by the organisation. The practice of providing individuals with access to their own personal information is one that should be adopted more widely by organisations.

The third option is to undertake a privacy impact assessment at the design stage of a new program. Consideration should be given to involving or consulting other stakeholders who may have relevant experience or interest – such as customers, IT security consultants, and privacy professionals. A privacy impact assessment provides an excellent opportunity to take stock of the types of personal information that is being collected, how it will be managed, breach risks, the response strategy if a breach occurs, and the record destruction schedule.

I will finish with an observation on one of the common fallacies that is often raised about privacy regulation. What is the purpose of privacy laws, some argue, if the largest global data custodians – the social media giants – can thumb their nose at them? While social media trends have rightly attracted considerable public comment and criticism, the reality is that the main corporate players are earnestly attuned to the need for good privacy practice. Their business model depends entirely on having the regulatory freedom to amass and use personal data, and their commercial survival depends on individuals entrusting personal information to them. There is room for differing views on whether social media giants should reveal more about their data management practices and whether more limitations and safeguards should be in place, but the corporate players actively engage on these issues with privacy regulators around the globe.

Financial institutions have similarly understood and adopted the mantra that good privacy practice is good business sense. Interestingly, on the most recent consumer awareness study undertaken by the OAIC,[10] people placed higher trust in financial institutions to manage their personal information than in other commercial or government agencies. This consumer trust has been built in an era when financial institutions have been amassing and using more customer information.

Privacy law and practice is now an area of great importance and complexity. The regulatory role in this area becomes ever more active.

Endnotes

1 S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 195.
2 Z Cowen, *The Private Man* (ABC, 1969) 10.
3 ALRC, *Privacy*, Report No 22 (1983), Vol 2, [1032].
4 Cited in Andreas Busch, 'Privacy, Technology and Regulation' in B Roessler & D Mokroinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (2015) 312.
5 *Privacy Act 1988* (Cth) s 6.
6 *Ben Grubb and Telstra Corporation Limited* [2015] AICmr 35. The Commissioner's decision was later set aside on appeal by the Administrative Appeals Tribunal, on the basis that the relevant information was not information about an individual: *Telstra Corporation Limited and Privacy Commissioner* [2015] AATA 991. The Commissioner has appealed the AAT's decision to the Federal Court.
7 *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*; see also *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014.*
8 The Government commenced public consultation on an exposure draft bill in 2016: www.ag.gov.au/consultations/pages/serious-data-breach-notification.aspx
9 OAIC, *Data breach notification – A guide to handling personal information security breaches*.
10 OAIC, *Consumer attitudes to privacy survey*, Research report (2013).

A RIGHT TO PRIVACY? COMMENTS AS PART OF A DISCUSSION ON DATA COLLECTION / SURVEILLANCE

Michael Fraser

Privacy is a fundamental element of one's humanity, of one's human dignity. It connotes autonomy, and control of one's personhood in society. It is a fundamental human right protected under article 12 of the *Universal Declaration of Human Rights*. Yet now we see a multibillion dollar international industry, the largest and most wealthy corporations in the world have built up, in a very short period, trading on our private information, our personal information. That is the value on which they are trading.

Social media, ad brokers, information brokers comprise a supply chain in which the currency is our private and sensitive information. We are asked, when we engage with these so called free services, to give consent under their privacy policies. I do not believe that that agreement is indeed in the form of consent or that those contracts are enforceable, I believe they are probably unconscionable. I do not believe that the consent given is informed consent.

I do not think any of us can conceive the way in which data is being collected, aggregated and analysed on a massive scale in order to profile us. This rich profile enables advertisers and others who have access to that data to manipulate us and control us. Indeed, there are many anecdotal accounts where retailers have known that customers are pregnant or ill long before the customers themselves know. These people who have this data know more about us in many ways than we know about ourselves and yet we are freely giving up this information. This makes us very vulnerable to these wealthy and powerful organisations.

Next we have the spectacle of governments, such as the American government, in the interests of national security, both unlawfully and lawfully tapping into that information. Presumably this includes information about us when we have been in contact with the United States. The justification is that this intrusion is to improve their national security. I do not think any of us has given our informed consent to that either. In effect, the government has outsourced national security data collection to social media to which we are willingly providing this information.

Our forebears fought and defeated authoritarian regimes whose law enforcement, national security and espionage agencies could never, in their wildest dreams, have hoped to obtain a fraction of the data that we are giving to these corporations and through them to governments. Yet, we are acquiescing to this in order to receive ads to spend money. I think this is a concern.

