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NOT MAKING A DIFFERENCE: QUEENSLAND'S EXTENSION OF STATUTORY REVIEW

Justice Catherine Holmes*

May I say immediately I accept absolutely no responsibility for adhering to any of the views I express here should the questions I discuss come before me for decision at first instance or on appeal.

I am going to talk about the attempt at expanding the scope of judicial review in s 4(b) of the *Judicial Review Act 1991* (Qld). It has been a signal failure in the sense that no-one has ever made a successful application under it; in fact, all but one of the first-instance cases I will talk about involved summary dismissal using the Court's power to do so where there is no reasonable basis for the review application. I am perhaps in part responsible for this sad state of affairs, so the least I can do is discuss how it has come about.

The *Judicial Review Act 1991* is very much along the lines of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the AD(JR) Act). It has these differences: it contains pt 5, which preserves the Court's common law jurisdiction but simplifies the way in which remedies are to be granted, substituting prerogative orders and injunctions for the old writs; it permits review of decisions made by the Governor-in-Council, although it provides for the relevant Minister to be named as defendant; and it contains, in s 4(b), an extension of the decisions which may be reviewed beyond those which are made 'under an enactment':

> **4 Meaning of *decision to which this Act applies***
>
> In this Act —
>
> ***decision to which this Act applies*** means —
>
> (a) a decision of an administrative character made,
>
> proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); or
>
> (b) a decision of an administrative character made, or
>
> proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part) —
>
> (i) out of amounts appropriated by Parliament; or
>
> (ii) from a tax, charge, fee or levy authorised by or under an enactment.

* *Justice Holmes is Chief Justice of the Supreme Court of Queensland. This article is an edited version of the National Lecture on Administrative Law to the Australian Administrative Law Forum National Conference, Brisbane, 21 July2016.*

The availability of review turns on two elements: the identity of the decision-maker and the making of the decision under a publicly funded non-statutory program or scheme.

Section 4(b) is unique to Queensland. Tasmania and the Australian Capital Territory also adopted the Commonwealth model, but neither contains any equivalent to s 4(b) — although the Tasmanian legislation came nine years after the Queensland Act, so they had the opportunity to consider it.

I should elaborate on the section's reach. 'State authority' is defined as meaning an authority or body, whether or not it is incorporated, established by or under an enactment. The provision is supplemented by s 9 of the Judicial Review Act, which extends a reference in the Act to the exercise of the power conferred by an enactment to the exercise of a power or function of the kind described in s 4(b). The effect of that is to make almost all of the grounds of review in the Act available in an application brought under s 4(b), although they may not be particularly apposite. Thus the ground that the making of the decision was an improper exercise of the power conferred is incorporated, with all its sub-grounds of taking irrelevant considerations into account, failing to take relevant considerations into account, unreasonableness and so on.

The compass of s 4(b) is expanded by s 21 of the Judicial Review Act so that review under it is available in respect of conduct for the purpose of making a decision to which it applies, whilst s 22 extends its application to a failure to decide by a person with a duty to do so.

The background to the enactment of s 4(b)

The history of s 4(b) begins, as so much of the jurisprudence in this area also does, in a Commonwealth setting. In 1989, the Administrative Review Council (the ARC), with Professor Cheryl Saunders at its helm, completed a review of the AD(JR) Act.[1] It noted that there were many decisions made by Commonwealth officers which were not made under an enactment and which were not covered by the Act. Such decisions were reviewable in the High Court under s 75(v) of the *Constitution* and in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth). Among other things, the ARC recommended that the types of decisions to which the Act applied ought to be expanded to include a decision of an administrative character made or proposed to be made by an officer of the Commonwealth under a non-statutory scheme or program, the funds for which were authorised by a parliamentary appropriation.[2] The idea was that the source of funding gave such decisions a public interest character. The review gave an example of what might be covered, which was employment and training schemes. The ARC's aim was to align the non-statutory decisions for which it was proposing review under the AD(JR) Act with those for which review was available under the prerogative writs and, by incorporating them in the AD(JR) Act, to provide greater simplicity as to procedure, the grounds for review and the remedies available.

The ARC did not recommend any provision the equivalent of s 9 of the Judicial Review Act so that those grounds of review which referred to decisions being made under an enactment — that is, all of the improper exercise of power grounds — would continue to remain inaccessible for non-statutory decisions. That seems to have come out of a concern that the kinds of informal documents likely to be involved in non-statutory schemes or programs should not be elevated to the status of enactments or regarded as having a binding character.

Interestingly, in light of the later decision in *Griffith University v Tang*[3] (*Tang*) the Australian National University, noting that most of its decisions about enrolment of students, allocating academic grades and the termination of admission to degrees and so on were not made

under legislation and would become amenable to review under this proposal, opposed bringing such decisions within the compass of the AD(JR) Act. Other opposition came from the Commonwealth departments and agencies concerned about the effect on public sector personnel decisions; concern was also expressed about the prospect of challenges to individual steps within the decision-making process. And, as it happened, the ARC recommendation was not acted on either then or when it was repeated in a 1998 report.[4]

In Queensland, the 1989 report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry), because of certain failures of government accountability, had contained a section concerned with administrative review. It proposed the adoption of a simple form of machinery for applications for judicial review and the setting up of the Electoral and Administrative Review Commission (EARC) to report on that matter among many others. The EARC was duly set up and provided a report,[5] an appendix to which was a draft Judicial Review Bill. The report noted that, at common law, non-statutory decisions affecting rights or interests had been set aside on the ground of error of law. In particular, it cited *R v Criminal Injuries Compensation Board; Ex parte Lain*[6] (*Lain*), which concerned the availability of certiorari to the decisions of a non-statutory scheme for compensating victims of crime.

The EARC's thinking was a little more expansive than the ARC's. Its draft, which was adopted in the Act, extends to decisions of local government authorities. The thinking was that any scheme or program funded by rates, a decision as to which might have an adverse effect on a citizen's interests, should be within the compass of the provision.

It is noteworthy that the EARC also considered including in the definition of 'decision to which this Act applies' the words 'a decision of an administrative character otherwise operating in law to determine a question affecting the rights, interests or legitimate expectations of any person', which, it acknowledged, was a variant of what is contained in the *Administrative Law Act 1978* (Vic). The EARC dismissed it as too expansive. Its concern was that such an extended definition could encompass decisions on tendering processes, entering of contracts and decisions relating to the state's rights to manage and control its own property. It said:

> [Those were] powers not materially different to the powers of most adult citizens ie to enter contracts, to manage and control one's own property. They [were] not powers conferred by Parliament for the benefit of citizens or to regulate the affairs of citizens …[7]

There was no compelling case for them to be brought within the scope of statutory judicial review. Counsel for Griffith University in *Tang*, now the Hon Justice Keane of the High Court, recited precisely that passage in the course of his submissions.

Unlike the ARC's efforts, the EARC's recommendations were adopted and we have s 4(b) in its present form. The Explanatory Notes for the Judicial Review Bill 1991 do not shed much further light on statutory intent, but they do reiterate the example, as something which would be capable of review, of a scheme operated by a municipal council funded by rates which had an adverse effect on the interests of a citizen. The Bill was very much as the EARC had drafted it, which makes its report a particularly significant extrinsic source in construing the Act.

But judicial consideration of s 4(b) has been a disappointment to academic commentators. Indeed, I had no idea how much of a disappointment it has been until I read in preparation for this article. The reality is that very little concerning s 4(b) has come before the court at first instance and there has been next to nothing at appellate level. I can literally count on one hand the number of decisions of any substance[8] made under the section and they are

so few as to permit an outline of them. In none of them was there any issue about the decision-maker meeting the statutory description or the source of relevant funding. They either fell at the hurdle of establishing a 'non-statutory scheme or program' or the grounds of review were not made out.

Cases considering s 4(b)

The two earliest cases fall in the latter category. The first was *Anghel v Minister for Transport (No 1).*[9] The Minister for Transport approved the construction of a railway line which was partly funded through State funds appropriated by Parliament. The applicants for review were residents who said that their properties would be affected. Justice Derrington held that the rail project was a scheme within the meaning of the section, drawing a distinction between a scheme, which could mean a single project or enterprise, and a program, which suggested a repetition of events. Section 4(b) applied, but none of the Judicial Review Act grounds of review were made out.

Macedab Pty Ltd v Director-General, Department of the Premier, Economic and Trade Developments[10] (*Macedab*) was decided about nine months later. The government had approved a policy of purchases, on compassionate grounds, of land affected by development. It was for the respondent Director-General to decide which cases met the conditions for acquisition. The State refused to buy the applicant's property. There was no argument about the application of s 4(b). Again, though, the grounds of review were found not to be made out. An appeal was dismissed.[11] Tantalisingly, in their judgment, the members of the Court of Appeal said that, on the hearing, they had had some interest in the width of the power to review the decisions of government officers under s 4(b) and s 9. They had received supplementary submissions from the respondent on the point but had decided against examination of the issue because of the concession that review was available. At the end of the judgment, though, the observation was made that it was not surprising that the decisions of the kind had been included by the legislature as subject to judicial review; *Lain* was cited as involving decisions of a comparable kind.

The remaining cases turned on what constituted a 'non-statutory scheme or program', most of them focusing on the scheme or program aspect. The first is *Wide Bay Helicopter Rescue Service Incorporated v Minister for Emergency Services*[12] (*Wide Bay Helicopter Rescue*). The applicant had lobbied the government to engage it to run a helicopter rescue service in the Hervey Bay – Fraser Island Area. The government, however, decided to vary its agreement with an existing provider of a helicopter rescue service so that it expanded to an area a bit further north, with a helicopter flying out of Bundaberg. The applicant for review characterised the relevant decision as a decision to place a rescue helicopter service in Bundaberg.

Justice Williams held that there was no decision of the kind from the contract variation, but, even if there were, it was not a decision within s 4(b). His Honour made the observation that, if the decision had been to make government funds available to the provider of a rescue service in a relevant region, it might have been within s 4(b). That observation has caused concern in subsequent commentary[13] as possibly suggesting that the scheme or program in question must be about delivery of funds as opposed to involving funds from a particular source. I think the better view is that his Honour was just giving an example of something that might fall within s 4(b).

In *Mikitis v Director-General Department of Justice and Attorney-General*[14] staff members of the Office of the Director of Public Prosecutions sought review of a decision by the Director-General of Justice to change the office layout in the Cairns office to an open-plan one. One can sympathise with their reaction — who among us does not want a door and a

little privacy? However, they were unsuccessful. Cabinet had set up a Government Office Accommodation Committee, the role of which was to formulate guidelines for planning office accommodation for government agencies. Under its guidelines, which the Director-General had to apply, the applicants were not important enough to qualify for individual offices. The applicants argued that the scheme in question was one established by Cabinet minute for provision of office accommodation to government employees. The office refurbishment was undertaken pursuant to that scheme and, as part of it, the decision about office allocations was made pursuant to the guidelines. Justice Margaret Wilson held that the Cabinet minute which set up the committee did not establish a scheme or program. She accepted that the decision was made under the guidelines, but they were neither a scheme nor part of a scheme.

Then we come to my judgment in *Bituminous Products Pty Ltd v General Manager (Road System and Engineering) Department of Main Roads*[15] (*Bituminous Products*). The facts, I fear, are as dull as the name of the case suggests. Section 11 of the *Transport Infrastructure Act 1994* (Qld) required the Director-General of the Department of Main Roads to develop roads implementation programs and prescribed their content: projects, policies and financial provision for road work. The Department had a manual which set out standards specifications for road construction, one of which was that the proportion of waste oil in pre-coating material was not to exceed 20 per cent. It had also developed a list of approved pre-coating agents, which included the applicant's, until the list was revised and the applicant's product was removed from it because it contained too much waste oil. That was the decision of which review was sought, and the question was whether it was made under a non-statutory scheme or program. The applicant had two arguments. The first argument was that the process for developing lists of products and formulating specifications was a scheme or program embodied in the manual of standards specifications, and the decision to restrict approved products was made in the course of the program of identifying products to be used. The alternative submission was that the decision was made pursuant to the roads implementation program, which was said to be a non-statutory program.

I made a number of comments about what constituted a scheme or program for the purposes of s 4(b). I repeat them here, not through immodesty but because there is so little else about what this section means. Also, this part of the judgment was cited with apparent approval by the Court of Appeal in a later case, *JJ Richards & Sons Pty Ltd v Bowen Shire Council*[16] (*JJ Richards*), so it has some respectability. Looking at dictionary definitions of 'program' and 'scheme', I thought both connoted a need for some planned action. I made the general observation that, the harder it was to identify a discrete program or scheme, the less likely it was that one existed, and that one had to be careful not to dissect a program so as to confer the status of program on any of its internal arrangements which themselves appeared structured or organised. I also thought the emphasis on public funding in the provisions suggested that a useful, but not necessarily essential, identifier of a scheme or program was a specific appropriation or a specific statutory levy for its purposes, that being consistent with the ARC recommendation, on which the EARC relied, and its rationale that the public interest character of a decision related to the fact that it came from a parliamentary appropriation specifically for the scheme or program.

Applying those considerations, I did not think that the development specifications and products lists for carrying out road works constituted a program or scheme, and I held that the 'non-statutory' component was not made out. The roads implementation program itself was required by statute; its minimum content was prescribed by statute; its purpose was to implement strategies developed in accordance with statute; and the Chief Executive Officer had statutory powers to further its aims. This aspect of the decision was criticised in a 2011 submission to the ARC by Professor Billings and Professor Cassimatis from the TC Beirne School of Law at the University of Queensland. Billings and Cassimatis argued that it took

too restrictive an approach to the question of whether a program was statutory or non-statutory.[17]

The applicant in *Bituminous Products* had a second string to its bow, which was to argue that the decision was reviewable under s 4(a). Unfortunately for it, before my decision was handed down, judgment was given in *Tang* and I held that, because the applicant could not point to existing rights or obligations affected by the decision or rights which might be acquired through the making of a different decision, it could not bring itself within s 4(a).

The respondent in *Tang*, of course, was a postgraduate student excluded from a PhD program at Griffith University. The majority (Gleeson CJ; Gummow, Callinan and Heydon JJ) held that the university's actions were authorised by the *Griffith University Act 1998* (Qld), but its decision was not 'made under' that Act in the sense which would make it reviewable under the Judicial Review Act. The university was not exercising a unilateral power to affect Ms Tang's rights and obligations. There was instead a consensual relationship between her and the university which had been brought to an end by its decision to exclude her — a decision made under the general law.

The critical passage of the joint judgment of Gummow, Callinan and Heydon JJ is as follows:

> The determination of whether a decision is 'made … under an enactment' involves two criteria: the first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter, or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made … under an enactment' if both those criteria are met.[18]

The Court went on to say that it was not necessary that the decision affect or alter existing rights or obligations; it would suffice that the enactment required or authorised decisions from which new rights or obligations would arise. The legal rights affected did not have to arise from the enactment; it would suffice if they derived from the general law or other statute.

The respondent in *Tang*, as I have already observed, confined her application to one under s 4(a). She did not argue s 4(b), although it was suggested she might subsequently seek to rely on it. That provision received only passing reference in the majority judgments. It did feature in the dissenting judgment of Kirby J. His Honour observed that the fact that there existed an alternative wider ambit of the Act's operation in s 4(b) constituted another argument against the adoption of a narrow interpretation of the phrase 'under an enactment'. I have, with respect, some difficulty with the logic of that argument; one might say instead that the existence of s 4(b) suggests a distinct and confined sphere of operation for s 4(a).

I will return to *Tang*, but first I will finish my summary of decisions which did concern s 4(b). In *JJ Richards*, the relevant decisions were the respondent Council's decisions to terminate a tender process and to institute a new one. The Court of Appeal held that the relevant source of power was not statute but the power of legal persons to enter commercial relationships, so that the application, insofar as it was made under s 4(a), failed on the *Tang* basis.[19] There was an alternative, last-minute argument that the decisions fell within s 4(b). The Court held that there was no 'non-statutory scheme or program', referring in this context to *Bituminous Products.*

The history, then, of s 4(b) as a mechanism for review is one of unmitigated failure. Why is it so? Professor Cassimatis and Professor Billings lay part of the blame, in the most tactful language possible, on the way courts have construed the section. They argue that, although in the light of the original ARC recommendation the section should be seen as balancing an intention to expand statutory review in accordance with that available under s 75(v) of the

Constitution while avoiding the uncertainty connected with the prerogative writs, the words 'non-statutory scheme or program' have not been interpreted in a way that would permit that to occur.[20]

I have already referred to their criticism, in their submission to the ARC's 2012 review, of my approach in *Bituminous Products* to what amounted to 'a non-statutory' program. They do not elaborate on that criticism in their submission, but I infer that they would contemplate a narrower view of the converse; in other words, what is a 'statutory' program. Presumably they would argue that the program must be explicitly established by an Act rather than be required and its content prescribed by statute. That is a debate that may still be held somewhere at some time; my decision was not appealed, so it is no better than persuasive. But, assuming a more liberal approach to what is 'non-statutory', there is still the requirement that the decision must be made under a 'scheme or program', and I do not think that it has been the interpretation of those terms that has been the stumbling block.

Section 75(v) turns on the identity of the decision-maker as a Commonwealth officer. Section 4(b) is similar to the extent that it identifies the decision-maker by status, but it also contains a second pivot: the making of the decision under a publicly funded non-statutory program or scheme. With the best will in the world towards a liberal reading, those words must be given some content. Once they were incorporated into s 4(b), they imposed an additional limit on the section's application which has no equivalent in the constitutional provision. I would argue that, rather than adopting restrictive construction, this is the reason why, if the EARC's intentions were to match s 75(v) review, they were foiled.

Professor Billings and Professor Cassimatis have also suggested that the underuse of s 4(b) may be attributable to legal advisers' failure to recognise its potential and they cite two decisions — *Blizzard v O'Sullivan*[21] (*Blizzard*) and *Concord Data Solutions Pty Ltd v Director-General of Department of Education*[22] (*Concord Data Solutions*) — as instances in which reliance was placed on s 4(a) but s 4(b) might have been used. Professor Aronson and Professor Groves also refer to those two cases in their text, *Judicial Review of Administrative Action*,[23] and they suggest that s 4(b) might provide a way around the statements in *Tang* that the AD(JR) Act provides no coverage of decisions to award a contract or decisions under a contract. But I am not so sure about that.

Construction of s 4(b) has never got very far. It stalled at the non-statutory scheme or program point. There is also the preposition 'under', which has yet to receive any judicial consideration. This is where I think that we have to think about *Tang*. *Tang* caused alarm and despondency because of the concern as to what was embraced by 'legal rights and obligations'. Justice Kirby certainly thought that the expression as used in the joint judgment did not extend to the affecting of interests[24] and some commentators have shared that view.[25] Others have thought that a reference in the joint judgment to the decision-maker's obligations expanded the coverage of the section under this construction.[26] Justice Keane, who was counsel for Griffith University, has expressed the view that it extends to interests capable of legal protection.[27] However, whatever the effect of *Tang* in that regard, the question of what is protected is not, I think, of concern in the application of s 4(b).

First, the court in *Tang* construed s 4(a) consistently with the way in which it considered that the equivalent provision of the AD(JR) Act should be construed, acknowledging that that might lead to a more restricted form of judicial review.[28] This was because of s 16 of the Judicial Review Act, which provides that, if a provision of the AD(JR) Act expresses an idea in particular words and a provision of the Judicial Review Act seems to express the same idea in different words, the ideas were not to be taken to be different merely because of that. The impact of that mode of construction in the joint judgment is apparent. In particular, their Honours said that the character of the AD(JR) Act as a law of the Commonwealth conferring

federal jurisdiction supported the construction they had given to the phrase 'decision … under an enactment' because of the constitutional requirement that there be a 'matter' — that is to say, 'some immediate right, duty or liability to be established by the court'. While the Judicial Review Act did not have the constitutional underpinning relevant to interpretation of the AD(JR) Act, s 16(1) had linked the two so as effectively to make that a necessary sequence of reasoning.

Now, that is not the case for s 4(b). As the provision has no equivalent in the federal Act, there is no common idea between the two pieces of legislation to be construed consistently by force of s 16 of the State Act. Secondly, there are indications that the range of interests covered is meant to be much wider. The reference in the EARC report, and also in *Macedab,* to *Lain* as the common law equivalent of the sort of review contemplated by s 4(b) makes that clear. You will recall that in *Lain* certiorari was said to be available in respect of interests well short of legally enforceable rights, even where the decision was merely a step in a process which could ultimately affect legal rights or liabilities.[29] There is also the fact that the Explanatory Notes for the Judicial Review Bill 1991 gave the example, as something which would be capable of review, of a scheme which had an adverse effect on the interests of a citizen. If the ARC's recommendation that the AD(JR) Act permits review of decisions made under non-statutory programs had been acted on so that s 4(b) had a federal equivalent, I might now be talking about the effect of the constitutional requirement that there be a 'matter' on s 4(b). But we have been spared that. And that does, in my view, make for a broader coverage in this respect for s 4(b). While I could not see that the removal of the applicant's name from the approved products list in *Bituminous Products* met the *Tang* criteria, I do think that the decision may have met the *Lain* description, although that was not something I had to decide.

But *Tang* is relevant to consideration of whether a decision is made '*under* a non-statutory scheme or program'. In the joint judgment, the observation was made that the expression 'decision made … under an enactment' used in the AD(JR) Act and its state equivalents directed attention away from the decision-maker's identity to the decision-maker's source of power. Section 4(b), as it seems to me, is concerned with both those things: the source of power as well as the identity of the decision-maker. One has a dual hurdle, then, although the second is not so hard to meet. One must look, under s 4(b), at whether the program or scheme is the source of the decision-maker's power to decide, and it is hard to go past the reasoning that a decision made exercising powers available under the general law, such as a tender arrangement or contract, will not meet that description.

Professor Michael Taggart has written of judges' egregious tendencies to try to exclude tendering and contract decision-making from statutory judicial review,[30] and I may be joining that guilty group. But it would be consistent with the purpose of common law review, as Keane J has described it, to subject to judicial scrutiny decisions by which the executive affects the interests of individuals, as opposed to those in which the executive exercises rights available to all, so that commercial decisions would not fall within the compass of s 4(b). And it seems to me that this would be an operation of the provision as the EARC intended. You will recall that its report rejected a broader definition of 'decision' because of its concern that it would affect 'powers not materially different to the powers of most adult citizens ie to enter contracts, to manage and control one's own property'.

If I am right about that, the two cases the academic commentators have referred to — *Blizzard* and *Concord Data Solutions* — would not have qualified for review under s 4(b). Both of those cases were decisions of Thomas J, which were made in 1993 — well in advance of *Tang. Blizzard* concerned the dismissal of a senior police officer who was employed under a contract. Referring to *Australian National University v Burns*,[31] Thomas J held that that was an exercise of the Police Commissioner's rights pursuant to contract, not a

unilateral exercise of power under the *Police Service Administration Act 1990* (Qld). *Concord Data Solutions* concerned the Director-General's decision to appoint someone other than the applicant as the preferred supplier of computer software. There was a State Purchasing Policy which was said to contain rules for government procurement. Justice Thomas held that the policy did not amount to an enactment and the Director-General had in any case made his decision exercising the government's prerogative power to enter into a contract.

If it is correct to say that the decision must derive its effect from the scheme or program, not the general law, neither of these cases would have succeeded under s 4(b). *Wide Bay Helicopter Rescue,* which involved the government's exercise of its contractual powers, was similarly doomed to failure on that basis alone.

Similarly, you will recall that in *JJ Richards* the Council's decisions were to terminate a tender process and institute a new one. The Court of Appeal might, I think, have used exactly the same reasoning as that which caused it to reject the application of s 4(a) and hold that, if the decision was made pursuant to a power to enter commercial relationships, it was not made under a 'non-statutory scheme or program'. In dealing with the s 4(b) argument on the basis that there was no scheme or program, the judgment added the observation that it would be a misconstruction of s 4(b) to suppose that it encompassed *any* decision by a local government authority discharging its functions.[32] Now this was a judgment of the Court and Keane J was the presiding judge, so it is conceivable that that observation hints at possible application of at least part of the *Tang* reasoning to s 4(b) cases.

The general lack of consequence of s 4(b) led Professor Groves to say that the provision should not be replicated in the AD(JR) Act[33] — a view which the ARC cited in 2012 when it revisited the question of whether judicial review should be available for non-statutory decisions. It moved away from its earlier recommendation, noting the uncertainty about which judicial review principles could apply to non-statutory decisions and the burden that review would place on the agencies administering non-statutory schemes. Instead, it proposed that the AD(JR) Act be amended to enable anyone who otherwise would be able to initiate a proceeding in the High Court under s 75(v) of the *Constitution* to apply for an order of review under the AD(JR) Act.

Conclusions

Why has the attempt in the form taken by s 4(b) to permit review of non-statutory decisions had so little success? I think the problem lies in finding the formula which will allow a proper balance, which will not bring the machinery of government grinding to a halt but also does not stifle the prospect of appropriate accountability; that does not permit every minor action along the way to an outcome to be held up to scrutiny but affords a mechanism for ensuring proper process. It is just harder than everyone thought. I do wonder whether the incorporation of the words 'under a non-statutory scheme or program', which in themselves have a narrowing effect, were really necessary. It may be that the EARC should have stuck with its third definition — 'a decision of an administrative character … operating in law to determine a question affecting the rights, interests or legitimate expectations of any person' — which was close to the Victorian definition of 'decision'. It could have incorporated the identity of the decision-maker qualification. The concern about application to contract and tendering processes may not have been realised; my understanding is that the definition of 'decision' in the Victorian Act has been construed as excluding a decision to exercise rights under contract[34] — again, perhaps, an exhibition of those tendencies which Professor Taggart deplores.

I do not mean to suggest that s 4(b) is unusable in its present form. It is just that, if I were assessing it as I would an applicant for bail, on its previous history I would say that its prospects for future satisfactory performance are not good.

Does it matter much? Professor Aronson suggests[35] that s 4(b) was not really needed in the state context. The ARC had proposed statutory judicial review of non-statutory decision-making in a context in which the Federal Court had no inherent jurisdiction and no other form of judicial review was possible. The state superior courts, in contrast, had inherent jurisdiction to review non-statutory public power.

And it is true that many of these decisions could be reviewed using the common law jurisdiction preserved by pt 5 of the Judicial Review Act. But it is a pity that applicants should have lost the advantage of reasons and of a codified and clear procedure with readily understood grounds of review and orders — in short, the straightforwardness which was intended to be at the heart of the Judicial Review Act.

