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Freedom of Information

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Editor: Kirsten McNeill

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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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National inquiry report released

On 2 May 2016, the Australian Human Rights Commission and the Attorney-General, Senator the Hon George Brandis QC, launched a report on employment discrimination against older Australians and Australians with disability: *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*.

'This Inquiry report is an historic first in terms of the scope and range of issues addressed. We have never had such a clear or detailed national picture of what happens to older workers and those with disability in the labour market', said the Hon Susan Ryan AO, Age and Disability Discrimination Commissioner.

'The exclusion of capable and skilled older people and people with disability from the workplace results in a massive waste of human capital and productivity. It drives increases in public expenditure that in the long term are not sustainable', she said.

The inquiry heard of the distress, poor health and poverty experienced by individuals unfairly excluded from paid work. It held 120 consultations with more than 1100 people between July 2015 and February 2016.

Key recommendations include:

- establishing a Minister for Longevity;
- developing national action plans to address employment discrimination and lift the labour force participation of older people and people with disability;
- expanding the role of the Workplace Gender Equality Agency to become the Workplace Gender Equality and Diversity Agency;
- introducing national education campaigns to dispel myths and stereotypes about older people and people with disability;
- adopting targets for employment and retention of older people and people with disability in the public service.

The report also recommends improvements to existing laws and policies and presents a suite of strategies for businesses and employers to improve employment of people with disability and older people.

The Australian Human Rights Commission hopes to see a speedy adoption and implementation of these recommendations so that all Australians who are willing and able to work can do so.

https://www.humanrights.gov.au/news/media-releases/national-inquiry-report-released-today

Appointments to the Australian Human Rights Commission

On 5 May 2015, the Commonwealth Attorney-General, the Hon Senator George Brandis, announced the appointment of the Hon Dr Kay Patterson as Age Discrimination

Commissioner, Mr Alastair McEwin as Disability Discrimination Commissioner and Mr Edward Santow as Human Rights Commissioner. These appointments will be for five years and ensure that the Australian Human Rights Commission has its full complement of commissioners.

Dr Patterson is a psychologist with expertise in gerontology and has had extensive experience advocating for older Australians. She is a current Commissioner of the National Mental Health Commission. Dr Patterson has had a long and distinguished career as a parliamentarian and an academic. She served as a senator for Victoria for 21 years and has held a number of ministerial positions, including as a cabinet minister, the Minister for Health and Ageing, the Minister for Family and Community Services and the Minister Assisting the Prime Minister for Women's Issues. Dr Patterson is extremely well placed to advocate for the transformation of community attitudes towards older Australians and continue our national conversation on the rights of older persons and their contributions to all aspects of our society.

Mr McEwin has been a longstanding advocate for the rights of people with disability and has represented the interests of people with disability at all levels. He is a former chief executive officer of People with Disability Australia and a former manager of the Australian Centre for Disability Law. In addition to his extensive qualifications and experience, Mr McEwin brings to the role lived experience of the issues confronting people with disability. The Attorney-General believes he will be a fantastic leader and role model for the sector.

Mr Santow is the Chief Executive Officer of the Public Interest Advocacy Centre. He is a Senior Visiting Fellow at the University of New South Wales and a former senior lecturer. Mr Santow is currently a Director of the Australian Pro Bono Centre and the University of Sydney Law School Foundation. He has very strong academic and practical knowledge of human rights. The Attorney-General said he is confident that Mr Santow will successfully prosecute the case for our fundamental political freedoms in Australia.

The commissioners were selected following a comprehensive merit selection process that complied with the APSC Merit and Transparency Guidelines. The selection panel included the Secretary of the Attorney-General's Department, the President of the Human Rights Commission, the President of the Australian Law Reform Commission, a representative of the Australian Public Service Commissioner and a former Director-General of the Queensland Department of Justice and the Attorney-General.

The Attorney-General said the success of the Australian Human Rights Commission should be measured by outcomes, not by rhetoric. The Attorney-General is confident that these new commissioners will be strong advocates for their sectors by adopting a pragmatic and courageous approach to promoting human rights, enabling the Australian Human Rights Commission to become a strong voice for all Australians, not just a select minority.

https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/SecondQuarter/5-May-2016-Appointments-to-the-Australian-Human-Rights-Commission.aspx

Improving transparency for Victorians

The Andrews Labor government will merge the Victorian Office of the Freedom of Information (FOI) Commissioner and Commissioner for Privacy and Data Protection into a single office, streamlining Victoria's information and data oversight bodies.

A newly created Office of the Victorian Information Commissioner (OVIC) will look after freedom of information, privacy and data protection issues, matching similar New South Wales, Queensland and Commonwealth bodies.

This ensures the Victorian community has a single regulator to oversee Victoria's FOI, public sector privacy and data protection laws and provide independent advice to government across those closely related fields. The new body will also help to improve the way government manages information.

It will be led by an Information Commissioner and will be supported by a Public Access Deputy Commissioner, who will improve FOI decision-making, and a Privacy and Data Protection Deputy Commissioner.

Legislation to establish the Office of the Information Commissioner will be introduced into Parliament shortly, delivering on the Labor government's election commitment to overhaul freedom of information, including:

- the ability to review ministerial and departmental decisions, including under cabinet exemptions;
- reducing the time to respond to an FOI request from 45 days to 30 days;
- reducing the time that agencies have to seek the Victorian Civil and Administrative Tribunal's review from 60 days to 14 days.

These reforms are only the first stage in improving transparency and access to information for Victorians. The Labor government will shortly announce details of a comprehensive review of Victoria's FOI legislation.

The Labor Government's action on transparency contrasts with the former Liberal government, which refused to release ambulance and CFA response data. The Labor government immediately moved to release this information and is legislating to stop future governments from hiding it from the community.

Under existing structures, the FOI Commissioner handles complaints about government decisions and monitors legislative compliance. The Commissioner for Privacy and Data Protection provides guidance to the public sector in dealing with personal information and provides a recourse for complaints from the community.

The current Commissioner for Privacy and Data Protection, Mr David Watts, and the current Acting Freedom of Information Commissioner, Mr Michael Ison, will both continue in their roles until OVIC is established.

http://www.premier.vic.gov.au/improving-transparency-for-victorians/

Appointment of a new South Australian Equal Opportunity Commissioner

The South Australian Government has announced the appointment of Dr Niki Vincent as the new Equal Opportunity Commissioner. Dr Vincent has been appointed as Commissioner for a five-year term commencing on 26 May 2016. Ms Anne Burgess will cease her role as the Acting Commissioner on 27 May 2016.

Dr Vincent has been the Chief Executive Officer of the Leaders Institute of South Australia since 2004. She has held, and currently holds, a variety of community and board positions, including with:

- the Committee for Economic Development Australia (advisory board member);
- the South Australian Institute for Educational Leadership (advisory board member);
- Time for Kids (board member);
- Community Leadership Australia (board member).

Dr Vincent has also authored 16 publications in peer-reviewed academic journals and 14 presented and published conference papers.

http://www.agd.sa.gov.au/appointment-equal-opportunity-commissioner

OAIC establishes national privacy consumer forum

The Office of the Australian Information Commissioner (OAIC) has announced the establishment of a Consumer Privacy Network and is calling for organisations that represent consumer interests to join.

The Consumer Privacy Network will assist OAIC to understand further and respond to current privacy issues affecting consumers. The group will meet twice a year for in-person forums in addition to providing advice to OAIC throughout the year on key areas of work.

'Privacy continues to be an issue of growing concern for the community, particularly with the rapid increase in the range of technology and consumer goods that access and rely upon personal information. When consumers understand their rights, they can make informed choices about how their personal information is handled', says Mr Timothy Pilgrim, Acting Australian Information Commissioner.

'In the past year, the OAIC has made a significant difference to consumers' privacy with the launch of numerous education materials and the finalisation of over 1900 privacy complaints in 2014–15, as well as through its ongoing work with private sector organisations and Australian Government Agencies to help improve their privacy practices', Mr Pilgrim added.

'We want to work closely with consumer protection and advocacy groups that are at the frontline of consumer concerns. The establishment of the Consumer Privacy Network reinforces our commitment to engaging and consulting with consumer communities to best inform our program of work.'

'I encourage all interested parties to express their interest in joining the Consumer Privacy Network', said Mr Pilgrim.

Expressions of interest are open until 4 April 2016. For further information and to submit an application please visit www.oaic.gov.au.

https://www.oaic.gov.au/media-and-speeches/media-releases/oaic-establishes-national-privacy-consumer-forum

Recent cases

Procedural fairness and the Ombudsman

University of South Australia v Miller [2016] SADC 54 (3 June 2016) (Slattery J)

Dr Miller is a former employee of the University of South Australia (the University). On 13 January 2014, the University received a *Freedom of Information Act 1991* (SA) (FOI Act)

application from Dr Miller seeking access to a copy of a confidential email between Dr PH and Ms KW about an investigation of alleged misconduct of Professor Ha. Dr Miller made these allegations. The University denied Dr Miller access to the email, finding the release of the document would be contrary to the public interest to ensure efficient and effective conduct of University functions and to protect the personal information of an individual.

On 8 March 2014, Dr Miller asked the University to undertake an internal review of its decision. On 24 March 2014, the University informed Dr Miller that, upon undertaking its review, it determined to refuse access to the document. In doing so, the internal reviewer broadened the basis of refusal to cll 9 and 13 (documents containing confidential material) and 16 (documents concerning operations of agencies) of sch 1 of the FOI Act.

Dr Miller sought external review by the Acting Ombudsman (the Ombudsman). On 27 August 2014, the University received the provisional determination and reasons of the Ombudsman and a request for further submissions before making her final determination. The Ombudsman also received further submissions from Dr Miller, but the University did not see these and the Ombudsman did not give the University an opportunity to respond to them. The submissions provided further information about Dr Miller's complaint against Professor Ha, including an allegation that staff members could have been exposed to genetically modified human pathogens.

On 7 October 2014, the Ombudsman made a final determination ordering production of the email on the basis that it was not an exempt document. The Ombudsman's decision, among other things, summarised Dr Miller's further submissions. It also found that the contents of the email were well known within the University's School of Pharmacy and Medical Sciences and the industry.

The University sought permission from the District Court to appeal against the decision made by the Ombudsman that the email was not an exempt document under the FOI Act. Under s 42E of the *District Court Act 1991* (SA), the District Court may give permission only where the appeal is on a point of law and where there are cogent reasons to depart from the determination of the Ombudsman.

The University contended, among other things, that it had been denied procedural fairness because it had not seen and had not been invited to respond to the further submissions made by Dr Miller.

The Ombudsman contended that Dr Miller's submissions did not prompt the Ombudsman to change her determination. Therefore, as the outcomes of the provisional and final determination were the same, it did not consider it necessary to seek further submissions from the University in response to the submissions made by Dr Miller about the provisional determination.

The Court found that the Ombudsman had taken into account Dr Miller's further submissions, including incorrectly accepting that Professor Ha was an employee and that the email was publicly available and notorious within the relevant schools. The Court found that each of these matters raised by Dr Miller is both intuitively and intrinsically important because of its potentially damaging effect. While it is not the role of the Ombudsman to descend into the arena of the complaint made by Dr Miller, the opportunity to respond must be given to the University and those involved, particularly given the serious nature of some of the assertions, like the exposure of staff members to genetically modified pathogens.

The Court found that the actions of the Ombudsman in receiving the further material, considering it, acting upon it and failing to give the University any opportunity to address it before making the decision were an error, which vitiates the decision of the Ombudsman.

The Court then considered whether that error was sufficient to justify a grant of leave. The appropriate question to address is whether the Ombudsman's conclusion falls outside the range of conclusions that were reasonably open to her: that is a question of law (*Department of Premier and Cabinet v Colin Thomas* [2014] SADC 56, [11]).

The University contended that the Ombudsman's conclusion in relation to the question of public interest fell outside the range of conclusions that was reasonably open to her. First, the disclosure of the email would fail to protect the integrity of the University's internal investigation process and, second, there was no countervailing public interest in disclosing the email. The University should be able to investigate complaints sufficiently and effectively and that process would be compromised if the supply of information to the University investigators were somehow prejudiced.

However, while the Court agreed that the University's internal inquiry into Dr Miller's complaint was a private matter, and the Court found it difficult to conceive how the disclosure of documents received in the course of such an inquiry can be anything other than contrary to the public interest, this was not a matter that the Court needed to decide in this case.

Instead, the Court was satisfied that the Ombudsman's failure to afford the University procedural fairness had deprived the University of the possibility of a successful outcome, and the Court was not satisfied that a properly conducted consideration of the relevant matters could not have produced a different result. In the Court's opinion the University must succeed on that ground alone.

Is a friendship or an association enough to preclude judicial impartiality?

Waterhouse v Independent Commission Against Corruption (No 2) [2016] NSWCA 133 (Basten JA, Ward JA, Gleeson JA)

For more than two decades, Mr Waterhouse has claimed that he and his mother were unsuccessful in equity proceedings before Kearney J because other members of his family used their relationship with the former Premier, the late Neville Wran QC, to have the matter heard by Kearney J, who was allegedly appointed to ensure that the applicant was unsuccessful. In 1999, 2000 and 2012 Mr Waterhouse requested that the Independent Commission Against Corruption (ICAC) investigate allegations of corruption involving the Labor government and judiciary.

After conducting a preliminary investigation in 2000, ICAC declined to investigate further, similarly declining to investigate his subsequent requests. In 2014 Mr Waterhouse sought judicial review of ICAC's 2012 decision in the Supreme Court. Justice Garling found that ICAC had a statutory discretion to decline to investigate, which it had validly exercised in this case. Mr Waterhouse also sought to set aside an earlier leave application judgment of the Court (*Waterhouse v Independent Commission Against Corruption* [2015] NSWCA 300 (Basten JA, Emmett JA and Sackville AJA)) on the ground that the judges involved had conducted themselves in a manner giving rise to a reasonable apprehension of bias.

To support his contentions of bias, Mr Waterhouse made several assertions. First, he claimed that all of the judges of the Supreme Court of New South Wales were tainted by actual or apprehended bias and would be unable properly to hear his cases free from prejudgment. This was, he contended, by reason of association with colleagues, Adams and

Allsop JJ, who had acted as opposing counsel in the equity proceedings in which he had been unsuccessful, leading to the possibility that a fair-minded observer might think that such an association might preclude judicial impartiality.

Second, Mr Waterhouse specifically alleged that the trial judge, Garling J, did not disclose the fact that he was appointed by the Labor government to the Bench and was also the recipient of substantial and very lucrative Labor government briefs and commissions before his judicial appointment. The affidavit also asserted that Garling J had 'concealed' his 'close friendship with' Allsop and Adams JJ.

Third, in seeking to have the earlier leave application judgment of the Court, Mr Waterhouse suggested, among other things, that specific words spoken by the judges had been removed from the sound recording and consequently did not appear in the transcript of the hearing, giving rise to a reasonable apprehension of bias.

Fourth, with regard to Sackville AJA, Mr Waterhouse alleged that he pointed his finger at Mr Waterhouse during the proceedings and said 'You are warned'. However, Mr Waterhouse did not provide evidence concerning the context surrounding this statement.

The Court dismissed Mr Waterhouse's applications. In doing so, it rejected all allegations of bias.

The Court held that Mr Waterhouse had misconceived the relevance of the associations relied upon. The Court held that there are many institutional litigants who have numerous cases in the Supreme Court. It is common for individual judges to have acted for such litigants while at the Bar. They may or may not recuse themselves in relation to litigation involving former clients, depending upon the nature of their relationship and other relevant factors. The suggestion that colleagues who have not acted for such litigants are disqualified because of their friendship or association with those who have so acted has never been raised. The Court found that it might confidently be stated that there is no possibility that a fair-minded observer might think that such an association might lead a judge to fail to deal impartially with litigation involving that party.

Mr Waterhouse also failed to satisfy the Court of the truth of his allegations concerning tampering with the court's audio recording in the earlier leave application. The Court held that no judge would have had any reason to seek to have material deleted and the suggestion that that occurred is entirely fanciful. This conclusion was also consistent with the evidence of Ms Walsham (Reporting Services Branch) that no request to delete anything from the transcript was made and that, had it been made, she would have been advised of it.

The Court further held that, assuming that the words 'You are warned' had been spoken, it did not indicate an apprehension of bias on the part of the judges hearing his case.

When is it unreasonable not to endeavour to contact an applicant who fails to attend a hearing?

WZAVH v Minister for Immigration [2016] FCCA 1020 (6 May 2016) (Lecev J)

The applicant (a Pakistani citizen) applied for a protection visa with the assistance of Case for Refugees (Case). When the visa was refused, the applicant applied to the then Refugee Review Tribunal for a review of that decision. He thought Case was acting for him, but he failed formally to appoint Case as his representative. He also failed to update his address with the Tribunal when he moved. However, the Tribunal had his correct mobile phone number and email address.

Pursuant to ss 425 and 425A of the *Migration Act 1958* (Cth), the applicant was invited to a Tribunal hearing on 8 October 2014. This invitation was sent to a previous address and he did not receive it. When the applicant failed to appear, the Tribunal checked for any communication but no messages had been received. Although the Tribunal Hearing Record included the applicant's mobile phone number, the Tribunal made no attempt to contact the applicant and, pursuant to s 426A(1A) of the Act, refused the applicant a protection visa without taking any further steps to allow the applicant to appear.

When the applicant learned a decision had been made, he sought judicial review of the Tribunal's decision in the Federal Circuit Court.

The applicant contended, among other things, that the Tribunal acted unreasonably in exercising its discretion under s 426A(1A) to proceed without taking further steps to allow the applicant to appear. The applicant argued that the inclusion of his mobile phone number on the Tribunal Hearing Record, when the Tribunal had previously corresponded with him by post, supported his contention that it is general practice for the Tribunal to contact applicants by phone to confirm their hearing date and related matters.

The Minister contended that, in considering the exercise of the discretion under s 426A(2) of the Act to reschedule a hearing, the Tribunal is not required, where there is compliance with ss 425 and 425A of the Act, to make further enquiries if the applicant fails to attend the review hearing (*Minister for Immigration and Multicultural and Indigenous Affairs v SZFHC* [2006] FCAFC 73, [38]–[39] (Spender, French and Cowdroy JJ); compare *Kaur v Minister for Immigration and Border Protection* [2014] FCA 915 (*Kaur*) (Mortimer J)).

The Court held that, while the Tribunal is not under an obligation to afford 'every opportunity' to an applicant for review to present their case and it is open to a Tribunal to determine that 'enough is enough' (*Minister for Immigration and Citizenship v Li* [2013] HCA 18, [82] (Hayne, Kiefel and Bell JJ)), in this case, the Tribunal did nothing to afford the applicant a meaningful opportunity to present his case, save for sending him the invitation to the Tribunal hearing. While that action complied with the requirements of s 426A of the Act, the exercise of the discretion to proceed to make a decision without taking any further action to allow or enable the applicant to appear before it was, in the Court's view, in all the circumstances, unreasonable (*Kaur*).

The Court held that it is entirely reasonable (and common sense, as was pointed out in *AZAFB v Minister for Immigration and Border Protection* [2015] FCA 1383) for the Tribunal to endeavour to contact an applicant who has provided the relevant contact details, including a telephone number, especially where that telephone number appears on the Tribunal's Hearing Record. Dependent upon the circumstances, it may be reasonable for the Tribunal, having endeavoured to contact an applicant, to proceed under s 426A(1A) of the Act, but it is not reasonable to proceed without making that endeavour when an obvious means of contact is available.

The Court found that the fact that the Tribunal would endeavour to use the contact details provided (including a telephone number) before making a decision on the review under s 426A(1A) of the Act is implicit in the terms of the declaration signed by an applicant, which provides that if he or she changes their contact details and does not inform the Tribunal of the new address the Tribunal may proceed to make a decision about their case 'even if it cannot contact me'. It must be inferred from the terms of the declaration that the Tribunal will make endeavours to contact an applicant by means of the contact details provided and will not simply proceed to make a decision without endeavouring to contact the applicant, as occurred here. If the Tribunal had used the applicant's mobile number in an attempt to contact him and had failed, or had contacted him and he had elected not to proceed, it would

have been reasonable for the Tribunal to proceed in the manner that it did. However, in this case there was no such attempt by the Tribunal.

For these reasons, the Court considered that the Tribunal committed a jurisdictional error by acting unreasonably in exercising its discretion to proceed to make a decision without taking further steps that might have allowed the applicant to appear before it.

JUDUCIAL REVIEW IN STATE JURISDICTION

The Honourable Justice John Basten*

One day someone will study the history of the publication of textbooks dealing with Australian law. I suspect that there will be interesting inferences to be drawn from such a history: the publication of a first text on a particular area of law is likely to reflect a growing level of practical importance, which may, in some areas, actually be encouraged and directed by the new publication. When I studied administrative law at the University of Adelaide we had no Australian textbook.[1]

That position has long since changed, but when I moved to the New South Wales Court of Appeal in 2005 I think it not unfair to say that there was a relatively small group of practitioners who were comfortable with seeking judicial review in a state jurisdiction. That was not because there was anything particularly distinctive about state judicial review; rather, it was a reflection of the fact that most judicial review was undertaken in federal courts and, largely as a result of subject-matter specialisation, practitioners who were at home in federal courts rarely appeared in state courts. One consequence was that much of the development of administrative law which occurred from about 1990 was unfamiliar territory both for those appearing and those dealing with cases in a state Supreme Court.

Interestingly, an important exception to that proposition was to be found in an earlier generation who knew their judicial review principles not from cases involving the *Migration Act 1958* (Cth) or social security but from cases involving industrial relations and, to an extent, tax. Former judge of the New South Wales Court of Appeal the Hon Ken Handley was an example of a judge who brought to the New South Wales state jurisdiction a deep knowledge of administrative law principles established in industrial and tax cases.

In any event, that lesson has largely been appreciated and absorbed. For example, there is now a far greater appreciation of the extent to which principles of administrative law have been developed in cases involving refugee applications under the *Migration Act 1958* (Cth) and the need to stay abreast of that jurisprudence.[2]

Underlying this history is an institutional element of some importance. As we know, an important trigger for the development of Australian administrative law was the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). New South Wales did not follow the Commonwealth example and still does not have equivalent legislation. However, the existence of that seminal legislation provided another development of administrative law which was seen to be irrelevant in state jurisdiction.

Since federation, there has, of course, been the constitutionally entrenched jurisdiction providing judicial review of actions of Commonwealth officers, which is found in s 75(v) of the *Constitution*. Case law dealing with the constitutionally entrenched jurisdiction has always been relevant in state courts, subject to its particular significance as a constitutional provision which is, perhaps, diminished by the constitutional protection now accorded to the

* *Justice Basten is a Judge of Appeal in the New South Wales Court of Appeal.* *This article is an edited version of a paper presented at the Australian Institute of Administrative Law (NSW Chapter) Seminar of 2 March 2016.*

state supervisory jurisdiction.[3] Section 75(v) was a bare conferral of jurisdiction without a statement of procedural elements, grounds of review or any of the other trappings of a statute like the ADJR Act. The content of the constitutional review had to be derived from the general law. The same is true in a state jurisdiction.

Against that background, I propose to address two issues, both topical but both of which have, to a degree, slipped under the radar. They are, first, the exercise of the supervisory jurisdiction with respect to criminal proceedings and, secondly, problems in characterising grounds of review. The term 'supervisory jurisdiction' is preferable to 'judicial review jurisdiction' because the latter is often thought of as referring to judicial review of administrative action. By contrast, the supervisory jurisdiction extends to the control of excess or want of jurisdiction on the part of any court or tribunal, judicial or administrative or something in between.

Criminal proceedings and the *Supreme Court Act 1970* (NSW) s 69

Let me turn, then, to what is widely treated as the source of the New South Wales Supreme Court's supervisory jurisdiction — namely, s 69 of the *Supreme Court Act 1970* (NSW) (Supreme Court Act):[4]

> **69 Proceedings in lieu of writs**
>
> (1) Where formerly:
>
> (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
>
> …
>
> then, after the commencement of this Act:
>
> (c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
>
> (d) shall not issue any such writ, and
>
> (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
>
> (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.
>
> (2) Subject to the rules, this section does not apply to:
>
> (a) the writ of habeas corpus ad subjiciendum,
>
> ….
>
> (3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.
>
> (4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

While it is commonplace and not, I hope, inaccurate to refer to proceedings 'brought under s 69', s 69 neither confers jurisdiction on the New South Wales Supreme Court nor constitutes a statement of pre-existing jurisdiction. It is, in truth, no more than a procedural liberalisation, not unimportant in that regard but, importantly, not the source of jurisdiction. That appears explicitly from paras (c)–(f) of s 69(1). If we wish to find a statutory source of the Court's supervisory jurisdiction, we will find it in ss 22 and 23 of the Supreme Court Act.

Part 2 The Court

Division 1 Continuance and jurisdiction

22 Continuance

The Supreme Court of New South Wales as formerly established as the superior court of record in New South Wales is hereby continued.

23 Jurisdiction generally

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

Section 23 is a quasi-constitutional provision: it reflects the institutional arrangements for the exercise of judicial power in the State and the original conferral of jurisdiction by the Charter of Justice of 1823. However, the jurisdiction is not at large or at the whim of the individual judge. It is to be exercised in accordance with statute and established general law principles.