The new developments in terms of metadata retention raise the question about whether there is any data which is not personal data. I do not believe that there is any data pertaining to us that is not personal data. That is because of the manner in which it can be aggregated. Even if cookies can be removed from your system so you cannot be tracked, your search engine, your fingerprint can be identified and any fragment of data which you may consider inconsequential can be added to this rich tapestry. That makes us vulnerable and it undermines our ability to function as humans and as citizens.

Privacy is recognised as a human right because one needs one's privacy in order to think and develop one's ideas. It is a prerequisite to freedom of expression. You cannot work out what you think and what you are going to say unless you have some privacy. Speaking personally, the ability to enjoy seclusion and solitude when I choose is among my most precious possessions.

Now, in the interests of national security, we see government requiring service providers to gather our metadata and once they have the metadata they do not need the content. By linking that information, organisations can obtain a good picture of what a person is doing and what are their interests. The compulsory collection and retention of metadata fundamentally alters the relationship of the citizen to the state.

Our ancient freedoms and liberties are compromised by this. Now my metadata is being collected, I am a potential suspect. It has long been the case that unless a law enforcement officer has a reasonable suspicion, if they ask you who are you, where are you going, what have you got in your hand, you can say that is none of your business. Unless they are investigating with a reasonable suspicion, they are not entitled to get an answer from you or to detain you in any way. That is what it means to me to be an Australian citizen. We enjoy rights to privacy we have inherited from British institutions and the common law.

This raises the question: why protection cannot be provided for our privacy, by requiring that unless there is a reasonable suspicion, the law enforcement agencies, the security agencies cannot get a warrant to obtain information about us. At present, they start to investigate and they need to gather the necessary data, and if necessary, the data and communications of the associates, and if there is a conspiracy, the warrant may provide for access to a wide collection of information.

Now I know that somebody is collecting my data, that limits my freedom and even if that data is not accessed, I know I am being watched. That changes my behaviour and changes my standing in respect to the state. In the movies, you know who the ‘baddies’ are. They are the ones who officiously stop people as they go about their business and demand ‘show me your papers please’. We don't have that affront in our society. You don't have to justify yourself to the state. You don't have to allow your personal information to be accessed by the state, by law enforcement or by corporations unless there's a good reason for it, a need to know.

I am not in a position to know whether there is a need to know information about a particular person. I do not know enough about security threats to know whether this intrusion is warranted. But it is a concern to me. It diminishes me as a person and as a citizen and removes my rights as a citizen. So in Australia, we don’t have a right to our privacy. There is no tort or a statutory right, as has been recommended by many, to protect our personal privacy. The Privacy Act protects our information, but that is a regulatory protection about how entities can use our personal information. It is not based on the right of the individual to their private information.

In response to the technological developments and the awesome ways in which our data is now being gathered, aggregated, analysed and traded and the power which this gives to the wealthiest corporations and to the state to manage its citizens in unprecedented ways, we need to strengthen the protection of both our personal privacy and our information privacy.

2015 AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW CONFERENCE THE COMMONWEALTH OMBUDSMAN – FUTURE VISION

Colin Neave*

I have been the Commonwealth Ombudsman for nearly three years now. Prior to that, I led the Financial Ombudsman Service. Altogether, I have had almost 20 years of experience with ombudsmanship.

Ombudsmanship, in both theory and practice, has changed over that period as is only to be expected of an institution that exists in the context of a dynamically changing society.

What I would like to do today is to give you a sense of what I, as the Commonwealth Ombudsman, see as being the role of ombudsmen and their place in the public sector environment.

And I would like to share with you the work that we have been doing in my office to describe where we will be over the coming years – our vision for the future.

Some history

The Commonwealth Ombudsman commenced operations in 1977. At that time, dealing with the Commonwealth Ombudsman was a new experience for Commonwealth public servants.

The Ombudsman's approach must have come as a shock to senior public servants at the time. And one must remember, of course, that the introduction of the Commonwealth Ombudsman came as part of a broader suite of administrative law reforms, all of which placed new levels of constraint and accountability around the exercise of power by officials.

The first Commonwealth Ombudsman, Professor Jack Richardson, was not backward in coming forward in his approach to the role. He worked very hard to promote the office of the Ombudsman.

In my Canberra office today there are a number of hand-painted signs that must date from around that time. They variously show citizens tied up in red tape, a bull being led by the nose by Commonwealth bureaucracy and similar themes.