Endnotes

1 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review Act): the Ambit of the Act* (Report No 32, 1989).
2 Ibid, recommendation 1.
3 (2005) 221 CLR 99.
4 Administrative Review Council, *The Contracting Out of Government Services Report* (Report No 42, 1998) recommendation 22.
5 Electoral and Administrative Review Commission, *Report on Judicial Review of Administrative Decisions and Actions* (Brisbane, December 1990).
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8 In *Reid v Commissioner of Police* (1994) QAR 404 (White J) and *Krajniw v Flegg* [2012] QSC 392 (Martin J), [2013] QCA 233 (application for extension of time to appeal), there was simply no evidence of anything resembling a 'scheme or program'.
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10 Unreported, Supreme Court of Queensland, Demack J, 14 September 1994.
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12 (1999) 5 QAR 1.
13 Peter Billings and Anthony E Cassimatis, 'Twenty-one Years of the Judicial Review Act 1991' (2013) 32 *University of Queensland Law Journal* 65, 74.
14 (1999) 5 QAR 123.
15 [2005] 2 Qd R 344.
16 [2008] 2 Qd R 342.
17 Peter Billings and Anthony E Cassimatis, Submission No 6 to the Administrative Review Council, *Judicial Review in Australia Consultation Paper*, 20 June 2011.
18 *Griffith University v Tang* (2005) 221 CLR 99, 130–1.
19 Ibid [22].
20 Billings and Cassimatis, above n 13, 73.
21 [1994] 1 Qd R 112.
22 [1994] 1 Qd R 343.
23 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 5th ed, 2013) 28.
24 *Griffith University v Tang* (2005) 221 CLR 99 [102],[154].
25 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after *Griffith University v Tang*' (2006) 17 *Public Law Review* 22.
26 See, for example, Billings and Cassimatis, above n 13, 71–2. For a contrary view see the judgment of Edmonds J in *Guss v Deputy Commissioner of Taxation* (2006) 152 FCR 88, [41].
27 Patrick A Keane, 'Judicial Review: the Courts and the Academy' (2008) 82 *Australian Law Journal* 623, 630; Chief Justice The Hon P A Keane, 'Democracy, Participation and Administrative Law' (Paper presented at the 4th National Lecture on Administrative Law at the Australian Institute of Administrative Law National Conference, Canberra, 21 July 2011).
28 *Griffith University v Tang* (2005) 221 CLR 99, 105.
29 [1967] 2 QB 864, 881, 884.
30 Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 21.

31 [1982] FCA 207.
32 *JJ Richards & Sons Pty Ltd v Bowen Shire Council* [2008] 2 Qd R 342 [23].
33 Matthew Groves, 'Should We Follow the Gospel of the Administrative Decisions (Judicial Review) Act 1977 (Cth)?' (2010) 34 *Melbourne University Law Review* 736, 756.
34 *Monash University v Berg* [1984] VR 384; *Szwarc v Melbourne City Council* (1990) 70 LGRA 162.
35 Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 1.

HONORARY LIFE MEMBER: EMERITUS PROFESSOR JOHN McMILLAN AO

The Australian Institute of Administrative Law was set up 27 years ago. In that period it has awarded just three life memberships — to Robert Todd AM, Emeritus Professor Dennis Pearce AO and Stephen Argument. Each was an inaugural member of the AIAL. Each is a distinguished figure in administrative law generally — but it was their contribution to the AIAL for which they were honoured. [The late Professor Geoffrey Sawer AO was also appointed as a life member of the AIAL in recognition of his contribution to administrative law in Australia.]

Today it gives me considerable pleasure to add a fifth member to the list. The National Council yesterday unanimously endorsed a nomination to award life membership of the AIAL to Emeritus Professor John McMillan AO, who is currently Acting NSW Ombudsman, in recognition of his contribution to the AIAL.

He has made — and continues to have — a memorable impact on broader administrative law as a leader of its key institutions, as an academic and author and as a participant in professional bodies.

This nomination recognises his involvement in the AIAL. John was an inaugural member of the AIAL and remained a member of its National Executive until 2015. He has been its President. But it is his shaping of the AIAL for which this recognition is especially apt.

It was his innovation gene which led to the holding of an annual national conference — he has devised themes, been on the Planning Committee, been the Director and edited the proceedings of the conference on at least five occasions since 1991.

It was John who suggested that the AIAL establish a journal. The AIAL had a newsletter from its inauguration in 1989. In 1994, at John's suggestion, that newsletter became a fully fledged journal — *AIAL Forum*. For its first 80 editions, he has been the second-most prolific author after Stephen Argument.

It is to John, too, whom the AIAL owes many of its suggestions for and contacts with speakers for the seminars which enrich our understanding of administrative law. Not only does he suggest others, but he has also been a regular and generous presenter to all chapters of the AIAL on topics of current interest.

And, of course, it was John, with his astounding memory and his quirky sense of humour, who, together with Stephen Argument, introduced the AIAL to the Trivia Quiz.

Given the part John has played in the development and continuing success of this national body, it is only fitting that John's impact on the AIAL should be marked in this fashion. The honour comes with our sincere thanks.

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory

The Governor-General has issued Letters Patent to establish a Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory.

This Royal Commission will be conducted jointly with the Northern Territory Government, which will issue an appointment in identical terms under its *Inquiries Act* (NT).

The Royal Commission is independent from government and is responsible for determining its own processes. It can investigate any matter that falls within its Terms of Reference.

The Royal Commission has been established in a targeted and focused way to enable the swift inquiry into the treatment of children and young persons detained in youth detention facilities administered by the Government of the Northern Territory — in particular, the Don Dale Youth Detention Centre. The Royal Commission is due to report by 31 March 2017.

The Royal Commission will focus on the specific systemic problems identified within the Northern Territory, how those problems arose, the failure to identify and correct them, and appropriate reforms.

Specifically, the Royal Commission has been asked to examine:

- failings in the child protection and youth detention systems of the Government of the Northern Territory;
- the effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate;
- cultural and management issues that may exist within the Northern Territory youth detention system;
- whether the treatment of detainees breached laws or the detainees' human rights; and
- whether more should have been done by the Government of the Northern Territory to take appropriate measures to prevent the reoccurrence of inappropriate treatment.

The Royal Commission will also make recommendations about legal, cultural, administrative and management reforms to prevent inappropriate treatment of children and young persons in detention, and what improvements can be made to the child protection system.

Many of the recommendations and findings of this Royal Commission are expected to be of use to other jurisdictions when they are considering how their juvenile detention systems can be improved.

The Government thanks the many individuals and organisations, including the Opposition, who have provided constructive input into the development of the Terms of Reference.

https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/28-July-2016-Royal-Commission-into-the-Child-Protection-and-Youth-Detention-Systems-of-the-Northern-Territory.aspx

Commonwealth Ombudsman publishes report on Tourist Refund Scheme

Acting Commonwealth Ombudsman Richard Glenn has released a report into the Department of Immigration and Border Protection's Tourist Refund Scheme (TRS) and the application of the '30-minute rule'.

The TRS allows Australian and overseas passengers to claim back the Goods and Services Tax (GST) and the Wine Equalisation Tax (WET) on goods purchased in Australia and taken overseas.

The Ombudsman received a number of complaints about the '30-minute rule', which requires passengers who wish to claim a refund of GST to present themselves at the airport's TRS counter at least 30 minutes before their flight's scheduled departure time.

The purpose of the '30-minute rule' is to ensure people claiming a refund allow sufficient time to do so, thus ensuring that flight departures are not delayed.

'We received a number of complaints from people who felt they were unfairly denied a refund of the GST that had been paid on goods purchased in Australia', Mr Glenn said.

In some instances they had arrived at the TRS counter well before the 30-minute cut-off but still were not able to lodge their claim for a refund.

'In our investigation, it became apparent that the "30 minute rule" is not supported by legislation', Mr Glenn said.

'We also found that the ad hoc arrangements intended to be put in place when there was a high volume of passengers to process, were at times not deployed when they should have been', Mr Glenn said. These arrangements include the use of a drop box so that passengers may lodge their claim, which is then processed at a later time.

The Ombudsman made a number of recommendations:

- as an interim measure, the department takes all reasonable steps to ensure that travellers who wish to claim a TRS refund are able to do so in a way that is consistent with the law; and
- the department considers the permanent use of a drop box service at TRS facilities at all international points of departure, and takes all necessary steps to ensure the appropriate regulations are in place to give effect to this arrangement.

Mr Glenn said he was pleased that the department acknowledged problems with the '30-minute rule' and had accepted the recommendations. The department is now considering how changes to their processes at the TRS facilities can be made.

He also acknowledged the assistance his office received from the department throughout the investigation and report drafting process.

http://www.ombudsman.gov.au/news-and-media/media-releases/media-release-documents/commonwealth-ombudsman/2016/28-july-2016-commonwealth-ombudsman-publishes-report-on-tourist-refund-scheme

Queensland Ombudsman presents report on the management of child safety complaints

The Queensland Ombudsman, Phil Clarke, has presented his report on the management of child safety complaints to the Hon Peter Wellington, Speaker of the Queensland Parliament, for tabling.

The Ombudsman's investigation found that the Department of Communities, Child Safety and Disability Services is not capturing all child safety complaints due to inadequate complaint-recording processes at its Child Safety Service Centres.

It found a significant, unexplained reduction in the number of child safety complaints since the Commission for Children and Young People and Child Guardian (CCYPCG) was disbanded in 2014.

The Ombudsman's report does not address notifications received by the department about harm or risk of harm to a child. These matters are not considered complaints when first received.

The investigation identified the need for greater collaboration between the department and the Office of the Public Guardian (OPG) to ensure that serious issues identified by OPG Community Visitors are handled as child safety complaints by the department.

The investigation also found that the department had failed to publish information about complaints received and resolved, despite a legal requirement to do so under the *Public Service Act 2008* (Qld). The department has since published this data.

The Ombudsman decided to investigate the management of child safety complaints in the wake of significant reforms to Queensland's child safety system stemming from the Queensland Child Protection Commission of Inquiry, led by the Hon Tim Carmody QC.

The inquiry returned oversight of child safety complaints to the department, with oversight by the Queensland Ombudsman.

Mr Clarke launched an investigation in September 2015 to determine whether the Department of Communities, Child Safety and Disability Services had a robust child safety complaints system.

'The public needs to have confidence in the department's ability to investigate complaints to ensure the state's most vulnerable children are protected', Mr Clarke said. 'My investigation revealed serious shortcomings, including a significant number of child safety complaint issues that have seemingly been lost since the CCYPCG ceased operation.'

Mr Clarke has made five recommendations, including that the department improve its complaints management system and develop protocols with the OPG to decide when a matter should be considered under the department's complaints system.

'The number of complaints about child safety issues received in Queensland should not be a controversial topic and should not be open to debate', Mr Clarke said.

'An effective child safety complaints system should be accessible, responsive, objective and fair with transparent and comprehensive reporting.'

'Properly managing complaints helps ensure the integrity and effectiveness of the child safety system in Queensland and allows individual concerns to be resolved.'

'I believe that the recommendations made in this report will lead to a stronger system for managing child safety complaints into the future.'

The Queensland Ombudsman is an independent officer of the Parliament. The Ombudsman ensures public agencies make fair and balanced decisions for Queenslanders by investigating complaints and conducting own-initiative investigations that tackle broader, systemic concerns.

The Ombudsman can investigate complaints about state government departments, local councils and publicly funded universities.

The Ombudsman can make recommendations to rectify unfair or unjust decisions and improve administrative practice.

Management of child safety complaints: An investigation into the current child safety complaints management processes within the Department of Communities, Child Safety and Disability Services was tabled on 19 July and is available at <http://www.ombudsman.qld.gov.au>.

http://www.ombudsman.qld.gov.au/Portals/0/docs/Publications/Media_Releases/Media_release_Child_Safety_Report_FINAL.pdf

NSW Ombudsman report on the consorting law

The Acting NSW Ombudsman, Professor John McMillan, has completed his report on the operation of the New South Wales consorting law. The Attorney-General has tabled the report in Parliament.

The Ombudsman's report recommends the adoption of a statutory and policy framework to ensure police apply the consorting law in a way that is focused on serious crime, closely linked to crime prevention, and is not used in relation to minor offending.

'Proper use of the consorting law requires careful judgement on the part of individual police officers', said Professor McMillan.

'That judgement should be informed by reliable intelligence and controlled by rigorous policy and procedures.'

In 2012, the NSW consorting law was modernised. It is now an offence for a person to continue to communicate or associate with at least two 'convicted offenders' following receipt of a police warning in relation to each offender. 'Convicted offender' is defined broadly and may include a person convicted of a relatively minor offence such as shoplifting. The offence has a maximum penalty of three years' imprisonment and/or a $16 500 fine.

The new consorting law was introduced as part of a suite of changes designed to assist police to tackle organised crime and criminal gangs. The consorting law is intended to disrupt and prevent the building or continuation of criminal networks between people and, in doing so, prevent crime. It is a controversial law. There is no legal requirement for the associations targeted by police for consorting to have any link to planning or undertaking criminal activity.

Police have significant discretion in deciding who they will warn, who they will give warnings about and whether to bring charges.

The Ombudsman's report outlines use of the consorting law in relation to members of criminal gangs but also in relation to people experiencing homelessness, children and young people and people with no criminal record. In some areas the proportion of use in relation to Aboriginal people was high.

The NSW Police Force Gangs Squad was responsible for the majority of charges under the consorting law and approximately half of all consorting warnings during the three-year review period. The Ombudsman's report outlines qualitative evidence to support the police claim that the consorting law had been effectively used to target high-risk criminal gangs. However, the report discusses some concerns about police use of the consorting law, particularly in commands outside of the NSW Police Force Gangs Squad. These concerns include:

- using the consorting law to address minor or nuisance offending, including less serious summary offences;
- applying the consorting law in a way that effectively deterred vulnerable people (including people experiencing homelessness) from spending time in certain public areas and accessing support services;
- disproportionately high numbers of Aboriginal people being subjected to the consorting law, both as persons receiving official warnings and those about whom official warnings were made; and
- consorting warnings breaching the privacy of convicted offenders by disclosing their convictions to others.

'Worryingly, most of the official warnings that police issued about consorting with a person aged 17 or less were unlawful', said Professor McMillan. The data showed three-quarters of these children and young people did not in fact have an indictable conviction formally recorded in their criminal record.

The Ombudsman's report makes 20 recommendations intended to increase the fairness of the operation of the consorting law and reduce the risk of use that may undermine public confidence in the NSW Police Force. The recommendations include:

- amending the law to include an 'objects' clause that states the purpose of the consorting law is to prevent serious criminal offending;
- expanding the legislated defences to the consorting offence to ensure that it does not prevent people from complying with parole conditions; obtaining emergency accommodation; or seeking welfare or support services, such as counselling or drug and alcohol rehabilitation;
- statutory time limits for issuing warnings and the period the warning remains in effect; and
- amending the law so it cannot be used against persons aged 17 years or less.

'Unless these changes are made it is likely that the consorting law will continue to be used to address policing issues not connected to serious and organised crime in a manner that may impact unfairly on disadvantaged and vulnerable people in our community.'

The Ombudsman's report *The consorting law, Report on the operation of Part 3A, Division 7 of the Crimes Act 1900, April 2016* is available on the website of the NSW Ombudsman: <http://www.ombo.nsw.gov.au>.

https://www.ombo.nsw.gov.au/ data/assets/pdf_file/0015/34710/2016-Media-release-Review-of-consorting-law-20-June-2016.pdf

SA Watchdog appointed to hear complaints against judges and magistrates

Highly respected former Supreme and Federal Court Judge Bruce Lander has been appointed as the inaugural Judicial Conduct Commissioner for South Australia.

The Hon Mr Lander QC, who also is the Independent Commissioner Against Corruption, was appointed by the Executive Council.

The position of Judicial Conduct Commissioner creates a formal independent avenue through which to pursue serious complaints about judicial officers.

The *Judicial Conduct Commissioner Act 2015* (SA) created the position, with an appointment to be made by the Governor after approval by a parliamentary committee. The Act establishes a transparent, formal and independent mechanism for dealing with substantial complaints made against judicial officers, such as judges and magistrates.

Previously, there was no formal, independent system in place to deal with such complaints, with the only option being to write to the head of the jurisdiction of the judicial officer in question.

The Judicial Conduct Commissioner Act provides for an appointment term of up to seven years with possible extensions up to a maximum of 10 years. Mr Lander has chosen to have his appointment coincide with his ICAC term — that is, until 1 September 2020.

The Commissioner is free from any direction by any person and can only be removed by both Houses of Parliament. Complaints received by the Commissioner will be dismissed if they are properly a matter for an appeal, vexatious or without merit – for example, a complaint about losing a case.

Minor matters would usually be dealt with by a senior judicial officer. In very serious matters, the Commissioner can report to Parliament — which has the power to remove a judicial officer — or recommend the Attorney-General appoint a Judicial Conduct Panel to investigate the complaint. The panel would have the powers of a royal commission.

http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Media Releases/2016/AUG/20160811-MR-AG-Rau_Judicial_Conduct Commissioner.pdf

Recent decisions

Procedural fairness and data breaches

Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTZI [2016] HCA 29 (27 July 2016)

The Department of Immigration and Border Protection (the Department) publishes statistical reports on its website. On 10 February 2014, the particular electronic form of the report included embedded information, which disclosed the identities of 9258 applicants for protection visas in immigration detention (the data breach). The document containing the embedded information remained on the website until 24 February 2014.

The information disclosing the identities of the protection visa applicants was information protected from unauthorised access and disclosure by criminal prohibitions in pt 4A of the *Migration Act 1958* (Cth) (the Act).

SZSSJ is a Bangladeshi national. He arrived in Australia on a student visa in 2005. He was taken into immigration detention when his student visa expired in 2012. Shortly afterwards, he applied for a protection visa. At the time of the data breach, his application for the protection visa had been refused and he had exhausted his rights to merits and judicial review under pts 7 and 8 of the Act. He was in immigration detention awaiting removal under s 198 of the Act.

SZTZI is a Chinese national who arrived in Australia as an authorised air arrival on a visitor's visa of three months' duration. That visa expired and she was taken into immigration detention in September 2013. Her application for a protection visa, made the following month, was refused in November 2013. That refusal was affirmed on merits review under pt 7 of the Act in January 2014. Like SZSSJ, she was in immigration detention at the time of the data breach.

The Department retained external consultants KPMG to investigate the data breach. A report was produced by KPMG.

The Department wrote to people affected by the data breach, including SZSSJ and SZTZI, and provided them with an abridged version of the KPMG report.

The abridged version of the report recorded that, during the 14 days in which the document disclosing the identities of the visa applicants had remained on the website, the document had been accessed 123 times and that the access had originated from 104 unique internet protocol (IP) addresses. The abridged version of the KPMG report did not record those IP addresses or give the precise time of access. Rather, the abridged version stated:

> It is not in the interests of detainees affected by this incident to disclose further information in respect of entities [who] have accessed the Document, other than to acknowledge that access originated from a range of sources, including media organisations, various Australian Government agencies, internet proxies, TOR network and web crawlers.

The abridged version went on to record that KPMG had 'not identified any indications that the disclosure of the underlying data was intentional or malicious'.

After being notified of the breach, SZSSJ and SZTZI both requested unabridged copies of the KPMG report. Those requests were refused.

The Department also began to conduct 'International Treaties Obligations Assessments' (ITOAs), through standardised procedures prescribed in a publicly available document (Procedures Advice Manual), to assess the data breach's effect on Australia's non-refoulement obligations to SZSSJ and SZTZI under the *Convention relating to the Status of Refugees*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Covenant on Civil and Political Rights*.

Officers conducting ITOAs were instructed to assume that an affected visa applicant's personal information may have been accessed by authorities in the country in which he or she feared persecution or other relevant harm.

SZSSJ commenced proceedings in the Federal Circuit Court of Australia seeking relief in respect of the data breach before an ITOA had been completed. SZTZI commenced proceedings in that Court after an ITOA concluded that her claims did not engage Australia's non-refoulement obligations. Both of those proceedings were dismissed.

SZSSJ and SZTZI then sought judicial review in the Full Federal Court of Australia.

The Full Court allowed their appeals, holding, among other things, that they were denied procedural fairness by virtue of the Department's failures adequately to explain the ITOA processes and to provide the unabridged KPMG report.

By grants of special leave, the Minister appealed to the High Court, which unanimously allowed the appeals.

The High Court held that, while SZSSJ and SZTZI were owed a duty to be afforded procedural fairness in the ITOA process, they were not denied procedural fairness. SZSSJ and SZTZI were not deprived of any opportunity to submit evidence or to make submissions relevant to the subject-matter of the ITOA process as a result of not having such further information as might be inferred to have been contained in the unabridged version of the KPMG report. Exactly how and why the data breach occurred was not relevant to the question of whether one or more of Australia's non-refoulement obligations were engaged in respect of them. And, irrespective of what the unabridged KPMG report might have to say about the identities of the 104 IP addresses from which the document had been accessed during the 14-day period of the data breach, the fact would remain that, once the document was downloaded, the personal information of SZSSJ and SZTZI could have been accessed by anyone. Even if the unabridged KPMG report might have allowed SZSSJ and SZTZI to prove by reference to the report that one or more of those IP addresses were associated with persons or entities from whom they feared harm, that proof would advance their cases for engagement of Australia's non-refoulement obligations no further than the assumption already made in their favour.

The High Court held that SZSSJ and SZTZI were squarely put on notice of the nature and purpose of the ITOAs and of the issues to be considered. The instruction given to officers conducting ITOAs to assume that SZSSJ's and SZTZI's personal information may have been accessed by authorities in the countries in which they feared persecution or other relevant harm meant that not providing the unabridged KPMG report did not constitute a denial of procedural fairness.

Statutory information-gathering powers and tribunals

Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority [2016] FCA 814 (13 July 2016)

The Australian Institute of Professional Education (the Applicant), until December 2015, was a registered training organisation under the *National Vocational Education and Training Regulator Act 2011* (Cth) (the NVR Act). The Australian Skills Quality Authority (the Authority) is a public authority which has regulatory responsibilities in respect of the NVR Act and the *Education Services for Overseas Students Act 2000* (Cth) (the ESOS Act).

On 17 December 2015, pursuant to s 39 of the NVR Act, the Authority cancelled the Applicant's registration as a national vocational and training registered organisation on grounds that it had not complied with particular statutory standards. At the same time, the Authority rejected an application by the Applicant to change the scope of its registration under the NVR Act. Also on that day, the Authority cancelled the Applicant's registration under the ESOS Act as an approved provider of vocational education and training courses to overseas students.

On 23 December 2015, the Applicant sought merits review of the Authority's decision. The proceedings in the Administrative Appeals Tribunal (AAT) have yet to be concluded.

On 3 May 2016, the Authority issued a further notice under s 26 of the NVR Act requiring the Applicant to produce certain student information by 10 May 2016 and other information by 23 May 2016.

On 5 May 2016, by its solicitor, the Applicant put to the Authority that the notice was not validly issued and, further, that it would not be able to comply with the requirements of the notice within the times specified.

On 10 May 2016, the Applicant instituted judicial review proceedings under both the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the AD(JR) Act) and s 39B of the *Judiciary Act 1903* (Cth) seeking review of the Authority's decision to issue the s 26 notice on 3 May 2016. The Applicant contended, among other things, that the notice was invalid or, alternatively, that the decision to issue the notice was an improper exercise of the power conferred by s 26 of the NVR Act or was otherwise contrary to law, because the decision to issue the notice:

(1) constitutes a contempt of the AAT; or

(2) was for the substantial purpose of obtaining evidence for the AAT proceeding, and there is a real risk that obtaining the evidence in that way either gives the Authority advantages which the rules of procedure of the AAT otherwise deny it or otherwise usurps the function of the AAT to decide the matter according to law.

The Court held that, while a statutory information-gathering power was exhausted and could not be used in aid of judicial proceedings (*Brambles Holdings Ltd v Trade Practices Commission (No 2)* (1980) 44 FLR 182), this did not mean such powers could not be used during merits review. The merit review procedures of the AAT differ greatly from court proceedings. For example, there is no provision for the filing of pleadings or for discovery or inspection of documents, and the AAT is not bound by the rules of evidence. Provision is made for there to be 'parties' to the proceedings (s 30), but the parties are not adversaries in the strict sense. The decision of the AAT is not in the nature of a judgment for or against a particular party.

The Court found that it was apparent enough that the notice was issued for multiple purposes, one of which included using the information gathered for the purposes of the pending proceedings in the AAT. That was not in any way an improper purpose. To the contrary: it was a permissible purpose once the nature of administrative review is understood — that is, it was to assist the Tribunal.

The Court held that it is quite permissible for the Authority to obtain material pursuant to its powers under the NVR Act for the purpose of placing such material before the AAT. In so doing, the Authority is not in contempt of the AAT.

Oral reasons versus written reasons — can there be any difference?

Negri v Secretary, Department of Social Services [2016] FCA 879 (5 August 2016)

On 16 October 2012, the Applicant, Ms Negri, claimed a Disability Support Pension (DSP) under the *Social Security Act 1991* (Cth) (the SS Act) on the basis that she suffered from, among other things, fibromyalgia and depression. On 22 November 2012, a Centrelink officer rejected that claim. Ms Negri was unsuccessful on internal review. She applied to the Social Security Appeals Tribunal (SSAT) and was again unsuccessful. On 2 April 2014, Ms Negri sought merits review of the SSAT's decision in the Administrative Appeals Tribunal (the AAT).

The AAT heard the application on 26 February 2015. The AAT affirmed the SSAT's decision and gave *ex tempore* oral reasons. Ms Negri requested written reasons under s 43(2A) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act).

On 26 March 2015, Ms Negri filed a Notice of Appeal in the Federal Court of Australia. The AAT delivered its written reasons later that day.

Ms Negri contended, among other things, that the AAT's written reasons substantially departed from its oral reasons and that the Court was to have regard only to the latter. The respondent (the Secretary) contested both propositions.

The Court noted that, pursuant to s 43(1) of the AAT Act, the AAT's 'decision' must be one affirming, varying or setting aside the decision under review. The reasons for decision are not themselves the 'decision'. This distinction is familiar in that it is similar to the distinction between a judgment and reasons for judgment (compare *R v Ireland* (1970) 126 CLR 321 at 330 (Barwick CJ)). Here, the AAT's decision, made on 26 February 2015, was to affirm the decision under review under s 43(1)(a) of the AAT Act. Pursuant to s 43(2), the AAT was required to give reasons for that decision either orally or in writing. It gave them orally. Pursuant to s 43(2A), where (as in this case) the AAT had not given reasons in writing for its decision, a party was entitled to request 'a statement in writing of the reasons of the Tribunal for its decision' — that is, the decision to affirm, made on 26 February — and the AAT was obliged to provide 'such a statement'.

Based only on the words of s 43, the Court considered that the section does not prevent the AAT from giving reasons in writing that it did not give orally, as long as they are 'reasons for [the AAT's] decision'. The AAT is permitted to elaborate upon its oral reasons and to improve their expression.

The Court opined that the AAT's written reasons may be different from those given orally. Differences in the written and oral reasons are not necessarily demonstrative of different reasoning. As long as the reasoning remains consistent, there can be no objection to the provision of a more elaborate exposition of the same reasoning that was orally explained.

However, what is not permissible is altered or new reasoning. The AAT is not permitted to substantially divert from the reasoning upon which its decision was made but is permitted to explain that reasoning differently. Whether a statement of reasons passes from permissible elaboration to impermissible departure is a question of degree.

The Court found the AAT's written reasons were expressed very differently from those given orally. First, in the oral reasons the AAT referred to the dictionary definitions of 'frequent' and 'usual', and it opined that 'usual' meant 90 per cent of the time or more. The reasons continued to the effect that, as Ms Negri experienced symptoms less than 50 per cent of the time, she did not 'usually' experience them. Those reasons did not appear in the written reasons. Instead (and this is the second difference), the AAT referred to Job Capacity Assessment reports (JCA reports) and reasoned that they were more reliable because they were prepared contemporaneously. There is no express reference to the JCA reports in the oral reasons on this question.