This background has practical significance in 2016, more than 40 years after the commencement of the Supreme Court Act, when considering the operation of s 17 of the Supreme Court Act. As enacted in 1970, that section relevantly provided:

Part 1 Preliminary

…

Division 4 Savings

17 Criminal proceedings

(1) Except as provided in this section this Act and the rules do not apply to any of the proceedings in the Court which are specified in the Third Schedule to this Act.

…

(3) Subsection one of this section does not affect the operation of sections one, two, five, six, seven and seventy two of this Act.

(4) This Act and the rules apply to and with respect to —

(a) proceedings in the Court under the Supreme *Court (Summary Jurisdiction) Act, 1967*, in respect of which the jurisdiction of the Court under that Act may be exercised by the Court of Appeal; and

(b) any judgment or order of the Court of Appeal given or made in the exercise of that jurisdiction.

Critical to the operation of this provision is the Third Schedule, which, as enacted, provided:

THIRD SCHEDULE

EXCLUDED CRIMINAL PROCEEDINGS

(a) Proceedings in the Court for the prosecution of offenders on indictment ('indictment' including any information presented or filed as provided by law for the prosecution of offenders) including the sentencing or otherwise dealing with persons convicted;

…

(d) proceedings in the Court under the *Criminal Appeal Act of 1912*;

…

(i) proceedings in the Court for the grant of a certificate under the *Costs in Criminal Cases Act, 1967*;

….

Of these, para (a) is the basic element for present purposes; paras (d) and (i) are relevant to particular cases discussed below. It is important to note a particular feature of s 17 and a related feature of the Third Schedule as originally enacted. Section 17 disapplied the Supreme Court Act and the Supreme Court Rules, with certain exceptions specified in s 17(3) which are presently relevant only in a negative sense: they did not exclude ss 22, 23 or 69, or s 101 (the source of the right to appeal from a judgment or order made in a Division of the Court). The critical element in para (a) of the Third Schedule was the reference to proceedings in the Court — 'Court' being by definition the Supreme Court.

Thus, in 1986, in *Shepherd v Bowen*, Mahoney JA said:

> the *Supreme Court Act*, as originally enacted, was intended to have application generally to the civil jurisdiction of the Supreme Court. However, limitations were imposed upon the generality of its application in respect of its criminal jurisdiction.[5]

In 1989 both s 17 and the Third Schedule were amended to extend in particular ways to criminal proceedings on indictment in the District Court. Before noting the effect of those changes, it is convenient to refer to two cases decided under the original provisions.

The first was *Richards v Smyth*.[6] The case involved a challenge to the decision of a District Court judge to refuse to allow the accused to withdraw a plea of guilty with respect to certain drug offences. The relief sought appears to have been limited to a declaration that the exercise of discretion miscarried. The Court was satisfied that the claim to relief was made good but noted two objections raised by the Attorney-General to its exercise of jurisdiction. The narrow ground attempted to invoke s 17; a broader ground was also relied upon, which merely invoked the 'structure' of the Supreme Court Act when read with the *Criminal Appeal Act 1912* (NSW). The Court had little difficulty in rejecting the submission based on s 17 for the reason already identified — namely, that the reference to the 'Court' was a reference to proceedings in the *Supreme* Court. So far as the broader ground was concerned, the Court rejected the proposition that the statutory scheme for dealing with criminal appeals precluded any jurisdiction of the Supreme Court to deal with such matters.[7]

More detailed consideration was given to the scope and effect of s 17 in the case already referred to — namely, *Shepherd v Bowen*.

Shepherd v Bowen concerned an indictment laid in the Criminal Division of the Supreme Court which resulted in an application for a stay until the accused had had the benefit of a committal proceeding. Lusher J had rejected the application and the applicant sought leave to appeal to the Court of Appeal pursuant to s 101 of the Supreme Court Act. Section 101 provides a right of appeal from any judgment or order of the Court in a Division. The exclusion in s 17, covering 'proceedings in the Court for the prosecution of offenders', was held to encompass all aspects of such proceedings, with the result that there was no appeal pursuant to s 101 from an interlocutory order. There was no reliance on the supervisory jurisdiction, probably because of the generally held view that it was not possible to obtain an order by way of certiorari directed to the decision of a judge of a superior court of record and, perhaps more pragmatically, that orders in the nature of prohibition would not be made in circumstances where a judge in the Division had refused a stay, from which there was no right of appeal.

The result of the case was an inevitable consequence of the fact that appeals are a function of statute and that the Criminal Appeal Act, which was the intended source of rights of appeal with respect to criminal proceedings, did not then include a right of appeal with respect to interlocutory judgments and orders.

There was passing reference in the reasons to ss 22 and 23 but as the source of the Court's criminal, rather than supervisory, jurisdiction. Thus, Mahoney JA noted that the general jurisdiction of the Court to deal with both civil and criminal proceedings was conferred by the Charter of Justice of 1823. He continued:

> As the result of the relevant legislation the Supreme Court, having all the jurisdiction of the King's Bench, Common Pleas and Exchequer Courts in England, had jurisdiction in the trial of relevant indictable offences. That jurisdiction was preserved by the *Supreme Court Act*: see, eg, ss 22 and 23.[8]

The possibility that s 17 might, if broadly construed, disapply s 23 in relation to criminal proceedings on indictment was not considered.

In 1988 s 17 was amended and two additional paragraphs were inserted in the Third Schedule to deal with appeals from criminal proceedings brought in the District Court.[9] The effect of these amendments placed those provisions in the following form:

> **17 Criminal proceedings**
>
> (1) Except as provided in this section this Act and the rules do not apply to any of the proceedings in the Court which are specified in the Third Schedule, and no claim for relief lies to the Court against an interlocutory judgment or order given or made in proceedings referred to in paragraph (a1) or (a2) of that Schedule.
>
> **Third Schedule Criminal proceedings**
>
> (a) Proceedings in the Court for the prosecution of offenders on indictment (***indictment*** including any information presented or filed as provided by law for the prosecution of offenders) including the sentencing or otherwise dealing with persons convicted,
>
> (a1) proceedings (including committal proceedings) for the prosecution of offenders on indictment (***indictment*** including any information presented or filed as provided by law for the prosecution of offenders) in the Court or in the District Court,

(a2) proceedings (whether in the Court or the District Court) under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* … [10]

The new second limb of s 17(1) is a true privative clause: it prohibits any claim for relief being brought in the Court against an interlocutory judgment or order given or made in serious criminal proceedings. The term 'claim for relief' is defined in s 19(1) in terms broad enough to cover any claim 'justiciable in the Court'.[11] In *El-Zayet v The Queen*[12] (*El-Zayet*), to which further reference will be made shortly, the joint reasons of the President and Emmett J referred to s 17 as effecting 'two preclusions'.[13] I prefer to avoid a label which suggests that the two limbs have a similar effect. The first limb of s 17(1) is not so much a preclusion as a limitation on the operation of the Act and rules made under it; the second limb is a privative clause. The difference in structure is important: the 'proceedings' referred to in the first limb are the criminal proceedings; the claims for relief in the second limb are not the criminal proceedings but the appeal or judicial review proceedings in the Court of Appeal.

The drafting of the amendments is curious in a number of respects. First, the references to the Supreme Court in new paras (a1) and (a2) of the Third Schedule add nothing to the scope of para (a) and therefore do not affect the scope of the first limb of s 17(1), which itself remained unamended. The first limb did not disapply the Act with respect to criminal proceedings in the District Court. Because it only applied to proceedings in the Supreme Court, the extensions to the Third Schedule were only relevant to the second limb.

Secondly, although paras (a1) and (a2) applied to serious criminal proceedings generally, the second limb of s 17(1) was limited to interlocutory judgments and orders.

The question then raised was whether s 17(1) immunised criminal proceedings from judicial review in the supervisory jurisdiction of the Court — a question which raises issues of statutory interpretation and constitutionality. The question of statutory construction, which must, of course, be informed by the answer to the constitutional question, is how to reconcile s 17 on the one hand and ss 23 and 69 on the other. The constitutional question is: if s 17 is effective to limit the supervisory jurisdiction of the Court, how does it sit with the constitutionally protected jurisdiction of the Supreme Court identified in *Kirk v Industrial Court of New South Wales*[14] (*Kirk*)?

The effect of amended s 17

The statutory construction issue

Let me put the constitutional question to one side, if only because the principle accepted in *Kirk* had not been identified when the amendments were passed. The question of statutory construction may start from the point that the procedural reforms in s 69 are in fact excluded from operation in the criminal jurisdiction by s 17. Because s 69 does not confer jurisdiction, the result is that we may be thrown back on the old forms of prerogative writs and we may lose the ability to search for error of law in the reasons of the court or tribunal except in the very limited circumstances where, under the general law, reasons formed part of the record.[15] That would be unfortunate, but it would not raise a constitutional issue.

On that approach, the true conflict is between s 17 and s 23.[16] Here it is helpful to have regard to a matter often downplayed in exercises in statutory construction — namely, the structure of the statute. First, s 17 is a provision to be found in pt 1 of the Supreme Court Act, headed 'Preliminary', and div 4, in which s 17 appears, is headed 'Savings'. In other words, its primary purpose appears to be to maintain the scheme for criminal appeals to be found in the *Criminal Appeal Act 1912* (NSW) together with the institutional structure

created by that Act — namely, the creation of, and conferral of appellate jurisdiction on, the Court of Criminal Appeal.

By contrast, s 23 appears in pt 2, headed 'The Court', and div 1, headed 'Continuance and jurisdiction'. Section 22 provides that the Supreme Court 'is hereby continued'. Section 23 provides that the Court shall have 'all jurisdiction which may be necessary for the administration of justice in New South Wales'. Clearly these provisions are of fundamental importance: without them the Act and rules would have no institutional operation.

The way in which the Court has addressed its judicial review function in relation to criminal proceedings is revealed in three cases: *Adler v District Court of New South Wales*[17] (*Adler*) in 1990, *Chow v Director of Public Prosecutions*[18] (*Chow*) in 1992 and *El-Zayet*[19] in 2014.

Adler was decided shortly after the amendments commenced.[20] The prosecution of Mr Adler was brought in the District Court. Of the three members of the Court, Kirby ACJ concluded first that the summons should be dismissed without dealing with the question of jurisdiction.[21] However, noting that an order refusing relief involved an assertion of jurisdiction, he considered it appropriate to deal with the issue. Mahoney JA dealt with the issue in his separate reasons. Priestley JA agreed on this issue with both the other members of the Court.[22]

Justice Kirby noted that the origins of the supervisory jurisdiction of the Court were derived through the Charter of Justice and the common law. He said that it would 'require very clear legislative language to oust the jurisdiction of the Court of Appeal from exercising such a beneficial and important function'.[23] He then said that no such intention was revealed by s 17(1) without further seeking to construe the section. He also identified, without deciding, a 'subsidiary argument' which was that the proceedings referred to in the Third Schedule dealt with the prosecution of offenders on indictment filed 'as provided by law'. The submission was that this language did not prevent a challenge on the basis that the indictment was a nullity — a submission which anticipated the approach of the High Court in *Plaintiff S157/2002 v Commonwealth.*[24]

Justice Mahoney also commenced with the proposition that the Supreme Court Act 'does not create or provide the basis of the jurisdiction of the Supreme Court … to grant prerogative relief'.[25] As the first limb of s 17(1), disapplying the Act, had no effect on proceedings in the District Court, the relevance of this proposition was unclear.

However, Mahoney JA then asked, explicitly referring to the first limb, whether a proceeding seeking prerogative relief was within the words 'any of the proceedings in the Court which are specified in the Third Schedule'.[26] This seems to ask the wrong question: the Third Schedule specifies criminal proceedings and, relevantly for the first limb, criminal proceedings in the Supreme Court, not proceedings in the District Court. The form of the amendments, adding a functionally different second limb to s 17(1), was confusing. The proceedings specified in the Third Schedule now extend beyond proceedings in the Supreme Court to include proceedings in the District Court. However, to say that provisions in the Supreme Court Act do not apply to 'proceedings in the Court [that is, the Supreme Court] specified in the Third Schedule' is only meaningful in circumstances where the Third Schedule is (as it was) limited to proceedings in the Supreme Court. The amendments introducing reference to proceedings in the District Court have led to confusion.

The second limb of s 17 is also problematic but for quite different reasons. To say that 'no claim for relief' lies to the Court against an interlocutory judgment in the Court or in the District Court was intended to limit relief to the process available for interlocutory appeals, which was introduced by the contemporaneous inclusion of s 5F in the Criminal Appeal Act.

In *Adler*, Kirby ACJ acknowledged that the common purpose of s 17 and the amendments to the Third Schedule, read with s 5F of the Criminal Appeal Act, 'was to direct the flow of ordinary proceedings of that character from the Court of Appeal to the Court of Criminal Appeal'.[27] In rejecting the proposition that s 17(1) had that effect, he drew no explicit distinction between the two limbs of s 17(1), but the focus must have been on the second limb. The underlying justification relied on the absence of any express prohibition on a challenge to the *jurisdiction* of the District Court. That justification relied on the limitation in the privative effect of s 17(1) (second limb) to claims for relief against 'interlocutory judgments and orders' and the fact that it did not in terms extend to the proceedings in the District Court generally, as did the amendments to the Third Schedule. In fact, and understandably, Mr Adler did first seek interlocutory relief in the District Court. However, Kirby ACJ held that the prohibition in the second limb could have been avoided if the applicant had come straight to the Court of Appeal rather than first seeking a permanent stay from the District Court judge, with the result that s 5F could provide an avenue for appeal. The fact that the Court of Appeal had jurisdiction made the question one of discretion as to whether to grant relief, which it did. The beneficial effect of that construction, which allows (and indeed may encourage) accused persons to bypass the appellate process, is not self-evident.

The applicant in *Chow* had reached a plea bargain with the Director, pursuant to which he entered a plea of guilty in the District Court to a lesser offence. He later sought, unsuccessfully, to withdraw his plea when it appeared that the sentencing judge was firmly of the view that the facts supported the more serious offence with which he was originally charged. A majority of the Court (Kirby P and Sheller JA) thought the judge was disqualified for a reasonable apprehension of bias from proceeding with the sentencing. In dealing with the Director's submission that s 17(1) precluded a grant of relief, Kirby P applied the analysis he had noted but not adopted in *Adler*:

> The proceedings brought against the claimant are for his prosecution as an 'offender on indictment in the District Court'. However, it is well-established that the purpose of this exclusion is to protect orders which are made within jurisdiction. It is not to exclude the supervisory jurisdiction of this Court, as the final appellate court of the State, to ensure against the making of orders which are outside jurisdiction.
> …
> … The 'interlocutory judgment or order' referred to by Parliament is thus an interlocutory judgment or order made within jurisdiction. It is not to be supposed that Parliament would intend to give the cloak of immunity from judicial review to an interlocutory judgment or order made outside jurisdiction of the District Court judge making such order. This Court has jurisdiction to prevent such excesses and will do so, where necessary, by declaration.[28]

Sheller JA, having also found prejudgment, stated:

> For reasons which are set out in *Adler* …, there is, in my opinion, nothing in s 17 of the *Supreme Court Act* which inhibits the exercise by this Court of its supervisory jurisdiction in this case. This is not a claim for relief against a judgment or order given by the District Court in the sentencing proceedings but a claim directed to preventing a particular judge sitting or continuing to sit to hear a particular matter. In terms of the power of this Court it matters not whether his Honour had made an interlocutory order. The sort of remedy here invoked is not addressed by s 17.[29]

Cripps JA dissented as to the finding of prejudgment but observed with respect to jurisdiction:

> My present inclination is that s 5F of the *Criminal Appeal Act* would allow the claimant to appeal to the Court of Criminal Appeal (with leave) because the decision, if it were made, not to allow the claimant to change his plea would be relevantly an interlocutory order. It would also seem to me that such an order, at least in the absence of any denial of natural justice, would be an order within the prohibition of s 17 of the *Supreme Court Act*. But these are matters for another day.[30]

The remark with respect to s 17(1) is ambiguous: prejudgment would not be understood to be a denial of natural justice.

Applications continued to be made to the Court of Appeal with respect to proceedings in the District Court; the complications in the construction of the privative provision have largely been sidestepped.[31]

The issue arose in a slightly different form in *El-Zayet*. The case involved a purported appeal from a decision of Price J, sitting in the Supreme Court, dealing with an interlocutory application in proceedings for a certificate under the *Costs in Criminal Cases Act 1967* (NSW), which was a form of proceeding covered by the Third Schedule.[32] Although an appeal at least would have been excluded by the first limb of s 17(1), the Court dealt with both limbs. It accepted that the right of appeal under s 101 was excluded and that the exclusion included purported appeals from interlocutory orders.[33] Perhaps unfortunately, in a joint judgment the President and Emmett JA reiterated the confusion in *Adler*, saying that 'the reference in s 17 to "proceedings in the Court which are specified in the Third Schedule" does not include a proceeding for prerogative relief'.[34] In the end, the scope of the second limb was not resolved and there was no discussion as to whether prerogative relief could lie against a judge of the Supreme Court.

The current state of the law is thus that the second limb of s 17(1) does not preclude review of the District Court for jurisdictional error, such as a reasonable apprehension of bias, whether or not the District Court has ruled on the issue. Where the second limb of s 17(1) operates — that is, in relation to interlocutory judgments of the District Court — it may be accepted on ordinary principles that it is effective to prevent review for error of law not constituting jurisdictional error.[35] Whether the supervisory jurisdiction could extend to orders made in the District Court to which s 5F of the Criminal Appeal Act does not apply has not been addressed; nor has the separate question as to whether there is any scope for the operation of the supervisory jurisdiction with respect to decisions of Supreme Court judges when exercising judicial power.[36]

As a practical matter, it is likely that the Court of Appeal will insist on the dissatisfied accused in the District Court exhausting his or her appeal rights under the Criminal Appeal Act before contemplating a grant of relief in the supervisory jurisdiction. All of this means that the constitutional issues will largely fall away.

The constitutional issue

Let me turn briefly to the constitutional issue. As we know, *Kirk* provides that no legislation enacted by the New South Wales Parliament can curtail the 'essential' jurisdiction of the Supreme Court as the superior court of record in the state. That jurisdiction includes the Court's 'supervisory jurisdiction'. Clearly, s 17 should be construed in a manner which does not derogate from the traditional functions of the New South Wales Supreme Court as reflected in ss 22 and 23.

As a practical matter, this raises two specific questions. The first is that, although *Kirk* is expressed at a level of generality which appears to demand that any administrative or judicial decision can be reviewed by a state Supreme Court, it is necessary to insert the word 'ultimately'. *Kirk* provides no basis for limiting the power of the Parliament to specify exclusive mechanisms for review of decisions of inferior courts, tribunals and administrative officers so long as the question of power can ultimately be resolved, if necessary, by the Supreme Court. If that is right, it follows that a strong privative clause can prevent one party from going directly to the Supreme Court so long as the decision of another court or tribunal can ultimately be reviewed by the Supreme Court for jurisdictional error. For this purpose,

the Supreme Court includes the Court of Criminal Appeal as the institution having equivalent functions to deal with criminal matters dealt with by way of indictment.

There is another practical issue which needs to be borne in mind in seeking to review the decisions of lower tribunals or courts. That is the effect of a statutory appeal. Again, there is no prohibition in *Kirk* upon the supervisory jurisdiction being exercised by way of a statutory appeal, which will often provide a broader basis for review than at least the unreformed supervisory jurisdiction. That means that the traditional step of refusing judicial review until rights of statutory appeal have been exhausted remains an available course for a Supreme Court to take, regardless of *Kirk*. However, it is important to recall that the decision of an intermediate court may supersede that of the lower court. In relation to appeals from, for example, the New South Wales Local Court to the New South Wales District Court (then Quarter Sessions), this principle was articulated in *Wishart v Fraser*.[37]

Characterising grounds

Let me now move to my second topic and descend to a level of procedural practicality.

There is nothing in *Kirk* which prevents the establishment of uniform rules to allow for the expeditious and orderly conduct of judicial review proceedings; nor is there any constitutional difficulty with the imposition of time limits so long as there is a residual discretion in the court to extend time where necessary.[38]

Regulation has now been given effect in pt 59 of the *Uniform Civil Procedure Rules 2005* (NSW) together with particular rules to be found in pt 51 dealing with proceedings in the supervisory jurisdiction of the New South Wales Court of Appeal.[39]

Rather, I will confine my comments to the concept of grounds, identified with 'specificity' referred to in r 59.4(c), which causes some difficulty in practice and is by no means a self-evidently useful concept at the level of principle.

In one sense, the general law knew only two grounds — namely, jurisdictional error and error of law on the face of the record. Neither of those phrases is helpful: jurisdictional error is sometimes referred to (especially in the UK) as a form of ultra vires, meaning no more and no less than that, in some respect, the decision was beyond power. Error of law on the face of the record was a singularly narrow concept until the record was extended by s 69 to include the reasons for the decision. That reform went a considerable distance towards equating judicial review for error of law with a statutory appeal on a question of law. That is especially so in an environment where the obligation to give reasons has expanded rapidly to cover most forms of important decision-making.

These broad concepts were first broken down in Australia by the list of grounds provided by s 5 of the ADJR Act. This proved of considerable assistance to those seeking to articulate a basis for review of a particular decision. Nevertheless, as a form of pleading, to complain that the decision maker took into account irrelevant considerations was often of little assistance. What was necessary was to articulate those considerations and provide a basis for contending that they lay beyond the statutory remit of the decision maker.

In the modern context, it is likely that, with the possible exclusion of procedural fairness and unreasonableness, the limits of power will be defined by statute. That is not to say that they will be defined with precision. The broad nature of the power may be defined with some degree of precision in terms of the powers or orders available to the decision maker, but the factors which may properly be taken into account are likely to be implied from the subject matter, scope and purpose of the legislation. This is often a tricky exercise.

Let me give two examples, both relating to relevant and irrelevant considerations. We can start with a tripartite characterisation: thus, factors may be mandatory, permissible or prohibited.[40] There is value in the tripartite characterisation, because immediately one is within the broad range of permissible considerations, which one usually is; it is necessary to find some other ground, such as manifest unreasonableness, to identify an error of law. But, if the limits of power are not clearly defined by statute, the distinction between the permissible and impermissible simply involves reliance upon a concept of rationality. This may be illustrated by a pre ADJR Act case, *Murphyores Inc Pty Ltd v Commonwealth*.[41] Thus, Stephen J posed for himself the question: 'has the maker of the decision duly exercised his decision-making power or, on the contrary, is his decision vitiated by the nature of the considerations, extraneous to the power conferred, to which he has had regard in arriving at that decision?'[42]

The answer, he continued, will depend primarily upon the legislation which confers the power. Stephen J continued:

> It will be seldom, if ever, that the extent of the power cannot be seen to exclude from consideration by a decision-maker all corrupt or entirely personal and whimsical considerations, considerations which are unconnected with proper governmental administration; his decision will not be a bona fide one since these considerations will, on their face, not be such as the legislation permits him to have regard to.[43]

One can find in that statement references to good faith, improper purpose, manifest unreasonableness and irrelevant considerations. The outcome of a case is unlikely to turn on the precise characterisation of the ground. It is the focus on the limits of the statutory power which will be critical.

My second example focuses upon the use being made of a consideration. In *Duffy v Da Rin*, I sought to illustrate this point in the following terms:

> The significance of these omissions is that 'considerations' have different qualities which are not recognised by a simple classification as permissible, mandatory or prohibited. To identify a lion and a deer as wild animals and place them together in a zoo is unlikely to provide a satisfactory outcome (at least for the deer). Two considerations may each be relevant, but may pull in opposite directions. A particular consideration may be relevant to one aspect of the reasoning process, but not to other aspects. For example, in sentencing an offender a prior criminal record is relevant, but may only be used to diminish a plea for leniency, not to increase an otherwise appropriate sentence for the particular offence. Thus a consideration which is relevant for a specific purpose or in respect of a particular issue only may be impermissibly used for a different purpose or with respect to another issue. Such misuse could constitute an error of law.[44]

Conclusion

Much of the discussion of judicial review in Australia focuses upon federal jurisdiction. That may have led to a misapprehension that there are no particular issues arising specifically within a state jurisdiction. The role of the New South Wales Court of Appeal in reviewing decisions in criminal jurisdiction is, I think, one which is worthy of careful attention.

On the other hand, absent the shackles (perhaps imposed only by ourselves) flowing from s 5 of the ADJR Act, we have the opportunity to do better in State jurisdiction with respect to the grounds of judicial review, because we are free to focus on where precisely the limits of power were exceeded without apparently pre-empting the discussion by overly taxonomic characterisation.