They all announce, very clearly, that if you are dissatisfied with your dealings with the Commonwealth government, you should speak to the Ombudsman.

Professor Richardson also famously arranged to advertise his office on milk cartons distributed in the Australian Capital Territory (ACT), ruining the breakfasts of any number of then agency heads.

Colin Neave AM is the Commonwealth Ombudsman. This article is an edited version of a paper presented at the 2015 AIAL National Administrative Law Conference, Canberra ACT, 23 July 2015.

The present

Proving that perceptions can be hard to shift, there are enough long memories in Canberra to ensure that nearly 40 years later current and former senior public servants still talk about the milk cartons!

My concern, though, is that the perception of ombudsmen held by some people has not changed since the 1970s.

That is, some people think all ombudsmen do is handle complaints.

They think ombudsmen are combative, preferring to hector and lecture than find solutions.

And they see ombudsmen, and I am referring to parliamentary ombudsmen specifically here, as being something from outside the normal architecture of government.

Why is this a concern? I will give you three reasons among many.

- first, it sells short the enormous contribution ombudsmen make at all levels of government to improve public administration as a whole;
- secondly, it colours interactions agency officials have with ombudsmen and their staff – if you are expecting a combative approach from an ombudsman (or anyone for that matter) then that is probably what you will see regardless of reality; and
- thirdly , it leads to perverse policy outcomes including the proliferation of niche oversight agencies.

There are some people, both in government and the community, who think that all the Ombudsman does is handle complaints; that we investigate complaints that people cannot resolve in their dealings with Commonwealth or ACT government agencies. That is a very old-fashioned and narrow view, and falls dramatically short of reality.

Ombudsmen are leaders in building better public administration. We have a critical place between government and the public, and we are a safety net for members of the community.

Ombudsmen are an integral part of a framework that provides access to justice. We promote good governance, accountability and transparency through oversight of government administration and service delivery.

My office does this in five main ways.

- First, we do resolve individual disputes between individuals and agencies. We investigate complaints, and we safeguard citizens from government actions which could adversely affect them. We also give citizens a voice to complain where they would otherwise fear to do so. Ombudsmen are often the only avenue readily available to individual citizens seeking recourse on matters of maladministration that affect everyday lives. And because ombudsmen services are free, they are particularly valuable to the most vulnerable.
- Secondly, we investigate systemic problems. I find it surprising that some very senior public servants I speak to do not realise we perform this role. We investigate systemic

problems following complaints, or on my own initiative. The key issue here is that some issues have a one-to-one relationship between the problem and the individual. But many others have a one-to-many relationship. That is, a single administrative problem could be adversely affecting a large number of people and detracting from good public administration as a whole. So we use our own motion investigation powers to expose and remedy systemic issues.

- Thirdly, we contribute to improving public sector performance by feeding the intelligence we gain from looking at complaints and complaint trends back to agencies.
- Fourthly, through our oversight of the Commonwealth and ACT public interest disclosure schemes we assist in the discovery and remedying of serious wrong-doing within the Commonwealth and ACT public sectors. This is one reason why ombudsmen should be considered to be *integrity* agencies. I will return to this theme a little later.
- And fifthly, we have an increasing role in monitoring the use of intrusive and coercive powers by law enforcement and other agencies.

Strategic vision

Every organisation, whether in the public or private sector, exists within a broader context.

Organisations that fail to adapt when that broader context changes risk irrelevance.

Ombudsmen and other oversight agencies have been slower than some to recognise that simple truth.

That is not to say that ombudsmen should bend to every whim of government, but it does require ombudsmen to give regular consideration to their place in government.

Like every other agency, the role of ombudsmen will continue to evolve. As government's activities and citizens' expectations of governments change, so must ombudsmen.

Change cannot be considered unusual – it is in fact the only constant in today's public sector environment.

For some time my office has articulated its purpose this way:

- *To influence* agencies *to treat people fairly through our investigation of their administration.*

That is a fine purpose for an ombudsman.

But I think the future is going to require more of us. I now describe the purpose of my office, for the coming three to five years, this way:

- To provide **assurance** that the organisations we oversight act in **integrity** and treat people fairly, and
- To **influence** enduring systemic **improvement** in public administration in Australia and the region.

The way we manage the evolution of our role over the coming years will be based on four key concepts which we have called our 'four pillars': **assurance, integrity, influence** and **improvement.**

I will tell you more about what I mean by each of the 'four pillars'.