The Court held that the correlation between what a tribunal says orally and what it later says in writing (albeit with elaboration) should generally be quite clear. Here, however, the correlation was not clear. On a first reading of the written reasons, one is left with the impression that the AAT viewed the written reasons as an opportunity to start again. And the absence of any express reference to the JCA reports in the oral reasons sits poorly with the decisive weight of those reports in the written reasons. The AAT in this case flirted dangerously with impermissible alteration to its reasoning. Certainly the kind of extensive rewriting in which it engaged is not to be encouraged.

However, ultimately, the Court took the view that the two sets of reasons can stand consistently together. Put in another way, the reasoning process disclosed by the written reasons does not substantially depart from that disclosed by the oral reasons, even though there are dissimilarities between the oral and written reasons.

As such, the Court approached Ms Negri's grounds of appeal on the basis that the AAT's written reasons are its reasons, except that it would look to the oral reasons for the purposes of clarification where required.

WHAT IS 'SUBSTANTIVE' JUDICIAL REVIEW? DOES IT INTRUDE ON MERITS REVIEW IN ADMINISTRATIVE DECISION-MAKING?

Justice Alan Robertson*

There is a distracting ambiguity in the use of the word 'substantive' to describe what a court on judicial review does or does not do, particularly in its consideration of the lawfulness of the administrative action.

The argument in this article is that it is accurate to describe as 'substantive', in the sense of 'qualitative', the court's consideration of the administrative action which is under review in a particular case, although it is important in that respect to try to understand what is and what is not 'the merits' from which the courts must stay away. This is, arguably, what Brennan J had in mind in *Attorney-General (NSW) v Quin*.[1] The article seeks to distinguish 'merits review' and judicial review.

As to remedies, I argue that it is, and should be, only in a rare case that in Australia a court grants 'substantive' relief. Here, 'substantive' relief is generally limited to where there is only one possible answer once the legal framework has been properly understood. By way of contrast, reference will be made to the concept of 'substantive legitimate expectations' in English public law. But at least one commentator[2] reviews developments in that jurisdiction over the last 20 years in terms which bear some similarity to the abandoning of pigeonholes necessary to apply the Australian concept of jurisdictional error.

In this article I confine myself to judicial review, but I have no new empirical data as to the extent to which judicial review does 'make a difference'.[3]

I can give you some bare statistics: in the Administrative and Constitutional Law and Human Rights National Practice Area (ACLHR NPA) of the Federal Court, there were approximately 295 matters filed in each of the last two financial years. In the last financial year, 107 of them were first-instance *Migration Act 1958* (Cth) matters and 184 of those were not Migration Act matters. Of the approximately 295 matters to which I have referred, 220 were classified as administrative law (the balance being human rights (32) and constitutional law (39) matters). In addition, in the last financial year there were 630 Migration Act appeals to the Federal Court from the Federal Circuit Court and 31 other appeals within the ACLHR NPA. The Migration Act appeals generally involve whether or not the judge of the Federal Circuit Court erred in finding that there was or was not jurisdictional error on the part of the Administrative Appeals Tribunal.

For an empirical view, there is a recent paper by Professor Sunkin and Varda Bondy[4] in which the authors refer to the work exploring whether judicial review does lead to the highest standards of public administration; whether it does encourage public bodies to adhere to the standards of legality, fairness and justice implicit in the principles of judicial review; and if so, whether such standards are conducive to good administration. The authors refer to the

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earlier work done by Professor Creyke and Professor McMillan in Australia.[5] Sunkin and Bondy discuss the limits on judicial review but also refer to a study they did investigating the effect and value of judicial review litigation and exploring what happened following judgments of the Administrative Court between July 2010 and February 2012 inclusive. They refer to 34 cases, in only four of which were they told that the public body had made the same decision on the substance as it had originally made. In the remaining 30 cases the public body made a fresh decision that differed from the original decision and favoured the claimant. What the authors were keen to examine was whether the reconsideration by the public authorities was a response that was 'wholly negative or ritualistic'.[6] You may recall that, in their work, Professor Creyke and Professor McMillan found that over half of the remitted matters were determined in the applicant's favour. I suspect that the percentages would be very different depending on the area of public administration in question.

There is a gulf, as you know, between the substance, as seen by an applicant for judicial review; the story, as seen by journalists; and what the courts actually do on judicial review.

An example is *Yasmin v Attorney-General of Commonwealth of Australia*[7] (*Yasmin*), which was ultimately about the age of a crew member on an asylum seeker vessel in 2009 and whether the crew member was a child who was then imprisoned in Australia. But for the Court the question was whether or not the Commonwealth Attorney-General had a duty to consider an application — that application being to the Attorney-General to refer a case to the Court of Criminal Appeal of Western Australia — so that that Court could consider a petition of mercy. This was reported in the press as the Full Court finding that the Attorney-General was obliged to help to correct a miscarriage of justice. As it happened, although not required by the Court's order, it was reported in the press that the Attorney-General accepted what the Full Court had found — that it was his duty to consider the application — in the sense that he did not apply for special leave to appeal; considered the application; did so positively; and referred the case to the Court of Criminal Appeal.

Lawyers need always to look at the orders of the court. On judicial review, in all but a small number of cases, as in *Yasmin*, the matter is remitted to the decision-maker; the decision-maker now knows what the law is. The phrase 'to be determined according to law' means 'consistently with the reasons of the court'.

In relation to *Haneef v Minister for Immigration and Citizenship*,[8] I draw attention to the orders made by the primary judge, Spender J, quashing the Minister's decision to cancel the applicant's visa.

The Full Court dismissed the appeal.[9] The result was that the matter was remitted to the Minister in accordance with the orders made by the trial judge. The Full Court noted a submission, which is relevant to remedies, put by the Solicitor-General that the primary judge should have concluded that it would be futile to remit the matter because it would be virtually certain that Dr Haneef's visa would be cancelled in any event. The Full Court said:

> having found that the Minister applied the wrong test, and that this was very much to Dr Haneef's disadvantage, it is difficult to see how, or why, relief should have been refused in the exercise of discretion. It is certainly far from clear that it would have been futile to remit the matter for reconsideration. Apart from anything else, when the Minister next considers whether to revoke Dr Haneef's visa the circumstances will have changed. For example, he will be aware of the fact that the charge against Dr Haneef has been withdrawn. The Minister may regard that fact as highly significant.[10]

So sometimes, but not in that case, there is only one possible answer and the court makes a substantive order. That principle can work either in favour of or against the applicant for judicial review: in favour of the applicant if the court finds there is only one answer, makes a

declaration and does not remit the matter to the primary decision-maker; against the applicant if the court finds there was a legal error but that it would be futile to remit the matter.

A well-known case involved a group of American entertainers known as The Platters. In *Conyngham v Minister for Immigration and Ethnic Affairs*,[11] the primary judge set aside the decision and made the following additional orders:

> (1) That the court declares that the application lodged by the first applicant in respect of the entry into Australia of the third to eleventh applicants inclusive was within the policy guidelines issued by the respondent for the approval of sponsorship relating to grant of temporary entry permits.
>
> (2) …
>
> *(3) That the respondent issue or cause to be issued within twenty-four (24) hours to the first applicant an approval of the application made by him on 29 May 1986 in respect of the sponsorship by the second applicant of the visit to Australia of the third to eleventh applicants inclusive, being an approval for the purposes of the subsequent issue of temporary entry permits under s 6 of the Migration Act, such approval being upon such terms and conditions as will permit the said third to eleventh applicants to fulfil the engagements itemised in the itinerary which is part of Exhibit C herein.*[12]

The Full Court, in *Minister for Immigration & Ethnic Affairs v Conyngham*,[13] allowed the appeal, set aside the declaration and the mandatory order and substituted an order that the Minister consider the applications for temporary entry permits in accordance with law.

Sheppard J, for the Full Court, said that there was no ground for elevating the guidelines here (now referred to as 'soft law') to the status of law. That was why the primary judge fell into error in making a declaration that the application for sponsorship was within the policy guidelines issued by the respondent for the grant of temporary entry permits. Sheppard J said:

> Wide though the provisions of s 16 of the [Administrative Decisions (Judicial Review)] Act are, they do not in my opinion authorise the making of a declaration unless what is being declared is a right in the true sense of the word. The guidelines themselves conferred no rights. They operated only to indicate … the manner in which the application for a temporary entry permit would usually be dealt with.
>
> …
>
> … where the court comes to the question of what remedy it will grant an applicant who has made out a case for relief, it should concentrate its attention on what statutory provisions are applicable to the case. *If the decision-maker, although his discretion has miscarried, is left with a residual discretion under the statute to decide the ultimate question favourably or unfavourably to the successful applicant, the order which the court makes should, notwithstanding the width of s 16 of the Act, usually, if not invariably, be one which remits the matter for further consideration according to law.* Where, as here, what has transpired has amounted to a constructive failure to deal with the real application which has been made, it will sometimes be appropriate (for example, in cases of substantial urgency from the point of view of the aggrieved party) to require the decision-maker to make a decision forthwith or within a limited time.[14]

A subtler version, albeit unsuccessful, on the part of the decision-maker of an 'only one answer' proposition may be seen in the High Court's decision in *Samad v District Court of New South Wales*[15] — a case concerning whether or not the District Court of New South Wales had a discretion, in certain circumstances, to cancel or not cancel a methadone licence. One question was whether discretionary relief should be refused on the basis that the decision was not based upon the error identified — that error being construing 'may' as if it conferred no discretion. The argument with which I am presently concerned was that relief should be refused, as a matter of discretion, because the decision of Herron DCJ was virtually inevitable.

Chief Justice Gleeson and McHugh J said that they were not persuaded that there was only one possible outcome. The appellants were, and remained, entitled to have their case determined according to law. Justices Gaudron, Gummow and Callinan described the argument and their conclusions on it as follows:

> This was that, whilst cl 149(f) did confer a discretion upon the Director-General, in the circumstances the Director-General had been obliged to exercise the discretion in favour of cancellation because there was no permissible reason indicating why the Director-General should decide otherwise. This was said to be a case where 'the discretion [had] effectively run out' and, indeed, because the grounds for not deciding upon cancellation would be impermissible, mandamus would have been available to compel cancellation. Undoubtedly particular legislation and circumstances arising thereunder may call for such a remedy. [Referring to *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 187-8; *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 536–7; *Comptroller-General of Customs v ACI PET Operations Pty Ltd* (1994) 49 FCR 56 at 81–2.] However, the present case is not one of them. The existence of the state of affairs identified in para (f) of cl 149 *enlivens the discretion but does not dictate the outcome of its exercise*.[16]

What I have described so far are the ordinary parameters of judicial review. You will have discerned a strong theme in what I have described as the courts, at the point of remedy, staying away from the merits of the administrative action.

I note that, in terms of whether administrative law makes a difference, it may well be that, from the perspective of the individual affected, the greatest reform of the mid to late 1970s in Australia was the concept of a general administrative tribunal — what became the Administrative Appeals Tribunal, with its still expanding 'jurisdiction' to review decisions on their merits. Also, there is the important role of the Ombudsman, which for litigators and the courts tends to be below the radar. It is from the point of view of principle, the structure of government and its administration, the legality of actions and other exercises of power that judicial review is more significant.

But what I want to dwell on — and these are not matters free from controversy — is what the courts do on judicial review of administrative action. I wish to tease out what is a distracting ambiguity in the use of the word 'substantive' to describe what a court on judicial review does in its consideration of the administrative action.

I wrote on this topic in a 2014 paper.[17] My argument then was, and is now, that in judicial review there is in practice no clear division between process and substance: the courts must and do make qualitative judgments in relation to the particular exercise of administrative power. This may be expected to increase owing to the 'increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.[18] Properly understood, the qualitative judgments made in relation to process are no different from those made on so-called substantive review. I therefore question the usefulness of an analysis by reference to process or substance. The common question on judicial review does not depend on that divide but on whether something has gone wrong, in a legal sense, that is of such gravity that the decision-maker has not performed the (usually statutory) task given to them. Further, even where courts make qualitative judgments on judicial review, that is to be distinguished from merits review.

It may be accepted that (for Australia) judicial review is not so much about the outcome of the exercise of administrative power but the process by which that outcome was achieved. It is said that the grounds almost invariably go to the process of exercising the power, not the outcome. The commonly stated exception is *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[19] (*Wednesbury*)).

The classic exposition in Australia is by Brennan J in *Attorney-General (NSW) v Quin*,[20] who said:

> The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government … The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error…
>
> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. …
>
> There is one limitation, 'Wednesbury unreasonableness' …[21]

In *Minister for Immigration and Border Protection v SZSSJ*[22] the seven members of the High Court unanimously applied this dictum in a procedural fairness context and described it as axiomatic.[23] This was not to say, their Honours said, that the court must proceed in a normative vacuum; it was to say that the court can proceed only for the purpose of declaring and enforcing the law which determines the limits and governs the exercise of the repository's power. Their Honours added that the circumstances of a data breach did not provide a principled foundation for converting the ordinary requirement of procedural fairness that an affected person be given notice into a duty that the Department reveal 'all that it knows' about the data breach.[24]

My contention is that, at least in cases of any complexity, judicial review does involve a qualitative assessment and is qualitative. What has been done by the person who has exercised the administrative power must, on judicial review, be considered and evaluated; and that evaluation involves a qualitative assessment of what was done. Indeed, it has been said that the development by the courts of techniques for reviewing the quality of decision-making has been a fundamental doctrinal shift central to the development of administrative law during the 20th century and occurring primarily after the Second World War.[25] But this judicial review is not for the purpose of the judge considering whether or not he or she agrees with the decision and whether it is correct in that sense. Merits review and judicial review overlap, but each type of review is conducted for a different purpose.

One also sees this in assessing what a tribunal has said. In *SZTAP v Minister for Immigration and Border Protection*[26] the Full Court said:

> '… the reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.' As Brennan CJ, Toohey, McHugh and Gummow JJ said in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (*Wu Shan Liang*), these propositions from *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review … Of course, it does not follow that any ambiguity in approach or reasoning has to be resolved in the decision-maker's favour: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 at [190]. *It was recognised in Wu Shan Liang itself, at CLR 271 that: 'The words used by the delegate must be analysed to establish what they say as to the thought process in fact applied by the delegate to the determination of refugee status.' In our opinion, the Court must give the Tribunal's reasons a fair reading, in context, and attention must be given to the substance of the Tribunal's reasons for decision.*[27]

A major difference between judicial review and merits review, in my opinion, is that the legislature has not vested in the court the power directly to decide the ultimate outcome so that the court is not concerned with what ultimately is the correct or preferable decision. Likewise, the court is not concerned with good administration of or in itself. However, I contend that the conceptual division between process and substance may tend to disguise

what goes on in judicial review. Conversely, I question whether what happens in judicial review when *Wednesbury* unreasonableness is deployed is accurately described as substantive review.

The difference, I suggest, is essentially the purpose for which, and thus the perspective from which, the primary exercise of power is being examined rather than process or substance, except when it comes to remedy. It would be quite incorrect, in my experience, to characterise what a judge does on judicial review as involving the question: 'Do I think this is the correct or preferable decision?' As illustrated by *FTZK v Minister for Immigration and Border Protection*[28] (*FTZK*), in the circumstances of that case, the claim that the Tribunal had committed a jurisdictional error warranting the issue of constitutional writs did not involve an examination of the correctness of the findings of fact made by the Tribunal but did involve a consideration of whether those findings disclosed that the Tribunal responded to the question it was required to ask in order to perform its task.

In addition, although in judicial review the facts are not at large, being in most cases limited to the material before the person exercising the primary power, they must be understood in order to understand in turn what the exercise of the power has been without divorcing the substance of what was decided from how (the process by which) it was decided. In *Reid v Secretary of State for Scotland*[29] Lord Clyde said:

> But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.[30]

I next examine the concept of 'merits'. What are the merits from which the judicial arm must stay away? This is a distinction which is blurred at the edges. Indeed, in *Greyhound Racing Authority (NSW) v Bragg*[31] Santow JA said that 'the merits' is that diminishing field left after permissible judicial review. In comparing judicial and merits review, Sir Anthony Mason has written:

> The comparison is hampered by the blancmange-like quality of the expression 'merits review'. For the most part, it is used in the sense of review that includes, but goes beyond, what is comprehended in review for legality. The distinction between judicial review and merits review assumes that the content of review for legality is not co-extensive with the scope of potential review; in other words, the grounds of judicial review for legality do not include review on the basis that the decision-maker, though making no error of law, arrived at a decision which, though not unreasonable, falls short of the correct or preferable outcome.
>
> …
>
> The difference between judicial review and appeal is well recognised. In an appeal, the tribunal can substitute its opinion of what is a correct (or preferable) outcome on the material before it for that of the decision-maker; in judicial review, the court cannot do that. The difference is a central element of recent High Court judgments, and of English judgments of high authority as well.[32]

The search for a clear line of demarcation is perhaps explained, in part, as follows. First, there is the statutory history in Australia, particularly the enactment of the *Administrative Appeals Tribunal Act 1975* (Cth), establishing what is called a 'merits review system' in a tribunal. Secondly, by its early decisions the Tribunal explained its powers and functions. I refer particularly to *Drake v Minister for Immigration and Ethnic Affairs*,[33] establishing that the question for the determination of the Tribunal was not whether the decision which the decision-maker made was the correct or preferable one on the material before him; the question for the determination of the Tribunal was whether that decision was the correct or preferable one on the material before the Tribunal. Thirdly, there was the later enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act), dealing with judicial review, not limited to jurisdictional error, primarily in the Federal Court. Fourthly,

there is the background of the separation of executive power and judicial power required by the *Constitution*.

Rather than seeking to identify the merits as opposed to the lawfulness of the exercise of power in question, perhaps the better enquiry is to emphasise the distinguishable and distinct processes: merits review on the one hand and judicial review on the other.

In merits review the facts need to be found and evaluated, and this involves choice. Where the matter turns on evaluation of, and choice between, competing views of the facts by the person exercising administrative power, there is likely to be 'mere' fact-finding in respect of which no legal error could be successfully maintained on judicial review.[34] In contrast, in judicial review it is necessary to understand the facts and, often, the fact-finding process of the person who has exercised the power in order to understand and judge the claims of legal error.

Next, in merits review the making of the correct or preferable decision is a defining characteristic. Where there is a legally available alternative then to select one over the other, whether or not accurately described as 'policy', is plainly a matter of merits, but in my view the same analysis applies where, upon an evaluation of the facts, only one decision, described after the conclusion has been reached as the correct decision, is available. In each case what happens is accurately described as choice.[35]

Thus, choices are at the heart of merits review and, on judicial review, the court must understand the choices but must do no more than decide whether the choice that was made was legally available.

There is also a clear distinction between the 'place' of executive decision-making and judicial review. The merits may be seen as the outcome of executive decision-making, what is described as the 'correct or preferable' decision on the material before the primary decision-maker, and most often that will be the final decision. On the other hand, judicial review is review of the legality of the process and of the exercise of administrative power.

As I have said, this is reflected in the usual form of order on successful judicial review, at least in Australia, which is to set aside the decision or exercise of power and to remit the matter to the person in whom the primary power is vested for further consideration or determination 'according to law', which includes the court's reasons. Generally, it is where only one answer would be available on remitter, or where the parties consent, that the court will dispose of the matter finally. In matters of procedural fairness, most often there will be 'more than one answer', as the court will have looked only at procedure. The position may well be different if, for example, a fixed time limit for making the original decision has expired.

Chief Justice French, writing extrajudicially, has said that '[a] better distinction might be drawn by using the terms "factual merits review" and "legal merits review"'.[36] The former is a power to reconsider decisions; the latter is to police the limits of the power to decide.[37]

I prefer the description 'consideration of the merits but not a decision on the merits', and I resist the proposition that the distinction between merits review and judicial review reduces to the fact that on judicial review the court does not substitute its decision.

To illustrate this, I turn to consider categories of judicial review. I have not accepted, for present purposes, a division between review grounds that deal with process, including errors of law, and other grounds, such as *Wednesbury* unreasonableness, which are said to turn on the quality of the decision.[38] My proposition is that both process review and substantive

review are qualitative but not, in either case, in the sense of the court undertaking merits review.

Procedural fairness

Procedural fairness, particularly an opportunity to be heard, is conventionally allocated to 'process'. But judicial review on this ground will often be a qualitative exercise. Procedural fairness may extend to the quality of the hearing, such as where there have been frequent interjections by a tribunal member in relation to the credibility of the claims[39] or, where there was an interpreter, the quality of interpretation before a tribunal.[40] The High Court has held that a decision of the Refugee Review Tribunal was procedurally unfair where the Tribunal made demeanour-based findings against the appellants in circumstances where four and a half years had elapsed between the observation of the demeanour and the making of the findings.[41]

Those are perhaps obvious cases where a qualitative assessment is involved in deciding whether or not there has been a denial of procedural fairness.

More commonly, the issue is the content of natural justice in the circumstances of the particular case. The court works out what the applicant knew to be in issue and what the steps or stages of the exercise of the power were in order to answer whether what happened was unfair, in a practical sense,[42] as a matter of process. And, in so doing, it is inevitable that the court assesses the quality of the exercise of the power and, although focused on process, it does so in light of what was done or decided: the substance.

Another basis on which the courts are involved in qualitative assessment in this context arises because the applicant for judicial review is not limited, in terms of evidence in the court, to material which was before the primary decision-maker. For example, the Supreme Court said in *R (Osborn) v Parole Board*[43] that the courts below were wrong to adopt the approach that the reviewing court should decide the question of the Parole Board's fairness as if it were reviewing a matter of judgment on *Wednesbury* grounds. The court must determine for itself whether a fair procedure was followed: its function was not merely to review the reasonableness of the decision-maker's judgment of what fairness required.[44]

Turning to the bias limb of natural justice, in Australia a claim of reasonable apprehension of bias depends on a qualitative assessment of what was said and done against the legal test 'whether a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial and unprejudiced mind to the resolution of the question the [decision-maker] is required to decide'. The same assessment would have to be made in applying the English test:

> [t]he court *must first ascertain all the circumstances which have a bearing on the suggestion* that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.[45]

While therefore it is true that on judicial review for an alleged denial of natural justice or procedural fairness the courts are reviewing the process by which a power has been exercised, the judicial review itself is qualitative. Perhaps this is implicit in what Lord Mustill said: '[w]hat fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.'[46]

Relevant and irrelevant considerations

I now consider two other grounds of judicial review, which are often a more or less well-disguised appeal to the merits. They are, first, whether a mandatory (relevant) consideration *was not* taken into account and, secondly, whether a prohibited (irrelevant) consideration *was* taken into account by the person who has exercised the primary power.

It is at least primarily to the provisions of the legislation that one must look in order to decide whether a particular consideration is obligatory (relevant in the sense of mandatory), extraneous (irrelevant in the sense of prohibited) or a consideration which is of neither of those characters and which is therefore 'available'.[47] Considerations that are neither legally mandatory (relevant) nor legally prohibited (irrelevant) but are simply 'available' would constitute the bulk of most primary exercises of administrative power.

However, I wish to concentrate on the qualitative nature of the assessment by the court of the material which was before the person exercising the power, and his or her reasons, in order to decide whether or not an improper purpose (as that term is used in the AD(JR) Act) is disclosed.

Whatever language is used to describe taking into account or having regard to or considering a relevant consideration — and many descriptions have been offered in the cases — the fundamental point is that the court needs to assess the quality rather than the mere fact of the consideration in order to work out whether it has or has not been taken into account. In addition, the statute may be construed as involving a consideration of a particular factor to a particular standard.

Again, whether and whatever descriptions are used, what must be avoided is merits review and what has to be borne in mind is the distinction, albeit elusive, between understanding the terms in which the power has been exercised and evaluating it for the purpose of seeing whether a matter has been taken into account, on the one hand, and, on the other hand, evaluating the decision in the sense of second-guessing *relative* weight.[48] But I see no alternative to assessing the nature of the consideration.

As to descriptions that have been used by the courts of the quality of the assessment required by the decision-maker, in Australia these include: 'active intellectual process or engagement', 'give weight to as a fundamental element in making the determination', 'a process of evaluation, sufficient to warrant the description of the matters being taken into consideration',[49] 'focal points' and 'proper, genuine and realistic consideration' — the last being taken out of its original context in *Khan v Minister for Immigration and Ethnic Affairs*.[50] 'But whether or not it can be judged that a matter has been considered is essentially an evaluative process based exclusively on what the decision-maker has said or written'.[51] In other words, it is for the court to assess qualitatively what, in the particular statutory context, constitutes 'due regard' by the decision-maker exercising the power conferred.

Turning to whether the person exercising the power has taken into account an irrelevant (prohibited) consideration, in my view the same analysis applies. It may well be necessary to analyse the reasons for, and the terms of, the exercise of the power and the material before the person exercising the power in order to reach a conclusion on whether the prohibited consideration has been taken into account.

Unreasonableness

Next I consider the legally unreasonable exercise of a discretion: classic *Wednesbury*. It has been said that *Wednesbury* involves substantive intervention in that:

> [a]ll tests of substantive judicial review entail the judiciary in taking some view of the merits of the contested action. This is so even in relation to the classic *Wednesbury* test. What distinguishes different tests for review is not whether they consider the merits or not, but the stringency of the judicial scrutiny.[52]

I offer a different emphasis to the conclusion that this ground involves substantive intervention.

First, in my opinion, judicial review of the exercise of a discretion for legal unreasonableness does not involve the court in the merits of the primary decision. Of course, the court must understand the substance of what has been decided, but it is the legal context which must dominate. Secondly, I do not see the *Wednesbury* ground as involving a view of the merits of the decision different in kind from the grounds of judicial review to which I have already referred. In my opinion, there is a real difference, as a matter of mental process, between taking a view of the merits in the sense of understanding the facts and, on the other hand, taking a view of the merits in terms of what the judge thinks is the correct or preferable outcome. It is for this reason I questioned above whether *Wednesbury* unreasonableness is accurately described as substantive review. I accept that the court considers the outcome by reference to the standard of legal unreasonableness and, where satisfied that the outcome is not legally reasonable, remits the matter for further consideration. Thirdly, it seems to me that manifest unreasonableness or classic *Wednesbury* unreasonableness is a shorthand way of further describing the area of difference beyond which (reasonable) minds may not reasonably differ, as a matter of legal reasonableness. The questions are: what is the scope of the discretionary power; and is what has been done by the executive within that scope?

Furthermore, the plurality in *Minister for Immigration and Citizenship v Li*[53] (*Li*) said that *Wednesbury* is no longer to be the yardstick of the legal standard of unreasonableness in relation to the exercise of discretion. I take this to mean that what is no longer to have exclusive sway is the test 'so unreasonable that no reasonable person could have arrived at it', because the legal standard of reasonableness must be the standard indicated by the true construction of the statute unless there be an affirmative (statutory) basis for its exclusion or modification. This, in my view, must have been at least implicit in *Wednesbury* itself since the Court of Appeal there referred to the subject-matter or scope of the statute and the otherwise unqualified terms of the power to impose conditions.