Endnotes

1 There was such a text, but I do not recall it being prescribed. Professor W Friedmann, then at the University of Melbourne, had published a modest 112-page text in 1950, *Principles of Australian Administrative Law* (Melbourne University Press). The second edition, co-authored with Professor David Benjafield and published in 1962, was more than double the size. The third edition, co-authored by Professor Benjafield and Professor Harry Whitmore, published in 1966, was over 350 pages.
2 Curiously, tax cases appear still to be a genre set apart: see Geoffrey Kennett and David Thomas, 'Constitutional and Administrative Law Aspects of Tax' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) ch 12.
3 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1.
4 The less used power to make an order that a person fulfil a duty — a form of statutory mandamus identified in s 65 — may be put to one side.
5 (1986) 4 NSWLR 475, 478 (Glass and Priestley JJA agreeing).
6 Unreported, NSWCA, Kirby P, Hope and Priestley JJA, 24 December 1985.
7 Typescript judgment, 14–16.
8 *Shepherd v Bowen* (1986) 4 NSWLR 475, 478D–E.
9 *Statute Law (Miscellaneous Provisions) Act 1988* (NSW) sch 18(1) and (4).
10 Paragraph (a2) is given in its present form, referring to the current provisions dealing with proceedings on a plea of guilty.
11 *Supreme Court Act 1970* (NSW) s 19(1)(d).
12 (2014) 88 NSWLR 556; [2014] NSWCCA 298.
13 Ibid [51].
14 (2010) 239 CLR 531. See n 3 above.
15 See *Craig v South Australia* (1995) 184 CLR 163 at 181–3; [1995] HCA 58. This effect of a privative clause is recognised in s 69(5).
16 The issue was addressed by Beech-Jones J in *Bimson, Roads & Maritime Services v Damorange Pty Ltd (No 2)* [2014] NSWSC 827; and see authorities discussed there.
17 (1990) 19 NSWLR 317.
18 (1992) 28 NSWLR 593.
19 See n 12 above; *El-Zayet v Director of Public Prosecutions* [2014] NSWCA 422.
20 Although the Act was not assented to until 28 June 1988, the amendments to sch 18(1) and (4) were taken to have commenced on 18 December 1987 (s 2(3)), being the date of commencement of s 5F of the *Criminal Appeal Act 1912* (NSW), allowing appeals from interlocutory judgments.
21 *Adler v District Court of New South Wales* (1990) 19 NSWLR 317, 332G.
22 Ibid 345B.
23 *Adler v District Court of New South Wales* (1990) 19 NSWLR 317, 334 (Kirby ACJ).
24 Ibid 335G; *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476.
25 *Adler v District Court of New South Wales* (1990) 19 NSWLR 317, 338G.
26 Ibid 339 (Mahoney JA).
27 Ibid 334 (Kirby ACJ).
28 *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593, 610D, F.
29 Ibid 618E.
30 Ibid 623.
31 See, eg, *Gargan v Director of Public Prosecutions (NSW)* [2004] NSWSC 10; 144 A Crim R 296, [70]; *BUSB v Director-General of Security* [2011] NSWCA 49, [2] (Spigelman CJ, Allsop P and Hodgson JA, McClellan CJ at CL and Johnson J agreeing); *WO v Director of Public Prosecutions (NSW)* [2009] NSWCA 370; *Jenkins v Director of Public Prosecutions* [2013] NSWCA 406, [18]–[23] (Gleeson JA, Hoeben JA agreeing); *JW v District Court of New South Wales* [2016] NSWCA 22 (Simpson JA).
32 See also *Palfrey v South Penrith Sand and Soil Pty Ltd* [2013] NSWCA 99 (Barrett JA).
33 *El-Zayet v The Queen* (2014) 88 NSWLR 556; [2014] NSWCCA 298, [54]–[57].
34 Ibid [52], [60] and [61].
35 See, by analogy, the case law on s 176 of the District Court Act, applying to appeals from the Local Court in summary criminal jurisdiction.
36 Compare, in respect of non-judicial power, *Sinkovich v Attorney General of New South Wales* (2013) 85 NSWLR 783; [2013] NSWCA 383, [66]–[72].
37 (1941) 64 CLR 470; [1941] HCA 8.
38 See *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651.
39 *Uniform Civil Procedure Rules 2005* (NSW) r 51.45.
40 See generally Richard Lancaster and Stephen Free, 'The Relevancy Grounds in Environmental and Administrative Law' in Williams, above n 2, ch 13.
41 (1975–1976) 136 CLR 1.
42 Ibid 12.
43 Ibid.
44 *Duffy v Da Rin* [2014] NSWCA 270, [53].

FROM THE MAGNA CARTA TO BENTHAM TO MODERN AUSTRALIAN JUDICIAL REVIEW

Grant Hooper*

On the 800th anniversary of the Magna Carta it is an opportune time to sit back and consider how history has shaped and still continues to shape Australian administrative law or, more specifically for the purpose of this paper, judicial review of government decision-making. It is perhaps an even more opportune time to undertake this task given that the war on terror has seen no less than the Prime Minister ask whether we as a society have the correct balance between governmental power and individual rights.[1]

It is somewhat trite to observe that one of the primary reasons our government makes laws and enforces them is to govern the behaviour of individuals with a view to the protection or mutual betterment of our society. To achieve this aim it is equally trite to observe that laws must be practical — practical in that they must address, either directly or indirectly, the behaviour in question and practical in the sense that our government must be able to implement and enforce the laws. Yet, as a civilised society, there is a recognition that, by giving our government the ability to make, implement and enforce laws, we are imbuing it with immense power — a power that must be overseen to ensure it is exercised in the right spirit so that, even in times of heightened conflict, individuals do not find themselves subjected to arbitrary or unfair administrative decision-making. This spirit, with symbolic roots winding back to the Magna Carta, forms the 'foundation block' of the powerful but nebulous rule of law.

The interplay or balance between a need to allow the government to govern — practicality — and the notion that law contains a substantive content to protect the individual from arbitrary government decision-making — its spirituality — forms the backdrop to this paper. To illustrate that this search for balance is not new and despite 800 years is not resolved, this paper starts with the Magna Carta but proceeds to consider influential historical figures chosen for the impact they have had, and continue to have, on the modern understanding of what limits can and should be imposed on government and how these limits may be legitimately applied by the judiciary. The historical figures chosen are Lord Coke, Blackstone, Dicey, Bentham and Austin. These figures in particular highlight what might be described as some of the original and core underlying values that shape the judicial response to Parliament's recent efforts to increase governmental power. In this regard, it will be contended that, while modern judicial review is essentially practical, there persists a touch of spirituality and without understanding this it is not possible to appreciate the balance that the High Court so often seeks to achieve between increased governmental power and protecting individuals from arbitrary government decision-making. This 'balance' will be explored by examining some examples of the modern form of the Magna Carta's 'law of the land' or 'due process' — natural justice. More specifically, it will touch upon three well-known

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modern developments:[2] the rebirth, defence, reformulation and rebadging of natural justice by the judiciary; the constitutionalisation of judicial review; and the adoption of a broader 'purposive' approach to statutory interpretation generally.

The common law: Magna Carta to Bentham

Magna Carta

Eight hundred years ago, rebelling English barons coerced King John I into signing the Magna Carta, bringing into existence the document that has been proclaimed as the oldest of 'liberty documents'[3] and 'the first principle of western freedom under law'.[4] This was a time when there was no Parliament but the common law had started to evolve.

The common law had been a feature of the English governing system since the 12th century, when the King had appointed judges to act as 'his surrogates' to dispense his justice. The judges were known collectively as 'the King's court'.[5] While the common law originated in a time when the King of England ruled with almost absolute power, it was not an arbitrary or capricious system designed only and always to benefit the King. Rather, the common law 'was founded in notions of justice and fairness of the judges, consolidated by their shared culture, their professional collegiality, and a growing tradition'.[6]

With the rise of the common law, a perception had developed that the King's power was not absolute but was instead subject to certain limits: '[t]he problem in 1215 was that the king had flouted pre-existing limits, not that such limits did not exist.'[7] As such, the Magna Carta was a document created to limit the brutal and despotic power of King John and it did so by clothing itself in the legitimacy of custom and of precedent. It was a practical rather than an aspirational document. Many of its original 63 clauses were quite specific in nature. However, two clauses in particular have had a lasting and influential impact on common law countries. The two clauses were cl 39, with its requirement that 'no free man' may have what can be termed their basic rights taken away other than 'by the law of the land';[8] and cl 40, with its claim that justice would be denied to 'no one'.[9]

With the signing of the Magna Carta, for the first time in English history the sovereign was forced to acknowledge in writing that he was subject to a higher law. To ensure his compliance, the Magna Carta provided for 25 barons to act as a committee of overseers. While this committee could be described as an ongoing rebellion, it can also be seen as the precursor to the creation of Parliament. Despotic power had been challenged and the seeds of what was ultimately to replace it (Parliament and the common law) had been planted.

Yet, despite the esteemed position that the Magna Carta holds today, it did not have legal force in its own right, nor did those in power blithely accept it. To be recognised as law it needed to be assented to by the King and reaffirmed by future Kings. Even with King John's assent, it would seem he never intended to honour it,[10] Pope Innocent III issued a papal bull denouncing it[11] and 'after the turmoil and suffering of the War of the Roses, the stability of the strong rule of the Tudors' was welcome, with the result that the Magna Carta did not feature prominently in the 16th century.[12] Further, it must be remembered that, despite the universal portrayal of the principles underlying the Magna Carta today, at the time of its creation the use of 'free-men' excluded the lower born, outlaws and slaves. It is estimated that, when the Magna Carta was entered into, it only applied to 10 per cent of the population.[13] While the reach of the Magna Carta was slowly to expand over time, it was not until the 17th century that it was to play its most important role. This time, rather than being a sword used to impose obligations on a King, it was to be used by Lord Coke[14] in tandem with the common law as both a shield and a sword. It was to be used as a shield to protect the

substantial power that Parliament had slowly taken from the King over time[15] and then as a sword to obtain further power.

Lord Coke the judge

To understand Lord Coke's championing of the Magna Carta as a parliamentarian, it is necessary to start with his time as a judge and in particular with two decisions: *Rooke's Case*[16] and *Dr Bonham's Case*.[17] These decisions illustrate Dr Coke's deep-seated faith in the common law and the fundamental role he saw for it in supervising government decision-making.

In *Rooke's Case* the Commission of Sewers had undertaken repairs to the riverbank of the Thames. The relevant statute allowed the Commission to recover from landowners the costs of such repairs 'according to their discretions'. The Commission sought costs from only those landowners adjoining the Thames. Lord Coke ruled that the Commission had to spread the cost of repairs more broadly. He did so by finding that, regardless of the broad parliamentary grant of 'discretion' to the Commission, there was nevertheless a right and a wrong way to exercise it, as the discretion was 'limited and bound with the rule of reason and law'. Lord Coke made it clear that it was the judiciary's right to intervene 'not withstanding the words' of the statute. On this formulation it is difficult to see when a court would not be justified in substituting its own decision for that of the government decision maker, either in law or on the merits of the individual case.[18]

Dr Bonham's Case was, on one view, an early but fairly straightforward application of the natural justice bias rule; however, in its time it was even more controversial than *Rooke's Case*. Indeed, *Dr Bonham's Case* attracted the ire of King James I, with the King suggesting, to no avail, that Lord Coke correct it.[19] For present purposes, it is the following phrase that has proven most controversial, as, on one reading, it gave the common law precedence over legislation and hence gave the judiciary power over Parliament and King:

> it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void … [20]

Lord Coke's rhetoric held out the hope of individual salvation when a law of a general and broad nature, as most legislation is, would otherwise apply arbitrarily and unfairly.

Given the backward-looking nature of the common law, *Dr Bonham's Case* raises the hope, or spectre, that an ancient principle could be invoked to protect common law principles such as natural justice from repudiation by Parliament.[21] This interpretation is attractive to those who aspire to an implied Australian 'Bill of Rights'. Some have queried and others rejected such an interpretation, arguing instead that Lord Coke was simply, if not powerfully, stating a rule of statutory interpretation[22] — that rule being that there is a presumption that Parliament does not intend to abrogate common law principles. This latter interpretation sits more comfortably with Coke's defence of Parliament, Dicey's later theory of parliamentary supremacy and the judiciary's current approach to statutory interpretation. Either way, *Dr Bonham's Case* illustrates a tradition of judicial review that, at the very least, can be described as intrusively supervisory.

Lord Coke's questioning of Parliament's (and, through it, the King's) legal supremacy when an individual needed protection from arbitrary decision-making continues to resonate today. Yet, from a practical perspective, it had a more timely and significant impact on the yet to be formed American colonies, as it raised for consideration the constitutional possibility that an

Act of Parliament could be declared invalid.[23] It was ultimately a possibility that came to fruition in America with the creation of a written constitution setting out the 'fundamental law' that Parliament could not contravene, including a Bill of Rights that was to contain, in the Fifth Amendment, what could be described as a Magna Carta law of the land or due process clause. The 'axiomatic'[24] decision of *Marbury v Maddison*[25] then confirmed that it was the duty of the judiciary to ensure Congressional compliance. Of course, this development was in turn to have particular significance for Australia, with our founding fathers also adopting a written constitution, albeit without a Bill of Rights.

Lord Coke the parliamentarian

Having, in his time on the bench, rejected the notion of unconstrained governmental power, it should have been of little surprise that, on becoming Speaker of the English House of Commons in 1621, Lord Coke would join with others to oppose attempts by King James I to increase his power. In doing so, Lord Coke drew heavily upon the spirit of the Magna Carta and famously stated:

> If my sovereign will not allow me my inheritance, I must fly to Magna Carta and entreat explanation of his Majesty. Magna Carta is called Charta libertatis quia liberos facit ... The Charter of Liberty because it maketh freemen.[26]

Incensed by the opposition he was facing, King James I dissolved Parliament and, for a time, imprisoned Lord Coke and other parliamentarians. However, in the face of continued opposition, King James I relented and freed the dissidents. It was in the late 1620s, when Charles I ascended to the throne asserting an absolute right to rule, that the struggle between the King and Parliament really came to a head. This time Parliament prevailed, with the King ultimately being compelled to accept a Petition of Rights inspired by the Magna Carta. In accepting the petition the King was forced to acknowledge 'Parliament's (and Coke's) interpretation of the [Magna Carta] as a constitutional limitation' on his power.[27] The seeds of freedom planted with the signing of the Magna Carta had germinated and, while the publishing of Lord Coke's Second Institute, civil war, revolution and the passing by Parliament of other foundational Acts such as the *Habeas Corpus Act* (1679), the *Bill of Rights* (1689) and the *Final Act of Settlement* (1701) were still required, the spirit of the Magna Carta evolved from a claim of inalienable feudal rights to a claim that there was an inalienable and universal right to be protected from arbitrary government action.[28] It is in this sense that it can be most confidently asserted that the spirit of the Magna Carta had blossomed and become one of the most important ideals underlying modern democracy.

Blackstone

It was William Blackstone who in 1759 produced what is often referred to as the first scholarly edition of the Magna Carta[29] and then in 1766 produced his *Commentaries on the Laws of England*. These writings were available to American colonists and have been described as preparing 'the mind for the American revolution of the 1770s'[30] and influencing 'the Declaration of Independence and the Constitution of the United States'.[31]

Blackstone's commentaries 'were the first comprehensive statement of the common law'.[32] The commentaries were filled with reference to rights, principally civil and property, and extolled the importance of the Magna Carta.

Yet in Blackstone's commentaries there can be seen a very significant shift in emphasis from Lord Coke's 'spiritual' rhetoric evoking the Magna Carta as a natural source of inalienable human rights to a more 'practical' view of the law. For Blackstone, natural rights offered guidance to but did not supplant the laws set down by Parliament. As no less than H L A

Hart observed, for Blackstone the law of nature, or unalienable rights, 'consists almost wholly of gaps: it is a net through which virtually everything must fall'.[33]

Consequently, while Blackstone believed natural rights existed and were promoted by the common law,[34] they did not inhibit and limit Parliament's ability to legislate — rather, Parliament 'by its own acts recognised' such rights and could be expected to protect them.[35] Rights such as those that had become synonymous with the Magna Carta were morally compelling but not legally enforceable;[36] the spiritual had begun to be riven from legal reality. As such, it could be argued, erroneously, that Blackstone placed all of his faith in Parliament.

While Blackstone championed the power of Parliament, at the time he wrote most law was still made by the judges — that is, the common law still reigned supreme in practice if not in his theory.[37] Indeed, Blackstone identified the 'law of the land' or 'due process' in the Magna Carta with the established procedures and rules of the common law.[38] Consequently, while his writings clearly placed Parliament as the supreme law maker when it legislated, he still championed the broader and vital role of the common law. Importantly, influenced by Locke and Montesquieu,[39] Blackstone's *Commentaries on the Laws of England* explain how the English legal system had matured from a mixed constitution, where judges were beholden to the King in Parliament, to one with a constitutional separation of power in which both Parliament and the judiciary sought independently to protect public and private liberty.[40]

For Blackstone, Parliament was supreme when it intervened, but the common law played a vital role where it did not. Where Parliament did intervene, its laws still needed to be interpreted. While his views on parliamentary supremacy meant that in theory he supported a textualist approach to the interpretation of legislation[41] and he rejected any suggestion in *Dr Bonham's Case* that the common law could override legislation, he recognised that in practice the 'intention' or 'will of the legislature' was often unclear. When it was unclear, it was necessary to have recourse to 'the context, the subject matter, the effects and consequences, or the spirit and reason' of the legislation.[42] This allowed and, indeed, required judges to presume that Parliament did not intend to pass unreasonable or unjust laws. This presumption in turn allowed legislation to be interpreted so that it conformed with the common law as the source of 'ancient practice and hence to reason and justice'.[43] This approach has remarkable similarities to the approach of the Australian High Court today. In any event, it can be said that for Blackstone legal reality meant the acceptance of parliamentary sovereignty but a belief that such power would be exercised, and implemented, for a higher purpose.

Bentham and Austin

Perhaps the most strident critic of inalienable or fundamental human rights was Jeremy Bentham. Bentham was the ultimate utilitarian, with the practical always prevailing over the spiritual. He was a prolific writer and, as such, it is not surprising to find in his writings a direct connection to Australia. What is perhaps surprising is that in those writings he used the Magna Carta to argue that the conveyance of convicts to, and the treatment of British subjects in, the new penal colony of New South Wales was illegal.[44] Yet Bentham's reliance on the Magna Carta illustrates how distinctively different his approach was from those of Lord Coke and Blackstone. This is because his real complaint was not that British subjects had some higher natural rights but, rather, that existing legislation, represented by the Magna Carta, gave them such rights and those rights could in turn only be taken away by Parliament.

At the age of 16, Jeremy Bentham attended Blackstone's lectures at Oxford — lectures that later became the basis for Blackstone's *Commentaries on the Laws of England*.[45] Bentham's disdain for Blackstone's ideas materialised very quickly.[46] Bentham believed that

Blackstone's commentaries were designed to perpetuate what he saw as a system that benefited the ruling class and, in particular, the legally trained. He saw Blackstone's common law, with its outdated reference to rights, as a yoke around society's neck — one that needed to be swept away.[47]

While Bentham wanted to overthrow the prevailing legal system, he did not seek to justify doing so by claiming that every person held natural or inalienable rights; in fact, he famously stated that such claims were 'rhetorical nonsense, — nonsense upon stilts'.[48] The answer for Bentham was the replacement of the existing common law with a codified system — a system designed and passed into law by a sovereign Parliament. This belief in codification was founded in his underlying theory of utility (subsistence, abundance, security and equality, with security being the most important) or, more simply, that Parliament was in the best position to balance the needs of society and pass laws to provide for 'the greatest happiness of the greatest number'.[49] As his views, mentioned above, on the settlement of New South Wales illustrate, Parliament was the only legitimate source of law. As will be touched upon below, it was similar Benthamic beliefs that resulted in the codification of Australia's migration laws.

Bentham's mission to codify the common law was spectacularly unsuccessful. Nevertheless, he was extremely influential[50] and his combination of utilitarianism and command theory, assisted by the writings of his protégé John Austin,[51] was dramatically to influence the development of the common law.

Austin's most significant contribution to the study of law was the analytical approach he brought to it — an approach often referred to as 'analytical jurisprudence'. He was more interested in law as it was than law as it should be. His focus was the logic, not the morality or spirituality, of the law. He sought to clarify and classify rather than to reform.[52] A law was a law because Parliament, and to a lesser extent the judiciary, said it was a law, not because of some underlying right. In a nutshell, Austin was, like Bentham, a legal positivist.

Like Bentham, Austin saw parliamentary codification as the answer to the faults of the common law. However he 'approached the subject of codification in a much more cautious and realistic manner', rejecting 'the idea of an ideal code as too utopian'.[53] For Austin, Parliament reigned supreme, but judges were needed to implement its decrees and, when Parliament had not yet legislated, to maintain and develop the common law.[54]

Dicey

Without doubt, the most influential conception of legal parliamentary sovereignty has been that of A V Dicey.[55] His writings 'heavily influenced' the drafting of the *Australian Constitution*.[56]

The attraction of Bentham's legal positivism, ameliorated by Austin's acceptance of the judiciary,[57] can be seen in the manner in which Dicey formulated his approach to the law and constitutionalism. This approach was to portray law, and particularly the legal principles that dealt with the separation and interaction of Parliament, the judiciary and administrators, as a 'political, scientific and technical' exercise.[58] In his iconic text, *An Introduction to the Study of the Law of the Constitution,* Dicey stated that:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.[59]

Stated in this manner, Dicey's conception of parliamentary power is largely consistent with that of Bentham. However, there are two stark differences for the purposes of this paper. The first difference is that Dicey accepted the practical reality that, in a federation formed under a written constitution, Parliament was 'subordinate to and controlled by the Constitution'.[60] This has meant that, from the commencement of federation,[61] Australian legislatures have never had the form of absolute power envisaged by Dicey's pure vision, albeit that the Australian judiciary has acknowledged that parliamentary supremacy is grounded in 'political facts' and it is inappropriate for it to question 'such basic political realities'.[62]

The second difference, and more important for immediate purposes, is that Dicey espoused and made popular the rule of law as a limitation on governmental power. For Dicey, the rule of law was a practical concept that included equality before the law, a lack of arbitrariness in the law's application and an obligation on the government to obey the law — obedience that the judiciary must enforce.[63]

From a modern administrative law perspective, this formulation of the rule of law had two practical deficiencies. The first deficiency in Dicey's conception of the rule of law was that, unlike Bentham, with his highly prescriptive codes, Dicey did not develop a means of accounting for discretion in administrative decision-making. He did not see what 'law' there was for the judiciary to enforce when the administrative decision maker was to use their discretion to reach a decision. As he could not account for administrative discretion, the rule of law could not be applied to it. A similar attitude will be seen in the approach taken by the English courts to natural justice from the 1930s to 1960s.

The second deficiency in Dicey's conception of the rule of law arose because of the possibility of an inherent conflict between parliamentary supremacy and his conception of the rule of law. This conflict can occur if Parliament stipulates what the law is but then seeks to prevent the judiciary from enforcing it.[64] This potential quandary was recognised by the Australian High Court as early as 1910[65] and then confronted directly in more modern times.[66] Consequently, it is an opportune point for this paper to shift its focus to Australia and to the application of natural justice.

The rejection and then re-emergence of natural justice in Australia

The origins of natural justice

The Magna Carta, with its requirement that rights not be taken away other than in accordance with the 'law of the land', later to become 'due process', can be seen as the precursor to the modern principle of natural justice, or procedural fairness.[67] The Magna Carta was a clear statement that government (then the King, now Parliament and the executive) does not have an absolute power over its people and, in particular, it cannot make a decision that directly affects one or more of them without taking into account their legal rights. In a modern context, what these rights entail and what is sufficient to show they have been taken into account can vary greatly depending upon whether the 'law of the land' is viewed through a looking glass held by one or more of Lord Coke, Blackstone, Bentham, Austin or Dicey.

In Australia the law of the land starts with the *Constitution*. However, the *Constitution* does not include a Bill of Rights, nor does it provide a constitutional right to procedural 'due process' like the *United States Constitution*, whose drafters had been so influenced by the writings of Blackstone (and, consequently, the Magna Carta).[68] Neither has Parliament seen the need to guarantee due process through an ordinary legislative Act such as a Charter of Rights. Consequently, to obtain 'due process' or natural justice, it has been necessary to

have recourse to the highly malleable common law so admired by Blackstone and so abhorred by Bentham.

Common law natural justice boils down to two grand principles:

- the rule that the decision maker must not be, or must not be perceived to be, biased (*nemo debet esse judex in propria sua causa*);
- the rule requiring a procedurally fair hearing (*audi alteram partem*).

Of the two, the bias rule is the more straightforward and readily defined.[69] The content of the hearing rule is far more uncertain and may not even include a hearing.[70]

Natural justice is described as a 'duty to act fairly'[71] and it has been stressed that it 'does not require the application of fixed or technical rules; it requires fairness in all the circumstances'[72] and what is required may even 'fluctuate during the course of particular decision making'.[73] These formulations conjure up an image of Lord Coke's appeal to the spirit of the common law, yet the Australian judiciary has repeatedly emphasised, in true Austinian style, that it is a duty focused on the procedures followed by the decision maker, not the actual substance of the decision itself.[74]

Natural justice and administrative decisions

The requirement to provide natural justice was seen as a judicial obligation until in 1863[75] it was extended to government or, more correctly, executive or administrative decision-making. In any event, and contrary to popular belief,[76] shortly after the High Court's establishment in 1903, natural justice had been applied in a number of administrative contexts.[77] It was only in 1927 that the English Privy Council, channelling Dicey's insecurities, held that natural justice was only owed in judicial or quasi-judicial style enquiries,[78] not when the decision was the culmination of 'a merely administrative function'.[79] In an administrative context, it was to be Parliament, not the judiciary, that was to hold the decision maker accountable. The immediate and then ongoing effect of English decisions was to retard the growth of natural justice for the next 37 years.