Assurance

I am firmly of the view that the role of the Ombudsman will increasingly be to support and oversight agency complaint handling processes. We will provide **assurance** to agencies, Government and the public that the organisations we oversight are dealing with complaints effectively.

There are two main drivers for this. One is philosophical, the other pragmatic.

At the philosophical level, the correct place for complaints about agencies to be resolved is within the agencies themselves. It is the agencies that have the ongoing relationship with the citizen making the complaint. And it is the agencies whose duty it is to provide efficient and effective services to their clients. It stands to reason that agencies also have an obligation to resolve complaints, whenever possible, within the agency at the time the complaint is made.

At the pragmatic level, the ever-increasing number of citizen interactions with government means that ombudsmen simply will not have the capacity to be the primary vehicle for dealing with complaints about agencies. We cannot be front-line complaint handlers to the whole public sector. In other words, you cannot drink from a fire hose.

I recognise that with the best will in the world, not all complaints will be resolved by agencies. But the more adept agencies become at complaint handling, the better; and the more the traditional role of the Ombudsman will change.

I cannot foresee a day when ombudsmen will not receive and investigate complaints, but the nature of those complaints and the investigations that need to be conducted will change.

I would expect ombudsmen in the future to do fewer complaint investigations. The more individual agencies address the needs of complainants, the lower the volume of work flowing through to ombudsmen. The corollary of that, though, is that the complaints that do end up with the Ombudsman will be harder to resolve.

The model of complaint handling by ombudsmen will move from what might be described as a volume business, to a more specialised role of monitoring complaint handling by others and resolving difficult disputes.

Integrity

Integrity issues, along a spectrum ranging from personal impropriety to corruption, confront us daily in the media.

The Ombudsman is already a central figure in the Commonwealth's integrity framework. My expectation is that the significance of this part of the Ombudsman's role will grow over the coming years.

After all, the root cause of public sector corruption is not rampant criminality. It is the opportunity provided by weak administrative systems.

Looked at this way, maladministration can been seen as the vulnerability that allows corruption to enter and flourish within the public sector. The Ombudsman's role in stamping out maladministration is the first line of defence against corruption.

The Commonwealth Parliament has seen fit to vest additional functions in the Ombudsman, which enhance this role.

The public interest disclosure scheme established under the *Public Interest Disclosure Act 2013* (Cth) (PID Act), which we oversight, seeks to improve accountability and integrity in the Commonwealth public sector by supporting agencies to address suspected wrongdoing.

The scheme established under the PID Act confers a number of roles on the Ombudsman to ensure it provides robust protections to public officials who report wrongdoing in the public sector.

The Ombudsman is responsible for reviewing the Australian Federal Police's administration of Part V of the *Australian Federal Police Act 1979* (Cth) (AFP Act). That part of the AFP Act has regard to the AFP's professional standards and provides the framework for its complaint management system.

My office inspects records of AFP complaint investigations to review the comprehensiveness and adequacy of the AFP's administration of Part V of the AFP Act.

In conducting these reviews we do not investigate the AFP's own complaint investigations. Rather we make an assessment of the administration and processes involved in handling complaints. That way we can assess issues that the complainant may not be aware of, such as conflicts of interest.

Monitoring roles such as this are becoming increasingly important for ombudsmen and will be a significant feature of the way ombudsmen execute their responsibilities in the future.

Another example is the Ombudsman's role in monitoring the use of covert and intrusive powers such as surveillance activities.

Proper oversight of these sorts of powers is critical. As you would expect, the public will not (or at least should not be) aware of the use of these powers.

And since you cannot complain about something you are not aware of, people affected by the use of the powers are unlikely to approach my office.

Best practice therefore requires the legislative schemes that create coercive and intrusive powers to include an independent oversight mechanism to increase accountability and transparency of agencies' use of the powers.

My office performs this independent oversight in relation to powers such as intercepting telecommunications, preserving and accessing stored communications, using surveillance

devices, exercising coercive examination powers, and exercising certain immigration-related powers.

Parliament recently expanded my office's responsibilities to include oversight of agencies' access to 'metadata' that will be stored as a result of the Government's data retention reforms.

I welcome these additional roles for my office and anticipate them becoming an ever more important dimension to the role of the Ombudsman.

Influence

Focusing on how the Ombudsman will influence outcomes will be critically important to the role over the coming years.