In *Minister for Immigration and Border Protection v Singh*,[54] the Court said that *Li* did not create some kind of factual checklist to be followed in determining whether there had been a legally unreasonable exercise of a discretionary power: legal unreasonableness is invariably fact dependent, so that, in any given case, determining whether an exercise of power crosses the line into legal unreasonableness will require careful evaluation of the evidence before the court, including any inferences which may be drawn from that evidence.

In similar vein, I refer to *Minister for Immigration and Border Protection v Stretton*[55] — a case involving judicial review of the Minister's decision to cancel the respondent's visa on character grounds and where the primary judge had characterised the Minister's decision as legally unreasonable. I draw your attention to what Allsop CJ said at [10]–[12], particularly the following:

> The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, insufficiently lacking

> rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.
>
> Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, *the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful.* The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.[56]

It will be recalled that, in *Wednesbury*, Lord Greene did not consider that he was creating new doctrine and, indeed, treated other 'grounds' of judicial review, such as taking into account irrelevant considerations, as one example of an unreasonable decision. Lord Greene certainly did not envisage encouraging merits review and, indeed, the very thrust of the decision is that the courts should not engage in merits review. It is to be remembered that the underlying issue in *Wednesbury* was who was to be master: whether it could be said the discretion miscarried because the exercise of the discretion appeared unreasonable to the court or, as was held, whether the alleged miscarriage of the discretion should be tested from the perspective of the authority and from the perspective of a hypothetical reasonable authority (the standard being set by the judges) and the discretion could only be said to have miscarried if 'no reasonable authority' could have so exercised the power.

Irrational fact-finding

I turn to fact-finding. There are real differences between England and Australia as to the availability on judicial review of challenges, as such, to findings of fact, or fact-finding.

In contrast to the position in England, where it seems that judicial review may be had for fundamental error of fact[57] and that *Wednesbury* unreasonableness is also applied to fact-finding, in Australia there is a no evidence ground, with the emphasis on the word 'no', but irrational or unreasonable fact-finding is not, as such — at least, yet — a well-established ground of judicial review. I have not seen applied in Australia the approach of the Court of Appeal in *E v Secretary of State for the Home Department*[58] (*E*), apparently now applied in *IA (Iran) v Secretary of State for the Home Department*.[59] For present purposes, it would seem that each of the paradigms in *E* involves a degree of evaluative judgment by the court. It also seems that, as in Australia (*Ex parte Hebburn Ltd; Re Kearsley Shire Council*[60] (*Hebburn*)), there are mistakes and mistakes, although in *Hebburn* Jordan CJ was dealing with a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction.

In Australia, the better view is that *Wednesbury* unreasonableness should be limited to its origins — that is, as a ground of review of the exercise of a discretion. But a similar principle may be emerging on which fact-finding may be judicially reviewed for serious irrationality. It is to be noted, however, that in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[61] Gummow and Hayne JJ were making the point that, although the satisfaction of the criterion in question may include consideration of factual matters, 'the critical question is whether the *determination* was irrational, illogical and not based on findings or inferences of fact supported by logical grounds'.[62] This may mean that to look only at one instance, or more than one instance, of erroneous fact-finding may not of itself give rise to the conclusion that there has been a jurisdictional error. A wider enquiry is required and one which is founded in the statutory task vested in the person exercising the power.

It seems to be relatively uncontroversial that the absence of a reasonable or rational basis for a finding may found an inference that the decision-maker made a jurisdictional error on other grounds.[63]

Aronson and Groves say that '[t]here is a significant difference between supervising discretionary choices on the one hand (unreasonableness), and the care with which decision-makers have approached their tasks (irrationality)'.[64] However, in my opinion, this statement should not be taken as exhaustive of the available categories of judicial review in relation to fact-finding. In *Minister for Immigration and Citizenship v SZRKT*,[65] I said that what may be considered to be fact-finding is not universally immune from judicial review because it may be that, where there is an error, and having assessed the gravity of the error, what has gone wrong is of such significance to the statutory task, and that the person exercising the power has so departed from the task, that he or she has not carried it out or completed it. There may be some correspondence, even if it is non-conceptual, between that and 'the close link between judicial scrutiny of evidence [evidentiary review] and the general issue as to the reviewability of fact in judicial review proceedings' to which Paul Craig has referred.[66]

The point, for present purposes, is that any ground of serious irrationality in fact-finding must involve a close and qualitative evaluation of the fact-finding of the person exercising the primary power. As with all alleged unreasonableness, on judicial review it is necessary to identify precisely the 'nature and quality' of the error attributed to the administrative decision-maker and the legal principle that attracts a particular legal consequence.[67]

Although *Waterford v Commonwealth*[68] states that there is no error of law simply in making a wrong finding of fact, the emphasis should be on 'simply' and the question can be framed: 'was the factual conclusion so badly formed as to reveal error to be characterised as legal error going to jurisdiction?'

Where a ground of judicial review involves error of fact, the court must understand the facts and test, for example, whether there was any evidence for a finding or whether the finding has otherwise departed from the norm and, if so, to what extent.

Other grounds of judicial review

What about other commonly formulated grounds of judicial review?

A question of statutory construction would not commonly (except perhaps in Canada or the United States) involve qualitative review of the primary exercise of the power.

However, *FTZK* shows that error of law may also involve a detailed consideration and evaluation of the findings of fact made by the Tribunal in the particular context of the structure of the reasoning. Having done so, the High Court held unanimously that the Tribunal misconstrued art 1F of the *Convention Relating to the Status of Refugees* 1951.[69]

Returning to the traditional categories or 'grounds': in my view, non-observance of procedures that were required by law to be observed in connection with the making of the decision would be approached in the same way as denial of natural justice or procedural fairness. An exercise of a power in such a way that the result of the exercise of the power is uncertain — a species of ultra vires — would also, I think, be approached in the same way as error of law.

Other grounds — that the decision was induced or affected by fraud, or an exercise of a power for a purpose other than a purpose for which the power is conferred, or an exercise of

a discretionary power in bad faith, or an exercise of a personal discretionary power at the direction or behest of another person, or an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case — would each, I think, require a qualitative evaluation. I have already referred to the ground of no evidence or other material to justify the making of the decision.

The courts must leave the merits to the person exercising the primary power, and it seems reasonably clear that the courts will stay away from a choice or policy at least where the statutory power has been exercised reasonably, not limiting the legal standard of unreasonableness to the irrational. A state of satisfaction by the person who has exercised the primary power must be reasonable in that it could be reached by a person understanding the statutory function being performed.

To summarise, judicial review is largely qualitative in the areas I have primarily identified: natural justice, whether mandatory considerations have been taken into account or prohibited considerations have not been taken into account, and unreasonableness/irrationality. Qualitative judicial review may be involved in an error of law case. I have sought to explain that judicial review of impugned fact-finding is also qualitative. I agree that 'the quality of the [administrative] decision made, both substantive and procedural, is the province of judicial review, whether or not the decision was "correct and preferable"'.[70]

None of this is to say that judicial review tends to merits review as opposed to legality or that it tends to policy rather than law. Understanding the quality of the exercise of the power is not merits review: the court does not or should not ask itself whether or not it agrees with the exercise or brings to the task the question of whether the exercise is right or wrong, albeit the court needs to understand the substance of what has been decided by the person who has exercised the power in order to rule on the lawfulness of what has occurred. This is not the same as judicial review being an appeal by way of a rehearing, and it is not the same as the court substituting its opinion for that of the administrator. Also, the court, even in *Wednesbury* review, does not rule on the correctness of the decision. As the plurality said in *Li*:

> Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker.[71]

It is possible to examine the substance without entering into the merits, and the courts should so act. Where judicial review is qualitative, it is not concerned with what the repository of the power should have done where there were legally available choices; instead, the concern is with what the repository of the power should not have done.

I accept that federal judicial review involves a relatively limited conception of judicial power reflected in the limits of judicial review.[72] However, I contend that the assessment of a legal error or the gravity of a legal error will often involve qualitative review.

I now come to consider the concept of substantive legitimate expectation. I draw attention to a recent paper by Mark Elliott.[73] Professor Elliott describes substantive legitimate expectations in England as the courts acknowledging that a public authority might be required to deliver to the claimant whatever it was that was legitimately expected as distinct from merely requiring the defendant to undertake some other procedural step before deciding whether to fulfil or frustrate the expectation.

I will not go into the detail because I think it is clear that, at least for the present — no doubt contributed to by the surprising reasoning in *R v North and East Devon Health Authority; Ex parte Coughlan*[74] — that door is closed in Australia.[75]

For England, in *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs*[76] Cranston J has said that the threads of the English doctrine of substantive legitimate expectation could be drawn together in 10 propositions, which he there set out.

What is interesting about Professor Elliott's description of the doctrine in England over the last 20 years is what he calls 'convergence'. The passage is too long to set out in full, but it includes the following:

> Convergence, in contrast, involves not the forcing of the whole of substantive review (or judicial review) into pigeon-holes that can at best accommodate only parts of it, but rather liberating substantive review by means of the removal of the pigeon-holes themselves. On this approach, rigid distinctions are dismantled and replaced with more subtle tools for the purpose of calibrating the nature and intensity of substantive review. … The notion that a particular type of case — such as one entailing frustration of a substantive legitimate expectation — should, *simply because the case is that type of case*, attract a particular form of review, such as *Wednesbury* or proportionality, thus ceases to be meaningful.
>
> On this approach, substantive judicial review converges not upon a single concept (such as proportionality) or lens (such as rights). Rather, it converges in the sense that an holistic understanding is adopted of what substantive review is, and in the sense that its operation is animated by a single, cohesive set of principles and considerations. …
>
> Yet this does not mean that anything goes. It does not, for instance, lead me to the conclusion that *Coughlan* involved no judicial overreach. But it does change the terms of the analysis.[77]

A point for discussion is whether, by a side-wind, being the restriction on resort to the AD(JR) Act achieved by successive governments in the Migration Act field, what Professor Elliott describes, particularly the removal of the pigeonholes and the dismantling of rigid distinctions, is what has happened by the Parliament requiring lawyers to think about jurisdictional error rather than enumerated 'grounds'.

The key point under our constitutional arrangements is that, if there is a statute, it provides both the framework for discerning the jurisdiction, whether or not there has been a jurisdictional error, and the scope of any remedy. It is the statute that has primacy: so much is clear in the context of jurisdictional error and so much should be clear in the context of the AD(JR) Act.

What I have said involves some concepts that are not always going to be easy to apply. The existence of merits review in another independent forum is fundamental to understanding what goes on in federal administrative law. It is also at the heart of whether administrative law makes a difference in the sense of improving public administration and providing administrative justice. It is that structure, and the quality of the work of the Administrative Appeals Tribunal, which frees the court from the need or tendency to embark on merits review in the course of judicial review. The court on judicial review is thus free to stay away from the quality of the outcome. Each arm plays its part in 'administrative justice' — itself not an expression with an absolute meaning.

It may be observed that the constitutional 'necessity' of having a different body to review the merits of administrative decisions is seen as flowing, in turn, from the separation of powers found in the *Constitution* in terms stricter than prevail elsewhere or, indeed, in terms which do not prevail at all elsewhere, such as in England.

Despite this, in relation to judicial review of administrative action I would contend that there is, on judicial review, substantive (qualitative) review of that administrative action, but there are not substantive remedies unless there is only one possible outcome. This in itself maintains the distinction between merits review and judicial review, which in turn reflects that the Parliament has given the powers and the discretions to the Minister or another member of the executive and not to the court. The court's jurisdiction is supervisory. But it operates to decide on the limits of power and whether those limits have been exceeded in a particular case.

Endnotes

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10 Ibid [139].
11 (1986) 68 ALR 423.
12 Ibid [53] (emphasis added).
13 [1986] FCA 289; 11 FCR 528.
14 Ibid [43], [45] (emphasis added).
15 [2002] HCA 24; 209 CLR 140.
16 Ibid [77] (footnote omitted; emphasis added).
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18 *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1, 36 (Brennan J).
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34 *Waterford v Commonwealth* [1987] HCA 25; 163 CLR 54, 77 (Brennan J).
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45 *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 [102]–[103] (Lord Hope) (emphasis added).
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49 *Weal v Bathurst City Council* [2000] NSWCA 88; 111 LGERA 181, [13], [80].
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PERSPECTIVES ON ECONOMY AND EFFICIENCY IN TRIBUNAL DECISION-MAKING

Bernard McCabe*

Tribunals can be more efficient than courts in the sense that it is possible to obtain more output from a given level of inputs in a tribunal. That outcome can be achieved without compromising on quality. No wonder governments like the tribunal alternative, and no wonder governments in most jurisdictions have embraced the promise of super-tribunals. But getting greater *value* from tribunals — as opposed to merely achieving cost savings — is a tricky business.

Innovation and reform is essential for tribunals. The need for economy is a fact of life. Developments in information technology that assist information management hold great promise. Professional managers also make a contribution. Yet not every innovation is to be welcomed, and not everything done in the name of economy actually promotes efficiency or even saves cost. Innovations justified with reference to economy in particular need to be scrutinised very carefully to ensure they do not lead to false economies in tribunal operations or compromise, at great cost to the community, the quality of what tribunals do.

Governments set policy, appoint members and allocate money, but individual tribunals enjoy a measure of independence in the discharge of their mission. Operational responsibility falls to tribunal leaders, assisted by professional managers. Many tribunal members have been missing in action in the debates over how these organisations are to be run. That is a pity. Tribunal members should have a deep understanding of the review and dispute resolution process, but that is not the limit of their knowledge. It is time for them to re-engage with what is happening. That is not to say members need to roll up their sleeves and take over the minutiae of management: that way madness (and inefficiency) lies. Rather, the challenge for members is to articulate clearly the philosophical basis for what each tribunal does and how economy and efficiency fit in.[1] The challenge — their challenge — is not only to do more with less but also to do it better.

Tribunals generally deliver outcomes at lower cost to users

The objects clauses in most of the statutes establishing our larger tribunals refer to a range of objectives, including accessibility, fairness, flexibility, justice and speed. Most of the statutes also address the desirability of minimising costs *to users*.[2] Tribunals typically provide a lower-cost experience for users through lower filing fees, simpler forms and flexible processes that are generally designed to be understood by litigants in person. They favour less formal hearing processes that focus or limit the scope of hearings, and they may dispense with 'in-person' hearings altogether in appropriate cases. Australian tribunals have also pioneered the development of alternative dispute resolution processes as part of their mission to provide cheaper mechanisms for dispute resolution and review. A number of tribunals are now considering opportunities for online dispute resolution and other

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techniques for helping to defuse conflict and clarify misunderstandings before the formal tribunal processes are engaged.

All of the statutory objectives are important, but they can be difficult to reconcile. Being fair can be costly. Justice can be slow. A balancing process is always required, and it is difficult to make general statements about what a tribunal should do in particular cases. That balancing process is tricky because prosaic objectives like cost and delay are readily measurable, while 'fairness' and 'justice' are hard to define, let alone quantify. There is a danger of a kind of measurement bias that overemphasises the achievement of some objectives simply because they are easy to visualise on a spreadsheet. The courts can exercise some high-level control over the weighting and interaction of the variables in the exercise of the supervisory jurisdiction, but the practice of each member is more likely to be shaped by the culture in the particular tribunal. I will return to questions of culture in due course.

Individual and business users clearly benefit when tribunals achieve their statutory objectives. Yet the benefits of good tribunal processes do not stop at the hearing room door. It *almost* goes without saying that tribunal review and dispute resolution processes that are 'fair, just, economical, informal and quick'[3] also promote social harmony. Community disputes are less likely to spiral to the point where houses are firebombed or neighbours hire goon squads, and disputes between citizens and government can be resolved without riot police and arrests in the middle of the night. That is no small achievement, and it is only possible because our institutions — especially our tribunals, which do most of the review and dispute resolution which matters to ordinary people — generally satisfy expectations. When processes work well, everyone can be confident their liberty and property will be protected. People know their contracts will be enforced. Individuals can structure their own behaviour and interactions on the basis of a shared expectation that the law will be obeyed by other citizens, businesses and officials. It follows that tribunals do not just provide effective review and dispute resolution; they also help shape norms of conduct that enable citizens to avoid disputes in the first place.[4] Those norms permit a drastic reduction in transaction costs in the economy because citizens can safely make assumptions about the conduct of others. Good processes that reinforce shared norms reduce the need for complex negotiation and contingency planning.

The savings are real, but they defy easy calculation. As Richard Posner points out, 'It is even harder to estimate the benefits of our legal system than its costs'.[5] We may take some of the more abstract benefits and savings for granted as a result. We tend to focus on the direct costs to the community of establishing and running the institutions that underpin the success of our civil society.

There is no question that the cost of providing court and tribunal services is a concern for governments that must manage tight budgets.[6] That is as it should be. Courts and tribunals consume public monies. Australian governments are not alone in their concern about cost. In the United Kingdom, for example, a recent inquiry recommended the establishment of Her Majesty's Online Court as an alternative to traditional court processes. While the report plainly anticipated cost savings from more effective pre-hearing (and even pre-application) processes that would resolve disputes at an early stage, the report emphasised the potential savings that could be made in relation to real estate. Large courthouses in central locations are expensive, and many of the buildings are old, grand and require significant maintenance.[7] Anything that can reasonably be done to reduce the cost of court infrastructure is likely to commend itself to government, and so it should.

Tribunals do not require expensive purpose-built buildings, and they are anything but grand. Tribunals can usually be accommodated in modified commercial office space.[8] There is also

the potential to save money on personnel costs in tribunals. Judges are paid more than most tribunal members, and courts principally comprise relatively expensive full-time appointees. Judges cost significantly more than part-time or sessional tribunal members in particular. Judges also have higher on-costs and carefully prescribed working conditions. The casualisation of tribunal membership offers enormous flexibility to tribunal leaders and managers. It also enables tribunals to reduce their real estate footprint, as sessional members may be encouraged to work from home.

Governments have attempted to economise on other costs in courts and tribunals by merging 'back-office' functions like finance, human resources and payroll. There have also been attempts to economise on information technology expenses. That makes sense, as information and case management systems now account for a significant part of the budget (as well as a potential source of cost savings) in these bodies. In some cases, governments have implemented a 'shared services' model to achieve economies of scale. In others, governments have chosen to amalgamate entities.

The desire to economise on back-office functions is one explanation for the embrace of super-tribunals. The potential for rationalising and consolidating accommodation needs has also been a significant attraction of the super-tribunal model. Super-tribunals are large tenants, and they should be able to negotiate better deals in softening markets for commercial office space.

The move to establish super-tribunals has not been wholly uncontroversial. Members of some specialist tribunals might argue they have developed a level of expertise in relation to particular subject-matter that might be lost in a larger, more diverse body. Members and managers of the smaller bodies can also point to processes that have been tailored to deal with the needs of users in the particular jurisdiction.[9] Those arguments have found favour on occasion. Some specialist tribunals continue to operate outside the super-tribunal framework.

There are real advantages to be had from specialist expertise. The Kerr Committee[10] recognised that the ability to include members with specialist expertise on tribunal panels would lead to better, more informed decision-making. Of course, there is no reason why specialists cannot be appointed to a super-tribunal and provide the benefit of their particular experience in that context. A super-tribunal that is committed to informality should be able to establish (or preserve) a range of processes that are tailored for dealing with the challenges of particular cases or the needs of a particular jurisdiction.

The advent of super-tribunals has also seen the emergence of the specialist *generalist* decision-maker who is experienced in applying law and policy in a range of different jurisdictions. These expert generalists can develop a system-wide perspective that might elude a member with experience in only one jurisdiction. A super-tribunal can comprise a mix of experts and generalists who can be listed to hear cases individually or in combination in ways that best meet the needs of a particular case or jurisdiction. Super-tribunals also have the resources and economies of scale to invest in professional development for all members with a view to improving the quality of hearings and decisions.

It is not just members who can benefit from scale. Super-tribunals are relatively large and sophisticated organisations. They need managers equal to the task. The super-tribunal environment provides an opportunity for the development of professional managers. (Managers with expertise in information management processes are especially prized.) This new breed of manager holds out the promise of greater efficiency in tribunal operations. Their expertise in navigating the reporting and accountability mechanisms that now apply to all government bodies is also important.

The emergence of a class of professional managers creates challenges alongside the obvious benefits. The challenges were recognised by Sir Gerard Brennan, the first president of the Administrative Appeals Tribunal (AAT), when he delivered an address at a conference marking the AAT's 20th anniversary in 1996. Towards the end of his remarks, Sir Gerard observed:

> The growth of large volume jurisdiction has necessarily produced a bureaucracy of the AAT itself. I notice from the AAT Annual Report 1994–1995 a diagram of the large bureaucracy under the control of the Registrar. No doubt, having regard to the heavy caseload which the AAT now bears (as the statistics for that year demonstrate), a large bureaucracy spread throughout Australia is required. I hope that the need for this core of personnel and the inevitable closeness of their working relationship with the members, especially the permanent members, is not conducive to a cast of mind that subjects the independence of the members to the corporate memory or knowledge or advice of the AAT bureaucracy.[11]

The potential for tension between managers and members that Sir Gerard described is not unique to tribunals, of course. The same challenge is present in any professional organisation. Managers and professional staff often coexist uneasily. Professionals are jealous guardians of their autonomy and independence. They brood about managers misunderstanding and potentially usurping the professionals' role. Professionals understand their core value lies in their independent exercise of judgment and they are alive to (real and imagined) threats to their prerogatives. Accommodating that need for independence is a delicate task in a larger organisation like a super-tribunal that deals with high volumes of work. At best, there will be a creative tension in the relationship between members in a tribunal and managers who possess expertise in coordination. At worst, the relationships may become dysfunctional as a result of mutual incomprehension and disrespect.[12]

That brings us back to questions of culture. The establishment of a super-tribunal inevitably precipitates cultural tensions as members and officers of former bodies settle into the new structure or cling to elements of the old one. A fresh culture must emerge. That process takes time. It must also be handled with care. Not all of the cultural traits of the former organisations will make the transition, and some of them must be actively avoided in the new body. Tribunal leaders have an obvious role to play in shaping what emerges. But individual members must also play their part.

Members need to be better advocates for their own role. That role extends beyond passively sitting in hearings and making decisions that resolve disputes between parties. Members must also be concerned with the other aspects of the integrated review and dispute resolution process that lies at the heart of every tribunal and that (for administrative review tribunals, at least) makes an important contribution to good government. Members must be better at articulating the philosophical basis for *all* of their work so as to avoid misunderstandings about what needs to endure in tribunals and what can change or be improved.

Members *should* know what they are doing. As professionals, they should have knowledge and experience which enables them to recognise what is valuable in their tribunal's work. They should also have insight into what measures will genuinely promote efficiency and economy in that organisation. A concern for efficiency must form a central part of their philosophical discussion. Efficiency is a core value in government, and tribunals concerned to promote good government must ensure their own operations are conducted with the need for efficiency in mind. But the language of management and efficiency must be watched. Members are not mere inputs into a process or resources to be deployed. That language only serves to diminish them. In any event, the members' perspective needs to be carefully explained and justified, not just asserted.

Getting the philosophy right

Any discussion of the philosophical basis of tribunals must begin with an acknowledgement that tribunals come in many forms and play many roles. No two tribunals need operate or be structured in the same way. Indeed, in a super-tribunal, the same tribunal might operate in quite different ways in different cases depending on the jurisdiction it exercises and other variables. It is therefore difficult to identify an overarching theory of tribunals. Indeed, that is part of their point: the dispute resolution and review functions which lie at the heart of the tribunal concept have few essential features apart from a measure of independence and an obligation to act judicially. These entities can be adapted to fit many needs. As a student of design might explain, their form should correspond to their function. If they have several different functions, they may require a number of different forms. The form(s) should also be efficient because tribunals cannot pretend to the role of promoting good government unless their own operations are well run and because they should be conscientious in their expenditure of public monies in any event.

Tribunals are often defined with reference to courts. That is not altogether surprising given the bodies often perform essentially the same function. Yet the comparisons are often greeted with an emphatic warning in response. Tribunals are *not* courts, we are regularly reminded. That is frustrating because, even if the statement is true, it is ultimately unhelpful. Tribunals have been a long-term feature of the Australian legal system. The AAT has been conducting merits review at the Commonwealth level for over 40 years. Surely, after all that time, we should be able to explain who we are and what we do without having to define ourselves with reference to what we are not.

The statement is not universally true in any event. While the larger state super-tribunals undertake administrative review, they also perform other functions. Most of these bodies decide small debt cases and resolve disputes between parties in their original jurisdiction.[13] Those claims may involve significant amounts of money. Tribunals effectively act as courts in those cases — or at least as 'anomalous tribunals' which operate within the hierarchy of courts. In Queensland, for example, s 164(1) of the *Queensland Civil and Administrative Tribunal Act 2009* expressly provides that the Queensland Civil and Administrative Tribunal (QCAT) is a court of record, and the Queensland Court of Appeal acknowledged in *Owen v Menzies* that QCAT was a 'court of a state' for the purposes of s 77(iii) of the *Constitution*.[14] That does not mean tribunals undertaking judicial work must be modelled slavishly on the courts. But the court model should not be militantly dismissed as irrelevant or objectionable either.[15]

It is true that Commonwealth administrative tribunals are not courts exercising judicial power under ch III of the *Constitution*. The High Court has said so repeatedly. But the separation of powers doctrine should not be used to overstate the differences between courts and (at least some) administrative tribunals. Consider the AAT in comparison with the Federal Court. Many disputes dealt with in the pre-amalgamation AAT were binary in nature in the sense there was a single lawful answer available. There is no role for preference or policy in deciding whether a deduction is allowable under income tax legislation, for example. The reasoning process the AAT adopted in such a case was really no different from that followed by the Federal Court, which might otherwise deal with the same dispute under the *Administrative Decisions (Judicial Review) Act 1978* (Cth) or pursuant to a constitutional writ.

The comparison becomes more complicated when the exercise of discretion is required. Tribunals like the AAT have a broader role in those cases. They must examine the merits of the case and potentially have regard to government policy, community expectations, public policy and the need to promote good government in the course of making the correct or preferable decision. That may require the AAT to undertake a more inquisitorial role and

co-opt government decision-makers who are under a statutory obligation to assist the tribunal.[16] But that does not mean the experience of the courts is irrelevant.

Indeed, the AAT was consciously established on a judicial model. The report of the Kerr Committee, which recommended the establishment of a new general merits review tribunal, included a detailed outline of how the new organisation should operate. The structures and procedures the committee envisaged were plainly modelled on the courts.[17] That was no accident, as Sir Anthony Mason (a member of the Kerr Committee) subsequently explained. Writing in 1989, Sir Anthony identified the common shortcomings in administrative decision-making that the AAT was designed to address using a more judicial approach:

> Experience indicates that administrative decision-making falls short of the judicial model — on which the AAT is based — in five significant respects. First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not always observe the standards of natural justice or procedural fairness. That is not surprising: he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.[18]

Sir Anthony did not use the expressions 'efficiency' or 'good government' in that passage, but he surely could have done so given the shortcomings he identified contribute to unsound decision-making, waste, costly appeals and conflict.