After 1964 and, in particular, the House of Lords' decision in *Ridge v Baldwin*,[80] the Australian judiciary was able again to consider the appropriateness of extending natural justice to more typical administrative decisions. By 1970 Windeyer J was willing to find that natural justice applied where the administrative decision maker 'looks to facts and determines whether they answer a particular statutory description'.[81] In 1976, Mason J went further when he held that the obligations of natural justice applied 'whether the authority is acting judicially or ministerially'[82] — a position also adopted shortly afterwards by Gibbs J[83] and Jacobs J.[84] However, it was not until 1985, in *Kioa v West*,[85] that the possibility of natural justice applying more generally to administrative decisions really became a reality. While there was a difference in opinion as to whether the renewed reach of natural justice was due to the common law or statutory imputation (with overtures of the approach of Lord Coke or Blackstone respectively), it is a debate that is now largely seen as irrelevant.[86] It is largely irrelevant because a point was reached where the High Court no longer had to extend the reach of natural justice, as, in a statutory context, it was accepted that there will almost always be an initial assumption that natural justice applies to administrative decision-making.[87] It is this position that is now important and was evident in *M61/2010 v Commonwealth*,[88] where natural justice was held to apply to boat people held in a legislatively defined 'excised offshore' location, and in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,[89] where the visa applicant was in Pakistan. Further, during this period the High Court's increased emphasis on 'jurisdictional error' generally[90] — and, in particular, that a breach of natural justice was a jurisdictional error — allowed it to assert that

it was simply monitoring the boundaries within which administrative decision makers were authorised to act by Parliament and consequently it was abiding by Dicey's separation of powers as supplemented by the adoption in Australia of a written constitution. This in turn allowed the judiciary to shift its attention to what rules should be applied in deciding whether a decision was made in accordance with natural justice. As these rules developed and were applied more often, it became apparent that the judiciary was becoming more and more comfortable intervening in administrative decision-making. It could also be argued, as I have done elsewhere,[91] that this increased 'bulking up' of natural justice formed part of an ongoing evolution in which the High Court was imposing a thicker, more justificatory account of the rule of law.[92]

What was also apparent from natural justice's expansion was that, where Dicey had not known what 'law' there was to enforce when an administrative decision maker exercised a discretion, the judiciary did. The law they were enforcing was the law that they had applied and expanded in true common law fashion — natural justice. Lord Coke would have appreciated this development, yet, unlike in Lord Coke's time, it is a development that is unlikely to have unfolded, and certainly would not have unfolded as quickly as it did, if Parliament had not sought to limit the judiciary's role.

Australia's Benthamic codification

Theoretically, it is accepted that Parliament can exclude the operation of natural justice. To a degree this must be correct, as any Australian formulation of natural justice places great importance upon the wording of the statute. However, theory does not always reflect reality. In Australia, this truism has been particularly evident in the politically charged arena that is the *Migration Act 1958* (Cth). It is in this arena where Benthamic attempts by Parliament to introduce a code to promote practicality of decision-making over, and to the exclusion of, natural justice have failed.

After 1985 and, in particular, in *Kioa v West*,[93] natural justice took centre stage in many migration decisions. Decisions were set aside where, for example, an applicant was not given the opportunity to provide further evidence on a crucial issue;[94] respond to adverse inferences;[95] respond to allegations that they were not a bona fide visitor;[96] and respond to assertions that they had relied upon fraudulent documents or claims.[97]

Parliament was concerned about the increasing number of migration decisions being set aside and in 1989 sought to check the judiciary's influence in the migration arena through the introduction of a highly prescriptive code.[98] However, it was not until 1992 that Parliament, through the *Migration Reform Act 1992* (Cth) (Reform Act), sought expressly to limit the scope of judicial review. It did so by introducing a unique regime for the review of migration decisions by the Federal Court.[99] This was a regime that no longer allowed applicants to use the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). Strict time limits and far more limited grounds of review were to be provided in the Migration Act itself. These limited grounds included review where the procedures set out in the Migration Act had not been followed but specifically excluded natural justice (and unreasonableness, which will be touched upon later). The Reform Act also sought to codify the procedures that were to be undertaken in reaching a decision by introducing new subdivisions under the heading 'Code of procedure for dealing quickly and efficiently with visa applications'.[100] It was believed that these reforms would 'codify decision-making processes', thereby addressing concerns with both the fairness and potential abuse of such processes.[101] It was also envisaged that these codified procedures would provide greater guidance and direction for decision makers, as they would 'replace the current common law rules of natural justice'.[102] Parliament had spoken: the practicality of a Benthamic code was to supplant the more flexible common law, and the spirit of the common law was no longer to

direct decision-making processes. This was consistent with a belief that Parliament could direct the judiciary to leave the common law behind and focus on whether the legislative code and visa criteria had been correctly followed by the executive decision makers.[103]

The constitutional validity of the new scheme was tested in *Abebe v Commonwealth*[104] (*Abebe*). In *Abebe* the central issue was whether the *Constitution*[105] allowed Parliament to limit the jurisdiction of the Federal Court by giving it power to review only part of a 'matter' — that is, for example, giving it the power to review an administrative decision for failure to comply with statutory procedures but not natural justice. The majority of the High Court[106] deferred to 'parliamentary supremacy' and found the scheme was valid insofar as it applied to the Federal Court.[107] However, Parliament's victory was somewhat hollow. The High Court emphasised that there was a substantial difference between its own original jurisdiction guaranteed under s 75(v) of the *Constitution* and the Federal Court's jurisdiction, which was given to it, and could therefore be taken away, by Parliament. As such, the new scheme did not prevent an applicant from seeking judicial review in the High Court for a breach of natural justice.[108] Indeed, if anything, the High Court encouraged applicants to use its original jurisdiction by predicting a serious increase in its workload.[109] This was a prediction that over time was proved correct and became the 'Achilles heel of the scheme'.[110]

Any doubt that a breach of natural justice was something that attracted the jurisdiction of the High Court under s 75(v) was dispelled the following year in *Re Refugee Review Tribunal; Ex parte Aala*[111] (*Aala*). Mr Aala argued that he had been denied natural justice. Before the High Court, the government's most interesting argument was premised on the originalist assumption that the jurisdiction given to the High Court by s 75 of the *Constitution* was to be determined by reference to the state of the common law in 1901, when the *Constitution* came into existence. In Diceyian fashion, it was argued that in 1901 there was a distinction drawn between 'jurisdictional error' — a breach of an express parliamentary direction — and 'natural justice'.[112] Jurisdictional error was said to activate the High Court's original jurisdiction under s 75(v), but natural justice did not.[113]

The High Court rejected the government's arguments. Regardless of whether there was a breach of natural justice or a procedural requirement in the Act, it was 'a breach of a condition governing the exercise of a power'[114] and was 'today'[115] to be considered a jurisdictional error activating s 75(v) of the *Constitution*. To adopt terminology used by Gummow and Gaudron JJ, the effect of *Aala* was 'to outflank and collaterally impeach' Parliament's attempt to exclude natural justice.[116] The High Court had sent a clear message that it would adjust judicial review under s 75(v) of the *Constitution* to accommodate modern circumstances. The government's constitutional argument was rejected. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[117] (*Miah*) it argued that Parliament had enacted a code and as a result it had, in a Benthamic fashion, replaced or at least modified any common law natural justice obligations.[118]

Illustrating how rapidly the law was developing in this area and the jurisdictional uncertainty that consequently existed, in *Miah* the High Court split three to two on whether the wording used in the Migration Act was enough to exclude natural justice. The minority of Gleeson CJ and Hayne J adopted a literal or textual approach, focusing intently on the wording of the statute, to find that it was a code and hence natural justice had been replaced.[119] On the other hand, the majority, and particularly McHugh and Kirby JJ, evoked what this paper has referred to as the 'spirituality' of the law in that they found the requirement that an administrative decision maker accord natural justice was so 'deeply entrenched'[120] that the rules of statutory interpretation assumed it would not be excluded unless there was explicit wording to the effect that the decision maker did not have to comply with it.[121] This was because Parliament was not to be taken to 'intend to work serious procedural injustice', as it ordinarily acts 'justly'.[122] This judicial presumption held so much weight with the majority that

they found little to no significance in the fact that the word 'code' was used in the heading of the relevant subdivision setting out the procedures to be followed.[123]

The majority's findings in *Miah* represented a real and tangible advance by the judiciary in its efforts to ensure that administrative decision makers remained subject to natural justice. Nevertheless, the result was achieved 'traditionally' in that judicially created principles of statutory construction were still being applied and the underlying rationale that the judiciary was implementing a legislative directive had not changed. What was different was that the judicial starting point for its interpretive analysis had been modified to assume that Parliament placed as great an importance upon natural justice as the judiciary, thereby reflecting the judiciary's current values onto Parliament. While it can be argued that the majority placed too great an emphasis on its judicially created presumptions, such criticism should not be confused with a belief that the judiciary can and should cast aside its judicial norms and apply the written word as an automaton in accordance with a Benthamic understanding of the judiciary's role relative to a 'supreme' Parliament. The belief that the judiciary can act as an automaton is in its simplicity alluring but, as even Austin recognised, unrealistic.

Together *Abebe*, *Aala* and *Miah* heralded the downfall of the Reform Act.

Further, and somewhat ironically, Parliament's attempt to limit judicial review actually turned attention to and invigorated judicial interest in s 75 of the *Constitution*. This was to lead to what was insightfully described as 'the "new common law" of constitutional judicial review'.[124] It was an avenue of judicial review that had largely lain dormant due to a lack of real need while the broad review rights under the ADJR Act had been available. For present purposes this meant, in somewhat simplified terms, that the underlying justification for the role played by the judiciary and the reach and limits of judicial review were moving from the traditional English reliance on the ordinary common law to an amalgam of the common law and the interpretation of the written *Constitution*.[125] As the creators of the common law and the interpreters of the *Constitution*, the judiciary had intimated that parliamentary sovereignty in Australia might be more limited than previously believed.

A privative clause

Parliament strikes back

Parliament's initial attempt to limit judicial review being an abject failure, it responded with the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) (Judicial Review Act).

The Judicial Review Act represented a new extreme in parliamentary attempts to vest in the executive exclusive control over immigration. This emphasis on executive control was described rather aptly by two commentators as:

> a metaphor for a changing conception [by the government and opposition] of the relation of the three arms of government, and a reconceptualisation of the separation of powers in which executive power is paramount in relation to the other arms of government. This metaphor rests on a crude majoritarian view of democracy.[126]

The key to the new scheme was a privative clause — s 474 — that was designed to restrict judicial review. Due to its broad definition the privative clause sought to make almost all decisions under the Migration Act, including decisions of the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT), 'final and conclusive'.[127]

As is now well known, the privative clause was spectacularly unsuccessful, being eviscerated by the High Court in *Plaintiff S157 v Commonwealth*[128] (*Plaintiff S157*).

Plaintiff S157

In *Plaintiff S157,* the judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ emphasised two statutory presumptions: first, if there is an 'opposition' between the *Constitution* and a privative clause it should, if 'fairly open', be resolved by adopting an interpretation of the clause that is consistent with the *Constitution*;[129] and, second, 'Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies'.[130] As is well known, these two rules allowed the majority to conclude that the privative clause only applied to decisions that the judiciary found to be valid in the first place. A decision would not be valid if there had been a jurisdictional error[131] and, as *Aala* demonstrated, a breach of natural justice was a jurisdictional error.

Such an interpretation was clearly at odds with Parliament's 'intention' if this was understood to be as stated in the Explanatory Memorandum and parliamentary debates.[132] It was also at odds with the literal meaning of the section, which would have fallen foul of s 75(v) of the *Constitution*. For this reason it was unsurprising that the majority judgment sought shelter amongst, and to an extent was consumed by, an appeal to higher constitutional values. In this regard it most famously stated that:

> [Section 75], and specifically s 75(v), introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review.[133]

The proposition that the judiciary had an 'entrenched role' was said to be unavoidable when it was understood that one of the underlying assumptions of the *Constitution* was the 'rule of law'.[134] Of course, the rule of law is a concept far more protean and subject to contrary notions of its content than even natural justice. Understandably, although unfortunately, the majority did not give any guidance as to what the 'minimum provision of judicial review' may entail.[135] It is suggested that such guidance that is available must be obtained from the judgment of Gleeson CJ.

Gleeson CJ, while agreeing with the joint judgment, emphasised the manner in which a decision maker is to reach their decision — that is, in a fair way. What is fair is still a relatively abstract and controversial question, but Gleeson CJ's use of it nevertheless points to the 'rule of law' having an underlying substantive effect. That is, the rule of law is more than simply the rule by law — or, to put it another way, there is an underlying spirit within the law that will not be expelled.

For Gleeson CJ, natural justice was not a unique independent rule; it was instead part of the decision-making matrix created by the Migration Act to ensure that decision makers acted fairly and with detachment. This matrix meant there was no one 'central and controlling provision'[136] such as the privative clause. Rather, the impact of the privative clause was to be ascertained through established principles of statutory construction (a conclusion consistent with the joint judgment[137]). This approach to statutory construction brought Gleeson CJ closer to the approach of McHugh and Kirby JJ in *Miah*. More importantly, Gleeson CJ was presenting fairness as a higher-level organising principle that, having been derived from a value assumed by the *Constitution*, set a minimum standard against which to judge the conduct of administrative decision makers.

Gleeson CJ's formulation of fairness in this way is particularly resilient. It rejects the notion that in undertaking judicial review the undesirable administrative conduct must be

categorised under one and only one organising label, such as natural justice.[138] This means that, in circumstances affecting 'fundamental rights'[139] and where there is a legislative right to a hearing,[140] short of saying that a decision can be made 'unfairly', it is difficult to see what wording would exclude all of the underlying obligations inherent in natural justice. If this reconstruction of what *Plaintiff S157* can stand for is correct (and, as discussed later in this paper, the rejection of labels is evident in the 2013 decision of *Li v Minister for Immigration and Citizenship*[141] (*Li*)) then, from a statutory construction standpoint, Parliament will rarely prevent the judiciary from imposing some natural justice like obligations on decision makers if, after considering the particular circumstances faced by the administrator, it is inclined to do so. Rather, the issue will mostly be how high a standard the judiciary sets.[142]

In *Plaintiff S157* the High Court had once again demolished Parliament's attempt to limit judicial review and, in particular, exclude review for natural justice. However, the skirmishing between Parliament and the judiciary was not yet over. As the interpretation of the privative clause wound through the courts, Parliament inserted new sections into the Migration Act with the aim of once again trying to codify the procedural requirements that decision makers were to follow.

The end of a Benthamic vision of a code uncorrupted by the spirit of the common law

A renewed attempt to codify

In *Miah*[143] the High Court rejected the executive's argument that amendments to the Migration Act meant it had codified the decision-making process.[144] The *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (Procedural Act) was designed to overcome *Miah* through what will be called the 'codifying clause' — an express statement that the procedures contained in the relevant divisions of the Migration Act exhaustively stated the requirements of the natural justice hearing rule in relation to the matters the relevant division dealt with.[145] In true Benthamic style, the Procedural Act was seen as necessary to restore the Parliament's original intention that the Migration Act should contain codes of procedure that allow fair, efficient and legally certain decision-making processes that replace the common law requirement of the natural justice hearing rule.[146]

A distinct fissure quickly opened within the Federal Court over the interpretation of the codifying clause. It was a split that can be seen to have its genesis in whether, or to what degree, individual judges felt compelled to look for the actual legislative intent or, alternatively, utilised common law statutory presumptions to limit the operation of what could be termed an 'ambiguous perhaps also obscure'[147] clause. Illustrating the complexity of the interpretive task faced by individual judges, Belperio usefully categorised the different interpretations that had arisen under three distinct headings: the whole division approach[148] (where common law natural justice is extinguished and the only natural justice like obligations that do exist are those reproduced in the Migration Act itself); the exact text approach (where each section in the relevant procedural division is looked at individually, with the result that few common law natural justice obligations are excluded);[149] and the individual sections approach (which sits somewhere between the previous two approaches).[150]

The interpretation of the codifying clause by French J (as he then was) was particularly influential. He adopted the exact section approach. However, despite his interpretation being at odds with what was said to be the aim of the codifying clause, French J's concerns went beyond arbitrary decision-making. Rather, like Gleeson CJ, his concern was the fairness of the entire decision-making process combined with an uncompromising but not unique view that it was the judiciary's role to be the final check against arbitrary executive decision-making. In his own way, he was balancing justice to the applicant, efficiency and

certainty, and in doing so he began to develop a richer theoretical foundation for the position he was adopting. This foundation justified the limitation he placed on the codifying clause by again adopting the approach that is now known as the principle of legality[151] — a principle that featured prominently and widely in the High Court after French J's rise to Chief Justice[152] and channels Blackstone's faith in the common law.

Despite French J's efforts, in *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat*[153] (*Lay Lat*), overtures of parliamentary supremacy overrode fidelity to common law presumptions and the Full Court adopted the whole division approach.[154] Despite initial resistance,[155] this approach quickly came to be the accepted view,[156] even though it was seen as operating harshly[157] and 'a matter of shame for every Australian citizen'.[158] A Benthamic view of the world had prevailed. However, like the experience with the privative clause, it was a success that was not to last. Four years later the High Court, in *Saeed v Minister for Immigration and Citizenship*[159] (*Saeed*), with French as Chief Justice, rejected the reasoning in *Lay Lat* and instead endorsed the individual section approach or perhaps even the exact section approach.[160]

Saeed was a significant reversal of legal principle and reintroduced many of the common law natural justice obligations previously exiled. However, by the time it was decided, its significance was muted by both an expansive interpretation of the sections in the Migration Act that could be said to impose natural justice like obligations[161] and an extremely strict application of the procedural codes when they were breached by the decision maker.[162] These two developments (which, due to constraints of space, will not be discussed further) and a significant change in approach to statutory construction by the High Court under French CJ in 2009 put to rest any remaining hope that the procedural codes in the Migration Act could ever extinguish the spirit of the common law completely. Indeed, these developments were so significant that they overshadowed and in most instances made it unnecessary for the judiciary to explore the impact in 2007 of an amendment to the Migration Act directing the tribunals to be fair and just (and, as such, this paper will not explore it either).[163]

A broader approach to statutory construction

By early February 2009, Gleeson CJ, McHugh J and Kirby J had all retired and been replaced by French CJ, Crennan J and Bell J respectively. Up until this point in time the outcome in many of the key High Court cases interpreting the procedural codes in the Migration Act would have been different if one judge in the majority had changed their mind.

With the change in personnel came a unanimous change in approach to a less restrictive interpretation of the procedural requirements in the Migration Act. This change can be discerned almost immediately in *Minister for Immigration and Citizenship v Kumar*[164] (*Kumar*). Instead of focusing on the fact that the codifying clause in the Migration Act sought to replace natural justice and endorsing the trend in the Federal Court to view and read the procedural requirements in the Migration Act with an emphasis on protecting the individual, the Court took a broader purposive approach. This broader approach started from the premise that the Migration Act as a whole is designed not only to ensure that a person who is entitled to a visa receives it but also to ensure that a person who is not entitled to a visa does not get it.[165] This allowed the Court to decide the procedural issue that arose by balancing competing policy objectives exactly as had been done four years earlier when determining what natural justice required at common law.[166] *Kumar* denoted a determination by the High Court now to consider a larger range of underlying values, some which favoured the administrative decision maker and some which did not.

The High Court's new approach was applied again in *Minister for Immigration and Citizenship v SZKTI*[167] (*SZKTI*), where it rejected the position adopted by two Federal Court benches that when making enquiries the RRT had to use one of the procedures stipulated in its procedural code.[168] The High Court once again considered the aim of the decision-making process as a whole rather than simply following the Federal Court's approach and focusing on the purpose of the procedural code alone.[169] Starting from this broader premise meant that, while the High Court acknowledged that the procedural code had an important role to play in providing the applicant with natural justice, it had to be balanced against a need to ensure the RRT could operate efficiently and effectively.[170] The High Court was now showing a willingness to consider the needs of the RRT without losing sight of the individual's needs for protection from arbitrary decision-making.

While the broader approach by the High Court flagged a more pro-administrative stance to the procedural requirements in the Migration Act, it also foreshadowed the end of any hope that they really were a code. This is because the RRT was able to avoid the restraints of the legislatively proscribed procedures by relying on a power outside the code. As Alderton, Granziera and Smith observed, 'one might ask whether the role of [the relevant division] as a "code" has any significance at all'.[171]

Alderton, Granziera and Smith were critical of the High Court's reasoning, as they were concerned that parliamentary safeguards could now be ignored. However, this sole concern with protection did not fully account for the fact that the declinature in the codes' effectiveness would also allow, as will be seen with *Li*, the judicial introduction of more natural justice like obligations.

Shortly after *SZKTI*, the decline in the codes' significance continued in *Minister for Immigration and Citizenship* v *SZIZO*[172] (*SZIZO*), where the High Court found that, despite Parliament prescribing the procedure to be followed in detail and using language indicating the procedure was mandatory, it did not necessarily mean that a decision was invalid if the procedure was not followed. Rather, the court had to consider 'whether in the events that occurred the applicant was denied natural justice'.[173] It is interesting to observe that the Court used the more traditional words 'natural justice' rather than the modern ones of 'procedural fairness'. It is suggested that subconsciously this is a significant change in semantics, as the use of natural justice has its origins in the common law and, as has been argued, the spirituality of the Magna Carta. It is this spirituality that can then be seen to influence the outcome in *Li*.

Li and the unpacking of natural justice; the end of labels

Li can be seen as the culmination of a judicial trend, evident in Gleeson CJ's reliance on fairness, to unpack the obligations traditionally underpinning natural justice so that in the face of legislative resistance it has the flexibility still to offer some protection against arbitrary decision-making.

The facts in *Li* were fairly straightforward. Ms Li was denied a skills visa. A mandatory criterion for the issuing of the visa was a favourable skills assessment (made by a third party), which Ms Li did not have. Ms Li's review application before the MRT had a substantial history and it is fair to say that the MRT had taken numerous steps to afford her natural justice, including the provision of further time in which to obtain a second skills assessment. When the second skills assessment was unfavourable, the MRT made its decision despite Ms Li seeking a further adjournment. In rejecting the adjournment, the MRT did not address the reasons provided by Ms Li, simply observing that Ms Li 'has been provided with enough opportunities to present her case and [it] is not prepared to delay any further'.[174]

A decade before *Li*, in *Dranichnikov v Minister for Immigration and Multicultural Affairs* the High Court had observed that:

> To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice.[175]

It is a passage previously acknowledged by all of the High Court justices that heard *Li* except Gageler J, who was not at the time on the bench.[176] It is also a passage that appears directly relevant to the facts in *Li* — that is, the MRT failed to respond to Ms Li's reasoned request for an adjournment other than blandly to state that she had had enough opportunities. Further, as the joint judgment of Hayne, Kiefel and Bell JJ observed, a failure 'to accede to a reasonable request for an adjournment can constitute procedural unfairness'.[177] Yet only French CJ treated the case as one involving a denial of procedural fairness.[178] Hayne, Kiefel, Bell and Gageler JJ circumvented the need once again to engage with Parliament's attempts to exclude natural justice by opening up what could be termed a 'new front'. On this 'front', rather than treating the claim as one that falls under the more traditional natural justice label, they instead focused on the reasonableness of the decision maker's actual decision. Illustrating his unwillingness to be constrained by traditional labels, French CJ also joined in this reasoning.

In determining what was reasonable, all of the judgments looked beyond the specific power to adjourn a hearing, which on its own appeared to be unlimited, and read it in the context of the statute as a whole. This was a 'functional and pragmatic approach'[179] perfectly consistent with what had occurred in *Kumar, SZKTI* and *SZIZO*, although with very different consequences. By taking this approach the Court was able to balance what seemed in Diceyian terms an unfettered discretion to grant or refuse an adjournment against the statutory obligation to invite the applicant to a hearing.[180] While neither of these obligations on a plain literal reading created a right to an adjournment, they allowed the Court to read into the adjournment power an obligation to consider the circumstances of the applicant. In finding that the MRT had committed a jurisdictional error by acting unreasonably in not granting the adjournment, all judgments were clearly swayed by the fact that the MRT had not provided any substantive justification for its decision.

As a ground of judicial review, up until *Li* unreasonableness had been a very 'rare bird'.[181] This was because, as a ground of judicial review, it had been governed by the particularly stringent *Wednesbury* test.[182] This test in effect was that a decision would only be set aside if it was so unreasonable that no reasonable decision maker could have made it. Despite Gageler J's protestations,[183] what is now clear is that the stringency of the unreasonableness test will depend upon the particular statutory context in consideration.[184] As this context cannot be unaffected by the subject matter of the legislation, where the administrative decision affects rights symbolised by the Magna Carta (for example, life, liberty, deportation, property) the stringency of the test is likely to be less. Further, in applying the unreasonableness test, the fact that the Court has rejected a strict reading of the particular statutory power in issue for a more global approach will allow a balancing of other administrative obligations elsewhere in the relevant Act. Given the many competing aims that modern statutes seek to address, this raises the possibility of a more substantive approach being taken to judicial review, albeit that it must still be tied to obligations within the legislation itself.