I find this a particularly interesting issue to reflect upon because it goes to how the Ombudsman is perceived, but also to how the Ombudsman and his or her office perceives itself.

The Ombudsman only has the power to *recommend* change. I am not empowered to enforce or seek enforcement of any recommendation.

So it is incumbent on all ombudsmen when considering making a recommendation to ask the question: 'How do I make this happen?'.

I recently read a publication produced by the Catalan Ombudsman in Spain called *International Framework of the Ombudsman Institution*,[1] to which contributions were made by a professor and lecturer in constitutional law at the University of Barcelona.

The publication describes the ombudsman as 'a magistrate of persuasion'. I think that is a lovely phrase which sums up nicely the approach ombudsmen should take.

But of course it leaves much open to interpretation. There are lots of ways to 'persuade'.

To my mind the best sort of persuasion comes as a result of mutual respect: agencies' respect for the rigour, objectivity and independence with which ombudsmen conduct their activities; and respect by ombudsmen and their staff for the integrity and efforts of agencies to do the right thing.

My office will continue to invest in strong relationships to achieve outcomes and effect change. Building a relationship of trust at all levels with agencies and the community will provide a platform for our views to be heard and also receive early warning about issues that agencies know will impact our work.

This will require us to negotiate the balance between being a trusted partner of agencies and maintaining appropriate independence. In a phrase: 'collaboration without capture.'

[1] Available at: http://www.sindic.cat/site/unitFiles/3682/International%20framework%20of%20Ombudsman%20institutions_oct2015.pdf

But what does all this say about the Ombudsman's place in the framework of government?

To my mind it is critical that my office is outwards focused and sees itself as a part of the architecture of government.

Independence is vitally important for an ombudsman, but it does not require detachment from what Government and the public sector is trying to achieve.

The world of the Ombudsman cannot include a 'them' and an 'us'. Every public servant, whether working in an agency like the Commonwealth Department of Human Services (DHS) or the Ombudsman's office, shares an obligation to promote good public administration for the benefit of the Australian people.

This means that the place of the Ombudsman is on the *inside* working with agencies to fix problems, not on the *outside* simply criticising the fact that problems exist.

Over the coming years my office will be working hard on how we are 'positioned' in this regard – both by building trust with agencies and by being clear about how we view ourselves and our role.

I mentioned earlier that one of the downsides of the general misconception about what ombudsmen do is that it is leading to perverse policy outcomes. Let me explain what I mean by that.

There has been a proliferation of oversight agencies created in recent years. Some handle complaints, some also have policy or advocacy roles. Many share some of the key characteristics of an ombudsman and even adopt the name. But they operate in niche areas and often have a one-to-one relationship with the agency they oversight.

Reducing traditional ombudsman oversight has the effect of narrowing the view the ombudsman has of the public sector as a whole and undermines his or her ability to see sector-wide trends.

The danger in small bodies oversighting only one or two agencies in a niche area lies in the possibility of complaint-handler capture or an unworkable relationship if things do not go well between the complaint handler and the agency.

That relationship problem can, in my opinion, develop from the suggestion that a single agency complaint handler should have on its staff specialists in the business of the agency.

This can lead to the complaint handler second guessing the agency's decisions, which should not be its role.

Good complaint handling and good systemic oversight are skills that are quite distinct from the intricacies of the business of the agency being oversighted. They are the professional skills of an ombudsman.

Any agency that says you must understand all of its intricacies to form a view about its administrative processes and service delivery is just trying to dazzle you with complexity.

Why are these bodies created? Part of the reason is that governments want to adopt the 'ombudsman' brand without taking everything else – the rigour, the independence – that goes along with a traditional ombudsman.

They want an oversight body that is 'part of government', not an outsider like an ombudsman.

Governments are, of course, entitled to make these sorts of judgements. But my contention is that if ombudsmen do more to see themselves as part of the architecture of government, and promote that idea, the perceived need to create niche agencies will be diminished.

An ombudsman's independence will not be put at risk by this sort of 'positioning'.

Failure to better articulate the case of ombudsmen, however, does leave the institution at risk.

Improvement

I have spoken already about the misconception among some that the Ombudsman only investigates individual complaints and does not address systemic issues.

Over the coming years I intend to focus more attention on encouraging systemic improvement in public administration. My own motion investigations will focus on areas where systemic and whole-of-government improvement is required.

Systemic improvement to public administration in one area has the potential to improve public administration generally. Every improvement provides greater assurance that the organisations the Ombudsman oversights will act with integrity and fairness.