Sir Gerard Brennan noted in 1996 that members of the Kerr Committee had considered whether a less 'judicial' (some would say less costly) structure should be adopted. Sir Gerard pointed out that Professor Harry Whitmore initially 'did not envisage a high-powered institution engaged in statutory construction and the time-consuming enunciation of reasons for decision'.[19] Professor Whitmore reportedly favoured a more administrative model in which 'shopfront' reviewers would provide quick and informal action in relation to decisions.[20] Sir Gerard pointed out there were enormous practical impediments to that sort of approach. It would require an army of well-trained staff and reviewers and lots of shopfronts, and there would be issues with the consistency and quality of review decisions. That model would have been much more costly over time.[21] The Kerr Committee preferred the more judicial model in its final report, and its recommendations were largely reflected in the *Administrative Appeals Tribunal Act 1975* (Cth).

Sir Gerard pointed out that adopting a qualified judicial model lent the AAT the authority (and, one might interpolate, the infrastructure and resources) to carry out its role. His comments on that role are worth quoting at some length, because the AAT was not just intended to resolve narrow disputes and correct injustice to individuals; it was also intended to promote good government by playing a normative role. Sir Gerard explained:

> External review is only effective if it infuses the corporate culture and transforms it. The AAT's function of inducing improvement in primary administration would not be performed merely by the creation of external review. Bureaucratic intransigence would not be moved unless errors were clearly demonstrated and a method of reaching the correct or preferable decision was clearly expounded. AAT decisions would have a normative effect on administration only if the quality of those decisions was such as to demonstrate to the repositories of primary administrative power the validity of the reasoning by which they, no less than the AAT, were bound. Any effect that the AAT might produce in primary administration would depend on the reasoning expressed in the reasons for AAT decisions.[22]

The first president of the AAT was a strong believer in the benefits of what he described as 'decision-making in a judicial manner' because it ensured legal rules would be clearly stated and applied. That was essential to the authority of the AAT. Sir Gerard added that other features of the judicial approach, like a habit of independence and impartiality, were also essential for members. Members who went about reviews with a 'judicial' mindset were

better able to 'strike a balance between the interests of the public and individual interests' because they were professionally trained to consider the impact of decisions on citizens, whereas administrative decision-makers may be more inclined to think of the interests of the community and be sensitive to the concerns of their political masters.[23]

Interestingly, Sir Gerard made much of the desirability of appointing presiding officers with legal *training*, not just legal qualifications. He pointed out that professional lawyers were trained to develop the desired mindset, but they also needed legal skills of a high order so the AAT could provide more authoritative guidance on law and procedure to all decision-makers. That was important because decision-makers might otherwise be inclined passively to follow departmental guidance that effectively trumped the law.[24]

Presiding members were expected to be *experts* in the law on the judicial model. They were the equivalent of judges. (Many of the earlier members were, in fact, serving or former judges.) To assist those members in their high-profile role, the AAT provided access to support services like associates, legal research officers, libraries and other infrastructure designed to improve the quality of the reasons given to the bureaucracy and the wider community. Presiding members did not take legal *advice* from anyone and there was no suggestion of a presiding member claiming legal professional privilege over material received from an associate or researcher employed by the tribunal. The reasoning process was intended to be, as far as possible, transparent and it usually culminated in the publication of a set of reasons. Publication was seen as essential to give effect to the AAT's normative function.

Sir Gerard acknowledged the 'judicial' approach to decision-making in the AAT was modified by less formal hearing and pre-hearing processes, but the essential elements of a public judicial-style hearing were retained for most cases.[25] AAT members had the flexibility to adopt a more inquisitorial role than was common in court proceedings, but even then there were limits. Those limits were recognised and reinforced recently in the Federal Court's decision in *Charara v Commissioner of Taxation*[26] (*Charara*). In *Charara*, the Court considered whether a presiding member overstepped his role when he adopted an active role in questioning a self-represented applicant. Justice Wigney pointed out that members of the AAT might not have the same freedom to question a witness as the decision-maker who was represented as the presiding member could have in a more inquisitorial proceeding conducted in the absence of a contradictor. His Honour acknowledged it was difficult to make general observations about what was appropriate, but the behaviour and role of a presiding member must be evaluated in context. The context included the extent to which proceedings were inquisitorial.[27]

There are other practical limits to achieving a mechanism of review that is completely informal. Experienced presiding officers know that formality — most obviously, the emphasis on atmospherics in the hearing room, including modes of address and the deportment of the parties — has a role to play in the effective management of hearings. Too much formality can overawe or frustrate the parties, especially if one is self-represented. That is obviously undesirable. But *choosing* to adopt a more formal approach in particular cases should not be dismissed as an exercise in self-aggrandisement. Used appropriately, the more formal aspects of the hearing process can assist a member to maintain control and retain a clear focus on the intellectual task at hand. A recent study of diagnostic errors by medical practitioners highlights the risks of professionals being distracted by challenging or unruly behaviour. The study confirmed that doctors dealing with unruly patients made 42 per cent more diagnostic errors when dealing with complex cases.[28] The higher error rate was attributed to the fact that the doctor was forced to devote more of his or her mental resources to dealing with the patient's bad behaviour.[29]

There is no reason why this pattern observed in doctors' surgeries would not be evident in tribunal hearings. Imposing a higher degree of formality on an applicant who is inclined to be unruly can help a member to remain focused because the features that make a hearing more formal are easy to apply and cost little. Perhaps unsurprisingly, the study reported a lower error rate associated with bad behaviour observed in routine, less complex cases.[30] For present purposes, that conclusion might help to explain why it is appropriate for a higher level of formality in AAT proceedings compared with other tribunals, where the issues in dispute may be less complex and the applicant is not faced with a contradictor. Dennis Pearce makes essentially the same point. He suggests that it is appropriate to expect a graduated increase in formality as an applicant progresses from primary decision to review. He suggests that a more formal environment becomes appropriate in circumstances where the less formal environment that preceded it did not yield a resolution. Where disputes linger, greater authority and formality may be required.[31]

The study may also have interesting implications for the conduct of hearings using technology. Experienced presiding members know there is an increased risk of unrepresented parties becoming unruly when they are not present in the hearing room. Individuals often become taller on the phone (although not as tall as many appear to feel when using Twitter or other social media where one may cat-call and heckle anonymously). Video-conferencing creates a greater sense of immediacy that assists the member to communicate the gravity of the process and maintain order, although challenges remain. It is possible that tribunals may encounter more difficulty than courts in handling parties that appear remotely precisely because tribunals are already less formal than courts. This is an issue that requires further study. But I digress.

The influence of the relatively elaborate judicial model on the development of the AAT was not the product of a lack of imagination. That model was consciously chosen because it was thought best adapted to the AAT's larger normative responsibility for promoting good government.[32] Given the AAT is a tool of good government, something more should be said on that topic.

I have already mentioned how the values of efficiency and economy lie at the heart of good government. Good government demands efficiency and abhors unnecessary bureaucracy. Good government also recognises the value of subsidiarity, especially in a federal system. Decision-making power is, as far as possible, delegated to appropriately qualified decision-makers who are close to the governed and who, as a result, may have best access to the knowledge required to make a superior decision. But a concern for good government also recognises the importance of independence and perspective (which may sometimes be compromised by proximity) and the need for accountability.

Accountability is an important concept which must also find its way to the heart of any philosophical explanation of the role of administrative tribunals like the AAT. The science of economics has much to say that is helpful and relevant on this topic. The theory of agency cost tells us that all human beings will face temptation when they expend resources belonging to other people. An agent or servant might slack, shirk, rort or steal (although, happily, the last of these phenomena in particular is much less common in the Australian Public Service than many people would have you believe). Agents might indulge their personal preferences — for power or leisure or pure self-aggrandisement. They might be careless, precisely because being careless is often easier than taking care. The costs of all of this bad behaviour are known collectively as 'residual costs'. Residual costs are obviously undesirable. They represent inefficiency in its purest form. But there are two other components of agency cost that need to be brought into the calculation. These are bonding costs and monitoring costs. I want to mention monitoring costs in particular. They are the costs associated with policing and containing residual costs. If we are to achieve the goal of

reducing agency costs — the loss in efficiency that occurs when an agent acts on behalf of a principal — we have to reduce residual costs without unduly increasing monitoring or bonding costs. Accountability mechanisms must not be so onerous and intrusive that their cost exceeds the losses they are intended to avoid. Agents should not be so busy being accountable that they end up without the focus or the resources they need to do their jobs.[33]

The AAT model described by Sir Gerard and envisaged by the Kerr Committee represents an inspired, if nascent, example of a measure designed to reduce *agency* costs across the whole of government, not just *residual* costs. The AAT was never intended to review every decision made by government. As Sir Gerard pointed out, the AAT was not designed to deal with a high volume of cases where it simply responded to isolated examples of administrative injustice. Sir Gerard said that would trap the AAT, with its relatively expensive infrastructure, in a forest of single instances where the cost of correcting the error was even greater than the error itself.[34] The AAT was designed to provide higher-level guidance that would yield benefits across the entire system of government administration. While the cost of dealing with individual cases was higher under a judicial model, the system-wide benefits that flowed from the AAT's intervention in particular cases were potentially very large indeed. That is why the investment was — and is — justified.

I have spoken at some length about the philosophy and model which informed the AAT at the time of its establishment and in its early years. I do not mean to suggest everything said or done during that period must be set in stone. That would be impossible in any event given the recent amalgamation with two different tribunals that were not established on the same judicial model. My point is to elucidate the philosophical underpinnings of the AAT which explain, for better or worse, why it was structured and conducted business in a particular way. In doing so, I hope I have demonstrated why, at least in relation to a significant part of the AAT, the oft-quoted observation that the 'tribunal is not a court' should be avoided. The expression is a conversation-stopper. It peremptorily dismisses a model which is still relevant because it formed part of the tribunal's DNA. In the case of the AAT, our challenge is to evaluate critically what follows against a coherent philosophy of *tribunal* decision-making that honestly acknowledges its judicial antecedents.

If we are to define ourselves by exclusion, however, we should be clear about what else we are definitely not: tribunals (and tribunal members) are not executive decision-makers operating within the hierarchical framework of a department in which members are supervised, scrutinised and directed by executive managers. Tribunal members must be independent. I have written elsewhere that federal administrative tribunals may be creatures of the executive branch in a constitutional sense, but their important role means they must remain separate from the executive and, in an important sense, above it.[35] The habits of mind and behaviour that may be appropriate in a department are not necessarily appropriate in a tribunal, as Sir Gerard Brennan observed.[36] Tribunal members need the assistance and support of public servants to make decisions, but it is not a straightforward collaborative process like that which occurs in other organisations. Tribunal members *are* the tribunal when they make a decision and must accept a measure of personal responsibility for what they do. Members should not be subject to direction in their role, but they must be appropriately supported. (If a decision is successfully appealed, the court does not typically criticise the public servants who may have assisted the tribunal member. The court will focus on the member and his or her reasons, and any shortcomings in the decision will be sheeted home to the member in a very public way. That is as it should be, but it rather underlines the point.)

That is not to say management structures and practices used elsewhere in the public sector have no role to play in a tribunal. Tribunals are still government agencies and they are staffed by public servants. Developments elsewhere in the public sector may offer valuable

insights into how the tribunal could work better and more efficiently. But managers do not have a monopoly on insight. The experience of specialist generalist members in particular should also be taken into account. They are appointed to make decisions which have an important effect on the lives of individuals and the community, and they may be called on to review the decisions of ministers and agencies. At their best, they have a deep understanding of government, process and human interaction. They know efficiency and economy when they see it. Their insights into their own workplace should not be lightly dismissed.

The important thing is that the experience of public service managers and the success of practices and structures developed in other contexts must be carefully assessed against a coherent philosophy of tribunal decision-making so that the tribunal's role is not compromised. It is for the leaders and members of each tribunal to work out what that philosophy should be. That process begins with the legislation which establishes the tribunal in question, but it cannot end there.

The responsibility for articulating and 'operationalising' (a dreadful, made-up word) a tribunal philosophy is more challenging in a super-tribunal because of the range of functions the body must perform. The dictates of efficiency — and, yes, of good government — require that hard questions be asked about whether there is a proper philosophical basis for persisting with different approaches to different functions in a super-tribunal. But there is no reason why different approaches cannot be pursued in an amalgamated body when it is appropriate to do so. Articulating a coherent philosophy for what changes and what stays is vital. The AAT, for its part, is approaching this task with care. We have made clear we understand that one size does not fit all (although it should be said there is potentially a worse outcome: one size fits nobody).

Squaring the circle: evaluating change against an appropriate philosophical framework

That brings me back to concepts of efficiency and economy and the way in which they are incorporated into the philosophy of tribunals and tribunal decision-making. That philosophy must be dynamic because, while it embodies enduring values, it must also respond to the environment. Innovations become possible as a result of technological or other progress (such as the potential inherent in video-conferencing, online dispute resolution and software that is used to manage and analyse information in law firms). Case loads fluctuate; budgets vary. New jurisdictions are added and old ones fall away. The composition of the membership evolves. Each tribunal must deal with all of this change and exploit new opportunities with a view to improving efficiency and economy without compromising the other important values which inform its operations.

Everything a tribunal does must be tested against a coherent philosophical framework that incorporates a commitment to efficiency and economy. A discussion of member support arrangements serves to illustrate the point.

I have already noted the influence of the judicial model on the establishment of the AAT. Early members of the AAT — mostly judges and senior lawyers — worked out of 'chambers' and had 'associates' and personal assistants. Associates attended hearings to assist the member in managing exhibits and dealing with the parties, as associates or tipstaffs in court do. Research officers and extensive libraries were made available. Most decisions were carefully edited by experienced staff before publication (through the law reports and, more recently, to the world at large on the internet). The extensive support arrangements were presumably thought necessary for the members to produce the sort of high-quality decisions that Sir Gerard Brennan described.

Those support arrangements evolved. Sessional or part-time members began to account for a growing share of the tribunal's membership. Some of their needs were different from those of the full-time members. Pools comprising full-time and casual support staffers were established to provide more flexible assistance to members. Technological change meant there was less call for typists and clerks, and remote access to tribunal files became possible. The number of personal assistants began to dwindle. But members were also provided with more sophisticated training — on decision-writing, for example. The ability to access information electronically helped them to do their jobs without as much direct assistance from support staff.

While the AAT has traditionally had a strong commitment to member support staff, some other tribunals have had a different experience.[37] In some high-volume jurisdictions, processes that were well adapted to a homogenous case load reduced the need for assistance to members. The review might focus on a limited range of evidence, and there were few opportunities for collecting new evidence that would have to be managed and exhibited. Hearings might be quick and informal, with only the member and the applicant present for a conversation; the hearings might routinely occur over the phone. In many of those tribunals, original decision-makers did not attend or play an active role in the proceedings; they were available to assist, but they were often disinterested in the tribunal's decision unless it went against them. Many tribunals did not regularly publish their decisions or they regularly delivered oral reasons, so editing assistance was less of an issue. In some cases, the only avenue of appeal was to another tier of the tribunal, or another tribunal, which proceeded to re-hear the matter de novo, which meant there was less scrutiny of the first body's reasons. In some cases, the tribunals acted as filters that dealt with straightforward disputes, leaving more complex disputes to be addressed in the more formal environment of the AAT or a court. Many of these bodies focused on dispute resolution and review *simpliciter*. They did not have the same normative role as the AAT.

These features of different tribunals might provide a principled explanation for why members could be provided with less elaborate support arrangements in some cases. But it seems likely that some tribunals have simply underinvested in member support. That may be a consequence of those bodies being inadequately resourced by governments. It may also be the product of conscious decisions by those who manage tribunal budgets to favour other priorities within the organisation.

Underinvestment in member support services compromises a tribunal's performance. If hearings are a shambles because files have not been adequately prepared or if written decisions are delayed, poorly researched or badly edited, there is an impact on quality and on the tribunal's prestige and authority. It might also lead to higher appeal rates. Appeals are enormously costly.

Limits on member support services are often justified with reference to the need for efficiency, but they might have the reverse effect. Underinvestment can waste (highly paid) time. Full-time members of tribunals are expensive, even if they are generally less expensive than judges. It makes no economic sense for a full-time member on a significant salary to be distracted from high-value tasks that only he or she can perform in order to undertake clerical functions that can be done competently by someone at a much lower pay grade. Better-quality support helps tribunals to get more out of their expensive members. But the way in which the support is provided is also important. Some tribunals provide support to members on an essentially transactional basis. Members 'task' support staff in a pool to undertake specific functions — this really means 'negotiate', although that might occur through the intermediation of a manager or some kind of electronic portal. That process tends to underestimate the scope of the beneficial interaction that is possible between a member and an associate. An associate should not just undertake tasks on a file; he or she

also acts as a sounding board on particular matters and assists the member in dealing with the stress and minutiae encountered when running a busy list. A transactional process might work for sessional members in particular; however, there may be significant transaction costs involved which are ignored because they are hidden or poorly understood.

The costs of wasting a relatively expensive full-time member's time may be poorly understood, but the cost of wasting the time of sessional members may be understood all too clearly. In some tribunals, sessional members are paid very low daily rates and their terms and conditions are relatively poor. They are so poorly remunerated that it may actually be more cost-effective for tribunal managers to off-load administrative tasks that should be undertaken by support staff onto members *because the members may effectively be cheaper than employing more staff*. Members may not do those tasks competently. It is hard to imagine them doing them willingly.

Members in those tribunals have allowed this to occur. In some cases, they have filled the gaps in member support arrangements out of a sense of professionalism. It is also possible that some members fear making a fuss over the quality of support they receive. In any event, it is unfortunate that there has not always been a principled response to these developments from members.

Tribunal work is challenging. While different tribunals have different needs, all members require formidable skills and excellent judgment. Many members have the alternative of working elsewhere for higher pay. More than a few accept an appointment out of a sense of civic duty. Tribunal jobs are unlikely to be attractive to any of those quality individuals if they perceive they are taken for granted and exploited. Tribunals and the communities they serve will suffer if well-qualified people are less motivated to accept appointment or be listed for hearings as a consequence of inadequate member support.

The advent of super-tribunals can lead to an accentuation of the unfortunate tendency to underinvest in member support. Super-tribunals undertake a range of different functions which might appropriately be supported in different ways. There is a danger that managers who do not appreciate the differences — most obviously because tribunal leaders and members have failed to explain them adequately — will try to standardise arrangements at the lowest level of support. Super-tribunals are also much larger than the tribunals they replaced. They may be more hierarchical and they have more internal stakeholders who are disconnected from (or have only a fragmented exposure to) the tribunal's core business of conducting reviews and resolving disputes. Member support arrangements might be a relatively easy target for budget cuts in those circumstances.

Decisions in relation to member support arrangements should be made in the context of a larger discussion over member productivity. But the entire discussion will make more sense and deliver superior outcomes if it proceeds against a clear philosophy of tribunal decision-making.

Conclusion

Economy and efficiency are important features of tribunals, and they are properly regarded as values that form part of a coherent philosophy of tribunal decision-making. But the people who should know best what that philosophy entails — the members — need to re-engage in the debates over the future shape of tribunals. That is particularly important in the case of super-tribunals, which need to balance different functions.

Endnotes

1 There is a rich vein of academic literature dealing with the challenge: see, for example, Robin Creyke, 'Tribunals — Carving Out the Philosophy of Their Existence: The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19–33; see also Robin Creyke and Matthew Groves, 'Administrative Law Evolution: An Academic Perspective' (2010) 59 *Admin Review* 27–41.

2 See, for example, s 10(e) of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (and s 8(1)(d) of the *South Australian Civil and Administrative Tribunal Act 2013* (SA), which is in similar terms), which refers to the need 'to keep costs to parties involved in a proceeding to a minimum insofar as is just and appropriate'; see also s 9(b) of the *State Administrative Tribunal Act 2004* (WA), which refers to the need to minimise cost to the parties. Section 6 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) casts its net more broadly and refers to the cost implications for all who are required to deal with the Tribunal, which presumably includes non-parties. Section 6(b) refers to the need 'to ensure that access to the tribunal is simple and inexpensive, for all people who need to deal with the tribunal'. The *Civil and Administrative Tribunal Act 2013* (NSW) says the object of the Act is to ensure the Tribunal can 'resolve the real issues in proceedings … cheaply', while s 2A(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) refers to 'providing a mechanism of review that … is …economical'.

3 *Administrative Appeals Tribunals Act 1975* (Cth), s 2A(b).

4 For an especially thoughtful and erudite discussion of the role of the law and legal institutions in promoting civil order, see Martin Krygier, *Civil Passions* (Black Inc, 2005) 64–6.

5 Richard Posner, *How Judges Think* (Harvard University Press, 2008) 4.

6 See, for example, National Commission of Audit, *Towards Responsible Government: Report of the National Commission of Audit — Phase One* (14 February 2014) 211–12 <http://www.ncoa.gov.au/index.html>.

7 Online Dispute Resolution Advisory Group, Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) 9 <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

8 There are limits, of course: poorly configured space or inaccessible premises will make it harder for tribunals to discharge their role. Security concerns must also be addressed.

9 Robin Creyke, 'Tribunals and Access to Justice' [2002] *Queensland University of Technology Law and Justice Journal* 4.

10 Commonwealth, *Report of the Commonwealth Administrative Review Committee*, Parliamentary Paper No 144 (14 October 1971) 86–8.

11 Sir Gerard Brennan, 'The AAT — Twenty Years Forward' (Speech delivered at the Administrative Appeals Tribunal Twentieth Anniversary Conference, Canberra, 1 July 1996 <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_aat2.htm>.

12 Some tribunal managers seem to think members are prima donnas. Some members say they wish for managers who have no more contempt for members than is absolutely necessary.

13 Professor Robin Creyke suggested that the larger state tribunals have 'a truly polyglot jurisdiction': see Robin Creyke, 'Tribunals: Divergence and Loss' (2001) 29 *Public Law Review* 403, 406.

14 [2012] QCA 170, [55] (McMurdo P).

15 Creyke and Groves, above n 1, 31.

16 Section 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth) obliges the decision-maker to assist the Tribunal to make its decision. Section 33(1AB) obliges all parties to assist the Tribunal to achieve its statutory objectives. The obligation is qualified in some areas of the AAT's jurisdiction, however. In the Migration and Refugee Division and the Social Security and Child Support Division, the original decision-maker does not ordinarily appear at hearings. The absence of a contradictor makes a significant difference to the dynamics of the hearing, but it also changes the emphasis of the Tribunal's role.

17 Commonwealth, *Report of the Commonwealth Administrative Review Committee*, Parliamentary Paper No 144 (14 October 1971) 88–92.

18 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 130; see also 131.

19 Brennan, above n 11.

20 Ibid; see also Creyke, above n 1, 22.

21 Sir Gerard's arguments about the relative efficiency of the more adversarial approach in appropriate cases were discussed in a paper he delivered at the University of Otago in 1979: see Sir Gerard Brennan, 'The Future of Public Law — the Australian Administrative Appeals Tribunal' (1979) 4 *Otago Law Review* 286. Sir Gerard pointed out (at 292–3) that, in a majority of cases where the AAT set aside a decision under review, the facts as found by the AAT were significantly different from the findings of the original decision-maker. That rather points to the importance of rigorous investigative and fact-finding processes in those cases selected for review by the AAT: it was essential that the AAT had access to the best-quality information available rather than simply 'going over' the factual findings of the original decision-maker. Those rigorous processes were costly — perhaps too costly for the AAT to undertake on its own. The AAT was, after all, a newcomer to the dispute between the parties. Sir Gerard explained (at 292): 'the ability to find the facts of a case makes an important contribution to the quality of justice. Where an adversarial procedure is adopted, the parties do the fact-gathering for the tribunal; where the inquisitorial procedure is adopted, the tribunal must use its own resources.' Sir Gerard went on to explain (at 298) that the cost of this more rigorous

review may be prohibitive in some areas of high-volume review. A more attenuated form of review may be appropriate in those cases.

22 Brennan, above n 11.

23 Ibid.

24 Ibid.

25 Ibid. There were a number of exceptions to this general rule recognised in the law applying to the pre-amalgamation tribunal. The most obvious exceptions were in the Security Appeals Division and in relation to decisions under the *Freedom of Information Act 1982* (Cth).

26 [2016] FCA 451.

27 Ibid [116].

28 Henk Schmidt et al, 'Do Patients' Disruptive Behaviours Influence the Accuracy of a Doctor's Diagnosis? A Randomized Experiment' (2016) *BMJ Quality & Safety* 4.

29 Silvia Mamede et al, 'Why Patients' Disruptive Behaviours Impair Diagnostic Reasoning: A Randomized Experiment' (2016) *BMJ Quality & Safety* 4.

30 Schmidt et al, above n 28.

31 Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis Butterworths, 3rd ed, 2013) 341.

32 The Kerr Committee could have recommended a different course — like the approach embodied in the Administrative Review Tribunal Bill 2000. That Bill proposed re-establishing the AAT (which would be renamed in the process) on a model that was less judicial and adversarial and which more closely resembled the administrative review processes that were commonly carried on within the executive: see generally Creyke, above n 13, 410–11. But those reforms were never implemented.

33 There is a rich literature on agency cost theory. One of the classic expositions can be found in Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Ownership Structure and Agency Costs' (1976) 4 *Journal of Financial Economics* 360.

34 Brennan, above n 11.

35 Bernard McCabe, 'Community Values and Correct or Preferable Decisions in Administrative Tribunals' (2013) 32 *University of Queensland Law Journal* 103, 113.

36 Brennan, above n 11.

37 Member support arrangements in the AAT are set to continue their evolution now the AAT has amalgamated with two other tribunals with a history of different member support arrangements, different philosophies and different functions. That does not mean the judicial model which informed the design of member support arrangements in the pre-amalgamation AAT becomes irrelevant. The same approach to member support may continue to prevail in cases in the General and Other Divisions and the Taxation and Commercial Division of the AAT, which now deal with the case load of the pre-amalgamation body given the statutory framework that governs those reviews is essentially unchanged and the normative function remains.

REASONS, REASONABLENESS AND RATIONALITY

Chris Bleby SC*

In 1995, Professor Paul Finn was appointed a Justice of the Federal Court of Australia, South Australian Solicitor-General John Doyle QC was appointed Chief Justice of South Australia and the Hon Justice W M C Gummow of the Federal Court of Australia was appointed to the High Court of Australia. That year, the Law Book Company published a volume of essays that had emerged from a seminar held at the Australian National University in 1994. The essayists and participants in the seminar read as a who's who of eminence in the legal profession and judiciary of that time and of the two decades yet to come — including the three eminent jurists I have mentioned. The editor of the book, Paul Finn, described the essays that were produced as being concerned 'with principles and values which do — or should — inform both our law and our system of government'.[1] The book was entitled *Essays on Law and Government, Volume 1, Principles and Values*. It remains compelling reading for any student of public law.

Twenty years later we can look back at the constitutionalisation of Australian administrative law that was yet to develop, heralded with such force by the decision of the High Court in *Plaintiff S157/2002 v The Commonwealth*[2] and still taking such strides in 2010 in *Kirk v Industrial Court of New South Wales*[3] (*Kirk*). If we think back to 1995, what clues were there of such upheavals to come?