Given the early history that this paper has traversed, it would be remiss not to observe that a case referenced by each judgment, the 1891 case of *Sharp v Wakefield*[185] (*Sharp*), was not necessarily supportive. Lord Halsbury's judgment in *Sharp* was used as authority for the proposition that when a decision maker exercises a statutory discretion they must do so 'according to the rules of reason and justice'.[186] Yet, while Hayne, Kiefel and Bell JJ were

correct in observing that this statement appealed to higher principles (particularly Lord Coke's comments in *Rooke's Case* that discretion is 'to be limited and bound with the rule of reason and law'),[187] the reasoning in *Sharp* as a whole suggests that this aspirational statement was of a far more limited reach and in fact that an administrative decision should not be disturbed unless the decision maker misinterpreted an explicit obligation imposed by the authorising legislation.[188] Indeed, if Lord Bramwell's judgment in *Sharp* had been followed, the MRT's decision in *Li* would not have been set aside because he observed that the administrative decision maker has 'a discretion to refuse; they are not bound to state their reason, and therefore their decision cannot be questioned'.[189] Consequently, despite the fine words of Lord Halsbury, *Sharp* was a continuation of a trend in its time to limit judicial review. It was a trend identified by Professor Jaffe as commencing in the early 19th century[190] and one this paper suggests reflects the values promoted by Bentham, Austin and Dicey. However, this does not mean that in *Li* the High Court was wrong to take the steps it did; rather, it means that it is participating in a trend moving in the opposite direction from that being experienced in 1891. The current trend, starting in 1964, is one in which there has been a strengthening of judicial review. Seen in this light, *Li* is not a return to the approach prevailing at the time of *Sharp* but the even earlier and far more liberal approach to judicial review of Lord Coke in *Rooke's Case* and *Dr Bonham's Case.* However, unlike the interpretations of *Dr Bonham's Case* which suggest a direct challenge to parliamentary supremacy, the High Court has striven for a more Blackstonian constitutional balance, as reflected in the words of French CJ:

> The [administrative decision maker] is not excused from compliance with the criteria of lawfulness, fairness and rationality that lie at the heart of administrative justice albeit their content is found in the provisions of the Act and the corresponding regulations and, subject to the Act and those regulations, the common law.[191]

Concluding observations

It has been said that, as a bastion against the abuse of basic rights and freedoms, the Magna Carta is 'overrated'.[192] Indeed, as an effective practical protection of such rights, it is quite true to say that it has 'died a death of a thousand cuts'[193] as the law, and modern judicial review in particular, has moved on. Yet the Magna Carta can be seen to stand for what I have loosely termed 'spirituality' — a general belief that within the law there is some higher purpose. The difficulty is that, like any search for a higher purpose, precise definitions are few and far between and differing beliefs proliferate. Nevertheless, it is hoped that it has been demonstrated that one signpost that reappears on the journey to enlightenment is the prevalence and enduring strength of the notion that the law should seek to protect individuals from arbitrary and capricious government decisions.

Of course, as the English barons recognised by forcing the agreement of the King, there is always a need to be practical and in this regard the most important and powerful way of protecting rights is to obtain the acquiescence of Parliament. On the other hand, when Parliament will not acquiesce or even seeks to limit rights, the judiciary can and does play a vital role. It is a role that Parliaments have been unable to extinguish and attempts by them to do so appear to have proceeded under a misplaced Benthamic view of the world. This proposition is evidenced by the fact that Australia now has a 'minimum entrenched level of judicial review', that the obligations underlying natural justice permeate multiple grounds of review and the adoption of a broad purposive approach to statutory interpretation has allowed the judiciary to balance a greater number of underlying values (with the weight of those values also being determined by the judiciary).

Yet, while it can be confidently stated that the judiciary's power to influence the rebalancing of government power and individual rights has increased, its power to do so is not, and never has been, absolute. The judiciary must still act within the general (although somewhat

modified) constraints articulated by Dicey. As Emeritus Professor Aronson has observed, to say that the judicial 'mission statement' has changed 'might be putting it too high'. The professed mission statement remains 'all about enforcing the law' and ensuring the decision maker exercises any discretion within the boundaries set out in the parliamentary Act under which the decision is made.[194] Yet it is hoped that this paper shows that there has been an understated but stark change in how this mission statement is achieved. The 'how' now includes situating (or re-situating) parliamentary legislation firmly within a body of pre-existing and judge-made presumptions, the origins of which go back more than 800 years. Consequently, it is fair to say that, despite their differences, the voices of Blackstone, Lord Coke and the barons who drafted the Magna Carta continue to resonate to this day.

Endnotes

1 The actual statement made by the then Prime Minister was that '[w]e need to ask ourselves whether we have got the balance right between the safety of our community and the rights of the individual': The Hon Tony Abbott MP, Prime Minister of Australia, 'Martin Place Siege Review Released' (Media Release, 22 February 2015).
2 These developments have largely occurred in the 'migration arena' and as such it is recognised, although not conceded completely, that they can be viewed as peculiar to high-risk administrative decisions.
3 Faith Thompson, *Magna Carta* (The University of Minnesota Press, 1948) v.
4 William Swindler, *Magna Carta Legend and Legacy* (The Bobbs-Merrill Company Inc, 1965) ix.
5 James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004) 6–7.
6 Ibid 6.
7 Caroline Eele, *Perceptions of Magna Carta: Why Has it Been Seen as Significant?* (Dissertation Code DISS02860, University of Durham, March 2013) 10.
8 Clause 39 initially provided that 'No free man shall be taken or imprisoned or disseized or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land'. The Magna Carta underwent many amendments — in particular, s 39 was re-scribed in 1354 as cl 28 and 'law of the land' was replaced with the modern reference to 'due process of law': Robert Aitken and Marilyn Aitken, 'Magna Carta' (2009) 35 *Litigation* 57, 61.
9 Clause 40 provided that 'To no one will we sell, to no one will we deny or delay right or justice'.
10 Aitken and Aitken, above n 8, 60.
11 Ibid.
12 William Allan Neilson and Charles Jarvis Hill (eds), *The Complete Plays and Poems of William Shakespeare* (1942) as cited in ibid 61.
13 Swindler, above n 4, 97.
14 He was possibly the most famous but not the first to do so. An earlier example is Sir John Fortescue, Chief Justice of the King's Bench under Henry VI.
15 It seems likely that the term 'Parliament' itself was first used in the 13th century: Crawford and Opeskin, above n 5, 8; see also Colin F Padfield, *British Constitution Made Simple* (WH Allen, 4th ed, 1977) 17–18.
16 *Rooke's Case* (1598) 5 Co Rep 99b.
17 *Dr Bonham's Case* 8 Co Rep 114, 77 Eng Rep 646 (CP 1610).
18 See Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Journal* 953, 954.
19 Swindler, above n 4, 172.
20 *Dr Bonham's Case* 8 Co Rep 114, 77 Eng Rep 646 (CP 1610), 652.
21 See, for example, Allen Dillard Boyer, '"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review' (1979) 39 *Boston College Law Review* 43, 85.
22 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 19; Nathan S Chapman and Michael W McConnell, 'Due Process as Separation of Powers' (2012) 121 *Yale Law Journal* 1672, 1690–1.
23 Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Hart Publishing, 2014).
24 *Australian Communist Party v Commonwealth* (1958) 83 CLR 1, 263; see also *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1, 35; and *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570.
25 *Marbury v Madison* 1 Cranch 137 (1803).
26 Aitken and Aitken, above n 8, 61.
27 Swindler, above n 4, 186.
28 Ibid 233–4.
29 William Blackstone, *The Great Charter and Charter of the Forest, with Other Authentic Instruments* (1759).
30 Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press, 2008) 8.
31 Arlidge and Judge, above n 23.

32 James J Spigelman, 'Blackstone, Burke, Bentham and the Human Rights Act 2004 (ACT)' (2005) 26 *Australian Bar Review* 1.
33 H L A Hart, 'Blackstone's Use of the Law of Nature' (1956) 3 *Butterworths South African Law Review* 169, 174.
34 Rights which he identified as 'security from personal injury, physical freedom and the complete freedom to use, enjoy and dispose of his property': Swindler, above n 4, 232.
35 See ibid 232.
36 See, for example, Howard Lubert, 'Sovereignty and Liberty in William Blackstone's *Commentaries on the Laws of England*' (2010) 72(2) *The Review of Politics* 271.
37 William Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (Duke University Press, 1999) 53.
38 Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (Penn State University Press, 1996) 58.
39 Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (The University of Chicago Press, 2003) 126.
40 Ibid 149–51.
41 Popkin, above n 37, 20–1; J W Ehrlich, *Ehrlich's Blackstone* (Nourse Publishing Company, 1959) 20.
42 Ehrlich, above n 41, 20.
43 Lubert, above n 36, 285.
44 Jeremy Bentham, 'A Plea for The Constitution' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol IV, 249–85.
45 Dean Alfange, 'Jeremy Bentham and the Codification of Law' (1969) 55 *Cornell Law Review* 58, 59.
46 See, for example, Jeremy Bentham, Preface to 'A Fragment on Government' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol I, 1–32, as cited in ibid 59.
47 See, for example, letter by Jeremy Bentham 'To the President of the United States' dated October 1811 in Philip Schofield and Jonathan Harris (eds), *The Collected Works of Jeremy Bentham: 'Legislator of the World': Writings on Codification, Law, and Education* (Clarendon Press, 1998) 5.
48 Ibid 53.
49 This focus underlies all of his writing. For example, it is specifically stated in his Constitutional Code, ch II, art 1, in James Henderson Burns and Frederick Rosen (eds), *Constitutional Code: Volume 1*, *The Collected Works of Jeremy Bentham* (Clarendon Press, 1984) 18.
50 See, for example, Alfange, above n 45, 76–7.
51 John Austin met Bentham in 1819 and soon became one of his inner circle and heir apparent: Richard A Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York University Press, 1996) 90.
52 Peter J King, *Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century* (Garland Publishing, 1986) 339.
53 Ibid 367; Robert Campbell (ed), *John Austin: Lectures on Jurisprudence or the Philosophy of Positive Law* (Glashütten im Taunus, D Auvermann, 5th ed, 1972) 1021, 1099–100.
54 Wilfrid E Rumble (ed), *John Austin: The Province of Jurisprudence Determined* (Cambridge University Press, 1995) 163.
55 It can be suggested that Bentham's conception (as well as that of others such as Bodin and Hobbes) differed in that they were political and did not seek to justify the existing legal order in the same way Dicey did. See Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, 2005) ch 4; and Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) 80–5.
56 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 232.
57 For Dicey the judiciary was vitally important — see, for example, Sir Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1885) 201.
58 Carol Harlow, 'Disposing of Dicey: from Legal Autonomy to Constitutional Discourse?' (2000) 48 *Political Studies* 356, 357.
59 Dicey, above n 57, 39–40.
60 Ibid 144.
61 Nor did the colonies have it prior to federation: *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 130, 155–6 (Higgins J).
62 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 427 (Kirby J).
63 Dicey, above n 57, 203.
64 Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 35, 37. Murray Hunt referred to this as the 'competing supremacies': Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nicholas Bamford and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart Publishing, 2003) (EBSCO Publishing, eBook Collection (EBSCOhost), 2003) 337. However, if it comes to a direct choice between parliamentary supremacy and the rule of law, Dicey would choose parliamentary supremacy: Dicey, above n 57, xxvi.
65 *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 131 (Griffith J).

66 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
67 Although the High Court has indicated a preference for the term 'procedural fairness', the terms are often used as synonyms.
68 Linebaugh, above n 30, 8; Arlidge and Judge, above n 23.
69 Although exactly what will be enough to give rise to a perception of bias can still be controversial: *Isbester v Knox City Council* [2015] HCA 20.
70 *Daguio v Minister for Immigration and Ethnic Affairs* (1986) 71 ALR 173 (Ryan J); *Hempel v Attorney-General (Cth)* (1987) 77 ALR 641 (French J).
71 *Kioa v West* (1985) 159 CLR 550, 584.
72 *O'Rourke v Miller* (1985) 156 CLR 342, 353 (Gibbs CJ); see also *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 660, 672; *Kioa v West* (1985) 159 CLR 550, 614; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504.
73 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 110.
74 Although it is possible to point to examples that blur this distinction — for example, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177, 192; Greg Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100.
75 *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.
76 See, for example, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 64 (Brennan J); and *Abebe v Commonwealth* (1999) 197 CLR 510, 553 (Gaudron J).
77 *Stockwell v Ryder* (1906) 4 CLR 469; *Evans v Donaldson* (1909) 9 CLR 140; *Municipal Council of Sydney v Matthew Harris* (1912) 14 CLR 1; and *Dickason v Edwards* (1910) 10 CLR 243 (*Dickason*). *Dickason* was a decision involving the decision-making of a friendly society, but the approach taken and principles adopted were the same as those applied to governmental decision-making.
78 *Laffer v Gillen* (1927) 40 CLR 86, 95. A requirement for a judicial or quasi-judicial inquiry was emphasised by Lord Hewart in *R v Legislative Committee of the Church Assembly* [1928] 1 KB 411, 415.
79 *Laffer v Gillen* (1927) 40 CLR 86, 95.
80 *Ridge v Baldwin* [1964] AC 40.
81 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 398.
82 *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 112–13.
83 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 419.
84 Ibid 452.
85 *Kioa v West* (1985) 159 CLR 550.
86 *Abebe v Commonwealth* (1999) 197 CLR 510, 572 (Gummow and Hayne JJ); *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 491 (Kirby J); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616, 640 (Gummow, Hayne, Crennan and Bell JJ).
87 See discussion by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 16.
88 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, particularly the discussion at 352–3.
89 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616.
90 See Stephen Gageler, 'The Constitutional Dimension' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 165; Grant Hooper, 'The Rise of Judicial Power in Australia: Is There Now a Culture of Justification?' (2015) 41 *Monash University Law Review* 102.
91 Hooper, above n 90.
92 David Dyzenhaus and Evan Fox-Decent, 'Rethinking the Process/Substance Distinction: Baker v Canada' (2001) 51 *University of Toronto Law Journal* 193, 204.
93 *Kioa v West* (1985) 159 CLR 550.
94 *Renevier v Tuong Quang Luu and Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 614 (Spender J).
95 *Waniewska v Minister for Immigration and Ethnic Affairs* (1986) 70 ALR 284 (Keely J); *Woudneh v Inder* (Unreported, Federal Court of Australia, Gray J, 16 September 1988, BC8802988).
96 *Waniewska v Minister for Immigration and Ethnic Affairs* (1986) 70 ALR 284, 296 (Keely J); *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 172, 173 (Keely J).
97 *Yaa Akyaa v Minister for Immigration and Ethnic Affairs* (Unreported, Federal Court of Australia, Gummow J, 5 May 1987, BC8702012).
98 *Migration Legislation Amendment Act 1989* (Cth).
99 *Migration Reform Act 1992* (Cth) s 33.
100 *Migration Reform Act 1992* (Cth) s 33.
101 Explanatory Memorandum, Migration Reform Bill 1992 (Cth), Migration (Delayed Visa Applications) Tax Bill 1992 (Cth) 5.
102 Ibid 6, 9; Commonwealth, *Parliamentary Debates*, House of Representatives, 4 November 1992, 2620 (Gerry Hand, Minister for Immigration).
103 John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335,

348.
104 *Abebe v Commonwealth* (1999) 162 ALR 1.
105 In particular, s 77.
106 It was a 4:3 majority, indicating how finely balanced the decision was.
107 *Abebe v Commonwealth* (1999) 197 CLR 510, 26 (Gleeson CJ and McHugh J).
108 For example, see ibid 553 (Gaudron J) and 583 (Kirby J).
109 For example, see ibid 534 (Gleeson CJ and McHugh J) and 593 (Kirby J).
110 Andrew Metcalfe, 'Jason's Legacy — Impact of Immigration on Administrative Law' (Paper presented at Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 3.
111 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
112 See argument of counsel T Reilly that 'The grounds for relief, not being specified in the Constitution, are derived from the common law': ibid 85.
113 Ibid 86.
114 Ibid 92, 101, 109 (Gaudron and Gummow JJ) and 135 (Kirby J); see also Stephen Gageler SC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 285.
115 The Court did not concede that there had ever been a distinction but, rather, felt that it did not matter, as it was now clear that a breach of natural justice by an administrative decision maker was a jurisdictional error.
116 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90.
117 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
118 Hayne J, while not addressing it directly, appeared to allude to this possibility: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 142.
119 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 75.
120 Ibid 112 (Kirby J).
121 There is even one reading of Kirby J's judgment that holds out the possibility of there being some 'truly fundamental obligations of natural justice' that cannot be excluded: ibid 113. See Simon Evans, 'Protection Visas and Privative Clause Decisions: *Hickman* and the *Migration Act 1958* (Cth)' (2002) 9 *Australian Journal of Administrative Law* 49, 50, 56, 60.
122 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 113 (Kirby J).
123 Ibid 84 (Gaudron J), 94 (McHugh J), 113 and 114 (Kirby J).
124 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 131. See also David F Jackson, 'Development of Judicial Review in Australia over the Last 10 Years: The Growth of the Constitutional Writs' (2004) 12 *Australian Journal of Administrative Law* 22.
125 An interest that, since *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, has been responsible for the development of Australia's unique form of constitutional judicial review and, in particular, its reliance upon jurisdictional error. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, Gaudron J (87), McHugh (102) and Kirby J (123–4) referred back to Gaudron and Gummow JJ's reliance upon s 75(v) of the *Constitution* in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101. However, it was in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 that its real potential was realised. For a concise assessment of this development, see John Basten, 'Constitutional Elements of Judicial Review' (2004) 15 *Public Law Review* 187.
126 Helen Pringle and Elaine Thompson, 'Tampa as Metaphor: Majoritarianism and the Separation of Powers' (2003) 10 *Australian Journal of Administrative Law* 107, 117–18.
127 Section 474(1)(a).
128 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
129 Ibid 504.
130 Ibid 505.
131 Ibid 506; the proposition that a decision affected by jurisdictional error was not a decision under the *Migration Act 1958* (Cth) had been the reason for the earlier decision of *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.
132 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31314 (Philip Ruddock); Commonwealth, *Parliamentary Debates*, Senate, 26 February 2001, 21910 (Eric Abetz).
133 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
134 Ibid 514. Gaudron and Kirby JJ's approach in *Re Minister for Immigration and Multicultural and Indigenous Affairs: Ex parte Applicants S134/2002* (2003) 211 CLR 441, 471, underscored their presumption that Parliament similarly believed that the rule of law necessitated judicial enforcement of the legislative command. These observations were later described by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [51], as 'compelling'.
135 Callinan J in a separate judgment was quite unapologetic about the lack of guidance: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 535.
136 Ibid 493 (Gleeson CJ).
137 Ibid 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
138 That is, labels are not mutually exclusive; they overlap.
139 Which will almost always be the case in a migration decision and undoubtedly in a refugee decision.
140 That is, before the Refugee Review Tribunal or the Merits Review Tribunal in this instance.
141 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

142 This is not to suggest that the judiciary will always require a high standard; it will not. While rare, there will also be occasions where no natural justice obligations are imposed by the judiciary. An example of the later case is *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616, although that decision must be viewed in light of the fact that the plaintiff had previously received a full merits review as well as judicial review of his claim for a visa, both of which had confirmed he was not entitled to the visa.
143 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
144 That is, the decision from which applicants had a right of appeal to the Refugee Review Tribunal or the Merits Review Tribunal.
145 *Migration Act 1958* (Cth) ss 51A, 97A, 118A, 127A, 357A, 422B.
146 Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2790–1 (Ian Campbell, Parliamentary Secretary to the Treasurer).
147 *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 562, 567; *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 214, [64].
148 Enzo Belperio, 'What Procedural Fairness Duties Do the Migration Review Tribunal and Refugee Review Tribunal Owe to Visa Applicants' (2007) 54 *AIAL Forum* 81, 85; *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 562 (Heerey J); *SZEGT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1514 (Edmonds J); *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 214 (Heerey, Conti and Jacobson JJ).
149 Belperio, above n 148, 84; *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624 (French J); *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 170 (Gray J).
150 Belperio, above n 148, 84; *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 (Lindgren J); *Wu v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 23 (Hely J).
151 *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624, [59], where he set out the test in *Annetts v McCann* (1990) 170 CLR 596, 598. This approach was also adopted by Gray J in *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 170, [36]. In between *WAJR* and *Moradian* the term 'principle of legality' was used by a member of the High Court for the first time as an overarching rule of statutory interpretation: *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ).
152 For example, in 2013 alone see *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289; *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082; *Monis v The Queen* (2013) 87 ALJR 340.
153 *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 214.
154 Ibid (Heerey, Conti, Jacobson JJ); the same bench simultaneously handed down *SZCIJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 62. *SZCIJ* dealt with s 422B, while *Lay Lat* dealt with s 51A.
155 *Antipova v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 151 FCR 480 (Gray J).
156 *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419, [85] (Young J); *MZXFN v Minister for Immigration and Citizenship* [2007] FCA 362, [17] (Bennett J); *MZXGB v Minister for Immigration and Citizenship* [2007] FCA 392, [51] (Lander J); *SZHWY v Minister for Immigration and Citizenship* (2007) 159 FCR 1, [93]–[96], [113] (Graham J), [189] (Rares J); *SZEQH v Minister for Immigration and Citizenship* (2008) 172 FCR 127, [27] (Dowsett J). Although see the observation in the joint judgment of Emmett, Kenny and Jacobson JJ in *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427, [10]–[12], which proposes an individual section approach, although, due to the broad way in which they define the nature of each section, it in turn gives the codifying clause a very broad reach.
157 *SZHWY v Minister for Immigration and Citizenship* (2007) 159 FCR 1, [189] (Rares J).
158 *SZHMM v Minister for Immigration and Multicultural Affairs* [2006] FCA 1541, [7] (Madgwick J).
159 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.
160 It was not necessary on the facts to choose between the tests.
161 See, for example, the application of the invitation to appear clause (ss 425 and 430) in *SCAR v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 198 ALR 293 and *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152.
162 For examples of the strict application of the codes, see in particular *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 and *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214, although the trend to apply this strict approach universally — that is, to every section of the code — was eventually rebuffed, as discussed immediately below.
163 *Migration Amendment (Review Provisions) Act 2007* (Cth).
164 *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448 (French CJ; Gummow, Hayne, Kiefel and Bell JJ).
165 Ibid 455.
166 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.
167 *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489.

168 *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256, [45] (Tamberlin, Goldberg and Rares JJ); and *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236, [6] (Stone and Tracey JJ), [63] (Buchanan J).
169 See, for example, the consequences listed by the Full Federal Court of not following the specified procedure: *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256, 268 [46].
170 *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489, 503–4.
171 Matthew Alderton, Michael Granziera and Martin Smith, 'Judicial Review and Jurisdictional Errors: The Recent Migration Jurisprudence of the High Court of Australia' (2011) 18 *Australian Journal of Administrative Law* 138, 143.
172 *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (French CJ; Gummow, Hayne, Crennan and Bell JJ).
173 Ibid 640 [36].
174 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 339.
175 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389, 394 (Gummow and Callinan JJ).
176 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 177.
177 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 357. French CJ was less reticent and made a specific finding that there had been a breach of procedural fairness: ibid 347.
178 Ibid 347.
179 John Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 35, 35.
180 *Migration Act 1958* (Cth).
181 Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 117, 117.
182 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (*Wednesbury*). As pointed out in Matthew Groves and Greg Weeks, 'Substantive (Procedural) Review in Australia' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 133, 140, prior to *Wednesbury* the High Court in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 had also taken a very 'conservative' approach to the reasonableness ground of review.
183 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377–8.
184 Ibid 364 (Hayne, Kiefel and Bell JJ).
185 *Sharp v Wakefield* [1891] AC 173.
186 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 349 [24] (French CJ), 363 [65] (Hayne, Kiefel and Bell JJ), 371 [90] (Gageler J), although strictly speaking Gageler J did not use 'justice' but instead said the exercise must be 'according to law and to reason within limits set by the subject matter, scope and purpose of the statute' — this formulation can be seen as more restrictive than a general appeal to 'reason and justice'.
187 *Rooke's Case* (1598) 5 Co Rep 99b.
188 The specific examples given by Lord Halsbury which warranted intervention included 'where justices thought proper not to enforce the law because they considered that the Act in question was unjust in principle', where the statute specified what matters had to be considered and a completely irrelevant matter was taken into consideration, and the statutory discretion was implemented incorrectly in that a general resolution was made rather than considering affected persons individually: *Sharp v Wakefield* [1891] AC 173, 179–81.
189 Ibid 183.
190 Jaffe, above n 18, 960.
191 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 344.
192 Michael Sexton SC, 'Bills of Rights are Overrated, Like the Magna Carta', *The Australian*, 9 June 2015 <http://www.theaustralian.com.au/opinion/bills-of-rights-are-overrated-like-the-magna-carta/news-story/ba572a278b67196b7ef51c90a3083ecb>.
193 Matthew Zagor, *England and the Rediscovery of Constitutional Faith* (30 July 2009, The Australian National University) <http://ssrn.com/abstract=1445138 or http://dx.doi.org/10.2139/ssrn.1445138>, 25 and fn 134.
194 Mark Aronson, 'The Growth of Substantive Review: The Changes, Their Causes and Their Consequences' (Paper presented at the Cambridge Public Law Conference, Cambridge, 16 September 2014) 21.