I am interested in examining new ways to measure and report on our impact on public administration.

I am also keen to collaborate more with agencies, academia and civil society to bring new thinking about how to improve public administration to the fore.

Whether it is appropriate for ombudsmen to contribute to policy debate has long been an issue of contention.

It is inevitable that ombudsmen will from time to time speak about policy issues. I do not seek to be an active participant through the media in controversial policy debates, but my office does make appropriate submissions to parliamentary inquiries and to agency consultation processes.

That has been the approach of my office for many years and it will continue into the future.

The leader of every organisation should measure his or her success on whether they are leaving behind a better organisation than the one they found when they first arrived in the job. Ombudsmen have the added measure of whether they are leaving behind a better public sector.

Industry ombudsmen

I have not said much so far about industry ombudsmen.

In 1989, the first industry ombudsman was announced by the banking industry. This was followed shortly thereafter by organisations handling complaints about telecommunications, general insurance, investment products, energy and water.

Those industry ombudsmen were established essentially to redress what was seen to be a power imbalance between individual consumers and industry when many organisations, like Telecom, were being privatised as part of asset sale initiatives or as a result of freeing up markets.

There is an intersection between parliamentary ombudsmen and industry ombudsmen. A number of parliamentary ombudsmen, including me, also have responsibility as an industry ombudsman.

I am the Postal Industry Ombudsman, the Overseas Students Ombudsman and, since 1 July 2015, the Private Health Insurance Ombudsman.

There is an opportunity for parliamentary ombudsmen to do more industry ombudsman-style work.

We are expert in complaint handling and identifying systemic issues. Our infrastructure is already established. Why not look to expand?

There is one main challenge in this area.

To be effective, industry ombudsmen need to use charging mechanisms to create an economic incentive sufficient to change industry behaviour.

As you would appreciate, the incentives for private sector bodies are different to those for public sector bodies.

Unfortunately, while there is a degree of ‘user pays’ funding for my office’s industry ombudsman functions, I do not have the ability to introduce a more sophisticated charging regime that would put my office on an equal footing with other industry ombudsmen.

That is something I intend to speak to the Government about.

I will leave for another day the question of whether parliamentary ombudsmen ought to charge agencies for their services.

International engagement

I would like to finish today by saying a couple of things about the international community of ombudsmen.

My view is that international engagement is a vital element of any parliamentary ombudsman role.

I am the Regional President of the Australasian and Pacific Ombudsman Region of the International Ombudsman Institute (IOI). I am also a board member of that Institute and the Chair of the Pacific Ombudsman Alliance, which deals with ombudsmen in the Pacific region.

The IOI encourages the exchange of information at regional and international levels, but the main goal of the Institute is to facilitate communication between all members in order to be a forum within which ombudsmen can frankly discuss issues which confront them.

Our involvement in the Institute gives us a platform for voicing regional issues and ideas to the international ombudsmen community and to influence the discussion about the place of ombudsmen within the integrity landscape now, and into the future, and to learn about developments overseas.

The Pacific Ombudsman Alliance is a service delivery and mutual support organisation for ombudsmen and allied institutions of countries that are members of the Pacific Islands Forum.

My office receives funding from the Department of Foreign Affairs and Trade (DFAT) to provide secretariat services and funds activities which are selected and evaluated by the Pacific Ombudsman Alliance Board, which I chair and which has members on it including the Ombudsmen from Papua New Guinea, Vanuatu and the Marshall Islands.

The members of the Pacific Ombudsman Alliance share many challenges and use the Alliance to exchange ideas and experiences and target assistance to its members to build institutional capacity. It provides a visible support structure that can assist ombudsmen in strengthening their domestic positions.

My office also works in Indonesia, Papua New Guinea and the Solomon Islands under other DFAT-funded aid programs.

I should say that we learn just as much from what is going on in those areas as we give to those people we work with. Our international connections allow us to tap into overseas experiences and are invaluable.

I will continue to advocate for a strong Ombudsman presence in Australia's aid programs.

Conclusion

The work of my office, and of ombudsmen around Australia and our region, have made a demonstrable difference to citizens' access to justice and the standard of public administration over the past 40 years or so.

I want to build on that success and ensure my office and the institution of ombudsmen adapts to the challenges of the contemporary public sector.

My office's vision for the future is about how we set ourselves up to do just that.

I look forward to working with all of you to make the vision a reality.