John Doyle, in his contribution to the volume, observed a change in approach by the High Court 'from one which emphasises its function as that of determining the balance between Commonwealth and State powers, to one which emphasises its function as determining the balance between governmental powers and individual rights'.[4] This observation was made in the context of the decision of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth (No 2)*[5] (*Australian Capital Television*), the herald of the then relatively newly conceived implied freedom of political communication. Doyle wrote:

> More recently, the protection of basic rights has taken a new form. Rights have been given a new emphasis in limiting the scope of the powers conferred on parliament by the Constitution. That development is significant because, by virtue of the role of judicial review in our system, parliamentary supremacy is subordinated to the rights protected in this way.
>
> It is probably no coincidence that this approach has been taken in judgments, some of which have emphasised that sovereign power resides in the people, and that in parliament their elected representatives 'exercise sovereign power on behalf of the Australian people'.[6]

From this, Doyle developed a thesis of common law rights, which built in the observation that parliamentary supremacy is itself a common law doctrine, and speculated on the prospect that such rights 'will be used more and more as a limit on government power' as an interpretive device. He observed of the development of common law rights as a limit on some aspects of Commonwealth legislative power: 'The issue is now whether they will become a general limit on its power.'[7]

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This approach, he suggested, was based not on the text of the *Constitution* or ascertaining the intention of the Parliament; rather, it intruded a new element into the system of constitutional law — that is, 'an intention to limit legislative powers imputed to those who originally gave the *Constitution* its legal force'.[8]

This development of the theme of popular sovereignty in constitutional jurisprudence was, of course, a banner of the Mason court, observed in such judgments as that of Deane J in *Breavington v Godleman*,[9] Deane and Toohey JJ in *Nationwide News v Wills*[10] (*Nationwide News*) and, as mentioned, Mason CJ in *Australian Capital Television.* So too, then, in his own contribution to the book, did Paul Finn take up the task of prediction in his chapter entitled 'A Sovereign People, A Public Trust'.[11]

Finn's thesis was particularly concerned with the idea that 'government is a trust'; that its officers are trustees for the people and accountable to them, akin to the relationship of a fiduciary. He considered the historical unacceptability of this argument in the context of the historical dominance of Australian constitutional thought by parliamentary sovereignty. But he was able to observe, in broad brush, a turning of the tide,[12] by which the emergent recognition of popular sovereignty was an indicator of recognition of this public trusteeship, practically expressed as the obligations of the government to act in the public interest, noting that the interests of government are not synonymous with the public interest.[13] This idea of public trusteeship continues to resonate in a number of areas of practical application, such as freedom of information.[14]

Finn also saw the declaration by members of the High Court in *Australian Capital Television* and *Nationwide News* that 'sovereign power resides in the people' as a harbinger of this recognition of a relationship of trust — a harbinger that called into question the doctrine of parliamentary supremacy.[15] He then turned to a series of illustrative observations of the principle, noting as he did so the implications of sovereignty for the courts and referring to the extrajudicial statement of Sir Anthony Mason that the courts 'are institutions which belong to the people and … the judges exercise their powers for the people'.[16]

I will address one of those examples in a moment, but it is timely to remind ourselves of this period when popular sovereignty was emerging as such a focal point for constitutional jurisprudence when considering the recent decision of the High Court in *McCloy v New South Wales*[17] (*McCloy*). The plurality in this case has reformulated the test articulated in *Lange v Australian Broadcasting Corporation*[18] (*Lange*) and *Coleman v Power*[19] as to whether a law infringes the constitutionally implied freedom of political communication. It does so in a way that may test the resolve of the courts in the years to come. However usefully the test has been articulated, the plurality in *McCloy* has asserted unequivocally the underlying doctrine of popular sovereignty as a source of Australian constitutional jurisprudence. This assertion, in the context of the same implication that focused the question in *Australian Capital Television*, looks to be squarely a response to the decision of the Supreme Court of the United States in *Citizens United v Federal Election Commission*,[20] which the plurality in *McCloy* described as articulating the view 'that an attempt by the legislature to level the playing field to ensure that all voices may be heard is, prima facie, illegitimate'.[21]

The High Court was having none of this, and its response is rooted firmly in the doctrine of popular sovereignty that has emerged as a foundation stone of constitutional jurisprudence over the last 25 years or so:

> That is not the case with respect to the Australian *Constitution*. As this Court said in *Lange*[22], ss 7, 24, 64 and 128 of the *Constitution*, and related provisions, necessarily imply a limitation on legislative and executive power in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors.' Sections 7 and 24 contemplate legislative action to implement the

> enfranchisement of electors, to establish an electoral system for the ascertainment of the electors' choice of representatives[23] and to regulate the conduct of elections 'to secure freedom of choice to the electors.'[24] Legislative regulation of the electoral process directed to the protection of the integrity of the process is, therefore, prima facie, legitimate.[25]

The plurality went on to ground this conclusion firmly in the decision of Mason CJ in *Australian Capital Television*, noting, in that case:

> The legitimacy of the concerns that the electoral process be protected from the corrupting influence of money and to place 'all in the community on an equal footing so far as the use of the public airwaves is concerned' was accepted.[26] The legislation struck down in that case did not give equality of access to television and radio to all candidates and parties. The constitutional vice identified by Mason CJ was that the regulatory regime severely restricted freedom of speech by favouring the established political parties and their candidates. It also excluded from the electoral process action groups who wished to present their views to the community without putting forward candidates.[27] [28]

So, having been given such a timely reminder of the strength of the concept of popular sovereignty in the very area of constitutional jurisprudence in which it first received such precise endorsement, let us go back to Paul Finn's observations and predictions in 1995, and to one in particular. This was something that he saw to be quite the anomaly in the context of this emerging jurisprudence, which he had framed in the context of the idea of the public trust — the 1986 decision of *Public Service Board of New South Wales v Osmond*[29] (*Osmond*). In that case, it was held that:

> [There is] no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which may have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons.[30]

Finn's particular observation of this conclusion was that it seemed discordant in the common law, even then, as:

> [i]n several quite diverse fields the courts have been prepared on grounds of democratic principle to preserve and to facilitate public discussion, review and criticism of governmental action.[31] Considered from the perspective of the individual citizen, that facility would seem the most necessary at the point of the individual's greatest vulnerability to government, that is when he or she is affected by an administrative decision, and necessary both on grounds of democratic entitlement and public accountability.[32]

He called for reconsideration of *Osmond* on this basis. That call has been repeated over time, with the decision being subject to the occasional assault — so far unsuccessful. In the event, questions of whether reasons are required tend to devolve to whether special circumstances require the giving of reasons (as contemplated by Gibbs CJ in *Osmond*)[33] or whether the particular statutory scheme in question gives rise to an implication of an obligation to require reasons.[34]

Mike Wait, in a paper delivered to the AIAL National Conference in 2011, approached *Osmond* in the light of two steps in High Court reasoning on s 73 of the *Constitution*. The first was the discussion of French CJ and Kiefel J in *Wainohu v New South Wales*[35] (*Wainohu*) of the duty of judges to give reasons, which they characterised as necessary for the Supreme Court to examine judicial decisions. Chief Justice French and Kiefel J saw the duty as having a constitutional characteristic by reason of s 73 of the *Constitution*. The second was the reliance on s 73 in *Kirk* to invalidate a privative clause preventing the Supreme Court of New South Wales from judicially reviewing a decision of the Industrial Relations Commission.[36]

Wait has asked, in light of these cases, whether s 73 might not also confer a duty on administrators to provide reasons in order to facilitate the supervisory function conferred on state supreme courts. However, as he pointed out, in *Wainohu* the plurality of Gummow, Hayne, Crennan and Bell JJ, in confirming the giving of reasons as a hallmark of the judicial function, did not rely on s 73 but on a rationale of fairness, drawing on the decision of McHugh J in *Soulemezis v Dudley (Holdings) Pty Ltd*.[37] We should also acknowledge Heydon J's comment in his dissenting opinion forcefully reiterating that there is no common law duty on an administrative decision-maker to give reasons.[38]

A version of Wait's mooted thesis was argued by the first respondent in *Minister for Home Affairs of the Commonwealth v Zentai*.[39] This was to the effect that, in the Commonwealth sphere of administrative decision-making, to confer a power to make a decision without giving reasons was to confer a power to make an unreasoned decision, which is unexaminable and therefore contrary to the implication in s 75(v).

Justice Heydon was the only one to consider this argument and he rejected it, holding that making a decision without giving reasons does not make the decision unreasoned or unexaminable. He accepted the ease of challenge that reasons facilitated but said that reasons were not essential to a challenge. Then, in a passage that is important to the theme that I wish to develop but which can only cause the blood of every trial judge hearing an application for judicial review to run cold, he said:

> A decision-maker can be compelled to produce documents revealing the reasons for a given decision, whether by subpoena duces tecum or a notice to produce. That decision-maker can be compelled by interrogatories to reveal those reasons in writing, and by a subpoena ad testificandum to reveal those reasons in the witness box. It is true that judicial review proceedings cannot be commenced on an entirely speculative basis. But non-speculative inferences can be drawn from the nature of the decision and from the dealings between the decision-maker and the affected person before the decision was made. It is also true that it would be difficult for a person challenging the decision to frame non-leading questions capable of eliciting answers that would reveal the decision-maker's reasons. But the person challenging the decision can question the decision-maker as though on cross-examination where the decision-maker is not making a genuine attempt to give evidence on a matter of which that decision-maker may reasonably be supposed to have knowledge: *Evidence Act* 1995 (Cth), s 38(1)(b). Reluctance on the decision-maker's part to give reasons would support an inference that there were no reasons, or no convincing reasons. It would be likely to stimulate close scrutiny. That is particularly so of adherence to a code of *omerta* in the witness box[40].[41]

Leaving aside the unlikelihood of a code of omerta residing in modern administrative decision-makers, this rationale minimises genuine difficulties in trial processes on judicial review.

More fundamentally, Heydon J appears to be coming close to saying that reasons need not be given because they can ultimately be squeezed out of the decision-maker in the trial process, with adverse inferences to be drawn in the absence of an ability to do so. That begins to look a lot like a duty to give reasons or at least an effective obligation ultimately to disgorge them.

Apart from the question of the utility of taking this position but still denying a common law obligation to give reasons, the difficulties mount where the decision-maker is a panel: if there is no duty to give reasons, but the panel members can be subpoenaed and effectively cross-examined on the reasons of the panel in any case. There is good reason to think that panel members may be able to claim public interest immunity in respect of the deliberations that passed between them,[42] yet, in the absence of an obligation to give reasons, every question at trial would need to be parsed as to whether it goes to the reasons of the panel or its internal deliberations.

The jurisprudence that has emerged on s 75(v) and s 73 of the *Constitution* in the last 15 years or so is consistent with John Doyle's observation in 1995 of the emerging emphasis given to rights in limiting the scope of the powers conferred on Parliament by the *Constitution* and the significance of that development in subordinating parliamentary supremacy to such rights by virtue of the role of judicial review. The vehicle of that emphasis has been the particular position of the courts in ch III — specifically, the inviolability of their supervisory role. For the moment, this constitutional approach has not extended to requiring a rethink of an obligation on administrative decision-makers to give reasons.

Nevertheless, the theoretical underpinning that is capable of supporting the idea continues to have influence, as we have most recently seen in *McCloy*. There are further strains of it in the High Court's decision in *Minister for Immigration v Li*[43] (*Li*) — strains that appear to put further pressure on the *ratio* of *Osmond*.

Wednesbury unreasonabless

Li, it is to be recalled, concerned a refusal by the Migration Review Tribunal (MRT) to exercise a statutory power of adjournment on its review of a decision by the Minister to refuse to grant a skilled overseas student residence visa. The application had been supported by a skills assessment by Trades Recognition Australia (TRA), which is an assessing authority. That assessment was found to be based on false information submitted by the applicant's former migration agent, and the application was refused. The applicant applied to the MRT for review and submitted to TRA a fresh application for a new skills assessment. That application to TRA was refused. The migration agent wrote to the MRT requesting an extension of time so as to be able to pursue a review of that refusal, identifying errors in the TRA's assessment. The MRT went ahead and affirmed the delegate's decision without waiting for advice as to the outcome of the migration agent's representations to the TRA.

The High Court determined that the failure to grant the adjournment was unreasonable such as to amount to jurisdictional error. It has now been remarked on in various commentaries[44] that the approach that the Court took in this case rejected the narrow and traditionally understood conception of unreasonableness derived from Lord Greene's statement in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[45] (*Wednesbury*) and articulated a test that requires consideration of the discretion in question in the context of the statutory purpose.[46]

The Court noted that the decision to refuse the request for the adjournment was explained by the MRT on the bases that Ms Li had had sufficient opportunity to present her case and that it was not prepared to delay the matter any longer.[47] What was missing was an explanation of its treatment of the substance of the reasons that Ms Li had put forward in support of the adjournment. Thus French CJ said:

> The MRT did not in terms or by implication accept or reject the substance of the reasons for a deferment put to it by the first respondent's migration agent. It did not suggest that the first respondent's request for a deferment was due to any fault on her part or on the part of the migration agent. It did not suggest that its decision was based on any balancing of the legislative objectives set out in s 53. Its decision was fatal to the first respondent's application. There was in the circumstances, including the already long history of the matter, an arbitrariness about the decision, which rendered it unreasonable in the limiting sense explained above.[48]

Similarly, the plurality found arbitrariness in the refusal when measured against the statutory context:

> The purpose of s 60(1) has already been referred to. It is to provide an applicant for review the opportunity to present evidence and arguments 'relating to the issues arising in relation to the decision under review'. The question which remained in issue when the Tribunal made its decision was the satisfaction of a visa criterion by a complying skills assessment. Although the Tribunal could not be expected to assume that the second skills assessment, when reviewed, would favour Ms Li, it did not suggest that there was no prospect of the second skills assessment being obtained, or that the outcome could not be known, in the near future. In these circumstances it is not apparent why the Tribunal decided, abruptly, to conclude the review.[49]

There are probably several ways of looking at this shift in thinking from the traditionally narrow characterisation of *Wednesbury* unreasonableness. One way is to note that, while the traditional formulation was that no reasonable decision-maker could have made the decision, this formulation was that in light of the statutory context there was nothing to suggest that this decision was anything other than arbitrary. As the plurality put it, unreasonableness may be concluded where a decision 'lacks an evident and intelligible justification'.[50]

The conclusion in *Li* was a function of the analysis of the reasons of the MRT — an analysis simply not necessary on the traditional formulation. Where reasons are given, and especially where they are required, it is entirely orthodox to analyse them critically. Further, there will be cases where the lack of an evident and intelligible justification will be inferred from a decision where reasons are not obliged to be given. However, to restate the test for unreasonableness in the exercise of a discretion with specific reference to the statutory context for the exercise of the discretion does two things: it puts a greater focus on the public interest that is served by the exercise of the statutory power; and, in doing so, it puts further pressure on the common law position that reasons are not required.

That pressure is not always evident, as reasons are often required by statute. Neither does this pressure necessarily lead to an intolerable tension — it is comparable with that which exists on account of the tests for failure to take into account a relevant consideration and taking into account irrelevant considerations — grounds of review that are located deeply in the statutory context. The plurality was alive to this.[51] Nonetheless, it adds to the pressure that Finn observed 20 years ago. Unperturbed, however, the plurality noted the well-understood comparison with appellate review, referring to the principles in *House v The King*,[52] to the effect that it is not enough that the appellate court would have decided the matter differently:

> What must be evident is that some error has been made in exercising the discretion, such as where a judge acts on a wrong principle or takes irrelevant matters into consideration. The analogy with the approach taken in an administrative law context is apparent.[53]

Justice John Basten, writing extrajudicially, has observed that 'this principle is well-understood in the area of judicial review of administrative action, especially in cases where no reasons are available'.[54] Thus, in *Avon Downs v Federal Commissioner of Taxation*,[55] to which Basten J here made reference, Dixon J said of the Commissioner of Taxation as decision-maker:

> The fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough

> that you can see that in some way he must have failed in the discharge of his exact function according to law.[56]

To broaden the scope of unreasonableness review as appears to have occurred in *Li*, however, does warrant questioning of the continued common law rule that administrative decision-makers do not give reasons. The availability of an inference of unreasonableness under the formulation in *Li* would appear to demand the giving of reasons far more acutely than does the traditionally understood *Wednesbury* formulation, narrow as that formulation is. That narrower formulation makes it considerably easier to 'know it when you see it', even without reasons.

Rationality

Li came three years after *Minister for Immigration and Citizenship v SZMDS*[57] (*SZMDS*), in which a majority of the Court confirmed that illogicality or irrationality in the finding of a jurisdictional fact constituted a distinct ground of judicial review. That ground had emerged not fully formed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[58] and was reiterated as a potential ground in *Minister for Immigration and Multicultural Affairs v SGLB*.[59] In *SZMDS*, the separate joint judgments of each of Crennan and Bell JJ and Gummow ACJ and Kiefel J developed the idea of illogicality and irrationality tainting a public officer's state of satisfaction as to a jurisdictional fact — in this case, the Minister's state of satisfaction under s 65 of the *Migration Act 1958* (Cth).

Justices Crennan and Bell emphasised the origins of this distinct type of error in *Wednesbury* unreasonableness, now confirmed as applicable to the exercise of discretions, and identified situations in which illogicality or irrationality may be found.[60] Such situations are where only one conclusion was open on the evidence and that conclusion was not drawn; where the decision was simply not open on the evidence; and 'if there is no logical connection between the evidence and the inferences or conclusions drawn'.[61]

Similarly, Gummow ACJ and Kiefel J, in the minority in the result, found that the Refugee Review Tribunal had made 'a critical finding by inference not supported on logical grounds'.[62]

The necessity for the existence of a logical connection between evidence and inference going to a state of satisfaction as jurisdictional fact self-evidently demands, I suggest, an understanding of the reasoning process by which the conclusion as to the jurisdictional fact was reached.

Theresa Baw has suggested that, given the emphasis that Crennan and Bell JJ gave in *SZMDS* to the origins of the irrationality ground in *Wednesbury* unreasonableness, the process aspect of the findings of illogicality and irrationality as identified in *SZMDS* are particularly important, as opposed to the question whether the decision was self-evidently illogical, observing:

> it is not sufficient to simply consider the possibility that another rational person would have come to the same decision, rather the decision-maker's process of deliberation and justification in arriving at his or her decision becomes paramount. Therefore, the focus on the process of reasoning is similar to the Gummow ACJ and Kiefel J test of illogicality and irrationality in SZMDS.[63]

If that is the case — and we probably need only note that the process of reasoning must necessarily be able to be scrutinised for the purpose of questioning rationality — then, as Basten J has identified, 'It would seem to follow that effective judicial review requires a duty on all decision-makers to give reasons'.[64]

This is, I think, a different way of characterising what I have described as the 'pressure' on the still-standing *ratio* of *Osmond*: under either description, what is in question is the continuing coherence of this area of judicial supervision.

Conclusion

However we describe the difficulty, be it one of practical effectiveness or doctrinal coherence, one useful and I think extremely important opportunity lies in taking up the underlying themes that have developed in order to locate both the common law and constitutional role of the courts. Twenty years ago, Doyle and Finn identified particular emphases in the jurisprudence on individual rights and the public trust of government, respectively, both of which arose from the tectonic shift in thinking to the role of popular sovereignty as a core constitutional premise.

These critiques remain important. Both *SZMDS* and *Li* extend judicial review grounds by which decision-makers are more closely called to account for their reasoning processes, placing pressure on the common law position that reasons are not required. *SZMDS*, in its insistence on rational processes of reasoning, promotes a theme of individual rights placed in opposition to executive power. *Li*, in its focus on assessing reasonableness in the statutory context, develops the exercise of executive power specifically as a vehicle of furthering the public interest.

Viewed from the perspective of these underling doctrinal themes but also from the immediate experience of unifying coherence, we might well ask: for how much longer can *Osmond* remain defensible? As the cases continue to give content to the constitutional premise of popular sovereignty, it will be an increasing struggle, I suggest, to find a way.

Endnotes

1 Paul Finn, 'Preface', in Paul Finn (ed), *Essays on Law and Government, Volume 1, Principles and Values* (Law Book Company Ltd, 1995) v.
2 (2003) 211 CLR 476.
3 (2010) 239 CLR 531.
4 John Doyle QC, 'Common Law Rights and Democratic Rights' in Finn, above n 1, 145.
5 (1992) 177 CLR 106.
6 Doyle, above n 4, 144–5, quoting *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106, 137–8 (Mason CJ). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 71–3.
7 Doyle, above n 4, 167.
8 Ibid 166.
9 (1988) 169 CLR 41, 123.
10 (1992) 177 CLR 1, 69, 72.
11 Paul Finn, 'A Sovereign People, A Public Trust' in Finn, above n 1, 1.
12 Ibid 12–13.
13 Ibid 14–15.
14 See, for example, *Department of Planning and Local Government v Chapman* [2012] SADC 120, [45]–[46] (Cole DCJ).
15 Finn, above n 11, 4.
16 Ibid, quoting Sir Anthony Mason, 'The Role of the Judge at the Turn of the Century' (Speech delivered at the Fifth Annual AIJA Oration in Judicial Administration, Melbourne, 5 November 1993).
17 [2015] HCA 34.
18 (1997) 189 CLR 520.
19 (2004) 220 CLR 1.
20 558 US 310, 365, 469 (2010).
21 [2015] HCA 34, [41] (French CJ; Kiefel, Bell and Keane JJ).
22 (1997) 189 CLR 520, 560.
23 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 56; [1975] HCA 53; *McGinty v Western Australia* (1996) 186 CLR 140, 182; [1996] HCA 48.
24 *Smith v Oldham* (1912) 15 CLR 355, 358; [1912] HCA 61.

25 [2015] HCA 34, [42] (French CJ; Kiefel, Bell and Keane JJ).
26 *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 177 CLR 106, 130; see also 161, 175, 189, 239.
27 Ibid 132, 145–6; see also 171–3 (Deane and Toohey JJ), 220–1 (Gaudron J), 236–7, 239 (McHugh J).
28 Ibid [43] (French CJ; Kiefel, Bell and Keane JJ).
29 (1986) 159 CLR 656.
30 Ibid 662 (Gibbs CJ), 675 (Brennan J), 676 (Deane J), 678 (Dawson J).
31 Compare *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Ltd v Commonwealth (No 2)* (1992) 177 CLR 106.
32 Finn, above n 11, 16.
33 See, for example, *Watson v South Australia* (2010) 208 A Crim R 1; 278 ALR 168; [2010] SASCFC 69, [114]–[125] (Doyle CJ), [130]–[142] (Peek J).
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36 Michael Wait, 'When is an administrative decision maker required to give reasons? From *Osmond* to *Wainohu*' (Paper presented at the AIAL National Conference, Canberra, July 2011).
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38 (2011) 243 CLR 181, [155].
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46 (2013) 249 CLR 332, [23]–[26], [31] (French CJ), [79] (Hayne, Kiefel and Bell JJ).
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50 Ibid [76] (Hayne, Kiefel and Bell JJ).
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54 The Hon 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) 44.
55 (1949) 78 CLR 353.
56 Ibid 353.
57 (2010) 240 CLR 611.
58 (2003) 77 ALJR 1165, [34], [37] (McHugh and Gummow JJ).
59 (2004) 78 ALJR 992, [38] (Gummow and Hayne JJ).
60 (2010) 240 CLR 611, [123].
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62 Ibid [53].
63 Theresa Baw, 'Illogicality, Irrationality and Unreasonableness in Judicial Review' in Williams, above n 54, 77.
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CALL-OUT POWERS FOR THE AUSTRALIAN DEFENCE FORCE IN AN AGE OF TERRORISM: SOME LEGAL IMPLICATIONS

David Letts and Rob McLaughlin*

The use of the Australian Defence Force (ADF)[1] by the government in situations that do not involve those specifically envisaged by the *Constitution*[2] can be a cause of tension between those who can see the logical benefit of using Commonwealth assets to their maximum advantage in adverse situations and those who are cautious about deploying the ADF internally within Australia. There are, of course, solid arguments which support both points of view,[3] and there is also an extra dimension in terms of ensuring that there is adequate legal protection for ADF members when they are deployed in circumstances where an expectation might arise that they may be required to use some level of force.

Until relatively recently, the legal framework which supports the internal deployment of the ADF was vague and uncertain and there was little fidelity surrounding the statutory procedure upon which the use of the ADF within Australia — the 'call-out' provisions — could be based. Rather, reliance on the 'executive power'[4] has been the historical basis upon which governments from across the political spectrum have used the ADF (including its people and equipment) in situations when it was considered that extraordinary measures were required.

This article will examine the manner in which the legal authority for the deployment of the ADF in Australia has been addressed. The first part of the article will distinguish between call-out and other ADF assistance before reviewing the main constitutional issues that affect the internal deployment of the ADF. This analysis will be followed by a brief review of some of the judicial decisions which have considered the extent of the defence power under the *Constitution* and/or the use of the ADF.

The second part of the article will examine the legislative amendments which were put in place in 2000 when the wide-scale deployment of the ADF in support of logistic and security arrangements for the Sydney Olympic Games occurred.[5] In 2006, as part of the preparation for the Melbourne Commonwealth Games, further legislative amendments specifically recognised that security threats could emanate from the maritime and air environments.[6] The key aspects of these amendments will be examined later in this article, as will some of the impacts and issues which arise from a legal and operational perspective.

Call-out distinguished from ADF assistance

At the outset it is important to distinguish between some of the different ways in which the ADF may be deployed internally in Australia. The most fundamental distinction involves an appreciation that situations can arise when it is expected that some of the ADF personnel

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involved may be required to use force against the population, whereas in other situations no such expectation arises.

Historically, this distinction had been marked by two different nomenclatures supported by relevant Defence Instructions: Defence Assistance to the Civil Community (DACC)[7] and Defence Force Aid to the Civil Power/Authority (DFACP/A).[8] The distinction is further clarified by describing DACC as primarily comprising the provision of support to the community by the ADF in circumstances where the civilian community does not have the necessary resources to undertake a specified task.[9] Disaster relief is included among the tasks which are covered by DACC.

On the other hand, DFACP/A consists primarily of providing ADF assistance to Commonwealth or state/territory law enforcement bodies in circumstances where their law enforcement capabilities are insufficient or inadequate for the task. Clearly, the latter circumstance is the one where the potential use of the ADF within Australia has the capacity to cause the most concern for both the civil community and those members of the ADF involved in the operation.

In terms of direct authorisation to a particular element of the ADF to provide either DACC or DFACP/A, the use of Defence Instructions[10] are one means by which the Secretary of the Department of Defence and the Chief of the Defence Force (CDF) may jointly issue instructions or orders which are of a permanent or standing nature unless/until there is subsequent amendment. The *Defence Act 1903* (Cth) allows the Secretary and the CDF to issue such instructions when their purpose is 'for the good governance and administration of the ADF':

> (1) Subject to section 8, the Secretary and the Chief of the Defence Force shall jointly have the administration of the Defence Force except with respect to:
>
> (a) matters falling within the command of the Defence Force by the Chief of the Defence Force or the command of an arm of the Defence Force by the service chief of that arm of the Defence Force; or
>
> (b) any other matter specified by the Minister.
>
> (2) Instructions issued by or with the authority of the Secretary and the Chief of the Defence Force in pursuance of the powers vested in them jointly by virtue of subsection (1) shall be known as Defence Instructions (General).[11]

The use of Defence Instructions to support and direct ADF activities is often buttressed by other administrative processes — but, arguably, these other mechanisms do not possess the same line of direct legislative authority.[12] Nevertheless, there is certainly an expectation that all military and civilian ADF personnel will adhere to the requirements of the *Defence Assistance to the Civil Community Manual* (DACC Manual). Additionally, it has been made clear in the *2016 Defence White Paper* that the provision of DACC and DFACP/A are both key functions of the ADF, and defence capability will be structured and procured with both of these tasks in mind.[13] Accordingly, it can be concluded that defence policy and some elements of legislation applicable to defence provide sufficient legal basis for at least initial consideration of the use of the ADF in internal security operations within Australia.