WHOSE APPREHENSION OF BIAS?

The Honourable Justice Debbie Mortimer*

In preparing to speak tonight, I learnt how much has been written about judges expressing opinions outside the courtroom at events just like this and whether this gives rise to various apprehensions of bias. The heat in that debate is enough to make me sit down right now.

So I am not going to speak about the difficulties attending the development of an incredibly knowledgeable and legally well-informed hypothetical lay observer, which has been the subject of considerable academic commentary; nor will I express any views about what kind of connection — causal, rational, direct, indirect — might be sufficient to satisfy the second step of the test in *Ebner*.[1]

Instead, I am going to talk about dogs for a while. I will come shortly to Izzy the dog's brush with a death sentence at the hand of the Knox City Council. But first I thought I would tell you about how, in a previous life, you might have seen me at a dog show. Yes, in the ring, running around with a dog at the end of a lead. As you may or may not know, there are judges in dog shows. I was never that kind of judge. Dog show judges are almost always drawn from the ranks of dog breeders and dog show exhibitors, and they are licensed after a long and intensive training program. However, at base, they remain exhibitors of specific breeds of dogs. So, when a judge breeds golden retrievers and a golden retriever wins best in show on the decision of that judge, well, you can imagine — or at least, if you have seen the movie *Best in Show*, you might have an idea of the reaction.

However, there are express rules about apprehension of bias for dog show judges. For example, when a particular judge is judging, there are rules prohibiting dogs from being shown by individuals who are related to a judge, or individuals who co-own dogs with that judge, and sometimes even dogs bred by that judge cannot be shown when that judge is presiding, so to speak. Those rules are taken very seriously and breaches can lead to judges losing their licences to judge.

Why am I talking about dog shows? The point is this: impartiality, and especially the appearance of impartiality, is not the sole prerogative of the law. That is because, as many authorities on apprehended bias have observed, impartiality is a central indicator, or ingredient, of fairness. In any walk of life where there is choice, competition, successful and unsuccessful applicants, prize winners and runners up and the 'did not place' — in all those situations — our society expects fairness to be a foundational value. And the appearance of impartiality is essential to our sense of fairness. Our community is adept at, and adapted to, testing all sorts of circumstances and events for their fairness. Members of our community are used to viewing impartiality, and the appearance of impartiality, as a necessary aspect of fairness in their interactions with government (large and small), with each other and in the widest range of their activities. They expect no less of the judiciary, but it is important to recall the breadth of members of the Australian community who measure what judges do

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against their own perceptions of fairness and impartiality and also to recall that judges hold no particular monopoly on the content of the concepts of fairness and impartiality.

Some commentators — judicial and academic — have suggested that the principles concerning apprehension of bias were developed only to avoid the need to descend into the murky and unpalatable depths of actual bias. That is not, to my mind, the whole explanation; rather, apprehended bias principles play their own substantive role in serving the values of fairness and impartiality in exercises of public power.

That is because exercises of public power concern how people are treated; and how people are treated is, in part, about how they *feel* they are treated. Being fair is not only about what I *do* as the repository of a power but what is *experienced* by the person over whom the power is exercised.

Fairness is reflexive; so, too, is impartiality. If that is right then those affected by exercises of public power are entitled to *feel* fairly treated and impartially judged. Accepting that there needs to be some objectivity about this, the law allows for the hypothetical lay observer to test whether those affected by exercises of power *should* feel fairly treated and impartially judged and, more broadly, whether the community (which ultimately must accept the authority that accompanies those exercises of power) *should* feel litigants have been fairly treated and impartially judged.

Within this normative framework, two questions arise. First, when we require the appearance of impartiality from our judges, do we sufficiently allow for how judges, as human beings, decide controversies and what they bring to those decisions from their own life experiences and identity? Second, what is it about the background, experiences and perspectives of judges who examine allegations of apprehended bias that makes them reach such a range of conclusions on the same fact situation? Abella J, on behalf of the Canadian Supreme Court, wrote a comprehensive and thoughtful judgment on these issues last year, and I will turn to that in more detail a little later.

But let us not forget Izzy the dog. Izzy's situation does not concern bias in a judicial context, but it is a good example of the second issue I have raised — different judicial perspectives on apprehended bias.

In *Isbester v Knox City Council*[2] (*Isbester*), the High Court overturned a decision of the Victorian Court of Appeal about the role that a local council officer had played in the prosecution of Ms Isbester, the owner of two dogs who attacked another dog and at the same time bit the owner of the victim dog (if I might use that term).

Section 84P(e) of the *Domestic Animals Act 1994* (Vic) empowers municipal councils to destroy any dog seized by the council if the dog's owner is found guilty of an offence under s 29 of the Act, which includes (in s 29(4)) where a dog causes serious injury to a person.

Ms Kirsten Hughes was at this time the 'Co-ordinator of Local Laws' at Knox City Council — a local council in the outer eastern suburbs of Melbourne, where the attack had occurred. Ms Hughes determined that charges, including charges under s 29(4), should be laid and she arranged for drafting of the charges. Ms Isbester entered guilty pleas in the Ringwood Magistrates' Court.

After the guilty pleas, Ms Hughes convened a hearing by a panel of council officers to decide whether the dog that caused the injury should be destroyed. The panel (which was an optional process) consisted of a chairperson, who was authorised to make the decision, another officer and Ms Hughes herself. The panel decided that the dog should be destroyed.

The legal issue was whether Ms Hughes' involvement in the prosecution of Ms Isbester gave rise to a reasonable apprehension of bias when Ms Hughes was subsequently involved in the decision to destroy Ms Isbester's dog.

At trial, it was held that Ms Hughes had insufficient personal interest to give rise to any such apprehension.[3] On appeal, the Court (Hansen and Osborn JJA and Garde AJA) distinguished two types of apprehended bias: prejudgment and conflict of interest.[4] As to the latter, the Court of Appeal held that no relevant conflict existed, distinguishing two cases (*Dickason v Edwards*[5] (*Dickason*) and *Stollery v Greyhound Racing Control Board*[6] (*Stollery*)) in which it had been 'held that a person who is in the position of an accuser cannot also hear and decide the charge in conjunction with other people'.[7]

The High Court did not agree with the Court of Appeal. The plurality (Kiefel, Bell, Keane and Nettle JJ) held that Ms Hughes' participation in the deliberations concerning the destruction of Ms Isbester's dog, after Ms Hughes had been in the position of Ms Isbester's accuser, gave rise to a reasonable apprehension of bias.

The plurality affirmed the two-step test for apprehended bias set out in *Ebner v Official Trustee in Bankruptcy*,[8] which involves:

(i) 'identification of what it is said might lead a decision-maker to decide a case other than on its legal and factual merits'; and
(ii) 'articulation of the *logical connection* between that interest and the feared deviation from the course of deciding the case on its merits'.[9]

Their Honours acknowledged the distinction between prejudgment situations and 'conflict of roles' situations[10] but held that the only extent to which it might be said that the test operates differently in respect of 'conflict of roles' cases is that, if an incompatibility is identified, the connection between that incompatibility and the feared deviation will be 'obvious'.[11]

The plurality considered *Dickason*[12] and *Stollery*[13] applicable and did not consider the 'rule of justice [prohibiting] an accuser to be[ing] present as a member of a tribunal hearing the charge he promoted'[14] was limited to judicial officers.[15]

It is here that their Honours emphasised the value underlying the law about bias. They said the main issue is whether the decision maker was impartial and seen to be so.[16] It did not matter that Ms Hughes might not have been described as the 'prosecutor' when it came to the panel deliberations: it was 'not realistic to view Ms Hughes' interest in the matter as coming to an end when the proceedings in the Magistrates' Court were completed' and she remained 'the moving force' in the panel's deliberations.[17] Ms Hughes had, the plurality held, a personal interest not in the sense of receiving any material or other benefit but because she might be seen to have a 'view' of what Ms Isbester had done, which was personal to her.[18]

As a footnote, it seems that, as a result of a decision of a new panel convened by Knox City Council, Izzy the dog was sent to the South Australian RSPCA to find a new home.

Isbester shows that, within the application of established principles of apprehended bias, different judges see what would be apprehended about a particular circumstance very differently, reaching (as between the Court of Appeal and the High Court) opposite conclusions. That can only be because their own life experiences and identities affect their perceptions of what is required for impartiality and the appearance of impartiality.

A recent decision from the New South Wales Court of Appeal is a further example of

contrasting judicial evaluations of apprehended bias claims. The decision is *B v DPP (NSW)*.[19] In that decision the appellant had been convicted[20] of having sex with a woman without telling her of the risk of contracting HIV, while knowing that he had HIV. B said he had told his partner; she said he had not. One ground of appeal was that 'the judges had preconceived perceptions about people living with HIV so that they would have found him guilty regardless of the evidence that was adduced'.[21]

The statement said to show bias was the District Court judge's statement, on appeal, that he 'agree[d] with the learned magistrate that no *normal* woman *in her right mind* would have unprotected sexual intercourse with a man she knew to be HIV positive'.[22] Beazley P, with whom Tobias AJA agreed,[23] pointed out that the magistrate had not, in fact, said such a thing and, rather, that this should be seen as the District Court judge's own opinion.[24]

While finding that the appellant could not prove actual bias, a majority of the Court of Appeal found there was a reasonable apprehension of bias based on this statement.

Accepting the starting point that, as Beazley P put it, 'judges do not enter upon their decision-making task as if they had no experience of life. Nor are they devoid of opinions',[25] her Honour nevertheless considered that an apprehension of bias was made out. Her Honour pointed out that, as a 'matter of common experience, people react in a variety of ways to different situations, including when personal, emotional and sexual matters are involved'.[26] She considered that the remark of the judge 'involved the appearance of a preconception of how a person would react in the circumstances underlying the case' rather than being a conclusion based on the evidence.[27] Nor could it be described as an aside: it was a material reason he gave for his conclusion.

Barrett JA dissented on the bias issue. His Honour cited a list of cases in which common experience formed the basis of a finding and considered that all the judge had done by his remarks was to test, against common experience, a conclusion the judge had 'independently reached'.[28] While he described the 'normal woman in her right mind' aspect of the reasons as 'unfortunately blunt', he considered the remarks would not cause the fair-minded lay observer to apprehend the judge had approached the matter according to some impermissible preconception.[29] Clearly, two very different fair-minded lay observers were at work in this case.

Hindsight is a wonderful thing, and the outcomes in these two decisions might not now seem surprising (other than to the Victorian Court of Appeal and to the District Court judge). But the division of judicial opinion, between intermediate and ultimate appellate courts and between judges in the New South Wales Court of Appeal, demonstrates that these are not easy lines to draw. Much depends on who is doing the apprehending: on how particular judicial minds conceive of that hypothetical fair-minded lay observer and conceive of what constitutes a sufficient disqualifying connection with the issues to be decided.

If there are no easy or definitive answers, and yet if we take impartiality as such a central value in our judicial system, might our conception of when there is an appearance of partiality change as our community changes? What do we expect, in 2016, of the individuals who hold judicial office and are responsible for the integrity of those institutions? Would a remark such as that by the District Court judge in *B v DPP (NSW)* have been decided the same way in the 1950s or 1960s?

The Supreme Court of Canada looked at these issues last year in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*[30] (*Yukon*). Yukon, a territory in northwest Canada, is still often referred to as a 'frontier' area. Almost a quarter of its population (of about 50 000 people) comprises Canada's First Nations people. In a

publication on the Yukon government website that I found, Yukon is described as having a 'strong and active Francophone community'.[31] This case was about Yukon's only French language school.

The Yukon Francophone School Board made a claim against the Yukon government claiming it had breached s 23 of the Canadian Charter of Rights and Freedoms,[32] alleging there were deficiencies in the provision of French minority language education in Yukon.[33]

The trial judge upheld the Board's claims under s 23 and went further, also ordering the Yukon government to communicate with and provide services to the Board in French in compliance with what he considered to be its statutory obligations. Now that is some court order.

On appeal the Yukon government claimed the trial judge's decision was affected by a reasonable apprehension of bias on two bases: first, the judge's treatment of counsel for Yukon and some of the rulings he made; and, second, the judge's involvement in the francophone community in Alberta both before and during his time as a judge, together with the fact that the judge was, while holding judicial office, the governor of a charitable foundation whose mission was said to be to 'enhance the vitality of Alberta's francophone community'.[34] This charitable foundation was not directly involved in the activities of the school in the litigation and was not affiliated with any organisation implicated in the trial.

For present purposes, I need not dwell on the long catalogue of rulings and remarks by the trial judge that both the Court of Appeal and the Supreme Court held gave rise to a reasonable apprehension of bias, such as the trial judge's accusations that counsel made submissions that 'lacked conviction or sincerity'.[35]

It is the second basis which is relevant. The Court of Appeal had found that the trial judge's background and involvement in the francophone community in Alberta both before and during his time as a judge did *not* give rise to any reasonable apprehension of bias; indeed, the Court of Appeal said:

> The fact that the judge in this case had experience in the provision of minority language education was, in fact, a positive attribute. He was able to approach the issues with important insights gained from his experience.[36]

However, the Court of Appeal found that the judge's ongoing position as a governor of the charitable foundation was inappropriate because that foundation promoted a particular vision of the francophone community which would 'clearly align it with some of the positions taken by the [Board] in this case'.

The Supreme Court did not agree. The Court's judgment was delivered by Abella J. Her Honour found that the charitable foundation was 'largely a philanthropic organization rather than a political group'.[37] She held that, while it is important that 'judges [avoid] affiliation with certain organizations, such as advocacy or political groups, judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest':[38] 'The reasonable apprehension of bias test recognizes that while judges "must strive for impartiality", *they are not required to abandon who they are or what they know*.'[39]

Her Honour emphasised the values of impartiality in actuality and in appearance[40] but then quoted some passages from an earlier Supreme Court decision, where two of the Justices said:

> [J]udges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. …
> It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.[41]

Abella J added:

> Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, *they require that the judge's identity and experiences not close his or her mind to the evidence and issues*.[42]

To that, perhaps more critically, we must add that the judge's identity and experiences *do not appear* to close her or his mind.

There is then a rather lovely series of propositions from Abella J that I would like to share with you, as well as two quotations her Honour cites.

First, Abella J says this:

> A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand 'life' — their own and those whose lives reflect different realities.[43]

'Justice is the aspirational application of law to life' is rather a wonderful sentence.

Abella J then quotes a passage from an article by Martha Minow, Dean and Professor at Harvard Law School. The passage is a little long, but worth repeating and repays careful consideration.

> None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending *not* to know risks leaving unexamined the very assumptions that deserve reconsideration.[44]

And, finally, Abella J refers to a passage from the judgment of Cameron J of the South African Constitutional Court:

> '[A]bsolute neutrality' is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality. … Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views that is the keystone of a civilised system of adjudication.[45]

Abella J went on to say:

> We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.[46]

Her Honour was not persuaded that the trial judge's involvement with an organisation, whose functions were largely undefined on the evidence, could be said to rise to the level of a contributing factor such that he should not have sat on the trial.

What might we discern from all these thoughtful observations in *Yukon*? I venture to suggest that the judgment shows an awareness, and recognition, of two matters.

First, with greater diversity in the judiciary comes a more obvious diversity of background, experience and outlook. As the broad uniformity of the judiciary (gender, race, background, religious belief) breaks down, so, ironically, the challenges to the appearance of impartiality may be perceived to increase. Differences in experience, background and attitude are apparent for all to see. Will it trouble one party, or the 'fair-minded lay observer', if a Muslim judge sits on a terrorism case with a Muslim accused? Will it trouble a party, or a 'fair-minded lay observer', if an Aboriginal judge sits on a case such as the one I am currently hearing about the events on Palm Island in November 2004? Will it trouble one party, or the 'fair-minded lay observer', if a judge who is a publicly declared atheist determines a claim of religious discrimination?

Second, judges themselves may need to become more astute to consider how they may be viewed by others who are not like them, not of their background, with different life experiences and attitudes and with different beliefs and values. The range of activities it was once thought quite conventional for judges to be involved in (for example, membership of governing bodies of religious institutions, board membership of private schools and membership of the armed forces) may require reassessment. It may be that the attributes invested in the 'fair-minded lay observer' are changing as our community changes. That, too, is a consequence of diversity.

What will not change is the proposition that impartiality, including the appearance of impartiality, is a core value in the proper exercise of public power. But what is involved in maintaining the appearance of impartiality, it seems to me, is the contemporary challenge for the judiciary, and one we must continually review.

As Aharon Barak observed, a person 'who is appointed as a judge is neither required nor able to change his skin'.[47] We will never know completely what drives an individual judge to a particular decision. Indeed, the intuitive and internal nature of the reasoning process means that the judge herself or himself may not be able *wholly* to explain why one conclusion, or one argument, seems more appropriate or more persuasive than the competing conclusion or argument. That is why different judges, looking at the same set of facts and the same series of competing legal propositions, can reach quite different conclusions. It is the intuitive and the internal aspects of our reasoning which are most strongly the products of who we are, our background and experiences, and which inevitably influence the conclusions we form. As the *Yukon* judgment contends so eloquently, to a point that is as it should be.

The reassurance we can give litigants, and the community in general, is that judges will be sensitive to perceptions of fairness and impartiality about our internal reasoning processes and those of judges whose disqualification decisions we are required to review, where a

judge's statements, background, activities and experience cause questions to be asked — that we will try to see it from the perspectives of others as well as our own. After all, that is part of having an open mind.

Bearing in mind the Canadian Supreme Court's observations in *Yukon*, that will develop a concept of impartiality that encourages diversity in the judiciary rather than one which frustrates it.[48]

Endnotes

1 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
2 (2015) 255 CLR 135.
3 *Isbester v Knox City Council* [2014] VSC 286, [111].
4 Ibid; see *Isbester v Knox City Council* (2015) 225 CLR 135, 144–5 [15]–[19].
5 (1910) 10 CLR 243. In this case, the plaintiff, 'a member of a friendly society regulated by statute[,] … was accused of insulting the District Chief Ranger of the society. It was held that the District Chief Ranger could not sit as part of the committee to hear the charges brought against the plaintiff': *Isbester v Knox City Council* (2015) 255 CLR 135, 149 [35].
6 (1972) 128 CLR 509. In this case, a greyhound owner was accused of attempting to bribe the manager of an association which conducted dog racing. The manager reported this to the Greyhound Racing Control Board, of which he was a member. He was present for the deliberations, although he took no part in them. The High Court quashed the decision of the Board.
7 *Isbester v Knox City Council* (2015) 255 CLR 135, 145 [17].
8 (2000) 205 CLR 337, 345 [8].
9 *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [21] (emphasis added).
10 Ibid. Their Honours noted that '[o]nly the question of Ms Hughes' possible conflict of interest remains relevant' and distinguished *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 and *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209 on the basis that those cases dealt with prejudgment situations: at 145 [16], 148 [28].
11 *Isbester v Knox City Council* (2015) 255 CLR 135, 152–3 [47]–[49].
12 Ibid 149–50 [35]. The facts of this case are set out above at n 5.
13 Ibid 150 [36]–[37]. The facts of this case are set out above at n 6.
14 Ibid 150 [37], citing *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 526–7 (Gibbs J).
15 Ibid 150 [38], citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 358 [59]–[61]; cf 154 [54] (Gageler J).
16 Ibid 148–9 [31].
17 Ibid 151 [42]–[43].
18 Ibid 152 [46].
19 [2014] NSWCA 232.
20 Under s 13(1) of the *Public Health Act 1991* (NSW).
21 *B v DPP (NSW)* [2014] NSWCA 232, [10].
22 Ibid [45] (emphasis added).
23 Ibid [78].
24 Ibid [58].
25 Ibid [54].
26 Ibid [58].
27 Ibid.
28 Ibid [68].
29 Ibid [76].
30 [2015] 2 SCR 282.
31 Yukon government, 'Yukon at a Glance', <http://www.gov.yk.ca/pdf/yukon_at_a_glance.pdf>.
32 *Constitution Act 1982*, pt 1. Broadly, s 23 provides certain guarantees to citizens of Canada whose first language is 'that of the English or French linguistic minority population of the province in which they reside' in relation to education in that language.
33 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282, 290 [3].
34 Ibid 313 [56].
35 Ibid 311 [52].
36 Ibid 294 [17], quoting [2014] YKCA 4 [181].
37 Ibid 313 [58].
38 Ibid 313 [59].
39 Ibid 300 [34] (emphasis added).
40 Ibid 299 [31].
41 *R v S (RD)* [1997] 3 SCR 484, [38]–[39] (L'Hereux-Dubé and McLachlin JJ), quoted in ibid 299–300 [32].

42 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282, 300 [33] (emphasis added).
43 Ibid 300–1 [34].
44 Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201, 1217, quoted at ibid 300 [34] (emphasis added).
45 *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] 3 SA 705, [13], quoted in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282, 301 [35].
46 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282, 316 [61].
47 Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 103–4.
48 This presentation ended with an account of a retiring New Zealand District Court judge and one of his last cases, which might have raised novel questions concerning his impartiality (*Collections Unit v La Rue* (Unreported, District Court at New Plymouth, Roberts DCJ, 21 January 2016)). An account of it can be found at <http://thespinoff.co.nz/18-04-2016/that-moment-when-youre-in-the-dock-and-the-judge-makes-you-read-your-facebook-post-in-which-you-call-him-a-fn-ct/>.

TRIBUNAL AMALGAMATION 2015: AN OPPORTUNITY LOST?*

Robin Creyke

The *Tribunals Amalgamation Act 2015* (Cth) was passed on 14 May 2015. So ends a 20-year saga which began with the publication in 1995 of the Administrative Review Council (ARC) Report No 39, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, which had recommended the combination of the major merits review bodies in the Commonwealth.

The history of that saga includes the rare defeat in 2001 in the Senate chamber of the Australian Parliament of a package of Administrative Review Tribunal Bills (the 2000 Bills), notable for containing the most pages on a single topic introduced until then into the Australian Parliament. The 2000 Bills were to amalgamate the key national tribunals — the Administrative Appeals Tribunal (AAT), the migration tribunals (Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT)), the Social Security Appeals Tribunal (SSAT) and the Veterans' Review Board (VRB). The defeat followed a sustained national media campaign waged against the amalgamation by every major metropolitan newspaper in Australia,[1] principally on the ground that the Bills unacceptably diminished the independence of the tribunal system. There was also significant opposition from within the veterans' community — opposition which led ultimately to the removal of the VRB from the Bill. The coup-de-grace to the legislation came with the defection of the migration tribunals.

It is striking that, 15 years later, there was a brief mention but no analysis in the coverage of the proposal in the 2014 Budget to again seek to amalgamate the AAT with the SSAT, the MRT and the RRT, together with the Australian Classification Review Board. No major newspaper mentioned the topic. Such media interest as was evident came from online sources. The independent *IT News* queried the initial inclusion of the Australian Classification Review Board. Otherwise, there was a reference to the proposal on the website of one university centre, the Department of Immigration website and the website of one law firm. The Senate Standing Committee for the Scrutiny of Bills noted in its inquiry report that there had been submissions of 'major interest groups' but referred only to the Bar Association of Queensland, the Law Institute of Victoria and the Chief Justice of the Family Court.[2] For a Bill — the Tribunal Amalgamation Bill 2014, described by Senator Penny Wright in the second reading debate as legislation for tribunals, which are 'the coalface of the legal system' and, according to the Productivity Commission, one of the three pillars of the civil justice system in Australia[3] — that is both surprising and disappointing.[4]

Australian amalgamation developments

That surprise and disappointment may have reflected a widespread acceptance of the amalgamation concept. Between 1975, when the legislation for the first general jurisdiction tribunal, the AAT, was passed, and by 2015, the Australian states and territories had embraced the amalgamation movement. Every mainland state and the two territories had

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established amalgamated civil and administrative tribunals, often referred to as 'super-tribunals',[5] and in 2015 Tasmania published a discussion paper advocating it follow suit.[6] Key federal publications between 2000 and 2015 also referred with approval to the earlier proposal to amalgamate the national merits review tribunals[7] and, to a large extent, there was bipartisan political support for the legislation.[8]

Other possible reasons for the lack of media attention were that the hard lessons from 15 years ago had been learned or that, since 2000, the wider interest in the status of the federal tribunal has waned significantly. This paper examines whether either of these conclusions is accurate and concludes that, although there is much less to criticise in the 2015 amendments and this may have accounted for some absence of comment, the Commonwealth missed an opportunity to take further steps to modernise the tribunal merits review system and thus cement its reputation as a leader in the tribunal field.