Constitutional issues

Turning now to the constitutional basis upon which the ADF might be deployed on such operations within Australia, the first observation to note is that the topic of when and how the *Constitution* supports the use of the ADF within Australia is one that has caused debate and difference in opinion among selected Australian legal, military and academic writers.[14]

Further, the issue is not one that has only been contemplated in relatively recent times;[15] nor has consideration of this topic been confined to Australian writers.[16]

Part of the answer to understanding the constitutional basis for using the ADF within Australia comes from consideration of the constitutional authority provided by 51(vi) of the *Constitution* (the 'defence power'), which states:

> The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> …
>
> (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth …

It is noted that there are two limbs to s 51(vi). The first limb provides the power to the Commonwealth Parliament to deal with, in general terms, the defence of Australia (both the Commonwealth and the states), while the second limb provides a different element of power insofar as it permits the Commonwealth to legislate to control the forces which will execute and maintain its laws.[17] It is further contended that the second limb of s 51(vi) can be construed as having two elements. The first element is that it permits the passage of legislation that deals with the ADF itself, such as the *Defence Act 1903* and associated amending legislation which is regularly enacted by the Parliament. The second element is that the proper reading of s 51(vi) supports the view that it permits the enactment of other laws (using the defence power as constitutional authority) which do not directly affect the control of the ADF but which do assist in executing and maintaining the laws of the Commonwealth.[18]

Clearly, it is contemplated that constitutional authority exists under s 51(vi) for the Commonwealth to take the necessary action to defend Australia, including making the necessary preparations for such defence, in circumstances where an attack is being contemplated, or has occurred against, Australia. While it may be hoped that Australia's military forces and capabilities are sufficient to prevent such action occurring in areas which are subject to Australian jurisdiction, the lessons of history do not support this view. Further, the nature of threats currently posed by non-state armed groups leads to a sense of inevitability of an attack which would be likely to necessitate ADF involvement in the response occurring in the near to medium term.[19]

Deployment of the ADF in Australia might also be supported by the executive power of the Commonwealth under s 61 of the *Constitution*:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth …

The extent of the executive power is a topic which has 'rarely been examined in the High Court',[20] with (on one account) fewer than 15 High Court cases directly considering the nature of this power.[21] However, one area involving Australian military deployments which has exclusively been the subject of the executive power has been the decision to commit Australian forces to combat operations overseas. It is true that, on most occasions, Parliament has been informed of the decision, but Parliament has never been specifically asked to approve or vote on a decision to deploy Australian forces overseas in a combat role. Instead, the government of the day has relied on the executive prerogative to provide the legal basis for such deployments.[22] Despite a number of attempts to alter this situation, most recently by the introduction of the Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2015 into the Parliament by the Australian Greens party,

there seems little prospect of any changes being made to the current practice in the foreseeable future.[23]

Internally, the use of the executive power to provide the legal basis for the Commonwealth's use of Australian forces within Australia has been linked with a surviving prerogative which permits the Commonwealth to take action that (in very broad terms) 'protects its interests'. A detailed analysis of actions of this type which the Commonwealth has taken since Federation was undertaken by Elizabeth Ward for the Parliamentary Library in the 1990s.[24] The key conclusions were:

- there are legal difficulties inherent in nearly all uses of the defence forces for 'non-defence' purposes;
- successive Commonwealth governments have used the defence forces without prior consideration of the legal steps involved;
- the defence forces have often responded to requests without regard for their own operational instructions; and
- on a legal basis, the deployed troops are found to be largely unprotected.

In terms of the Commonwealth protecting its interests, much of the analysis contained in Ward's paper was centred on s 61, but it was noted that the power which the Commonwealth exercised under s 61 'may vary depending on the extent to which there is a relevant law to execute'.[25] The implication raised by this finding supports the contention that using s 61 alone to provide the legal basis for the use of the ADF within Australia is problematic from a legal perspective on a number of fronts.

There have been two interesting recent developments in terms of the extent to which s 61 can be relied upon to support the deployment of the ADF within Australia. The first development was the decision of the High Court in *Williams v Commonwealth*[26] (*Williams*), where the issue raised was whether Commonwealth expenditure was supported from the perspective of either a valid head of legislative power under the *Constitution* or the executive power of the Commonwealth. The High Court held that support was not provided by either power. The potential issue for the future deployment of the ADF within Australia is that *Williams* makes it clear that the allocation of funds to provide for the deployment of the ADF could be challenged if it was considered there was not a solid constitutional basis under either an explicit head of power (for example, s 51(vi) or s 119) or the executive power.

In relation to the second development, the decision in *CPCF v Minister for Immigration and Border Protection*[27] builds upon *Williams* in the sense that it perhaps foreshadows a line of reasoning which, if adopted in the future, could call into question the constitutional validity of authorising the use of the ADF in Australia relying on the executive power. Kiefel J raised this issue in the following terms:

> It can hardly be said that a statute such as the MP [Maritime Powers] Act, which authorises a decision that the relevant powers be exercised in a particular way and details the manner and conditions of their exercise, and in respect of which the role of the Commonwealth Executive is discernible, supports an intention that the Commonwealth Executive is to retain a complete discretion as to how such powers are to be exercised.[28]

There is potential that a combination of the two cases could adversely affect the deployment of the ADF within Australia, especially if the circumstances were considered to be controversial, as would be the case in the event of an allegation that such use of the ADF was 'politically motivated'. A constitutional challenge could be mounted on the basis used in *Williams* (in terms of the use of Commonwealth funds) and/or by seeking a ruling from the High Court that pt IIIAAA of the Defence Act already provides a comprehensive regime for the use of the ADF in Australia and this has therefore extinguished any residual s 61

executive power. Although these situations are untested, an element of caution should be adopted if there is any future desire to use s 61 as the basis for the deployment of the ADF.

The use of the command power under s 68 of the *Constitution* is included for completeness rather than because there is any reasonable expectation that the Governor-General might exercise actual command and authority over the deployment of the ADF within Australia. Section 68 provides: 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.'

It is not the purpose of this article to review the command power extensively other than to note that the existence of that power in anything other than a 'titular' sense has long been considered otiose.[29] In fact, when reflecting upon his command role, Sir Ninian Stephen noted that:

> [p]urely titular my title as Commander-in-Chief may be, but it does reflect the quite special relationship that I believe exists between the Governor-General and the armed forces of the Commonwealth. It is a close relationship of sentiment, based neither upon control nor command but which in our democratic society expresses on the one hand the nation's pride in and respect for its armed forces and, on the other, the willing subordination of members of those forces to the civil power.[30]

Finally, and for completeness, it is noted that s 119 of the *Constitution* stipulates that the Commonwealth has an obligation to protect the states (and territories) against invasion and, if requested, against domestic violence: 'The Commonwealth shall protect every State against invasion, and on the application of the Executive Government of the State, against domestic violence.'

The first limb of s 119 is uncontentious, as this function for the ADF is entirely consistent with other authorisations in the *Constitution* as well as a long line of legal reasoning. However, the second limb is an area where the potential for dispute can arise and, as will be shown below, is precisely the situation envisaged by the activation of the regime provided for in pt IIIAAA of the Defence Act. However, pt IIIAAA goes further than s 119, as it also permits the Commonwealth to protect its own interests without any request from a state. In the broadened understanding of national security that currently exists in Australia, it is quite conceivable that the Commonwealth could deploy the ADF without waiting for a state request.

The impact of judicial decisions

Since Federation, there have been numerous judicial decisions which have considered the extent of the defence power under the *Constitution* and/or the use of the ADF within Australia. A number of these cases have directly addressed the reach of the defence power under s 51(vi),[31] while others have had a more peripheral connection with the military.[32] Brief examination of a few selected cases thus repays attention.

In terms of cases which have had a direct impact on the constitutional validity of action purportedly supported by the defence power, in *Farey v Burvett*[33] the High Court found that the use of the defence power to support the fixing of the price of bread at a time when there was a global conflict occurring (the First World War) was permitted. Similarly, during the Second World War the High Court held that the defence power could legitimately be used as the basis for the constitutional validity of the *Income Tax (Wartime Arrangements) Act 1942* (Cth).[34] However, in *Australian Communist Party v Commonwealth*[35] the High Court did not consider that the reach of s 51(vi) was sufficient to provide a basis for upholding the constitutional validity of a law which sought to make the existence of the Communist Party in Australia illegal.

While it is beyond the immediate scope of this article, analysis of the meaning and extent of power provided by the two limbs of s 51(vi) was recently considered by the High Court in *Thomas v Mowbray*.[36] In that decision, the Court upheld the use of the defence power to underpin the control order regime which is contained in the Criminal Code (Commonwealth)[37] despite there being no involvement of ADF personnel in the particular circumstances of the case. In this sense, the second limb of s 51(vi) was found to extend to 'forces' other than those which are part of the ADF (for example, the Australian Federal Police).

Turning to cases which have affected the ADF and its operations, one of the most celebrated cases in recent times arose when the vessel *MV Tampa*, having rescued over 400 persons who were in distress at sea, sought to enter Australian waters at Christmas Island in August 2001. The government decided that it would not permit *MV Tampa* to offload the 'rescuees'[38] at Christmas Island, and proceedings were commenced in the Federal Court, in effect, to seek an injunction against the stated intention of the government to remove the rescuees from the *MV Tampa* and take them to Nauru as part of the 'Pacific solution'.[39] The injunction was successful at trial but was immediately and successfully appealed to the Full Court of the Federal Court by the government.[40] An application for special leave to appeal the Full Court's ruling in the High Court was discontinued, as by the time the application was heard on 27 November 2001 the circumstances had so altered that there was no basis for proceeding with the case.[41]

In *A v Hayden [No 2]*[42] the involvement of the ADF was limited to providing assistance to assess how a training activity being undertaken by the Australian Secret Intelligence Service was conducted. There was no suggestion that the ADF was deeply involved in the planning of or preparation for the activity itself and the one Army member present while the training activity occurred was nowhere near the main scene of action. The main learning point for all involved with this case, including the military, was that activities carried out in Australia must comply with relevant Australian law. Gibbs CJ stated:

> It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.[43]

The overall theme which can be drawn from analysis of the cases mentioned above is that some latitude will be permitted by the courts when determining the width of the defence power at times when Australia is engaged in a conflict, but this latitude will not be extended in all circumstances. Further, the cases demonstrate that compliance with the law is, and remains, a fundamental requirement of any activity involving the military. It is in this context that we will now consider the specific legislative framework for the deployment of the ADF in Australia.

The legislative framework — *Defence Act 1903*

Immediately prior to the amendments put in place as a precursor to the 2000 Sydney Olympic Games, the *Defence Act 1903* contained four short and administratively focused sections relating to 'calling out the forces' by proclamation of the Governor-General (pt III, div 4). Section 50D dealt with the procedures for calling out the emergency forces for continuous full-time service in time of 'war or defence emergency'. Section 50E dealt with calling out the reserve forces for continuous full-time service in time of war and defence emergency and, in s 50F, in times other than war or defence emergency where, nevertheless, it was considered 'desirable' by the Governor-General for the 'defence of Australia'. Section 50G then set out the associated reporting requirements — essentially, that the 'reasons for the making of the Proclamation' were to be reported to both Houses of Parliament.[44]

The immediate precursor to pt IIIAAA was s 51, 'Protection of States from domestic violence':

> **51 Protection of States from domestic violence**
>
> Where the Governor of a State has proclaimed that domestic violence exists therein, the Governor General, upon the application of the Executive Government of the State, may, by proclamation, declare that domestic violence exists in that State, and may call out the Permanent Forces and in the event of their numbers being insufficient may also call out such of the Emergency Forces and the Reserve Forces as may be necessary for the protection of that State, and the services of the Forces so called out may be utilized accordingly for the protection of that State against domestic violence:
>
> Provided always that the Emergency Forces or the Reserve Forces shall not be called out or utilized in connexion with an industrial dispute.[45]

It is notable that the threshold requirements for a s 51 call-out were 'domestic violence' and, in line with s 119 of the *Constitution*, the request of the relevant state. There was no allowance for a Commonwealth interest to act as a trigger or for the Commonwealth to take action regardless of a state request. That such options still persisted within the broader executive power is of little doubt; however, the next set of changes specifically brought these two matters within a statutory scheme.

The 2000 Sydney Olympic Games amendments

The new pt IIIAAA regime for call-out replaced s 51 with 27 new sections (ss 51–51Y).[46] The focus of these amendments was clearly upon land-based counterterrorism and hostage recovery situations: As the Explanatory Memorandum noted:

> This Bill will add new provisions to the *Defence Act 1903* to enable the utilisation of the Defence Force in assisting the civilian authorities to protect Commonwealth interests and States and Territories against domestic violence …
>
> The Bill provides for the specific powers that the Defence Force has under the new scheme. There are powers relating to the recapture of premises and in connection therewith, freeing hostages, detaining persons, evacuating persons, searching and seizing any dangerous things. There are also the general security area powers and designated area powers.[47]

This purpose was clearly reinforced in the second reading speech:

> The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 proposes to amend the *Defence Act* 1903 to bring the framework for call-out of the Defence Force in law enforcement emergencies up to date. I believe the bill provides a sound basis for the use of the Defence Force as a last resort in resolving such emergencies …
>
> The existing legislation is not responsive to contemporary needs. Rather, it reflects its 18th century English origins, which focused on riot control — at a time before modern police services were developed …
>
> The present legislative framework does not provide sufficient accountability to parliament. Nor does the legislation provide members of the Defence Force with appropriate authority to perform the tasks they may be required to carry out, either in an assault upon terrorists or in a related public safety emergency. Furthermore, there needs to be provision both for safeguards in the exercise of such authority and for accountability for the actions of individuals as well as government …
>
> Call-out will occur only if the Prime Minister, Minister for Defence and Attorney-General agree that a state or territory is not, or is unlikely to be, able to protect the Commonwealth or itself against the domestic violence. In making or revoking an order, the Governor-General acts on the advice of Executive Council or, for reasons of urgency, he or she is to act with the advice of an authorising minister. The Chief of the Defence Force is to use the Defence Force for the purpose set out in the order. Subject to directions from the minister, the Chief of the Defence Force will determine the composition of the force to be deployed and will exercise command of it.[48]

This significant suite of amendments thus incorporated powers and authorisations in relation to recapturing buildings, recovering hostages and enforcing General Security Areas (GSAs) and Designated Areas (DAs) within GSAs. It also provided for associated matters such as use of reasonable and necessary force, seizure of dangerous objects, and reporting to Parliament. Section 51Y also purported to maintain the executive power in parallel with, or behind, the statutory pt IIIAAA scheme:

> **51Y Part additional to other Defence Force utilisation and powers**
>
> This Part does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded.

Quite apart from the detail as to substantive powers and authorisations, this new statutory scheme included two vital and significant procedural innovations to the call-out regime. The first was to identify — in greater detail — the appropriate triggers for the scheme; the second was to delineate a clear procedure for enlivening the scheme.

The triggers for the scheme were identified in ss 51A, 51B and 51C. Each requires some explanation. Section 51A concerned 'utilising the Defence Force to protect Commonwealth interests against domestic violence' and provided (in part):

> *Conditions for making of order*
>
> (1) Subsection (2) applies if the authorising Ministers are satisfied that:
>
> (a) domestic violence is occurring or is likely to occur in Australia; and
>
> (b) if the domestic violence is occurring or is likely to occur in a State or self-governing Territory — the State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence; and
>
> (c) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the domestic violence; and
>
> (d) either Division 2 or Division 3, or both, and Division 4 should apply in relation to the order.
>
> …
>
> *Involvement of State or Territory*
>
> (3) If paragraph (1)(b) applies:
>
> (a) the Governor-General may make the order whether or not the Government of the State or the self-governing Territory requests the making of the order; and
>
> (b) if the Government of the State or the self-governing Territory does not request the making of the order, an authorising Minister must, subject to subsection (3A), consult that Government about the making of the order before the Governor-General makes it.
>
> *Exception to paragraph (3)(b)*
>
> (3A) However, paragraph (3)(b) does not apply if the Governor-General is satisfied that, for reasons of urgency, it is impracticable to comply with the requirements of that paragraph.

The definition of 'domestic violence' in s 51 was and remains as follows: 'domestic violence has the same meaning as in section 119 of the *Constitution*'. There was no definition of 'Commonwealth interest'.

Sections 51B and 51C concerned utilising the Defence Force to protect, respectively, one or more of the states or the self-governing territories from domestic violence. Section 51B is indicative:

> *Conditions for making of order*
>
> (1) Subsection (2) applies if a State Government applies to the Commonwealth Government to protect the State against domestic violence that is occurring or is likely to occur in the State and the authorising Ministers are satisfied that:
>
> (a) the State is not, or is unlikely to be, able to protect itself against the domestic violence; and
>
> (b) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the State against the domestic violence; and
>
> (c) either Division 2 or Division 3, or both, and Division 4 should apply in relation to the order.
>
> …
>
> *Revocation of order*
>
> (5) If:
>
> (a) the State Government withdraws its application to the Commonwealth Government; or
>
> (b) the authorising Ministers cease to be satisfied as mentioned in subsection (1);
>
> the Governor-General must revoke the order.

Thus a multi-trigger scheme was brought into effect. The first trigger — s 51A — concerns domestic violence that affects a Commonwealth interest and provides the Commonwealth with the ability to act under pt IIIAAA without, if necessary, the consent or request of the state or territory in which the domestic violence threatening that Commonwealth interest is occurring. The second trigger — ss 51B and 51C — concerns domestic violence where there is no Commonwealth interest at play and thus requires the application of the state or self-governing territory prior to the authorising Ministers making the necessary decision to invoke pt IIIAAA. As will be noted below, the amendments brought into place just prior to the 2006 Melbourne Commonwealth Games have broadened the scope of these triggers but still rely upon these two seminal concepts — domestic violence and Commonwealth interests — as either the sole or the combined trigger for the expanded scheme.

The process for call-out implemented in 2000 is expressed primarily in the requirements for the call-out 'order' as anticipated for each of the ss 51A–51C call-outs. For example, for a s 51A call-out, the content of the order was statutorily set in s 51A(4) as follows:

> (4) The order:
>
> (a) must state that it is made under this section; and
>
> (b) must specify the State or Territory in which the domestic violence is occurring or likely to occur, the Commonwealth interests and the domestic violence; and
>
> (c) must state that Division 2 [power to recapture etc] or Division 3 [GSAs and DAs etc], or both, and Division 4 [provisions common to Divisions 2 and 3, such as reasonable and necessary use of force] apply in relation to the order; and
>
> (d) must state that the order comes into force when it is made and that, unless it is revoked earlier, it ceases to be in force after a specified period (which must not be more than 20 days).

However, the requirement to seek further ministerial authorisations for specific acts, once the call-out was underway, was also built into the scheme. For example, s 51I, dealing with

special powers to recapture premises, still required additional ministerial authorisation for certain actions:

> *Ministerial authorization*
>
> (2) However, the member must not recapture the subject premises etc., or do any of the things mentioned in paragraphs (1)(b) or (c) in connection with any recapture of the subject premises etc., unless an authorising Minister has in writing authorised the recapture.
>
> *Exception*
>
> (3) Subsection (2) does not apply if the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists.

Additionally, it was the role of an authorising Minister to declare a GSA (s 51K) and, if necessary, a DA (s 51Q) and for those declarations to be published appropriately. Requirements for publication of orders and reporting to Parliament were also specifically addressed.[49]

Further amendments — the 2006 Melbourne Commonwealth Games

As noted in the Explanatory Memorandum for the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005, 'the amendments give effect to Government initiatives to improve responsiveness of the Australian Defence Force (ADF) to domestic security incidents in the current threat environment'.[50] Indeed, as with the Sydney Olympics, the imminent presence in Australia of many heads of state, heads of government, VIPs, athletes, and others provided the impetus to update and radically broaden the scope of pt IIIAAA:

> The current legislative basis for ADF operations in support of domestic security does not reflect the evolving threat environment nor does it reflect recent initiatives such as the March 2005 establishment of the Joint Offshore Protection Command …
>
> The bill will amend current call-out provisions for the ADF in domestic security operations, replacing parts of the legislation which are rigid and complex and inhibit the flexibility and speed with which the ADF could respond should Australia face a terrorist incident in limited or no notice circumstances. Further, the amendments address the lack of statutory legal authority to use reasonable and necessary force in ADF operations involving aviation and maritime security and the protection of designated critical infrastructure. The amendments to Part IIIAAA will clarify accountabilities, facilitate the effective use of ADF capabilities and ensure that there are adequate legal protections for ADF personnel when conducting domestic security operations.[51]

This updated 2006 pt IIIAAA scheme thus addressed a range of shortfalls and problems identified in the 2000 scheme and implemented a series of fixes.[52] These fixes are broadly categorisable into three types of amendments: process; scope; and protections.

Procedurally, the amendments introduced new call-out initiation options on top of the 'standard' call-out process involving advice to, and then the issuing of the call-out order by, the Governor-General. The first of these new procedures was the 'expedited call-out' whereby, in an emergency situation (as would likely be the case in many call-out situations), a short-form, and even unwritten, call-out order can be initiated by the Prime Minister or by two relevant Ministers through direct contact with the CDF:

> The expedited call-out arrangements will enable the Prime Minister to make an order, that the Governor-General is usually empowered to make, in the event that a sudden and extraordinary emergency makes it impractical for a call-out order to be made under existing sections of the Part. In the event the Prime Minister cannot be contacted, call-out can be authorised by the two other authorising Ministers. Should either of the remaining authorising Ministers be non-contactable, an authorising Minister in consultation with the Deputy Prime Minister, the Minister for Foreign Affairs or the Treasurer can authorise call-out.[53]

This new call-out mechanism is provided for in s 51CA and covers all domains of call-out:

> **51CA Expedited call out**
>
> *Expedited call out by the Prime Minister*
>
> (1) The Prime Minister may make an order of a kind that the Governor-General is empowered to make under section 51A, 51AA, 51AB, 51B or 51C if the Prime Minister is satisfied that:
>
> (a) because a sudden and extraordinary emergency exists, it is not practicable for an order to be made under that section; and
>
> (b) the circumstances referred to in subsection 51A(1), 51AA(1), 51AB(1), 51B(1) or 51C(1) (as the case requires) exist …

Additionally, s 51CA(2) and (3) provide that, if the Prime Minister is 'unable to be contacted for the purposes of considering whether to make, and making, an order under subsection (1) of this section', the other two 'authorising Ministers' (that is, the Minister for Defence and the Attorney-General) may make the order; if either the Minister for Defence or the Attorney-General is unavailable then the order can be made by the remaining authorising Minister plus one of the Deputy Prime Minister, the Minister for Foreign Affairs or the Treasurer. Further, the order need not be in writing (s 51CA(4)) initially, but a signed and witnessed record of the order must be made by both the giver(s) (the Prime Minister or the two Ministers) and the receiver (CDF) and exchanged between them, with the Prime Minister or Ministers also providing a copy to the Governor-General.

The second new call-out procedure has come to be known in some quarters as a 'contingent call-out', but it is perhaps more accurately labelled a 'specified circumstances call-out'. Section 51AB provides for situations in which it is prudent to have a dormant call-out order in place, where the meeting of certain pre-specified criteria — effectively, triggering conditions or events — will automatically bring the call-out into effect:

> **51AB Order about utilising Defence Force to protect Commonwealth interests against violence if specified circumstances arise**
>
> *Conditions for making of order*
>
> (1) Subsection (2) applies if the authorising Ministers are satisfied that:
>
> (a) if specified circumstances were to arise:
>
> (i) domestic violence would occur or would be likely to occur in Australia that would, or would be likely to, affect Commonwealth interests; or
>
> (ii) there would be, or it is likely there would be, a threat in the Australian offshore area to Commonwealth interests (whether in that area or elsewhere);
>
> and, for reasons of urgency, it would be impracticable for the Governor-General to make an order under section 51A or 51AA (as the case requires); and
>
> (b) if subparagraph (a)(i) applies—the domestic violence would occur or would be likely to occur in a State or self-governing Territory that would not be, or is unlikely to be, able to protect the Commonwealth interests against the domestic violence; and
>
> (c) the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the violence, or the threat in the Australian offshore area, if the specified circumstances arise; and
>
> (d) Divisions 3B and 4 should apply in relation to the order.

Significantly, however, this form of contingent call-out is only available for div 3B threats (div 4 being matters common across all divisions) — that is, only in relation to 'powers relating to aircraft'. This scheme was thus designed to allow for the 11 September 2001 scenario of aircraft being used as a weapon through crashing — for example, crashing into a VIP-heavy location such as the Melbourne Cricket Ground during the Commonwealth Games opening or closing ceremonies or the meetings of significant international leader forums such as APEC Economic Leaders Week. Effectively, such a contingent call-out order is a signed but dormant call-out order which specifies a series or set of circumstances — indicia or trigger events — which, should they occur, automatically bring the call-out order into effect and thus, from that point forward, cover subsequent actions (which may include an aircraft shoot-down) under the aegis of pt IIIAAA.

The second category of amendments related to the scope of domain and threat types covered by the pt IIIAAA regime. Whereas the 2000 scheme was essentially focused upon land-based threats and hostage recovery operations, the 2006 scheme expanded coverage into three new areas of threat concern: the 'offshore area' (div 3A); the issue of aircraft threats noted above (div 3B); and 'designated critical infrastructure' (div 2A).

The 'offshore area' is defined in s 51:

> Australian offshore area means:
>
> (a) Australian waters [which is also specifically defined to exclude the internal waters of states and self-governing territories]; or
>
> (b) the exclusive economic zone of Australia (including its external Territories); or
>
> (c) the sea over the continental shelf of Australia (including its external Territories); or
>
> (d) an area prescribed by the regulations;
>
> and includes the airspace over an area covered by paragraph (a), (b), (c) or (d).