Comparison of amalgamation legislation and policies in 2000 and 2015

Fifteen years ago, the debate on the 2000 Bills[9] was intense. Although the debate was principally about whether the 2000 model detracted from the independence of the Tribunal,[10] there were multiple concerns expressed in that debate. These were summed up in a statement by Ms Anne Trimmer, then President of the Law Council of Australia, who said:

> Our main concerns in relation to the ART Bill are: first, reduced opportunity for merits review; secondly, compromised independence of the ART; thirdly issues associated with the appointment and qualifications of members; fourthly, denial of a right to legal representation; and lastly, the constitution of the panels themselves. A theme of the bill is a whittling away of the independence of the external merits review tribunal and its absorption into the bureaucracy. This is reflected in lack of tenure of members, the funding of divisions by departments, the concept of ministerial directions and the code of conduct and performance agreement requirements. Any reform which attacks the independence of the external merits tribunal must be regarded with caution.[11]

Others' criticisms of the 2000 Bills were that they:

- took a 'one-size-fits-all' approach to the amalgamation in their core provisions;[12]
- provided no minimum qualifications for the President, including not having to be a Federal Court judge;[13]
- increased the imposition of rules on the Tribunal, referred to as 'trip-wires', not 'directions';[14]
- did not provide an open and transparent appointments system;[15]
- funded the six divisions of the Tribunal by the respective portfolio agencies;[16]
- introduced a presumption against legal representation in providing that portfolio legislation could restrict or remove access to representation and would be by leave;[17]
- required approval by all six affected ministers to cross-appointments to divisions;[18]
- emphasised the administrative and investigative character of the Tribunal's processes at the expense of its independent dispute-handling role. As the Hon Daryl Williams, the then Commonwealth Attorney-General, remarked: 'The new tribunal will provide for independent review within the framework and culture of an executive body' and 'Commonwealth review tribunals constitute part of the executive arm of government and provide administrative, not judicial, decision making in dispute resolution processes';[19]
- required that, if an applicant produced new evidence, the matter would be remitted to the agency for reconsideration;[20]
- proposed that portfolio ministers could issue directions that would prevail over those of the President in reviewing decision relating to that minister's legislation;[21]
- provided that members could be removed for breaches of performance agreements and the proposed code of conduct for the Tribunal;[22]

- raised the concerns of the veterans' community about reduction in the quality of decisions, which was due, among other reasons, to quotas on the total numbers of members and for each division, potentially diminishing available expertise;[23]
- provided for second-tier review within the ART but only for cases heard initially by a single member, where there was a manifest error or where the case raised matters of general significance;[24]
- established a system comprising a 'separate group of tribunals, broken up into divisions but with different rules relating to how they go about their procedures and with different processes for appointment and different funding'.[25]

In combination, these concerns about loss of independence and other aspects of the 2000 Bills spelled their undoing.

By contrast, as Senator Jacinta Collins remarked during debate on the 2015 Bill, 'This bill is much less controversial. For the most part, its provisions affect a simple consolidation of existing tribunal architecture';[26] and it tidied up the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), largely in non-controversial areas. Evidence supports Senator Collins's conclusion and indicates the contrast between the 2000 and 2015 legislation. That evidence is apparent in the provisions dealing with the following matters criticised in 2000:

- **Uniformity**: The 'one-size-fits-all' model has not been embraced despite an initial stated purpose which was 'to harmonise and streamline procedural matters for the amalgamated tribunal'.[27] That purpose was quietly dropped. Instead, the Explanatory Memorandum to the Bill stated the amalgamation would retain the successful features of each of the tribunals as currently constituted while preserving 'the distinctive aspects of each of the tribunals that are important in their specific jurisdictions'.[28] This is an approach which will adopt best practice but not at the expense of procedures and practices designed for the users of the former specialist tribunals.
- **President of the AAT:** The President of the AAT in 2015 remains a Federal Court judge.[29]
- **Members subject to directions**: Moves by the government in 2000 for the Administrative Review Tribunal (ART) to become an executive-focused tribunal have been resisted and there is no provision in the AAT Act that members must comply with government policy. Directions may be issued but only by the President and, if the direction affects the division, following consultation with the division head. That means the Minister cannot trump decisions of the President and the directions are only to relate to operational and procedural, not substantive, matters.[30] Moreover, a failure to comply with a direction does not result in the invalidity of the decision.[31]
- **Funding**: Although not reflected in the *Tribunals Amalgamation Act 2015* (Cth), funding for the new AAT is a one-line appropriation to the Attorney-General's Department.[32]
- **Representation:** Parties may generally appear in person or by a representative, and a party summonsed may also be represented.[33] In the Social Services and Child Support Division, however, representation of the non-agency party may only appear with leave of the Tribunal, and leave must take account of the objectives of the Tribunal. These include, for example, that Tribunal functions are to be 'proportionate to the importance and complexity of the matter'[34] and the wishes of both parties.[35] To that extent there is a limit on representation.
- **Appointments and cross-appointments**: These are subject to the approval of only two ministers — the Attorney-General and, if to a particular division, the portfolio minister — not six as in 2000, thus hopefully minimising delays.[36]
- **Performance agreements for members**: There is no suggestion in 2015 that there be performance agreements and performance pay for members.

- **Removal of members**: There was a provision in the Tribunal Amalgamation Bill 2014 that membership could be terminated by the Governor-General for breach of certain criteria, but that was removed following the Senate debate and the recommendations of the Senate Legal and Constitutional Affairs Committee.[37] The status quo — namely, that members can only be removed by the Governor-General after an address by Parliament for proved misbehaviour or incapacity — has been preserved,[38] although the Governor-General may also terminate an appointment if a member, other than a judge, becomes bankrupt, is in financial difficulties, is absent without approval for 14 consecutive days or 28 days in any 12-month period and for certain other reasons.[39]
- **Terms of appointment**: There was an attempt in 2015 to reduce the maximum term of appointment of members from seven to five years, but this was dropped by the Attorney-General following Senate objection. The position now is that a member may be appointed for up to seven years and be reappointed.[40]
- **Appeal tier**: There is no general right to second-tier review within the AAT. The right is restricted to certain cases from the Social Services and Child Support Division in which a second review is available from the General Division of the Tribunal.[41] In effect, this preserves the status quo prior to 1 July 2015, except that second-tier review is provided within the same institution.
- **Hearings**: Hearings on the papers are provided for, but only if the matter is appropriate and both parties agree.[42] Hearings in the Social Services and Child Support Division at first review are generally, as was the case for the SSAT, to be in private.[43] However, the AAT may direct who may be present and the direction must take account of the 'wishes of the parties and the need to protect their privacy'.[44]
- **New evidence:** The fundamental principle that merits review by the AAT was 'de novo', and could take account of new evidence without demanding that the matter be remitted to the original decision maker, has been retained.

The 2015 legislation has eschewed those key aspects of the 2000 Bills relating to the diminution of the AAT's independence, its structure and its processes. To that extent, the restructured AAT can ensure public confidence in its independence, integrity and impartiality.

There have, however, been lost opportunities. The loss of expertise, as feared in 2000 by the veterans' community, did arise in 2015; there has been no attempt to provide in the legislation for an open and transparent appointments system; and the VRB was not included.

Loss of expertise

There was a considerable changeover of members in 2015, notably due to the failure to reappoint a significant number of the migration tribunal members[45] and a lesser number of AAT and SSAT members. The extent to which this can be attributed to the impending amalgamation is not known but would have been a consideration. Overall, when the merger took place, according to the AAT President, Justice Duncan Kerr, the AAT 'came in about 15 [tribunal members] short'.[46] Kerr J said the expectation was 'that the ministers responsible for the previous tribunals would have completed all appointments so we would get a full complement of people coming across'.[47] That did not happen. Even if that full complement had been appointed, there would still have been a loss of expertise. The migration tribunals, for example, lost 31 experienced members since only seven of those whose terms expired on 30 June 2015 were reappointed.

In the short term, having new members means existing members carry an extra case load and need to spend time mentoring the newcomers during their learning period. Typically it takes two years for new members to become competent in an unfamiliar jurisdiction. So this consequence of the appointments process imposed additional pressures on experienced

members and will have had a considerable impact on migration and refugee decision-making. That pressure, in the circumstances of the AAT merger, has been compounded by the considerable delays in the appointment processes.

An optimistic view of the loss of expertise issue was taken by Justice John Chaney, President of the Western Australian State Administrative Tribunal (SAT), who noted in 2013:

> The establishment of a super-tribunal inevitably creates concerns about a loss of specialist expertise, an increased level of formality or legality, and the application of a 'one size fits all' approach to procedures which is unsuited to the wide range of jurisdiction that super-tribunals exercise. Those concerns have not been borne out in practice. Rather, the benefits which have been identified in the way of accessibility, efficiency, flexibility, accountability, consistency and quality have all come to pass.
>
> All super-tribunals have retained specialist expertise through full time members drawn from a variety of fields, and large numbers of sessional members from varied disciplines. That has preserved the availability of expertise.[48]

That view may represent observations from a longer-term perspective. The SAT had been in existence for nearly a decade when Justice Chaney presented that paper. In the short to medium term, for the AAT, there has undoubtedly been a loss of expertise through the non-appointment of experienced members and the slowness to appoint new members. That is not to suggest there can be legislative criteria mandating fixed types and numbers of expert members. Tribunals' need for expertise changes over time. As the discussion of appointments suggests, however, there can be statutory objectives which reflect the need for maintenance of a spread of expertise.

Having members competent to review decisions across a range of activities is a key feature of the tribunal system and can be jeopardised during an amalgamation. A failure to appreciate this poses a danger to that system. Unless careful attention is paid to the mix of expertise in members post-amalgamation, this prized feature of tribunals as compared with courts can be weakened or lost. In the material available prior to the amalgamation there was no indication that this was a consideration, as it should have been, of those managing the process.

Open and transparent appointments processes

The legislation exhibits a significant gap on the appointments front. The situation can be contrasted with that pertaining to tribunals in Canada's largest province, Ontario. An amendment to its *Adjudicative Tribunals Accountability Governance and Appointments Act, 2009* provided, under 'Appointment to Adjudicative Tribunals', that: 'The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process' (s 14(1)), there was to be publication of the statutory criteria for positions which were to include 'Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal' (s 14(1) at 1) and 'If a member … is required by or under any other Act to possess specific qualification, a person shall not be appointed to the tribunal unless he or she possesses those qualifications' (s 14(2)).

In addition, the responsible minister was required to publish the steps in the recruitment process and the criteria for appointment (s 14(3)) and the minister was not to appoint or reappoint a member without consultation with the chair of the tribunal (s 14(4)).[49] Legislation along these lines balances the ministers' ultimate responsibility for appointments with a more open and transparent system and takes account of the performance of existing members when reappointment is contemplated.

In relation to the AAT, although there are some specified qualifications for members in the 2015 AAT Act[50] and the President, in practice, does have the opportunity to make recommendations about appointments, this is not supported by legislation; nor are there legislative requirements for the process to be a public, merit-based, competitive process. Provisions like these are capable of mitigating the loss of expertise and alleviating some of the concerns being expressed by the current President of the AAT.

The present position, as the AAT notes in its corporate plan, is that:

> The AAT … has limited control over the size, makeup or location of its membership. This can affect the Tribunal's ability to plan for and undertake the review workload, including meeting targets for the number of reviews finalised and timeliness standards.[51]

This echoes warnings by the President that the failure to reappoint members and the delays in appointments mean that that there will be 'personnel shortages' and these 'will inevitably lead to delays and backlogs'.[52] These are pointers to issues which are likely to lead to the public's dissatisfaction with the Tribunal and could be avoided with a more open and transparent process for appointments. There are also other adverse managerial consequences from the delay.

Exclusion of the Veterans' Review Board

From the time of the Budget in 2014, when the proposal to merge the tribunals was announced, there was no mention of the VRB, despite it also being a high-volume merits review tribunal. The government explained that this was because it is 'within the Defence portfolio' — an explanation that did nothing to enhance the public's perception of the VRB as an independent review agency.[53] If convinced of the advantages of amalgamation for its larger merit review tribunals, there was no reason in principle for the VRB not to be included. The truth is the attempt to include the veterans' jurisdiction in 2000 was so bruising that for political reasons it was excluded from consideration. The government baulked at facing the powerful veterans' lobby should it object to the revived proposal.

Although for the veterans' community the review process has not changed — that is, there is review by the VRB followed by further review by the AAT — the result is untidy, requires special legislative attention in the AAT Regulations and was not warranted by the government's reluctance to confront the powerful veterans' lobby. The omission is to be regretted.

In summary, some lessons from the ART experience were learned. There were, however, gaps in fundamentally important areas such as the need for the retention of expertise and an improved appointments process, and failure to include the VRB. Overall, there is no room for complacency, as the following discussion indicates.

Alternative models

The 2015 amalgamation offered opportunities to evaluate and reshape the AAT in the light of alternative models. That opportunity, to a large extent, was missed. In effect, the outcome bears the hallmarks of the ARC's *Better Decisions* report — a report developed in 1995 at a time before some of these alternatives had been trialled or introduced. It is to be regretted that there appears to have been no or little attempt to update thinking about the architecture of the administrative justice system and this is to the detriment of the federal tribunal system.

Typically there are four alternatives to achieve a more coherent, less fragmented civil and administrative tribunal system:

- complaints can be heard within a designated division or divisions of a court (the court-based model);[54]
- tribunals can be combined along sectoral lines, the sectors being topic-based[55] or regional-based[56] (the cluster model);
- the administration of existing tribunals can be centralised with or without tribunal co-location (the shared services model); or
- there can be adoption of a 'super-tribunal' comprising most or key existing tribunals while retaining some standalone specialist tribunals (the civil and administrative tribunal model).[57] This is not a permissible option under the *Constitution* and will not be considered further.

Court-based model

The first approach may be particularly attractive in the case of bodies politic with relatively small populations and a limited number of tribunals.[58] It was for these reasons that Tasmania, which had a population of 473 252 in 2001,[59] opted to house its administrative review jurisdiction in its lower-tier Magistrates Court,[60] which already dealt with civil matters.[61]

Size, however, is only one factor. So, for example, in 2008 the Australian Capital Territory, which had a population of 342 670 in the first quarter of 2008,[62] introduced legislation for its ACT Civil and Administrative Tribunal (ACAT); the Northern Territory, with a population of only 244 300 in December 2014,[63] has set up its Civil and Administrative Tribunal (NTCAT);[64] and in 2015 Tasmania, with a population of 516 111 in the March quarter of 2015,[65] has announced that it is to explore the civil and administrative amalgamation tribunal option.[66]

The disadvantage of this model is that it blurs the distinctions between courts and tribunals. This inhibits tribunals from publicising their distinctive features.[67] These include a multiplicity of dispute resolution options, specialist expertise, flexible modes of operation, more timely decision-making and lower costs. A tribunal is not just another court and has significant advantages accordingly.

Cluster model

The sectoral approach has been adopted in Ontario, Canada, with its 'cluster' model based on topics. As Bryden describes it, the 'clustering initiative … is seen as an alternative to consolidating a number of tribunals exercising specialized jurisdiction into one or more "super-tribunals"'.[68] Suitability for clustering is based on effectiveness and efficiency and is progressively being introduced in that Province.[69]

This option has the advantage that there has been no loss of specialisation. Whether it is cost-effective and what tribunals should be included in each cluster are issues.

Shared services model

The centralisation of administrative functions for existing tribunals — the 'shared services model' — is attractive. The model aligns with moves generally within governments to achieve greater administrative efficiency and cost savings. Against these objectives there are start-up costs which require substantial upfront investments in premises and information technology, and this suggests that efficiencies are unlikely in the short to medium term.[70]

Despite such concerns, Canada is trialling this option for 11 of its smaller federal tribunals. The *Tribunals Support Service of Canada Act* 2014[71] provides for consolidation of back office functions in one agency while retaining the identity of the existing specialist tribunals. As Bryden noted, it is too soon to judge the success of this initiative, but it brings access to technology which might not be affordable for smaller tribunals as well as the cost and expertise advantage of shared services.[72]

In summary, consideration of these alternatives may have resulted in the adoption of an alternative model or a variation of the model chosen for the amalgamation of the AAT, but there is no evidence that this consideration took place.

Government's objectives[73]

In the lead-up to the introduction of the 2015 legislation, the government identified the objectives of the amalgamated tribunal as savings, to avoid confusion, better governance arrangements and to improve the quality and reputation of the national merits review system.[74] It is arguable that none of these objectives have been achieved in the short term and some may not be achievable in the longer term.

Savings

Governments favour a dispute resolution system that is efficient and cost-effective. There can be no criticism of these objectives applied, as they are, across the public and private sectors. But justifying major institutional changes of the kind involved in mergers of high-volume tribunals should not be pursued at the expense of other laudable objectives. There was no discussion in the publicly available material from government whether, for example, cost saving and more efficient operations could have been achieved by adoption of any of the alternative models for bringing disparate tribunals into a more cohesive structure.

The predicted savings over the forward estimates (three years) for the merged AAT is a modest $7.2 million.[75] That is less than $2.5 million a year. The savings are said to come from 'streamlining back office functions and reducing property expenses by consolidating accommodation arrangements'.[76] This may reflect the warning provided by the Skehill Review in 2012 concerning financial restraints and the need for adequate resourcing if amalgamation was to be pursued.[77]

That warning is being borne out. Property consolidation has not been effected quickly. The AAT website indicated that seven months after amalgamation only the ACT and Tasmania were co-located and in the ACT the co-location predated the amalgamation. In Queensland (which services the Northern Territory), in South Australia and in Western Australia, the former migration tribunals and the former AAT, but not the SSAT, are in the same building. In Western Australia, social services and child support operate from the adjacent but not the same building. For the largest registries — in Melbourne and Sydney — the former tribunals remained in separate buildings, although this changed for Sydney in May 2016.

At its most optimistic, full co-location is not scheduled to occur until 2017.[78] In addition, there are costs associated with co-location. Changes of venue are expensive, with new signage, security systems, websites, telephone numbers, stationary, directions, guidelines and manuals. The current indications are that in the short to medium term savings from the co-location are likely to be non-existent or minimal.

It is notable that the federal government did not refer to savings from having a single IT system. That may have been deliberate. The IT systems of the former migration and social security tribunals are tied to and supported by their related departments. Separating these

legacy systems would be costly and disruptive. Integrating IT systems is fraught with problems and inevitably takes time. Ten years after the Victorian Civil and Administrative Tribunal (VCAT) was created, its President noted: 'On amalgamation there were four computer systems in use. That has been reduced to two. That … is a significant achievement.'[79] Understandably, the merged AAT has been cautious about its promises in this area. The most it has been prepared to state publicly is that it 'will review the range of legacy IT systems used by the AAT, MRT, RRT and SSAT'.[80]

That leaves any financial benefits to come from bringing back office functions together. There is a single finance and human resources (HR) system.[81] However, consolidation of other back office functions is likely to be protracted while the tribunals are housed in different buildings which must be equipped with libraries, telephones, video equipment and administrative staff. This suggests even modest savings are unlikely.

Warnings emerged from the amalgamation experiences in the states and territories about the potential for a blowout in costs from amalgamation. A witness to the New South Wales Legislative Council Standing Committee on Law and Justice review in 2012, preceding the amalgamation of tribunals in New South Wales, pointed out that '[t]here are … diseconomies of large scale that occur in all big bureaucracies, and I submit to you that a change … will cost more'.[82] The evidence of the General President of ACAT to the committee was that the ACAT 'was not cheaper than the existing tribunal system in the Australian Capital Territory'.[83] The President of the SAT, while noting that there are difficulties in comparing pre-amalgamation and post-amalgamation costs,[84] said, although it was more efficient, that SAT was 'unlikely to be cheaper'.[85] So this evidence too indicates that achieving even modest savings in the short term is doubtful.

The evidence suggests that it is unlikely that amalgamation of tribunals will lead to a reduction in calls on the revenue, at least in the short to medium term. Those seeking to identify the financial benefits of the amalgamation need to take a long-term view, and focusing exclusively on financial benefits is misplaced. Achievement of this goal should be replaced with others such as greater efficiency or better public satisfaction and even these will take time to materialise. It is also a pity that alternative models were not canvassed to assess whether more savings could have been achieved.

Avoid confusion and provide better access for litigants

Consolidation is based on the assumption that there will be one set of premises; one logo; one telephone number or email address; one front counter; uniform application forms; a consistent fee structure; more uniform practices and procedures; and a common set of manuals, directions and guidelines.

The Productivity Commission report *Access to Justice Arrangements* identified the potential benefits from full co-location as 'improved accessibility and … the single tribunal avoids the confusion that can arise from the existence of multiple tribunals, furthers the "no wrong door" principle, and provides a better opportunity for those with complaints to find and use the justice system'. The 'one-stop-shop' facility saves people 'time, money and stress'.[86]

These objectives can be bundled under a single ambition: to improve user experience. At present, these objectives cannot be met by the merged AAT. Enhanced user satisfaction is not furthered by housing different key divisions of the Tribunal in different locations in those cities where full co-location has not yet occurred. In those cities, the Tribunal will have the same label — the AAT — in their lobbies, which is a recipe for confusion. It can be expected that applicants, practitioners, representatives, witnesses, taxi drivers and GPS sources cannot decide which is the appropriate building to attend.

Confusion is ameliorated to an extent by the AAT website provided those searching understand that the information they need about location of a particular division may not be found immediately on the home page. The searcher must scroll down to find references to the Migration and Refugee Division and the Social Services and Child Support Division, and they must follow another link or two to find their location in a particular state or territory. Considerable persistence may be required and that is not a universal quality among applicants, witnesses, and legal or other advisers.

Although the failure for the AAT to be fully co-located is a short to medium term situation, confusion and access problems are likely to continue. There is an understandable irritation by the public at problems in finding their way to the correct building to hear matters. These issues do not augur well for the reputation of the Tribunal. The AAT plans to survey stakeholders and applicants for their 'views about the AAT's services … in the first half of 2016'.[87] If it does so, the findings may not be to its liking.

Better governance

There are multiple facets to achievement of improved governance. This paper includes only managing institutional structures; leadership; and better utilisation of members and staff.

The impact of a fragmented institutional structure impacts negatively on the whole Tribunal. This is illustrated by a comment of the General President of ACAT, who noted in a public forum in 2015 that it is essential for the development of organisational culture that staff should be in one location. There needs to be a coherent and integrated structure within the combined Tribunal if it is to be successful. As the Hon Justice Kevin Bell, a former President of VCAT, commented:

> With such a[n amalgamated] structure, the natural tendency is towards separation. Therefore, not working towards unity leads to disunity. To date, there has not been sufficient institutional drive [in VCAT] towards the centre. As much as possible, [divisions of an amalgamated tribunal] should be working as part of a unified organisation …[88]
>
> [T]here needs to be much greater emphasis on functional integration and operational unity, not just on institutional amalgamation.[89]

His words apply not only to physical location but also to the internal structures of the combined Tribunal and to the management of its personnel. Slowness in achieving integration and a unified institutional structure for the AAT has the potential to stall progress and inhibit those developments needed to create a cohesive, effectively functioning institution.

The amalgamated Tribunal is a large dispute resolution body by Australian standards. The AAT will have over 700 full-time equivalent members and staff,[90] about 300 of whom are members;[91] receive some 40 000 applications per annum;[92] and operate nationally in all capital cities. The Tribunal now comprises eight divisions — Freedom of Information Division (FOI Division), General Division, Migration and Refugee Division (including the Immigration Assessment Authority), National Disability Insurance Scheme Division (NDIS Division), Security Division, Social Services and Child Support Division, Taxation and Commercial Division, and the Veterans' Appeals Division.

There are only two additional divisions to those that existed under the former AAT. However, those divisions comprise the former migration tribunals and the SSAT. It is these divisions that receive by far the greatest proportion of the Tribunal's case load. The combined case load of these divisions exceeds that of the former AAT by a factor of six to one, with the migration case load being roughly three times and the social security and child support case

load being roughly twice that of the pre-existing six divisions of the former AAT.[93] The consequences of this significant increase are the need to avoid institutional imbalance, for a more extensive leadership team and for development of a more productive team of members and staff.

(a) Institutional imbalance

From a management perspective these figures signify an unbalanced structure. The concern is that the two divisions representing the former migration and income support tribunals will dominate the former six divisions of the AAT, have an undue influence on the processes and administration of the amalgamated body, receive the lion's share of resources and inhibit the retention of appropriate features of the former tribunal.

That concern has been faced in the states and territories which have amalgamated their tribunals. The New South Wales Legislative Council Standing Committee on Law and Justice, in its inquiry in 2012 into the possible establishment of the New South Wales Civil and Administrative Tribunal (NCAT), heard evidence that the pre-existing Consumer, Trader and Tenancy Tribunal (CTTT), formerly the largest tribunal in New South Wales, had a total of 65 294 applications in 2012–2013.[94] By contrast, the Administrative Decisions Tribunal (ADT) — an amalgamated administrative-only tribunal to be included in the NCAT amalgamation — received only 841 applications in the 2013 financial year.[95] That meant that the CTTT case load was 77 times that of the ADT.

In the Standing Committee's final report, the New South Wales Legislative Council acknowledged that the CTTT could 'overwhelm any new tribunal in an administrative and fairness/justice sense and from a resources perspective'.[96] Nonetheless, it recommended the adoption of the NCAT proposal. As the report pointed out, other amalgamated tribunals had accommodated potential 'swamping' and this could be avoided with 'thorough planning and implementation and a staged process of consolidation'.[97]

Although the imbalance in sizes of the federal tribunals merged in 2015 is less marked, the potential for swamping remains. It is too early to conclude that the 'swamping effect' has occurred, although anecdotally there are complaints, particularly that the practices of the former migration tribunals are being imposed at the expense of those of the former AAT. These complaints suggest at least teething problems due to the inequality of size and influence of these former specialist tribunals.