This is a significant expansion in terms of the geographic area in which pt IIIAAA may be used, but it allows for a new s 51AA 'Order about utilising Defence Force in the offshore area etc to protect Commonwealth interests' to be made in relation to (for example) structures and installations over which Australia may properly exercise jurisdiction in its exclusive economic zone and over its continental shelf and extended continental shelf in accordance with the *United Nations Convention on the Law of the Sea* 1982.[54] Importantly, this form of call-out relies solely upon a Commonwealth interest trigger, as there are no issues of domestic violence affecting a state which can, theoretically, arise in this area, which is subject to Commonwealth jurisdiction (although certain aspects of state legislation are extended into Australia's exclusive economic zone by virtue of the *Crimes at Sea Act 2000* (Cth)).[55]

In addition to parallel powers analogous to those available on land — such as to recover vessels and hostages, declare GSAs and DAs, conduct search and seizure etcetera — ss 51SO and 51SP provide additional offshore area-specific powers to require people to answer questions or produce documents (along with a waiver and protection as to the normal rule on self-incrimination) and to direct people to operate a 'facility, vessel or aircraft or machinery or equipment'. Importantly, however, s 51T, relating to reasonable and necessary use of force, specifically indicates that the normal rule — 'use such force against persons and things as is reasonable and necessary in the circumstances' (s 51T(1)) while not doing 'anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member)'

(s 51T(2)(a)) — does not apply to these special powers (s 51T(1A)). That is, quite appropriately, force cannot be used to ensure that a person answers questions or produces documents, or operates machinery (and so on), under an offshore area call-out. However, conversely, s 51T(2B) also adjusts the standard rule in its application over two of the special s 51SE powers under an offshore area call-out, being:

> **51SE Special powers of members of the Defence Force**
>
> *Special powers*
>
> (1) Subject to this section, a member of the Defence Force who is being utilised in accordance with section 51D may, under the command of the Chief of the Defence Force, do any one or more of the following:
>
> (a) take any one or more of the following actions:
>
> (i) take measures (including the use of force) against a vessel or an aircraft, up to and including destroying the vessel or aircraft;
>
> (ii) give an order relating to the taking of such measures …

In relation to these two offshore powers, the applicable rule on use of reasonable and necessary force is expressed to include a defence against causing death or grievous bodily harm where this is necessary to give effect to either an order relating to s 51SE(1)(a)(i) or (ii) — as above — or to a measure against aircraft under div 3B:

> **51T Use of reasonable and necessary force**
>
> …
>
> (2B) Despite subsection (1), in exercising powers under subparagraph 51SE(1)(a)(i) or (ii) or Division 3B, a member of the Defence Force must not, in using force against a person or thing, do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that:
>
> (a) doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member); or
>
> (b) doing that thing is necessary to protect designated critical infrastructure against a threat of damage or disruption to its operation; or
>
> (c) doing that thing is necessary and reasonable to give effect to the order under which, or under the authority of which, the member is acting.

In relation to aircraft threats, the brief but powerful new div 3B permits, inter alia, the 'taking of measures' against aircraft, including shooting that aircraft down, along with specific protections such as an emphasised requirement for a ministerial authorisation, where possible, that has specifically considered the 'reasonableness and necessity' of the measure (s 51ST(4)–(8)) and provides a specifically tailored superior orders defence (s 51ST(2)–(3)) in addition to the s 51WB superior orders defence applicable across the entirety of pt IIIAAA. Further, as with a very narrow set of potential orders in the offshore area (s 51SE(1)(a)(i) and (ii), noted above), the manner in which the reasonableness and necessity of a use of force is assessed is slightly altered for measures taken under this division. As noted above, s 51T(2B) applies across all of div 3B, thus providing that reasonable and necessary force may in some circumstances include force that is likely to cause death or grievous bodily harm, even where there is no imminent risk to life, so long as 'doing that thing is necessary and reasonable to give effect to the order under which, or under the authority of which, the member is acting'. Arguably, however, the authorisations in s 51T(2B)(c) in relation to giving effect to these orders remain linked to the broader concept of self-defence and imminent harm (see below).

The third new domain brought within pt IIIAAA by the 2006 amendments is designated critical infrastructure (DCI). This regime only applies where a preliminary declaration that an object or facility is DCI has been appropriately made:

> **51CB Declaration of designated critical infrastructure**
>
> (1) The authorising Ministers may, in writing, declare that particular infrastructure, or a part of particular infrastructure, in Australia or in the Australian offshore area is designated critical infrastructure.
>
> (2) However, the authorising Ministers may do so only if they believe on reasonable grounds that:
>
> (a) there is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; and
>
> (b) the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons …

If such a declaration has been made, the powers under div 2A may be authorised to protect that DCI. As per s 51IB, these powers relate to actions to 'prevent, or put an end to, damage or disruption to the operation of the designated critical infrastructure' and/or to 'prevent, or put an end to, acts of violence' in relation to that DCI as well as associated powers for detaining suspected perpetrators, control of movement, evacuation, search and so on. Section 51T(2A) and s 51T(2B)(c) then provide that a use of force likely to cause death or grievous bodily harm may still constitute reasonable and necessary force in two additional situations. The first is where it is necessary to 'protect, against the threat concerned, the designated critical infrastructure in respect of which the powers are being exercised'. The second additional authorisation applies where the relevant call-out order relates to measures against aircraft under div 3B or to the specific s 51SE(1)(a)(i) or (ii) powers available in the offshore area (to order or take measures including use of force against a vessel or aircraft), where 'doing that thing is necessary to protect designated critical infrastructure [if any such is so designated] against a threat of damage or disruption to its operation'.

The third category of 2006 amendments relates to protections afforded to ADF members who engage in conduct while under pt IIIAAA orders. The nature of these protections is not one that should raise concerns about immunity or impunity; indeed, these amendments are solely about clarifying the applicable law against which ADF conduct under pt IIIAAA orders is to be assessed. Division 4A, 'Applicable criminal law', comprises two sections. The first, s 51WA, provides inter alia that the relevant law to be applied when assessing ADF members' conduct under pt IIIAAA is the 'substantive criminal law of the Jervis Bay Territory, as in force from time to time' (a routine legal arrangement for the ADF, including within the *Defence Force Discipline Act 1982* (Cth)) and that it is the Commonwealth Director of Public Prosecutions who exercises these functions exclusive of state and territory Directors of Public Prosecutions. This does not, however, remove from state or territory police the jurisdiction to investigate possible offences: as the note to s 51WA makes clear, '[i]t is not intended that this section or Act restrict or limit the power of State or Territory police to investigate any criminal acts done, or purported to be done, by Defence Force members when operating under Part IIIAAA of this Act'. The second section in div 4A provides a clear statement as to the availability of an additional defence of 'superior orders' in circumstances where the following cumulative conditions are met:

> **51WB Defence of superior orders in certain circumstances**
>
> …
>
> (2) It is a defence to a criminal act done, or purported to be done, by a member of the Defence Force under this Part that:
>
> (a) the criminal act was done by the member under an order of a superior; and

(b) the member was under a legal obligation to obey the order; and

(c) the order was not manifestly unlawful; and

(d) the member had no reason to believe that circumstances had changed in a material respect since the order was given; and

(e) the member had no reason to believe that the order was based on a mistake as to a material fact; and

(f) the action taken was reasonable and necessary to give effect to the order.

Remaining challenges?

The pt IIIAAA call-out regime has yet to be activated, although 'contingent call-out' orders have been in place — but have remained dormant — on several occasions such as during the 2006 Melbourne Commonwealth Games and for a number of high-level international political leader events in Australia. Consequently, while the regime has been exercised, it has not yet been utilised.

However, there are a number of ambiguities or challenges that remain afoot in relation to this otherwise comprehensive statutory scheme. As noted previously, the first challenge is the degree to which the s 51Y preservation of the executive power both behind and in parallel with the statutory pt IIIAAA scheme remains extant. From an operational perspective, it would be useful if at least those components of the executive power which cover preliminary acts, or acts precedent, remained available. For example, a dormant contingent call-out in relation to an air threat is to a large extent preconditioned upon the presence of fighter aircraft already in the air and available to enforce the relevant authorisations as soon as the triggers are met. To some extent, the authority for that presence over a meeting venue in a major city will need to rely upon the executive power. Thus, whatever may ultimately be said about whether s 51Y is fully effective, it is vital that the executive power remains available on either side of a pt IIIAAA call-out in order to manage both preconditional requirements and, if necessary, post-call-out consequences.

The second continuing challenge is locating the authorisations for use of lethal force contained within pt IIIAAA within the broader legislative context of self-defence as the only defence that is otherwise available for use of lethal force in such situations.[56] The pt IIIAAA scheme for the most part reflects orthodoxy[57] — s 51T(2) asserts that force likely to cause death or grievous bodily harm is generally limited to situations of imminent threat of serious harm or death to the ADF member or others.[58] However, in relation to destroying certain vessels or aircraft in the offshore area, or certain aircraft under a div 3B measures against aircraft call-out, or to protecting DCI (either directly under div 2A or as an adjunct to an offshore (div 3A) or aircraft measures (div 3B) call-out), the grant of authority appears wider. That is to say, in the narrow circumstances anticipated in s 51T(2A) for DCI or s 51S(2B)(b) and (c) in relation to DCI, and giving effect to an offshore or aircraft measures call-out order, the usual overt link required between imminent threat of death or serious injury and the authority to use lethal force in response appears broken. However, it is also arguable that each of these situations is in fact actually a subspecies of self-defence in that each such event, if left unmitigated, inherently presages inevitable — if not always imminent — death or grievous bodily harm to others. The maintenance of this perhaps attenuated but nevertheless clear link between these authorisations and the defence of self-defence is perhaps most evident in the second reading speech for the 2006 amendments. In relation to the DCI scheme, for example, the Minister specifically observed that:

This measure acknowledges the increasingly close interrelationships between infrastructure, critical services and facilities; and that the destruction or disabling of a system or structure is likely to have

> significant flow-on effects that may result in loss of life. For example, the potential loss of power to a hospital, the disruption of communications or the interruption of vital utilities … The authorising Ministers must be satisfied that an attack on infrastructure will result in the loss of life before directing the CDF to utilise the ADF to protect infrastructure.
>
> The potential use of force by the ADF in such circumstances would be informed by a process that identifies the importance of the infrastructure, on its own and within a system, and whether disruption to its operation would endanger the life of a person. That process would be underpinned by a reasonable belief that there is a threat to specific infrastructure and the disruption of that infrastructure would result in potential loss of life.[59]

Similarly, in the Explanatory Memorandum:

> 77. A primary concern is the authority to use force to protect uninhabited infrastructure, where the loss of that infrastructure is likely to have cascade effects directly resulting in serious injury or the loss of life. Within the current Commonwealth, State and Territory criminal law frameworks, force can only be used if an attack against infrastructure is likely to cause immediate death or serious injury to persons (such as the inhabitants of infrastructure targeted for attack).
>
> 78. No provisions currently exist that allow the use [of] lethal force where this is necessary to protect uninhabited infrastructure from attack, even if the consequences of that attack would have secondary effects resulting in the death or serious injury to others. The increasingly close interrelationships between infrastructure, critical services and facilities means that the destruction or disabling of a system or structure could have significant flow-on effects that may result in loss of life or serious injury …
>
> 79. It is proposed that the Attorney-General, the Minister for Defence and the Prime Minister will be the authorising Ministers for the purposes of 51CB. The authorising Ministers must be satisfied that an attack on infrastructure will result in the loss of life or serious injury before directing the CDF to utilise the ADF to protect infrastructure. Once Ministers have directed CDF to utilise the ADF, the ADF will have specific powers to act to protect infrastructure.[60]

Consequently, the most problematic remaining issue is in relation to a use of lethal force under the aegis of s 51T(2B) as concerns an order to shoot at or into a vessel or to shoot down an aircraft under an offshore call-out; or to take lethal measures against an aircraft under a div 3B call-out. However, the Explanatory Memorandum for the 2006 Bill makes clear in relation to s 51SE that:

> The powers include the power to destroy an aircraft or vessel. This might be required where the vessel or aircraft was heading for a facility offshore or a city of facility onshore.[61]

Similarly, for an aircraft in a div 3B situation:

> 127. In essence, the terms of proposed 51ST are intended to ensure that where ADF members in good faith comply with their orders to take measures against aircraft, or to order other members of the ADF to take such measures, then there is significant statutory protection for those measures. Such statutory protection will only be withdrawn, in accordance with 51ST(2) and (3), where there are clear reasons that were or should have been known to the ADF member why measures should not be taken against an aircraft. For instance, should an ADF member who is specifically positioned to deal with a potential air threat, receive an order to engage an aircraft through the expected channels, that is consistent with the rules of engagement under which he or she is operating, and there are no clear reasons for the order to be questioned in the circumstances, then that ADF member will be able to comply with that order with confidence that they are acting with lawful authority. Likewise, should an ADF member who is positioned to give orders to other members to take measures against an aircraft, apply the facts known to them to a set of objective criteria defining an aerial threat and conclude on reasonable grounds that the criteria have been met, then that member will have confidence that they are acting within their lawful authority by giving an order to engage the aircraft.[62]

The nexus to threat of serious harm or death as a consequence of the vessel or aircraft achieving its objective is perhaps unstated but nevertheless clear — albeit this appears to be a decision for the relevant Minister upon which the 'shooter' is entitled to rely so long as 'the member has no reason to believe that circumstances have changed in a material way since

the superior order was given'.[63] However, it is equally clear that the justification of 'lawful authority'[64] also infuses the structure and logic of this particularised authorisation for use of lethal force as potentially 'reasonable and necessary' outside of the traditionally narrower parameters of immediate self-defence.

Finally, there are a number of areas where future clarification may be useful. For example, in the context of terrorist tactics that involve taking hostages for the purpose of killing rather than extracting concessions, closer consideration could perhaps be given to the need for an authorisation to use lethal force in self-defence of the hostages where, as a matter of terrorist tactics, the death of those hostages is considered inevitable even if not necessarily immediate. This would allow for a lethal response at an opportune time before the actual manifestation of an imminent — but seemingly inevitable — threat of death to the hostages. This issue was recently ventilated at the Inquest Into the Deaths Arising from the Lindt Cafe Siege, albeit in relation to a police sniper.[65] Similarly, the relationship between a possible act of terrorism and a 'Commonwealth interest' could perhaps be clarified, as the existence of such an interest does generate the possibility of a Commonwealth response under pt IIIAAA even if it is against the wishes of the relevant state.[66]

Conclusion

The comprehensive nature of the scheme for Commonwealth responses to domestic violence — whether via its implications for a Commonwealth interest or via the request of a state or self-governing territory — is clearly evident in the scope and detail of pt IIIAAA of the *Defence Act 1903*. The desire to place the types of activities traditionally available to the executive under the relatively opaque Crown prerogative for internal security upon a firmer and more transparent statutory basis is clearly a victory for the rule of law. However, this case study is equally indicative of a number of challenges that can arise when such endeavours are pursued.

First, the relationship between the statutory scheme and its parallel, subsisting, or foundational executive power — most particularly in terms of the preservation or extinguishment debate — is, to some extent, hostage to the vagaries of constitutional jurisprudence in unrelated fields. This is unavoidable, but the implications for the pt IIIAAA s 51Y preservation of the executive power should be vigilantly reassessed after each new High Court or Full Court of the Federal Court case in which this relationship is reviewed.

Secondly, the importance of coherence and consistency between the essential elements of the regime and correlative authorisations elsewhere in legislation — particularly in relation to such sensitive and fundamental authorisations as the use of force, especially lethal force, by state agents — can never be understated. In terms of pt IIIAAA, for example, this is perhaps best evidenced by lingering confusion as to the precise justification for use of lethal force outside situations of immediate self-defence. Perhaps a more robust approach to resolving the operational requirement for greater clarity around this issue might be, as we have suggested, to create a more precise statutory permission within pt IIIAAA for use of lethal force in self-defence when the requisite harm is not immediate but, rather, is downstream and inevitable. Indeed, this appears to be the reasoning evident in the example for DCI concerning the loss of power or such services to a hospital, which was given by the Minister in the second reading speech for the 2006 amendments.

Finally, because so much hangs upon it, it may be worthwhile for the Commonwealth and the states to agree on some broad parameters for when an incident of apparent terrorism might constitute a Commonwealth interest. All of these issues, however, are matters of refinement and progressive development rather than wholesale problems with the scheme. It is probable, of course, that further challenges to the scheme as currently enshrined in statute

may present if a call-out is ever activated and the subsequent report to Parliament is subject to debate. However, as it currently stands, the pt IIIAAA scheme demonstrates a well-balanced, workable and accountable approach to regulation of that most critical challenge for democratic governance — when to authorise the armed forces to use force in support of a civil authority faced with a manifest threat to internal security.

Endnotes

1 While the term 'Australian Defence Force' (ADF) has been in wide usage since at least the mid-1970s, the term is one that only achieved legislative authority in 2016 with the entry into force of the changes to the composition of the ADF that will occur from 1 July 2016 pursuant to the *Defence Legislation Amendment (First Principles) Act 2015* (Cth). These changes will, inter alia, result in the statutory creation of the Australian Defence Force, made up of three 'arms' — namely, the Royal Australian Navy, the Australian Army and the Royal Australian Air Force — under the *Defence Act 1903* (Cth). The *Naval Defence Act 1910* (Cth) and the *Air Force Act 1923* (Cth) will be repealed from 1 July 2016.

2 The *Commonwealth of Australia Constitution Act 1900* (the *Constitution*) is, in fact, an Act passed by the British Parliament in 1900 which entered into force on 1 January 1901 and provided the statutory basis for the creation of the Commonwealth of Australia. See *Australia's Constitution: With Overview and Notes by the Australian Government Solicitor* (Parliamentary Education Office and Australian Government Solicitor, 7th ed, 2010) vii–viii.

3 See generally Cameron Moore, 'The ADF and Internal Security — Some Old Issues with New Relevance' (2005) 28(2) *UNSW Law Journal* 523–537.

4 See the *Constitution* s 61.

5 Amendments were made to the *Defence Act 1903* by the insertion of pt IIIAAA via the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth). Detailed examination of the provisions of pt IIIAAA will be provided later in this article.

6 See *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth), which will be discussed in detail later in this article.

7 *Defence Instruction (General) OPS 05–1 Defence Assistance to the Civil Community* was the relevant authority for DACC until it was replaced in December 2012 with the *Defence Assistance to the Civil Community Manual* (DACC Manual): see Auditor-General, *Emergency Defence Assistance to the Civil Community* (Audit Report No 24, Australian National Audit Office, 2014) 12 <https://www.anao.gov.au/sites/g/files/net616/f/AuditReport_2013-2014_24.pdf>.

8 *Defence Instruction (General) OPS 01–1 Defence Force Aid to the Civil Power — Policy and Procedures* was the relevant authority for DFACP until it was completely revised and renamed in June 2010 and issued as *Defence Instruction (General) OPS 01–1 Defence Force Aid to the Civil Authority*.

9 See Auditor-General, above n 7, 30–2.

10 The legal basis for issuing Defence Instructions is currently provided in the Defence Act, s 9A, which permits the issuing of Defence Instructions (General) (DI(G)s) by the Secretary and Chief of the Defence Force (CDF) jointly, as well as Defence Instructions (Navy/Army/Air Force) issued by each of the three Service Chiefs in relation to matters which impact upon their respective service. However, as a result of changes to the Defence Act which will occur pursuant to the *Defence Legislation Amendment (First Principles) Act 2015*, from 1 July 2016 there will only be provision for the issuing of Defence Instructions (replacing the current DI(G)s) jointly by the Secretary and the CDF. Service Chiefs will no longer have the authority to issue Defence Instructions relevant to their service.

11 Explanatory Memorandum, Defence Legislation Amendment (First Principles) Bill 2015 (Cth) 43.

12 For example, as noted above, DACC is no longer covered by a Defence Instruction, as the applicable policy and procedures are provided in the 2012 DACC Manual. Although it was issued under the authority of the Secretary and the CDF, the DACC Manual does not have authorisation currently provided for under s 9A of the Defence Act, which may therefore present difficulties if adverse administrative or discipline action is contemplated for any failure to adhere to the requirements stipulated in the DACC Manual.

13 See Department of Defence, Australian Government, *2016 Defence White Paper* (25 February 2016), 72–3 <http://www.defence.gov.au/WhitePaper/>.

14 See, for example, Garth Cartledge, *The Soldier's Dilemma: When to Use Force in Australia* (AGPS Press, 1992); Michael Head, 'The Military Call-Out Legislation — Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273; Moore, above n 3; Michael Head, 'Australia's Expanded Military Call-Out Powers: Causes for Concern' (2006) 3 *University of New England Law Journal* 125.

15 See Douglas I Menzies QC, 'The Defence Power', in R Else-Mitchell (ed), *Essays on the Australian Constitution*, (Law Book Company of Australasia Pty Ltd, 1952) 132.

16 See E C S Wade and G Godfrey Phillips, *Constitutional Law* (Longmans, Green and Co, 5th ed, 1955), especially chs VIII and IX, for an outline of how the use of the military internally in the United Kingdom raised significant constitutional issues in that jurisdiction.

17 See *Re Tracey; Ex parte Ryan* [1989] HCA 12 (Brennan and Toohey JJ) 22.

18 The nature of the defence power — and, in particular, its existence as a 'purpose' power (and not a 'subject-matter' power) that waxes and wanes as Australia's defence needs alter — has long been the subject of constitutional law textbook analysis. See, for example, George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) 845–7.

19 In response to the security situation which exists in the world today, Australia has instituted a National Terrorism Threat Advisory System which has a current threat level of 'Probable': Australian Government, *National Terrorism Threat Advisory System* <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>.

20 Williams, Brennan and Lynch, above n 18, 366.

21 See Benjamin Tomasi, 'Variation on a Theme: CPCF v Minister for Immigration and Border Protection [2015] HCA 1' (2016) 39(2) *University of Western Australia Law Review* 426–33, especially 430–1.

22 See generally Deirdre McKeown and Roy Jordan, 'Parliamentary Involvement in Declaring War and Deploying Forces Overseas' (Background Note, Parliamentary Library, Parliament of Australia, 22 March 2010) <https://www.aph.gov.au/binaries/library/pubs/bn/pol/parliamentaryinvolvement.pdf>; note also the remarks regarding the historical use of Australia's military provided in *Re Tracey; Ex parte Ryan* [1989] HCA 12, where the High Court justices noted the external defence of Australia is the usual function of the armed forces.

23 The Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2015 has since lapsed: Parliament of Australia, *Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2015* <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s997>.

24 Elizabeth Ward, 'Call Out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-defence" Matters' (Research Paper No 8 1997–98, Parliamentary Library, Parliament of Australia, 1997).

25 Ibid 7.

26 [2014] HCA 23. Two separate but related cases were initiated by Mr Williams against the Commonwealth. For analysis of the earlier case in 2012, see Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253–81.

27 [2015] HCA 1.

28 Ibid 283.

29 For a comprehensive assessment of the nature and extent of the command power, see Sir Ninian Stephen, 'The Governor-General as Commander-in-Chief' (1984) 14 *Melbourne University Law Review* 563–71.

30 Ibid 571.

31 For example, *Farey v Burvett* [1916] HCA 36; *South Australia v Commonwealth* [1942] HCA 14; *Australian Communist Party v Commonwealth* [1951] HCA 5; *Re Tracey; Ex parte Ryan* [1989] HCA 12.

32 In this latter regard, examples can be found in numerous cases involving the use of the ADF in border protection operations where the central issue has not been the legality of the ADF deployment. See, for example, *A v Hayden [No 2]* [1984] HCA 67 and, as a recent example, *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1.

33 *Farey v Burvett* [1916] HCA 36.

34 See *South Australia v Commonwealth* [1942] HCA 14.

35 [1951] HCA 5.

36 *Thomas v Mowbray* [2007] HCA 33.

37 *Criminal Code Act 1995* (Cth) s 104.4.

38 The term 'rescuees' was used by North J in *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297, 17, to describe the persons taken onboard *MV Tampa*.

39 *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297.

40 *Ruddock v Vadarlis* [2001] FCA 1329.

41 *Vadarlis v Minister for Immigration and Multicultural Affairs M93/2001* [2001] HCATrans 625 (27 November 2001).

42 [1984] HCA 67.

43 Ibid 2 (Gibbs CJ).

44 *Defence Act 1903* as at 1 July 2000 (incorporating amendments up to Act No 179 of 1999): Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2004C03476>.

45 *Defence Act 1903* s 51.

46 *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth): Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2004A00711>.

47 Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (Cth) 2. Parliament of Australia, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000* <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1122>.

48 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000, Second Reading, 18409 (Dr Stone, Parliamentary Secretary to the Minister for the Environment and Heritage) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A"chamber%2Fhansardr%2F2000-06-28%2F0041%22>.

49 Section 51X.

50 Explanatory Memorandum, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005 (Cth) 2. Parliament of Australia, *Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005 (Cth)* <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A"legislation%2Fems%2Fs493_ems_23cc6b1e-cbb4-4e8d-afee-c66e15dc54c2%22>.

51 Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005, Second Reading, 25 (Senator Coonan, Minister for Communications, Information Technology and the Arts) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A"chamber%2Fhansards%2F2005-12-07%2F0053%22>.

52 *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth): Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2006A00003>.

53 Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005, Second Reading, 26 (Senator Coonan, Minister for Communications, Information Technology and the Arts).

54 Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

55 *Crimes at Sea Act 2000* (Cth), s 6 (application of Australian criminal law outside the adjacent area) and sch 1 (the 'Cooperative Scheme' for application of criminal law within the 'adjacent area', particularly ss 2–3): Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2014C00290>.

56 *Criminal Code Act 1995* (Cth): '10.4 Self-defence: (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or

(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or

(c) to protect property from unlawful appropriation, destruction, damage or interference; or

(d) to prevent criminal trespass to any land or premises; or

(e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:

(a) to protect property; or

(b) to prevent criminal trespass; or

(c) to remove a person who is committing criminal trespass.

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.' Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2016C00544>.

57 For example, *Crimes Act 1914* (Cth): '3ZC Use of force in making arrest: (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

(2) Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence:

(a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); or

(b) if the person is attempting to escape arrest by fleeing — do such a thing unless:

(i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and

(ii) the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.' Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2016C00484>.

58 See generally Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations — Is There a "Lawful Authority"?' (2009) 37(3) *Federal Law Review* 441.

59 Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005, Second Reading, 26 (Senator Coonan, Minister for Communications, Information Technology and the Arts).

60 Explanatory Memorandum, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005 (Cth) 77–9.

61 Ibid 31.

62 Ibid 137.

63 Section 51SE(3)(d) for s 51SE powers specifically; and s 51WB(2)(d) across pt IIIAAA generally.

64 *Criminal Code Act 1995* (Cth): '10.5 Lawful authority: A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law.' It is uncertain, however,

whether there can be a 'lawful authority' to kill in situations outside of either the strict provisions of s 10.4 self-defence or the Crown prerogative to employ the ADF under the Law of Armed Conflict (LOAC) to engage with the designated enemy. The strong impression left from any close reading of *A v Hayden [No 2]* [1984] HCA 67, particularly Murphy J's 'death squads in Europe' observation, is that it would be difficult to argue that a provision in a status that indicated that it was permissible for state agents to kill people in certain situations outside of either self-defence or a LOAC-governed situation would be intensely problematic and contentious.

65 Louise Hall, 'Sniper had "potential shot" at Lindt cafe siege gunman Man Monis: inquest', *Sydney Morning Herald*, 9 June 2016: 'Under questioning from Counsel Assisting the Coroner Sophie Callan, the witness said in his opinion, the sniper did not have the "legal authority" to take the shot anyway. He said the sniper would have had to establish that someone was about to be killed or injured or that he himself would be seriously injured to have such authority.' <http://www.smh.com.au/nsw/sniper-had-potential-shot-at-lindt-cafe-siege-gunman-man-monis-inquest-20160609-gpfh52.html>.

66 See, for example, s 51A(3) and (3A).