The only indication that government appreciated this issue is gleaned from the provisions in the AAT Act indicating the need for differentiating between the three, emphasising the objective of maintaining the distinctive aspects of each.[98] There was certainly no staged process of consolidation — the amalgamation of all the tribunals occurred on 1 July 2015.

These figures, along with the legislative and practice distinctions between the general former AAT divisions and the two large new divisions, coupled with the fact that there are different funding models for the three arms,[99] illustrate the potential for the AAT, post 1 July 2015, to be a federated, tri-partite body, not a unified structure. This creates a live issue for management of the combined tribunal if the 'diseconomies of scale' are to be avoided or counteracted. They also raise the issue of whether a preferred structure such as shared services model, or the cluster model might not have been a more apposite approach.[100]

(b) Leadership

To compound the problem, the revised management structure of the AAT was slow to materialise. The AAT Act provides for there to be heads and deputy heads of divisions.[101]

The positions are to be assigned by the Attorney-General.[102] The advertisements for the heads of the Migration and Refugee Division and of the Social Services and Child Support Division appeared in 2015.[103] At the beginning of 2016 the positions had not been filled, although this was rectified by appointments in February[104] and March[105] 2016.

In its first months of operation, when guidance and leadership is critical to manage the inevitable problems which accompany the creation of a new institution, these failures are worrying. The absence of those with responsibility for the leadership and management of the merged body at this time should have been avoided. That need is the greater to avoid the 'swamping effect' on the new body.

(c) Better utilisation of members and staff

Cross-fertilisation of experience for Tribunal members and staff is one of the advantages of amalgamation. This can be achieved for the AAT by cross-appointments to divisions, leading to a more flexible and experienced workforce, less chance of 'capture' by client groups, better-quality decisions, less downtime for members and a wider pool of expertise. These moves could also lead to cost savings if they lessen the need for underutilised part-time members.

Although there was a widespread practice of appointments of individuals to multiple divisions in the former AAT, since 1 July 2015 cross-appointments have been limited to Deputy Presidents. That may alleviate concerns about the initial absence of expertise of cross-appointed members and staff more generally but denies the wider benefits which flow from the practice.

A significant barrier to cross-appointments is the different categories of membership provided for in the AAT Act. There are to be two categories of senior members and three categories of members[106] as well as the President and presidential members — seven categories in all. Each category has a different salary scale,[107] reflecting in particular the previous differential salary scales of the three constituent tribunals involved in the merger. A similar position arises in relation to staff. Different rates of pay will inhibit cross-appointments unless there are moves to remove these impediments to uniformity.

Managerially, members and staff need uniform appointment practices and common general criteria for appointments, tenure and remuneration; for members, there should be standardised reappointment and removal from office provisions as well as common sessional sitting fees and other conditions of service such as employment status, room sizes, and entitlements and allowances for each principal category of member.

The continuation of the differential treatment of members and staff for the three key parts of the merged body is understandable in the short term but, since the differences are enshrined in the Act, it appears that they are intended to continue. That is inimical to the development of a unified tribunal. Consistency of salary scales for members and for staff in a combined tribunal is critical to avoid morale problems and to promote social cohesion.

Other issues

In addition to the objectives identified by government, there are other facets of the amalgamated body which raise potential issues.

Process and procedure

A risk from amalgamation is that there will be an 'inflexible application of generalist processes to specialist bodies that need the capacity to cater their procedures to suit their client base and legislative objectives'.[108] This risk appears to have been heeded.

An initial objective of the merger was said by government to be 'to harmonise and streamline procedural matters for the amalgamated tribunal'.[109] That purpose was quietly dropped. The Explanatory Memorandum to the Bill noted that the amalgamation would 'retain the successful features of each of the tribunals as currently constituted' and preserve 'the distinctive aspects of each of the tribunals that are important in their specific jurisdictions'.[110]

Nonetheless, the corporate plan of the Tribunal states that 'The AAT will work with government to increase consistency in procedures relating to the conduct of review across divisions where appropriate'.[111] The statutory objectives of the AAT apply to all its divisions,[112] as do aspects of the *General Practice Direction*.[113] So some attempts have been made to harmonise procedures.

Beyond these steps, the general procedures in pt IV of the AAT's *General Practice Direction* do not apply to the Migration and Refugee Division and the Social Services and Child Support Division.[114] Since these procedures relate to lodgement of documents, stay of decisions, expedited review, processes for initial conferences, directions hearings, procedures at hearings and the consequences of non-compliance with legislative requirements and directions — core procedural matters for any tribunal — it is apparent that any consistency advantages of amalgamation in these areas is not to eventuate. This is evidenced further as each former tribunal has maintained its separate identity on the AAT website, including maintenance of individual statistics and performance data and their own annual reports.[115]

Other specific differences are sanctioned by the direction of the President. Hence, there are special privacy provisions which apply only in the Migration and Refugee Division.[116] That division is not subject to the requirement that parties use their 'best endeavours' to assist the Tribunal,[117] and there is a special regime for the provision of material to the AAT which applies only in that division.[118]

There is also a flexible approach to hearings in Social Services and Child Support Division claims, particularly at first review. Pre-hearing ADR processes are not employed,[119] oral applications are permitted in some matters,[120] oral or no reasons may be the norm[121] and only the applicant may attend a first review hearing.[122]

These practices indicate the former migration tribunals and the SSAT will continue to operate under their pre-1 July 2015 procedural practices[123] — a feature of the merged body cemented by the legislation. This confirms that a high degree of flexibility in practices and procedures is to be tolerated and any realisation of consistency is not likely to materialise.

While continuation of differences can be divisive, uniformity too can be counterproductive to the needs of particular users, inhibiting rather than enhancing rights of access to review. A delicate balancing act is required to achieve the aim of consistency of procedures and practices within the combined Tribunal while maintaining different practices specific to, and appropriate for, individual jurisdictions.

The present position enshrined in the legislation is that the delicacy required to achieve the desired objective has not been achieved. That is because the different procedures of the chief divisions are enshrined in legislation and will be difficult to change. This is inimical to

the development of a more user-friendly, accessible tribunal which avoids confusion and enhances accessibility. More careful attention to this issue was needed and will be needed to avoid these consequences of the status quo.

'Creeping legalism'

A controversial procedural issue is how to avoid aspects of adversarial legal practices infecting the practices and procedures of an amalgamated tribunal. In particular, the generally court-focused training and experience of most legal practitioners mean it is more likely that the tendency of legally trained members in hearings is towards an adversarial rather than an inquisitorial approach.

The amalgamation of tribunals is capable of providing a more flexible, less formal, more cost-effective and quicker form of dispute resolution. These features are reflected in the common statutory objectives of amalgamated tribunals that the Tribunal should operate in a manner which is 'fair, just, economical, informal and quick',[124] coupled with the requirement in one of the objectives in s 2A, added in 2015, that the Tribunal's operations are to be 'proportionate to the importance and complexity of the matter'.[125]

Despite being obliged to follow the same 'fair, just, economical, informal and quick' objectives, the 10-year review of VCAT identified as a key theme the need to revisit the foundation principles on which the Tribunal was established — namely, to adopt procedures which were user-friendly and different from those in courts and, in particular, to avoid 'creeping legalism'.[126] As the review reported:

> Within the community sector, there was a sense that the tribunal needed to get back to its roots. It was intended to provide quick, cheap and efficient justice for the general public. Yet many people think it had become too formal, with lawyers, expert witnesses and advocates dominating proceedings. It was often said the tribunal had allowed 'creeping legalism' to occur.[127]

The tendency for tribunal processes to become judicialised is due to pressures from several quarters:

- the lower federal courts' stringent application of judicial review standards;
- the courts' willingness to find 'errors of law' in appeals against tribunal decisions; and
- the presence of legally trained representatives before the tribunal.

The responses to these tendencies have been varied. The Australian High Court has, since 1996, regularly warned the lower courts against being overly demanding when exercising judicial review, or hearing appeals, from tribunals.[128] The fact that the message has needed to be repeated on several occasions suggests that the warning is not always heeded.[129]

Another response has been the legislative attempt to restrict the appearance of legal practitioners before tribunals.[130] Evidence about the effectiveness of these provisions is limited, but in its first year of operation researchers noted of the provision in the *Queensland Civil and Administrative Tribunal Act 2009* that legal representation could only be by leave[131] that it had been the most litigated of any of the provisions in the new Act, indicating that attempts to exclude lawyers are strenuously opposed.[132]

There are mixed views about the desirability of representation by legal practitioners at tribunal hearings. In its *Access to Justice Arrangements* report, the Productivity Commission recommended that, for simple legal and factual matters where there is equality between the parties, legal representation should generally only be permitted with leave, but, for more

complex matters or where there is a power imbalance, representation by legal practitioners should generally be allowed.[133]

This is a sensible view. It is preferable in many matters for evidence to be presented by an applicant. That person is in the best position to chronicle the facts and can provide evidence without bearing the extra costs associated with legal representation. At the same time, for any matter depending on analysis of complex legislation or where the facts, including the credibility of witnesses or parties, are in dispute, the knowledge and skill of a legally trained representative can enhance the prospects of success for an applicant.[134] In general, representation leads to better outcomes in ADR and more efficient, focused hearings — benefits which accrue to claimants.

Whether that balance has been achieved in the AAT is not yet known. At present, the position preserves the pre-1 July 2015 approach. Previously, an applicant before the SSAT was rarely represented and required the permission of the principal member,[135] and in the migration tribunals persons other than an applicant were prohibited from giving evidence unless invited to speak.[136] That situation has been preserved.

In the former AAT, there were generally no limits on representation. Currently, the President's direction power in s 18B of the AAT Act may be used to limit the level of representation formerly experienced in the AAT, and this may be encouraged by the new objective for the Tribunal to provide review which is proportionate to the importance and complexity of the matter.[137] There has as yet been no direction by the President on this issue.

Administrative Review Council

A notable omission from the amendments to the AAT Act was the retention in pt 5 of the provision for the ARC. As the government had announced prior to its Budget in May 2014 that the ARC was to be one of the bodies which was to be abolished, the failure to remove this section of the AAT Act is puzzling. To take an optimistic view, the retention may have been because it was seen that in the future there may again be a need to reactivate that body. If that was the rationale, it is laudable. If the reason was simply to avoid taking a step which was controversial, the motive is not praiseworthy. No public comment, beyond the initial announcement of its demise, has given any indication of government thinking on this issue.

Conclusions

The upshot of this discussion is that there were omissions from the amendments to the legislation, such as to provide for a more transparent appointments process, overtly to include the VRB in the merger, and to provide legislatively for an appointments process, which would prevent loss of expertise.

The failure to provide some incentives for a better appointments process has undoubtedly impacted negatively on membership and the need for more effective leadership at this critical time. The slowness to co-locate, although a matter not wholly within the control of the Tribunal, has undoubtedly contributed to some of the management and cost-saving difficulties. Whether these could have been avoided had action been taken earlier or had there been adequate funding to permit earlier co-location and better attention to IT issues is not known. Certainly the savings expected are unlikely to be reached, and the inevitable access issues arising from the incomplete co-location, although not long-term issues, do nothing to improve the quality and reputation of the national merits review system.

There are also major issues which may continue from the predominant influence of the Migration and Refugee Division on the operation of the Tribunal, the different funding models, and the differential salary scales within the Tribunal's membership. There are other simmering issues, such as the impact on the mode of operation of the Tribunal of the insidious effects of 'creeping legalism'. The report card overall is not particularly healthy in the short term, although it may improve if the President uses the directions power strategically and makes good on his promise to tackle other legacy issues.[138]

Finally, the failure actively to consider whether another model might have avoided what appears to be a loose federation of tribunals, with a possibility of the largest element of that federation — the Migration and Refugee Division — having a predominant and not necessarily appropriate impact on the other elements, is a disappointment and does not augur well for the future of the amalgamated body.

Dr Cronin, in her assessment of the 2000 proposals, noted that 'Chief Justice Gleeson said … that the only criterion for judging courts and tribunals is the measure of success they have in ensuring public confidence in their independence, integrity and impartiality'.[139]

In similar vein, The Hon Justice O'Connor, then President of the AAT, said of the 2000 proposals that the policymakers should be asking the following questions:

- [H]ow can the amalgamated tribunal … improve what the Australian public already has?
- How can it improve the quality of the decisions that are made?
- What improvements in service are going to result from amalgamation?
- How will the Australian public benefit from the amalgamation?[140]

Until these questions can all be answered positively, the history of the AAT's amalgamation will not have fulfilled the promise of the undoubted benefits that can be gained from amalgamation. At present, the body resembles a cluster rather than an amalgamated institution and the story is of opportunities missed rather than taken, to the detriment of the institution.

Endnotes

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REFLECTIONS OF A FORMER INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

Bret Walker SC

In the three years from April 2011 that I discharged the office of Independent National Security Legislation Monitor (the Monitor),[1] I was performing a role intended to complement that of the Inspector-General of Intelligence and Security.[2] This was complementary in the sense that, while there was no general administrative function concerning national security inflicted upon the Monitor, it was emphatically required of the Monitor to consider and report upon what might be called the merits and policy of Australia's counterterrorism laws.

There are three headings under which the statutory requirements of the office of the Monitor can be seen. They may be summarised as the appropriateness, the efficacy and, believe it or not, the necessity of those laws. I say 'believe it or not' because it is broadly accepted by the community, politicians and administrative lawyers that something had to be done in relation to Australia's role in the countering of terrorism, including that there should be a system of law addressing that issue. However, once that point of easy consensus has been reached, thereafter it seems to me that under these headings there is, and I hope will remain, lively dispute about the best way for our laws to address terrorism.

One thing, however, is clear and that is treaty obligations dominate this area of law-making in Australia. There are two main treaties to which I had particular regard while I was the Monitor and to which the statute establishing my office required me, perhaps unusually in this country, to pay explicit attention in my reports.

The first is the obvious *Charter of the United Nations*. This requires, in ch 7, mandatory compliance by member states with Security Council resolutions. United Nations Security Council Resolution No 1373 (2001), made just 17 days after the Twin Towers were attacked, is not the only but is the main source of our treaty obligations in countering terrorism. It is quite explicit and, indeed, repetitive in its terms. It requires member states, in order for the response to be of preventive value, to have criminal legislation which is enforced and which has appropriate procedures for enforcement.

The second treaty to which constant recourse was made by me as the Monitor and which, I am happy to say, is more often explicitly referred to in Parliament than it used to be is the *International Covenant on Civil and Political Rights* (ICCPR) which, not coincidentally, contains many of the maxims of fair process and individual dignity and equality before the law that have been derived, perhaps mythically, from the Magna Carta and have been thrashed out over the centuries after 1215. In particular, the ICCPR seeks to preserve from arbitrary executive treatment matters of conscience, such as are involved in cultural and religious identity and practice. They are matters which are at the very centre of any consideration of, on the one hand, the efficacy and, on the other hand, the fairness of our counterterrorism laws.

Against those general remarks by way of preamble, the following discussion contains some impressions produced by reflection upon three years in the office of the Monitor and topical events in relation to new counterterrorism proposals.

The first is that there is in this country some clarity of mission in relation to counterterrorism laws, but that clarity should and could be greatly improved. Greater clarity is easily available. Resolution 1373 requires terrorism to be treated as a matter of criminal law, not as a matter of military force. In other words, terrorists in our streets are to be arrested, tried and, if convicted, imprisoned. They are not to be shot in the streets, as presumably we would want our soldiers to do if our country were to be invaded by a foreign enemy. That is the first thing.

The second thing is that it follows that our conduct with respect to those we call terrorists ought to be regulated by reference, ultimately, to the ends of criminal justice. In criminal justice, generally, great effort is taken to prevent suspects from escaping the administration of justice and, if they have escaped, to bring them back. The process is called extradition. There is, therefore, confusion in any agenda that appears to wish terrorists to leave the country uncharged, to prevent them from coming back and therefore to prevent them from ever being tried. That is a very dangerous recent introduction. These factors are contrary to the highly desirable clarity of mission. Terrorism is treated by all members of the United Nations as a crime with international dimensions. Laws should therefore properly involve means of preventing suspects from leaving jurisdictions and, if they do, the laws should also provide means of bringing them back to the relevant jurisdiction to face criminal justice.

The other clarity of mission in relation to counterterrorism laws that it appears to me is also easily available and perhaps has been lost sight of recently is the secrecy that is desirable for police and security investigations. Remarkably, journalists only recently discovered that there are laws that punish them as well as the rest of us for revealing certain official secrets. I say 'remarkably' because the laws in relation to controlled operations are not so old as to be overlooked as a relic of fusty history. They were introduced in the wake of *Ridgeway v The Queen*[3] — a High Court decision which vindicated the notion that criminal prosecutions should not be founded upon evidence gathered by criminal conduct on the part of police officers. A controlled operation was a law-abiding and rule-of-law inspired response. It was the expedient and principled means by which what would otherwise have been criminal was permitted to be undertaken.

Controlled operations legislation permitted courageous undercover officers to gather evidence in order to facilitate the prosecution of those who could be called the real criminals. It should not be surprising that there are and have always been, as part of a legislative package, secrecy provisions which apply primarily to police officers and their colleagues but also to anybody else, lawyer or journalist, who has come across information of such operations. The experience of undercover officers being assassinated is not melodrama; it is not confined to television.

It is for these reasons that I found it remarkable that there has been a controversy loudly produced and continued by some newspapers and broadcasters concerning s 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth). This provision follows an established tradition which requires certain secrets to be kept for the safety of operatives who are engaged in pending operations as well as for the good of all of us who benefit from their obtaining of evidence.

Increasingly, I have come to feel that the best laws we have for countering terrorism are not the plethora of criminal offences that have been created — not a single one of them was strictly necessary to fill a gap — but the laws that provide funding for, and regulate, the surveillance of terrorist conduct. There is no point in having elaborate criminal laws that we report on each year to the United Nations, and which are one of the best systems in the world in terms of the criminalisation of terrorism, if we do not give to our agencies, the police and the Australian Security Intelligence Organisation (ASIO) in particular, the means to carry

out relevant surveillance. It need hardly be said that there is no abundance of people who have security clearance, are fluent in languages of various dialectal kinds and, of course, have a willingness to engage in what is not always the most glamorous work in the world. This conclusion, expressed in my first report[4] and my report four years later,[5] I continue to urge as a matter of policy for counterterrorist laws in this country.

Some recent law-making provokes consideration of the level of clarity that is desirable for counterterrorism in light of treaty obligations and the rule of law values which administrative lawyers represent. It concerns, in sardonic shorthand, the Allegiance to Australia Bill. Its full name is the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth). It is, I hope, a work in progress rather than fully accomplished and perfect as a piece of law to be made by our Parliament.[6]

The purpose of the legislation is found in proposed s 4 of the Bill. It is a provision which will be interesting to practitioners, whether as criminal defence counsel or as administrative lawyers seeking judicial review. It is said that the Bill is to be enacted because 'the Parliament recognises that Australian citizenship is a common bond'. The preamble goes on to say 'and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia'.

This is not mere preambular language, because some of those phrases are picked up in the operative language. There is a danger that the legislative technique engaged includes features that were denounced by the majority of the High Court in *Australian Communist Party v Commonwealth*:[7] namely, the attempt by the Commonwealth Parliament to ascribe a character to certain conduct — in that case, of the Australian Communist Party — to bring it within the defence power. In turn the character would inform the legislative competence of the Parliament to enact the legislation. The High Court responded: you may enact whatever you like concerning the danger of international communism, but the Court will decide whether facts exist that engage the legislative power.

If this Bill is enacted it will insert into the *Australian Citizenship Act 2007* (Cth) a s 33AA(1) which will read as follows:

> Subject to this section, a person … who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection (2) …

That conduct includes terrorism. The words 'subject to' are important, since the section contains significant qualifications and extensions. The section is aimed at those with dual nationalities.

The provision does not involve any exercise of discretion of a kind that can be judicially reviewed. It does not provide for a ministerial act or decision, let alone a disallowable instrument or any kind of instrument which accomplishes this renunciation. Unfortunately, the concept of renunciation is being used in a way which is like a waiver of privilege — that is, it includes the actions of a person even with an opposite intention to that which Parliament prescribes. You may waive privilege by doing something which, as a matter of fairness, requires the privilege to be regarded as waived even though quite explicitly you intended not to waive it and said you were not waiving it. Similarly, you will renounce your Australian citizenship if you do something which has that statutory character even if your activities were on the side, or for the cause, of groups explicitly supported by Australia's current foreign policy.

The statutory character in question is to be satisfied simply by engaging in certain conduct. This is based in pt 5.3 of the Commonwealth Criminal Code[8] – Terrorism. The provisions in s 100.1 of the Code define 'terrorist act'. The second item in proposed s 33AA(2) of the Australian Citizenship Act is simply 'engaging in a terrorist act'. The definition of a terrorist act has nothing to do with fighting against Australia. Some terrorist activity will, of course, have that character, but the definition does not require it. If you are not engaged in military activities and are killing in a cause strongly approved by the Australian Government — for example, one against Islamic State (IS) — that will still be terrorism.

Whether, as a matter of fact, you have acted inconsistently with your allegiance to Australia by engaging in such conduct — namely, violent acts for political motive against IS — is, I suspect, extremely doubtful. I doubt that the drafting has fully taken into account the difficulty posed by inserting these descriptions. They are intended to enlist political support for the measure, but the effect is that terrorist conduct has added to it the description that it is acting inconsistently with allegiance to Australia. Other relevant definitions in relation to terrorism in pt 5.3 of the Code are used in other proposed sections of the Australian Citizenship Act.

We are told that, like the tree falling in the forest with nobody to hear it, a person renounces their Australian citizenship upon the conduct being committed. We also know that the Minister is to be given a discretion in the public interest to exempt a person from the effect of this provision. This is a salutary and beneficial notion. The renunciation may be reversed after the event. Administrative lawyers, however, will be aware that consideration of a possible reversal of that kind is a function which cannot be the subject of any meaningful mandamus and is not the subject of compulsory provision of reasons. That is a consequence of various provisions which are part of the pattern of this Bill. The same thing happens under the proposed s 35A of the Australian Citizenship Act in relation to convictions. There can be an exemption in the public interest. This is salutary, because it somewhat improves the clarity.

However, full clarity is presently lacking. It is a quality that should be brought into the zone of counterterrorist law. Australia's role in counterterrorism is inseparable from our conduct of foreign relations. The conduct of foreign relations requires our compliance with relevant statutes and our adherence, in particular, to the principles espoused by the United Nations. Importantly, they include what might be called the pacifist trend of those principles.

This area could thus be greatly improved by greater clarity in relation to foreign fighters. I think the expression 'foreign fighters' is intended to mean Australians fighting abroad. Unfortunately, it may mean people who are to be regarded as not Australian by reason of fighting abroad. There are likely to be Australians fighting abroad who are fighting for causes which are favourably viewed in the Cabinet room and, with respect, rightly so. Fighting against IS would appear at the moment to be a relatively unequivocal good (subject to basic objections to violence). But Australians abroad who are combating IS are unquestionably breaching the law unless they are our soldiers, sailors or airmen, they are with the Australian Defence Force or they are seconded to other friendly forces.

For these reasons a desirable element of clarity would be to recognise that these issues involve foreign relations and it would generally be inappropriate to subject such issues to judicial review. The conduct of our foreign relations ought to be the subject of an executive certificate for the purposes of both criminal and judicial review proceedings. It should be for the executive, unexaminably, to say that IS is against us and anyone who is opposed to IS is involved in a position that Australia supports.

In my last report I tried to suggest that there were too many certificates in our counterterrorist laws that had merely prima facie effect. Ironically, this gave judges — and, even worse,

juries — the capacity to second-guess decisions by the Australian executive concerning what was, for example, to be regarded as part of the military forces of a government. Equally, they could decide who was the government in the territory which was being contested.

So far, at least, none of that friendly advice has been accepted. I look forward to some interesting criminal and administrative law litigation about whether or not, for example, the person taking up arms to fight against IS has thereby renounced his or her allegiance to Australia.

Another aspect of international import is the critical role of international humanitarian law (IHL) governing the conduct of war and warlike activities. IHL is best known in the Geneva Conventions, as is thoroughly reflected in our Criminal Code's coverage of war crimes and crimes against humanity. Policy decisions have not yet been made or published, let alone promulgated by statute, that clearly distinguish the areas of war and counterterrorism. Political rhetoric already confuses the two. It would be better if legislation clarified it.

Endnotes

1 Under the *Independent National Security Legislation Monitor Act 2010* (Cth).
2 Under the *Inspector-General of Intelligence and Security Act 1986* (Cth).
3 (1995) 184 CLR 19.
4 Independent National Security Legislation Monitor, *Annual Report 2011* (2012).
5 Independent National Security Legislation Monitor, *Annual Report 2014* (2014).
6 The Bill was passed: *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth). The provisions discussed in this paper were included in the Act as passed.
7 (1951) 83 CLR 1.
8 The Code is the Schedule to the *Criminal Code Act 1995* (Cth). Proposed s 33AA(6) of the Australian Citizenship Act makes this link to the Code.